

# Soft Law, Hard Law, and Effective Implementation of International Environmental Norms

---

*Jon Birger Skjærseth, Olav Schram Stokke and  
Jørgen Wettestad*

## Introduction

The study of institutional interplay in international environmental governance is increasingly pervasive.<sup>1</sup> So far, however, little systematic attention has been given to an important part of this field—the interaction between soft law and hard law. Contributions on soft and hard law in international governance tend to discuss these types of law separately, or as an evolutionary process from soft to hard law in one issue area or within one institution.<sup>2</sup> This article expands the study of soft and hard law to the interplay between *different* institutions operating in the same problem-area, such as multinational environmental agreements and the European Union. By doing so, we explore and identify mechanisms that have received scant attention in the study of the relationship between different types of law and effectiveness. “Soft law” refers to international norms that are deliberately non-binding in character but still have legal relevance, located “in the twilight between law and politics.”<sup>3</sup> Important examples are resolutions by international organizations and international plans of action or codes of conduct. The essence of “hard law” is legally binding obligations. Other dimensions sometimes considered when evaluating the “hardness” of legal commitments are precision—unambiguity with respect to the conduct required, authorized, or proscribed—and delegation of authority to third parties for interpreting and implementing the law.<sup>4</sup>

This article explores the validity of two propositions on the relationship between soft law, hard law, and institutional effectiveness.<sup>5</sup> The first proposition

1. For recent contributions, see Oberthür and Gehring 2006; Young 2002; and Stokke 2001.
2. See e.g. Abbott and Snidal 2000; Thürer 2000; and Sand 1991.
3. Thürer 2000, 452–454.
4. Abbott and Snidal 2000, 421.
5. The article draws on certain parts of material published in Skjærseth 2006; Stokke and Coffey 2006; and Wettestad 1998, 2002, 2004.

is that ambitious soft law institutions can serve to strengthen institutions based on hard law that regulate partly overlapping activities or member sets. Several arguments can be proffered to support it. One revolves around contracting costs:<sup>6</sup> international acceptance for ambitious norms is easier to obtain in soft law processes than in negotiations of binding rules. Among other things, domestic ratification is not required for soft law adoption and the difficult matter of compliance is less central—both of which usually imply greater leeway for negotiators who attend international conferences.<sup>7</sup> Another argument is that soft law will set the pace for subsequent hard law development—partly because ambitious soft law norms may put pressure on “laggards” in negotiations over hard law rules or provide salient solutions for negotiators engaged in integrative bargaining.<sup>8</sup>

A second proposition is that transformation or incorporation of ambitious soft law norms into hard law institutions will strongly improve the implementation of those norms. Again, several theoretical arguments may justify the proposition. Binding rules are negotiated more thoroughly and are scrutinized more carefully by those who will be responsible for their implementation, better reflecting that which states are prepared to put into life.<sup>9</sup> Moreover, binding rules involve more credible commitments and are often accompanied by more stringent procedures for verification, review and response.<sup>10</sup>

Strong norms and serious implementation are decisive ingredients in effective environmental governance: an international institution is effective if it contributes significantly to solving the problems that motivated its establishment, notably by shaping the behavior of relevant target groups.<sup>11</sup> Three empirical cases on, respectively, marine pollution, transboundary air pollution, and fisheries subsidy control are examined to shed light on these propositions. These cases are selected for two main reasons. First, they display similarity with regard to the phenomenon under scrutiny. In all cases, there is significant interplay between distinct institutions based on different types of law within the same problem-area. Second, these cases differ on other key variables. They span a range of sectors (major sources of land- and vessel-based pollution, fisheries, and trade), vary in terms of policy saliency, include interplay in different operational stages (agenda setting, regulation and implementation) and differ in their spatial scope: the fisheries subsidy case is global, the transboundary air pollution case is semi-regional and the marine pollution case is regional. This allows us to explore some of the implications of such differences; and findings that hold across our cases can be assumed to be relatively robust to variation in

6. Abbott and Snidal 2000, 434–436.

7. Sand 1991.

8. Young 1989.

9. Chayes and Chayes 1993; and Thürer 2000.

10. Abbott and Snidal 2000, 427–8; and Downs, Rocke, and Barsoom 1996.

11. See Underdal 1992. These two dimensions are often referred to as problem-solving effectiveness and behavioral effectiveness.

institutional contexts. That said, we certainly do not claim that our sample of cases is representative of the expanding universe of environmental and resource-management regimes or that findings can be readily generalized beyond it.

## Protecting the Northeast Atlantic

The collective workings of the soft law declarations adopted by the International North Sea Conferences (INSC) and legally binding norms under the Oslo and Paris (OSPAR) commissions and the European Union (EU) have proved instrumental in two ways. First, the INSC declarations have sped up decision-making and strengthened OSPAR and EU rules. Second, OSPAR, and particularly the EU, have in turn improved domestic implementation of the original INSC declarations.

