

**SOFT LAW AND INTERNATIONAL RELATIONS:
THE ARCTIC, OUTER SPACE, AND CLIMATE CHANGE**

by

Hema Nadarajah

B.Sc., University of Toronto, 2009

M.Env., Australian National University, 2012

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The following individuals certify that they have read, and recommend to the Faculty of Graduate and Postdoctoral Studies for acceptance, the dissertation entitled:

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submitted by Hema Nadarajah in partial fulfillment of the requirements for

the degree of Doctor of Philosophy

in Political Science

Examining Committee:

Michael Byers, Professor, Department of Political Science, UBC

Supervisor

Katharina Coleman, Associate Professor, Department of Political Science, UBC

Supervisory Committee Member

Peter Dauvergne, Professor, Department of Political Science, UBC

Supervisory Committee Member

Merje Kuus, Professor, Department of Geography, UBC

University Examiner

Karin Mickelson, Associate Professor, School of Law, UBC

University Examiner

Abstract

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

This dissertation makes three contributions. Firstly, it proposes that soft law instruments can be binding or non-binding. Binding soft law instruments, called “soft treaties”, are made up of permissive, ambiguous, and/or redundant obligations. Secondly, this dissertation empirically establishes that soft law instruments are becoming more prevalent, as the literature has claimed but not verified. In order to identify reasons for this prevalence, the dissertation examines a sample of significant instruments using a mixed methodology that encompasses legal textual analysis, a review of the International Relations and International Law literature, and interviews with academics and practitioners. It finds that the prevalence of soft law is an outcome of, ranked in relative importance: (1) shifting global politics arising from an increasing diversity and influence of states and non-state actors; (2) coordination despite mutual suspicion; (3) the desire for states to paper over differences; (4) a desire to avoid constitutional constraints domestically; (5) the promotion of epistemic communities; (6) a desire to be seen as doing something, and; (7)

the gradual crystallization of harder law. Thirdly, this dissertation examines the potential implications of these findings which are: (1) the increased opportunities for states to forum shop; (2) the rise in complacency about soft law-making that may arise from consensus-based decision making structures; (3) the establishment of path dependency to cooperate within discrete areas despite diplomatic challenges elsewhere, and; (4) the non-linear evolution of written international law. In broadening the definition of soft law, this dissertation contributes to understanding the dynamics between International Relations and International Law.

Lay Summary

Soft law's increasing use, and the gaps in the current literature examining its prevalence and implications, call for a re-examination and further theorizing of this now ubiquitous feature of the international system. The methodological approach employed in this research will contribute to the literature by: (1) empirically accounting for the increased recourse to soft law across three issue areas—the Arctic, Outer Space, and Climate Change; (2) opening the black box of binding treaties by identifying a particular strand of soft law (i.e. “soft treaties”) and; (3) developing new insights into the role and influence of soft law. Such an analysis not only helps us gain a better understanding of the international system, as it exists today, and how it has changed, but also develops our understanding of the relationship between International Relations and International Law.

Preface

This dissertation is original, unpublished, independent work by the author, Hema Nadarajah. The research reported in Chapters 3–5 was covered by UBC Ethics Certificate number H18-01620.

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List of Abbreviations

AEPS	Arctic Environmental Protection Strategy
AOSIS	Alliance of Small Island States
ASEAN	Association of Southeast Asian Nations
BBNJ	Biodiversity of Areas Beyond National Jurisdiction
CEC	Commission for Environmental Cooperation
CNES	Centre National d'Etudes Spatiales
COP	Conference of Parties
CSA	Canadian Space Agency
ESA	European Space Agency
FCTC	Framework Convention on Tobacco Control
ICJ	International Court of Justice
IMO	International Maritime Organization
IPCC	Intergovernmental Panel on Climate Change
ISS	International Space Station
IUCN	International Union for Conservation of Nature
JAXA	Japan Aerospace Exploration Agency
NAAEC	North American Agreement on Environmental Cooperation
NAFTA	North American Free Trade Agreement
NASA	National Aeronautics and Space Administration
NATO	North Atlantic Treaty Organization

OECD	Organisation for Economic Co-operation and Development
OPRC	Oil Pollution Preparedness, Response and Cooperation
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UN COPUOUS	United Nations Committee on the Peaceful Uses of Outer Space
UNCED	United Nations Conference on Environment and Development
UNCLOS	United Nations Convention on the Law of the Sea
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
WMO	World Meteorological Organization

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Dedication

To my greatest gifts,

Appa and Amma.

Chapter 1: Introduction

1.1 Introduction

Since the founding of the United Nations in 1945, the late 20th century has seen an increased visibility and efficacy of international legal rules, procedures, and organizations.¹ These rules serve to cement the relationships of states.² However, similar to the natural sciences, international law is still replete with uncertainties. These uncertainties arise from its genesis, whether it is binding, and more fundamentally, what exactly international law entails. In order to explore the uncertainty of international law and its role in international relations, clear terminology and classifications are key.

Written international law can be differentiated in several ways, one of which is by using a spectrum ranging from “soft law”, in the form of resolutions and declarations, to “hard law” in the form of treaties. Another approach categorizes written agreements in a binary form — non-binding and binding, the former being soft and the latter hard law. However, these two widely used definitions generate extremely broad categories that fail to capture the nuances of the more specific forms of instruments that we see in the international legal system today. The terminology and classification of soft law are overly simplified and possibly outdated. For example, the Paris Agreement as well as all three agreements negotiated under the auspices of the Arctic Council³ are binding but soft and as such fall within a very specific part of the soft–

¹ Slaughter Burley 1993, 205.

² Simmons 2008.

³ The Arctic Council is made up of eight member states include the following: Canada, Denmark, Iceland, Finland Norway, Russia, Sweden, and United States, and permanent participants who represent the six indigenous

hard spectrum. Such instruments classified here as “soft treaties”, are binding documents that are “soft” in terms of their substantive expectations. An example is a treaty that uses the term “should” instead of “shall”. This small difference in language can be of great consequence because a country that fails to comply with a “should” is not subject to the reputational consequences or enforcement measures that follow the violation of a “shall”. Such instruments have received almost no attention in the literature. The literature, while also claiming that soft law (both binding and non-binding) is increasing within the international system, has failed to empirically substantiate this observation.

Why are states having recourse to soft law, an instrument with weaker degrees of legalization, in certain regions or issue areas? Soft law is often assumed to be characteristic of areas where decisions are based on the best available and often uncertain scientific and technological knowledge. However, can the prevalence of soft law be explained simply by this uncertainty of science and the ensuing need for flexibility of instruments as knowledge and technology improves? If so, how certain does scientific knowledge have to be for harder degrees of legalization to be adopted? How does the inherent uncertainty of science tie into the often-assumed path of soft to hard legalization? If uncertainty is a constant in the knowledge used to design these agreements, is the resulting soft law instrument always the best legal solution?

organizations in the region. As of 2017, there were 13 non-Arctic states and 13 intergovernmental organizations that have been approved observer status within the Arctic Council. Observer states include China (which has since called itself a “near-Arctic state”), Germany, Poland, South Korea, Singapore, Switzerland, and the United Kingdom (which also calls itself “the Arctic’s nearest neighbor”). Each of the soft treaties was negotiated “under the umbrella of” the Arctic Council, as they were, technically, negotiated and concluded outside of the Arctic Council by the same eight states; China’s Arctic Policy 2018; Arctic Council 2018; United Kingdom Arctic Strategy 2013.

Is it also true, as is widely assumed, that issue areas involving “high politics”, such as military security, are less likely to being governed by soft law? The existing literature — in both International Relations and International Law — barely investigates the roles that power disparities or difficult diplomatic relationships play in the choice between different kinds of legal agreements. Also, to what extent is this choice influenced by the design of the organization within which these instruments are negotiated? Or are there perhaps other political factors driving the increasing prevalence of soft law? Finally, what are the potential consequences of a prevalence of soft law for the international system? This dissertation aims to explore and answer some of these questions, while also testing the oft-made assumptions underlying the causal linkage between scientific uncertainty and the prevalence of soft law.

1.1.1 Argument in Brief

This dissertation adopts a broad definition of soft law that includes some binding written legal instruments as well as non-binding ones. The former, henceforth referred to as ‘soft treaty’, is defined *as a binding instrument containing some combination of permissive language, ambiguity, and redundancy that leaves it devoid of mandatory, clear, new obligations*. The latter will be referred to as “non-binding soft law”.

Using this definition, it is then confirmed that states have been increasingly negotiating agreements with weaker degrees of legalization in regions and issue-areas where science-based

decision making is central. Framing its analysis by utilizing three discrete regime complexes⁴ — the Arctic, Outer Space, and Climate Change — this research finds that the prevalence of soft law is not only due to the often-made assumption of uncertainty that is inherent in scientific knowledge but also to other, political factors that have not yet been sufficiently explored in the literature. It demonstrates that, within each of the regime complexes examined, states are increasingly opting to negotiate soft law instruments due to some or all of the following factors:

1. In order to reach consensus and/or adjust to shifting global politics resulting from an increasing diversity of states and/or changes in their relative influence within and outside the region or issue-area;
2. In order to facilitate coordination, especially in circumstances of mutual suspicion;
3. In order to paper over existing political differences, especially among states with an otherwise difficult diplomatic relationship;
4. In order to avoid constitutional constraints, in circumstances where domestic law and politics limited a government's freedom of action on the international stage;
5. In order to promote epistemic communities and other non-state actors, the diversity and influence of which is increasing;
6. In order to be seen as doing something, especially in the eyes of domestic constituencies;
7. In order to eventually build towards hard law; and,

⁴ A regime complex defined by Keohane and Victor (2011, 9) as one in which: (1) “elements are loosely linked to one another, between the poles of integration and fragmentation”; (2) exists “a loosely coupled system of institutions”; and “has no clear hierarchy or core, yet many of its elements are linked in complementary ways”.

8. An increasing recognition of the need to use a science-based decision-making process that also takes into account the uncertainty inherent in science.

As is apparent from the inclusion of this last factor, this dissertation does not deny that soft law's prevalence can in part be explained by uncertainty inherent in the natural sciences. However, it argues that the other, preceding factors provide a more comprehensive understanding of the reasons why soft law has become more widespread. It should also be noted here that Factor (7) above is another assumption that is often used to explain soft law's place in the international system. While it can, at times be used to explain soft law's growing presence, this research finds that the number of soft law instruments has increased through the years without contributing to the eventual conclusion of hard treaties. Additionally, as this dissertation later demonstrates, the relative importance of this basket of factors varies across each case study. Within the Arctic, for example, all factors were found to explain soft law's prevalence with the often-credited Factor (8) being proven not to hold true. In the case of Outer Space, Factors (1) – (3), (5), (7), and (8) were observed to contribute to soft law's expansion at different periods over the last half century. Factor (7), for example, was increasingly found not able to explain soft law in recent years. And, all factors, except for (7) were found to explain the increase in soft law within Climate Change.⁵

⁵ The two assumptions of soft law highlighted in this dissertation – (i) that it is a solution to incorporating scientific uncertainty and (ii) it eventually crystallizes to a harder form – were found to be the more prominent ones in my review of the International Relations literature. The second assumption is largely an observation of the functional approaches that the soft law-International Relations literature takes, particularly in the early 21st century. More recent work indicates that soft law can have momentum and impacts of its own and is not simply taking the form of law-in-waiting. However, what this dissertation tries to do is to point to the broader argument that the International Relations literature takes on soft law.

The fundamental rationale of this research is to explore the reasons why states have increasingly negotiated soft law instruments. In doing so, it finds reasons that are different from, and therefore additional to, the two reasons (Factors (7) and (8) respectively) often advanced in the literature, namely that: Soft law is negotiated as a stepping stone to hard law and; Science is inherently uncertain and therefore requires a soft legal approach.

1.1.2 Brief Outline of Dissertation

Before investigating the causes and introducing the potential consequences of the prevalence of soft law, this research will first empirically confirm whether that prevalence indeed exists.

Concepts derived from the fields of International Relations and International Law are then used to advance the understanding of the prevalence of soft law as well as to examine reasons as to why states choose to opt for non-binding soft law or the binding but soft treaty (as opposed to hard treaties). This analysis is conducted by focusing on a small sample of agreements in two regions, the Arctic and Outer Space, and an issue area, Climate Change, that the literature on soft law has yet to fully explore. These regions and issue areas are governed by a combination of hard and soft law instruments, with states of varying political influence and technological capabilities as well as non-state actors playing active roles in the design of those instruments. The selection criteria for these three case studies is expounded in Section III of this chapter.

Employing a simple quantitative approach to the question of prevalence will allow us to assess the general trend of soft law agreements within each case study while also identifying a specific and underexamined form of such agreements, namely soft treaties. Such an approach will, therefore, test existing theories on soft law against actual evidence. Other approaches will also be

used in tandem with this quantitative study: a qualitative approach involving process tracing; legal textual analyses of the sampled instruments; interviews; and an in-depth review of the International Relations and International Law literature.

This dissertation has six chapters. This introductory chapter provides a preliminary overview of this dissertation's argument on the definition and prevalence of soft law. In doing so, it sets out the list of preliminary reasons explaining the prevalence of soft law as well as the phenomenon's potential implications within the international system. This will then be followed by a discussion of the methodological approaches and tools used in this dissertation.

Chapter 2 delves deeper into the existing research on soft law in order to identify gaps in the International Relations literature. A novel form of categorizing and defining soft law will be proposed. This categorization will form the methodological basis for examining the prevalence of soft law in the subsequent three case-study chapters. Then, the chapter will hypothesize reasons as to why states choose soft law instruments over hard treaties.

The following three case-study chapters — 3, 4, and 5 — focus on the regime complexes governing the Arctic, Outer Space, and Climate Change respectively. All three chapters provide contextual background on the governance of each region or issue area and then proceed to illustrate the prevalence of soft law in them. In each chapter, 7–10 instruments are examined to determine the contributing factors for why states chose to negotiate a non-binding soft law instrument or a soft treaty. Chapter 6 will summarize the findings from the preceding chapters and suggest potential consequences of soft law's growing prevalence.

1.2 Argument

International law instruments seek to formalize cooperation among states and to constrain their behaviour. This is done with a range of instruments of varying degrees of legalization. There are three primary and two subsidiary “sources of international law”, according to Article 38.1 of the International Court of Justice (ICJ) Statute:

- a. “international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59⁶, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law”⁷

Written international law, in particular, was historically confined to the first source, namely written treaties. In recent decades, however, international law has expanded to include a new category of written instrument – soft law. Soft law was first identified as a way to fill a normative gap within international environmental protection.⁸ Over time, soft law came to be viewed as a substitute and, at times, a complement of legally-binding international law, also known as “hard law” — usually in the form of treaties and UN Security Council Chapter VII Resolutions.

⁶ Article 59 of the ICJ statute states that the: “decision of the Court has no binding force except between the parties and in respect of that particular case”.

⁷ Statute of the International Court of Justice 1945.

⁸ Singleton-Cambage 1995

Soft law, although conventionally considered to include non-binding instruments only, is now being recognized as sometimes having binding elements.⁹ In light of this growing literature, and its own observations, this dissertation employs a broader definition of soft law, one that includes some binding written legal instruments (“soft treaties”) as well as non-binding ones.

In addition to the inadequate classification and definition of soft law, other gaps in the literature are further elaborated in Chapter 2: (1) A lack of empirical evidence substantiating claims of an increased prevalence of soft law instruments; (2) A lack of an in-depth exploration and critical analysis of the reasons for the increase; and (3) An insufficient inquiry into the potential implications of soft law’s increasing use in the international system. The following sections serve as an introduction to this thesis’ overall argument. In exploring these gaps, this dissertation situates itself and its contribution primarily in the discipline of International Relations, not International Law.

1.2.1 Defining Soft Law

The distinctions among various forms of written international legal instruments — and therefore the definition of soft law — have not achieved consensus in either of the disciplines of International Relations or International Law. The debate over soft law also includes its effectiveness as a legal instrument, as well as its role and the consequences of its use in the international system.

⁹ Abbott and Snidal 2000; Olsson 2013.

Chapter 2 of this dissertation will provide several examples of “soft treaties”, which I argue should be categorized as “soft law” in addition to the more often discussed non-binding variant.

Figure 1 below illustrates the definition of soft law that is adopted in this dissertation and used to examine the prevalence of such instruments within each of the three case studies.

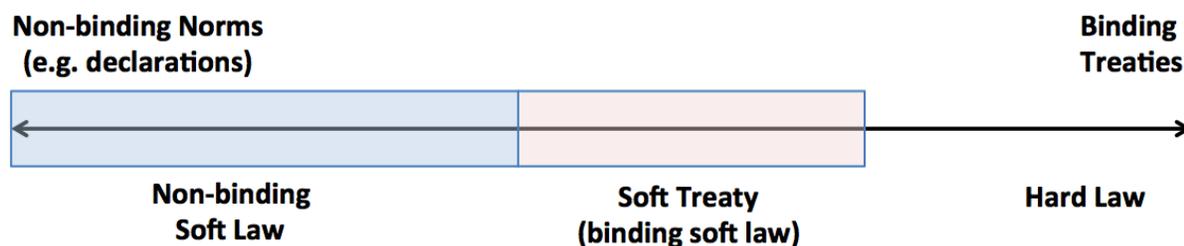


Figure 1.1: Spectrum of written international law with the shaded segments representing the focus of my analysis

In order to set some methodological boundaries to this dissertation, the definition utilized here will be focused on the negotiation process leading up to the conclusion of the respective instruments examined in detail in Chapters 3, 4, and 5.¹⁰

1.2.2 Explaining Soft Law’s Pervasiveness in the International System: More Than Just the Uncertainty of Knowledge?

The literature generally does not identify the circumstances that have led to an increased recourse

¹⁰ The definition utilized in this thesis is based on an “ex ante negotiation perspective” — whereby States are able to conclude an instrument that may take on a number of possible characteristics rendering the instrument as non-binding soft law, soft treaty, or hard treaty. From an ex post perspective, courts may take on the binary perspective as to whether an instrument is simply binding versus non-binding. This is not to say that there are no ex post variations to the consequences of a soft versus hard treaty.

to soft law. Those authors that do, stop short of providing an in-depth examination of these circumstances. Dinah Shelton contends that the recourse to soft law is a result of an advance in international relations due to deepening globalization.¹¹ However, she does not examine the reasons for the increase, beyond a brief paragraph outlining the role of non-binding legal norms in contemporary global politics. The question of why states have been employing soft law instruments increasingly in recent years has yet to be sufficiently examined and will be one of the principal issues addressed in this thesis.

The following section sets out several reasons for soft law's expansion, which are based on an extensive review of the International Relations/ International Law literature and the assumptions that are commonly made concerning soft law. This preliminary list serves to guide the analysis of the instruments examined in each of the case study chapters and be revisited in Chapter 6.

#1: The number of soft law instruments is increasing

While most articles on soft law state that there is an increase in the number of such instruments, they fail to assess this phenomenon quantitatively.¹² Current quantitative literature on the topic is limited to the number of times an instrument was either activated in times of crisis or referenced in the judgements and orders of courts due to potential non-compliance by parties.¹³ These analyses tend to examine a very small sample of agreements within a single region or issue area, which results in a limited understanding of the role of soft law across a variety of contexts. But

¹¹ Shelton 2003.

¹² Cárdenas Castañeda 2013; Escudé 2016; Olsson 2013; Shelton 2003; Ştefan 2008; van der Sluijs 2013

¹³ Clark 2018; Ştefan 2008.

coding documents as soft/hard across the international legal system would be a Herculean task since every instrument would have to be carefully examined for clarity, determinacy, and obligatory language. This problem is further exacerbated by the fact that the soft/hard dichotomy extends beyond binding and non-binding instruments, to include soft treaties, i.e. binding but hortatory, redundant and/or constructively ambiguous agreements. An empirical analysis of a small but still representative sample of agreements across three case studies is able to confirm trends in the use of soft law within the sample and, by extrapolation, provide evidence of more general relevance as well.

#2: Soft law rarely contributes towards the conclusion of hard treaties

If the increase in soft law is mostly due to uncertainties in science, we should over time see a soft law instrument crystallize into a harder form as knowledge becomes more certain within the specific field. But as can be seen in the tables illustrating the prevalence of soft law within each case study in Chapters 3, 4, and 5, the number of soft law instruments has increased through the years without contributing to the conclusion of hard treaties.

If soft law instruments do not necessarily contribute to the negotiation and conclusion of hard treaties, this raises further questions. Do decision-makers regularly adopt soft law instruments thinking that they will facilitate the negotiation of hard treaties, even though they do not? Have power shifts in the international system, the increasing presence of non-state actors, and/or increased reliance on scientific knowledge as a decision-making tool, caused the process of crystallization to stall, or caused decision-makers to see new value in soft law as international law? The case study chapters, in examining these questions, find that soft law does not always

result in the eventual conclusion of a hard treaty. Instead, the evolution of international law is found to be highly non-linear.¹⁴

#3: Uncertainty due to current state of scientific knowledge and technology has an influence on the design of soft law

There is an increasing recognition of the need to use a science-based decision-making process to govern certain issue-areas/regions, possibly pointing to the greater need for flexibility given the uncertainty inherent in science as well as the rapid pace of technological change. How do scientific uncertainty and rapid technological change contribute to the recourse to soft law? Increased recognition of the need to use a science-based decision-making process has tied international political decision making to longstanding transboundary communities of scientists and other experts/specialists that rely on soft forms of coordination and cooperation rather than formal negotiations and hard law. Have soft approaches colonized hard politics in regions and issue-areas where science and technology play especially important roles? The literature within issue-areas such as climate change and biodiversity conservation argues that, due to the uncertainty in scientific knowledge and the pace at which this knowledge is developed, a legal structure composed of soft law is preferred.¹⁵

Dinah Shelton argues that soft law maybe an appropriate alternative to binding instruments in the face of scientific uncertainty, particularly when there is a degree of urgency in formulating a

¹⁴ See, Chapter [6.2.3.1](#)

¹⁵ Atapattu 2012.

solution.¹⁶ Similarly, Robert G. Lee explains that “soft law may be a wiser response” to issues that are steeped in uncertainty, for reasons of flexibility.¹⁷

#4: An increasing diversity of state and non-state actors present in the negotiation of international agreements result in an increasing number of soft law instruments

#5: The influence of non-state actors on states negotiating the legal instruments is increasing

The diversity of state and non-state actors involved in global governance has been increasing over recent decades. How has the increasing presence of non-state actors influenced the recourse to soft law? Olsson argues that soft law has a tendency of ‘promoting more participatory international law permitting the participation of non-state actors in the law-making process’.¹⁸ Chinkin extends this further by stating that such participation has occurred only in domains such as human rights, environment, and poverty — issues that she calls soft, or perhaps too intrusive on domestic jurisdiction to be subject of binding obligation’.¹⁹ Regions such as the Arctic and Outer Space do not neatly fall within Chinkin’s soft domains given the important military, commercial, and technological components of international relations there. However, the presence of large businesses such as Shell, Equinor, COSCO, Boeing, ArianeSpace, SES, Maxar, SpaceX and Orbital Sciences, as well as the indigenous peoples who make up the six permanent participants in the Arctic Council, may necessitate the inclusion of these non-state actors in the region’s governance. However, whether this necessarily results in an increase in soft law instruments will be further investigated in Chapters 3, 4, and 5.

¹⁶ Shelton 2003, 13.

¹⁷ Lee 2012, 116.

¹⁸ Olsson 2013, 194.

¹⁹ Chinkin 2003, 28.

Building upon #5, does soft law facilitate the inclusion of non-state actors such as corporations, civil society groups, and indigenous communities more than a hard instrument would? If it does, the fact that the soft law does not crystallize into hard law might be explained by the continued inclusion of these non-state actors.

#6: Shifts in power relationships within these regions have contributed to the use of soft law instruments

The increased presence and participation of newly interested and potentially powerful state actors in an issue-area, such as China and India in the Arctic and Space, may, in turn, create a need to incorporate a greater diversity of expectations than an instrument with clear provisions and/or hard obligations allows. This takes our analysis of the diversity of actors further, by examining potential shifts in power wielded by the relevant actors.

1.2.3 Consequences of the Increase: Egalitarian or Tool for the Powerful?

Although there is no consensus in the literature, soft law has been increasingly recognized as a useful diplomatic tool as well as an effective alternative policy instrument due to its normative influence.²⁰ And while the primary aim of this dissertation is to assess and explain the prevalence of soft law, the concluding chapter of this dissertation will examine the potential consequences of this prevalence in greater detail.

As mentioned above, while the literature has pointed to an increased recourse to soft law, it has

²⁰ Olsson 2013.

yet to sufficiently examine the reasons as well as the consequences of the increase for international relations. For instance, Escudé examines the norm-setting process of the “profusion of soft law in the Arctic [which reflects the] search for legitimacy...” of the Arctic Council.²¹ He stops short of further investigating the consequences of this profusion of soft law for the international system, either in the Arctic or more broadly. Based on a preliminary review of the literature, the section below highlights the potential consequences and possible supplemental inquiries arising from examining the prevalence of soft law in the international system.

1.2.3.1 A Non-Linear Evolution of International Law

With the exception of the common assumption that non-binding soft law often leads to the development of hard law, the literature does little to examine the evolution of written international law. Through its examination of the various instruments within each of the three case studies, this dissertation reveals the non-linear evolution of written international law.

Illustrated in Figure 1.2 below and elaborated further in Chapter 6, the evolution of international law highlights the need for a dynamic approach to studying the interface of international relations and international law. Stage 1 indicates the initial phase of the negotiation process, whereby states problematize an issue that requires a solution in the form of an international legal instrument. Whether that instrument takes the form of a binding or non-binding form is decided in Stage 2. If the former is chosen, negotiations determine whether a hard or soft treaty is

²¹ Escudé 2016, 42.

adopted. Stage 4 onwards indicates the evolution of instruments whether from: non-binding soft law to soft treaty or hard law; soft treaty to hard law; or even hard law to soft treaty.

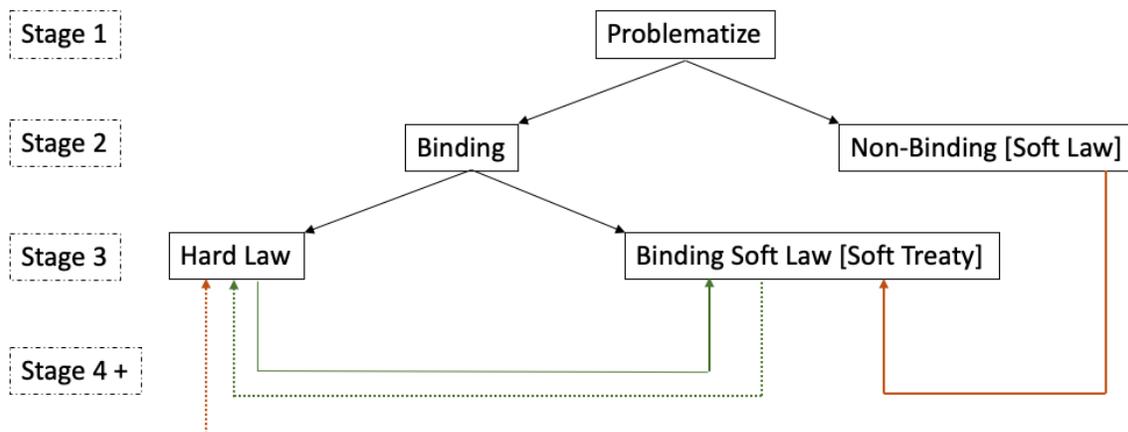


Figure 1.2: A simplified version of the various stages in the decision-making process of written international legal instruments²²

1.2.3.2 Complacency Stemming from Institutional Design

Soft law has often been identified as easier to negotiate given that its flexibility and vague obligations may involve lower transaction costs.²³ But it is also widely assumed that soft obligations will not be complied with as often as hard obligations, for what, otherwise, would be the point of the latter? Hard law is often argued to impose a greater “compliance pull” than its

²² This diagram is a simplified illustration of the various pathways through which international law can evolve. A negotiation failure could either terminate or suspend the evolutionary process. This figure is not meant to be a comprehensive outline of international law’s complete lifecycle. It, instead, offers a snippet of this cycle.

²³ Abbott and Snidal 2000.

softer counterpart.²⁴ Yet each of the three case studies in this dissertation indicate that this is not the case and that soft law is just as likely to be complied with as hard law.²⁵ This is perhaps because enforcement is not that important in international law generally, as compared to the importance of self-interest driven gains and reputational concerns. It is also worth noting that states take the negotiation of soft law seriously, given the still substantial transactional costs that are involved.²⁶ Indeed, the mere fact that they bother to negotiate such instruments indicates that they attach value and importance to them.

1.2.3.3 Path Dependency to Cooperate within Discrete Areas

Path dependency within discrete areas could emerge and be established by iterated negotiations of soft law instruments, and it could pave the way for continued cooperation despite new or ongoing diplomatic challenges among the negotiating states. By coming together to negotiate (whatever the outcome is), communication is taking place between states, and recording the results of that communication in some form of a document legitimizes the decision to talk. Such path dependency could see the continued creation of soft law instruments generated via a positive feedback loop.

²⁴ Guzman and Meyer 2010, 177.

²⁵ As this dissertation will highlight later in Chapter 2, non-binding soft law instruments can contain obligations that are as precise as some treaties. And some soft treaty instruments can contain as few obligations as some non-binding soft law instruments.

²⁶ Chayes and Chayes 1993.

1.2.3.4 Opportunities to Forum Shop Increase

Although more research on treaty conflict and forum shopping has taken place, little work has been done on the tension arising from the existence of overlapping hard and soft instruments, particularly in the context of the latter's increased prevalence. As a result of the increase in soft law instruments, particularly those that repeat obligations already set out elsewhere, states are able to strategically "use soft-law provisions [to] undermine existing hard law or creat[e] hard-law provisions to trump existing soft law".²⁷ Shaffer and Pollack, among the few scholars who have written on this topic, argue that the incentive for states to forum shop between soft and hard law depends on the ongoing "distributive conflict among states". When this conflict is low, there may be a higher tendency for states to employ hard and soft law in a complementary manner, and when conflict and regime complexity is high, the reverse may more likely be observed.²⁸ Such variations in behaviour is often an outcome of a regime complex.²⁹

1.3 Methodology

1.3.1 Overview

The central aim of this research is to explain the prevalence of soft law in certain regions and issue areas. It first seeks to establish that soft law is indeed prevalent in each case study by conducting a comprehensive search of the various legal instruments governing each region or issue area. After reviewing the literature, the potential reasons for the prevalence of soft law listed in the preceding section are evaluated through interviews of people who have taken part in

²⁷ Shaffer and Pollack 2010, 739.

²⁸ Shaffer and Pollack 2011, 1167.

²⁹ Drezner 2009.

the formation of soft law in the respective regions or issue areas. Then, conclusions are drawn, or list of reasons revised. This process is repeated for each case study.

Current definitions of soft law are developed further and used to identify any increase in soft law instruments, and to identify any binding but nevertheless “soft” treaties. An empirical analysis of a small number of case studies, when combined with other, qualitative methods, is a feasible approach for identifying trends with regards to soft law instruments. The end-goal of this research is to identify and examine these trends across various case studies in order to explain the phenomenon of soft law generally as well as to assess its implications for the international system. This research aims to fill several gaps in the literature and provide convincing evidence — if it exists — of an increased recourse to soft law.

This dissertation focuses on three case studies — the regime complexes governing the Arctic, Outer Space, and Climate Change — and within each, concentrates only on instruments where the decision to choose between a non-binding soft law instrument, a soft treaty, or a hard treaty had to be made. The methodological process of the research unfolds as follows:

1. In order to identify the prevalence of soft law within each case study, instruments were selected based on a review of the literature. Once a list of these instruments was compiled, instruments were coded as non-binding soft law/ binding soft law (i.e. soft treaty)/ hard law.
2. The negotiations leading to the conclusion of the instruments were examined using process tracing which took into consideration the political context leading up to key soft

law instruments within each case study.³⁰ The key junctures of the decision-making process that this research focuses upon are illustrated below in Figure 1.3. Stages 2 and 3 respectively represent a simplified dichotomy where negotiators opt for either a binding versus a non-binding instrument and then, if the former, a soft versus a hard treaty.

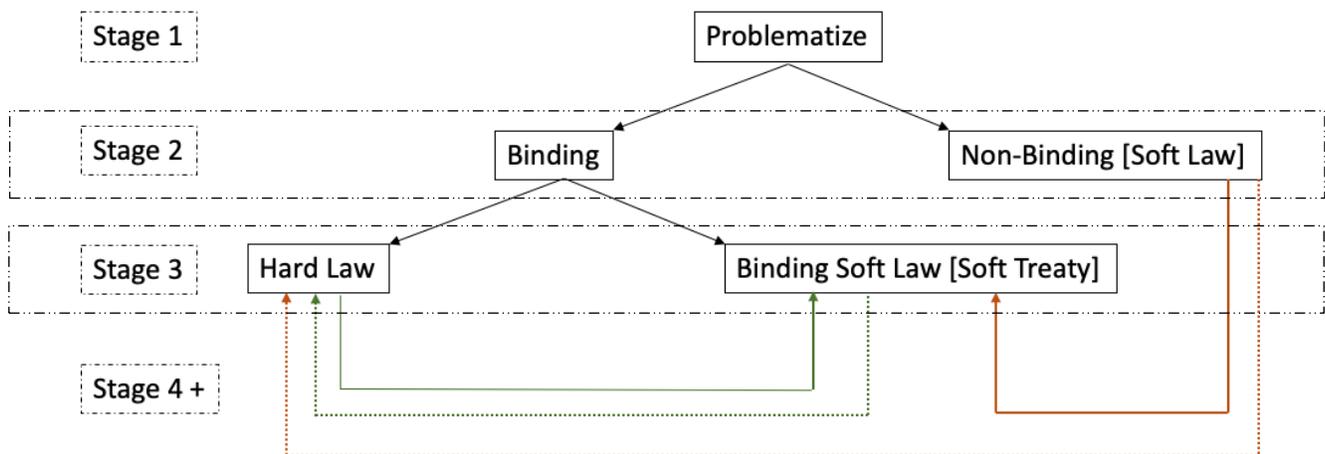


Figure 1.3: Key junctures of the decision-making process examined in this research

1.3.2 Case Study Selection Criteria

This research project does not focus solely on environmental issues, as the literature on soft law often has. Instead, the aim is to study international law more broadly while focusing on specific regions and issue areas governed by a complex of various sub-fields of international law such as international environmental law, international trade law, the law of the sea, and international

³⁰ While the issue of enforcement or enforceability is an important factor in compliance with international law, this dissertation focuses on identifying reasons for the design of various forms of written international law, particularly those found toward the soft law end of the spectrum of Figure 1.1.

space law.

The current literature has largely studied soft law in silos, that is to say, within single-issue areas such as climate change and human rights, or single regions such as the Arctic. To avoid limiting the explanatory power of this dissertation's analysis, the selection of case studies involves a wider selection criterion. The focus is on cases where technical knowledge has been crucial to the governance of the issue-area or region, in order to: (1) Serve as a form of bounded limitation given the sheer number of soft law instruments in the international system; and (2) Question widespread assumptions about soft law, such as it being benign and egalitarian; a legal instrument that will eventually crystallize into a harder form; and with its characteristic softness being attributed primarily to the uncertainty of scientific knowledge.

Regions and issue-areas such as the Arctic, Outer Space, Climate Change, Deep Seabed, Biodiversity Conservation, and Nuclear Disarmament, each rely on the use of scientific and technological knowledge in the design of the relevant legal instruments. Given the necessary brevity of this project, two regions and one issue-area have been selected as case studies. They encompass member states of various degrees of development, domestic governance, and technological adeptness, allowing for sufficient variability across the case studies. At the same time, the following case study selection criteria seek to minimize variability of other kinds.

To avoid limiting the explanatory power of this dissertation's analysis, case study selection has been based on the following criteria:

1. Each case study includes issues that can be categorized as encompassing high politics (e.g. security issues) and low politics (e.g. environmental issues).³¹
 - This criterion also serves to investigate the commonly held assumption that soft law is prevalent only in “soft” issue areas that do not involve the core interests of a state.
2. Governance within each region or issue-area prioritizes scientific and technological knowledge that is evident in the design of the relevant legal instruments.
 - Such a criterion excludes cases focusing solely on issues such as human rights and the environment which, as other research has already shown, are governed largely by soft law instruments.
 - This criterion also limits the possible number of cases temporally and allows the analysis to be focused on issues or regions that have a more recent history in international law-making.
 - Reducing the variation at a systemic level across all three cases helps minimize the noise effects that could arise from other factors of soft law’s emergence. One of the goals of this dissertation is to identify other factors that are contributing to soft law’s emergence, aside from the uncertainty associated with scientific and technological knowledge.
3. A complex of various types of international law, such as environmental law, law of the sea, security law, and sovereignty governs each region or issue-area.
 - This allows the findings of this research to contribute to the topic of soft law in a

³¹ The high politics - low politics distinction is used broadly in this dissertation to facilitate a discussion of soft law. Some issues such as climate change transcend this distinction; in the case of climate change, because of its implications for national and international security (which fit Criteria #1).

broad-based manner, as opposed to the current literature which has often been limited to single-issue areas.

