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## Some Reflections on the Relationship of Treaties and Soft Law

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## SOME REFLECTIONS ON THE RELATIONSHIP OF TREATIES AND SOFT LAW

### 1. Introduction

My starting point for this discussion of the relationship between treaties and soft law is the observation that the subtlety of the processes by which contemporary international law can be created is no longer adequately captured by reference to the orthodox categories of custom and treaty. The role of soft law as an element in international law-making is now widely appreciated, and its influence throughout international law is evident. Within that law-making process the relationships between treaty and custom, or between soft law and custom are also well understood. The relationship between treaties and soft law is less often explored, but it is no less important, and has great practical relevance to the work of international organisations.

### 2. What is soft law?

Soft law has a wide range of possible meanings,<sup>1</sup> but three are of direct relevance to the present enquiry:

#### (1) *Soft law is not binding*

When used in this sense soft law can be contrasted with hard law, which is binding. Treaties are by definition always hard law because they are always binding. In this category of soft law the legal form is decisive: if the form is that of a treaty it cannot be soft law. If the form is that of a non-binding agreement, such as the Helsinki Accords,<sup>2</sup> it will not be a treaty for precisely that reason and we will have what is in effect a "soft" agreement. Of course, the question whether an agreement is a binding treaty is not necessarily easy to answer, as we can observe in the *Qatar-Bahrain Maritime Delimitation Case*.<sup>3</sup> Moreover, an agreement involving states may be binding even if it is not a treaty,<sup>4</sup> so the distinction between hard and soft agreements is not simply synonymous with the distinction between treaties and non-treaties. Moreover, once soft law begins to interact with binding treaties its non-binding character may be lost or altered.

#### (2) *Soft law consists of general norms or principles, not rules*

An alternative view of soft law focuses on the contrast between "rules", involving clear and reasonably specific commitments which are in this sense hard law, and

1. See generally Baxter, "International Law in Her Infinite Variety" (1980) 29 I.C.L.Q. 549; Chinkin, "The Challenge of Soft Law: Development and Change in International Law" (1989) 38 I.C.L.Q. 850; Dupuy, "Soft Law and the International Law of the Environment" (1991) 12 *Michigan J.I.L.* 420; Sztucki, "Reflections on International Soft Law", in *de Lege* (1992), 365; Elias and Lim, "General Principles of Law, Soft Law and the Identification of International Law" (1997) 28 *Neths. Ybk. IL* 3.

2. See Schachter, "The Twilight Existence of Non-Binding International Agreements" (1997) 71 *A.J.I.L.* 296.

3. (1994) I.C.J. Rep. 112.

4. For example an agreement between a state and a multinational company: see *Anglo-Iranian Oil Case* (1952) I.C.J. Rep. 93.

“norms” or “principles”, which, being more open-textured or general in their content and wording can thus be seen as soft. From this perspective treaties may be either hard or soft, or both, as we shall see later in regard to the Convention on Climate Change. In this category it is the content of the treaty provision which is decisive in determining whether it is hard or soft, not its form as a treaty.

*(2) Soft law is law that is not readily enforceable through binding dispute resolution*

Here the contrast is between a treaty subject to compulsory adjudication in cases of dispute, such as the 1982 UN Convention on the Law of the Sea,<sup>5</sup> and a treaty or other instrument under which disputes can be referred unilaterally only to non-binding conciliation or a non-binding compliance procedure, such as the Montreal Protocol to the Convention on the Ozone Layer.<sup>6</sup> These examples represent only some of the gradations on a spectrum of possibilities, which shade ultimately into dispute avoidance, but in this category it is the character of the dispute resolution process which determines whether we have hard or soft law.

What is obvious from this discussion is that the distinction between treaty and soft law is not clear cut: a treaty can be both hard and soft, and in several different senses at once. Of itself this is neither contradictory nor problematic, so long as we are clear about what we mean when we use the terms hard and soft law. Bearing this caveat in mind, we can now explore the relationship between treaties and soft law more fully.

*3. Soft-Law as Non-Binding Law*

Reliance on soft law as part of the law-making process takes a number of different forms, including declarations of intergovernmental conferences, such as the Rio Declaration on Environment and Development; resolutions of the UN General Assembly, such as those dealing with outer space, the deep seabed, decolonisation, or permanent sovereignty over natural resources; or codes of conduct, guidelines and recommendations of international organisations, such as IAEA, IMO, UNEP or FAO. While the legal effect of these different soft law instruments is not necessarily the same, it is characteristic of all of them that they are carefully negotiated, and often carefully drafted statements, which are in some cases intended to have some normative significance despite their non-binding, non-treaty form. There is at least an element of good faith commitment, and in many cases, a desire to influence state practice and an element of law-making intention and progressive development. In this sense non-binding soft law instruments are not fundamentally different from those multilateral treaties which serve much the same law-making purposes. In this respect they may be both an alternative to and a part of the process of multilateral treaty-making.