### *Speeding up OSPAR and EU Decision Making by the INSCs*

By the early 1980s there were growing indications that certain parts of the North Sea were becoming severely polluted. Neither OSPAR nor EU developments suggested that any stringent international commitments would be initiated without additional political impetus. Against this backdrop, Germany initiated the first ministerial-level INSC in 1984. Three years later, a breakthrough came at the second INSC: the London Declaration was a turning point particularly with respect to dumping and incineration of hazardous substances at sea. The eight North Sea states and the EU Commission decided to phase out dumping of industrial waste by the end of 1989. Commitments covering land-based sources of phosphorus, nitrogen and hazardous substances were subject to similar targets—a substantial reduction in the order of 50 percent between 1985 and 1995. The 1990 Hague Declaration clarified and strengthened the London targets, especially concerning land-based sources. In the mid-1980s, only a few substances had been under international regulation, and even fewer were subject to elimination. One decade later, the 1995 Esbjerg Declaration committed states to move towards the target of phasing out all emissions of hazardous substances within 25 years.

Why did this breakthrough on nutrients, hazardous substances, dumping and incineration at sea occur within the INSCs and not in OSPAR or the EU? The INSCs rectified two weaknesses of existing institutions. First, OSPAR covered the entire North-East Atlantic, whereas the pressing ecological problems concerned the North Sea. Second, OSPAR and the EU lacked political momentum and decisions required unanimity at the time. The INSCs first induced a change in membership. The scope of OSPAR implied that Mediterranean states such as Portugal and Spain, without any strong interests in North Sea pollution control, could unite with the UK and block ambitious proposals by the majority. In essence, the INSCs excluded the non-North Sea states and left the UK

alone as a laggard. The position of the UK rested upon its dedicated defense of Environmental Quality Objectives, which in turn was closely linked to the fact the UK was a net exporter of marine pollution due to the counter-clockwise direction of the North Sea currents.

Changes in membership were not sufficient to break the deadlock since the UK remained within the INSCs. However, the INSCs also changed the institutional set-up. First, the INSCs were based on ministerial representation, a circumstance which improved the conditions for exerting political pressure on the UK. Second, INSC declarations could take immediate effect since commitments were political only—while the adoption of proposed amendments submitted to OSPAR or to EU rules could take many years. Third, norms articulated in INSC declarations were precise, facilitating their verification. In contrast to OSPAR, the INSCs systematically reviewed the achievements of the preceding declarations by preparing comprehensive progress reports on measures taken by each country as well as reductions in emissions from each country. This raised the level of transparency and generated pressure on the UK by environmental organizations as well as the more ambitious states. As a consequence of the increasing political costs involved, the UK accepted the precautionary principle and the Uniform Emission Standards in a 1988 position paper which had far reaching implications for both the UK and the North Sea cooperation particularly with regard to dumping and hazardous substances.<sup>12</sup>

Several other factors contribute to explaining the pattern witnessed but cannot fully account for them. First, the exceptional 1988 and 1989 toxic algae blooms and seal epidemics led to a sense of crisis in the cooperation. But these crises cannot explain the 1987 breakthrough, however, since they occurred later. Second, public concern for the environment increased significantly throughout Europe in the latter part of the 1980s, particularly after 1987.

Although containing far-reaching commitments, the INSC declarations were not legally binding for the parties. Since ministers come and go as governments change, the political declarations carried a risk of ending up as “paper tigers.” This was avoided by transforming the declarations into legally binding commitments under OSPAR and the EU. OSPAR took action on several fronts. Dumping and incineration at sea were banned and discharges of hazardous substances and nutrients were addressed systematically, including best environmental practices on diffuse sources, and best available technology on industrial point sources. The EU adopted several directives on nutrients in the wake of the North Sea Declarations, including the Nitrates Directive. In 2000, the EU adopted the Water Framework Directive which included the aim of eliminating emissions of hazardous substances. These and other responses by OSPAR and EU to the North Sea Declarations also extended the geographical coverage of the declarations to the larger EU area and the Northeast–Atlantic region.

12. Skjærseth 2000, 124.

*Strengthening INSC Implementation through EU Law*

Commencing with the 1995 conference in Esbjerg and continuing with the most recent INSC in Bergen 2002, the conferences identified previously adopted OSPAR decisions and particularly EU directives as the principal instruments for reaching declaration targets.

The North Sea states had particular problems with achieving the 50 percent reduction target for nitrogenous substances. These implementation problems were mainly caused by strong farming lobbies and a conflict of interests between environmental and agricultural authorities. However, the 1987 INSC declaration triggered the adoption of the EU Nitrates Directive. In 1988, the Council adopted a resolution specifically related to the protection of the North Sea, requesting the Commission to take action on nutrients. Although the Nitrates Directive is an extremely poor example of effective EU implementation, it illustrates that the EU has more powerful tools at its disposal than OSPAR and the INSCs when states fail to comply. In cases of non-compliance, OSPAR has more competence than the INSCs due to its legally binding nature while the EU has greater competence than OSPAR owing to its supranational nature. When the EU acts, it does so with significantly greater force than traditional institutions, also because the compliance instruments at its disposal are more powerful.<sup>13</sup> Concerning enforcement, the main formal difference between the INSCs/OSPAR and the EU is that EU directives impose legal obligations directly upon the member states. Failure to comply with EU law can be pursued in national courts which are required to interpret domestic laws in accordance with EU law.<sup>14</sup> A failure to do so can even result in awarding damages to individuals who have suffered loss as a consequence.