4. Cases that encompass issues that are transboundary in nature and extend beyond national jurisdiction.
 - Such regions or issue areas often call for regional or international cooperation, given that the challenges are impossible for a single state to manage.
 - Regions or issue areas that extend beyond national jurisdiction also allow for a consideration of frontiers—where a science-based decision-making process has often been called for. These areas are increasingly requiring international coordination as the interest increase. These interests could stem from the discovery of untapped resources, new shipping routes that are potentially time and cost cutting, new technology that allows for further exploration and exploitation.
 - It is widely assumed that hard law will be prevalent in areas beyond national jurisdiction, given that costs to constraining sovereignty are low. But this thesis questions that assumption—with case studies that enable this examination to take place.

1.3.2.1 Case Studies

The Arctic, Outer Space, and the Climate Crisis³² are each governed by a combination of hard and soft law instruments. However, the development of soft law instruments has not been

³² The terms “climate crisis”, “climate emergency” are used interchangeably with “climate change” in this thesis. Both these terms refer to the anthropogenically caused changes to the global climate bio-sphere and are also a reflection of the current rhetoric in the global climate dialogue. See, BBC 2019; Guterres 2018; Schellnhuber 2018; for a further discussion on climate change and terminology.

carefully assessed within the literature and neither has there been an in-depth analysis of the reasons for (and consequences of) using soft law in regions or issue areas where science and technology have been integral to the design of international legal instruments. A focus on such regions and issue areas also precludes other potential case studies with dense and complicated histories of international relations, such as human rights. Instead of merely examining legal instruments within a single-issue area (especially one that has been examined extensively already, such as environmental law), the cases selected for this research encompass various sub-fields of international law as well as overlapping regimes.³³ The Arctic, for example, is governed by instruments delimiting sovereignty (Svalbard Treaty³⁴) as well as instruments governing maritime issues (United Nation Convention on the Law of the Sea; Polar Code), scientific cooperation (Agreement on Enhancing International Scientific Cooperation) and emergency response (Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic). Similarly, governance of Outer Space addresses issues of sovereignty, environmental protection, tourism, space exploration, resource management, and emergency preparedness. The international actors involved in the Arctic and Outer Space, as well as in the issue-area of climate change, are made up of a diverse mix of states and non-state actors, with varying degrees of political influence and technological capabilities.

³³ Nye (2014) defines regimes as a “subset of norms which are shared expectations about appropriate behaviour. Norms can be descriptive, prescriptive or both. They can also be institutionalized (or not) to varying degrees”.

³⁴ There is a total of 43 member states that have signed the Svalbard Treaty, which recognizes Norway’s sovereignty over the Svalbard and also providing signatories rights to commercial activity over the archipelago. The member states are: Afghanistan, Albania, Argentina, Australia, Belgium, Bulgaria, Canada, Chile, Denmark, the Dominican Republic, Egypt, Estonia, Finland, France, Greece, India, Iceland, Italy, Japan, China, Latvia, Lithuania, Monaco, the Netherlands, New Zealand, North Korea, Norway, Poland, Portugal, Romania, Russia, Saudi Arabia, Spain, the United Kingdom, Switzerland, Sweden, South Africa, South Korea, Czech Republic, Germany, Hungary, the United States, Venezuela, Austria.

The case studies selected for this dissertation, while varying in the lengths of the time periods within which legal instruments were negotiated, are all still relatively contemporary. They are also similar in that scientific and technological knowledge is used to a considerable extent as a decision-making tool within each region or issue-area, while differing in the diversity and degree of political influence of the state and non-state parties involved. Additionally, they each encompass a combination of non-binding soft law, soft treaty, and hard law instruments, which permits the inquiry as to whether soft law evolves into a harder variant over time.

1.3.2.2 Regime Complex as a Systemic Tool

Originally coined by Kal Raustiala and David Victor³⁵, the term “regime complex” refers to “an array of partially overlapping and non-hierarchical institutions governing a particular issue-area” which are “marked by the existence of several legal agreements that are created and maintained in distinct fora with participation of different sets of actors. The rules in these elemental regimes functionally overlap, yet there is no agreed upon hierarchy for resolving conflicts between rules.” The respective regime complexes of the Arctic, Outer Space, and Climate Change indicate the systemic level at which this dissertation’s analysis takes place. Regime and regime complexity theories attempt to shed light on questions pertaining to: cooperation in the international system; the influence of international institutions on state behaviour; the stability of international regimes; the rise of rule-based cooperation between states; the formal and informal mechanisms governing inter-state relations; and the means through which states interact in a given region or issue-area. Regime complex theory, which is often used to study cooperation and conflict

³⁵ Raustiala and Victor 2004, 279.

emerging as a result of an increasing density of international institutions, lends itself well to the examination of soft law in this dissertation.³⁶ As a lens through which to observe the prevalence of soft law, regime complexity is not only a useful methodological tool by which to frame each case, but it also offers a theoretical lens through which to consider the implications of soft law's prevalence within the field of transnational governance.

Among the few scholars to have studied the interface of regime complexes and international law, Benjamin Faude and Thomas Gehring argue that the International Relations/ International Law nexus has been influenced by the emergence of regime complexes throughout the various stages of governance. In attempting to explain how regime complexes can affect the negotiation, adoption, and implementation of international law, they show “how states not only strategically create and use the institutional overlap that characterizes regime complexes, but also participate in attempts to develop decentralized methods of interinstitutional coordination.”³⁷ However, they stop before examining actual developments in international law as a result of soft law's pervasiveness within the respective regime complexes.

While there are a range of definitions for “regime complex” within the International Relations literature, this dissertation employs a definition provided by Oran R. Young. Young describes a regime complex as a “collection of distinct institutional arrangements dealing with related matters but not organized into a hierarchical³⁸ structure.” These complexes may be on the same

³⁶ Henning 2019, 24.

³⁷ Faude and Gehring 2017.

³⁸ The international legal system has rules for sorting out hierarchies between different instruments on the same matter. Examples include: the “last in time” rule and, the “more specific instrument” rule.

issue-area, such as climate change, or spatially defined area, such as the Arctic or Outer Space.³⁹ Joseph Nye adds to the literature on regime complex by highlighting that a regime complex sits in the middle of a continuum of governance structures whereby a single legal instrument lies at one end and fragmented arrangements at the other.⁴⁰ Each of the three case studies that are being examined in this literature are regions or an issue-area being governed within a regime complex.

1.3.3 Methodological Tools

1.3.3.1 Quantitative Methods

Quantitative analysis is used in this dissertation to explore and illustrate general trends and variations within and across the case studies. Utilizing descriptive statistics, multilateral legal instruments are categorized⁴¹ in order to derive the relative ratios of hard versus binding and non-binding soft law instruments in each case study. This categorization then graphically illustrates the increasing recourse to soft law across all three case studies. The baselines of analysis across the case studies are necessarily different, in order to take into account the historical development of international law within each of them.

Given the normative developments, subjectivity and complexity with each instrument, the utility of quantitative methodology is limited. However, conducting a quantitative analysis helps us to empirically assess the general trend of soft law agreements, to test current theories, to assess the extent of covariation, and perhaps even determine the directionality of causation. Doing so could

³⁹ Young 2019, 7.

⁴⁰ Nye 2014, 7.

⁴¹ See Chapter 2.3 for the definitions used to categorize multilateral instruments in this dissertation.

also help identify deviations from the theoretical explanations that warrant further investigation. Furthermore, combining this quantitative approach with other, qualitative methods (together, a ‘mixed-methods’ approach) helps to overcome the shortcomings of a single approach. While quantitative analysis contributes to identifying the trends in soft law in all three case studies, a combination of process tracing, interviews, and textual analysis tests the quantitative analysis and builds on it by identifying causes for these trends and potential consequences for the international system.

1.3.3.2 Qualitative Methods

A combination of qualitative methods such as process tracing, interviews, legal textual analysis, and literature review is used in this dissertation to further investigate and understand the trends observed from the quantitative analysis, as well as to better understand and identify potential outliers within each case study. An analysis of the historical development of international law within each case study is carried out in order to assess “trajectories of change and causation” as well as to extrapolate potential causal mechanisms resulting in the increased use of soft law instruments.⁴² Qualitative analysis also helps to contextualize the political and normative climate, both domestically and internationally, during the negotiation of each agreement and to infer factors that determine the decision to negotiate and conclude soft law instruments.

Agreements examined in this dissertation are found using, a review of the existing literature on related topics, informal interviews with experts, the preambular sections of international legal

⁴² Collier 2011.

instruments which often cite preceding related instruments as well as a broader internet search.

1.3.3.2.1 Legal Text Analysis

This dissertation merges and modifies existing definitions of soft law as outlined by: (i) Chinkin, who bifurcates written international law into two parts, where soft law is *entirely* non-binding, and (ii) Abbott and Snidal who describe international law as existing along a spectrum where soft law can be both binding *and* non-binding.⁴³ This dissertation combines these two approaches by arguing that while international law exists along a spectrum, soft law itself can be categorized in two parts: binding and non-binding soft law.⁴⁴ These instruments are sourced from a review of the various international and regional organizations governing each region or issue area, as well as from a thorough literature review. In coding the agreements, a close textual analysis of each agreement is conducted based on standardized definitions and legal vernacular outlining the degree of softness of each obligation, both developed based on available literature and taking into account any evidence of disputes over interpretation. Once a list of instruments is categorized, each case study then examines a small sample of them in greater detail. This in-depth analysis utilizes a close reading of the respective legal texts and other evidential documents that shed light on the negotiation processes.

1.3.3.2.2 Informal Interviews and Discussions

Informal interviews and discussions with a range of stakeholders, including government

⁴³ Abbot and Snidal 2000; Chinkin 1989

⁴⁴ For an extended discussion on soft law's definition in this dissertation, see Chapter 2.3.

negotiators as well as non-state actors who have contributed in some way to the development of these instruments, were conducted for a deeper analysis and in some instances, to assess claims made within the literature and to flesh out the intentions of the respective negotiating parties. The non-state actors include scientists, social activists, indigenous leaders, business leaders, and academics. Informal discussions with experts were held at, among other locations, Cambridge University's Scott Polar Research Institute, NASA, National University of Singapore, University of Tromsø, and University of Lapland's Arctic Centre. The interviews, as mentioned, were informal and did not utilize any form of standardized questionnaires. Aside from these interviews, a workshop was held at the Reykjavík University with academics as well as practitioners to discuss the topic of "soft treaties" — a definition of one of the two variants of soft law developed in this dissertation. Informal conversations with experts were additionally used to construct the list of written legal instruments⁴⁵ within each case study. These conversations were also used, on a not-for-attribution basis, to understand reasons for the architecture of various non-binding and binding soft law instruments.

1.3.4 Limitations

While the approach taken by this dissertation is novel, it is necessary in order to validate assumptions made about soft law's prevalence. At the same time, it is not without its limitations — as any approach would be.

⁴⁵ See, Tables 6, 7, and 8.

A more ambitious empirical approach could also have used regression analysis to quantify the degree to which each independent variable accounts for the conclusion of soft law instruments rather than harder alternatives. However, this dissertation takes only the first step towards validating soft law's prevalence, using a simplified descriptive statistical analysis.

With more time and resources, one could apply a more advanced quantitative analysis to a greater number of case studies so as to strengthen and verify the arguments made in this dissertation. Case studies of biodiversity beyond national jurisdiction, international finance, the deep seabed, cyberspace, and even the non-proliferation of nuclear weapons could add greater nuance and dimension to the evaluation of soft law's expansion.

Similarly, the process tracing conducted in this dissertation relies on informal interviews as well as an extensive review of the literature and other legal documents. Sitting in Working Group meetings or other negotiation settings as an observer could buttress this approach by providing a first-hand opportunity to discern reasons for an instrument's design.

1.4 Conclusion

Soft law's increasing use in the international system and the gaps in the current literature examining its prevalence and implications, call for a re-examination and further theorizing of this now ubiquitous feature of the international system. The methodological approach employed in this research will contribute to the literature by: (1) empirically accounting for the increased recourse to soft law across three case studies; (2) identifying a particular strand of soft law (i.e.

“soft treaties”) that has not been sufficiently analysed and; (3) developing new insights into the role and influence of soft law in International Relations and International Law more generally. Such an analysis will not only help us gain a better understanding of the international system, as it exists today, and how it has changed, but also develop our understanding of the relationship between International Relations and International Law, the role of negotiation, the deliberate use of legal language, and the importance of the context within which each agreement was negotiated. More broadly, it could also inform decision-makers and relevant stakeholders of the relative costs and benefits of the various forms of international instruments.

By firstly re-conceptualizing soft law to encompass both its binding and non-binding variants and secondly using regime complexity as a framework to examine the prevalence of soft law, this dissertation aims to address the gaps in the literature on soft law and, also, to help bridge the disciplines of International Relations and International Law.

Chapter 2: Conceptualizing Soft Law

2.1 Introduction

The literature on soft law has generally focused on issues that emerged as a result of globalization. This focus is reflected in the work of Ahmed and Mustofa, who equate the phenomenon with issues requiring an increasingly transnational approach, such as climate change and trade.⁴⁶ By contributing to this existing literature on the prevalence of soft law from an international relations perspective, this dissertation investigates why states are increasingly negotiating soft law instruments rather than harder alternatives, particularly in regions and issue-areas where international governance relies on scientific and technological knowledge.

As mentioned in the preceding chapter, in the disciplines of International Relations and International Law, the term “soft law” is generally used for declarations, guidelines and other written agreements that are not meant to be legally binding.⁴⁷ However, in light of the growing literature, as well as a review of written international law, this dissertation employs a broader classification of soft law — one that also includes some binding written legal instruments. This chapter identifies and explores the phenomenon of “soft treaties”, which are legally binding documents composed of permissive, ambiguous, or redundant provisions. The rest of the dissertation then seeks to answer a number of questions: Why do states negotiate soft law in its various forms? Do soft treaties differ from soft law on the one hand, and “hard” treaties on the

⁴⁶ Ahmed and Mustofa 2016.

⁴⁷ Abbott and Snidal 2000, 421-56; Chinkin 1989, 850–66; Shelton 2003.

other, in terms of the benefits they offer to states? Are they a compromise that helps bridge the interests of an increasing number and diversity of state and non-state actors? How might soft treaties affect state behavior? What might their existence tell us about the role of norms and rules in international affairs?

Before this dissertation addresses these questions, it must first situate the concept of soft law within the larger literature on written international law as well as provide a review of the existing literature on this topic. Drawing on the existing International Relations and International Law literature on soft law, this conceptual chapter begins by highlighting the major gaps in the current state of knowledge. These gaps are (1) definitional, (2) evidential, in that there is a lack of empirical evidence of soft law's rise within the international system, and (3) consequential, in that there have been few inquiries into soft law's prevalence and its effects on the international system. In addressing these gaps, this chapter offers a clearer definition of non-binding soft law, soft treaty, and hard treaty. The concept of soft law, in both its binding and non-binding forms, will then be contextualized within the larger spectrum of written international law. Last but not least, possible determinants for soft law's rise within the international system will be identified and assessed for their respective explanatory power in the subsequent case study chapters.

2.2 The Soft Law Literature

2.2.1 Soft Law Finding its Place within the Literature

International law instruments seek to promote cooperation among states and control their behaviour. This has traditionally been done through more constraining sources of international law such as treaties, customary international law, and general principles.¹ However, these

sources, which involve higher degrees of legalization, are argued to have been “unable to create an adequate international response to the rapid devastation of various aspects of the earth’s environment”. The failure to provide “a sufficient framework for cooperation and collective environmental action” and the shift towards more instruments that encompass weaker degrees of legalization have led to calls to examine this new distinction within the sources of international law.⁴⁸ Such calls have resulted in a growth in soft law research within the disciplines of both International Relations and International Law.

Within these two disciplines, written international law has been differentiated in several ways. The first approach describes *a spectrum* ranging from soft law in the form of resolutions and declarations to hard law in the form of legally binding treaties.⁴⁹ A second approach differentiates written agreements in *a binary* manner, i.e. binding and non-binding, with the former being hard law and the latter being soft law.⁵⁰ Third, there are *sceptics* such as Jan Klabbers, who agree that international law is binary in nature but argue that labelling soft law as “law” is both unnecessary and problematic.⁵¹ Kal Raustiala, in criticizing the conceptual coherence of soft law, similarly argues that “there is no such thing as soft law” and that instead, international documents should be categorized as either contracts (legally binding) or pledges (non-legally binding).⁵² Prosper Weil has gone so far as to warn that soft law instruments could have destabilizing consequences for the effectiveness of international law as well as the

⁴⁸ Cárdenas Castañeda 2013; Singleton-Cambage 1995, 172.

⁴⁹ Abbott and Snidal 2000; Cárdenas Castañeda 2013; Chinkin 1989; Guzman and Meyer 2010; Olsson 2013; Shaffer and Pollack 2010.

⁵⁰ Ahmed and Mustofa 2016; Atapattu 2012; Blutman 2010; Shelton 2008.

⁵¹ Klabbers 1996.

⁵² Raustiala 2005, 586.

international system as a whole.⁵³ However, none of these means of differentiation (or non-differentiation) have achieved consensus support within the disciplines of International Relations or International Law.⁵⁴ It could simply be that different approaches generate different ideas about how hard law is distinguished from soft law, as well as the form and content that soft law encompasses. Moreover, different scholars, even within the field of International Relations, have quite differing views as to the role, effectiveness, and consequences of soft law for the international political system.⁵⁵

Definitional debates aside, the literature has also focused on the value of soft law in the international system. While Klabbers argues that soft law is redundant, a large number of scholars argue for its place in governing interstate relations.⁵⁶ Barelli, for example, maintains that soft law has “enhanced the value of the [UN Declaration on the Rights of Indigenous Peoples] in a number of important respects, particularly its universality and legitimacy”.⁵⁷

Despite the lack of academic consensus, soft law is increasingly recognized as a useful tool for “getting to yes” in negotiations, and as a viable alternative policy instrument due to its normative influence.⁵⁸ For despite its (usually) non-binding character, soft law is often attributed with some ability to shape or even constrain state behavior by means of shaming over non-compliance.⁵⁹ It

⁵³ Weil 1983.

⁵⁴ Ellis 2012; Koivurova and Heinämäki 2006.

⁵⁵ Abbott and Snidal 2000; Harrop and Pritchard 2011; Kirton and Trebilcock 2017.

⁵⁶ Klabbers 1996.

⁵⁷ Barelli 2009, 983.

⁵⁸ Olsson 2013.

⁵⁹ Dreyfus and Patt 2012; Yee 2004.

may also enable broader participation in international law-making. For example, the Paris Climate Change Agreement, despite being formally binding, has significant soft law elements such as its highly permissive emission reduction targets⁶⁰ — unlike the Kyoto Protocol that preceded it.⁶¹ These elements, arguably, facilitated wider participation in the Agreement at a time when conflicting political interests among actors, particularly the United States, China, European Union, and small island developing states, were impeding the conclusion of any form of instrument.⁶²

As mentioned, the literature on soft law has focused on issues that emerged as a result of globalization and required a widely inclusive approach, such as human rights, trade, and environmental protection.⁶³ This literature has also assumed that there is a regular progression from soft to hard instruments. Hard international environmental treaties, for instance, often stem from soft law declarations such as those emerging from the 1972 Stockholm Conference and the 1992 Rio Summit.⁶⁴ These declarations, while non-binding, laid down the early principles of international environmental protection upon which norms and then, rules were developed.⁶⁵ The repetition of these principles in a large number of subsequent agreements, all couched within a

⁶⁰ See, Chapter 5.4.8 for an extended discussion on the Paris Climate Change Agreement.

⁶¹ Lawrence and Wong 2017; Popovski 2018.

⁶² Lawrence and Wong 2017, 276.

⁶³ Ahmed and Mustofa 2016; Xue 2009; Held and McGrew 2003

⁶⁴ Ahmed and Mustofa 2016; Bernstein 2013; Atapattu 2012.

⁶⁵ This dissertation will distinguish between the International Relations and International Law concepts of norms which are contextualized differently. A legal norm while largely focusing on substance, stops short of addressing its social implications (Bernstein 2013). Within International Relations, however, a norm ‘defines and regulates appropriate behaviour for actors with a given identity’ (Keck and Sikkink 1998, 891). They ‘identify notions of what appropriate behaviour ought to be’ (Bernstein 2013, 128). Shelton (2000) argues that non-binding soft law is often distinguished from binding law in terms of the type of norms that it creates, whereby the former often is manifested via social norms while the latter as a legal norm.

general commitment to environmental protection, has arguably led to the creation of unwritten but legally binding “customary international law”.⁶⁶ It certainly led to the negotiation, adoption, and ratification of binding treaties, such as the 1990 Montreal Protocol on Substances that Deplete the Ozone Layer—which legalized the commitments from the non-binding 1989 Helsinki Declaration on the Protection of the Ozone Layer.⁶⁷ Another example of a principle from a non-binding declaration being included in later, legally binding treaties concerns the “precautionary principle”, which first appeared in the 1992 Rio Declaration on Environment and Development, a soft law instrument, and was later included in treaties such as the 1997 Kyoto Protocol and the 2018 Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean.⁶⁸

Soft law, acting as guiding principles, is credited with a role in the norm formation process. Orchard, for example, argues that in the case of internally displaced persons, soft law has been more effective in domestic norm internalization than a hard treaty would have been.⁶⁹ As Shelton also points out, at a domestic level, legislation could be modeled after internationally non-binding soft law. Standards set out in declarations, recommendations and guidelines can become legally binding within states. One example is the Universal Declaration of Human Rights (UDHR) which served as the foundation of domestic laws on the same issue. Another example can be observed in the evolution and influence of the norm of scientific cooperation in the Arctic. The Arctic Council’s Agreement on Enhancing International Scientific Cooperation, a

⁶⁶ Birnie and Boyle 2002; Sands 2003.

⁶⁷ Ahmed and Mustofa 2016.

⁶⁸ Trouwborst 2002.

⁶⁹ Orchard 2010

“soft treaty”, reiterates the intergovernmental organization’s focus on scientific cooperation in the region, as expressed in previous agreements and declarations. But while the soft law approach may have facilitated norm formation, in this case, the legitimacy of the Arctic Council may be just as important a factor – by facilitating treaty-making among member states having many other, conflicting interests. As the subsequent chapter demonstrates, the Arctic Council, which includes Russia and five North Atlantic Treaty Organization (NATO) states, relies on a soft law approach that has long enabled the intergovernmental forum to shape decisions, rather than trying to make decisions itself — in circumstances where this might not be possible.⁷⁰ The soft nature of these instruments, coupled with the inclusion of a wide variety of regional and non-regional state and non-state actors, also strengthens social cohesion among various actors and thus facilitates cooperation — in a region where conflict has been predicted on numerous occasions.⁷¹

As the use of soft law became more common, research into soft law extended beyond environmental issues to include its role in international refugee policy, finance, and intellectual property.⁷² Other research considered the role of soft law in relations between the developed and developing worlds.⁷³ Despite being weaker in terms of legalization, soft law has also been argued to provide a “political value” to international relations itself through a process of “collective legitimization”.⁷⁴ However, most of this literature has not investigated the prevalence,

⁷⁰ Hasanat 2010

⁷¹ Escudé 2014

⁷² Orchard 2010; Kaminski 2014; Shelton 2000.

⁷³ Anghie 2015.

⁷⁴ Gruchalla-Wesierski 1984, 69.

emergence, and consequences of soft law within the international system more generally. For instance, soft law has become ubiquitous in the international law governing Space, where the last multilateral treaties were adopted in the 1970s and coordination and cooperation – which are extensive – now occur mostly through non-binding guidelines and codes of conduct.⁷⁵ As Martha Finnemore and Kathryn Sikkink pointed out two decades ago, the questions of which norms become soft law, which become hard law,⁷⁶ and why the distinction matters, are of considerable importance to the disciplines of both International Relations and International Law.⁷⁷ These questions demand both a broad perspective and an interdisciplinary response.

2.2.2 Gaps in the Literature

The following sections identify some major gaps in the soft law literature: (1) the currently used definition that precludes binding but soft instruments in the larger soft law research anthology; (2) a lack of empirical evidence substantiating claims of an increase in both binding and non-binding soft law instruments; and (3) an insufficient amount of inquiry into the potential consequences of the observed phenomena.

2.2.2.1 Definition

In reviewing the definitions of soft law in the literature, this dissertation concludes that the terminology and classification of soft law are overly simplified and outdated. Legally binding

⁷⁵ Marboe 2012.

⁷⁶ See, Chapter 6. The non-linear evolutionary nature of soft law is addressed in the concluding chapter of this dissertation.

⁷⁷ Finnemore and Sikkink 1998, 916.

instruments are not all hard in terms of their obligation, precision, and delegation.⁷⁸ Categorizing particular treaties as being at least partially “soft” raises several questions, the answers to which could contribute towards the International Relations and International Law literatures on rules and norms. However, before elucidating on this specific strand of written international law, this section will first highlight the contemporary debates on soft law’s definition before arguing why one needs to redefine soft law to include instruments that may currently be assigned, inaccurately, to the all-encompassing black box of hard treaties.⁷⁹

The disciplines of International Relations and International Law have yet to reach a consensus on whether soft law actually qualifies as international law, let alone its definition. Some argue that international law should remain binary in nature, for example by distinguishing legal or illegal, binding or non-binding, and that the very thesis of soft law as law is both unnecessary and problematic.⁸⁰

Among those who do agree on the existence of soft law, its definition and identification are no less contentious. As I will elaborate below, Chinkin’s work on soft law from an international law perspective and Abbott and Snidal’s work from international relations perspective have constituted the two major, but opposing, cornerstones on the topic. Each has proposed a structure for identifying soft law and its place within the respective fields.⁸¹

⁷⁸ Abbott and Snidal 2000.

⁷⁹ Scholars who argue that soft law is problematic, by extension consider hard treaties to be the sole source of written international law. Hard treaties, therefore, would be all-encompassing in terms of obligations.

⁸⁰ Klabbers 1996.

⁸¹ Abbott and Snidal 2000; Chinkin 1989.

Definitions of hard and soft law are either based on a binary distinction between the two forms, or on a set of characteristics that attribute various degrees of “hardness” or “softness along a spectrum.”⁸² It is the latter approach that seems most promising as it captures a greater diversity of instruments, though only a few scholars have pursued it so far. A binary distinction would categorize international agreements as those that are binding or non-binding. For instance, a hard law is often referred to a precisely worded treaty that sets out specific obligations. A soft law, on the other hand, is a more ambiguous document that lacks legal obligations.⁸³ However, as I argue below, not all soft law instruments are ambiguous and not all binding instruments provide clarity. To the contrary, non-binding soft law instruments sometimes contain more precise provisions than their binding counterparts.

The case for looking beyond a dichotomous approach to defining written international law, although infrequently made, can be found in the International Law literature. According to international law scholar Richard Reeve Baxter, the term “international agreements” refers to all instruments “concluded between states in written form and governed by international law”, including treaties, declarations, and resolutions.⁸⁴ He argues that soft law is part of an “infinite variety” of international law that refers largely to legal norms that do create obligations for states despite not being explicitly enforced in the same way as conventional hard treaties.⁸⁵ Soft law through “various degrees of cogency, persuasiveness, and consensus which are incorporated in

⁸² Abbott and Snidal 2000; Chinkin 1989; Shelton 2003.

⁸³ Chinkin 1989.

⁸⁴ Baxter 1980, 550.

⁸⁵ Baxter 1980, 566.

agreements” is simply an international legal instrument that expresses “a different intensity of agreement”.⁸⁶

Likewise, Shelton takes the discrete binary classification further by categorizing soft and hard law in a 2x2 typology, suggesting that the form and content should both be used to determine the character of an international legal instrument.⁸⁷ The form would determine if an agreement is legally binding or non-binding. The content would distinguish between the normative and hortatory nature of agreements. Such a classification does not capture variations among binding instruments. Hard law, at one end, would be an instrument that is both legally binding and normative in nature, while soft law at the other would be a non-binding instrument with promotional intent that can serve as a catalyst for further action on an issue.⁸⁸ Examples of soft law might include “formal written documents signed by states but that, for whatever reason, do not satisfy the requirements of a treaty; informal exchanges of promises through diplomatic correspondence; votes in international organizations; the decisions of international tribunals; and more”.⁸⁹ While some authors concur that soft law can be found in the form of weaker provisions in binding treaties, for the purposes of their research, the term soft law refers solely to non-binding instruments.⁹⁰ Several other authors also recognize that soft law can take the forms of both binding and non-binding agreements, but they then leave soft treaties out of their analysis, thus failing to explore a potentially important segment of international law.

⁸⁶ Baxter 1980, 549 and 566.

⁸⁷ Shelton 2003.

⁸⁸ Ibid.

⁸⁹ Guzman and Meyer 2010.

⁹⁰ Freeland 2011.

Abbott and Snidal, in their work on soft law, explain from a functionalist perspective why states may choose to design instruments with a lower degree of legalization in order to avoid the high transaction costs commonly associated with hard law.⁹¹ Ilham Olsson, thus far, has been one of the few scholars to have singled out binding agreements that may be weaker than other, harder treaties in terms of their “vagueness, indeterminacy, or generality of a treaty or treaty provision”.⁹² However, he fails to explore the implications of such instruments within the international system.

The concept of soft law explored in this dissertation is analogous to Lenz et al.’s concept of incomplete contracts which are defined as “contracts that involve unspecified obligations that are open to interpretation”.⁹³ The authors argue that the willingness of Parties in a regional organization to engage in such contracts is dependent on their “shared understandings which reduce the cost of perceptual ambiguity and which reflect prior historical experience”. While this may explain the Arctic Council states’ willingness to negotiate binding instruments, it does not explain the Arctic Five+Five⁹⁴ configuration of parties to the Central Arctic Oceans Fisheries Agreement, which includes regional actors as well as five other major fishing, but nonetheless non-Arctic states; states that share neither a geographic connection nor a common historical experience.

⁹¹ Abbott and Snidal 2000.

⁹² Olsson 2013, 181.

⁹³ Lenz et al 2014, 4.

⁹⁴ Arctic Five comprises of Canada, Denmark, Norway, Russia (the then-Soviet Union), and the United States.

While a currently underdeveloped segment of the International Relations/ International Law literature, soft law is increasingly being used in the design of international legal instruments — as can be observed in various declarations and resolutions governing regions and discrete issue areas such as Outer Space, the Arctic, climate change, and nuclear weapon disarmament. Current definitions of soft law are limited and perhaps even problematic, particularly because the literature is heavily focused on non-binding soft law. The role of soft treaties has been largely excluded from the literature. The gap in addressing the full range of written agreements (soft to hard) and the increasing use of soft treaties could have considerable implications for our understanding of contemporary international law and the role it plays in the international system. For instance, do soft treaties have less of a legitimizing effect within international relations than hard treaties do? And if so, why do states opt for such an alternative? The literature has also frequently portrayed soft law as a stepping-stone to hard law. Soft treaties may sometimes facilitate this transition, as illustrated in Stage 3 to 4 in Figure 1.2. But as will later be demonstrated in the case study on Climate Change, this transition is non-linear and may also take place in reverse.⁹⁵

2.2.2.2 Prevalence

While most articles on soft law state that there is an increase in the number of such instruments, they fail to assess and demonstrate this phenomenon quantitatively.⁹⁶ These analyses tend to examine a very small sample of agreements within a single issue-area or region, often those

⁹⁵ See, Chapter 5.4.7.

⁹⁶ Cárdenas Castañeda 2013; Escudé 2016; Meyer 2016; Olsson 2013; Shelton 2003; Ştefan 2008; van der Sluijs 2013.

pertaining to “low politics”, which results in a limited understanding of the role of soft law across different contexts.

Soft law’s greater prevalence has been asserted in the literature but has not been empirically demonstrated. This assertion has also generally been restricted to single-issue areas, which does not provide sufficient variation across various issues or regions to provide insights of general value; as a result, it does not contribute to understanding soft law’s place within the larger international system.

The case studies in this dissertation concern regions and issue-areas governed by a combination of hard and soft law instruments, and where states of varying political influence and technological capabilities, as well as non-state actors, play an active role in the design of these legal instruments. These case studies enable us to assess the potential reasons listed in the introductory chapter and are part of an iterative process for developing a more nuanced understanding of whether and why there is an increased recourse to soft law.

2.2.2.3 Implications for the International System

The literature generally does not identify the circumstances that have led to an increased recourse to soft law. Those authors that do, stop short of providing an in-depth examination of these circumstances. Timothy Meyer, whose argument hinges on defining soft law as purely non-binding, contends that hard law is more challenging to renegotiate. This could be caused by

scientific uncertainty and the contemporary shifts in power among states.⁹⁷ However, Meyer does not support his contention with examples. Aside from arguing that an expanded definition is needed, this dissertation provides three case studies and, on that basis, identifies reasons for the increasing use of soft law in the international system.

The literature on soft law has so far focused on issue-specific domains such as environmental law. This research project adopts a broader perspective. It studies international law at a regime complex level, by focusing on specific regions and issue-areas governed by a complex of various sub-fields of international law such as international environmental law, the law of the sea, and international space law.

The academic literature on even the more commonly studied issue-areas rarely investigates the place of soft law within the major theoretical paradigms of International Relations. Soft law has generally been assumed to be a benign and/or low-cost alternative to a hard treaty; one that can advance global norms without encountering the political impediments often associated with binding instruments.⁹⁸

The International Relations and International Law literatures on soft law, while frequently pointing out its increased use in contemporary politics, also fail to account empirically for the trend, beyond a few selective observations within single issue-areas. This omission may be due

⁹⁷ Meyer 2009.

⁹⁸ Abbott and Snidal 2000; Shaffer and Pollack 2010.

to the colossal task of coding the vast number of international legal agreements, binding and non-binding, as well as the lack of consensus as to what actually counts as a “soft” instrument. In particular, instruments that are “soft” yet legally binding — what I call “soft treaties”— have received almost no attention in the literature, despite an apparent increase in their number.⁹⁹

2.3 Categorizing Written International Law

This research broadens the examination of soft law in the international system through the definition upon which it bases its analysis. Soft law is used to refer to written legal instruments, other than hard treaties, that exist in either binding or non-binding forms. Non-binding soft law can exist in various forms, such as declarations, recommendations, resolutions, and official ministerial statements.¹⁰⁰ Soft treaty, on the other hand, is a category that this dissertation identifies for the grey area of binding but soft instruments that have been barely explored in the literature.

Abbott and Snidal define soft law in fairly broad terms. They argue that soft law encompasses any instrument that deviates from hard law with respect to the dimensions of obligation, precision, and delegation. They also distinguish soft law from political arrangements where legalization is absent. This leaves us with a rather large number of instruments that can be classified as soft law.

⁹⁹ Olsson 2013.

¹⁰⁰ Olsson 2013; Shelton 2009.

In this dissertation, the classification of written international law is based on the following criteria that have been derived based on the gaps identified in the literature:

- (i) It is necessary to include purely soft law instruments that, while lacking in legalization¹⁰¹, have an effect on legal governance itself. Such instruments are categorized in this research as non-binding soft law and can take the form of guidelines, resolutions, and declarations.
- (ii) It is necessary to clearly demarcate between binding (hard or soft), and non-binding soft instruments in order to identify instruments for which states are legally held accountable in the event of non-compliance.
- (iii) Instead of merely utilizing an overly simplified binary dichotomy of written international law as binding or non-binding, there is a need to further distinguish between soft and hard treaties. Not including soft treaties within the category of soft law fails to account for the full range of implications of “soft” governance within the international system.

Additionally, in line with the argument that the following section will make on how not all treaties are “hard” instruments, despite being binding, it is equally important to note that not all instruments that are designated as Memorandum of Understanding (MOU) are non-binding—as some scholars have assumed.¹⁰² An MOU can constitute a legally binding hard treaty, depending

¹⁰¹ There is a considerable volume of literature debating on the legal nature of “soft law” and the issues with being called “law”. Scholars such as Raustiala (2005) have called for such instruments to be instead categorized as pledges.