*(1) Soft law as an alternative to law-making by treaty*

There are several reasons why soft law instruments may represent an attractive alternative to law-making by treaty. First, it may be easier to reach agreement

5. *Infra*, n.36.

6. *Infra*, n.40.

when the form is non-binding. Use of soft law instruments enables states to agree to more detailed and precise provisions because their legal commitment, and the consequences of any non-compliance, are more limited. Secondly, it may be easier for some states to adhere to non-binding instruments because they can avoid the domestic treaty ratification process, and perhaps escape democratic accountability for the domestic treaty ratification process, and perhaps escape democratic accountability for the policy to which they have agreed. Of course this may also make it comparably harder to implement such policies if funding, legislation, or public support are necessary. Thirdly, soft law instruments will normally be easier to amend or replace than treaties, particularly when all that is required is the adoption of a new resolution by an international institution. Treaties take time to replace or amend, and the attempt to do so can result in an awkward and overlapping network of old and new obligations between different sets of parties. One of the better examples of the confused state of the law which can result is the 1929 Warsaw Convention Relating to International Carriage by Air.<sup>7</sup> Lastly, soft law instruments may provide more immediate evidence of international support and consensus than a treaty whose impact is heavily qualified by reservations and the need to wait for ratification and entry into force.

Given the relative advantages of soft law over treaties, it is perhaps surprising that the multilateral treaty has until now been the International Law Commission's preferred instrument for the codification of international law.<sup>8</sup> Although a treaty basis may be required when creating new international organisations or institutions, or for dispute settlement provisions, soft law instruments appear to be just as useful a means of codifying international law as treaties. Provided they contain no binding dispute settlement clauses, the Commission's draft articles on the law of state responsibility could equally well be codified using either a General Assembly resolution or an intergovernmental declaration.<sup>9</sup> Indeed this may be more effective than using a treaty, which, like the Vienna Convention on the Law of Treaties, runs the risk of securing only a relatively small number of parties. The Commission's work on treaties is among its most successful and authoritative codifications, but it is difficult to suggest that this owes much to its treaty status, or to the number of states parties.

The argument for using a treaty rather than a soft law instrument is stronger in the case of new law-making, such as the re-negotiation of the law of the sea or the elaboration of human rights law, although in many of these cases institutions with extensive powers were also being established at the same time and a treaty was thus desirable in any event. But even for new law, non-binding instruments may still be useful if they can help generate widespread and consistent state practice and/or provide evidence of *opinio juris* in support of a customary rule. There are

7. See Gardiner, "Revising the Law of Carriage by Air: Mechanisms in Treaties and Contract" (1998) 47 I.C.L.Q. 278.

8. Articles 17 and 23 of the Statute of the Commission do refer expressly to the conclusion of conventions, but other possibilities are left open.

9. The Commission considered the eventual form of its draft articles at its 50th Session in 1998 but deferred a decision on whether to propose a convention or a declaration. It was noted that the dispute settlement provisions in part three of the draft could not be included in a declaration: see *Rept. of the I.L.C. (1998)*, Ch.7, para.224.

good examples of UN General Assembly resolutions and intergovernmental declarations having this effect in the *Nicaragua Case*,<sup>10</sup> the *Nuclear Weapons Advisory Opinion*,<sup>11</sup> and the *Gabcikovo-Nagymaros Dam Case*.<sup>12</sup>

What all of this suggests is that the non-binding form of an instrument is of relatively limited relevance in the context of customary international law-making. Treaties do not generate or codify customary law because of their binding form but because they either influence state practice and provide evidence of *opinio juris* for new or emerging rules, or because they are good evidence of what the existing law is. In many cases this is no different from the potential effect of non-binding soft law instruments. Both treaties and soft law instruments can be vehicles for focusing consensus on rules and principles, and for mobilising a consistent, general response on the part of states. Depending upon what is involved, treaties may be more effective than soft law instruments for this purpose because they indicate a stronger commitment to the principles in question and to that extent carry greater weight than a soft law instrument, but the assumption that they are necessarily more authoritative is misplaced. To take only one example, it is clear that the 1992 Rio Declaration on Environment and Development both codifies some existing international law and tries to develop some new law.<sup>13</sup> It is not obvious that a treaty with the same provisions would carry greater weight or achieve its objectives any more successfully. On the contrary, it is quite possible that such a treaty would, seven years later, still have far from universal participation, whereas the Declaration secured immediate consensus support, with such authority as that implies. At the same time, it seems clear that agreements such as those on climate change and biological diversity could only be in treaty form, because of the combination of their status as new law, their more detailed terms, and their institutional provisions. These are good examples of cases where because of the content of an agreement, incorporation in a treaty is the right option and does carry a greater sense of commitment than a soft law instrument.

