HARD LAW VS SOFT LAW IN THE INTERNATIONAL CLIMATE CHANGE REGIME

Based on

Francesco Sindico and Julie Gibson: “Soft, Complex and Fragmented International Climate Change Practice: What Implications for International Trade Law?”
The current international climate change regime is characterized by soft and hard law instruments that are governing the issue of global warming. That was the only choice that the international community had to ensure minimum agreement between all the parties in order to unify the actions aiming at tackling climate change. In a way, one could say that the international community adopted an adaptive approach allowing thus the gradual progress of the climate change debate in the last decades despite the huge obstacles encountered as a result of the individual interests of the main states emitting Greenhouse Gas (GHG). These states along with others have to also balance between several issues that would reveal contradictory in practice such as environmental concerns in this case climate change and economic growth that is necessary to the well functioning of the society and legitimacy of the regime and governments. In the chapter “Soft, Complex, and Fragmented International Climate Change Practice: What Implications for International Trade Law,” the authors Francesco Sindico and Julie Gibson examined the evolution of climate change law since the beginning. In this regard, the authors aimed at analyzing whether the international climate change agreements adopted as a result of the international consensus constitute hard or soft law instruments and the actual relevance of that on the states’ obligations when it comes to applying the provisions of the agreement that it was agreed upon between the different parties. The authors in the chapter made several observations in this context. In the case of a hard law instrument such as the United Nations Framework Convention on Climate Change (UNFCCC), it was noticed that the provisions of the agreement were drafted expressly in an ambiguous way as to provide the necessary flexibilities to the states when it comes to the application of the obligations. As such, the UNFCCC is considered as a hard law instrument but with soft law commitments. In other words, the provisions are so broad that in fact there are no specific obligations written and directed to the states signing or ratifying the agreement. The legislator has made it expressly in order to ensure that there will be the possibility of reaching a maximum consensus among all the member states. Likewise, it will possible to reach the necessary number of state signatures requested for making the agreement valid in the international sphere. In the same time, for instance, the UNFCCC has also included provisions that allow the creation of protocols in the form of hard law instruments with hard law commitments. This is precisely what happened with the adoption of the Kyoto protocol which is considered as an international mandatory legal instrument where states signing the protocol has clear binding obligations which they must respect otherwise be subject to penalties stated in the protocol. In the case of having hard law commitments, it is very hard to ensure that all the important countries will actually sign or ratify the protocol. For instance, the United States (US) withdrew from the protocol in 2001 before ratification. As such, one can understand why it is important to have both approaches when dealing with international climate change negotiations that might lead to new agreements tackling global warming.
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