The enforcement powers of the European Court of Justice are also unique. The Court has developed a number of principles affecting national law, policies, and how EU policies are to be applied. By way of illustration, in October 1997 the EU Environment Commissioner, Ritt Bjerrgaard, made a strong plea for better implementation of the Nitrates Directive. The EU Parliament issued a resolution in late 1998 where it was stated that the Parliament was "shocked by the lack of progress" in implementing the nitrate law and called for action from governments, the Commission and farmers. In 2000, 13 of the 15 member states were facing legal proceedings in accordance with the EU infringement procedure.

EU members have been summonsed before the court for a number of different reasons. Germany, for example, had prepared an action plan as required by the law, but the plan was considered "insufficient" in its provisions for allowable storage capacities of livestock manure and failing to calculate maximum fertilizer application rates. In December 2000, the UK was found by the Euro-

13. Tallberg 2002.

14. i.e., sympathetic interpretation; Skjærseth and Wettestad 2002.

pean Court of Justice to have implemented the Nitrates Directive too narrowly. As a result, one year later the ministry of the Environment proposed measures to bring England and Wales into compliance with the directive. During 2003, the Commission continued to take action over bad application of the directive by a number of member states.

## **Reducing Transboundary Air Pollution**

This section argues that due to vagueness and inadequate scientific basis, NO<sub>x</sub> soft law did little to speed up and strengthen initial, corresponding decision-making on hard law.

The substantial strengthening of NO<sub>x</sub> hard and supra-national law that occurred in the late 1990s was based on synergistic capacity-building between the Convention on Long-Range Transboundary Air Pollution (CLRTAP) and the EU that produced the scientific underpinning lacking in the 1980s. In this latter process NO<sub>x</sub> soft law may have functioned as a mild inspiration for the negotiators, some of them active also in the 1980s.

### *Why No<sub>x</sub> Soft Law Initially Did Little To Strengthen Hard Law*

The NO<sub>x</sub> negotiations under CLRTAP started in 1986. A group of five countries—the Federal Republic, Austria, Switzerland, the Netherlands and Sweden—launched a proposal calling for 30 percent emissions reductions by 1995, with a 1985 baseline. Hence, they formed a “NO<sub>x</sub> club,” somewhat similar to the club of countries pushing for 30 percent reductions of sulphur dioxide emissions in the previous CLRTAP negotiation process. Other countries were less interested in reductions. The UK, Norway and Finland were only prepared to discuss a freeze of emissions: some countries, including the Socialist bloc, the US, Canada and Italy, were skeptical even to a freeze.

The 30 percent NO<sub>x</sub> club achieved insufficient support during the negotiations. By early 1988, a general consensus had emerged for stabilizing emissions at 1987 levels. However, the 30 percent club, together with Denmark and Canada, argued for an early 1990 target date, while most others favored 1994 as the target date. The resulting NO<sub>x</sub> Protocol, adopted in Sofia in November 1988, called for a freeze of NO<sub>x</sub> emissions at the 1987 baseline (or other specified baselines subject to certain conditions) as from 1994. Moreover, the Protocol contained a general agreement to develop the concept of “critical loads,” to negotiate further reductions of regulated substances, and a substantial technical annex. Twenty-five countries signed the Protocol. Simultaneous to the adoption of the Protocol, but as a distinctly separate step, a group of twelve European countries signed a Political Declaration calling for NO<sub>x</sub> reductions “in the order of 30 percent” by 1998, with a chosen baseline year between 1980 and 1986. This group did not include the UK, but other previous laggards such as Norway and Italy reluctantly signed up. The diffuse and flexible design of the Declara-

tion and lack of specific follow-up apparatus probably made states worry little about compliance and critical performance review.

Did the soft law Declaration strengthen the ambitiousness of the hard law Protocol? First, in one sense, simple timing prevented a very strong direct effect as the declaration was adopted after the Protocol. However, as indicated above, the 30 percent target was very much alive, particularly during the final stage of the negotiations, although it failed to become a focal point around which countries rallied as in the earlier sulphur-dioxide process. The NO<sub>x</sub> problem had a much shorter scientific history and hence was far less well understood, and emission sources were more numerous and complex. This made countries more hesitant to support a significant cut in NO<sub>x</sub> emissions. Nevertheless, as some countries were skeptical, even to a freeze, it is likely that the existence of the relatively ambitious 30 percent option made it easier for the frontrunners to portray the freeze option as a compromise.

Did development within the all-European context then influence the EU's NO<sub>x</sub>-policy development? Although half of the NO<sub>x</sub> 30 percent Declaration's signatories were EU members, available evidence points in a negative direction. Negotiations on EU vehicle emissions standards seem to have developed primarily according to internal EU policy dynamics. Moreover, these standards and the Large Combustion Plant (LCP) Directive were policy instruments of a more specific and technical nature than the rather loose declaration call.