## (2) *Soft law as part of the multilateral treaty-making process*

Some non-binding soft-law instruments are significant only because they are the first step in a process eventually leading to conclusion of a multilateral treaty. Examples are numerous, but they include the IAEA Guidelines<sup>14</sup> which formed the basis for the rapid adoption of the 1986 Convention on Early Notification of a Nuclear Accident following the Chernobyl accident; UNEP Guidelines on Environmental Impact Assessment<sup>15</sup> which were subsequently incorporated in the 1991 ECE Convention on Environmental Impact Assessment in a Transboundary Context; and UNEP's Guidelines on Land-based Sources of Marine

10. (1986) I.C.J. Rep. 14.

11. (1996) I.C.J. Rep. 241.

12. (1997) I.C.J. Rep. 7.

13. See A. E. Boyle and D. Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Prospects* (Oxford, 1999), Ch.1; Sands (ed.), *Greening International Law* (London, 1993), Chs.1 and 3.

14. IAEA/INFCIRC/321 (1985).

15. UNEP/GC14/25 (1987).

Pollution,<sup>16</sup> which provided a model for regional treaties such as the Kuwait Protocol.<sup>17</sup>

Other soft law instruments are used as mechanisms for authoritative interpretation or amplification of the terms of a treaty. This has occasionally been the role of General Assembly resolutions in regard to articles of the UN Charter, such as those dealing with decolonisation or the use of force.<sup>18</sup> The same task is performed more frequently by resolutions, recommendations and decisions of other international organisations, and by the conferences of parties to treaties. Thus it was a resolution of the parties to the Montreal Protocol to the Ozone Convention which first set out the terms of the non-compliance procedure provided for in the protocol.<sup>19</sup> The procedure was subsequently revised and then incorporated by amendment as an annex in the protocol,<sup>20</sup> showing again how non-binding soft law can often be readily transformed into binding form. Similarly, UNEP's Cairo Guidelines on the Transport of Hazardous Wastes<sup>21</sup> can be regarded as an amplification of the obligation of "environmentally sound management" provided for in the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes.<sup>22</sup>

Another important related role for soft law instruments is to provide the detailed rules and technical standards required for implementation of some treaties. Environmental soft law is quite often important for this reason, setting standards of best practice or due diligence to be achieved by the parties in implementing their obligations. These "ecostandards" are essential in giving hard content to the overly-general and open-textured terms of framework environmental treaties.<sup>23</sup> The advantages of regulating environmental risks in this way are that the detailed rules can easily be changed or strengthened as scientific understanding develops or as political priorities change. Such standards can of course be adopted in binding form, using easily amended annexes to provide flexibility, but this is not always what parties want. The IAEA has made particular use of formally non-binding ecostandards, through its nuclear safety codes and principles. These generally represent an authoritative technical and political consensus, approved by the Board of Governors or General Conference of the Agency. Despite their soft law status it is relatively easy to see them as minimum internationally endorsed standards of conduct, and to regard failure to comply as presumptively a failure to fulfil the customary obligation of due diligence in the regulation and control of nuclear activities.<sup>24</sup> However, because of the uncertainty

16. UNEP/WG.120/3 (1985).

17. 1990 Kuwait Protocol for the Protection of the Marine Environment Against Marine Pollution from Land-Gased Sources.

18. See *Western Sahara Advisory Opinion* (1975) I.C.J. Rep. 12; *Nicaragua Case* (1986) I.C.J. Rep. 14.

19. Decision II/5, UNEP/OzL.Pro/WG.3/2/2, Annex III (1990).

20. *Supra*, n.6.

21. UNEP/WG.122/3.

22. Article 4.

23. See P. Contini and P. H. Sand, "Methods to Expedite Environmental Protection: International Ecostandards", (1972) 66 A.J.I.L. 37.