¹⁰² Byrnes and Lawrence, 2015, 49; Guzman and Meyer 2010; Shelton 2009, 18.

on its content.¹⁰³ Prior to concluding the Agreement on Enhancing International Scientific Cooperation in the Arctic in 2017, the Arctic Council member states had drafted an MOU, which was non-binding, as a stepping stone to the aforementioned binding instrument.¹⁰⁴ In contrast, the 1998 MOU between NASA and the Japanese Space Agency (JAXA) pertaining to the International Space Station Programme is a binding instrument. As Anthony Aust argues, naming an instrument as a treaty, agreement, MOU and so on is simply the result of the “practice of international organizations or group of states, or political preference”.¹⁰⁵ Additionally, the International Law Commission sought to clarify that while MOUs may not be “formal instruments”, they are nonetheless “international agreements subject to the law of treaties”.¹⁰⁶ It is the content that determines an instrument’s degree of legality, which is what this dissertation aims to ascertain in the following sections of this chapter, and in the subsequent case study chapters.

2.3.1 Soft Treaty

The purpose of this section is to explore a form of international law that sits halfway between the general depictions of non-binding soft law (i.e. resolutions, declarations, and guidelines) and binding hard law (i.e. treaties and customary international law). Chinkin categorized such instruments as “legal soft law”, but did not focus her attention on them.¹⁰⁷ Ilhami Olsson similarly identified but did not explore why some binding agreements may be weaker than others

¹⁰³ See, Chapter 4.

¹⁰⁴ See, Chapter 3.

¹⁰⁵ Aust 2018, 20.

¹⁰⁶ International Law Commission 1966, 188.

¹⁰⁷ Chinkin 1989, 851.

because of the “vagueness, indeterminacy, or generality of a treaty or treaty provision”.¹⁰⁸ This form of an international instrument, which I call a “soft treaty”, while present has been insufficiently examined in the literature and deserves to be carefully analyzed with regards to its distinctiveness, prevalence, effects, and implications for international relations and international law.

It is my contention that some treaties are, in their entirety, properly categorized as “soft” rather than “hard” law. *I define a “soft treaty” as a binding instrument containing some combination of permissive language, ambiguity, and redundancy that leaves it devoid of mandatory, clear, and new obligations.* Identifying this new category called the “soft treaty” might then enable the expansion the analysis of soft law and its effects, including (perhaps) challenging the assumption that soft law instruments are necessarily benign and egalitarian. This dissertation explores the use of non-binding instruments, soft treaties, and non-binding provisions in hard treaties in order to understand the power dynamics involved in their negotiation and conclusion. These three elements, elaborated further later this in this chapter, make up a preliminary list of attributes of an international legal instrument that could indicate “softness” in terms of its degree of legalization.

While the term soft law has conventionally been used solely for non-binding political instruments, the literature recognizing binding instruments as encompassing soft elements is

¹⁰⁸ Olsson 2013.

growing.¹⁰⁹ To this, we might add “soft treaties”. Given the diversity in these instruments, one could usefully see international law as agreements along a continuum measured by a degree of “softness” or “hardness” at either end of the spectrum. If placed along such a continuum, such instruments would fall somewhere between two ends that are either purely legal or purely political, with soft treaties falling between non-binding soft law and binding hard treaties:

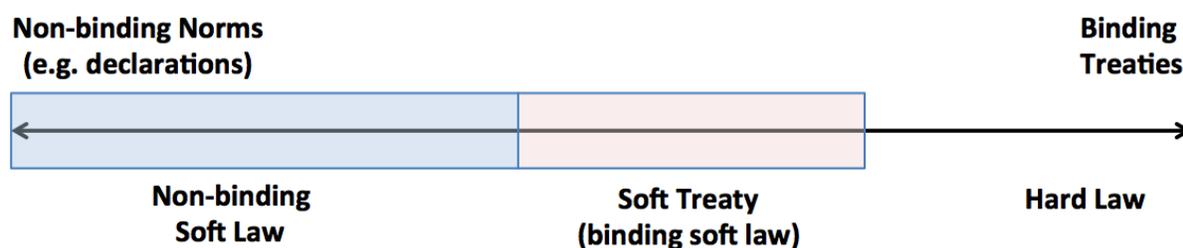


Figure 2.1: Spectrum of written international law with the shaded segments representing the focus of my analysis

Figure 2.1 illustrates the definitional framework this article uses. The spectrum indicates the degree to which a written international legal instrument is binding on its parties. Defining non-binding soft law to encompass a lower degree of precision, as Abbott and Snidal do, implies that such instruments contain vague provisions relative to binding instruments, which is not necessarily true. In this dissertation, *non-binding soft law* is simply defined as any legal instrument that is non-binding. In contrast to existing definitions of written international law, particularly those that find soft law to lie somewhere along a spectrum¹¹⁰, non-binding soft law here is not assumed to be less permissive, redundant or ambiguous than its binding counterpart.

¹⁰⁹ Abbott and Snidal 2000; Canuel 2015; Olsson 2013.

¹¹⁰ Abbott and Snidal 2000.

Some non-binding soft law instruments are highly precise. The 1948 Universal Declaration of Human Rights and the 1992 Rio Declaration are but two examples of non-binding soft law instruments that contain precise provisions. Another example is the 2018 Guidelines for the Long-term Sustainability of Outer Space Activities, which contain clearer provisions than a binding instrument on Space issues could deliver in today’s political climate.¹¹¹

It should also be noted here that the lines demarcating the three categories are in no way meant to be fixed. These blurred lines are simply used to facilitate a discussion on soft law and more broadly, all written international law. Defining “binding” is critical to an inquiry into soft law’s prevalence, as doing so bifurcates non-binding soft law from soft and hard treaties. To avoid convoluting the analysis of soft law, in either its binding or non-binding forms, this dissertation will not further deconstruct binding soft law as partially binding or fully binding.

Although a single accepted definition of “binding” is lacking, the literature generally characterizes a binding instrument as one whose provisions the parties accept as such. Bodansky explains that in some instances “final clauses addressing issues such as how states express their consent to be bound (for example, through ratification or accession) and the requirements for entry into force – provisions that would not make sense in an instrument not intended to be legal in character” help to distinguish binding from non-binding instruments.¹¹² Additionally, the general principle of customary international law – *pacta sunt servanda* – was first explicitly

¹¹¹ France 24 2019.

¹¹² Bodansky 2015, 157.

codified in the 1969 Vienna Convention on the Law of the Treaties. In particular, Article 26 of the Convention states: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith”.¹¹³ States, by signing and/or ratifying a treaty (depending on what the treaty itself requires) are consenting to be bound by the treaty’s provisions and held liable in the event of non-compliance.

In the case of the Arctic Council, two out of three Agreements negotiated under its auspices explicitly identify which of their sections are binding on their parties and which are not.¹¹⁴ As for the Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean, it explicitly states: “The depositary shall inform all signatories and all Parties of the deposit of all instruments of ratification, acceptance, approval or accession and perform such other functions as are provided for in the 1969 Vienna Convention on the Law of Treaties”. Likewise, Article 20 of the Paris Agreement states that the Agreement “shall be open for signature and subject to ratification, acceptance or approval by States and regional economic integration organizations that are Parties to the Convention”, with the “Convention” being the 1992 UN Framework Convention on Climate Change.

To identify soft treaties, we need to read international instruments carefully, for instance, maintaining an awareness of the important difference between “should” and “shall”. We also need to pay close attention to context, including whether the parties are already bound to the same commitments through other, pre-existing treaties. Last but not least, we need to apply the

¹¹³ Vienna Convention on the Law of Treaties 1969, Article 26.

¹¹⁴ Agreement on Enhancing International Scientific Cooperation, Article 14; Agreement on the Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic, Article 20;

customary international rules on treaty interpretation, as codified in the 1969 Vienna Convention on the Law of Treaties.¹¹⁵ International relations scholars, in particular, would benefit from paying more attention to these long-accepted rules, which are designed to reduce the scope for misunderstanding and disagreement over the meaning and legal consequences of words.

2.3.1.1 Different Kinds of Softness in Treaties

It is also important to note that the focus of this dissertation is on the substantive provisions of treaties and not their preambles, the provisions of which are almost always permissive, ambiguous, or redundant. Yet as the next section of this chapter will illustrate, softness across the substantive provisions of a treaty, while less frequent, is also widespread.

2.3.1.1.1 Permissive Language

Language within a treaty can be either mandatory or permissive. Words such as “shall” and “must” carry mandatory force, while “should” signals that a provision is permissive; a recommendation rather than a requirement.¹¹⁶ However, the existence of mandatory or permissive language does not determine whether the instrument itself is binding or non-binding.¹¹⁷ States may be more willing to adopt mandatory language in non-binding instruments precisely because they are not legally bound to them, which may help to explain the mandatory language in, for example, the 1948 Universal Declaration of Human Rights.¹¹⁸ Permissive language in a treaty signals that states, while agreeing to a legally binding instrument, are

¹¹⁵ Vienna Convention on the Law of Treaties 1969.

¹¹⁶ Rajamani 2016.

¹¹⁷ Shelton 2008, 73.

¹¹⁸ Olivier 2002.

carefully avoiding being required to actually do or not do anything. As the following examples show, permissive language comes in a variety of forms.

i. Covenant on Economic, Social and Cultural Rights

Article 2(1) of the 1966 Covenant on Economic, Social and Cultural Rights places an important qualifier on the obligations set out in that treaty:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.¹¹⁹

The words “with a view to achieving progressively” signal that the entire treaty is soft.

ii. North American Agreement on Environmental Cooperation

The 1993 North American Agreement on Environmental Cooperation (NAAEC) came into force alongside the North American Free Trade Agreement (NAFTA).¹²⁰ Its most significant contribution was the establishment of a new, three-member international organization, the Commission for Environmental Cooperation (CEC). NAAEC’s provisions on environmental

¹¹⁹ International Covenant on Economic, Social and Cultural Rights 1966.

¹²⁰ North American Agreement on Environmental Cooperation 1993.

protection are written in permissive language. For example, under Article 2, each Party commits to “promote education in environmental matters, including environmental law”; “further scientific research and technology development in respect of environmental matters”; “assess, as appropriate, environmental impacts”; and “promote the use of economic instruments for the efficient achievement of environmental goals.” Article 2 also states that each Party “shall consider implementing in its law any recommendation” provided by the CEC, and “shall consider prohibiting the export to the territories of the other Parties of a pesticide or toxic substance whose use is prohibited within the Party’s territory.” Here, the word “consider” removes the mandatory force from “shall”. Further examples of the use of permissive language in the NAAEC are found in Article 3, which reads:

Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and regulations, each Party shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations.

iii. Framework Convention on Tobacco Control

The 2005 Framework Convention on Tobacco Control (FCTC), the first public health treaty to be negotiated under the auspices of the World Health Organization, was developed in response to a global increase in tobacco-related deaths and illnesses. Kevin Oliver explains that the FCTC is based on the “concept of instructions that are stronger than recommendations – but not truly

binding”.¹²¹ For example, Article 13(4)(a) includes mandatory language (“shall”) but only after deferring to domestic law (“constitutional or constitutional principles”):

As a minimum, and in accordance with its constitution or constitutional principles, each Party shall:

(a) prohibit all forms of tobacco advertising, promotion and sponsorship that promote a tobacco product by any means that are false, misleading or deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions....¹²²

The soft character of the FCTC could be explained on the basis that it is, explicitly, a “framework” convention. Although securing agreement on the framework may have required a compromise between “purely recommendatory instrument and a binding convention”, “additional protocols” could then be relied on to elucidate and strengthen the commitments made by states.¹²³ This approach is now widely used in international treaties, including the Convention on Biological Diversity, the UN Convention on Certain Conventional Weapons, and the UN Framework Convention on Climate Change.¹²⁴ These “conventions” are not entirely soft, because they are intended to provide a framework for later, hard obligations. However, they are not really hard either, given the degree of ambiguity within them.

¹²¹ Oliver 2015, 195.

¹²² WHO Framework Convention on Tobacco Control 2005, Article 13(4)(a).

¹²³ Halabi 2011, 4.

¹²⁴ Convention on Biological Diversity 1992; UN Framework Convention on Climate Change 1992; UN Convention on Certain Conventional Weapons 1980.

2.3.1.1.2 Ambiguity

As a result of human error, especially during negotiations involving complex issues, divergent interests, and tight time constraints, ambiguity can find its way into international agreements. Ambiguity may also be unavoidable when crafting general rules that will be applied to subsequent instruments and situations, each composed of its own specific set of facts.¹²⁵ This is evident in broadly encompassing Conventions and subsequent Protocols that may be more specific. Examples of such forms of ambiguity include the 1992 UN Framework Convention on Climate Change and the 2005 Kyoto Protocol, as well as the 1967 Outer Space Treaty and the ensuing 1972 Liability Convention. Legal systems, domestic and international, are designed to take this latter kind of ambiguity into account.¹²⁶ Within the international legal systems, the principles of “proportionality” and “equity” are both “ambiguous and controlling” for instance, in the law governing the use of military force and the Law of the Sea, respectively.¹²⁷

Ambiguous language is often deliberately included in international legal instruments for a number of reasons. “Constructive ambiguity”¹²⁸ is defined by G.R. Berridge, Alan James, and Lorna Lloyd as “the deliberate use of ambiguous language in a sensitive issue in order to advance some political purpose”.¹²⁹ Legal instruments where language could have been more

¹²⁵ Byers 2020.

¹²⁶ Byers 2020.

¹²⁷ See, e.g.: *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* 2000; United Nations Convention on the Law of the Sea, 1982; Lord Hutton 2004; Byers 2020.

¹²⁸ One could argue that virtually any legal provision may be considered ambiguous, depending on the context in which it falls to be interpreted and applied. With regard to ambiguity, this dissertation focuses on constructive ambiguity—a form of ambiguity that involves political forethought.

¹²⁹ Berridge and Lloyd 2012, 73. Berridge and Lloyd explain that constructive ambiguity is also known as “fudging”. Byers 2020.

precise is argued to be a result of the political rather than the legal aspect of negotiations.¹³⁰ Such ambiguity is an indicator of the negotiators' position and as such reflects "good rather than bad drafting".¹³¹ Such deliberately ambiguous language where provisions could entail different meanings to each Party, came to be diplomatic trademarks of Henry Kissinger and Abba Eban.¹³² Aside from averting negotiation deadlocks, particularly when consensus is required, such constructive ambiguity may also be desirable because of the associated lowered transaction costs associated with a shorter negotiation process as well as the flexibility that ambiguity provides in foreign policy.¹³³

i. Geneva Convention on the Continental Shelf

A good example of constructive ambiguity can be found in Article 1 of the 1958 Geneva Convention on the Continental Shelf, which defines the continental shelf as "the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas".¹³⁴ As Thomas Franck explains this ambiguity:

[T]he parties simply covered their differences and uncertainties with a formula whose content remained in abeyance pending further work by negotiators, courts, and

¹³⁰ Byers 2020; Son and Lee 2018.

¹³¹ Byers 2020.

¹³² Fischhendler 2008, 111.

¹³³ See, Fischhendler 2008 111-112 for an extended discussion on the benefits and costs of constructive ambiguity; Son and Lee 2018.

¹³⁴ Convention on the Continental Shelf 1958.

administrators and by the evolution of customary state practice. The vagueness of the rule did permit a flexible response to further advances in technology, a benefit inherent in indeterminacy.¹³⁵

ii. TRIPS

A second example¹³⁶ of constructive ambiguity involves the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Article 1(1) states that:

Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.¹³⁷

“[E]xtensive protection” can be interpreted in several manners and a baseline from which to evaluate such protection is absent in the Agreement.¹³⁸

Additionally, within the same Agreement, Article 27(3)(b) provides that:

¹³⁵ Byers 2020; Franck 1998, 31.

¹³⁶ Byers 2020.

¹³⁷ Agreement on Trade-Related Aspects of Intellectual Property Rights 1994, Article 1(1).

¹³⁸ Son and Lee 2018.

Members may exclude from patentability ... plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.¹³⁹

The contradictions within Article 27(3)(b) leave it legally uncertain as to whether plants can be excluded from patents and comparable intellectual property protections, and are obvious enough to suggest that the ambiguity was intentional.¹⁴⁰ This suggestion is confirmed by the fact that – within the text itself – the parties committed to further negotiations, not on the issue of plant patents as such but on the *existing* provisions of this particular subparagraph.

2.3.1.1.3 Redundancy

Some treaties do nothing more than repeat hard law obligations from pre-existing treaties that are already binding on the negotiating states. This phenomenon is readily apparent in the Arctic, where the regulatory obligations from several global treaties have been recast in new regional instruments.

¹³⁹ Agreement on Trade-Related Aspects of Intellectual Property Rights 1994, Article 27(3)(b).

¹⁴⁰ Byers 2020.

i. Arctic SAR Agreement

The Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic (hereinafter “Arctic SAR Agreement”)¹⁴¹ was concluded by the eight Arctic states in 2011 and celebrated as a major development in the region’s governance.¹⁴² However, as its preamble reaffirms, all eight Arctic Council members were already parties to the 1944 Chicago Convention on International Civil Aviation¹⁴³ and the 1979 International Convention on Maritime Search and Rescue.¹⁴⁴ Article 7(1) goes on to state that those two conventions “shall be used as the basis for conducting search and rescue operations under this Agreement.”¹⁴⁵ The provisions of the Arctic SAR Agreement closely track the 1944 and 1979 conventions.¹⁴⁶ For example, although the Arctic SAR Agreement delimits the search and rescue zones over which each individual Arctic state has the responsibility, this delimitation simply implements an obligation set out in the 1979 Convention. The delimitation also tracks existing maritime boundaries,¹⁴⁷ and unless they have permission, states are prohibited from entering into another state’s zone to engage in a search and rescue.

ii. Arctic Agreement on Oil Spill Prevention and Response

¹⁴¹ See, Chapter 3.

¹⁴² Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic 2011; Byers 2013.

¹⁴³ Convention on International Civil Aviation, Annex 12, Seventh Edition, 2001.

¹⁴⁴ International Convention on Maritime Search and Rescue, 1405 U.N.T.S. 119, as amended in 1998 and 2004; Byers 2013, 277.

¹⁴⁵ Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic 2011, Article 7(1).

¹⁴⁶ Byers 2013; Shih-Ming, Pearre, and Firestone 2012.

¹⁴⁷ With the small exception of two disputed areas in the Beaufort Sea and the Lincoln Sea that are assigned to Canada’s zone of responsibility. The Agreement specifies that these assignments are without prejudice to the legal claims of the United States and Denmark, respectively.

The second binding instrument to emerge from negotiations conducted among the eight Arctic Council member states was the 2013 Agreement on Cooperation on Maritime Oil Pollution Preparedness and Response in the Arctic (“Arctic Oil Spill Response Agreement”). Its stated goal is to “strengthen cooperation, coordination and mutual assistance among the Parties on oil pollution preparedness and response in the Arctic in order to protect the marine environment from pollution by oil.”¹⁴⁸ However, the Arctic Oil Spill Response Agreement fails to create any new obligations.¹⁴⁹ This is because by previously ratifying the 1990 Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC), a treaty negotiated within the framework of the International Maritime Organization, all eight Arctic states had already made the same commitments.¹⁵⁰

2.3.2 Non-Binding Soft Law

Non-binding soft law is defined, in this dissertation, to be simply any legal instrument that is non-binding. Defining non-binding soft law to encompass a lower degree of precision, as Abbott and Snidal do, implies that such instruments contain vague provisions relative to binding instruments. In reality, this is not the case.

Such a definition may also lead one to assume that non-binding soft law instruments are benign and “residual”, possibly causing states to be lenient in their negotiation.¹⁵¹ As subsequent

¹⁴⁸ Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic 2013, Article 1.

¹⁴⁹ Byers and Stoller 2013.

¹⁵⁰ Byers and Stoller 2013; International Convention on Oil Pollution Preparedness, Response and Cooperation 1990.

¹⁵¹ Posner and Gersen 2008, 45.

chapters will demonstrate in more detail, such an assumption would be incorrect. The negotiations leading to the 2019 non-binding ministerial declaration by Arctic Council member states are a case in point.¹⁵² The United States was opposed to the inclusion of any reference to climate change, and the other seven countries refused to concede. This first-ever failure to adopt an Arctic Council ministerial declaration demonstrates that the language and content of some soft law instruments are hard-fought, and that states do consider them important.¹⁵³

Shelton's widely cited definition of soft law will be used in this dissertation for the category of non-binding soft law.¹⁵⁴ Shelton defines soft law as non-legally binding instruments that may take the forms of "normative texts not adopted in treaty form that are addressed to the international community as a whole or to the entire membership of the adopting institution or organization" such as the ASEAN Joint Statement on Climate Change to the UNFCCC Conference of the Parties¹⁵⁵ or as recommendations, resolutions, and other writings meant to "supervise state compliance with treaty obligations" such as the Guidelines for the Long-Term Sustainability of Outer Space Activities by the UN Committee on the Peaceful Uses of Outer Space.¹⁵⁶

While binding instruments may be more difficult to negotiate because of the sovereignty and transaction costs involved, the literature often explains the choice of non-binding soft law on the

¹⁵² See, Chapter 3.

¹⁵³ Washington Post 2019.

¹⁵⁴ Shelton 2009.

¹⁵⁵ ASEAN Joint Statement 2019.

¹⁵⁶ Shelton 2009, 72; UN COPUOUS 2018.

basis that it is a cheaper alternative.¹⁵⁷ However, as exemplified by the deadlocks that arose during the 2019 Arctic Council Ministerial Meeting, this is not always the case. It is also useful to note that the failure to adopt a declaration at the Ministerial Meeting was not the first time that plans for a soft law instrument were shelved due to deadlock over negotiations. In 2012, for example, for the first time in the Association of Southeast Asian Nations' (ASEAN) 45-year history, member states were unable to agree on a joint statement due to disagreements over the South China Sea disputes.¹⁵⁸ The 2019 US-Democratic People's Republic of Korea (DPRK) Summit held in Hanoi, Vietnam provides yet another example whereby the negotiations reached a deadlock. The 2019 summit was unlike the 2018 summer, which took place between the same two states in Singapore and concluded in a vague but nonetheless mutually agreed declaration.¹⁵⁹ Such instances, where states fail to agree upon a non-binding soft law instrument, are indicative that non-binding soft law instruments may not necessarily be benign and egalitarian as the much of the literature assumes them to be. Sometimes, however, the soft character of these agreements allows for imaginative ways around deadlocks – such as the 2019 Statement of the Arctic Council Chair, which is essentially a ministerial declaration of 8 states, alongside a stronger statement of 7 states, that will enable Arctic cooperation to continue apace.

2.3.3 Hard Law

While this research is focused on soft law, hard law needs to be defined clearly in order to better situate soft law and soft treaties along the spectrum of written legal instruments. The reverse of

¹⁵⁷ Abbott and Snidal 2000, 422.

¹⁵⁸ BBC 2012; CSIS 2012.

¹⁵⁹ US-DPRK Joint Statement 2018.

the elements that this dissertation uses to describe soft treaties – permissive language, ambiguity, and redundancy – could constitute a new list of the attributes, not just of hard treaties, but of hard law generally. These attributes could be expressed as: mandatory language, clarity, and novelty.

Hard law broadly encompasses written international legal instruments, that may take the form of treaties, agreements, conventions, as well as unwritten rules of customary international law. This dissertation solely focuses on written legal instruments in its enquiry of soft law. Hard law instruments are examined in Chapters 3, 4, and 5, to provide a point of reference when analysing non-binding soft law and soft treaty instruments. Examining these soft instruments relative to hard treaties is important to examine assumptions within the existing literatures such as hard law being an “ideal-type” and softer instruments being easier to negotiate.¹⁶⁰

2.4 Possible Determinants of Soft Law

There are a number of reasons why states sometimes conclude soft law and soft treaties rather than hard treaties. These reasons, drawn from a review of the literature, include: shifting global politics; papering over otherwise irreconcilable differences; building towards the conclusion of a hard treaty or the development of customary international law, and; enabling governments to be seen by their citizens to be doing something. These determinants, revisited in Chapter 6, may not all be equally visible in each of this dissertation’s three case studies. Additionally, the following section excludes the often-made argument that soft law is increasingly used in regions or issue-areas where governance and decision-making have to incorporate the uncertainty that is inherent

¹⁶⁰ Pollack and Shaffer 2009, 133.

in scientific knowledge, since this has been extensively covered in the literature on soft law.¹⁶¹ Some determinants may be interdependent, such as the role of scientific uncertainty and the promotion of epistemic communities, and others such as circumventing constitutional constraints may operate independent of any eventual crystallization towards hard law. Chapters 3, 4, and 5 examine the extent to which these factors determine the conclusion of soft law within the respective case studies, as well as if there are other factors in play.

2.4.1.1 Shifting Global Politics

The number and degree of influence wielded by state and non-state actors in global governance has been evolving over recent decades inter alia due to the rise of China and India, dramatic increases in international trade, and the Internet. An intensely interconnected multipolar world where conflicting interests are likely to be greater may be resulting in softer instruments that encompass lower sovereignty and transaction costs. One could argue that the mid to late- 20th century saw many of the great transformations such as decolonization and the end of the Cold War which resulted in more states vying for a say in international affairs. However, their relative influence in international affairs has grown along with their economies particularly over the last two decades. This influence is not just limited to states. Non-state actors, including corporations and non-governmental organizations have been able to shape governance, particularly in contemporary issue-areas such as cyberspace and climate change. Outer Space, once a domain for state actors, has seen a surge of private actors in the past decade.

¹⁶¹ Abbott and Snidal 2000; Scott 2016; van Schomberg 2012.

Given this increasingly complex system encompassing divergent interests, organizations that utilize a consensus based decision-making structure may see a rise of soft law instruments. Negotiating and concluding harder instruments may be more challenging given the higher transactional and reputational costs that such instruments necessitates of their parties.¹⁶²

2.4.1.2 Papering over Differences

Permissive or ambiguous language is sometimes used to paper over irreconcilable differences so that at least some agreement between the negotiating parties can be achieved.¹⁶³ As Richard Bilder explained: “Often agreement on a particular matter will only be possible through the adoption of very broad language in the text, which in effect leaves the problem for later resolution.”¹⁶⁴ The 1958 Geneva Convention on the Continental Shelf provides one example, as discussed above.

A second example is the 1979 International Convention Against the Taking of Hostages (“Hostages Convention”).¹⁶⁵ The negotiations, which were spurred by the 1976 Entebbe hostage crisis, involved two very different sets of interests among developed and developing states.¹⁶⁶ The former, concerned about their own nationals being taken hostage, sought a comprehensive treaty which would both address the issue and put in place rigorous cooperation requirements on developing states. The latter, evidently, were more concerned about the possibility of military

¹⁶² Bodansky 2015.

¹⁶³ Byers 2020.

¹⁶⁴ Bilder 1962, 654. For an extended discussion, see Lacharrière 1983.

¹⁶⁵ International Convention Against the Taking of Hostages 1979.

¹⁶⁶ Boyle 1980, 831-83; Byers 2004, 167.

interventions directed (actually or allegedly) towards rescuing hostages.¹⁶⁷ Both sets of interests were met through a compromise whereby one article in the Hostages Convention suggests that states have a right to use force to rescue their nationals, while another article affirms that nothing in the Convention “shall be construed as justifying the violation of the territorial integrity or political independence of a State in contravention of the Charter of the United Nations.”¹⁶⁸ The result is decidedly ambiguous, as Francis Boyle explained:

This outcome ... essentially left the seminal question of the Entebbe raid unanswered. ... All members of the Hostages Committee abstained from a revival of the Security Council debates on the legality of the Entebbe raid precisely in order to avert a breakdown of the Committee proceedings. Instead, they operated on the foundation of the least common denominator among them and drafted a hostages convention on that compromise basis.¹⁶⁹

However, the fact that permissive or ambiguous language is used to paper over differences does not explain why states bother to negotiate legally binding agreements that impose no actual limits on state behaviour, rather than opting for non-legally binding agreements. The answer to this question seems to lie, instead, in the political circumstances surrounding the negotiations.

¹⁶⁷ Byers 2004, 167-168.

¹⁶⁸ International Convention Against the Taking of Hostages 1979. Articles. 5 and 14.

¹⁶⁹ Boyle 1980, 835; Byers 2004.

2.4.1.3 Building Towards Hard Law, at times

It has been established that soft law can constitute a step towards hard law in the form of customary international law or a treaty.¹⁷⁰ The same may sometimes be true of soft treaties. Treaties can constitute state practice and evidence of *opinio juris* for the purposes of customary international law, as the International Court of Justice recognized in the 1969 North Sea Continental Shelf Cases.¹⁷¹ And a treaty provision containing permissive language could, conceivably, contribute to a rule of customary international law that was non-permissive, for instance, if states were to behave in accordance with the permissive rule and, over time, develop the view that this behavior was legally required. The subsequent chapters will assess whether this is happening in any of the three case studies and, where it is not, examine why not.

Similarly, a soft treaty could prompt the later negotiation of a hard treaty that transformed the earlier treaty's permissive language into mandatory language. One can see this kind of progression in the history of international trade law, where matters such as compensation for expropriation were initially governed by general norms expressed in permissive language but gradually evolved – including through a multiplicity of bilateral investment treaties – into rather specific rules expressed in obligatory language.¹⁷²

¹⁷⁰ Chinkin 1989; Olivier 2002.

¹⁷¹ Nelson 1972.

¹⁷² Lowenfeld 2003.

2.4.1.4 To Be Seen Doing Something

The North American Agreement on Environmental Cooperation (NAAEC) was adopted at the same time as NAFTA to satisfy public concerns—without bringing environmental rights into the trade agreement itself.¹⁷³ And as was explained above, NAAEC contains only permissive rather than mandatory language and provides no means for binding dispute settlement. This is not to say that NAAEC and the Commission for Environmental Cooperation that it established have failed to contribute to environmental protection; only that that contribution may have been less meaningful than the public would have anticipated when told that a binding treaty was concluded.

2.5 Conclusion

The issues identified above are not limited to soft law. Even hard treaties are open to different interpretations because no provision can be perfectly clear and specific with regard to every new situation. This means that there are no bright lines between different forms of international law. The best description of written international law is a spectrum, rather than a binary of hard law/soft law.¹⁷⁴ The form of soft treaties that this dissertation elucidates is located in the middle of this spectrum. As Alan Boyle explained: “Soft law is manifestly a multi-faceted concept, whose relationships to treaties is both subtle and diverse”.¹⁷⁵

¹⁷³ Moreno et al 1999; Peters 2006.

¹⁷⁴ Abbott and Snidal 2000; Abbott et al 2000.

¹⁷⁵ Boyle 1999, 913.

The following chapters will first confirm the prevalence of soft law within each case study, before examining in greater depth the reasons behind the decision to negotiate soft law rather than hard law instruments.

The propositions explaining soft law's prevalence will also be carefully assessed in each case study, when a more in-depth examination of a small number of non-binding soft law instruments, soft treaties, and hard treaties, is conducted. In assessing these reasons, the following questions will be asked: (1) do all of the participants have the same reasons for preferring a non-binding soft law or soft treaty? (2) what are some of the more systematic reasons for soft law's prevalence? (3) what countervailing pressures might apply, i.e. reasons why soft treaties are abandoned either because there is not enough support for them or because all parties agree to more ambitious (hard) treaties?

Chapter 3: Arctic

3.1 Introduction

[T]hus the belief in an ice-free north-east and north-west passage to the wealth of Cathay or of India, first propounded towards the close of the 15th century, cropped up again and again, only to be again and again refuted¹⁷⁶ - Fridtof Nansen, 1897

This belief that Fridtof Nansen writes of in 1897 is one that is fast becoming a reality in the face of increasingly warming temperatures in the Arctic. Alongside these changes, interests from non-Arctic states and non-state actors are also mounting as the region's resources and trade routes are becoming more commercially accessible. In a large part, these biophysical changes have called for a science-based decision-making approach to the region's governance, whether on issues pertaining to jurisdictional claims or on the management of fisheries resources.¹⁷⁷

The literature on soft law argues that a legal structure comprising of soft law is preferred due to the uncertainty in scientific knowledge and the pace at which this knowledge is developed.¹⁷⁸

This research takes this overly simplified analysis further by examining the dynamic processes leading to the negotiation and conclusion of a sub-set of binding and non-binding soft instruments as well as their relative implications for the region's governance, in order to investigate other underlying reasons for soft law's prevalence in the Arctic. This chapter, along

¹⁷⁶ Nansen 1897, 5.

¹⁷⁷ Cooperation over the management of fisheries takes places the Central Arctic Ocean, the Barents Sea, Bering Seas as well as the North-East and North Atlantic, where science-based quotas are used.

¹⁷⁸ Atapattu 2012; Meyer 2016.

with the subsequent two chapters, seeks to examine the prevalence of soft law within specific case studies. By conducting small-n analyses of the aforementioned phenomena, it aims to understand why states negotiate and conclude legal instruments that are softer than the often-assumed to be superior alternative of hard law.

This chapter, which begins with some background on the governance of the Arctic, will categorize existing instruments as hard law, soft treaty, and non-binding soft law, as defined in Chapter 2. In doing so, it confirms that the Arctic is indeed increasingly being governed by softer instruments. By utilizing process tracing, a subset of significant instruments will be closely examined to understand the ex-ante negotiation processes leading to the conclusion of each of these instruments. The implications of such instruments will then be examined within the Arctic context.

3.2 Background

Centred around an ocean that spans about 5.4 million square miles,¹⁷⁹ the Arctic, connects: (1) three continents – Asia, Europe, and North America; (2) the northern regions of eight sovereign states – Canada, Denmark (by way of Greenland), Finland, Iceland, Norway, Sweden, United States, and Russia and; (3) indigenous peoples represented by six indigenous organizations - Aleut International Association, Arctic Athabaskan Council, Gwich'in International Council, Inuit Circumpolar Council, Russian Association of Indigenous Peoples of the North, and the

¹⁷⁹ WWF 2020.

Saami Council. The entire region makes up about one-sixth of global landmass and is inhabited by over four million people.¹⁸⁰

Aside from global treaties such as the United Nations Convention on the Law of the Sea (UNCLOS), the Arctic is governed at a regional scale by the high-level intergovernmental Arctic Council, the five coastal Arctic states (Arctic Five)¹⁸¹, and the Barents-Euro Arctic Council (BEAC).¹⁸² The Arctic Council is made up of the following eight member states: Canada, Denmark, Iceland, Finland Norway, Russia, Sweden, and United States, and permanent participants who represent the six indigenous organizations in the region. As of 2017, there are 13 non-Arctic states and 13 intergovernmental organizations that have been approved for observer status¹⁸³ within the Arctic Council. Observer states include China (which has since called itself a “near-Arctic state”), Germany, Poland, South Korea, Singapore, Switzerland, and the United Kingdom (which calls itself “the Arctic’s nearest neighbor”).¹⁸⁴ Arctic Five refers to the five Arctic Ocean littoral states: Canada, Denmark, Norway, Russia, and United States. In 2008, these five states agreed to continue to utilize the existing international law as outlined in UNCLOS for matters pertaining to the Arctic and decided against the need for a “new legal framework”.¹⁸⁵

¹⁸⁰ Watson 2009.

¹⁸¹ Hirose 2018, 47; Ilulissat declaration 2008.

¹⁸² Escudé 2014; Hirose 2018.

¹⁸³ Arctic Council observer status is reviewed every four years (Arctic Council Rules of Procedure, Annex 2(5)).

¹⁸⁴ China’s Arctic Policy 2018; Arctic Council 2018; United Kingdom Arctic Strategy 2013.

¹⁸⁵ Hirose 2018, 47; Ilulissat declaration 2008.

Some hard treaties, such as the UNCLOS, the Polar Code, and the Montreal Protocol, govern the region but are not specific to it.¹⁸⁶ Other instruments are specific to the region, such as the Polar Bear Treaty, the Central Arctic Ocean Fisheries Agreement, and the Russia-Norway Boundary Treaty. The hard treaties listed in Appendix A.1, such as the UNCLOS and the UN Framework Convention on Climate Change (UNFCCC) are global in nature, while the Polar Code is specific to *both* the Arctic and Antarctic. Instruments that are specific to the Arctic and are binding, tend to take on characteristics of a soft treaty, such as those negotiated within the auspices of the Arctic Council or among the Arctic Five.

Having initiated the negotiation of three soft treaties and adopted numerous other non-binding soft law instruments, the Arctic Council has established itself as an institution for soft governance in the region. The Arctic Council itself was created on the foundation of a non-binding soft law instrument – the 1996 Ottawa Declaration.¹⁸⁷ Soft law has since come to characterize the Arctic Council member states’ approach to governance in the region.¹⁸⁸ Unlike the Antarctic Treaty, a hard law instrument, there is no equivalent in the Arctic. This could possibly be due to two reasons: (1) the UNCLOS, a hard treaty, serves the same role since the Arctic is centred on an ocean, and (2) UNCLOS supports the Arctic coastal states’ (Arctic Five) desire to “maintain sovereignty and sovereign rights” in the region.¹⁸⁹ It can be observed that,

¹⁸⁶ Canuel 2015.