#### *NO<sub>x</sub> Soft Law Not Turned Into Hard Law But Still Some Effect?*

The NO<sub>x</sub> Declaration target was not turned into hard and supra-national law in the first half of the 1990s. But being more ambitious, did it stimulate NO<sub>x</sub> implementation more generally? When the CLRTAP summed up the overall Protocol implementation situation in a 1999 review, 17 of the 26 Parties had achieved the Protocol target in each of the years 1994–96.<sup>15</sup> With respect to the declaration, the same review indicated that only three of the twelve countries had achieved the target; most of the others achieved only modest reductions.<sup>16</sup>

Did international instruments (and the interplay between them) play any significant role for bringing about these results?<sup>17</sup> Norway—a signatory to both the Protocol and the Declaration but outside the EU—achieved approximately a five percent emissions cut by the mid-1990s. Environmental authorities tried to use the 30 percent declaration target to bolster the case for adopting effective Norwegian NO<sub>x</sub> implementation measures—but largely failed, losing out to powerful Norwegian shipping and petroleum-production interests. Moreover,

15. ECE/CLRTAP 1999, 75.

16. The CLRTAP 1999 Review only had figures from 1996. Based on these figures, Sweden, Austria and Belgium achieved 30 percent reductions (the two latter due to high 1980 emissions).

17. For more detailed examination of these cases, see Wettestad 1998 and 2004; also Underdal and Hanf 2000.

by the mid 1990s, the green tide had waned, both among the general public and among political parties, and the issue of climate change had crowded out many other environmental issues.<sup>18</sup> These latter developments complicated strong NO<sub>x</sub> implementation in the 1990s more generally.

The Netherlands, a signatory to both the Protocol and the Declaration and an EU member, achieved a 10 percent emissions cut by the mid-1990s. Neither the Protocol nor the more ambitious declaration targets seemingly played any significant role as the Dutch had established even more ambitious domestic targets.<sup>19</sup> Although industry achieved respectable reductions, increases in emissions from freight traffic offset the achievements of other sectors.<sup>20</sup>

The UK—signatory to the Protocol but not to the Declaration, and an EU member—achieved a 20 percent emissions cut by the mid-1990s, much more, in fact, than most of the signatories to the declaration. The main explanation for this was the “dash-to gas” process in which coal-fired power stations switched to gas. This was largely driven by other concerns than environmental policies and targets, but there was also some installation of low-NO<sub>x</sub> burners, presumably related to the fulfillment of EU LCP requirements.

Everything considered, the scattered evidence presented here does not indicate very strong synergistic effects between soft-, hard- and supra-national law in the implementation phase. The most significant effect seems to have been supra-national law—the EU vehicle requirements and LCP Directive—improving the implementation of the CLRTAP commitments. For instance, hardly anyone noticed the massive non-compliance with the declaration in the late 1990s while at the same time the EU was increasingly targeting non-compliance with its environmental policies, including air pollution.

The 1999 CLRTAP Gothenburg Protocol and the 2001 EU National Emissions Ceilings Directive established the 30 percent NO<sub>x</sub>-emissions cut called for in the 1988 Declaration as hard and supra-national law. They even went a bit further since the emissions cut required by these instruments was around 40 percent. Does this suggest that the Declaration ultimately had a significant effect? It may have functioned as a mild inspiration for the CLRTAP and EU negotiators, some of them active also in the 1980s, but much more convincing clues for understanding this development are to be found within the CLRTAP and EU institutions. Provisions for the development of a critical-loads approach were included in the 1988 Protocol, and the 1990s saw CLRTAP and the EU collaborating in developing this critical loads approach.<sup>21</sup> It was mainly the synergistic capacity-building that enabled the adoption of an emissions cut exceeding 30-percent as a hard and supra-national target in 1999/2001—a scientific underpinning entirely lacking in the NO<sub>x</sub> negotiations in the 1980s.

18. Wettestad 2004.

19. i.e., a 50 percent NO<sub>x</sub> emissions cut by 2000.

20. Wettestad 1998.

21. Wettestad 2002.

## Constraining Fisheries Subsidies

The interplay between the UN Food and Agriculture Organization (FAO) and the World Trade Organization (WTO) on fisheries subsidies has been shaped by an overlap in membership and differences in institutional resources—fisheries expertise versus strong compliance capabilities. FAO soft law instruments have articulated clearly the norm that capacity-driving subsidies are undesirable and have thus strengthened the hand of those in the WTO negotiations who favor a renegotiation of subsidy disciplines. A second argument made in this section is that incorporation of this norm into WTO hard law would likely strengthen its implementation and problem solving impact considerably.

### *FAO Norms and the Strengthening of WTO Rules*

Figures on the amount of subsidies provided to the fisheries sector vary widely, a reflection partly of scattered knowledge and partly of differences in how this phenomenon is defined.<sup>22</sup> Some members of the so-called “Friends-of-Fish” group of countries that press for stronger WTO rules on fisheries subsidies, especially the United States and New Zealand, have a long track record of favoring constraints on governmental support to primary industries. On fisheries subsidies, they have been heavily supported by transnational environmental organizations, especially the World Wide Fund for Nature (WWF). Compared to their most outspoken opponents on the fisheries subsidies issue, including Japan and the EU, the former have relatively low levels of fisheries subsidies and would therefore be less affected by stronger rules.