24. The preamble to the Convention on Nuclear Safety recognises that internationally formulated safety guidelines "can provide guidance on contemporary means of achieving a high level of safety."

posed by this very soft approach to nuclear safety, the Convention on Nuclear Safety and the Joint Convention on the Safety of Spent Fuel and Radioactive Waste Management have now incorporated in binding treaty articles the main elements of IAEA's fundamental safety standards for nuclear installations, radioactive waste management and radiation protection, and most of its Code of Practice on the Transboundary Movement of Radioactive Waste.<sup>25</sup> Those remaining IAEA standards which retain a soft law status<sup>26</sup> will still be relevant when determining how the basic obligations of states parties to these agreements are to be implemented. Moreover, under the Joint Convention there is also an obligation on states parties to take account of relevant IAEA standards in adopting national law. These various agreements have significantly strengthened the legal force of IAEA standards and, in conjunction with non-binding soft-law safety standards, have created a more convincing legal framework for the international regulation of nuclear risks. They exemplify once again how soft-law and treaties can interact in a complex regulatory framework.

Some treaties give binding force to soft-law instruments by incorporating them into the terms of a treaty by implied reference. The 1982 UN Convention on the Law of the Sea makes extensive use of this technique, impliedly incorporating recommendations and resolutions of IMO, as well as treaties such as the 1973 MARPOL Convention, under provisions variously requiring or permitting states to apply "generally accepted rules and standards established through the competent international organisation or general diplomatic conference".<sup>27</sup> Thus although IMO has no power under its constitution to take formally binding decisions, UNCLOS may indirectly render some of these decisions obligatory.

Lastly, soft law instruments may operate in conjunction with a treaty to provide evidence of *opinio juris* for the possible emergence of a rule of customary international law. ICJ case law, including the *Nicaragua Case*, shows how the interplay between the UN Charter and resolutions of the General Assembly can have this effect.

These examples all point to the conclusion that the non-binding force of soft-law can be over-stated. In many of the above examples states are not necessarily free to disregard applicable soft-law instruments: even when not incorporated directly into a treaty, they may represent an agreed understanding of its terms. Thus, although of themselves these instruments may not be legally binding, their interaction with related treaties may transform their legal status into something more.

#### 4. *Soft Law as General Norms or Principles*

The point was made many years ago by the late Judge Baxter that some treaties are soft in the sense that they impose no real obligations on the parties.<sup>28</sup> Though

25. IAEA Safety Series No.110: *The Safety of Nuclear Installations* (Vienna, 1993); IAEA Safety Series No.111-F: *The Principles of Radioactive Waste Management* (Vienna, 1995); IAEA Safety Series No.120: *Radiation Protection and the Safety of Radiation Sources* (Vienna, 1996); IAEA GC (XXXIV)/939: *Code of Practice on the Transboundary Movement of Nuclear Waste* (1990).

26. E.g. the NUSS codes, IAEA GC (XXXII)/489 (1988).

27. 1982 UN Convention on the Law of Sea, Articles 207-212.

28. (1980) 29 I.C.L.Q. 549.



formally binding, the vagueness, indeterminacy, or generality of their provisions may deprive them of the character of "hard law" in any meaningful sense. This remains true. The Framework Convention on Climate Change provides a good example. Adopted at the Rio Conference in 1992, this treaty does impose some commitments on the parties, but its core articles, dealing with policies and measures to tackle greenhouse gas emissions, are so cautiously and obscurely worded and so weak that it is uncertain whether any real obligations are created.<sup>29</sup> Moreover, whatever commitments have been undertaken by developing states are also conditional on performance of solidarity commitments by developed state parties to provide funding and transfer of technology.<sup>30</sup> Such treaty provisions are almost impossible to breach and in that limited sense Judge Baxter is justified in calling them soft-law. More of a political bargain than a legal one, these are "soft" undertakings of a very fragile kind. They are not normative and cannot be described as creating "rules" in any meaningful sense. This is probably true of very many, if not most treaties, a point recognised by the International Court in the *North Sea Continental Shelf Case* when it specified that one of the conditions to be met before a treaty could be regarded as law-making is that it should be so drafted as to be "potentially normative" in character.<sup>31</sup>

There is, however, a second and more significant sense in which a treaty may be potentially normative, but still "soft" in character, because it articulates "principles" rather than "rules". Such principles do have legal significance in much the same way that Dworkin uses the idea of constitutional principles.<sup>32</sup> They may lay down parameters which affect the way court decide cases<sup>33</sup> or the way an international institution exercises its discretionary powers. They can set limits, or provide guidance, or determine how conflicts between other rules or principles will be resolved. They may lack the supposedly harder edge of a "rule" or an "obligation", but they are certainly not legally irrelevant. As such they constitute a very important form of law, which may be "soft", but which should not be confused with "non-binding" law.