¹⁸⁷ The Declaration on the Establishment of the Arctic Council (also known as the Ottawa Declaration) established The Arctic Council in 1996 under the Canadian chairmanship (Ottawa Declaration 1996).

¹⁸⁸ Smieszek 2019, 36.

¹⁸⁹ Goodsite et al. 2015.

when the Arctic states wish to conclude a hard treaty, such as the Central Arctic Ocean Fisheries Agreement, they do so outside the Arctic Council.

Although the soft law approach facilitates norm formation, in this case, the structure and form of the Arctic Council may have been just as important. The Arctic Council includes Russia and five NATO states. A soft law approach has long enabled it to shape decisions despite the often-tense relationship between NATO and Russia.¹⁹⁰ While the Arctic is a region within which tension has been low, power dynamics outside of the region risk spilling over into the Arctic as countries increasingly recognize the region as a key geopolitical theatre.¹⁹¹ These dynamics among regional actors are compounded by China's increasing interest in the region.¹⁹²

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.¹⁹³ 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

¹⁹⁰ Hasanat 2012.

¹⁹¹ Lanteigne 2019; Klimenko 2019.

¹⁹² Klimenko 2019, 10; United States Department of Defence 2019.

¹⁹³ Escudé 2014; Hasanat 2012.

implications for such an approach to the region's governance.

3.3 Prevalence and other Trends

3.3.1 Prevalence of Soft Law and Soft Treaty Instruments Relative to Hard Law

Utilizing the definitions outlined in Chapter 2, the aforementioned Appendix A.1 includes a list of hard and soft treaties, and non-binding soft law instruments (indicated as Hard, Soft Treaty, and Soft respectively) governing the Arctic. As there are numerous non-binding instruments ranging from declarations to statements, only key soft instruments that have been crucial to the decision-making process specific to the region are examined in Section 3.4.

In populating the list, each binding instrument was closely examined for characteristics of soft treaty – permissiveness, ambiguity, and redundancy. All non-binding instruments were coded as non-binding soft law. Two hard law instruments — the Agreement on the Conservation of Polar Bears and Central Arctic Ocean Fisheries Agreement — are analyzed in order to better situate the analysis of soft law. Several of the soft treaties examined here were negotiated under the auspices of the Arctic Council as well as within a consortium of Arctic littoral states and major fishing non-Arctic states, known as the Arctic Five+Five.¹⁹⁴

¹⁹⁴ Arctic Five+Five refers to the five coastal Arctic Ocean states (Canada, Denmark, Norway, the Russian Federation, and the United States) and five other major fishing non-Arctic actors (China, the European Union, Iceland, Japan, and South Korea).

3.3.2 Trends

Figure 3.1 below graphically illustrates the non-binding soft law and soft treaty instruments, relative to hard law instruments in the Arctic since 1920, the year the Svalbard treaty was concluded, to 2019, when the most recent Arctic Council Joint Ministerial Statement was adopted. The graph demonstrates that the Arctic has been and is increasingly being governed by softer forms of legalization.

In order to further contextualize this graph, key instruments and significant political events were identified in Figure 3.2. The 2014 Russian Annexation of Crimea did not deter the conclusion of the Polar Code, a hard law instrument. This is likely because Russia's interests aligned with the rest of the negotiating parties as well as perhaps because negotiations on the Polar Code long preceded the annexation. Additionally, the Trump administration's withdrawal from the Paris Agreement still saw the conclusion of the hard instrument banning commercial fishing in the Arctic Ocean — the Central Arctic Ocean Fisheries Agreement which is invariably linked to climate change. It can be counter argued that this instrument was concluded fairly easily because commercial fishing was not taking place in the Central Arctic Ocean anyway. And the Agreement does foresee commercial fishing in the future, when scientific research indicates that a sustainable fishery is possible. Table 1 summarizes other key information on the instruments examined in Section 3.4 such as the parties involved in the negotiation processes, and also highlights whether the binding instruments evolved from a non-binding soft law.

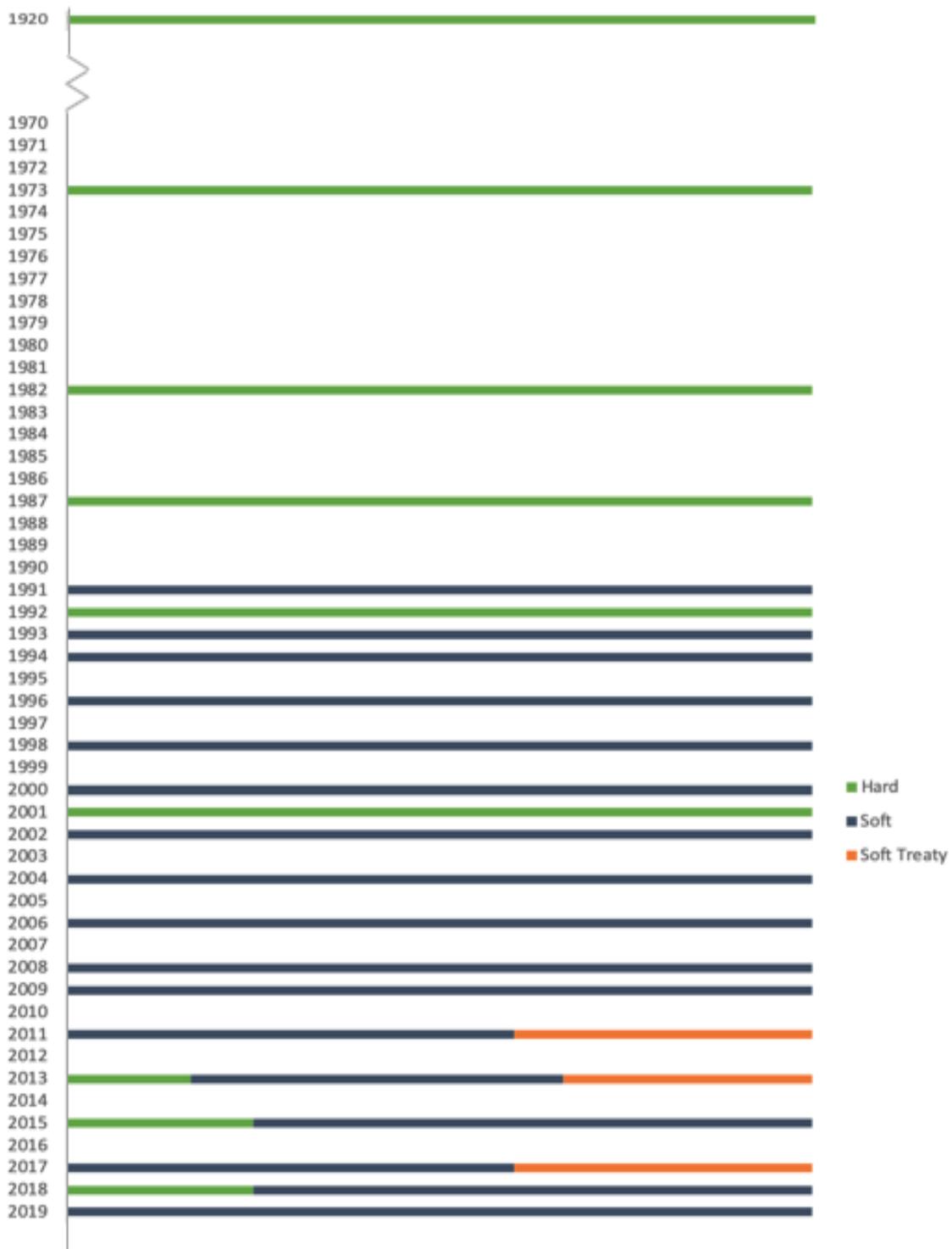


Figure 3.1: Prevalence of Soft Law in the Arctic

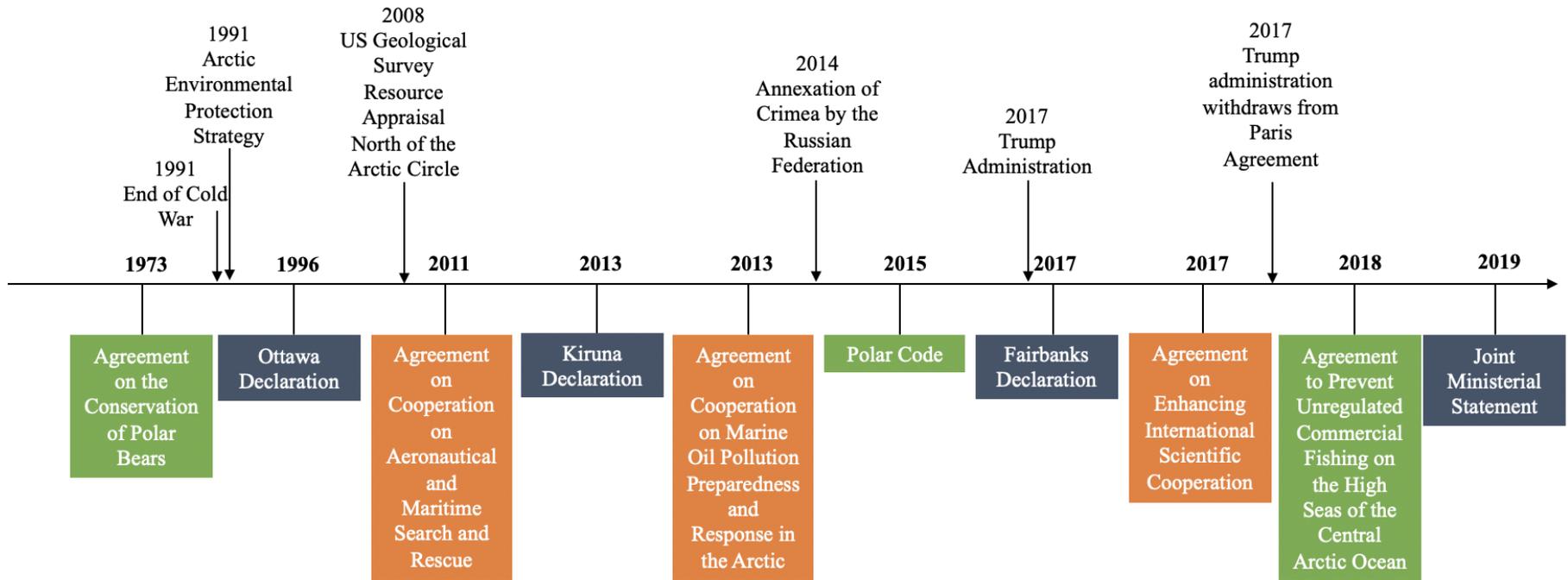


Figure 3.2: Selected international law instruments and key events in the Arctic

International Law Instrument (Arctic)	Year	Parties	Hard/ Soft Treaty Evolved from Soft Law Instrument	Overview
Agreement on the Conservation of Polar Bears	1973	Arctic Five	Yes	Senate approval 88-0; Cold War Period
Ottawa Declaration	1996	Arctic Council Members	N.A.	Adopted during the first Arctic Council Ministerial Meeting
Agreement on Cooperation on Aeronautical and Maritime Search and Rescue	2011	Arctic Council Members	Yes	Executive Agreement (United States)
Kiruna Declaration	2013	Arctic Council Members	N.A.	

Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic	2013	Arctic Council Members	Yes	Executive Agreement (United States)
Polar Code	2015	IMO Members	Yes	
Fairbanks Declaration	2017	Arctic Council Members	N.A.	
Agreement on Enhancing International Scientific Cooperation	2017	Arctic Council Members	Yes	Executive Agreement (United States)
Agreement to Prevent Unregulated Commercial Fishing on the High Seas of the Central Arctic Ocean	2017	Arctic Five+Five	Yes	First legal instrument in the Arctic that uses a precautionary approach Executive Agreement (United States)
Joint Ministerial Statement	2019	Arctic Council Members	N.A.	Statement adopted in lieu of Declaration

Table 1: Overview of key instruments examined

3.4 Case-Specific Analysis

This, and the subsequent two chapters aim to analyze the prevalence of softness in *both* binding and non-binding forms and does this in the following section by carrying out the following: (1) examining the background negotiations leading to the conclusion of each instrument; (2) identifying the key parties involved in the negotiation and the role they each played in the design of the instrument; (3) identifying the key issues raised during the negotiation that helped determine the instrument's degree of legalization; and (4) considering the possible reasons as to why the instrument was designed as non-binding soft law, soft treaty or hard law. In order to better situate our understanding of soft law instruments within the Arctic, this section also includes the examination of a hard law instrument.

3.4.1 Agreement on the Conservation of Polar Bears

The 1973 Agreement on the Conservation of Polar Bears was one of the relatively few efforts at multilateral treaty negotiations involving the Soviet Union and United States during the Cold War.¹⁹⁵ It occurred because polar bear populations were plummeting due to helicopters and icebreakers being used to hunt them. This hard treaty creates clear obligations for its five Parties — Canada, Denmark, Norway, the then Soviet Union and now Russia, and the United States.¹⁹⁶ The instrument creates clear and precise obligations concerning the hunting, killing, and capturing of polar bears.¹⁹⁷ In Article I of the Agreement, Parties are explicitly forbidden from

¹⁹⁵ Koivurova 2014, 52.

¹⁹⁶ It is perhaps useful to note that this Agreement was approved in the United States Senate, unopposed. This is unlike the subsequent binding instruments negotiated within the auspices of the Arctic Council which were concluded as “executive agreements” instead and as such did not require senate approval.

¹⁹⁷ Agreement on the Conservation of Polar Bears, Articles I and II.

“taking of polar bears” through means of “hunting, killing and capturing”.¹⁹⁸ Most significantly, Article IV prohibits “the use of aircraft and large motorized vessels for the purpose of taking polar bears”.¹⁹⁹ The treaty does, however, allow for the taking of polar bears in four carefully defined circumstances. These are when “such taking is carried out for bona fide scientific or conservation purposes; to prevent serious disturbance of the management of other living resources, subject to forfeiture to that Party of the skins and other items of value resulting from such taking; or by local people using traditional methods in the exercise of their traditional rights; or wherever polar bears have or might have been subject to taking by traditional means by its nationals”.²⁰⁰ These explicit exemptions add to the clarity of the Agreement. Given the mandatory language, clarity and novelty of obligations, this Agreement is categorized as a hard law instrument.

Having already banned polar bear hunting in 1956, the Soviet Union sought the help of the International Union for Conservation of Nature (IUCN) in getting the rest of the Arctic states to do the same.²⁰¹ The finalized hard treaty grew out of a scientific meeting attended by the five aforementioned Parties as well as Switzerland in 1965 in Fairbanks, Alaska. Concern over how the increases in recorded harvests could accelerate the endangerment of polar bears in the circumpolar Arctic states was raised at this meeting by all five Arctic states in a “Statement of Accord Approved by the Delegates”.²⁰² Additionally, Parties agreed that scientific understanding

¹⁹⁸ Agreement on the Conservation of Polar Bears, Article. I.

¹⁹⁹ Ibid., Article IV.

²⁰⁰ Ibid, Article III.

²⁰¹ Larsen and Stirling 2009, 8.

²⁰² International Scientific Meeting on the Polar Bear 1965.

was lacking and thus preventing the effective management of polar bears.²⁰³ This treaty was negotiated during the decades when tensions were high between the Soviet Union and the other Arctic Ocean states (all four of which belonged to NATO) and as such meetings were often closed to allow discussions to be confidential. Through the relevant scientific epistemic communities in each state as well as the IUCN, which acted as a secretariat and its Polar Bear Specialist Group (PBSG) as an advisory body, the Agreement eventually entered force in 1976.²⁰⁴ While initially in force for five years, the Agreement was renewed and has remained in force since.

Given that the Agreement accomplished what the negotiating states set out to do, it became celebrated for being a successful²⁰⁵ binding instrument aimed at international conservation. However, this treaty is not without its shortcomings. As Banks and Clark argue, the instrument is institutionally weak, in that it fails to create an appropriate mechanism to assess the instrument's effectiveness in meeting its stated objectives. While conservation practices are strongly based on the "best available scientific data"²⁰⁶, a "formal scientific advisory body" is lacking.²⁰⁷ Additionally, the Agreement fails to consider the impact that more contemporary issues stemming from climate change and pollution have on polar bear populations.²⁰⁸

²⁰³ Larsen and Stirling 2009.

²⁰⁴ Larsen and Stirling 2009.

²⁰⁵ Perstrud and Stirling 1994.

²⁰⁶ Agreement on the Conservation of Polar Bears, Article II.

²⁰⁷ Banks and Clark 2008.

²⁰⁸ Molnár et al 2020; Perstrud and Stirling 1994.

3.4.2 Declaration on the Establishment of the Arctic Council

In 1987, the then General Secretary of the Soviet Union, Mikhail Gorbachev, delivered a historic speech in Murmansk that is often credited with igniting regional cooperation in the Arctic and leading to the establishment of the Arctic Council less than a decade later.²⁰⁹ The Arctic Council is a “high level forum”, the foundation of which was the previously established Arctic Environmental Protection Strategy (AEPS). Arctic states adopted the non-binding soft law instrument entitled the Declaration on the Establishment of the Arctic Council (known shorthand as the “Ottawa Declaration”). The work of the AEPS – programs such as the Arctic Monitoring and Assessment Program, Conservation of Arctic Flora and Fauna, Protection of the Arctic Marine Environment, and Emergency Prevention, Preparedness and Response – was then integrated into the Arctic Council over two years.²¹⁰ These four programs would later form the Arctic Council’s Working Groups alongside the Sustainable Development Working Group and Arctic Contaminants Action Program.

The Ottawa Declaration is the first of eleven non-binding soft law instruments agreed biennially on the basis of consensus by the eight “Arctic States”.²¹¹ The exception to these “ministerial declarations” occurred in 2019 at Rovaniemi, Finland, which will be discussed in detail later in this section. Chairmanship of the Arctic Council is held for two years by each member state, on a rotating basis. With the handover from the preceding to the incoming Chair, a declaration summing up the accomplishments over the past two years as well as the future work to be carried

²⁰⁹ Koivurova 2014; Nord 2019, 28.

²¹⁰ Bloom 1999, 714; Ottawa Declaration, Article 1(b).

²¹¹ Ottawa Declaration, Article 2.

out in the next two years is outlined in these ministerial declarations. As this section will later elaborate, while non-binding, these declarations carry political weight. Reaching consensus on the agenda for the next two years legitimizes the work of the previous two years, including findings and recommendations by the working groups, as well as all the work that follows, including, to some significant degree, the results of that work in the form of scientific findings and recommendations such as the highly influential 2004 Arctic Climate Impact Assessment.

The soft nature of the Ottawa Declaration can be attributed to a compromise made between Canada – which was seeking a “multi-lateral decision-making organization with wide-ranging authority” and the US, which refused to be part of an organization that encompassed high operating costs.²¹² The creation of a high-level forum reflected a political commitment to promote regional cooperation—without taking on significant legal or financial implications.²¹³

3.4.3 Agreement on Cooperation on Aeronautical and Maritime Search and Rescue

The 2011 Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic (hereinafter “Arctic SAR Agreement”)²¹⁴ was the first of three binding instruments to be concluded by the eight Arctic states²¹⁵ and celebrated as a major development in the region’s governance.²¹⁶

²¹² Smieszek 2019, 35.

²¹³ Bloom 1999.

²¹⁴ See, Chapter 3.

²¹⁵ The SAR Agreement was negotiated by the Arctic Council member states separately from the organizations because the eight states wanted to maintain full control over the negotiations. It should be noted as well that the Arctic Council provides a forum within which member states can come together to discuss various issues, but compliance of any instrument is ultimately based on the goodwill of the member states. Enforcement of these instruments are not externalized to an independent entity.

²¹⁶ Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic 2011; Byers 2013.

A number of provisions in the Arctic SAR Agreement are permissive in character. For example, Article 3(3) states that “Each Party shall promote the establishment, operation and maintenance of an adequate and effective search and rescue capability” within its zone of geographic responsibility.²¹⁷ As one Canadian military officer observed, the Agreement “does not impose a minimum standard with respect to response time or number of assets to be available”.²¹⁸ Other cooperative measures that the Agreement promotes but does not require include: the sharing of information services as well as procedures, techniques, equipment, and facilities; joint research and development initiatives; reciprocal visits by experts; and joint search and rescue exercises. These are all soft law provisions, added on top of hard law commitments that were already binding on all the negotiating states.²¹⁹

Abbott and Snidal argue that soft law facilitates cooperation among states which may have varying degrees and types of interests, values, time horizons, and power.²²⁰ From a purely pragmatic, short-term perspective, a simple declaration by the eight Arctic Council foreign ministers of their states’ continued commitment to the 1944 Chicago and 1979 SAR conventions would have sufficed. But the Arctic states were likely seeking to do more, namely, to contribute to a cooperative momentum within Arctic diplomacy, and specifically to develop the Arctic Council into a centrally important regional institution under which international law-making could take place.²²¹ In this context, it is significant that, concurrent with the adoption of the

²¹⁷ Ibid., Article 3(3); Byers 2013.

²¹⁸ Poitras 2013, 17; Byers 2013.

²¹⁹ See, Chapter 2.3.

²²⁰ Abbott and Snidal 2000, 423; Byers 2013.

²²¹ Byers 2013; Exner-Pirot 2012.

Arctic SAR Agreement, the member states agreed to create a permanent secretariat for the Arctic Council.²²²

3.4.4 Agreement on Cooperation on Maritime Oil Pollution Preparedness and Response in the Arctic

Two years after the conclusion of the Arctic SAR Agreement, the eight Arctic states concluded the 2013 Agreement on Cooperation on Maritime Oil Pollution Preparedness and Response in the Arctic (“Arctic Oil Spill Response Agreement”).²²³ Both the SAR and Arctic Oil Spill Response agreements are being implemented by the Arctic Council’s Working Group on Emergency Prevention, Preparedness, and Response (EPPR).

The stated goal of this instrument is to “strengthen cooperation, coordination and mutual assistance among the Parties on oil pollution preparedness and response in the Arctic in order to protect the marine environment from pollution by oil.”²²⁴ However, the Arctic Oil Spill Response Agreement fails to create any new obligations.²²⁵ This is because by previously ratifying the 1990 Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC), a treaty negotiated within the framework of the International Maritime Organization, all eight Arctic states had already made the same commitments.²²⁶

²²² Byers 2013; Nuuk Declaration, adopted at the 7th Ministerial Meeting of the Arctic Council, 12 May 2011.

²²³ See, Chapter 2.3.

²²⁴ Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic 2013, Article 1.

²²⁵ Byers and Stoller 2013.

²²⁶ Byers and Stoller 2013; International Convention on Oil Pollution Preparedness, Response and Cooperation 1990.

This instrument simply reiterates obligations made in the OPRC without adding any new ones.²²⁷ These obligations include: Parties having to institute measures for dealing with pollution incidents, such as “the stockpiling of oil spill equipment, the development of clean-up plans, and the holding of exercises”.²²⁸ In the event of a spill, Parties are required to cooperate by means such as providing equipment when requested by another party. This requirement, however, is a “soft” provision concealed within what may seem like a hard provision. Article 8(3) of the Agreement states that “The Parties shall cooperate and provide assistance, which may include advisory services, technical support, equipment or personnel”.²²⁹ The requirement to provide assistance while mandatory is not in any way specific. While this Agreement is part of a “broader regime”²³⁰ it is nevertheless the first legal instrument that is focused on oil spill response within the Arctic. This reiterates the Arctic states’ commitment in addressing the issue regionally and as such is more likely a “symbol of Arctic cooperation than a practical mechanism”.²³¹

The Arctic Oil Spill Response Agreement is another example of a soft treaty being used to deliver the form but not the substance that the public might have expected of a legally binding instrument. Arctic governments, keen to assist the development of offshore oil, have encouraged investment from multinational companies.²³² However, they were also facing intensifying public concern about the risk of oil spills and the contribution that Arctic oil would make to climate

²²⁷ Byers 2013.

²²⁸ Byers 2013, 212.

²²⁹ Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic 2013, Article 8(3).

²³⁰ Rottem 2015, 54.

²³¹ Rottem 2015, 55.

²³² Hough 2012.

change.²³³ The Arctic Oil Spill Response Agreement was a weak response which addresses the clean-up issue by reaffirming previously made commitments, and does not even set minimal requirements for the positioning and deployment of oil spill equipment and personnel. A state could thus be in full compliance without spending the funds necessary for actual preparedness. Yet Arctic governments can still assure concerned publics that they have a treaty on Arctic oil spills.

At the same time, the Arctic states deferred the issue of prevention to a subsequent set of negotiations, even though prevention will always be more effective than clean-up. Cleaning up a major oil spill would be impossible in parts of the Arctic and throughout the region in winter.²³⁴ However, a meaningful agreement on oil spill prevention would increase the already high costs of Arctic offshore oil operations, perhaps rendering them uneconomical.²³⁵ Companies could, therefore, be expected to oppose such an agreement, and governments seeking economic development and royalty revenues might likewise hesitate.

Finally, a treaty that is soft because of redundancy could provide a foundation for negotiations on a related topic. The Arctic Oil Spill Response Agreement was seen as a precursor to a more important – and more difficult to negotiate – agreement on Arctic oil spill prevention.²³⁶ By reaffirming their prior commitments on oil spill preparedness and response, and doing so within

²³³ Byers and Stoller 2013; Hough 2012.

²³⁴ Byers and Stoller 2013; Wilkinson et al. 2017.

²³⁵ Byers 2013.

²³⁶ Rottem 2015.

a specifically Arctic context, the Arctic states were building toward that next step—a step, incidentally, which they have not yet taken.

3.4.5 Kiruna Declaration

This non-binding soft law instrument, negotiated within the Arctic Council, was significant for two reasons. The first reason was the adoption of a revised Rules of Procedure which augmented and clarified the criteria for Observers.²³⁷ At the same Arctic Council Ministerial Meeting where the revised rules were adopted, China, India, Italy, Japan, Republic of Korea, and Singapore were each granted observer status, to be reviewed biennially.²³⁸ These same states' involvement in the Arctic, particularly that of China, would later become the subject of numerous debates.²³⁹ According to the Swedish foreign minister, representing the Chair that year, the acceptance of new observer states “strengthens the position of the Arctic Council on the global scene”.²⁴⁰ A second reason why the Kiruna Declaration was significant was that the Arctic Council member states agreed to “establish a Task Force to work towards an arrangement on improved scientific research cooperation”.²⁴¹ Efforts to established the task force would culminate in the Arctic Council's third binding instrument — the Agreement on Enhancing International Scientific Cooperation.

²³⁷ Arctic Council Kiruna Declaration 2019; Smieszek 2019.

²³⁸ Kiruna Declaration 2013, 8

²³⁹ Pompeo 2019.

²⁴⁰ New York Times 2013; Steinberg and Dodds 2013.

²⁴¹ Kiruna Declaration 2019, 7.

The Declaration was therefore foundational in setting some new parameters for Arctic governance, in terms of the centrality of the Arctic States and the secondary status of non-Arctic states, as well as the opportunities for involvement and influence by the latter. It is noteworthy that instruments central to regional governance do not need to be hard treaties, as long as they are considered legitimate – and followed – by all the interested states. Since 2013, China has respected the limits of its observer status, while using the opportunity to participate extensively in Arctic Council working groups as well as in “corridor diplomacy”.²⁴² While China first expressed an interest in becoming an observer in the Arctic Council in 2007, it was not successful until 2013. This was largely because member states were unable to agree upon the role of observer states. This was later clarified in the Rules of Procedure which was adopted in 2013 at Kiruna, Sweden. Up until 2013, China, Italy, and the Republic of Korea were ad-hoc observers while Britain, France, the Netherlands, Poland, and Spain were observers. The European Union is still an ad-hoc observer and a final decision on its observer status has yet to be made.

3.4.6 Polar Code

On 21 November 2015, Parties to the IMO adopted the binding International Code for Ships Operating in Polar Waters (“Polar Code”). This hard law instrument details mandatory regulations for ships operating in the Arctic and Antarctic aimed to ensure the safety of the ships as well as to mitigate their impacts on the polar environment.²⁴³ The Polar Code evolved from a

²⁴² Corridor diplomacy refers to informal discussions among diplomats that often takes places between formal meetings.

²⁴³ IMO 2019.

set of Arctic-specific guidelines that were adopted in 2002 and Arctic and Antarctic focused guidelines in 2009 within the IMO.²⁴⁴

This evolution is significant, including because it reflects the progression that is often expected of soft law to hard law – a progression that is much more nuanced than understood before. Three Arctic states - Denmark, Norway, and the United States – initiated the move from a voluntary to mandatory instrument.²⁴⁵ This successful push for a mandatory instrument was reflected in the Arctic Council-endorsed Arctic Marine Shipping Assessment in 2009.²⁴⁶ This hardening of international law also shows the ability of the Arctic states to “influence the international agenda”.²⁴⁷ It can be inferred that a hard treaty was needed precisely to control the behaviour of non-Arctic states without shared interests in Arctic environmental protection. If Arctic states were the only actors, a soft instrument might perhaps have been sufficient. It may also have been easier to move to hard law in this instance because of the manner in which amendments to the IMO conventions become automatically binding on member states without the need for ratification, through a “tacit acceptance” procedure. This procedure, which ensures that amendments “shall enter into force at a particular time unless before that date, objections to the amendment are received from a specified number of Parties”, exists to ensure that the process of otherwise seeking the consent of two thirds of the Parties does not delay the process of acceptance.²⁴⁸

²⁴⁴ Rayfuse, Rosemary 2014, 237; Koivurova 2014.

²⁴⁵ Koch et al. 2015, 283; Rayfuse 2014, 245.

²⁴⁶ AMSA 2009, 4; Exner-Pirot 2013; Koivurova 2013.

²⁴⁷ Rayfuse 2014, 250.

²⁴⁸ IMO 2020.

Unlike the other instruments examined in this section, the Polar Code was not negotiated within an Arctic-specific organization. Given the Arctic and Southern Ocean applicability of the Polar Code, the instrument was negotiated within the IMO.²⁴⁹ As such, non-Arctic states, including major shipping states such as Singapore, Liberia, and Panama (and through them, the global shipping industry), were able to play a substantial role in the negotiations, allowing non-regional states to play a greater role in the Arctic which they would not be able to if negotiations were limited to the Arctic Council or any other regional organization.²⁵⁰ For example, Singapore is an observer state to the Arctic Council with a consequentially limited role there, but at the IMO it was able to participate actively in the negotiation of an international legal instrument that would be applicable to the polar regions.²⁵¹

3.4.7 Fairbanks Declaration

As had been the practice during the biennial ministerial meetings, a non-binding soft law instrument – a declaration – was once again adopted by consensus at the 10th Ministerial Meeting of the Arctic Council at Fairbanks, Alaska. The Fairbanks Declaration was adopted by consensus alongside the third binding instrument negotiated within the auspices of the Arctic Council – the Agreement on Enhancing Scientific Cooperation Agreement.

What was significant about this 2017 Declaration, was the United States’ efforts to weaken language referring to climate change. Despite these efforts, the Fairbanks Declaration noted the

²⁴⁹ Shibata et al. 2009, 24.

²⁵⁰ Shibata et al. 2009, 30.

²⁵¹ Shibata et al. 2009, 37.

Paris Agreement's entry into force and reiterated "the need for global action to reduce both long-lived greenhouse gases and short-lived climate pollutants".²⁵² This was, however, a short-lived victory for the other member states of the Arctic Council, as the United States withdrew from the Paris Agreement just a few weeks later. This development presaged the 2019 Arctic Council Ministerial Meeting in Rovaniemi, which failed to even adopt a declaration due to the United States' opposition to language on climate change. But even then, the other member states of the Arctic Council kept the momentum going by having the Chair of the Council issue a unilateral statement that affirmed the seriousness with which those seven states took climate change. This progression of events demonstrates the interplay between the requirements of state consent – a bedrock principle of international law – and the flexibility of soft law instruments.

Additionally, the Fairbanks Declaration introduced the Agreement on Enhancing International Scientific Cooperation. While it notes that the Agreement is "binding", Article 33 in the Declaration uses permissive language that only "encourages" implementation by all the parties, further exemplifying the Declaration's soft law nature.

Announce the Agreement on Enhancing International Arctic Scientific Cooperation, the third legally binding agreement negotiated under the auspices of the Arctic Council, which will help increase effectiveness and efficiency in the development of scientific

²⁵² Fairbanks Declaration, Preamble.

knowledge about the region as well as strengthen scientific cooperation in the Arctic region, and **encourage** its implementation by all parties following its entry into force.²⁵³

3.4.8 Agreement on Enhancing International Scientific Cooperation

On 11 May 2017, the eight Arctic Council member states signed the Agreement on Enhancing International Arctic Scientific Cooperation. The Agreement was a product of the Scientific Cooperation Task Force which had its first meeting in 2013. Like the previous two binding agreements, the 2011 SAR Agreement and the 2013 Arctic Oil Spill Response Agreement, the latest Agreement — although technically a treaty — does not create new obligations. Unlike the preceding agreements, this Agreement does not have a specific Arctic Council working group tasked with its follow-up.²⁵⁴ In its preamble, the Agreement reiterates existing scientific cooperation practices undertaken by various inter-governmental and non-governmental organizations, such as the World Meteorological Organization and the International Arctic Science Committee. In its substantive sections, the Agreement defines “scientific activities” in a very loose manner. It also uses qualifying terms such as “shall, where appropriate”, “best efforts”, “may continue”, and “shall facilitate” throughout.²⁵⁵

The sole substantively specific section of the Agreement is that of the “Identified Geographic Areas” listed in Annex I. These areas correspond with the territories and maritime zones of the parties and are therefore redundant.²⁵⁶ Apart from this, Article 17 calls for cooperation with non-

²⁵³ Fairbanks Declaration 2017, Article 33.

²⁵⁴ Smieszek 2017, 5.

²⁵⁵ Ibid., Articles 3–7, and 17.

²⁵⁶ Agreement on Enhancing International Scientific Cooperation 2017, Annex 1.

Parties to the Agreement, but only at the “discretion” of the Parties. Nothing in agreement legally requires cooperation between the Arctic member states or with non-parties such as the thirteen observer states of the Arctic Council. The Agreement, therefore, fails to add new obligations to an already existing practice of scientific research cooperation in the region. The implementation of the Agreement itself is rather vague as outlined in Article 10 of the instrument which states that activities and obligations under the Agreement are applicable only if they do not violate the laws, rules, regulations, and even procedures and policies of the respective Parties and in Article 11(2) which states that implementation “shall be subject to the availability of relevant resources”.²⁵⁷ This allows Parties a great degree of leeway and discretion in enforcing the Agreement. Furthermore, it in no way incentivizes or even binds the Parties to alter existing domestic arrangements to enforce the Agreement. Last but not least, the dispute settlement provision in the Agreement allows for direct negotiation only, without an alternative mechanism being provided for when direct negotiation fails.²⁵⁸ Why, then, did the Arctic Council members negotiate a binding instrument, if the activities and obligations of these parties are to be conducted at their discretion and based on existing practices?

While the Agreement lacks specific and obligatory language, it does reiterate the importance of science-based decision making as well as that of the need to facilitate cooperation in the region. To some degree, this signals the intent of the Arctic countries to maintain the Arctic as a region

²⁵⁷ Agreement on Enhancing International Scientific Cooperation, Article 10.

²⁵⁸ *Ibid.*, Article 1.

of peaceful cooperation. It also consolidates pre-existing commitments and provides greater political attention and importance to these matters.

The Agreement has already been credited with propelling diplomatic interests and reaffirming common interests.²⁵⁹ A “soft” instrument such as this can indeed formally regularize (or at least recognize and encourage) cooperation among diplomats and scientific experts. The Agreement, which reiterates the norm of cooperation in the region in the form of scientific research, could have been designed to be more substantive and achieve more specific outcomes, for instance, by making the provision of access for foreign scientists to territories and maritime zones mandatory rather than discretionary. A more functional agreement might also have required the inclusion of scientific knowledge in decision making, given that the science-policy interface is central to most of the issues in Arctic international cooperation. However, it is questionable whether this would have been acceptable to all the Arctic states. The point being that, even if a soft treaty was the most that could be agreed, it can still have discernible and even important effects.

More specifically, the Agreement restates the underlying purpose of the Arctic Council, namely the promotion of “cooperation, coordination and interaction among the Arctic States, Arctic indigenous communities and other Arctic inhabitants on common Arctic issues, in particular on issues of sustainable development and environmental protection in the Arctic”. Transnational non-security issues within the region have generally been managed among the Arctic states on a cooperative basis since the end of the Cold War, even during and after Russia’s annexation of

²⁵⁹ Berkman et al 2017.