FAO soft law instruments are very explicit on the undesirability of subsidies that produce overcapacity. The 1995 Code of Conduct on Responsible Fisheries encourages states to ensure that “excess fishing capacity is avoided and . . . the economic conditions under which fishing industries operate promote responsible fisheries.” In addition, the Code provides that “States, aid agencies, multilateral development banks and other relevant international organizations should ensure that their policies and practices . . . do not result in environmental degradation.” In 1999, the Code was followed up by an International Plan of Action for the Management of Fishing Capacity (IPOA-Capacity) which calls on states to achieve, “preferably by 2003 but not later than 2005, an efficient, equitable and transparent management of fishing capacity.” National plans on fishing capacity are important means and shall include assessments of “all factors, including subsidies, contributing to overcapacity.” Finally, “States should reduce and progressively eliminate all factors, including subsidies . . . which contribute, directly or indirectly, to the build-up of excessive fishing capacity, thereby undermining the sustainability of marine living resources.”

In comparison, only a limited subset of direct or indirect financial transfers to the fisheries industry is expressly disciplined under WTO rules and con-

22. Stone 1997. Recent estimates suggest USD 7–12 billion annually.

ceptual unclarity implies a poor flow of information on the extent, nature and objective of subsidies. Among the reasons for this difference is that FAO norms have been largely hammered out by fisheries diplomats in the context of growing resource management problems, whereas impacts on fair trade have predominated in the WTO.<sup>23</sup>

In the 2001 Doha Ministerial Declaration, which defines the mandate for the new round of trade negotiations, the Friends-of-Fish group succeeded in committing WTO members to “aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries.” The Declaration also highlights fisheries subsidies when sketching the broader trade–environment agenda. It is, of course, difficult to measure the influence of FAO soft law activities for this outcome. It is indicative of such influence that those in favor of reforming the trade rules on subsidies have consistently emphasized the norms articulated in global fisheries instruments and championed by the FAO. Throughout the 1990s, both proponents and opponents of WTO reform have acknowledged the FAO as a particularly relevant source of information on the matter. The IPOA-Capacity was presented to the WTO Committee on Trade and Environment (CTE) in June 1999, at a time when support for reform of fisheries subsidies rules was growing in the Committee. After this, FAO representatives have regularly attended CTE meetings providing updates on FAO activities related to fisheries subsidies.

The substantive thrust of FAO contributions on fisheries subsidies have strengthened the hand of the Friends-of-Fish group within the WTO. In addition to the soft law norms already mentioned, this organization has tried to render obsolete a key argument against WTO reform, namely the difficulty of separating “good” from “bad” fisheries subsidies by development of clearer and more consensual knowledge on what types of subsidies are capacity-driving, and which can be supportive of sustainable fisheries. The various FAO contributions also undermined the blocking coalition to fisheries subsidies reform by influencing the Agenda 2000 process in which the EU amended its foremost instrument for fisheries subsidies, the Financial Instrument for Fisheries Guidance.<sup>24</sup>

Despite this, the FAO’s influence on the Doha outcome may have been greatest in what it did *not* do: it did not opt for a front-runner position in hard law regulatory efforts, as it had with regard to high-seas fisheries compliance measures.<sup>25</sup> Instead, the organization assumed a supportive and facilitative role concerning the WTO fisheries-subsidies initiative and was careful to avoid any overlap with activities taking place there. This undermined attempts, including those by the EU and the Republic of Korea, to define the WTO as peripheral to the governance of fisheries subsidies.

All factors considered, FAO contributions were hardly decisive to the suc-

23. Stokke and Coffey 2006.

24. Stokke and Coffey 2006.

25. On the latter, see Stokke 2001.

cess of the Friends-of-Fish group. Of greater importance was the fact that proponents of reform were increasingly successful in framing fisheries subsidies as a development issue—and gradually gained the support of many developing countries. Early in the negotiations, the emphasis had been on trade and environmental sustainability, but over time the development aspect became increasingly salient. Framed as a North–South issue, fisheries subsidies imply that fishers in developing countries are forced to compete, both at sea and on international markets, with heavily subsidized colleagues in wealthier nations. This aspect had not been prominent in FAO soft law contributions; facilitative work by the UN Environment Program was much more salient in bringing this point home.<sup>26</sup>

### *Will WTO Rules Improve Implementation of Fisheries-Subsidy Norms?*

Since the Doha Round of global trade negotiations is still ongoing, we are unable to address this question empirically. We may, however, examine briefly whether this case sheds light on the validity of the assumptions that underpin it. As to whether binding rules will be more realistic and reflect more accurately the true intentions of member states, the period between the FAO soft law contributions and the present WTO negotiations has undoubtedly been the most intensive ever in terms of focusing attention on fisheries subsidies, their scope and how they affect various categories of states and resource management efforts. Although progress has been slow so far, it is too early to conclude that “more realistic” in this context also means “substantively weaker.”