The Convention on Climate Change once again provides some good examples of such principles explicitly included in a major treaty. Indeed, given how weak the rest of the treaty is, the principles found in Article 3 are arguably the most important "law" in the whole agreement because they prescribe how the regime

29. Especially Article 4(1) and (2). The United States' interpretation of these articles was that "there is nothing in any of the language which constitutes a commitment to any specific level of emissions at any time . . ." The parties determined at their first meeting in 1995 that the commitments were inadequate and they agreed to commence negotiation of the much more specific commitments now contained in the 1997 Kyoto Protocol.

30. Article 4(7).

31. (1969) I.C.J. Rep. 3.

32. R. Dworkin, *Taking Rights Seriously* (Oxford, 1977). This argument is developed by Sands, in, W. Lang (ed.) *Sustainable Development and International Law* (London, 1995), Ch.5.

33. See e.g. the International Court's reliance on the principle of sustainable development in the *Gabcikovo-Nagymaros Case*, on which see Lowe, in, A. E. Boyle and D. Freestone (eds) *International Law and Sustainable Development* (Oxford, 1999), Ch.2, and Boyle, "Gabcikovo-Nagymaros Case: New Wine in Old Bottles" (1997) 8 *Yearbook of International Environmental Law* 13.

for regulating climate change is to be developed by the parties. It is worth quoting the main elements of Article 3:

*Article 3: Principles*

In their actions to achieve the objective of the Convention and to implement its provisions, the parties shall be guided, *inter alia*, by the following:

1. The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities .....
3. The Parties should take precautionary measures to anticipate, prevent, or minimise the causes of climate change and mitigate its adverse effects .....
4. The Parties have a right to, and should, promote sustainable development .....

These elements of Article 3 are all drawn directly from the non-binding Rio Declaration on Environment and Development; they reflect principles which are not simply part of the Climate Change Convention, but which are also emerging at the level of general international law, even if it is as yet premature to accord them the status of customary international law. They are not expressed in obligatory terms: the use of "should" qualifies their application, despite the obligatory wording of the chapeau sentence. All of these principles are open-textured in the sense that there is considerable uncertainty concerning their specific content and they leave much room for interpretation and elaboration. They are not at all like rules requiring states to conduct an environmental impact assessment, or to prevent harm to other states.

Given their explicit role as guidance and their explicitly softer formulation, the "principles" in Article 3 are not necessarily binding rules which must be complied with or which entail responsibility for breach if not complied with; yet, despite all these limitations they are not legally irrelevant.<sup>34</sup> At the very least Article 3 is relevant to interpretation and implementation of the Convention as well as creating expectations concerning matters which must be taken into account in good faith in the negotiation of further instruments.

Article 3 takes a novel approach to environmental protection, but in the context of a dynamic and evolutionary regulatory regime such as the Climate Change Convention it has the important merit of providing some predictability regarding the parameters within which the parties are required to work towards the objective of the Convention. In particular, they are not faced with a completely blank sheet of paper when entering subsequent protocol negotiations or when the Conference of the Parties takes decisions under the various articles empowering it to do so. Thus it is significant that the relevance of Article 3 was reiterated in the mandate for negotiation of the Kyoto Protocol<sup>35</sup> and is referred to in the preamble to the Protocol. It is a nice question whether the parties collectively are entitled to disregard the principles contained in Article 3, or what the legal effect of decisions which do so may be, but however weak it may seem, parties whose interests are affected do have a right to insist on having the principles of Article 3 taken into account. Sustainable development, intergenerational equity, or the precautionary principle, are all more convincingly seen in this sense: not as binding obligations

34. See the debate between Sands and Mann in W. Lang (ed.) *Sustainable Development and International Law* (London, 1995), 53–74.

35. The so-called "Berlin mandate": Decision 1/CP.1, in *Report of the Conference of the Parties on its 1st Session*, UN Doc.FCCC/CP/1995/7/Add.1.

which must be complied with, but as principles, considerations or objectives to be taken account of—they may be soft, but they are still law.

### 5. *Soft Enforcement*

Another way of distinguishing hard and soft law is to focus not on questions of form or content but on methods of dispute settlement in case of non-compliance. What might be called hard enforcement is characterised most obviously by compulsory binding settlement of disputes. The 1982 UN Convention on the Law of the Sea is one of the foremost examples of a treaty which is subject to hard enforcement through a sophisticated scheme of compulsory dispute settlement involving both the ICJ and the International Tribunal for the Law of the Sea, as well as various forms of arbitration.<sup>36</sup> The Convention also affirms that states are responsible in international law for the performance of their environmental obligations under the Convention,<sup>37</sup> and in various circumstances it gives them either the power or the duty to use their own criminal law to enforce internationally agreed rules and standards against ships.<sup>38</sup> All of these elements add up to a treaty which is hard in every sense of the term.