Crimea, along with some more recent cooperation involving non-Arctic states such as China. The softness in the recent Agreement is explained, at least in part, by the need to secure an agreement between Russia and NATO countries during a time of geopolitical tension. This often-used explanation, however, does not adequately address the soft nature of the preceding two binding instruments within the Arctic Council which were both concluded before the annexation of Crimea.

Initially planned to be a non-binding instrument in the form of a Memorandum of Understanding, the Scientific Cooperation Task Force decided that issues such as facilitating research collaboration across borders that would require governments to “conform to the policy” would be better addressed with a binding instrument instead.²⁶⁰ This demonstrates at least one of the reasons why Arctic states wanted a treaty even if its provisions are all soft. This Agreement was concluded in its binding form in order to meet both the United States and Russia’s demands. Based on the former’s Circular 175 Process of the United States Constitution, the Scientific Cooperation Agreement is an Executive Agreement as opposed to a treaty that would have required the “advice and consent” of two-thirds of the Senate. The Russian representatives on the other hand, argued for a binding instrument which would better facilitate “coordination among the relevant Russian ministries”.²⁶¹ Therefore, it seems likely that in order to find a particular balance that would have been acceptable to the United States, which were not seeking a treaty

²⁶⁰ Smieszek 2017, 3.

²⁶¹ *Ibid.*, 3.

that would have required Senate approval, and Russia, which did want a binding instrument, the Arctic Council members negotiated a treaty with only soft provisions.

The effects of this soft treaty commitment to scientific cooperation can also be seen operating among the non-Arctic states with observer status at the Arctic Council, including between states that generally have an otherwise challenging relationship. Article 34 of the 2015 Joint Declaration for Peace and Cooperation in Northeast Asia states that China, Japan, and South Korea will hold high-level trilateral dialogues on “deepen[ing] cooperation over the Arctic”. The second trilateral summit, held in June 2017, saw the three states release a joint statement highlighting the need to “address common challenges over the Arctic with a particular focus on measures to strengthen scientific cooperation among the three countries in order to contribute to the efforts of the international community”.²⁶² The three states have since agreed on a joint study to assess pollution in the Arctic Ocean, the results of which will be reported to the Arctic Council.²⁶³

The softness in the Agreement on Arctic Scientific Cooperation is of a different character than the Arctic SAR Agreement: instead of involving redundancy, it involves a lack of mandatory language. This could be explained on the basis that no previous treaties on scientific cooperation existed, which meant that the Arctic states were breaking new ground—and doing so cautiously. However, this does not explain why they chose the form of a treaty rather than a more traditional

²⁶² Joint Statement 2017.

²⁶³ China, Japan, and South Korea held the annual Trilateral High-level dialogue in Shanghai on June 8, 2018 to reiterate their recognition of the Arctic being “an important platform for deepening and broadening cooperation on the Arctic among the three countries” (Joint Statement 2018: Article 11).

soft law instrument, such as a ministerial declaration. A better explanation is that they saw the Agreement on Arctic Scientific Cooperation as an opportunity to match the accomplishments of the previous two Arctic treaties and further demonstrate that regional cooperation had survived the 2014 Russian annexation of Crimea.²⁶⁴ In other words, a soft treaty can signal a higher level of cooperation than traditional soft law even if it contains no new mandatory content. Indeed, the soft character of the Agreement on Arctic Scientific Cooperation has not stopped the promoters of scientific cooperation from championing its significance.²⁶⁵ This championing could have political and ultimately legal effects, by helping a soft treaty gain legitimacy and therefore effectiveness. In other words, the fact that any kind of treaty exists may create a point of leverage for those who wish to see its provisions implemented through action. And so, the reason for negotiating a soft treaty rather a non-binding instrument may have been to achieve the goals of the treaty through its non-obligatory implementation, in circumstances where it was impossible to conclude a hard treaty because of a broader situation of mutual suspicion between Russia and the other Arctic states.

As Kuus argues, “scientific activity [is] an “entry-way” into governing the Arctic – a norm that the Arctic states utilize to their advantage.²⁶⁶ The Scientific Cooperation Agreement could thus serve as a tool for Arctic states acting as gatekeepers to those areas of the Arctic Ocean that lie beyond coastal state jurisdiction.

²⁶⁴ Byers 2017.

²⁶⁵ Berkman et al 2017.

²⁶⁶ Kuus 2020, 2.

3.4.9 Central Arctic Ocean Fisheries Agreement

A letter signed by 2000 scientists in 2012, coordinated by the environmental non-governmental organization Ocean North, played a major role in creating political will for states “to take a lead in developing an international agreement to address fisheries in the central Arctic Ocean, based on sound scientific and precautionary principles”.²⁶⁷ Coupled with the leadership of David Balton, the then United States ambassador for oceans and fisheries, the Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean (also known as the “Central Arctic Ocean Fisheries Agreement” or CAOFA) became the first legally binding instrument in the Arctic based on a precautionary principle approach.²⁶⁸ The Agreement, now in force for an initial 16 years, grew out of a non-binding soft law instrument – the 2015 Declaration Concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean (also known as the “Oslo Declaration”) – which initially only included the “Arctic Five”, namely, the Arctic Ocean littoral states of Canada, Denmark, Norway, Russia, and the United States. These states were later joined by China, the European Union, Iceland, Japan, and South Korea, in a grouping that became known as the “Arctic Five+Five”. The core of this Agreement, a hard treaty, is a clear commitment to not engage in commercial fishing until science supports doing so. Additionally, this Agreement challenges the assumption that scientific uncertainty gives rise to softer instruments. In this case, despite the uncertainty in the long-term effects on fisheries in the Arctic Ocean, a hard law instrument was negotiated.

²⁶⁷ Barber et al 2017.

²⁶⁸ Schatz et al. 2018

As Schatz et al. argue, the CAOFA, despite being binding, is a “low-cost instrument” largely because of its precautionary nature. Commercial fisheries do not currently take place in the area of high seas governed by the agreement. There is also debate as to how likely it is that commercial fisheries can take place there in the long run.

While indigenous communities do not currently fish in the Central Arctic Ocean, it should be noted that they did participate in the negotiations given the ripple effect that the changing environmental patterns in the Central Arctic Ocean have in the regions further south where they do fish.²⁶⁹ Additionally, the Inuit Circumpolar Council had previously called for a fisheries moratorium in 2014.²⁷⁰ In its preamble, the CAOFA, recalls the 2007 United Nations Declaration on the Rights of Indigenous Peoples, recognizes the interests of Arctic indigenous peoples, and desires to promote the use of indigenous and local knowledge of the Arctic Ocean.²⁷¹ It could also be presumed that the inclusion of Indigenous peoples was a low-cost approach as it would not likely have affected the outcome in terms of the substantive commitments.

While the Arctic regional states have been managing the Central Arctic Ocean, an area that lies beyond the national jurisdiction of any state, the development of the binding Polar Code as well as the CAOFA shows the role that non-Arctic states and non-state actors play in the legal

²⁶⁹ Kleist 2019.

²⁷⁰ Radio Canada International, 2018.

²⁷¹ Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean 2018.

governance of a region, as well as that these issues cannot be governed without them given the international nature of the rights at stake such as the freedom of navigation and high seas fishing.

3.4.10 Arctic Council Chair’s Statement

For the first time in the Arctic Council’s history, member states were unable to agree on a declaration at the 2019 Ministerial Meeting in Rovaniemi, Finland. Instead the Chair, Finland, released a unilaterally worded statement which did not require the consensus of the member states but would have nonetheless reflected discussions and widespread agreement, even if that occurred behind closed doors. The United States was against the use of any language recognizing the risk that climate change poses in the Arctic. However, since the remaining seven members were insistent on the inclusion of such language, a Ministerial Declaration — which would have to be agreed on the basis of consensus – was not achieved.

Unlike the previous Ministerial Declarations, the Chair’s Statement included phrases such as “majority of us” when making references to the following: “climate change”, “pollution prevention and emissions reductions and conservation of biodiversity”, “wetlands in the Arctic”, and “mercury pollution and persistent organic pollutants”.²⁷²

The soft character of the 1996 Ottawa Declaration (i.e. the founding document of the Arctic Council) may provide the flexibility to adopt and release documents that reflect the consensus of different configurations of Arctic states, including on the different aforementioned issues (some

²⁷² Statement by the Chair 2019.

of which had the support of all eight members; others only of seven) and that the Statement of the Chair is thus, in reality, just about as weighty as a full Ministerial Declaration and perhaps even more weighty – because it shows that the United States is not a hegemonic or even necessary actor in Arctic affairs. In this instance, it is perhaps not the soft/hard character of the instrument that matters, or even whether it conforms to previous practice, but rather the fact that states are continuing to express a substantial amount of cooperation and collective will even/especially in difficult circumstances.

While the Arctic Council members may have been unable to agree on a ministerial declaration, the Chair's statement as well as the unwillingness for the rest of the member states to yield to demands made by a powerful state result in two key takeaways. First, the responsibility as well as the stalwartness of the Chair resulted in a unilaterally produced statement that includes language that majority of the member states would clearly have agreed upon — and probably did agree upon in advance behind closed doors. Second, the strength in the alliance of smaller and, by most counts, less powerful states, to stand their ground against a more powerful outlier. This flexibility of soft law instruments reflected in instruments such as the Ottawa Declaration, ministerial declarations and chair's statements may be a key enabler of Arctic cooperation moving forward despite some current opposition from the world's most powerful state.

The 2019 Ministerial Meeting was the first high level meeting among Arctic Council states since the US withdrew from the Paris Climate Agreement. This raises two additional interesting questions, which remains to be answered. First, why did Russia – which is a serious laggard when it comes to climate policy – not join the United States in its opposition to including

language on climate change? Was it simply sitting back and watching NATO allies disagree, or did it see value in having Arctic cooperation continue? Second, will similar events unfold at the next Ministerial Meeting in 2021, should Donald Trump be re-elected, and what this might mean for the future of the Arctic Council?

The 2019 Ministerial Statement also shows the resilience of a subset of states within the Arctic Council. That seven states, some of them quite small, were able to oppose the United States push for the exclusion of climate change language shows that even a soft institution such as the Arctic Council can reduce the effect of massive power disparities. It also demonstrates the flexibility of soft instruments, including the opportunities that they provide for innovation.

3.5 Implications

3.5.1 Coordination despite Mutual Suspicion

Non-security aspects of the Arctic have generally been managed among the Arctic states on a cooperative basis since the end of the Cold War, even during and after Russia's annexation of Crimea, along with some more recent cooperation involving non-Arctic states such as China. The legal regime, as described earlier in this chapter, is largely made up of soft law instruments both in their binding and non-binding variations. A regime complex of hard law supplemented extensively by soft law instruments can be credited for cooperation in a region with several mutually suspicious states, such as the United States, Russia, and China, 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.

3.5.2 Promoting Epistemic Communities

Peter Haas coined the term “epistemic communities” to describe networks “of professionals with recognised expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area”.²⁷³ It is now well-established that epistemic communities can develop shared identities and interests and then influence the direction of international relations with regards to their areas of expertise.²⁷⁴ Soft treaties, by signaling a higher level of seriousness on the part of governments – for example, by requiring, in some countries, that domestic procedures for ratification be completed – may be more effective than resolutions or declarations in encouraging the inclusion of the relevant epistemic communities in developing and implementing them. This would help to explain why the Agreement on Arctic Scientific Cooperation, which grew out of decades of cooperative efforts among scientists from all eight Arctic states,²⁷⁵ was adopted in the form of a treaty even though it created no new obligations. Indeed, it has already been credited with advancing common interests.²⁷⁶ In this way, a soft but legally binding instrument can formally recognize, encourage, and legitimate cooperation among diplomats, scientists, and other experts.

The Arctic SAR Agreement accomplishes essentially the same thing with regards to the military personnel engaged in search and rescue planning and implementation. As mentioned, while not requiring them to do so, the Agreement encourages states to share information and to engage in

²⁷³ Haas 1992, 3.

²⁷⁴ Davis Cross 2013; Haas 1989.

²⁷⁵ Smieszek 2015.

²⁷⁶ Berkman et al 2017.

joint research.²⁷⁷ Consequently, the ongoing communication and cooperation occurring under the Arctic SAR Agreement, much of it among highly specialized personnel, strengthens trust and reduces tensions between the armed forces of the various Arctic states, including between NATO and Russia.²⁷⁸

Likewise, the Arctic Oil Spill Response Agreement will also lead to more consultation, coordination, and cooperation among specialized personnel; and it will do so in part because it is an Arctic-specific instrument. In short, Arctic governments and their experts are more likely to work together on these issues, as a group, now that their obligations from the global treaty (OPRC) have been “repackaged into a regional one”.²⁷⁹

3.5.3 Avoiding Constitutional Constraints

When negotiating an international instrument, the option of a soft treaty may be attractive for constitutional considerations — considerations that, depending on their respective domestic systems, will differ from state to state. For example, calling an instrument an “agreement” instead of a “treaty” can help to free the executive branch of the United States government from having to secure the “advice and consent” of two-thirds of the Senate for ratification.²⁸⁰ The three treaties negotiated under the umbrella of the Arctic Council were all treated as “executive agreements” and not referred to the Senate. This approach did not undermine their status as

²⁷⁷ Byers 2013, 278.

²⁷⁸ Exner-Pirot 2012; Byers 2013.

²⁷⁹ Byers and Stoller 2013.

²⁸⁰ See, United States Constitution Article II sec. 2.

treaties in international law, where the term “treaty” is not determinative of legal status,²⁸¹ but it did ensure that the United States could quickly become party to them. The content of the treaties would also have mattered here, with the absence of any new, clear, mandatory provisions making it easier to treat them as executive agreements.

The problem that its negotiators were seeking to avoid is manifest in the United States’ record of participation in the international instruments concerning offshore oil exploration and development. The United States was unable to ratify the 1969 International Convention on Civil Liability for Oil Pollution Damage and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, due to opposition in the Senate.²⁸² All the other Arctic states have ratified these conventions, both of which concern spills from tankers. The United States did ratify the 1990 Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC), but that step was facilitated by the fact that OPRC uses permissive rather than mandatory language with regard to the most onerous element of preparedness, namely the pre-positioning of oil spill equipment.²⁸³ It had no difficulty concluding the Arctic Oil Spill Response Agreement, because it is called an “agreement” rather than a “treaty” or “convention”, and because it only repeated the commitments of OPRC.

In contrast to the US, Russian diplomats admit to preferring treaties to non-binding instruments because funding from the Russian Duma for the implementation of a treaty is assured under

²⁸¹ Vienna Convention on the Law of Treaties 1969, Article 2(1).

²⁸² Byers 2013.

²⁸³ International Convention on Oil Pollution Preparedness, Response and Cooperation 1990, Article 6(2)(a).

Russian constitutional law, while funding for the implementation of a non-binding instrument is not. The need to bridge the concerns of US and Russia may help to explain why the Agreement on Arctic Scientific Cooperation was adopted in the form of a treaty rather than a ministerial declaration, even though it contains no new, clear, mandatory provisions.

Furthermore, the Arctic states were addressing the need for scientists and equipment to move across borders and maritime boundaries for research purposes, notwithstanding the tense nature of the relationship between Russia and the other Arctic states outside of the region.²⁸⁴ It is possible that they chose to negotiate a treaty rather than a non-binding instrument to underline that sovereign consent would still be required, on an *ad hoc* basis, to any such movements. This consideration may have been particularly important to the Russian government, which encourages its population to be highly suspicious of its Western counterparts.

3.6 Conclusion

The existing literature on soft law as well as the literature on Arctic law and politics has insufficiently explored the prevalence of such instruments and as a result failed to account for their influence in the region. In examining the prevalence of soft law in both its binding and non-binding forms in the Arctic, this chapter investigated why states choose to negotiate instruments that are softer in their design than hard law. The determinants of prevalence that were outlined in Chapter 2 were all found to hold true within the Arctic context, with the addition of three other determinants listed in the preceding section.

²⁸⁴ Smieszek 2015.

Both the Agreement on Enhancing International Scientific Cooperation and the Central Arctic Ocean Fisheries Agreement are based on the need for science-based cooperation. While the latter instrument was largely precautionary, the former was based on existing practices of scientific research accessibility that always depend on the ongoing consent of sovereign states.²⁸⁵ The Arctic may be a regime²⁸⁶ that is built on the norm of cooperation, but this does not mean that the soft treaty/soft law regime governing the region is a form of supranational governance. In reality, it remains to be seen if the Agreement can indeed facilitate researchers' accessibility to the Arctic; i.e. whether the Arctic states will really allow improved access to their territories and maritime zones.

Additionally, does this necessarily mean the states are rational actors choosing to negotiate and conclude instruments by considering the optimal net benefits of each alternative? If so, are states choosing to negotiate binding instruments because such instruments are necessarily better? Or are they doing so for other reasons that may not in fact yield the same benefits? Is the goal of legitimizing the Arctic Council and keeping non-Arctic states out of the region a rational behaviour? One way of studying the governance process in the Arctic can be to view member states as building concentric circles of support — Arctic Five, then Arctic Five+Five, and then perhaps more fishing states; the Arctic Council, then Arctic Council and observers.²⁸⁷

²⁸⁵ Smieszek 2017, 3.

²⁸⁶ See, Chapter 1 for the definition of “regime” used in this dissertation.

²⁸⁷ See, Rossi 2015 who proposes that the Arctic Five states are a “club within a club”.

Although the regional states have been managing the Central Arctic Ocean, an area that lies beyond the national jurisdiction of any state, the development of the binding Polar Code shows the role that non-Arctic states and non-state actors can play in legal governance. There is an unrestricted freedom of navigation beyond 12 nautical miles from shore, and this meant that non-Arctic shipping states needed to be involved in the development of a regime for shipping safety in both the Arctic and Antarctic. In other words, the geographic extent of the access of non-Arctic states to the Arctic is larger for shipping than for any other issue, including high seas fishing (beyond 200 nm) and deep-sea mining (beyond 200 nm and beyond the extended continental shelf). With the exception of the Northwest Passage and Northern Sea Route claims of Canada and Russia, the Arctic states could not act as gatekeepers over international shipping, and so they had to involve the IMO.

This case study is one where we can observe a legal regime grounded in a small number of hard instruments and supplemented with a larger number of soft treaties and soft law instruments. Of course, this situation exists within a single geographic region. Chapter 4 on Outer Space will explore if a similar situation exists within another regional case study. Chapter 5 will then explore the situation within a non-regional issue area, namely Climate Change.

Chapter 4: Outer Space

4.1 Introduction

In 1957, an earth-born object made by man was launched into the universe, where for some weeks it circled the earth according to the same laws of gravitation that swing and keep in motion the celestial bodies — the sun, the moon, and the stars. To be sure, the man-made satellite was no moon or star, no heavenly body which could follow its circling path for a time span that to us mortals, bound by earthly time, lasts from eternity to eternity. Yet, for a time it managed to stay in the skies; it dwelt and moved in the proximity of the heavenly bodies as though it had been admitted tentatively to their sublime company.

This event, second in importance to no other, not even to the splitting of the atom, would have been greeted with unmitigated joy if it had not been for the **uncomfortable military and political circumstances attending it**. But, curiously enough, this joy was not triumphal; it was not pride or awe at the tremendousness of human power and mastery which riled the hearts of men, who now, when they looked up from the earth toward the skies, could behold there a thing of their own making. The immediate reaction, expressed on the spur of the moment, was relief about the first "step toward escape from men's imprisonment to the earth." And this strange statement, far from being the accidental slip of some American reporter, unwittingly echoed the extraordinary line which, more than twenty years ago, had been carved on the funeral obelisk for

one of Russia's great scientists: "Mankind will not remain bound to the earth forever. – Hannah Arendt, 1958²⁸⁸

Arendt's quote from the prologue of her magnum opus, *The Human Condition*, preceded the first binding international law instrument governing Space – the 1967 Outer Space Treaty – by nearly a decade. Since the adoption of the Outer Space Treaty, Arendt's observation about the “uncomfortable military and political circumstances” still holds—with a couple of new additions. The surge in the number of actors (both state and private entities) in Space, together with the rapid advancement of science and technology have resulted in new issues of concern within the fields of International Relations and International Law as they relate to Space, such as debris caused by discarded rocket stages and defunct satellites in orbit, the ownership and allocation of “slots” and radio frequencies for satellites in geostationary orbit, and regulation and liability issues concerning resource extraction from the Moon, Mars, and asteroids.²⁸⁹ To address these concerns, States have been increasingly employing a diversity of soft law instruments. While the realm of space law is grounded by the Outer Space Treaty and four more specific multilateral treaties adopted in the late 1960s and 1970s, it is the soft law instruments that have animated it since then — in the absence of serious multilateral treaty making efforts.

In examining a selection of Space-related international instruments, this chapter aims to investigate the reasons for the growing prevalence of soft law in Space as well as the

²⁸⁸ Arendt 1958, 1.

²⁸⁹ Morozova and Vasyanin 2019.

implications of this development. While there is already a considerable literature on each individual instrument, this research aims to examine these instruments through the lens of binding and non-binding soft law, as defined in Chapter 2 of this dissertation.

Similar to the two other case studies in this dissertation, this chapter makes two contributions by rigorously examining a small number of instruments: (1) it overcomes the limitations involved in solely examining written international law in its binary form (i.e. as binding hard law and non-binding soft law) and thereby overlooking the presence and significance of binding soft law instruments, and (2) it examines reasons for why states increasingly choose to negotiate soft treaties as opposed to the alternatives of hard law or non-binding soft law.

Before establishing the prevalence of soft law within the Outer Space regime, this chapter will first outline key institutions, actors, and contemporary issues in the region's governance. It will then proceed to examine ten instruments of varying degrees of legalization as well as the implications of the pervasiveness of soft law within the regime.

4.2 Background

Although it is not the objective of this dissertation to define "Outer Space", it is useful to prime the chapter's examination of the region's legal and political aspects by first highlighting its definitional debate and to also clarify the definition of "Outer Space" used in this dissertation. In some ways similar to the debates on defining the Arctic, there has been much contention on the

means of delineating Space as a “physical realm, its definition, and legal status”.²⁹⁰ Its definition is not one that comes up in the Outer Space Treaty, nor its subsequent treaties, probably due to an inability to reach a consensus and perhaps that it does not quite matter since the lowest orbits are quite a distance above the highest altitudes used by aircrafts.²⁹¹ Nonetheless, defining the boundary between air space and outer space, and by extension, the applicability of international space law is increasingly critical²⁹² given the number of state and private actors operating in Space as well as an expected increase in sub-orbital traffic. There has been much contention, for example, as to what constitutes the lower boundary of space and “the existence of a ‘right of innocent passage’ to outer space”.²⁹³ Various international and national organizations define the demarcation between air and outer space quite differently and as a result, demonstrate the “conflicting opinions about the vertical limits of State sovereignty”.²⁹⁴

4.2.1 Governance

There are currently five UN binding space treaties, several other treaties among a smaller subset of nations (such as the International Space Station Agreement) and hundreds of soft law instruments governing space activity. As will be illustrated in the following section, soft law has become pervasive within the international legal regime governing Outer Space, where the last multilateral treaties were adopted more than four decades ago. Coordination and cooperation now occur mostly through non-binding guidelines and codes of conduct. Instead of negotiating

²⁹⁰ Von der Dunk 2012, 87.

²⁹¹ Lal and Nightingale 2014; Nelson 2019.

²⁹² Lal and Nightingale 2014; King 2016. Neto and Oliviera 2015.

²⁹³ Hobe and Chen 2016; von der Dunk 2012, 87.

²⁹⁴ Lal and Nightingale 2014; Neto and Oliviera 2015, 4.

binding instruments to address issues such as space debris and resource exploitation, space law has been increasingly refined and augmented via soft law instruments.

Since the onset of the space race almost half a century ago, advances of technology have meant that the foundation of current space law — the Outer Space Treaty — is increasingly becoming ambiguous in its application to new issues. It should be noted as well that all five binding instruments were negotiated against the backdrop of the Cold War, from 1967 to 1978, and spoke to a different set of political anxieties. The 1967 Outer Space Treaty which set the core content and governance approach for the subsequent four treaties was negotiated by a smaller subset of the current number of states that are currently active in space and as such bringing to the negotiating table different, and sometimes conflicting, concerns.²⁹⁵ China and India, for instance, were not major players then as they are now. To further illustrate how the global stage has changed drastically from the early stages of space law: contemporary space activity is no longer a state-centric affair. With the growth (and success) of commercial actors such as SpaceX, Blue Origin, and Surrey Satellite Systems, Space has since evolved to include a greater diversity of both state and non-state actors, some of which are beginning to launch constellations made up of 100s or even 1000s of satellites, while others seek to extract resources from the Moon, Mars, and asteroids.²⁹⁶

²⁹⁵ Urban 2016.

²⁹⁶ Hall 2019.

Astronomy is possibly one of the first scientific disciplines. Adding to the evolution of the Space Age from ancient times, as the Space activities gain more traction, various new areas of research such as Astro-environmentalism, space debris, light pollution,²⁹⁷ and Space Archaeology, are also emerging.²⁹⁸ Aside from the interests of new actors, these fields are but just some examples where the current legal and diplomatic institutions need to be re-evaluated.

International Space Law has been, and continues to be, shaped by states acting within the United Nations Committee on the Peaceful Uses of Outer Space (UN COPUOS). An ad hoc Committee,²⁹⁹ UN COPUOS was established in 1958 by the United Nations General Assembly (UNGA) with the responsibility of reporting to the UNGA on “the activities and resources of the United Nations...and of other international bodies relating to the peaceful uses of outer space” and “the nature of legal problems which may arise in carrying out of programmes to explore outer space”.³⁰⁰ The ad hoc Committee was composed of the following 18 states: Argentina, Australia, Belgium, Brazil, Canada, Czechoslovakia, France, India, Iran, Italy, Japan, Mexico, Poland, Sweden, USSR, United Arab Republic, United Kingdom, and the United States. It should be noted that key contemporary space actors such as China were not represented in this committee. UN COPUOS has since been the principal platform for international law-making on

²⁹⁷ Starlink is a constellation of satellites launched by SpaceX which have come under heavy criticism for impairing astronomers’ view of Space.

²⁹⁸ Gorman 2019; O’Leary and Capelotti 2015.

²⁹⁹ The ad hoc Committee was composed of the following 18 states: Argentina, Australia, Belgium, Brazil, Canada, Czechoslovakia, France, India, Iran, Italy, Japan, Mexico, Poland, Sweden, USSR, United Arab Republic, United Kingdom, and the US. Key contemporary space actors such as China were not represented in this committee.

³⁰⁰ UNGA Resolution 1348 (XIII) 13 December 1958, Article 1.

issues relating to Space,³⁰¹ although other groups – such as the Inter-Agency Committee on Space Debris – also play a role.

4.3 Prevalence of Soft Law and Soft Treaty Instruments Relative to Hard Law

4.3.1 Prevalence

A list of written international legal instruments was categorized based on definitions laid out in Chapter 2 of this dissertation. Found in Appendix A.2, this list was then used to illustrate soft law's expansion in the governance of Outer Space since 1961 when the first non-binding soft law instrument was concluded, relative to hard law instruments in Figure 4.1. The last binding instruments, four soft treaties, were signed in 1998. The last hard law instrument in 1992.

Zeroing in on the on the five foundational Outer Space treaties, Table 2 provides the number of states that have signed, ratified, accepted, approved accession or succession. The number of states that have committed to these instruments has declined, with the 1967 Outer Space Treaty having the largest number of parties, and the 1978 Moon Agreement having the fewest. The reasons as to why this has been the case are explored in the subsequent sections.

³⁰¹ Frans von der Dunk 2012, 37.

4.3.2 Trends

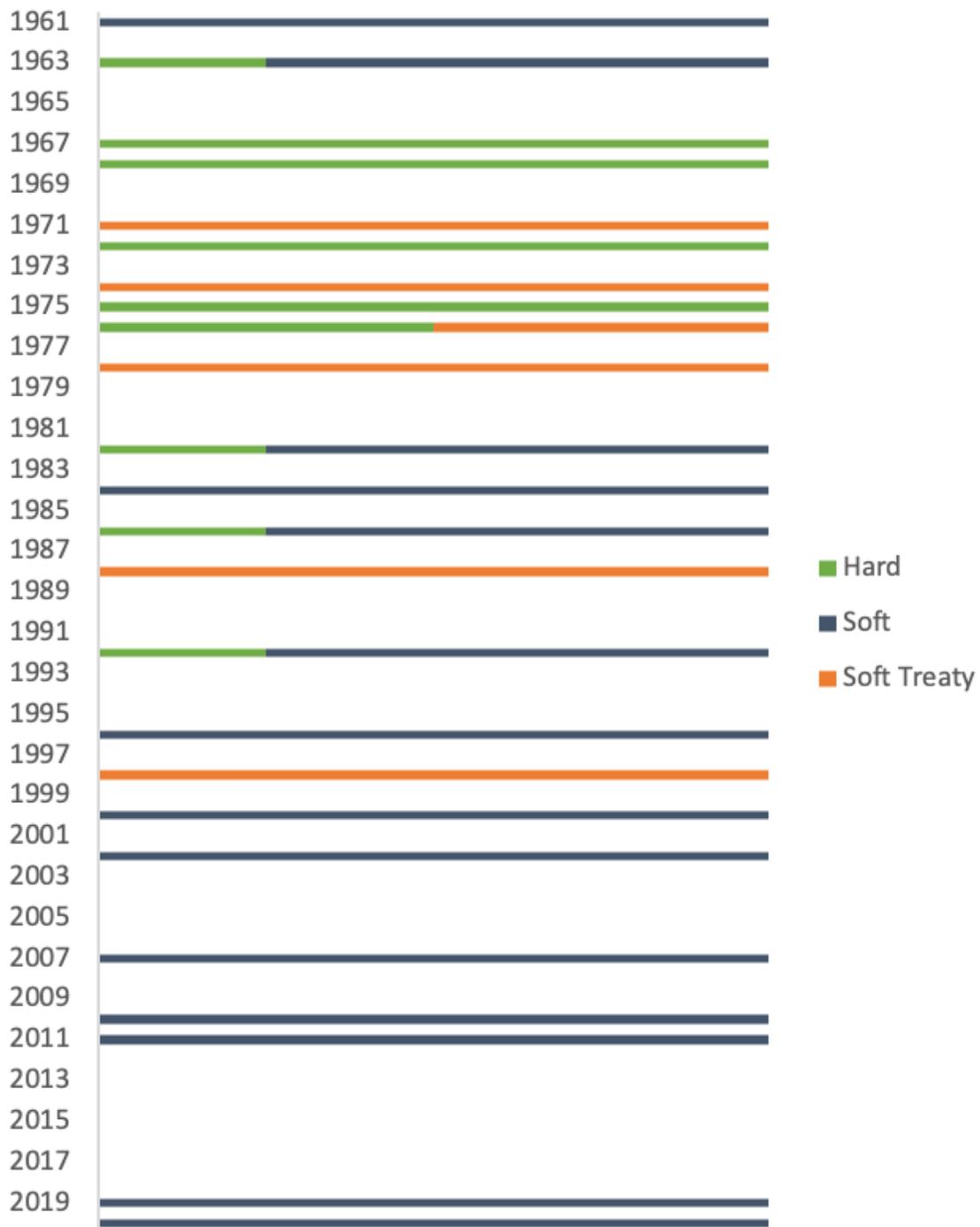


Figure 4.1: Prevalence of soft law in Outer Space

Year	Agreements	Total number of states (Ratified, acceptance, approval accession or succession)	Signed but not yet ratified
1967	Outer Space Treaty	109	23
1968	Rescue Agreement	98	23
1972	Liability Convention	96	19
1975	Registration Convention	69	3
1984	Moon Agreement	18	4

Table 2: Number of states that have signed, ratified, accepted, approved accession or succession of the five fundamental international treaties governing Space

4.4 Case-Specific Analysis

While literature exists on the role of soft law governing Outer Space, almost all of it concerns the non-binding variant of soft law.³⁰² The following instruments reflect milestones in space law, as determined through an extensive literature review. This section, by taking a small number of sample instruments listed in Appendix A.2 and, utilizing a combination of process tracing and literature review, aims to investigate reasons as to why negotiating parties choose soft law instruments as opposed to harder alternatives.

³⁰² Beard 2017; Clark 2018; Steer 2016; Urban 2016.

4.4.1 Declaration of Legal Principles

The Soviet Union launched Sputnik 1 in 1957, just months before the first resolution referencing “outer space” was adopted in the UN General Assembly.³⁰³ The initial launches of satellites along with the acquiescence of all other states created the right of overflight in customary international law.³⁰⁴ However, it was concern over the possible extension of the nuclear arms race to space that spurred the initial discussions of space within the United Nations³⁰⁵ and subsequently saw the adoption of the key non-binding Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, also known as the “Principles” Declaration in 1963 by the UNGA.³⁰⁶ Based on the earlier non-binding UNGA resolution adopted in 1961 on the International Co-operation in the Peaceful Uses of Outer Space³⁰⁷, the Principles Declaration sought to both reiterate and build upon the scope of the former.³⁰⁸

Classed in the first of four phases spanning the development of International Space Law, the 1961 and 1963 Declarations are often cited as the “blueprint” for the legal regime that was to follow.³⁰⁹ Among other things, the 1963 Principles Declaration:

³⁰³ Aoki 2016; UN Doc. A/RES/1148 (XII) (14 November 1957).

³⁰⁴ Listner 2011.

³⁰⁵ Aoki 2016, 198.

³⁰⁶ UN Resolution 1962 (XVIII), General Assembly 18th Session 13 December 1963.

³⁰⁷ UN Resolution 1721 (XVI)B, 1961.

³⁰⁸ Asamoah 1966, 129; de Gouyon Matignon 2019.

³⁰⁹ Von der Dunk 2015, 38.

Recommends that consideration should be given to incorporating in international agreement form, in the future as appropriate, legal principles governing the activities of States in the exploration and use of outer space.³¹⁰

The Principles Declaration garnered substantial support, so much so that five years later the non-binding principles were formalized in the Outer Space Treaty which became *the* foundational binding instrument governing Space today. Indeed, the Declaration has been credited with creating “instant international customary law”, given the near-immediate acceptance of its principles by states.³¹¹

The first four articles of the Principles Declaration are often reiterated in the subsequent treaties, especially Article 4:

The activities of States in the exploration and use of outer space shall be carried on in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international cooperation and understanding.³¹²

Similarly, the principles of cooperation and mutual assistance are recurring themes woven into the Space legal regime. Another key principle is that of liability “for damage to a foreign State or

³¹⁰ UN Resolution 1963 (XVIII), Article 1, 1963.

³¹¹ Chen 1997.

³¹² UN Resolution 1962 (XVIII), Article 4.

to its natural or juridical persons by such object or its component parts on the earth, in air space, or in outer space”.³¹³ Almost a decade later, this principle was developed further in the binding Liability Convention.

4.4.2 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies

The substance of the Principles Declaration was made legally binding through the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space including the Moon and Other Celestial Bodies, widely known as the “Outer Space Treaty”.³¹⁴ Adopted by the UNGA, the Treaty was intended to reduce uncertainty relating to compliance with UNGA resolutions.³¹⁵ Much of this uncertainty stemmed from a record of noncompliance with resolutions adopted by the League of Nations.³¹⁶

The Outer Space Treaty was also modeled after several existing treaties, including the 1959 Antarctic Treaty and the 1963 Treaty Banning Nuclear Weapons Test in the Atmosphere, Outer Space and Under Water (also known as the Limited Test Ban Treaty).³¹⁷ The former, governing a region that is almost as inhospitable and where activities are largely limited to those that pertain to science and technology, was a source of provisions by analogy. These included principles on scientific exploration for peaceful purposes and on the prohibition of nuclear weapons. The latter

³¹³ Ibid, Article 8.

³¹⁴ UNGA Resolution 2222 (XXI).

³¹⁵ Lyall and Larsen, 2009, 50.

³¹⁶ Lyall and Larsen, 2009, 50.

³¹⁷ Lyall and Larsen, 2009; Lim 201; Miller 2018.

instrument, the Limited Test Ban Treaty, was adopted just months before the Principles Declaration and therefore became a stepping stone to the inclusion of the nuclear weapon prohibition provision in the Outer Space Treaty.

The Outer Space Treaty was thus the second multilateral non-armament instrument in international law. It disallows its parties from placing any object carrying nuclear weapons in orbit, on the Moon, or on any celestial bodies. Together, the Outer Space Treaty, the Launch Registration Convention, the Moon Agreement, and the Limited Test Ban Treaty collectively represent the Space Arms Control legal regime.