On the second reason to expect further improvement, accountability and intrusive compliance systems, the FAO has a well-established practice of mobilizing relevant fisheries’ expertise in the development of consensual guidelines for implementation at national levels. Unlike the global trade regime, however, which includes compulsory and binding dispute settlement procedures and authorization of countervailing trade sanctions, FAO norms are rarely backed up by intrusive compliance mechanisms. This is certainly evident in the IPOA-capacity case as well. Verification has so far been limited to self-reporting by states, and a review of implementation has occurred at the level of a technical consultation based largely on aggregate-level summaries of a survey. Although there is some evidence of reduced subsidies for fleet expansion and modernization, any causal link between those changes and IPOA-capacity is not substantiated.<sup>27</sup> Implementation of the procedural commitments under this instrument remains moderate at best: even among major fishery producers as much as 20 percent of respondents were unaware of the plan of action and had not taken measures to monitor capacity—and only two thirds of respondents had developed, or were planning to develop, a national plan of action.<sup>28</sup>

26. Stokke and Coffey 2006.

27. FAO 2004, 6.

28. FAO 2004, 3–4.

## Soft Law, Hard Law, and Institutional Effectiveness

To what extent, and how, do these three cases shed light on the general propositions that were advanced above on the interplay between soft law and hard law in international environmental governance?

### *Soft Law and the Strengthening of Hard Law*

Our three cases conform to the assumption that it is easier to reach agreement on substantively ambitious soft law than on hard law. However, that greater ease was not only, or even primarily, due to more lenient domestic processes of evaluation or lower attention to the costs of compliance. In the North Sea case, it was much more important that the INSCs decoupled most of the laggards and stepped up representation from civil servant to ministerial level. The air pollution case also displays soft law decoupling of key laggards, especially the UK. In addition, the diffuse and flexible design of the NO<sub>x</sub> Declaration and lack of review structures probably made states worry little about compliance. In the fisheries subsidies case, the placement of the soft law negotiations within an international organization with fisheries, rather than trade, expertise allowed negotiators to narrow in on the sustainability aspects of subsidies and pay less attention to any impacts that rule strengthening may have in other sectors of trade. It appears, therefore, that greater flexibility in the delineation of what states and what sectors are involved in decision making can complement conventional accounts of why soft law is more ambitious than hard law that focus on domestic ratification and and compliance costs.

The potential of soft law to influence the strength of binding institutions by putting pressure on laggards is demonstrated in the North Sea and the fisheries-subsidy cases. In contrast, the NO<sub>x</sub> Declaration had little impact on hard law development within CLRTAP or the EU. At least three factors contribute to explaining this differential influence—political saliency, the state of knowledge, and the bargaining power of the coalition that favors strengthening of hard law rules.

In the North Sea and fisheries-subsidy cases, the more ambitious soft law norms fused with broader concerns that were gaining in political salience. During the late 1980s, the general “greening” of public opinion was channeled into marine pollution issues by the exceptional toxic algae blooms and epidemic deaths of seals, which elevated marine pollution control at the political agenda. A decade later, the Friends-of-Fish group succeeded in framing the fisheries subsidies norms articulated in FAO instruments in ways that aligned them favorably towards the increasingly salient North/South division line in the run-up to global trade negotiations. In comparison, the NO<sub>x</sub> case experienced a decreasing saliency in the late 1980s as the earlier strong concern about *Waldsterben* and air pollution was waning and political attention shifted from transboundary flows to climate change.

The perceived state of scientific knowledge that underpins soft law ad-

vances also seems important when explaining the impact on hard law. In the North Sea, those favoring stronger measures were able to draw upon results of nearly two decades of coordinated monitoring and research into environmental risks associated with dumping, incineration, and discharges of hazardous substances. These results indicated that environmental consequences were uncertain, that certainty would never be achieved, and that the precautionary principle should apply to emissions of substances known to be toxic, persistent and bio-accumulative. The air pollution case was different as the NO<sub>x</sub> issue had a fairly short scientific history, compared with the sulphur issue which set the whole collaborative process in motion, and much less was known about emissions and implementation costs of various policy options. As regards fisheries subsidies, knowledge about their levels and impacts on sustainability was recognized as inadequate, but the FAO, which had provided the arena for soft law development, had a high credibility both among promoters and opponents of change.

A third condition for influence suggested here is the bargaining power held by those who have pushed the soft law agenda. In the North Sea, soft law was used by a majority of states to put pressure on the minority, and notably the UK. Similarly, the renegotiation of fisheries subsidy constraints fostered under soft law instruments was backed in the WTO by the leading state, the US, as well as by active civil society organizations in one of the leading opponents, the EU, and ultimately by many developing countries. In contrast, the soft law that had emerged on NO<sub>x</sub> was a "fast-track" option preferred by a minority.

### *Hard Law and Enhanced Implementation*

The cases examined here have less to say about the proposition that transformation or incorporation of soft law into hard law will improve the implementation and effectiveness of international norms. This is because only the North Sea case permits examination of hard law norms beyond the stages of agenda setting and regulation. The other two cases speak indirectly to the issue, however, and again, the causal pathways that connect hard law and implementation levels appear to be more diverse than suggested in the introduction.