The contrasting model of “soft enforcement”, or “dispute avoidance”, is one in which problems are referred to non-binding conciliation before an independent third party, or to some form of non-compliance procedure involving other parties to the treaty.<sup>39</sup> In both situations there is an attempt to find an agreed solution, rather than to engage in adversarial litigation or claims for reparation. Soft enforcement characteristically evades issues of responsibility for breach, and relies on a combination of inducements or the possibility of termination or suspension of treaty rights to secure compliance.

36. See Part XV, on which see Boyle, “Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction” (1997) 46 I.C.L.Q. 37; R. Churchill, “Dispute Settlement in the Law of the Sea and Alternatives to it”, in M. Evans (ed.) *Remedies in International Law: The Institutional Dilemma* (Oxford, 1998), 85; J. Merrills, *International Dispute Settlement* (3rd ed. Cambridge, 1999), Ch.8; R. Churchill and A. V. Lowe, *The Law of the Sea* (3rd ed., Manchester, 1999), Ch.19; L. Sohn, *Settlement of Law of the Sea Disputes* (1995) 10 *Int. J. of Marine and Coastal Law* 205; A. Adede, *The System for Settlement of Disputes Under the UNCLOS* (Dordrecht, 1987); E. D. Brown, “Dispute Settlement and the Law of the Sea: The UN Convention Regime” (1997) 21 *Marine Policy* 17.

37. Article 235(1).

38. Articles 216–18, 220.

39. See Adede, in W. Lang, (ed.) *Sustainable Development and International Law* (London, 1995), Ch.8; Birnie, “Legal Techniques of Settling Disputes: The Soft Settlement Approach”, in W. E. Butler (ed.) *Perestroika and International Law* (Dordrecht, 1990), 177; Gehring, “International Environmental Regimes: Dynamic Sectoral Legal Systems” (1990) 1 *Yearbook of International Environmental Law*, 35; Handl, “Controlling Implementation of and Compliance with International Environmental Commitments: The Rocky Road From Rio”, (1994) 5 *Colorado JIELP* 327; Kiss, “Compliance with International and European Environmental Obligations” (1996) *Hague Yearbook of International Law* 45; Lang, “Compliance Control in International Environmental Law” (1996) 56 *ZaöRV* 685.

Soft enforcement is best exemplified by the non-compliance procedure adopted by parties to the 1987 Montreal Protocol to the Ozone Convention.<sup>40</sup> This procedure, adopted in 1990 and revised in 1992, can be invoked by any party to the protocol, or by the protocol secretariat, or by the party itself, wherever there are thought to be problems regarding compliance. The matter is then referred for investigation to an Implementation Committee consisting of 10 parties elected on the basis of equitable geographical representation. The main task of this committee is to consider the submissions, information and observations made to it with a view to securing an amicable solution of the matter on the basis of respect for the provisions of the Protocol. This is very similar to the provision for negotiation of a friendly settlement under the European Convention on Human Rights.<sup>41</sup> The Implementation Committee can seek whatever information it needs through the secretariat; for this purpose it may also visit the territory of the party under investigation if invited to do so. A report is then made to the full Meeting of the Parties, which decides what steps to call for in order to bring about full compliance. These can include the provision of appropriate financial, technical, or training assistance in order to help the party to comply. If these measures are insufficient, cautions can be issued, or, as a last resort, rights and privileges under the treaty can be suspended in accordance with the law of treaties. A very similar procedure has been adopted under the 1979 Convention on Long Range Transboundary Air Pollution.<sup>42</sup>

The non-compliance procedure has been invoked on several occasions by parties to the Montreal Protocol who are in difficulty, notably Russia and a number of other states from the former Soviet Union, where problems of non-compliance have been the most serious. Various measures have been recommended by the Meeting of the Parties, including the provision of assistance,

40. Article 8, and Annex IV, as adopted at Copenhagen in 1992. The process is described in UNEP, *Report of the Implementation Committee for the Montreal Protocol, 20th Meeting*, UNEP/OzL.Pro/Imp/Com/20/4, paras.24-33, and Yoshida, "Soft Enforcement of Treaties: The Montreal Non-Compliance Procedure and the Functions of the Internal International Institutions" (1999) 10 *Colorado JIELP* 95.

41. 1950 European Convention on Human Rights, Article 28 provided that the Commission on Human Rights "shall place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention."