While the Outer Space Treaty provided the fundamental principles on the legal governance of Space, the further development of several of its provisions was soon needed. The 1968 Rescue Agreement elaborated on provisions from Articles V and VIII. The 1972 Liability Convention stemmed from Article VII as well as Resolution 1721(XVI)B. Articles V and VIII were developed upon in the 1975 Registration Convention.³¹⁸ The 1979 Moon Agreement, although widely considered to be a less successful instrument than its predecessors, nonetheless built upon the Outer Space Treaty. The Outer Space Treaty had created the political momentum necessary to negotiate and conclude these four binding treaties over the next two decades. However, none of the subsequent treaties have come to be more impactful than the Outer Space Treaty. In fact, as illustrated in Table 2, the support for each successive treaty diminished.

³¹⁸ von der Dunk 2015, 41.

4.4.3 Rescue Agreement

The Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space was adopted by the UNGA in 1967 and entered into force one year later.³¹⁹ The “Rescue Agreement” grew out of the need to provide further clarification of Articles V and VIII of the Outer Space Treaty on the “all possible steps to rescue and assist astronauts in distress and promptly return them to the launching State, and that States shall, upon request, provide assistance to launching States in recovering space objects that return to Earth outside the territory of the Launching State”.³²⁰

Although the subsequently negotiated Liability and Registration Conventions preserved the interests of majority of states, the Rescue Agreement aimed to safeguard key interests of the major spacefaring states.³²¹ The latter was also a humanitarian instrument directed at saving lives, while also ensuring the return of potentially sensitive technology if a spacecraft came down in the territory of another state.

4.4.4 Liability Convention

The Convention on International Liability for Damage Caused by Space Objects (hereafter “Liability Convention”) entered into force in 1972, five years after the Outer Space Treaty. Similar to the other three multilateral instruments that followed the Outer Space Treaty, the Liability Convention sought to elaborate upon and clarify specific provisions in the Outer Space

³¹⁹ UNGA Resolution 2345 (XXII).

³²⁰ UNOOSA 2019.

³²¹ von der Dunk 2015, 79.

Treaty, specifically Article VII. The Convention stipulates that a “launching State shall be absolutely liable to pay compensation for damage caused by its space objects on the surface of the Earth or to aircraft, and liable for damage due to its faults in space”.³²² It should be noted that this absolute liability does not extend to damage caused by one space object to another; in that case, only fault-based liability applies.

Absent in the Outer Space Treaty, the Convention formally defined a “launching state” as: “(i) A State which launches or procures the launching of a space object; (ii) A State from whose territory or facility a space object is launched”.³²³ Frank von der Dunk listed eight clarifications that the Convention provided. Aside from the definition above, these are: the definitions of “damage” and “compensation”; the definitions of “space object” and “launch”; international versus national liability; the right to claim; procedural aspects; and the ability of international intergovernmental organizations to become parties to the Convention.³²⁴

4.4.5 Registration Convention

The Convention on Registration of Objects Launched into Outer Space entered into force in 1975, eight years after the Outer Space Treaty.

The “Registration Convention” was adopted to “make provision for a mechanism that provided States with a means to assist in the identification of space objects” and to address “issues relating

³²² Liability Convention 1972.

³²³ Liability Convention 1972, Article I(c).

³²⁴ von der Dunk 2015, 82-92.

to States Parties responsibilities concerning their space objects.”³²⁵ The Convention also connects every space object with a State, which has been crucial for the operation of the Liability Convention and for controls over the actions of private companies by ensuring national regulation by at least one state.

4.4.6 Moon Agreement

The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (hereinafter “Moon Agreement”) was negotiated over seven years by the UN COPUOS Legal Subcommittee from 1972 to 1979. While adopted by the UNGA in 1979³²⁶, it did not enter into force until five years later despite only requiring a minimum of five countries to ratify it.³²⁷

The Moon Agreement reaffirms the Outer Space Treaty and its provision on the de-militarization of the Moon and other celestial bodies, while also expanding on it. Additionally, the Agreement addressed a possible loophole in the Outer Space Treaty by clearly prohibiting ownership of extraterrestrial property by any organization or private person. It also expands on Article II of the OTS which prohibits national appropriation of the "moon and other celestial bodies by “claim of sovereignty, by means of use or occupation, or by any other means”.³²⁸ The Moon Agreement reiterates and expands this in its Article 11(3), which clarifies that:

³²⁵ Registration Convention 1975.

³²⁶ UNGA Resolution 34/68.

³²⁷ COPUOS 2018.

³²⁸ Outer Space Treaty, Article II.

Neither the surface nor the subsurface of the Moon, nor any part thereof or natural resources in place, shall become property of any State, international intergovernmental or non-governmental organization, national organization or non-governmental entity or of any natural person. The placement of personnel, space vehicles, equipment, facilities, stations and installations on or below the surface of the Moon, including structures connected with its surface or subsurface, shall not create a right of ownership over the surface or the subsurface of the Moon or any areas thereof.³²⁹

The inability of states to agree on the Moon and other celestial bodies as a “common heritage of mankind” and subsequently provide an international mechanism for regulating mineral exploitation (as envisaged in Article 12) has resulted in relatively few ratifications.³³⁰ It was the last treaty to be negotiated within the auspices of the COPUOS and has been labelled by some as a “failed treaty” due to its relatively lack of acceptance.³³¹ Major space-faring³³² nations such as the US, China, and Russia are not signatories to the Agreement.

The Moon Agreement signifies the end of the “‘golden age’ of space law treaty making”.³³³

³²⁹ Moon Agreement, Article 11.

³³⁰ von der Dunk 2015, 39.

³³¹ Feichtner 2019.

³³² Space-faring and Space actors are distinguished based on the following: the former is used to refer to states that “have a launch capability”, and the latter to any actor that “is involved in outer space activities” (Urban 2016). An example of a space-faring state would be North Korea, Russia, and the United States. It should be noted here that this distinction is losing importance as a result of the proliferation of commercial launch services, which means that any state can hire a launch as and when it needs one.

³³³ von der Dunk 2015, 39.

The preceding four binding treaties had garnered considerable acceptance.³³⁴ As illustrated in Table 2, the number of parties that have ratified each treaty fell from 109 for the Outer Space Treaty to a mere 18 for the Moon Agreement. The number of signatures (i.e. signed by not yet ratified) likewise fell from 23 to just 4.³³⁵ China, Russia, United Kingdom, and the United States have yet to sign, ratify, or accede to the Agreement. India, another major space actor, while having signed, has yet to ratify the Agreement. While binding between the ratifying states, there are those who argue that the Moon Treaty, despite not binding on the three major spacefaring nations has the potential to develop, in whole or in part, into customary law.³³⁶ This could perhaps be the case if the parties took actions pursuant to the Agreement and non-parties did not protest them.³³⁷

Article 11 of the Agreement designates the “moon and other celestial bodies” as “common heritage of mankind”.³³⁸ The UN Convention on the Law of the Sea was adopted four years later and it too designates a “common heritage of mankind” and even establishes an international mechanism for regulating deep seabed mining. Unlike the Moon Agreement, it was more widely accepted. So why was the Moon Agreement so unappealing that only 18 states have ratified it so far? Would a non-binding instrument have been a more acceptable alternative?

³³⁴ von der Dunk 2015, 42.

³³⁵ Status of International Agreements relating to activities in outer space as at 1 January 2019.

³³⁶ Listner 2011.

³³⁷ Listner 2011.

³³⁸ Bosco 1990, 618; Hobe and Chen 2016; Moon Agreement, Article 11.

The Agreement prohibits “harvesting” resources on the Moon, unless an international regime exists to govern such an exploitation in the event that it becomes feasible to do so. However, the definition of “regime” is not defined, nor is the word “resources”. Article 11(7)(d) of the Moon Agreement states:

An equitable sharing by all States Parties in the benefits derived from those resources, whereby the interests and needs of the developing countries, as well as the efforts of those countries which have contributed either directly or indirectly to the exploration of the Moon, shall be given special consideration.

This regime would require states, having already invested considerably large sums to exploit resources, to share technologies for use as well as the proceeds from such activities with every other state.³³⁹

The Moon Agreement was initially favoured by the United States, however due to the efforts made by the Space industry as well as the L5 Society³⁴⁰, the Senate Foreign Relations Committee during the Carter Administration put “ratification of the Agreement on hold until it was politically feasible to do so.”³⁴¹ The succeeding Reagan Administration unofficially killed the ratification by giving notice that it was against moving forward with the process. As such the

³³⁹ Von der Dunk 2015, 101.

³⁴⁰ The L5 Society, which was later merged with the National Space Institute to form the National Space Society, was one of the early pro-space groups in the United States.

³⁴¹ Listner 2011.

Agreement has been stuck in political limbo. However, given the increasing interest in mining in Space, Parties to the Moon Agreement could invoke Article 11(5) which states:

States Parties to this Agreement hereby undertake to establish an international regime, including appropriate procedures, to govern the exploitation of the natural resources of the Moon as such exploitation is about to become feasible. This provision shall be implemented in accordance with article 18 of this Agreement.

Invoking the article to launch multilateral negotiations with the objective of establishing an international regime could be test of the Moon Agreement's efficacy.

4.4.7 International Space Station Agreement

The Intergovernmental Agreement on Space Station Cooperation was signed in 1998 among the following states: Canada, Japan, Russia, the United States, and the participating countries of the European Space Agency (Belgium, Denmark, France, Germany, Italy, the Netherlands, Norway, Spain, Sweden, Switzerland, and the United Kingdom). The Agreement³⁴², albeit binding, is replete with permissive language and as such categorized here as a soft treaty. While one may argue that the Agreement is a hard treaty given that it contains novel provisions, this research finds that even such elements are laced with permissive language.

³⁴² The ISS Agreement signatories include the United States, Russia, Canada, Japan, and the eleven member states of the ESA (Belgium, Denmark, France, Germany, Italy, the Netherlands, Norway, Spain, Sweden, Switzerland and the United Kingdom).

The four bilateral MOUs between NASA and each of the other agencies from Japan, Canada, and Russia, supplement the ISS Intergovernmental Agreement. These MOUs, given their content and despite being designated as MOUs (a category that is often used to refer to non-binding soft law³⁴³) are categorized in this dissertation as soft treaties. These four instruments serve to closely supplement the binding ISS Agreement (hence encompassing redundant obligations to an extent in their respective substantive provisions) and as such the four MOUs have been argued to have the “status of international agreements”.³⁴⁴ Furthermore, all four MOUs are highly technical and necessarily specific to the rights and obligations of the parties, not least because they concern the health and safety of the astronauts.

4.4.8 International COSPAS-SARSAT Programme Agreement

The 1988 International COSPAS-SARSAT³⁴⁵ Programme Agreement was based on a 1984 Memorandum of Understanding among Canada, France, the former Soviet Union, and the United States. This MOU, unlike those in the preceding section, is categorized as a non-binding soft law. While it created a successful framework comprised of voluntary non-binding provisions, the Parties decided a legally binding treaty would be important as it would be the only way to include “cross-waivers of liability”.³⁴⁶ The Agreement provides a legal framework for a satellite system, the COSPAS-SARSAT, to be developed and then used in search and rescue. The

³⁴³ See, Chapter 2.

³⁴⁴ Frand 1998, 4.

³⁴⁵ COSPAS is an acronym for *Cosmicheskaya Sistema Poiska Avariynyh Sudov* (or “Space System for the Search of Vessels in Distress” translated from Russian) and SARSAT for Search And Rescue Satellite-Aided Tracking.

³⁴⁶ Israel 2014, 239.

Agreement also created an international organization, based in Montreal. This is important, since non-binding instruments cannot do this.³⁴⁷

The unique feature of the Agreement is its “layered system of partisanship”.³⁴⁸ Four states – Canada, France, Russia, and the United States – are parties that contribute to the core of the System.³⁴⁹ Other states can become “User States” should they wish to utilize the System. The seven obligations of this secondary category of states within the Agreement include the exchange of data with the COSPAS-SARSAT Council³⁵⁰ and the maintenance of a radiobeacon register.³⁵¹

The Agreement differentiates between States “to reflect the actual differences in financial and technical capability”. It also allows states of “lower ranks” to “enjoy the real-life benefits this convention brings”. Dunk commends the Agreement because it “embodies a striking example of the lofty aims of Article I of the Outer Space Treaty to use space “for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development”.³⁵² In the event that a dispute arises, however, this soft treaty fails to provide a specific path to resolution. Instead, it states that disagreements “should be settled by negotiations” and “may ...be referred to arbitration”.³⁵³

³⁴⁷ An intergovernmental forum such as the Arctic Council, which is not legally an organization and was created based on a non-binding soft law instrument, may fulfil similar roles as an international organization.

³⁴⁸ Dunk 2012, 116.

³⁴⁹ International COSPAS-SARSAT Agreement 1988, Article 5

³⁵⁰ The COSPAS-SARSAT Council comprises of one representative from each Party to the COSPAS-SARSAT Agreement - Canada, France, Russia, and the US and meets at least once a year.

³⁵¹ International COSPAS-SARSAT Agreement 1988, Articles 12.2 (c) and (d).

³⁵² Dunk 2012, 1116.

³⁵³ International COSPAS-SARSAT Agreement, Article 15.

4.4.9 International Charter on Space and Major Disasters

The 2000 International Charter on Space and Major Disasters (hereafter referred to as the “Charter”)³⁵⁴ has been commended as a highly effective non-binding soft law instrument and exemplar global policy tool for international cooperation.³⁵⁵ As of 2020, the Charter, the first of its kind, has been activated 662 times by 125 countries.³⁵⁶ Examples of these activations include the 2001 earthquakes in El Salvador; the 2014 missing Malaysian Airlines jet; and the 2019 earthquake in Pakistan.³⁵⁷

The Charter, entirely voluntary, partners national space agencies with each other and private satellite companies to provide satellite earth observation data and information to disaster-affected States at no cost.³⁵⁸ This entails for example access to satellites that are best positioned and have the best equipment for providing rapid imagery of the situation at hand, as well as the processing of the data, again for free, so that the state needing the imagery does not need to do so.

Chairmanship of the Charter is rotated biannually among members. Grown out of a joint recommendation for the Charter by the European Space Agency (ESA) and the French Space

³⁵⁴ The Charter was founded by the European Space Agency (ESA), Centre National d'Etudes Spatiales (CNES), and the Canadian Space Agency (CSA). The current members of The Charter are: Agencia Bolivariana para Actividades Espaciales (ABAE); CSA; CNES; China National Space Administration (CNSA); European Organisation for the Exploitation of Meteorological Satellites (EUMETSAT); ESA; German Aerospace Center (DLR); Indian Space Research Organisation (ISRO); Japan Aerospace Exploration Agency (JAXA); Korea Aerospace Research Institute (KARI); National Institute for Space Research (INPE); National Oceanic and Atmospheric Administration (NOAA); The Argentine Space Agency (CONAE); The State Space Corporation (ROSCOSMOS); United Arab Emirates Space Agency (UAESA) and Mohammed Bin Rashid Space Centre (MBRSC); United Kingdom Space Agency and DMC International Imaging (DMCii); and United States Geological Survey (USGS).

³⁵⁵ Clark 2018.

³⁵⁶ Disaster Charter 2020.

³⁵⁷ Bessis et al 2004.

³⁵⁸ Clark 2018, 77.

Agency (CNES) at the 1999 UN conference on the Exploration and Peaceful Uses of Outer Space, the Charter became operational one year later.³⁵⁹

The Charter is commended for having successfully promoted cooperation among private actors and 17 space agencies, as well as for having a relatively high rate of activations, despite its non-binding nature.³⁶⁰ Several of the Charter's partners are private actors such as MDA, Planet, and DMCii.³⁶¹

The Charter is argued to be one of the more successful instruments of its kind for several reasons. Firstly, space-faring states have already been historically cooperative in the field of disaster management. This is essentially a humanitarian initiative, and therefore similar to the 1988 COSPAS-SARSAT. G7 countries such as Canada too have invoked the Charter from time to time. Self-interest has been a driving force for the Charter's success as well. Secondly, given the restricted focus on disasters of the Charter, "political sensitivities in other humanitarian crisis areas such as war" has been avoided.³⁶²

4.5 Implications

The COPUOS, similar to the Arctic Council, makes decisions based on consensus of its members. One reason as to why there may be an increase in the number of soft law instruments (particularly of the non-binding variant), could be due to the increasing number and diversity of

³⁵⁹ Clark 2018, 79.

³⁶⁰ Clark 2018; Ito 2005.

³⁶¹ Disaster Charter 2019.

³⁶² Clark 2018, 106.

States having made it impossible to achieve (or at least impractical to seek) consensus on hard law instruments.

A number of hard treaties governing Space, such as the Outer Space Treaty, were built upon non-binding soft law instruments, although this happened half a century ago when this process might have been more common. While this has been often observed in the existing literature, the possibility of the reverse occurring has not been examined. A hard treaty could become a soft treaty over time, as provisions that were clear when the treaty was negotiated are rendered unclear by new political, technological, or environmental developments. Take again, for example, the 1967 Outer Space Treaty, which was negotiated before it was widely foreseen that private companies would become independent actors in space. That treaty's prohibition on the national appropriation of celestial objects was clear at the time, but there is a rigorous debate taking place now as to whether it extends to the extraction of resources by private actors.³⁶³ One might even contend that the refusal to negotiate new hard treaties, in circumstances where the meaning of old treaty provisions has become contested, is similar to the deliberate negotiation of new soft treaties. However, one could also argue that this is not a question of hard treaties becoming soft treaties, as much as it is a question of whether accepted interpretations of treaties have changed over time. Indeed, the Vienna Convention on the Law of Treaties includes "subsequent practice" by the parties to a treaty as a relevant factor in its interpretation.³⁶⁴ Either

³⁶³ Tronchetti 2015.

³⁶⁴ Vienna Convention on the Law of Treaties 1969, Article 31(3)(c).

way, the issue of old treaties poses yet another complication for anyone attempting to categorize individual treaties as soft or hard.

We are witnessing a situation whereby Space is no longer dominated by states and their interests, but a region in which non-state commercial actors are increasingly active. Largely a result of lowered barriers of entry into the industry such as improved technologies which enable reusability, minitarization and mass production, some of these non-state actors are even acquiring their own launch capabilities and thus shifting the balance of power in Space.³⁶⁵ When the Outer Space Treaty was drafted, the role and influence of these non-state actors were not accounted for.

As of the end of 2019, there were about 2218 operating satellites in low earth Orbit (LEO), Medium Earth Orbit (MEO), Geostationary Orbit (GEO), and a large variety of elliptical orbits.³⁶⁶ The ever-increasing number of satellites in Space risks turning Space, a global commons, into a tragedy. Aside from the issue of Kessler Syndrome, whereby a high density of satellites in an orbital shell could result in collisions which would then result in space debris that could, in turn, increase further collisions, satellite constellations have been found by astronomers to obscure some kinds of telescopic images. The 2019 UN COPUOS Guidelines for the Long-term sustainability of Outer Space Activities is an example of soft law being used, albeit imperfectly and slowly, to address the pressing challenge of space debris.

³⁶⁵ Fogo 2018.

³⁶⁶ Union of Concerned Scientists 2019.

The current multipolar world is starkly different from the period in which the Outer Space Treaty was negotiated. The increasing diversity and influence of space-faring states such as China and India in international politics is certainly a factor in the way the contemporary international legal framework is structured. Russia and China, for example, pursued a draft “Treaty on the Prevention of the Placement of Weapons in Outer Space, the Threat or Use of Force Against Outer Space Objects” within the Conference of Disarmament, a draft that the United States dismissed as being “fundamentally flawed” in 2019.³⁶⁷ It could be argued that achieving consensus on a hard treaty in the contemporary international system may be far more challenging than it was half a century ago. The COPUOS, for example, was able to come to agreement on a new set of soft law principles albeit on a different topic and in a different venue, while also operating on the basis of consensus the same year.³⁶⁸ Similarly, efforts to reach consensus in early 2019 on a peace treaty in Space within the Group of Governmental Experts failed when 25 nations, including major space-faring ones, were unable to reach consensus due to treaty language on military hardware deployed in space³⁶⁹ – a balance of power issue, particularly between US, Russia, and China, that has plagued international space negotiations for decades. Regardless of legal or political disputes elsewhere, cooperation has nonetheless been extensive between powerful states, such as the US and the former USSR (and now Russia) in Space, which continues on the ISS today. At the same time, some States have worked to exclude new competitors such as China, a relatively new entrant into Space. One example is the US Congressional ban on NASA working with its Chinese counterpart.³⁷⁰ Soft law instruments,

³⁶⁷ Ambassador Wood, 2019.

³⁶⁸ UN COPUOUS 2019

³⁶⁹ France24 2019.

³⁷⁰ Byers 2019, 10.

however, have enabled cooperation to continue among suspicious states by removing potential barriers to cooperation that are inherent in negotiating hard treaties.³⁷¹ In some ways, such an approach may be contributing to the resilience of the international legal regime governing space, during times of uncertainty due to political or scientific reasons.

4.6 Conclusion

This dissertation seeks to identify reasons for the prevalence of binding and non-binding soft law instruments as well as to offer an understanding of why such instruments are utilized in certain regions; it will also, in its concluding chapter, consider the broader implications of its findings.

Both case studies on the Arctic and Outer Space have shown that the prevalence of soft law within each of these regions has in some ways contributed to the resilience of international law during times of uncertainty, whether due to political or scientific reasons. The following chapter on climate change examines whether the same phenomenon is observable within a specific issue-area, as opposed to cases that are region-specific. The following chapter will also examine if the observations made pertaining to the prevalence of soft law hold in the case where there is a near-universal membership within organizations such as the UNFCCC, unlike the UN COPUOUS which was examined in this chapter which has fewer than 100 members.

³⁷¹ Byers 2019.

Chapter 5: Climate Change

5.1 Introduction

By comparison to what it could have been, it's a miracle. By comparison to what it should have been, it's a disaster.³⁷²

George Monbiot's commentary in *The Guardian* on the adoption of the Paris Agreement could very well be applied to the current climate regime as a whole. This is despite the regime having grown by leaps and bounds over the last four decades. There has been particularly a proliferation, or as Kenneth W. Abbott calls it, "a 'Cambrian explosion' of transnational institutions" aimed at addressing the climate crisis.³⁷³ These institutions, particularly that of the United Nations Framework Convention on Climate Change (UNFCCC), have produced non-binding soft law instruments as well as a small number of hard or soft treaty instruments aimed at mitigating climate change or adapting to its impacts.

The aim of this chapter is two-fold. It first establishes the prevalence of soft law within the climate change regime. It then seeks to ascertain the reasons and implications of such a prevalence by conducting a small-n analysis of 7 significant instruments of varying degrees of legalization.

³⁷² Monbiot 2015.

³⁷³ Abbott 2012.

The instruments examined in this chapter are multilateral environmental agreements (MEAs) aimed at mitigating anthropogenic climate change or adapting to its impacts. Although climate change is an increasingly cross-cutting issue that extends to other issue areas such as international trade and human rights, this dissertation focuses on instruments that specifically address climate change. This is done to examine the pervasiveness of soft law within a single-issue area and not across overlaps between different issue areas. Additionally, while it is acknowledged here that climate change has also been incorporated within international legal instruments adopted by other organizations, such as the G20, the World Bank, ASEAN, and the European Union, the instruments examined in this chapter will be limited to those negotiated within the UN regime. This is due both to length constraints and to allow for a more focused discussion on the prevalence of soft law, since the UN has been the primary platform for negotiating international climate law. This chapter also highlights a significant gap in the “climate change-soft law” literature that results from disproportionate attention having been given to international legal instruments aimed at the mitigation of greenhouse gas emissions, as compared to instruments aimed at adaptation to the effects of the changing climate.

This chapter will first examine the international legal and political efforts to address anthropogenic climate change³⁷⁴, before establishing the prevalence of soft law in this issue area. It will then examine a small number of key instruments using both legal textual analysis and a review of the existing literature in order to confirm the hypothesized determinants, laid out in

³⁷⁴ The UNFCCC (1992, Article 1) distinguishes natural from anthropogenic caused climate change. This chapter aims to examine the legal instruments aimed at addressing the adverse changes caused by the former.

Chapter 2.4 of this dissertation, explaining why each instrument was designed as a non-binding soft law instrument, soft treaty, or hard treaty. Last but not least, the implications of the prevalence of softness within the international climate change regime will be considered.

5.2 Background

The Intergovernmental Panel on Climate Change (IPCC)³⁷⁵ is a scientific body which has produced six Assessment Reports on climate change since 1990. Each report has reinforced the following message: the current climate crisis caused by anthropogenic factors is significant and rapidly accelerating.³⁷⁶ As Karen Litfin explains: “the uncertainties revolve around the timing and the degree of anticipated climate change, not whether climate change will occur”.³⁷⁷ Despite this certainty of climate change, or as some call it, the climate crisis, negotiating a global treaty to address what is quintessentially a global issue has been increasingly difficult.

The Paris Agreement is the latest in the globalized post-Kyoto effort. Although the larger and powerful states such as the United States and China had argued for a non-binding instrument, the Paris Agreement’s binding nature can be attributed to strong advocacy by The Alliance of Small Island States (AOSIS) which held a strong position on the need for a legally binding instrument, thus proving the ability of smaller states to influence international law-making.³⁷⁸ The Paris Agreement is one of many examples of soft treaties that were reached as a compromise between

³⁷⁵ The IPCC is a scientific body established in 1988 by the World Meteorological Organization (WMO) and the UN Environment Programme (UNEP). IPCC Assessment Reports, released every 5-7 years, provide governments on scientific information as well as are key to the negotiations conducted under the UNFCCC; IPCC n.d.

³⁷⁶ Keohane and Oppenheimer 2016, 143.

³⁷⁷ Litfin 2000, 136.

³⁷⁸ Lawrence and Wong 2017.

entities of varying degrees of power within the international system. Such a compromise can also be observed between states and non-state actors.

5.2.1 Mitigation and Adaptation

Governance addressing the climate crisis has conventionally been based on a two-pronged complementary approach: mitigation of greenhouse gases and adaptation to the effects of climate change.³⁷⁹ International legal instruments governing the issue-area of climate change have largely been focused on the former, defined as the “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”³⁸⁰ — although the words “dangerous anthropogenic interference” are arguably ambiguous.³⁸¹ In any case, most soft law research has focused on the emission reduction goals of the various legal instruments. However, this dissertation will also consider climate change adaptation,³⁸² which has been the subject of a much smaller portion of the literature on the soft/hard law instruments. This is for evident reasons, since global treaties have mostly focused on greenhouse gas emission reductions, leaving the issue of adaptation to individual states or rules and guidelines that are soft in character. Hall and Persson argue that the lower degree of legalization on adaptation may be explained by two factors. Firstly, adaptation is a “global public good” given its transnational effect (whether positive from effective adaptation measures or negative from the lack of measures). Secondly, it is “contested” given the minimal

³⁷⁹ Bierbaum and Raven 2007; IPCC Synthesis Report 2014, 17.

³⁸⁰ UNFCCC 1992 Article 2.

³⁸¹ Mann 2009; Oppenheimer 2005.

³⁸² Adaptation is defined by the UNFCCC (2019) as “adjustments in ecological, social, or economic systems in response to actual or expected climatic stimuli and their effects or impacts”.

international cooperation within the climate regime.³⁸³ When the research on soft law within the climate regime includes instruments addressing adaptation, soft law becomes far more prevalent than would appear to be the case at first glance. Another explanation for the lack of effort at the global level for a binding instrument on adaptation is that adaptation is experienced at a local context and thus requires localized policies. However, globalized political and economic forces can and should guide adaptation measures.³⁸⁴ This then begs the question as to why instruments on adaptation are sidelined in larger discussions about a globally binding climate regime.

With the Paris Agreement proving inadequate in reducing emissions sufficiently, and with the effects of climate change already being felt, adaptation is increasingly unavoidable and urgent. The failure to incorporate adaptation in the analysis of legalization within the climate change regime could yield deficient results. Merely examining mitigation targeted instruments and provisions offers a partial perspective on the prevalence of soft law within the regime. It also distorts our understanding of the efforts that are and need to be made to address the climate crisis. We need to “play offense and defense at the same time”, because the effects of climate change are inevitable and will continue occurring even if emissions are drastically reduced.³⁸⁵

5.2.2 Climate Governance Beyond the UNFCCC

The literature on soft law and climate change is not only limited with respect to adaptive efforts, but also with respect to the organizations responsible for the negotiation and conclusion of soft

³⁸³ Hall and Persson 2018, 541.

³⁸⁴ SEI 2017.

³⁸⁵ Oakes 2019.

law instruments within the regime. Existing literature on soft law has been largely limited to a sub-system of the UN, namely the UNFCCC. This chapter will examine non-UNFCCC instruments that have a significant influence on the climate crisis, such as the Montreal Protocol.³⁸⁶ To further expand the discussion of written international law beyond the UNFCCC, this section will also briefly review efforts made within other organizations such as the UN Security Council (UNSC) that have begun to increasingly incorporate language referencing climate change. In considering the work of these organizations, this section aims to demonstrate that soft law within the transnational global climate regime complex is far more prevalent than often assumed.

While climate change has been mentioned as a contributing factor to situations addressed in its resolutions, the UNSC does not make these resolutions wholly about climate change. In recent years, discussions on the linkages between climate change and security have been slow to develop within the UNSC. The first debate on the topic within the Council was initiated by the United Kingdom in 2007.³⁸⁷ The debate, on energy, security, and climate, saw opposition to the topic even being discussed within the UNSC. Opponents – Group of 77+ China³⁸⁸ and the Non-Aligned Movement – argued that the topic should be discussed within the General Assembly and the issue of climate change specifically within the UNFCCC, instead.³⁸⁹ Two years later, the

³⁸⁶ The Montreal Protocol, while focused on the sub-set of greenhouse gases, is included in this list given its role in the emission of other greenhouse gases.

³⁸⁷³⁸⁷ Security Council Press Release 2007; Motzfeldt Kravik 2018.

³⁸⁸ Group of 77 and China is a bloc of seventy-seven developing countries and China established on 15 June 1964. It is the largest intergovernmental organization of developing countries within the UN and is a “means for countries of the South to articulate and promote their collective economic interests”.

³⁸⁹ Statement on Behalf of Group of 77 and China 17 April 2007.

UNGA unanimously adopted a resolution seeking a report on “climate change and its possible security implications”, an effort initiated by the Pacific Small Island Developing States.³⁹⁰ The resolution called on the Security Council and other principal UN organs to “intensify their efforts in considering and addressing climate change”.³⁹¹ In the 2009 UNGA Report of the Secretary-General, the link between climate change and security was clearly identified via its effect on human well-being; economic development; loss of territory and statelessness; and threats to international cooperation in managing shared resources.³⁹²

In 2011, after a day-long debate initiated by Germany and supported by Portugal on the “maintenance of international peace and security: the impact of climate change”, the Council noted a Presidential Statement; one that had been issued as a concession to States opposed to the UNSC becoming more engaged in matters related to climate change.³⁹³ The statement, a non-binding instrument, used highly permissive language such as “may” and “possible”. An example:

The Security Council expresses its concern that possible adverse effects of climate change may, in the long run, aggravate certain existing threats to international peace and security.³⁹⁴

³⁹⁰ Sanwal 2013, 697; A/63/L.8/Rev.1 2009.

³⁹¹ A/63/L.8/Rev.1 2009.

³⁹² A/64/350 2998.

³⁹³ Motzfeldt Kravik 2018; Security Council Press Release 2011.

³⁹⁴ S/PRST/2011/15.

This stood in contrast to the respective statements by a number of UNSC members such as the United States, which stated that “climate change had very real implications for international peace and security” and, later, that the inability of the Council to concretely address the security implications of climate change was “pathetic”.³⁹⁵ The Presidential Statement also failed to provide measures to address the “potentially adverse effects”.

Attention to climate change within the UNSC, while intermittent, has been increasing in frequency and in the strength of language used. So, what drove the Council to utilize stronger language in its statement seven years later? It should first be noted that the 2018 UNSC Presidential Statement, as well as the aforementioned Resolutions 2349 and 2408, are focused on two very specific conflict-prone regions. As Motzfeldt Kravik contends, the issue of climate change within the UNSC sphere has been limited to conflict-prone regions such as the “West Africa and Sahel Region”³⁹⁶, unlike in the Small Island Developing States where conflict is remote, but the effects of climate change are significant.³⁹⁷

For the UNSC to enact any binding resolution would inherently be limited by the willingness of its five permanent members (P5) to agree. Russia and China, and now the United States, oppose the securitization of climate change, while the United Kingdom, and France are on the other side.

³⁹⁵ Security Council 2011.

³⁹⁶ S/PRST/2018/3.

³⁹⁷ Motzfeldt Kravik 2018.

Shirley V. Scott argues that while the adoption of the Paris Agreement may have temporarily reduced the push for policy in other forums outside of the UNFCCC, the very uncertainty of the Agreement’s effectiveness as well as the “evolving rhetoric regarding climate change both a development and a security issue” are reasons as to why debates on the topic would not be “ruled out” within the UNSC.³⁹⁸ While the UNSC has not used binding resolutions to implement substantive action on the issue of climate change, its role nonetheless in adaptation and mitigation efforts could “provide an ‘urgency factor’ necessary to push wider multilateral action forward” and supplement the UNFCCC regime.³⁹⁹

5.3 Prevalence and Other Trends

Similar to the preceding case study chapters, the list of written legal instruments within the issue-area of climate change was reviewed and categorized as non-binding soft law, soft treaty, and hard law; this list can be found in Appendix A.3. Figure 5.1 below illustrates the frequency in which soft law, in both forms, has been concluded over the past 50 years.

³⁹⁸ Scott 2018.

³⁹⁹ Cousins 2013, 192-196.

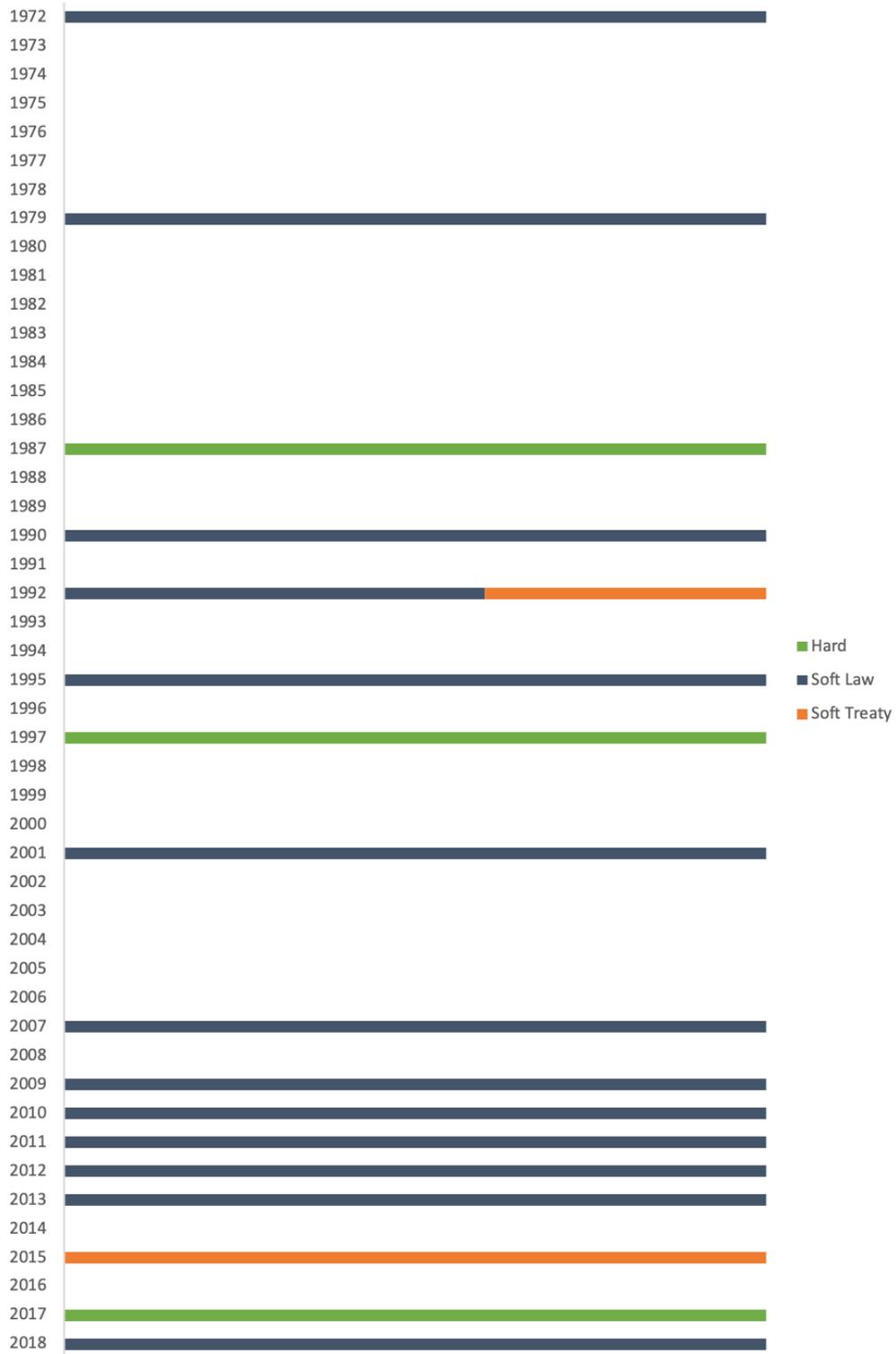


Figure 5.1: Prevalence of Soft Law relative to Hard Law in Climate Change

5.4 Case-Specific Analysis

5.4.1 Stockholm Declaration

The Declaration of the United Nations Conference on the Human Environment, also known as the Stockholm Declaration, was adopted at the first global environmental conference in 1972 — the Earth Summit.⁴⁰⁰ The Declaration, a non-binding soft law instrument, lists seven proclamations in its preamble and twenty-six principles in its substantive section, in an effort to examine the effect of anthropogenic activities on the natural environment.⁴⁰¹ Together with the 1992 Rio Declaration, the Stockholm Declaration would form the foundation of international environmental law, but also influence other spheres of global governance such as international maritime law, outer space, human rights, and nuclear waste.⁴⁰²

Despite universal agreement on the Declaration's non-binding nature, which makes the Declaration easier to negotiate given the low costs to sovereignty, there were disagreements on the precision of language pertaining to States' "rights and obligations in respect of the environment".⁴⁰³ After several rounds of reviews, 21 out of the original 23 drafted principles remained and 5 new ones were added. The hard-fought character of the negotiations provides additional evidence that states believe that soft law matters, which, in turn, makes soft law matter. One of the issues included the boycott of the Stockholm Conference as well as the preceding negotiations in New York by the then-Soviet Union and several Eastern European communist states. The second was one that emerged among developing states. Led by Brazil,

⁴⁰⁰ MEA Negotiator's handbook, 1-2.