Those who expect that soft law norms will be poorly implemented because they are poorly prepared, may nod pointedly towards the air pollution case. The very low level of goal achievement within the 30-percent club, even among environmental frontrunners like the Netherlands and Norway, clearly suggests that the target set by the NO<sub>x</sub> Declaration had been unrealistic. Indirectly, the bindingness-preparation thesis is also supported by the observation that most of the FAO's efforts to specify the distinction between environmentally compatible subsidies and those driving capacity occurred *after* its adoption of soft law on the matter and as part of its support of the process of considering a renegotiation of WTO rules. Apparently, the transformation of non-binding into binding norms favors the generation of information that can be brought to

bear on contested issues. In the North Sea case, the INSCs were able to draw upon in-depth preparatory work that had been conducted under the legally binding OSPAR Convention and its predecessors.

The problem with the argument underlying this thesis is, of course, that there may be a thin line between “realistic” and “watered-down” rules: indeed, some hypothesize that high formal compliance with international rules is indicative of a shallow agreement, i.e. one which requires little else of its parties than they would have done anyway.<sup>29</sup> We noted that the UK, which did not sign the NO<sub>x</sub> Declaration, achieved more substantial reductions than did the signatories Norway and the Netherlands. This paradox may illustrate the limits of non-binding commitments but mainly the need for caution when drawing inferences about levels of change in target-group behavior and institutional effectiveness. The UK reductions were largely caused by factors unrelated to international regulations, notably the transition from coal- to gas-driven power generation.

A similarly mixed picture emerges with respect to the second mechanism believed to connect hard law and effective implementation—that norm-hardening enables compliance activities. At least three observations point towards a modified formulation. First, the North Sea case demonstrates that soft law does not preclude intrusive compliance activities. On the contrary (and this is the second point) the soft law option was instrumental for adoption of much more precise norms which facilitated compliance activities. Third, soft law permitted North Sea negotiators to act swiftly on a pressing international challenge without awaiting complete agreement and cumbersome ratification procedures. Similarly, the fast-track option exploited by the NO<sub>x</sub> Declaration allowed leader states to set international targets that they hoped would stimulate domestic target-group adaptation, more ambitiously than the majority would accept. In the fisheries case, the soft law instruments provided vehicles for subsidy skeptics to further de-legitimize subsidies which were already declining in many countries within a policy context where severe sustainability challenges rendered opposition particularly difficult.

That said, the main thrust of the evidence confirms the link between norm-hardening and implementation. In the North Sea, the EU Nitrates Directive has clearly facilitated the implementation of measures to reach the INSC declaration target on nitrogenous substances. This is not primarily due to any better match between obligations and what states are prepared to do. In fact, very few states were prepared to comply reflected in the fact that 13 of the 15 EU member states have faced legal proceedings following inadequate implementation. The main reason is that the EU has powerful tools at its disposal when facing non-compliance. Both Germany and the UK have responded to European Court decisions by improving their implementation of the Nitrates Directive.

29. Down, Rocke, and Barsboom 1996, 383.

The NO<sub>x</sub> Declaration was not transformed or incorporated into hard law and this may partly explain its limited implementation. Norwegian environmental authorities tried in vain to use the declaration to strengthen domestic policy instruments. In view of the generally high level of compliance with EU directives displayed by this state, those efforts would likely have been more successful if the declaration had been transformed into hard law. More generally, the LCP directive and other relevant EU instruments strengthened the implementation of NO<sub>x</sub> commitments adopted within the CLRTAP framework.

Like the NO<sub>x</sub> case, the fisheries subsidy process does not offer direct empirical evidence on implementation. It makes clear, however, that the incorporation into WTO law of a sustainability-oriented definition of fisheries subsidies, as implied in FAO soft law, would be likely to improve implementation. In contrast to the FAO, whose verification and review of IPOA capacity is general and non-adversarial, and which lacks means for responding to cases of non-adaptation, the WTO includes compulsory and binding dispute settlement procedures and possibilities for trade sanctions.

Our cases leave no doubt that bindingness can be an important factor in supporting compliance activities and thus in shaping domestic action. They also bring out that verification and review structures can be established for soft law norms as well. Such structures will be particularly relevant if soft law norms are more precise than existing hard law, as was the case for the INSC declarations, and if review procedures permit evaluation of performance not only at aggregate levels but also pinpoint individual states.

## Conclusions

Four main findings emerge from this analysis of interplay between international institutions based on soft and hard law. First, while our cases confirm that ambitious norms are more easily achieved in soft law institutions than in legally binding ones, this is not primarily due to a bypass of the domestic ratification stage or low attention to compliance costs. More important in the processes examined here is the greater flexibility offered by soft law instruments with respect to the states that are included, the sectors of government that participate, or the aspects of a larger problem that are singled out for norm-building.

Second, whenever ambitious soft law has succeeded in putting political pressure on laggards in the operation of hard law institutions, one or several additional factors have been decisive for the outcome. One such factor is political saliency, notably that the soft law norm aligns or fuses with other important policy concerns among the group of states which engage in hard law negotiations. Examples include the marine algae explosion in the 1980s and the rise of the development issue in the fisheries subsidy talks. A second factor is the state of knowledge, in that soft law backed by scientific evidence that is well established or generated by widely respected bodies has a better chance to influence

the contents of binding rules. A third condition is that those who have successfully pressed for more ambitious soft law norms do not find themselves in a discernibly weaker bargaining position, for instance due to changes in membership or sectoral representation, within the hard law institution.