42. See Decision 1997/2, in, UNECE, *Report of the 15th Session of the Executive Body* (1997), Annex III and Szell, "The Development of Multilateral Mechanisms for Monitoring Compliance", in, W. Lang (ed.), *Sustainable Development and International Law* (London, 1995), 97.

GEF funding, and the issuing of cautions.<sup>43</sup> Further funding from the GEF has also been conditional on the Meeting of the Parties certifying that progress is satisfactory. The effect has been to secure compliance, albeit at the cost of some delay in implementation.

There is also provision in Article 18 of the Kyoto Protocol to the Framework Convention on Climate Change for a non-compliance procedure to be negotiated. Developing a process capable of handling the more complex commitments undertaken for climate change is not straightforward and none had yet been agreed at the time of writing.<sup>44</sup> However, the Climate Change Convention has created another innovation in "soft settlement" through the provision for a "multilateral consultative process" to resolve questions regarding implementation.<sup>45</sup> This process can be extended to the Kyoto Protocol if the parties so decide. It is intended to be an even softer form of dispute avoidance than the Montreal Protocol non-compliance procedure; conducted by a panel of experts, rather than by other member states, it is non-judicial in character, non-confrontational, and advisory rather than supervisory. No sanctions of any kind can be imposed, not even suspension of rights and privileges; there is power only to recommend measures to facilitate co-operation ad implementation and to clarify issues and promote understanding of the Convention. As in the Montreal Protocol non-compliance procedure, parties may bring questions concerning their own implementation or that of other parties to the Multilateral Consultative Committee; the Conference of the Parties may also do so.

This new process represents a further move away from formal, binding, third party dispute settlement in favour of procedures that facilitate compliance but cannot compel it. Like the Montreal Protocol procedure it tries to resolve problems, differences, or disputes, through political rather than judicial processes, relying on negotiation and persuasion, rather than formal findings of breach of treaty or responsibility. "Soft enforcement" of this kind is not confined to environmental agreements; it has however been criticised by Koskeniemi for undermining the binding character of the treaties concerned and setting them

43. See UNEP, *Report of the 7th Meeting of the Parties to the Montreal Protocol*, Decisions VII/15-19 (Poland, Bulgaria, Belarus, Russia, Ukraine) UNEP/OzL.Pro.7/12 (1995); *idem*, *Report of the 8th Meeting*, Decisions VIII/22-25 (Latvia, Lithuania, Czech Republic, Russia) UNEP/OzL.Pro.8/12 (1996); *idem*, *Report of the 9th Meeting*, Decision IX/29-32 (Latvia, Lithuania, Russia, Czech Republic) UNEP/OzL.Pro.9/12 (1997). For the most recent position see *Report of the Implementation Committee for the Montreal Protocol, 20th Meeting*, UNEP/OzL.Pro/ImpCom/20/4 (1998). See generally Werksman, "Compliance and Transition: Russia's Non-Compliance Tests the Ozone Regime" (1996) 36 *ZaRV* 750; Victor, *The Early Operation and Effectiveness of the Montreal Protocol's Non-compliance Procedure* (Vienna, 1996); R. Benedick, *Ozone Diplomacy* (London, 1998 edition), Ch.17; O. Yoshida, "Soft Enforcement of Treaties: The Montreal Protocol's Noncompliance Procedures" (1999) 10 *Colorado JIELP* 95.

44. The problems are discussed in Werksman, *Responding to Non-Compliance Under the Climate Change Regime* (OECD, 1998) *idem*, in, Cameron, Werksman, Roderick (eds), *Improving Compliance with International Environmental Law*, 85ff.

45. 1992 UNFCCC Article 13; 1997 Kyoto Protocol Article 16. For details of the process see *6th Report of the Ad Hoc Working Group on Article 13* (1998) UN Doc.FCCC/AG13/1998/2.

apart from "normal" treaties.<sup>46</sup> It does give us, as we have seen, another category of "soft" treaty. Why do states employ these techniques of soft enforcement for certain treaties? There are several reasons.