⁴⁰¹ Handl 2012.

⁴⁰² Atapattu 2012.

⁴⁰³ Handl 2012, 1.

these states were concerned that this declaration could have the potential to stunt their respective economic development and poverty alleviation efforts.⁴⁰⁴ A compromise, couched in Principle 12 of the Declaration, was eventually agreed upon:

Resources should be made available to preserve and improve the environment, taking into account the circumstances and particular requirements of developing countries and any costs which may emanate- from their incorporating environmental safeguards into their development planning and the need for making available to them, upon their request, additional international technical and financial assistance for this purpose.⁴⁰⁵

A third issue was the extent to which concerns over tests and use of weapons of mass destruction would be included in the text. Principle 26 states that:

Man and his environment must be spared the effects of nuclear weapons and all other means of mass destruction. States must strive to reach prompt agreement, in the relevant international organs, on the elimination and complete destruction of such weapons.

This was revised from the provision drafted by the New York Working Group that initially stated the following:

⁴⁰⁴ Blix 2003, 16.

⁴⁰⁵ Stockholm Declaration 1972, Principle 12.

Man and his environment must be spared the serious effects of further testing or use in hostilities of weapons, particularly those of weapons of mass destruction.

Japan stressed the necessity of a provision against the testing of nuclear weapons. Sweden emphasized the link between such weapons and their associated environmental impacts. In Stockholm, China, New Zealand, Peru, Mexico, the United States, and Tanzania failed to agree on the earlier draft provision. Some, like China, wanted the rejection of nuclear weapons but refused to condemn its testing. The United States opposed a provision that could be interpreted as the non-use of such weapons.⁴⁰⁶

Eventually, the Declaration was adopted in at the Stockholm Conference by 113 States present at the Conference and noted during the UNGA the same year with 112 votes to none.⁴⁰⁷ These evidential debates over soft law instruments reiterates the counterargument this dissertation makes on the egalitarian and benign nature of non-binding instruments.

5.4.2 Montreal Protocol

This dissertation goes beyond the commonly delimited analytical domain of UNFCCC in its analysis of the climate crisis within the context of soft law. While not an instrument targeted specifically at addressing the climate crisis, the 1987 Montreal Protocol on Substances That Deplete the Ozone Layer indirectly does so by phasing out on a group of greenhouse gases

⁴⁰⁶ Blix 2003, 23-24.

⁴⁰⁷ Ibid.

known as the chlorofluorocarbons (CFCs) that resulted in the depletion of the ozone layer which has knock-on effects on other components of the atmosphere, thus contributing to climate change.⁴⁰⁸ This protocol, created within the framework of the Vienna Convention for the Protection of the Ozone Layer, is the only UN agreement to have a universal membership and is a highly successful instrument in being able to address its goal of phasing out CFCs and closing the holes in the ozone layer. States were required to phase out CFCs by substituting their use with hydrofluorocarbons (HFCs) – another greenhouse gas, albeit with a much lower ozone-depleting effect than its phased-out alternative. As a result, HFCs were increasingly used. To address this, the Kigali Amendment to the Protocol was adopted in 2016, entering into force three years later. The Amendment aims to reduce the use of HFCs by 80 percent by 2047 and may avoid an up to 0.5°C increase in global temperatures.

5.4.3 Rio Declaration

Along with the Convention on Biological Diversity, the UN Framework Convention on Climate Change (UNFCCC) was opened for signature at the UN Conference on Environment and Development in Rio de Janeiro in 1992. The conference, known also as the Rio Summit, was significant in that aside from the aforementioned binding instruments, it also produced three major non-binding environmental instruments – Rio Declaration, Agenda 21, and the Forest Principles.⁴⁰⁹

⁴⁰⁸ A single molecule of CFCs has about 4660 to 13 900 times the same heat trapping potential as a single molecule of carbon dioxide (IPCC AR5).

⁴⁰⁹ MEA Negotiator's Handbook 2007, 7-73.

The UNFCCC, a combination of “harder and softer law provisions”, is categorized in this dissertation as a soft treaty.⁴¹⁰ The “common but differentiated responsibilities” (CBDR) principle outlined in the 1992 Rio Declaration was formalized the same year in the UNFCCC text. The CBDR principle, for example, was a requirement for all Parties to take into account. The Convention, however, does not impose any binding commitments upon Parties in terms of quantified mitigation targets and as such while overall binding was highly vague in terms of the obligations imposed on its Parties.⁴¹¹

The Rio Declaration, similar to the preceding Stockholm Declaration, set out key principles that would be repeated in subsequent non-binding and binding international environmental legal instruments. The Rio Declaration reaffirmed much of the 1972 Stockholm Declaration, and also went further by calling for the development of international law and national law pertaining to environmental “liability and compensation”.⁴¹² Furthermore, among the twenty-seven principles in the Rio Declaration, those of particular significance that were not found within its predecessor included the: “common but differentiated responsibilities” (Principle 7); “public information and participation” (Principle 10); the “precautionary principle” (Principle 15), “polluter pays principle” (Principle 16); “environmental impact assessment” (Principle 17); the cooperation of States to further develop international law with respect to sustainable development (Principle 27).⁴¹³

⁴¹⁰ Pickering et al 2019, 11.

⁴¹¹ Pickering et al 2019, 13.

⁴¹² Handl 2012, 8; Rio Declaration; Stockholm Declaration.

⁴¹³ Atapattu 2012, 209; MEA Negotiator’s Handbook 2007, 1-5.

The principle of “common but differentiated responsibilities” would become a characteristic feature of the ensuing Kyoto Protocol. The “precautionary principle”⁴¹⁴ has since widely been reaffirmed in multiple legal instruments outside of the climate crisis governance sphere such as the 2018 Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean. The Principle has also arguably developed into a rule of customary international law as evident in decisions of the International Tribunal of the Law of the Sea and the International Whaling Commission.⁴¹⁵

5.4.4 Berlin Mandate

The Berlin Mandate, a decision adopted at the first Conference of the Parties (COP-1), started the process of a negotiating towards an instrument that would require states to limit their respective greenhouse gas emissions. The result was the Kyoto Protocol, which was adopted two years later and become the first major binding instrument targeted at mitigating greenhouse gas emissions. The Mandate also saw the creation of the Ad hoc Group on the Berlin Mandate (AGBM), which held eight meetings between its creation and the adoption of the protocol.⁴¹⁶

To avoid overlap with the pre-existing legal arrangements, the Berlin Mandate sought to commence negotiations that would “set quantified limitation and reduction objectives within specified time-frames such as 2005, 2010 and 2020, for their anthropogenic emissions by sources

⁴¹⁴ Principle 15 in the Rio Declaration 1992 states that “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

⁴¹⁵ Handl 2012, 5; ITLOS Advisory Opinion 2011; McIntyre and Mosedale 1997.

⁴¹⁶ UNFCCC Secretariat 2000.

and removals by sinks of greenhouse gases not controlled by the Montreal Protocol”.⁴¹⁷

Categorized as a non-binding soft law instrument, the Mandate is a decision to commence the process and does not in any way bind states to commit to reducing their respective emissions. It is nonetheless significant as it began the process towards a global treaty targeted at reducing emissions, particularly for developed states, and saw the conclusion of the Kyoto Protocol and later the Paris Agreement. The COP-1 meeting was also significant due to the fact that Parties agreed by consensus that the 1992 UNFCCC was insufficient to prevent the impacts of climate change. At the same time, it brought to the surface the disagreements that we continue to see today with regards to the reduction targets, such as tensions over the respective responsibilities and burden borne as between developed and less developed countries.⁴¹⁸ It also reiterated the CBDR principle that continues to structure mitigation instruments.⁴¹⁹

5.4.5 Kyoto Protocol

Adopted in 1997 within the context of the UNFCCC, the Kyoto Protocol imposed “top-down” precise and binding emission reduction targets on its Parties, which later proved to be extremely difficult to implement.⁴²⁰ This difficulty is indicative that compliance with soft instruments might be as good as compliance with hard treaties.

A hard law instrument, the Kyoto Protocol delegated emission reductions based on the principle of common but differentiated responsibilities (CBDR) as it recognized “that industrialized

⁴¹⁷ Berlin Mandate 1995, Article II(2)(a).

⁴¹⁸ Downie 2011, 26.

⁴¹⁹ Rajamani 2008; Paris Agreement 2015.

⁴²⁰ Popovski 2018, 20.

countries are principally responsible for the high level of emissions in the atmosphere as a result of their 150 years of industrialized activities”. Countries were, as a result, divided into Annex I parties and Non-Annex I parties. The former group, referred to industrialized countries, were required to reduce their emissions to 1990 levels and submit “annual inventory of their greenhouse gas emissions”. The latter group made up of developing countries were given more leeway and the “protocol sought to help such countries limit greenhouse gas emissions in ways that will not hinder their economic progress”. Reports by these countries were also “contingent on getting funding for the preparation of the reports, particularly in the case of the least developing countries”.⁴²¹ The Protocol’s rules were adopted in COP 7 in Marrakesh in 2001. The parties’ first commitment period was from 2008 – 2012 and the second from 2013-2020. The Doha Amendment, adopted in 2012, “added commitment for Annex I parties in the second period”.⁴²²

5.4.6 Copenhagen Accord

In response to the outcome of the 2009 COP meetings in Copenhagen, Tuvalu declared that the resulting Accord was akin to being offered “30 pieces of silver to betray our future and our people”.⁴²³ The United States, in contrast, described “pieces of the Accord as being clear” and that “we can embrace this Accord”. This stark contrast towards the outcome of the meetings is one that continues through to the Paris Agreement years later.

⁴²¹ Popovski 2018, 21.

⁴²² Ibid.

⁴²³ Cryderman 2009.

Similar to the 2007 Bali Action Plan, 2010 Cancun Agreements, and 2011 Durban Platform, the 2009 Copenhagen Accord is a key COP outcome despite not being legally binding.⁴²⁴ The Copenhagen Accord, to which 141 Parties agreed to, was noted (and not adopted) during the 15th session of the Conference of the Parties to the FCCC (hereafter referred to as COP-15). It has become one of the more significant non-binding political agreements within the international climate change regime.⁴²⁵ Negotiated by the heads of twenty-eight states which included not only major economies and emitters but also the most vulnerable and least developed states alike, the Accord is “one of the most influential documents” according to Bodansky et al within the climate change regime due to three reasons.⁴²⁶ First, as already stated above, the Accord was negotiated by a large number of heads of states which allowed for “unparalleled political guidance”. Second, the Parties that adopted the Accord represented more than 87% of global emissions at the time.⁴²⁷ Third, the Accord, which was essentially comprised of political compromises, were translated into the Cancun Agreements and adopted via the formal UN Process during COP-16. Emission reduction pledges were set for this year: 2020. As such, it remains to be seen if these reductions were actually met. Furthermore, there has been debate as to whether the non-binding pledges made by the Parties were sufficient to prevent the 2°C increase in global temperatures identified as the upper threshold for climate stability.⁴²⁸

⁴²⁴ French and Rajamani 2013.

⁴²⁵ Bodansky et al 2017, 20; French and Rajamani 2013, 446.

⁴²⁶ Bodansky et al 2017, 21.

⁴²⁷ While the Kyoto Protocol was adopted by 192 Parties, emission reduction commitments aimed to cover a much smaller fraction of global emissions of 11% within the first commitment period of 2008 – 2012; UNFCCC Fact sheet 2011.

⁴²⁸ Dellink et al 2010; Rogelj et al 2010.

Another political promise made was the climate financing of adaptation projects in developing countries.⁴²⁹ Aside from being “two orders of magnitude smaller than the estimated levels of need”, the funding was not delivered as promised.⁴³⁰ This lack of compliance pull, possibly characteristic of certain soft law instruments, is indicative of a situation of complacency with regards to emission reduction pledges.

However, Bodansky et al assert that the Copenhagen Accords are significant, reiterating Stephen Toope’s argument that “informal, non-binding norms may come to shape practice quite effectively”.⁴³¹ In contrast to the Kyoto Protocol, it was the Copenhagen Accord’s architectural features such as the “bottom-up approach” that was emulated in the 2015 Paris Agreement.⁴³² This soft provision in the Copenhagen Accord was likely easier to agree to than a hard commitment. However, its true effectiveness may have been in shaping behaviour and causing changes that are inexpensive for states to make. However, without buy-in from all the states, its potential success was limited.

5.4.7 Paris Agreement

Similar to the 1997 Kyoto Protocol, the 2015 Paris Agreement was negotiated and adopted within the framework of the UNFCCC. The Agreement is a clear example of a “soft treaty”. Negotiations for the hybridized legal instrument comprising of binding and non-binding provisions were concluded at COP 21 in 2015. As scholars such as Pickering et al have pointed

⁴²⁹ Copenhagen Accord, Article 8.

⁴³⁰ Khan 2013, 9.

⁴³¹ Bodansky et al 2017, 21; Toope 2017, 108 and 119.

⁴³² Allan 2019; Bodansky et al 2017; Falkner 2016.

out, the legal architecture of the Paris Agreement takes on a *crème brûlée* approach: “a layer of harder law at the top ...with a substantial quantity of softer law at the bottom”.⁴³³ The Paris Agreement on Climate Change is an example of a soft treaty that could mislead publics into thinking that meaningful action was being taken, at least at the time of the Agreement’s conclusion.⁴³⁴ Although legally binding, the Paris Agreement is replete with permissive language; language that has been widely credited with enabling its conclusion.⁴³⁵ But while the Paris Agreement was negotiated within a divisive political context that would have precluded widespread agreement on a hard treaty,⁴³⁶ its permissive language has enabled many states – including some, like Canada, that celebrated the conclusion of the document as a political and moral victory – to avoid making significant reductions in their greenhouse gas emissions.⁴³⁷

Similar to the Copenhagen Accord but in contrast to its predecessor – the Kyoto Protocol – the Paris Agreement adopted a bottom-up approach.⁴³⁸ Scholars such as Popovski, argue that the softness in the Paris Agreement may “offer a viable alternative to ‘hard law’”.⁴³⁹ Moving away from the Kyoto Protocol’s emission target system, the Paris Agreement’s bottom-up Pledge and Review system allows states to submit their emission reduction targets based on their respective Nationally Determined Contributions⁴⁴⁰ (NDCs).⁴⁴¹ Additionally, the Paris Agreement extends

⁴³³ Pickering et al 2019, 12.

⁴³⁴ Paris Agreement 2015.

⁴³⁵ Lawrence and Wong 2017.

⁴³⁶ Rajamani 2016.

⁴³⁷ Office of the Auditor General of Canada 2018.

⁴³⁸ Popovski 2018, 20.

⁴³⁹ Popovski 2018, 20

⁴⁴⁰ Nationally Determined Contributions, also known as the Intended Nationally Determined Contributions at the time of the Paris Agreement negotiations, are each Party’s post-2020 climate actions that align commitments made under the global Agreement with their respective national policies.

⁴⁴¹ Harstard 2019; Keohane and Oppenheimer 2016.

the emissions reductions obligations to all state parties. This stands in contrast to the Kyoto Protocol, which established legally binding reduction targets for developed nations only.

While the Paris Agreement was lauded as a success primarily because a global climate treaty was negotiated and concluded, the instrument was nonetheless filled with vague obligations and “substantial discretion for governments”.⁴⁴² As Keohane and Oppenheimer argue, Parties may be inclined to take advantage of the Agreement’s ambiguity and substantial discretion to limit their obligations.⁴⁴³ They further argue that the effectiveness of the Pledge and Review system will depend on the “inclination both of OECD countries and newly industrializing countries to take costly actions, which for the OECD countries will include financial transfers to their poorer partners”.⁴⁴⁴ The Agreement comes into effect this year, 2020, which is when the Kyoto Protocol comes to an end. As such, although five years have passed since the Paris Agreement was concluded, compliance with it has yet to be tested.

A soft treaty also enables broader participation whereby more states are willing to support, or at least not oppose it, in international law-making. Despite being formally binding, the Agreement has significant soft law elements—unlike the Kyoto Protocol that preceded it.⁴⁴⁵ These elements facilitated wider participation in the Agreement at a time when conflicting political interests among actors, particularly the United States, China, European Union, and small island

⁴⁴² Keohane and Oppenheimer 2016, 142

⁴⁴³ Ibid.

⁴⁴⁴ Ibid.

⁴⁴⁵ Lawrence and Wong 2017; Popovski 2018.

developing states, were impeding the conclusion of any form of instrument.⁴⁴⁶ However, based on arguments that the Paris Agreement was successfully concluded because of the then US-Chinese cooperation, it remains to be seen if the success will be translated to its compliance phase, given the Trump administration's decision to withdraw from the Agreement.⁴⁴⁷ China, however, seems to now have stepped up to "play a greater role in writing the rules" by taking lead in the global climate efforts.⁴⁴⁸

COP-26 was due to be held in November 2020 but has now been postponed to 2021 because of the COVID-19 pandemic. The pandemic is already triggering a stark reduction in greenhouse gas emissions. However, it remains to be seen whether this will have a significant long-term effect on the climate crisis, let alone in allowing each Party to achieve their respective targets. Such a short-lived decline in emissions due to the pandemic does not constitute the deep structural changes that are required in the long run. In Asia, as of end of March 2020, carbon emissions which had dropped by 25% over a four-week period, are returning towards their normal ranges.⁴⁴⁹ However, "the environmental detox that followed months of sweeping lockdowns appears to be over"⁴⁵⁰ with emissions expected to increase with China's surge in coal-fired plants.

⁴⁴⁶ Lawrence and Wong 2017, 276.

⁴⁴⁷ Scott 2018, 222.

⁴⁴⁸ Ibid.

⁴⁴⁹ Le Quere et al. 2020.

⁴⁵⁰ Pearl 2020.

As Jennifer Allan rightly points out, the Paris Agreement “repackages existing rules that have so far proved to be an inadequate response” to the climate crisis.⁴⁵¹ The redundancy and permissiveness that this soft treaty encompasses can be observed in the lack of any binding timelines, targets, or financial commitments. But it was these “soft” components that enabled President Obama to commit to the Paris Agreement through an executive order rather than seeking the “advice and consent” of two-thirds of the US Senate for ratification, as is required by the United States Constitution with regards to treaties. This may explain why such instruments are called “Agreements” rather than treaties⁴⁵², similar to the three binding agreements negotiated by the Arctic states. Just as importantly, it explains why President Trump is able to withdraw the United States from the Paris Agreement through an executive order.

5.5 Implications

Similar to the NAAEC, the Paris Agreement on Climate Change is another example of a soft treaty that could mislead publics into thinking that meaningful action is being taken.⁴⁵³ Although legally binding, the Paris Agreement is replete with permissive language; language that has been widely credited with enabling its conclusion.⁴⁵⁴

The broadly cited assumption of soft law crystallizing to hard law does not hold within the issue area of climate change. As shown in this chapter, the degree of legalization has weakened and

⁴⁵¹ Allan 2019, 4.

⁴⁵² For an extended discussion on the designation of an instrument, See, Aust 2013, 20.

⁴⁵³ Paris Agreement 2015.

⁴⁵⁴ Dimitrov 2019; Lawrence and Wong 2017.

thus devolved from a hard treaty, the Kyoto Protocol, to a soft treaty, the Paris Agreement.⁴⁵⁵ Moreover, the path to the soft-but-binding obligations in the Paris Agreement was not linear. It instead went from hard provisions in the Kyoto Protocol, to non-binding political concessions in the Copenhagen Accord, to soft obligations in the binding Paris Agreement.⁴⁵⁶ It may be that the optimum design for an international instrument to reduce emissions is in fact a soft treaty – one that has taken the climate change regime decades to reach through a meandering path of trial and error. However, it remains to be seen if the combination of hard and soft hybridized instrument is effective, at least within the climate regime.

This case study on the prevalence of soft law on climate change has indicated that soft law, whether binding or non-binding, can contribute to the climate regime complex in positive ways. An examination of a selection of instruments in Section 5.4 of this chapter, including the Stockholm Declaration, the Rio Declaration, and the Paris Agreement, has shown how soft law in its various forms has moulded the international environmental regime. Soft law may also provide a degree of resilience to cooperation among distrusting states, by creating interdependence, building trust, cushioning cooperation against exogenous shocks, and ultimately creating a path dependency to cooperation.

Some of the softness in binding treaties within the climate change regime is the result of provisions pertaining to adaptation. As Hall and Persson observed, “Adaptation has low

⁴⁵⁵ Popovski 2015.

⁴⁵⁶ Bodansky et al 2017, 22.

precision and low obligation” and that a number of adaptation initiatives are not “constraining on states”. In analysing the Paris Agreement, Bodansky draws a similar conclusion: “Most of the provisions on adaptation and means of implementation are expressed, not as legal obligations, but rather as recommendations, expectations or understandings”.⁴⁵⁷ The absence of precise obligations pertaining to adaptation could simply be due to challenges arising from three issues. The first is empirically accounting for adaptation. The second, the lack of clarity as to what adaptation entails.⁴⁵⁸ And the third, wide gaps in power and wealth, which make the impact of a changing climate greater in developing countries, along with the cost of adaptation efforts.⁴⁵⁹

5.6 Conclusion

Non-binding soft law instruments and soft treaties are often quite diverse in their design, with these variations likely resulting in variations in compliance with them. This chapter has examined legalization within the climate change regime and found that the variation is skewed towards the soft law end of the written international law spectrum. Similar to the preceding two chapters on the Arctic and Outer Space, this chapter’s findings support several of the determinants of soft law’s prevalence hypothesized in Chapter 2.

Soft law, as observed in each of the three case studies examined within this dissertation, may contribute to strengthening the resilience of international law. Supplementing hard law with soft treaties and non-binding soft law instruments may not be the optimal solution for those seeking a

⁴⁵⁷ Hall and Persson, 554.

⁴⁵⁸ Nina Hall and Persson, 555.

⁴⁵⁹ Khan 2013, 9.

drastic reduction in greenhouse gas emissions, enough to prevent a 1.5°C warming, but it is certainly a far better alternative than the “business as usual” scenarios. Soft law may, through a process of norm creation and compliance as well as the continued facilitation of dialogue among states, thus help to address the climate crisis.

Chapter 6: Conclusion

6.1 Introduction

It is thus hardly surprising that the world has **increasingly turned to soft law solutions** to the hard choices it confronts.⁴⁶⁰

... **the proliferation of soft law instruments** in the field of environmental protection

...⁴⁶¹

increasing use of non-binding normative instruments in several fields of international law is evident⁴⁶²

These are but a handful of the claims made within the International Relations/ International Law literature on the prevalence of soft law. Despite the many claims, the literature has yet to empirically verify such a phenomenon. And if it is verifiable, why are states increasingly negotiating soft law in either binding or non-binding forms, as opposed to hard treaties? Can the dichotomy of written international law – binding or non-binding – account for the full range of effects that “soft” instruments may have within the international system? Is a greater degree of formal legalization of contemporary international relations necessary or even desirable, or would such an effort be futile and therefore counterproductive in the current political climate? This

⁴⁶⁰ Kirton and Trebilcock 2004, 4.

⁴⁶¹ Atapattu 2012, 212.

⁴⁶² Shelton 2009, 14.

dissertation has aimed to answer these questions and assess and explain soft law's prevalence within the case studies of the Arctic, Outer Space, and Climate Change. In addressing these questions, this research has exposed the overly narrow definitions of soft law within the existing International Relations/ International Law literature. Chapter 2 advanced a new, broader definition of soft law, one that encompasses both binding and non-binding variants in order to address the shortcomings for existing definitions.

Using this novel⁴⁶³ concept of soft law, the prevalence of soft law was then established by reviewing a large number of instruments of varying degrees of legalization within three discrete case studies, encompassing two regions: Arctic and Outer Space; and one issue-area: Climate Change. This was then followed by a close examination of a small number of key written legal instruments within each case study. This inquiry found that soft law is indeed becoming more prevalent within the three case studies and identified a number of reasons for this; reasons that will have varying degrees of influence within each case study. These include: (1) shifting global politics; (2) soft law's ability to paper over existing political differences; (3) soft law's ability to facilitate coordination despite mutual suspicion; (4) the eventual goal of crystallizing soft law into harder forms; (5) a desire to promote the role and influence of epistemic communities and non-state actors; (6) decision-makers wanting to be seen as doing something domestically; (7) a desire to avoid the constitutional constraints on ratifying hard treaties; and (8) an increasing recognition of the need to use a science-based decision-making process that also needs to

⁴⁶³ While the term 'soft treaty' has been used elsewhere, this dissertation's contribution to the literature lies in the way that it classifies written international law. Its careful definition of 'soft treaty' distinguishes it from writings that use the term but do not define it clearly (See, Section 6.2.1).

account for the uncertainty inherent in science. This concluding chapter will further unpack this constellation of factors and their degree of influence within each case study.

By tracing the negotiation processes behind each of these small number of instruments via an extensive review of the relevant literature, one can infer the potential consequences arising from soft law's prevalence within each case study. These consequences, briefly listed here and further advanced in this chapter, are: (1) a non-linear evolution of written international law; (2) potential complacency arising from soft law; (3) path dependency of cooperation due to repeated successful negotiations of written international law; and (4) forum shopping stemming from soft law's prevalence within each regime complex.

This concluding chapter proceeds as follows. An introductory section is followed by a summary of the arguments advanced in this dissertation, supported by the findings from the three case studies. This introductory section shows how this research has addressed the major gaps in the theoretical literature concerning soft law by providing a conceptual framework for analysis and then testing it through three quite different case studies. Then, the contribution of this research will be outlined with regard to the conceptual and practical dimensions. Last but not least, avenues for future research will be identified.

As Noam Chomsky rightly points out, the “historical conditions are too varied and complex for anything that might plausibly be called ‘a theory’ to apply uniformly” in international

relations.⁴⁶⁴ What this research tries to do in closely examining the three case studies in the preceding chapters is to offer a new insight into how politics shapes international law. In offering this insight, and exploring the conditions that led to the negotiation and conclusion of a specific segment of the written international law spectrum, this dissertation might shed light on treaties and other international legal instruments, compliance with them, as well as their influence on future negotiations of subsequent instruments.

6.2 A Reflective Analysis

Is soft law as egalitarian as the literature sometimes makes it out to be, or is it a tool that can be exploited by powerful states? Is ambiguity an agenda-driven outcome of powerful states, leaving them a margin of manoeuvre within a framework of legality? What would this mean for weak/small states which may prefer hard legalization in order to protect their interests?⁴⁶⁵ Does soft law perhaps provide concealment for states pursuing other objectives? Most agreements in the Arctic are (ostensibly) driven by the desire of states to protect the environment, but does the flexibility in these agreements leave the door open for less sustainable economic activities? This dissertation has sought to answer these and other questions through its examination of three case studies.

The objective of this section is to provide a reflective analysis of this dissertation's findings, particularly in light of the scholarly work on soft law and the reasons advanced at the outset of

⁴⁶⁴ Burchill and Linklater 2005; Chomsky 1994.

⁴⁶⁵ Abbott and Snidal 2000.

this research. The four fundamental contributions that this research makes are: (1) the proposition of a new category of written international law, namely “soft treaties”; (2) the provision of a previously lacking empirical verification of soft law’s prevalence; (3) an in-depth examination of the reasons why states choose to negotiate non-binding soft law or soft treaties rather than hard treaties; and (4) the inference of potential consequences that could arise from these findings.

6.2.1 Defining Soft Law

This dissertation defines soft law as including both binding and non-binding forms and finds that it is becoming more prevalent – at least within a subset of the international system – than before. It argues that soft law is neither benign, egalitarian nor apolitical. It also argues that understanding soft law is essential to understanding the relationship between International Relations and International Law.

This dissertation follows others who cogently argue that soft law as an important concept because of its normative value as well as its ability to fill in the gaps between existing treaties and provide a foundation for the development of international law within emerging issue-areas such as Outer Space and Cyberspace. Even among these scholars, 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.

To address the issue of the dichotomy of written international law, this dissertation distinguishes between “soft treaties” (i.e. binding soft law) and hard treaties, and thereby seeks to cast light on a largely overlooked but potentially important feature of international governance. In the disciplines of International Relations and International Law, the term “soft law” is generally used for resolutions, declarations, guidelines, and other written agreements that are not meant to be legally binding.⁴⁶⁶ This research identifies and explores, alongside non-binding soft law, the related phenomenon of legally binding documents composed of permissive, ambiguous, or redundant provisions; documents that are referred to here as “soft treaties”.

This research does not claim novelty in its identification of a form of international law that sits halfway between non-binding soft law (i.e. resolutions, declarations, and guidelines) and binding hard law (i.e. treaties and customary international law). Christine Chinkin categorized such in-between instruments as “legal soft law”, but did not focus her attention on them.⁴⁶⁷ Ilhami Olsson identified but did not explore why some binding agreements may be weaker than others because of the “vagueness, indeterminacy, or generality of a treaty or treaty provision”.⁴⁶⁸ And in a recent article on the Marine Biodiversity of Areas Beyond National Jurisdiction (BBNJ) negotiations, Mendenhall et al. refer to the likely result as a “soft treaty” without, however, exploring the concept or its implications.⁴⁶⁹ Clearly, these instruments deserve to be carefully analyzed with regards to their distinctiveness, prevalence, effects, and implications for International Relations and International Law.

⁴⁶⁶ Abbott and Snidal 2000, 421-56; Chinkin 1989, 850–66; Shelton 2003.

⁴⁶⁷ Chinkin 1989, 851.

⁴⁶⁸ Olsson 2013.

⁴⁶⁹ Mendenhall et al. 2019.

Abbott, Snidal, Chinkin, Olsson, and Mendenhall et al. have all identified that formally binding instruments are not always hard in terms of their obligation, precision, and delegation.⁴⁷⁰

Exploring this phenomenon further, Abbott, Snidal, Robert Keohane, Andrew Moravcsik, and Anne-Marie Slaughter explained that the “legalization of international norms, agreements, and regimes” further depends on the variability of each of the aforementioned dimensions.⁴⁷¹

However, they did not explore the consequences of this variability within binding treaties.

Steven Freeland likewise identified that soft law can be found in the form of weaker provisions in binding treaties, although he then examined soft law solely as found in non-binding instruments.⁴⁷² While this dissertation is not focused on an in-depth investigation of the consequences of soft law’s variability, it does explore some of the consequences of soft law and its variants as a step towards future research.

The way soft law is categorized has indubitably significant implications for the analysis of such instruments, and by extension, international law more generally. Integrating soft but binding treaties into the analysis of soft law casts light on a previously obscured variant of soft law, while also illuminating a previously under-examined variety among binding treaties.

The second broadly categorized variant of soft law is made up of legally non-binding instruments. Non-binding soft law instruments are just as diverse as soft treaties in terms of their

⁴⁷⁰ Abbott and Snidal 2000.

⁴⁷¹ Abbott et al 2000, 404.

⁴⁷² Freeland 2011.

design and other attributes, possibly resulting in variations in compliance with them. Non-binding soft law are “any written international instrument, other than a treaty, containing principles, norms, standards, or other statements of expected behavior”.⁴⁷³ But as this research has shown, it would be wrong to assume that all non-binding instruments are vague.⁴⁷⁴ A number of highly precise non-binding instruments exist, such as the 1992 Rio Declaration.⁴⁷⁵

⁴⁷³ Shelton 2009, 3.

⁴⁷⁴ Abbott and Snidal 2000.

⁴⁷⁵ See, Chapter 5.

6.2.2 Prevalence of Soft Law Exists

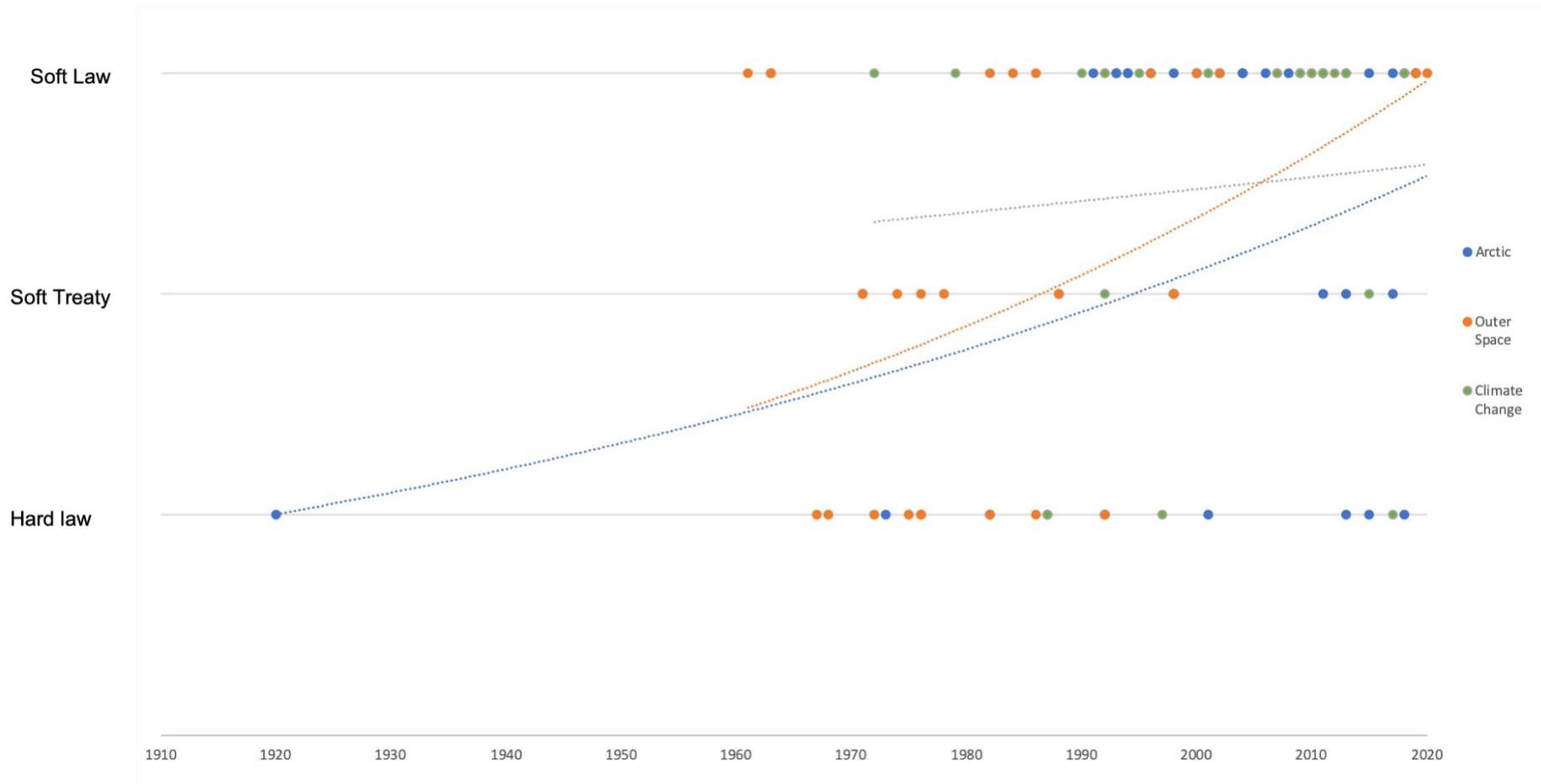


Figure 6.1: Prevalence of soft law across the Arctic, Outer Space, and Climate Change

Figure 6.1 above illustrates the prevalence of soft law and soft treaty relative to hard treaty across the three case studies examined in this dissertation. The trend-lines indicate that contemporary international law-making has primarily taken the forms of soft law and soft treaties within each of the three case studies. The various instruments, particularly in the later years, are observed to be clustered within the soft law/ soft treaty end of the written international law spectrum. This finding empirically verifies claims made within the literature on soft law's proliferation.