Our cases are compatible with the expectation that hard law instruments are subject to more thorough negotiation and preparation which is likely to improve the quality of implementation and compliance. Whether or not such enhanced compliance entails more effective governance, however, depends on the extent to which such additional preparation has watered down the substantive targets that had been achieved within the soft law institution.

Finally, although most of the evidence presented here confirms the edge that hard law institutions are expected to have over soft law with respect to implementation, the structures for intrusive verification and review that provide part of the explanation can also be created for soft law norms.

## References

- Abbott, Kenneth W., and Duncan Snidal. 2000. Hard and Soft Law in International Governance. *International Organization* 54: 421–456.
- Chayes, Abram, and Antonia Handler Chayes. 1993. On Compliance. *International Organization* 47: 175–205.
- Downs, George W., David M. Rocke, and Peter N. Barsoom. 1996. Is the Good News about Compliance Good News about Cooperation? *International Organization* 50: 379–406.
- ECE/CLRTAP. 1999. Strategies and Policies For Air Pollution Abatement. Geneva: UN/ECE.
- FAO. 2004. Implementation of the International Plan of Action for the Management of Fishing Capacity (IPOA-Capacity): Review and Main Issues. Doc. TC IUU-CAP/2004/4. Rome: FAO.
- Gehring, Thomas. 1994. *Dynamic International Regimes—Institutions Environmental Governance*. Berlin: Peter Lang.
- Miles, Edward L., Arild Underdal, Steinar Andresen, Jørgen Wettestad, Jon B. Skjærseth, and Elaine M. Carlin. 2002. *Environmental Regime Effectiveness—Confronting Theory with Evidence*. Cambridge, MA: The MIT Press.
- Oberthür, Sebastian and Thomas Gehring, eds. 2006. *Institutional Interaction in Global Environmental Governance: Synergy and Conflict among International and EU Policies*. Cambridge, MA: MIT Press.
- Sand, Peter H. 1991. Lessons Learned in Global Environmental Governance. *Environmental Affairs Law Review* 18: 213–277.
- Skjærseth, Jon B. 2000. *North Sea Cooperation: Linking International and Domestic Pollution Control*. Manchester: Manchester University Press.
- . 2006. Protecting the Northeast Atlantic: One problem, Three Institutions. In *Institutional Interaction in Global Environmental Governance: Synergy and Conflict among International and EU Policies*, edited by S. Oberthür and T. Gehring, 176–213. Cambridge, MA: MIT Press.

- Skjærseth, Jon B., and Jørgen Wettestad. 2002. Understanding the Effectiveness of EU Environmental Policy: How Can Regime Analysis Contribute? *Environmental Politics* 11: 99–120.
- Stokke, Olav Schram, ed. 2001. *Governing High Seas Fisheries: The Interplay of Global and Regional Regimes*. Oxford: Oxford University Press.
- Stokke, Olav Schram, and Clare Coffey. 2006. Institutional Interplay and Responsible Fisheries: Combating Subsidies, Developing Precaution. In *Institutional Interaction in Global Environmental Governance: Synergy and Conflict among International and EU Policies*, edited by S. Oberthür and T. Gehring. Cambridge, MA: MIT Press.
- Stone, Christopher D. 1997. Too Many Fishing Boats, Too Few Fish: Can Trade Laws Trim Subsidies and Restore the Balance in Global Fisheries? *Ecology Law Quarterly* 24: 505–544.
- Tallberg, J. 2002. Paths to Compliance: Enforcement, Management and the European Union. *International Organization* 56: 609–643.
- Thürer, Daniel. 2000. Soft Law. In *Encyclopedia of Public International Law* 4, edited by R. Bernhardt, 452–460. Amsterdam: Elsevier.
- Underdal, Arild. 1992. The Concept of Regime 'Effectiveness.' *Cooperation and Conflict* 27: 227–240.
- Underdal, Arild, and Kenneth Hanf, eds. 2000. *International Environmental Agreements and Domestic Politics: The Case of Acid Rain*. Aldershot: Ashgate.
- Wettestad, Jørgen. 1998. Participation in NOx Policy-Making and Implementation in the Netherlands, UK, and Norway: Different Approaches, but Similar Results? In *The Implementation and Effectiveness of International Environmental Commitments*, edited by D. Victor, K. Raustiala and E. Skolnikoff, 381–431. Cambridge, MA: MIT Press.
- \_\_\_\_\_. 2002. *Clearing the Air—European Advances in Tackling Acid Rain and Atmospheric Pollution*. Aldershot: Ashgate.
- \_\_\_\_\_. 2004. Air Pollution: International Success, Domestic Problems. In *International Regimes and Norway's Environmental Policy—Crossfire and Coherence*, edited by J.B. Skjærseth, 84–111. Aldershot: Ashgate.
- Young, Oran R. 1989. The Politics of Regime Formation. *International Organization* 43: 349–376.
- \_\_\_\_\_. 2002. *The Institutional Dimensions of Environmental Change: Fit, Interplay, and Scale*. Cambridge, MA: MIT Press.