First, like non-binding instruments, it facilitates agreement on rules or commitments which are hard in content. These rules or commitments do have the binding force of a treaty, with all that implies in terms of a sense of obligation, but the consequences of non-compliance are not as severe or potentially troublesome as they would be if there were compulsory binding adjudication in every case of dispute or alleged non-compliance. This may be important in areas such as climate change, where compliance may not be equally easy for all states, or where the capacities of states differ. It allows some leeway for parties in difficulty, while the emphasis on co-operation is consistent with broader notions of solidarity which underlie many modern environmental agreements. Secondly, soft enforcement is more suited to a regulatory approach which emphasises prevention of problems rather than reparation after the event. Thirdly, where, as in the case of climate change or ozone depletion, non-compliance affects all parties to the treaty equally, there is considerable merit in designing a process for securing compliance which is multilateral in character and which allows all parties, as well as NGOs, to participate, and which ensures that all interests are adequately represented. Although it is possible to accommodate a multiplicity of parties and NGOs in judicial proceedings,<sup>47</sup> it is not easy to do so, and an adversarial procedure is not well suited to the resolution of the kind of non-compliance problems likely to arise under global environmental treaties. Lastly, soft enforcement typically facilitates more readily than judicial processes the necessary input of scientific and technical expertise required to deal with issues of compliance under agreements of this kind. That is probably the major contribution of the processes of review developed under the Ozone and Climate Change Conventions.

None of this is to deny that hard settlement should remain an option under any of these treaties, in case the parties to a dispute should choose to resort to it. The evidence referred to earlier suggests that Koskenniemi's scepticism may be misplaced with regard to the operation of the Montreal Protocol's non-compliance procedure. Whether the same judgment can in due course be made in relation to the much more difficult and complex problem of climate change remains to be seen. It is of course wise to avoid disputes regarding compliance with treaties, or with softer instruments, but it is also necessary to have some assurance that they can be resolved, if not by persuasion and negotiation, then by some other authoritative process. From that perspective hard and soft enforcement are perhaps better seen not as alternatives but as complementary to each other.

46. Koskenniemi, "Breach of Treaty or Non-Compliance?" (1992) 3 *Yearbook of International Environmental Law* 123.

47. See for example the *Nuclear Weapons Advisory Opinion* (1996) I.C.J. Rep. 241, in which some 40 states made written or oral submissions to the court. In contentious cases involving the construction of a multilateral convention all parties to the convention have a right to intervene in the proceedings, and the construction so given will be equally binding on such states: Statute of the I.C.J., Article 66. It should be noted, however, that an allegation of non-compliance is not necessarily a question of construction.

### 6. Conclusions

Soft law is manifestly a multi-faceted concept, whose relationship to treaties is both subtle and diverse. It presents alternatives to treaties in certain circumstances, at other times it complements them, while also providing different ways of understanding the legal effect of different kinds of treaty. Those who maintain that soft law is simply not law have perhaps missed some of the points made here; moreover those who see a treaty as necessarily having greater legal effect than soft law have perhaps not looked hard enough at the "infinite variety" of treaties, to quote Baxter once more. Soft law in its various forms can of course be abused, but so can most legal forms, and it has generally been more helpful to the process of international law-making than it has been objectionable. It is simply another tool in the professional lawyer's armoury.

A. E. BOYLE\*

## CONSTITUTIONAL JUDICIARY IN CENTRAL EUROPE AND THE EUROPE AGREEMENT: DECISION 30/1998 (VI.25) AB OF THE HUNGARIAN CONSTITUTIONAL COURT

### *Introduction*

Against a background of increasingly intense legal harmonisation and with the prospects of Central European accession to the EU drawing ever closer, a recent decision of the Hungarian Constitutional Court, *Dec.30/1998 (VI.25) AB*<sup>1</sup> has highlighted the constitutional implications of applying EC law in the domestic system of an associate state. The judgment itself concerned the constitutionality of the competition provisions of the EC-Hungary Europe Agreement ("EA") together with Decision 2/96 of the Association Council on the relevant Implementing Rules ("IR"). While the Hungarian court is not the first of its type in an associate state to deal with the effect internally of an Association Agreement,<sup>2</sup> nevertheless its decision offers certain insights into the judicial response to the integration process in Central Europe.

### *The legal context of the petition*

Hungary has generally adopted a dualist approach to international treaties in the domestic system. Since the adoption of the Constitution in 1949<sup>3</sup> to the early 1980s, the reception of treaties continued on a statute-by-statute basis (or, more accurately, on a legal norm-by-norm basis), the process finally being regulated

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1. Reported in the *Hungarian [Official] Gazette, Magyar Közlöny* 1998/55, p.4565.

2. See Decision of Slovene Constitutional Court on the EA, 5 June 1997, No.Rm-1/97 (admittedly this referred to a pre-ratification amendment of the Constitution) and several decisions of the Austrian Constitutional Court in respect of the EEC-Austria Agreement, including VfGH 15 Dec. 1993, B 945/91: (1994) 116 *JBl.* 678.

3. Which did not contain any mention of international law until amended due to the change of regime in 1989/90.