In addition to the hypothesized determinants laid out in Chapter 2, the case study chapters finds additional explanatory factors for soft law's expansion within the Arctic, Outer Space, and Climate Change. They are: (1) the facilitation of coordination despite mutual suspicion; (2) promotion of epistemic communities and other non-state actors, whereby the diversity and influence of which are increasingly across all three cases and, (3) circumventing constitutional constraints, where respective domestic law and politics may restrict a government's ability to negotiate harder treaties.

While a regression analysis may be able to better quantify and rank these factors in terms of their relative importance, this dissertation can make the following conjectures based on its extensive review of the literature and analysis of the small-n sample instruments examined in Chapters 3, 4, and 5.

The eventual crystallization to hard law is found to be the least important factor across all three case studies, particularly within Outer Space and Climate Change. With the former, there has

been an increasing informalization of international legal instruments. Preceding soft law instruments have remained soft and hard law instruments have, because of rapidly changing technological advances, been subjected to softer interpretations. With the latter case, Chapter 5 demonstrates clearly how the Paris Agreement, for example, devolved from a hard treaty. Within the Arctic, all three soft treaties negotiated within the auspices of the Arctic Council grew out of non-binding soft instruments. The puzzle that this dissertation has tried to resolve was why were each of these soft treaties negotiated as binding instruments, if their respective content contained redundant, permissive, and/or ambiguous provisions. The answer was found to lie in other determinants such as constitutional constraints, the promotion of epistemic communities, and the facilitation of coordination despite NATO and Russia’s mutual suspicions elsewhere.

So why do states choose to negotiate and conclude these instruments that have often been perceived as “inferior” given their weaker degree of legalization? Within each case study, a small number of instruments were examined in close detail to identify reasons as to why states opt for soft law or soft treaty instruments. As is illustrated below in Table 3, several reasons are common across all three case studies:

Reasons for Soft Law's Prevalence	Arctic	Outer Space	Climate Crisis
Shifting global politics due to an increasing diversity of states and their relative influence within and outside the region or issue-area	x	x	x

to paper over existing political differences	X	X	X
the recognition that a soft law agreement assures continued cooperation among states with an otherwise difficult diplomatic relationship	X	X	X
to facilitate coordination despite mutual suspicion	X	X	X
in order to eventually build towards hard law	X	X	
in order to promote epistemic communities and other non-state actors whose diversity and influence is increasing	X	X	X
to enable governments to be seen by the public as doing something	X		X
in order to avoid constitutional constraints – a manifestation of the	X		X

tension between international and domestic politics and law			
to be able reach consensus despite the growing diversity and influence of states and non-state actors	x	x	x
increasing recognition of the need to use a science-based decision-making process that also needs to incorporate the uncertainty inherent in scientific and technological knowledge	x	x	x

Table 3: Summary of the reasons for soft law’s prevalence

6.2.3 Implications of Soft Law’s Prevalence

While the primary objective of this research was to assess soft law’s prevalence and examine the reasons why states choose soft law over hard, this dissertation also attempted to identify the potential implications of such a prevalence as well as to understand how the behaviour of states, and perhaps more broadly, the international system is influenced by this prevalence through an analysis of a small number of instruments within each case study.

Soft law’s expansion could operate as bridge between global policy regimes and regional governance through the inclusion of non-state actors, the path dependency to cooperate that has been set in motion through repeated efforts to negotiate soft instruments, and the reiteration of

provisions stemming from global treaties into regional soft treaties and non-binding soft law instruments. This contemporary global public policy paradigm is one that is steeped in soft law instruments, as opposed to one that was previously largely cemented in hard law, or no law at all.

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

6.2.3.1 Non-linear evolution of written international law

Aspects of The World Charter for Nature, a non-binding soft law instrument, such as the "EIA process and participatory rights", have been argued to become customary international law, entering the hard law end of the spectrum.⁴⁷⁶ With the exception of these oft-stated observations that non-binding soft law often leads to the development of hard law, the literature does little to examine these evolutions of written international law. Those that do, often examine the path that a legal regime may take as a whole, such as Harrop and Pritchard in their examination of the Convention on Biological Diversity which they observed to have, over time, devolved from a soft treaty to even softer forms of governance in the form of non-obligatory global targets.⁴⁷⁷ "It

⁴⁷⁶ Atapattu 2012, 212.

⁴⁷⁷ Harrop and Pritchard 2011.

is not unusual in international environmental law for a soft law instrument to act as a precursor for a hard law instrument.”⁴⁷⁸

Through the examination of the various instruments within each of the three case studies, this research reveals the non-linear evolution of written international law. Illustrated in Figure 1.2, the evolution of international law highlights the need for a dynamic approach to studying the interface of international relations and international law. Stage 1 indicates the initial phase of the negotiation process, whereby states problematize an issue that requires a solution in the form of an international legal instrument. Whether that instrument takes the form of a binding or non-binding form is decided in Stage 2. If the former variant is chosen, the negotiation process dictates whether a hard or soft treaty is adopted. Stage 4 onwards indicates the evolution of instruments whether from non-binding soft law to soft treaty or hard law; soft treaty to hard law; or even hard law to soft treaty.

An example of a Stage 4 process whereby a hard treaty could become a soft treaty over time is that of the 1967 Outer Space Treaty, whereby provisions that were clear when the treaty was negotiated have been rendered unclear by new political, technological, or environmental developments. The Treaty was negotiated before anyone thought that private companies would become independent actors in space. The Treaty’s prohibition on the national appropriation of

⁴⁷⁸ Bodansky et al 2017, 117.

celestial bodies was clear at the time, but there is now a rigorous debate taking place as to whether it extends to the extraction of resources by private actors.⁴⁷⁹

Another example of a Stage 4 process is the Montreal Protocol, a hard treaty. The Protocol is an instrument that has been amenable to changes over time, primarily because it is a protocol nested within a framework convention. This feature of flexibility in framework conventions is in contrast to the literature on the topic which argues that soft law is a preferable alternative given its flexibility.

What triggers the change from one form of written international law to another? By looking to the field of evolutionary biology, this dissertation borrows the theoretical concept of punctuated equilibrium⁴⁸⁰ to explain the evolution of written international law. Stephen Krasner had previously used the concept to explain institutional changes.⁴⁸¹ Krasner argues that during periods of crisis, institutions undergo rapid changes after which they are followed by “consolidation and stasis”.⁴⁸² Binding instruments could represent these periods of rapid changes which are then followed by soft law instruments characterizing periods of stasis. Hard treaties in particular could be indicative on large scale departures from the past. These changes could be triggered by political shocks such as wars, pandemics (much like the current COVID-19), major

⁴⁷⁹ Tronchetti 2015.

⁴⁸⁰ Punctuated equilibrium in the field of evolutionary biology is used to explain the rate of speciation. Species are thought to mostly be in a stable equilibrium which is punctuated by short bursts of rapid evolution which is in contrast to the Darwinian theory that evolution of species is a gradual process. For an extended discussion on the topic, see, Eldredge and Gould 1972.

⁴⁸¹ Krasner 1984.

⁴⁸² Krasner 1984, 240.

communication leaps (such as the digitization of diplomacy and social media advocacy) and, technological disruptors.⁴⁸³

As previously demonstrated, binding instruments, whether hard or soft, can evolve from a non-binding instrument. This, to an extent, lends support to existing theories of soft law's evolution towards the hard law end of the spectrum. However, it should be noted that most of these instruments are soft treaties rather than hard treaties. The reasons for the evolution in each of these cases often differ as well. Soft treaties may become hard over time, for instance, through the practices of their parties, or more specific sub-agreements. Some environmental treaties, such as the UN Framework Convention on Climate Change, provide examples of this process. The point is that the legal/cooperative landscape is constantly evolving, and that both soft and hard instruments are therefore part of a political and normative process.

6.2.3.2 Complacency arising from a Consensus Decision-Making Structure

The Arctic Council and the UN COPUOUS are the principal institutions through which cooperation in the Arctic and Space takes place. Both institutions use consensus decision-making whereby every state has to agree or at least acquiesce before any decision can be made. It would be easy to assume that consensus decision-making equalizes the power of different states within an institution, but this is not the case. After studying consensus decision-making within the GATT/WTO, Richard Steinberg concluded that the process – despite upholding the principle of sovereign equality and delivering rules that are accepted as legitimate by all the participants –

⁴⁸³ See, Figure 3.2 for examples of major events that have triggered change in the Arctic.

nevertheless favors powerful states.⁴⁸⁴ A plausible explanation for this continued role for power was advance by Paul Reuter, writing half-a-century ago:

Consensus may perhaps oblige the strongest to make certain sacrifices, but it sacrifices the viewpoint of another minority: the one which is not strong enough to make the consensus process fail; ... in spite of the apparent unanimity which it represents, it constitutes an instrument of coalition against those who are isolated.⁴⁸⁵

As Michael Byers argues “although each state in a consensus decision-making system could act as a spoiler, this fact provides an incentive for states to signal to any potential spoiler that the costs imposed for blocking consensus would be higher than any possible gains”.⁴⁸⁶ Consensus decision-making can thus conceal and perhaps even facilitate the application of power. In contrast, the decision-making based on voting is different. While “still open to applications of power, the very act of calling a vote legitimizes opposition by a single or small number of states”.⁴⁸⁷

That being said, the prevalence of soft law within each of the case studies examined in this dissertation is partially the result of consensus decision-making in many forums and international organizations within each issue-area or region. Soft law reduces the costs and the need for tough

⁴⁸⁴ Steinberg 2002, 342.

⁴⁸⁵ Reuter 1967, Michael Byers’ translation.

⁴⁸⁶ Byers 2019, 8; Coleman 2007.

⁴⁸⁷ Byers 2019.

negotiations.⁴⁸⁸ Because hard law “involves clear, mandatory, substantively new commitments”, the stakes are higher.⁴⁸⁹ As outlined in the section above, soft law can crystallize into harder forms, both written and customary law. In the case of customary international law, this only happens gradually, and “only if states demonstrate through consistent practice that they are following the norms and consider them binding”.⁴⁹⁰

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

It may lack the legitimacy and strong surveillance and enforcement mechanism offered by hard law. With a broader array of stakeholders, soft law may promote compromise, or even compromised, standards, less stringent than those delivered by governments acting with their full authority all alone. And soft law can lead to uncertainty, as competing sets of voluntary standards struggle for dominance, and as actors remain unclear about the costs of compliance, or its absence, and about when governments might intervene to impose a potentially different, mandatory regime.⁴⁹¹

⁴⁸⁸ Byers 2019.

⁴⁸⁹ Byers 2019.

⁴⁹⁰ Akehurst 1975; Byers 1999; Byers 2019, 9; D’Amato 1979.

⁴⁹¹ Kirton and Trebilcock 2004, 6.

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

6.2.3.3 Path dependency

The ongoing activities of all the Arctic Council working groups, many of which result in soft law instruments, provide an excellent example of path dependency for future cooperation. Non-security issues in the region have generally been managed among the Arctic states on a cooperative basis since the end of the Cold War, even during and after Russia's annexation of Crimea, with a number of non-binding soft law and soft treaty instruments having been successfully negotiated. These activities never stop, because the Arctic Council is always working on the next deliverable in the forms of reports, assessments, and other soft law instruments. Diplomats and experts are therefore on a perpetual hamster wheel of international interaction. There are over a hundred cooperative projects and initiatives continuously being worked on at the Arctic Council at any given time.⁴⁹² Whatever the outcome, when Arctic states come together to negotiate, communication is taking place among them, and in some instances, among them and non-Arctic States. Cementing that conversation in some form of a legal document legitimizes the effort to cooperate. Diplomacy is always taking place in the sidelines

⁴⁹² Arctic Council 2020.

and epistemic communities are continually being strengthened, thus adding to the resilience of cooperation.

This raises a more general question: Does a path dependency⁴⁹³ to cooperate arise as a result of soft law's prevalence? It certainly seems that negotiations on soft law instruments can amplify the path dependency to cooperation. Despite exogenous factors such as the annexation of Crimea, the Arctic has continued to be a region with considerable cooperation, including between Russia, China, the US and a number of other NATO states. Therefore, the negotiation of soft treaties and non-binding soft law instruments is perhaps not just about flexibility and sub-optimal outcomes, but rather about creating interdependence, building trust, and cushioning cooperation against exogenous shocks.

Moreover, the soft nature of these instruments, coupled with the inclusion of a wide variety of regional and non-regional state and non-state actors, may strengthen social cohesion and thus facilitates cooperation – in a region where conflict has been predicted on numerous occasions.⁴⁹⁴

The shift from governing purely with non-binding soft law instruments to a combination of binding and non-binding instruments perhaps indicates a move “from a policy-shaping toward a policy-making body” lending legitimacy to the Arctic Council and, by extension, to the Arctic

⁴⁹³ Path dependency defined by Dryzek (2014, 941) is “Path dependency means that early decisions constrain later ones, as the costs of changing course become high, actors develop material stakes in stable institutions, and institutions arrange feedback that reinforces their own necessity”.⁴⁹³

⁴⁹⁴ Escudé 2014.

Council member states' role as stewards of the region.⁴⁹⁵ Similar observations can be made within Outer Space and Climate Change as well.

Soft instruments could provide a degree of resilience to regional cooperation among distrusting states, in circumstances where hard treaties and formal international organizations are not possible (and might suffer full breakdowns if they were). The production of a soft law instrument can be as much a reason for diplomacy as it is a conclusion of diplomacy. And by reducing or eliminating the costs associated with the instrument, by making it soft, the initiation of diplomacy becomes much easier. Soft law could also be a way of filling gaps, encompassing new developments, gathering non-state parties (and non-state actors) into the normative envelop of a treaty.

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

⁴⁹⁵ Smieszek 2019, 41.

6.2.3.4 Forum Shopping

While there has been a growing volume of research on treaty conflict and forum shopping, little work has been done on the choices between, and the tensions arising, from the availability and interaction of hard and soft instruments, particularly in the context of the latter's prevalence.

With the increase in the number of soft law instruments, including those setting out obligations that are redundant, i.e. already binding on states as a result of pre-existing hard law, states are able to strategically “use soft-law provisions [to] undermine existing hard law or creat[e] hard-law provisions to trump existing soft law”.⁴⁹⁶

Shaffer and Pollack are among the few scholars who have written on this topic. They argue that the incentive for states to forum shop between soft and hard law depends on the ongoing “distributive conflict among states”.⁴⁹⁷ When this conflict is low, there may be a higher tendency for states to employ hard and soft law in a complementary manner; when conflict is high (and regime complexity is high) the reverse may more likely be observed.⁴⁹⁸

Each case study in this dissertation is governed by a combination of hard and soft law instruments, the provisions of which may overlap or even contradict each other. What are the consequences that could potentially arise from this co-existence of hard treaties and soft law instruments, both binding and non-binding? Does it give parties to the former influence vis-à-vis the latter, or at least vis-à-vis matters addressed by the later? China is a party to UNCLOS and

⁴⁹⁶ Shaffer and Pollack 2010.

⁴⁹⁷ Shaffer and Pollack 2010, 739

⁴⁹⁸ Shaffer and Pollack 2011, 1167.

only an observer at the Arctic Council, under the umbrella of which the Arctic Scientific Cooperation Agreement was adopted. An instance where a hard treaty such as UNCLOS can provide greater influence could possibly be foreseen with regards to China's presence in the Arctic.

While only an observer to the Arctic Council, the principal organization within which much of the regional non-binding soft law and soft treaties are negotiated by member states, China is nonetheless a party to the Central Arctic Ocean Fisheries Agreement, the UN Convention on the Law of the Sea, a permanent member of the UNSC (which is the only body within the UN that can “adopt binding coercive measures” in order to maintain international security), and a member of the UNFCCC. Koivurova, for this reason, argues that “under the framework of international law, China is one of the Arctic's main actors”.⁴⁹⁹ While for now, legal instruments concluded within the auspices of the Arctic Council are complementary to existing international law, it remains to be seen if conflict may arise on issues pertaining to China particularly due to deteriorating relations between it and the United States due to disputes on trade and the COVID-19 pandemic.

6.3 Contribution

6.3.1 Conceptual and Theoretical

This dissertation's examination of soft law's pervasiveness within the international system has led to the conclusion that existing definitions of soft law were insufficient for such an inquiry

⁴⁹⁹ Koivurova 2018.

and that commonly held assumptions such as the egalitarian nature of soft law, soft law's eventual hardening, and the low costs associated with its negotiation, do not always hold true. This dissertation has advanced a new, broader definition of soft law, one that includes both the non-binding and the often-excluded binding variant: "soft treaty". This dissertation has also confirmed the assumption, wide-spread in the literature but previously unexamined beyond any single issue-areas, that the prevalence of soft law is growing. Defining soft law and quantifying its prevalence are the first steps in situating soft law's role within contemporary international law and international relations.

Broadening the definition of soft law to include both binding and non-binding forms has not only confirmed that soft law is indeed increasing but also that it is far more pervasive than previously assumed. The literature's past exclusion of soft but binding instruments resulted in a narrow examination of soft law's influence within the international system. In addressing this gap, this dissertation has sought to also deepen the understanding the nexus of the disciplines of International Relations (IR) and International Law (IL).

"Most IL scholars (with important exceptions) have ignored IR. The attitude of IR scholars toward IL has been more actively negative."⁵⁰⁰ The central argument made in this dissertation speaks to such debates in international relations, particularly those that lie at the intersection of with international law and speak to this disconnect between the two fields. The rise of soft law,

⁵⁰⁰ Abbott 1992, 167.

both binding and non-binding, indicates a shift towards political arrangements governing the international system.

6.3.2 Practical Application

Scholarship and statesmanship, theory and practice, the academy and policy worlds, while they are different, are nevertheless joined at the hip, and neither can succeed, even within its own realm, without the other.⁵⁰¹

This dissertation aims to add to the academic fields of International Relations and International Law as well as to contribute its findings to diplomacy and policymaking. By understanding the net benefits of non-binding soft law and soft treaty instruments relative to hard treaties, states of varying degrees of power and size, as well as non-state actors, will be better able to determine the form that best enables them to pursue their respective goals.

6.3.2.1 Large and powerful states

Like other international norms and rules, soft treaties will sometimes facilitate exercises of power; in other cases, they will act as constraints. In yet other cases, they will remove and thus separate an issue-area from a larger power struggle.

For example, the extensive use of soft treaties and other soft law instruments in the Arctic, Outer Space, and in addressing the Climate Crisis could be explained on the basis that Russian-Western

⁵⁰¹ Nau 2008, 635-636.

cooperation in these regions and issue-area takes place against the backdrop of tensions elsewhere.⁵⁰² By choosing not to make clear legally binding commitments, mutually suspicious states are able to pursue collective goals within an isolated region or issue-area to each other.⁵⁰³

Similarly, the foundational treaties governing Outer Space were concluded during the Cold War, with the US and the then USSR playing pivotal roles in the negotiations. While the dynamics have changed to include more spacefaring states such as China and India, as well as non-state actors, cooperation has prevailed, though largely through a very small number of treaties and numerous soft law instruments.

6.3.2.2 Small and weaker states

Political interventions by small states have proven effective in shifting the needle on some global issues, such as the climate crisis. Though the larger and powerful states such as the US and China had argued for a non-binding instrument, the Paris Agreement's binding nature can be attributed to the strong advocacy by The Alliance of Small Island States (AOSIS) which held a strong position on the need for a legally binding instrument, thus proving the ability of smaller states to influence international law-making.⁵⁰⁴ The Paris Agreement as well as the Agreement on Enhancing International Scientific Cooperation are two of many examples of soft treaties that were reached as a compromise between entities of varying degrees of power within the international system.

⁵⁰² Byers 2019.

⁵⁰³ Byers 2019, 9.

⁵⁰⁴ Lawrence and Wong 2017.

Further countering the conventional argument in International Relations and International Law that soft legalization favours the large and strong, and that small states would be better off seeking hard legalization⁵⁰⁵, this dissertation has demonstrated that soft law instruments, on the contrary, have sometimes been a useful tool for these relatively “weaker” states.⁵⁰⁶ Abbott and Snidal argue that while strong states do have a certain degree of influence during negotiations relative to weaker states, it is impossible for them to dictate every negotiation to their advantage largely due to the costs of coercion. They provide examples of how small states such as Luxembourg, Nauru, and Singapore, have shaped international law.⁵⁰⁷ Soft law could offer a means for small states to reduce existing power imbalances within the international system and offer a counterweight to the changing power dynamics that has been a result of new powerful states emerging within the system.

6.3.2.3 Non-state actors

Sumudu Atapattu argues that within the realm of international environmental law, the expansion of soft law is reflective of a broader expansion of international law beyond the state-level.⁵⁰⁸ International law making, a traditionally state-centric enterprise, has evolved in recent decades to include non-state actors to a certain degree.⁵⁰⁹ This involvement of non-state actors in the negotiation process is readily evident in each of the three case studies examined in this

⁵⁰⁵ Abbott and Snidal 2000; Weil 1983.

⁵⁰⁶ See Chapters 3.4.10 and 5.4.8.

⁵⁰⁷ Feichtner 2019; Yeow 2019.

⁵⁰⁸ Atapattu 2012, 202.

⁵⁰⁹ It should be clarified, however, that formal law-making remains to be entrusted by states and international organizations; d'Aspremont 2010, 187; Steer 2017.

dissertation. Additionally, the degree to which various types of non-state actors, whether non-governmental organizations or corporate entities, can influence international law-making will vary.⁵¹⁰

Soft law, of the non-binding variant for example, can facilitate the involvement of non-state actors. As Timo Koivurova and Leena Heinämäki explained, soft law has “revolutionary” potential because its non-legally binding character enables the inclusion of non-state actors in its creation, while the resulting norms are still considered authoritative.⁵¹¹ The inclusion of indigenous peoples as “permanent participants” at the Arctic Council is the key example of this since they sit at the negotiating table alongside the Member States and take part in all discussions.⁵¹²

The involvement of private companies, as has been the case in the governance of Outer Space is also highly relevant. One example is the role of Planetary Resources in the development and content of the 2015 United States Commercial Space Launch Competitiveness Act (or CSLCA), which “acts as an incremental mechanism in the formation of international space law”.⁵¹³ The Act allows American companies to exploit materials mined off the moon and other celestial bodies and adds to the current debate on the Outer Space Treaty’s Article II.⁵¹⁴

⁵¹⁰ Future research could add nuance to our understanding of how various types of non-state actors influence soft law’s expansion.

⁵¹¹ Koivurova and Heinämäki 2006, 104.

⁵¹² Bloom 1999; Oslen and Shadian 2016.

⁵¹³ Blount and Robison 2016, 160.

⁵¹⁴ Article II of the Outer Space Treaty states that: “Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.”

Looking to the case of Climate Change, however, a hard treaty may not have been able to accomplish the degree of inclusion of a broader range of different actors as a soft instrument has, perhaps in part explaining the prevalence of soft law instruments in recent years.

6.4 Future Research

Due to space and time limitations, this dissertation contains just three substantial case studies, and within each of those, examines just 5–10 legal instruments in detail. Future research involving further case studies would provide greater certainty with regards to the general implications of soft law's prevalence for the international system. This dissertation does, however, make the case as to why a broad-based examination of soft law is important. This section discusses how the research conducted here could be extended and deepened.

In questioning if soft law is increasing, 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? The case study on Outer Space sheds some light on these questions. This research has 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 in this dissertation, one could

also explore possible differences in the hardness of different hard treaties and their associated implications. Additional to being studied relative to hard treaties as this dissertation has done, the analysis of soft law could usefully be expanded to include other sources of international law, such as customary international law and court decisions. It is widely accepted, for instance, that UN General Assembly resolutions and other soft law instruments can constitute state practice for the purposes of customary international law. As for court decisions, a court in the United Kingdom recently struck down a government decision based on the fact that it was contrary to the country's commitments under the Paris Agreement, a soft treaty. Broadening the analysis in these ways 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.

While a simplified empirical method was used to assess soft law's prevalence within each case, future research could build upon this methodologically by supplementing the process tracing method utilized here with regression analysis, in order to quantify the degree to which each independent variable can be held accountable for the conclusion of soft law instruments rather than harder alternatives. To add to this quantitative analysis, variations to the compliance of different forms of written international law (i.e. non-binding soft law, soft treaty, and hard law) could be identified and examined. For instance, is there a variability in the compliance between soft and hard treaties? Such an enquiry to deepen our understanding of soft treaties in particular. With the Trump administration having withdrawn the US from several international treaties, one could examine the role that soft law instruments may have in these legal regimes; regimes, which, in their current forms, are being dismantled by a powerful state.

In order to strengthen or even verify the arguments made in this dissertation, subsequent research could expand the analysis to other case studies and/or include more instruments within the case studies already examined here. For example, the regime complex that has developed concerning cyberspace might provide valuable insights, being a “frontier” regime that is similar in some respects to Arctic, Outer Space, and the atmosphere (i.e. climate change). Similarly, the regime complex that exists with regards to international finance seems to be experiencing a proliferation of soft law instruments and would, for this reason, provide another excellent additional case study.⁵¹⁵ Another potential, and topical, case study could be the governance of the global healthcare regime, particularly that of pandemics. The COVID-19 pandemic is an issue of global concern that required rapid responses which, while not always present, would frequently and almost necessarily take the shape of non-binding soft law instruments such as guidelines.⁵¹⁶

6.5 Conclusion

This dissertation aims to deepen our understanding of why states choose to negotiate soft law instruments and by extension help bridge the disciplines of International Relations and International Law, which are, despite their general lack of engagement with each other, inextricably intertwined. It demonstrates that soft law, in all its forms, is not a negotiating failure, but 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,

⁵¹⁵ Newman and Posner 2018.

⁵¹⁶ Berman 2020; WHO 2020.

with hard treaties at the top and soft law at the bottom. Instead, this is simply a situation of “different horses for different courses”.

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 growing tension between Western states and Russia, while leaving open and even facilitating the possibility that their commitments might later become part of hard treaties or customary international law.⁵¹⁷

International law is often criticized for lacking enforcement mechanisms.⁵¹⁸ 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.⁵¹⁹ 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

⁵¹⁷ Abbott et al 2000.

⁵¹⁸ Goldsmith and Posner 2005.

⁵¹⁹ Albright 1995; Franck 1998.

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.

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.

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.

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Appendices

Appendix A List of Written International Legal Instruments

A.1 List of Written International Legal Instruments in the Arctic

Year	International Organization/ Members	Binding/ Non-Binding	Legal Instrument	Type of Instrument
1920	Multilateral	Binding	Svalbard Treaty	Hard
1973	Arctic Five	Binding	Agreement on the Conservation of Polar Bears	Hard
1982	UN	Binding	UN Convention on the Law of the Sea	Hard
1987	UN	Binding	Montreal Protocol on Substances that Deplete the Ozone Layer	Hard
1991	Arctic Countries ⁵²⁰	Non-Binding	Arctic Environmental Protection Strategy	Soft
1992	UN	Binding	UN Framework Convention on Climate Change (UNFCCC)	Hard
1993	Barents-Euro Arctic Council	Non-Binding	Kirkenes Declaration	Soft
1993	Barents-Euro Arctic Council	Non-Binding	Terms of Reference	Soft

⁵²⁰ The Arctic Countries constitute the countries that would later form the Arctic Council Member States: Canada, Denmark, Finland, Iceland, Norway, Sweden, Union of Soviet Socialist Republics, and the United States.

1994	Northern Forum	Non-Binding	Tromsø Declaration	Soft
1994	Northern Forum	Non-Binding	Rovaniemi Code of Conduct	Soft
1996	Arctic Council	Non-Binding	Declaration on the Establishment of the Arctic Council (Ottawa Declaration)	Soft
1998	Arctic Council	Non-Binding	Rule of Procedure	Soft
2000	Arctic Council	Non-Binding	Barrow Declaration	Soft
2001	UN	Binding	Stockholm Convention on Persistent Organic Pollutants	Hard
2002	Arctic Council	Non-Binding	Inari Declaration	Soft
2004	Arctic Council	Non-Binding	Reykjavik Declaration	Soft
2004	Arctic Council	Non-Binding	Arctic Climate Impact Assessment	Soft
2006	Arctic Council	Non-Binding	Salekhard Declaration	Soft
2008	Arctic Five	Non-Binding	Ilulissat declaration	Soft
2009	Arctic Council	Non-Binding	Tromsø Declaration	Soft
2011	Arctic Council	Non-Binding	Nuuk Declaration	Soft
2011	Arctic Council	Binding	Agreement on Cooperation on Aeronautical and Maritime Search and Rescue	Soft Treaty
2013	UN	Binding	Minamata Convention on Mercury	Hard
2013	Arctic Council	Non-Binding	Kiruna Declaration	Soft

2013	Arctic Council	Binding	Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic	Soft Treaty
2015	International Maritime Organization	Binding	Polar Code	Hard
2015	Arctic Council	Non-Binding	Iqaluit Declaration	Soft
2017	Arctic Council	Non-Binding	Fairbanks Declaration	Soft
2017	Arctic Council	Binding	Agreement on Enhancing International Scientific Cooperation	Soft Treaty
2018	China, Japan, and South Korea	Non-Binding	Joint Statement the Third Trilateral High-Level Dialogue on the Arctic	Soft
2018	Arctic Five+Five	Binding	Agreement to Prevent Unregulated Commercial Fishing on the High Seas of the Central Arctic Ocean	Hard
2019	Arctic Council	Non-Binding	Joint Ministerial Statement	Soft

A.2 List of Written International Legal Instruments in Outer Space

Year	International Organization/ Members	Binding/ Non-Binding	Legal Instrument	Type of Instrument
1961	UNGA	Non-binding	General Assembly Resolution 1721 (XVI) on International Cooperation in the Peaceful Uses of Outer Space	Soft
1963	UNGA	Non-binding	Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space	Soft
1963	UNGA	Binding	Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water (Limited Test Ban Treaty)	Hard
1967	UNGA	Binding	Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty)	Hard / increasingly Soft Treaty
1968	UNGA	Binding	Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return	Hard

			of Objects Launched into Outer Space (Rescue Agreement)	
1971	International Telecommunicati ons Satellite Organization (ITSO)	Binding	Agreement Relating to the ITSO	Soft Treaty
1971	Intersputnik International Organization of Space Communications	Binding	Agreement on the Establishment of the Intersputnik International System and Organization of Space Communications	Soft Treaty
1972	UNGA	Binding	Convention on International Liability for Damage Caused by Space Objects (Liability Convention)	Hard
1974	UNGA	Binding	Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite	Soft Treaty
1975	European States	Binding	Convention for the Establishment of ESA	Hard
1975	UNGA	Binding	Convention on Registration of Objects Launched into Outer Space (Registration Convention)	Hard

1976	Arab Satellite Communications Organization	Binding	Agreement of the Arab Corporation for Space Communications (ARABSAT)	Hard
1976	Soviet Union and Allies	Binding	Agreement on Cooperation in the Exploration and Use of Outer Space for Peaceful Purposes (Interkosmos)	Hard
1976	International Maritime Organization (IMO)	Binding	Convention on the International Mobile Satellite Organization	Soft Treaty
1978	UNGA	Binding	Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Moon Agreement)	Soft Treaty
1982	Members of the European Conference of Postal and Telecommunications	Binding	Convention Establishing the EUTELSAT	Hard

	Administrations (CEPT) ⁵²¹			
1982	UNGA	Non-binding	Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting	Soft
1984	Canada, France, Russia, and the United States	Non-binding	Memorandum of Understanding among the Ministry of Merchant Marine of the Union of Soviet Socialist Republics, the National Oceanic and Atmospheric Administration of the United States of America, the Department of National Defence of Canada and the Centre National d'Etudes Spatiales of France	Soft
1986	European States ⁵²²	Binding	Convention for the Establishment of a EUMETSAT	Hard
1986	UNGA	Non-binding	Principles Relating to Remote Sensing of the Earth from Outer Space	Soft

⁵²¹ CEPT, established in 1959, comprises of 48 European countries that work together to “harmonize telecommunication, radio spectrum, and postal regulations”.

⁵²² As of 2020, there are 30 European states that are members to the Convention. This consortium of states is independent of the EU.

1988	Canada, France, Russia, and the United States	Binding	COSPAS-SARSAT Programme Agreement	Soft Treaty
1992	UNGA	Binding	Constitution and Convention of the International Telecommunication Union	Hard
1992	UNGA	Non-binding	Principles Relevant to the Use of Nuclear Power Sources in Outer Space	Soft
1996	UNGA	Non-binding	Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries	Soft
1998	International Space Station Programme	Binding	International Space Station Intergovernmental Agreement (IGA)	Soft Treaty
1998	International Space Station Programme	Binding	Memorandum of Understanding (MOU) between NASA-RSA	Soft Treaty
1998	International Space Station Programme	Binding	MOU between NASA-ESA	Soft Treaty

1998	International Space Station Programme	Binding	MOU between NASA-CSA	Soft Treaty
1998	International Space Station Programme	Binding	MOU between NASA-JAXA	Soft Treaty
2000	Multilateral	Non-binding	International Charter Space and Major Disasters	Soft
2002	Inter-Agency Space Debris Coordination Committee (IADC)	Non-binding	Space Debris Mitigation Guidelines	Soft
2007	UNGA	Non-binding	Space Debris Mitigation Guidelines of the UN COPUOS	Soft
2010	UN COPUOS	Non-binding	Space Debris Mitigation Guidelines of the Committee on the Peaceful Uses of Outer Space	Soft
2011	UNGA	Non-binding	Declaration on the Fiftieth Anniversary of Human Space Flight and the Fiftieth Anniversary of the Committee on the Peaceful Uses of Outer Space	Soft

2011	International Organization for Standardization	Non-binding	Space Debris Mitigation Requirements	Soft
2019	UN COPUOUS	Non-Binding	Guidelines for the Long-term sustainability of Outer Space Activities	Soft
2019	The Hague International Space Resources Governance Working Group	Non-binding	Building Blocks for the Development of an International Framework on Space Resource Activities	Soft
2019	Outer Space Institute	Non-binding	Salt Spring Recommendations on Space Debris	Soft
2020	Outer Space Institute	Non-binding	Vancouver Recommendations on Space Mining	Soft

A.3 List of Written International Legal Instruments in Climate Change

Year	International Organization/ Members	Binding/ Non-Binding	Legal Instrument	Type of Instrument
1972	UN	Non-binding	Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)	Soft Law
1979	WMO	Non-binding	Declaration of World Climate Conference (Paris Declaration)	Soft Law
1987	UN	Binding	Montreal Protocol	Hard
1990	WMO	Non-binding	Ministerial Declaration of World Climate Conference	Soft Law
1992	UNCED	Non-binding	Rio Declaration on Environment and Development	Soft Law
1992	UNFCCC	Binding	UN Framework Convention on Climate Change	Soft Treaty
1995	UNFCCC	Non-binding	Berlin Mandate	Soft Law
1997	UNFCCC	Binding	Kyoto Protocol	Hard
2001	UNFCCC	Non-Binding	Bonn Agreement to the Kyoto Protocol Rules	Soft Law
2001	UNFCCC	Non-Binding	Marrakesh Accords	Soft Law
2007	UNFCCC	Non-binding	Bali Roadmap	Soft Law

2009	UNFCCC	Non-binding	Copenhagen Accord	Soft Law
2010	UNFCCC	Non-binding	Cancun Agreements	Soft Law
2011	UNSC	Non-binding	Presidential Statement	Soft Law
2011	UNFCCC	Non-binding	Durban Outcomes	Soft Law
2012	UNFCCC	Non-binding	Doha Amendment	Soft Law
2013	UNFCCC	Non-binding	Warsaw Outcomes	Soft Law
2015	UNFCCC	Binding	Paris Agreement	Soft Treaty
2017	UNSC	Binding	Resolution 2349	Hard
2018	UNSC	Non-binding	Presidential Statement	Soft Law
2018	UNSC	Non-Binding	Resolution 2408	Soft Law
2018	UNFCCC	Non-Binding	Katowice Climate Package	Soft Law