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The Legal Nature of the Climate Change Regime: Fluctuation between *Lex Lata* and *Lex Ferenda*

RESEARCH ARTICLE

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ABSTRACT

International law is faced with the challenge between *lex lata* and *lex ferenda* in nature. *Lex lata*, based on legal positivism, has binding obligations and a top-down compliance structure, while *lex ferenda*, on the contrary, is based on non-binding values and bottom-up adherence architecture. Determining the legal nature of each regime is important because depending on its nature, the assessment of its efficiency will be different. The question is whether the evolution process of the climate change regime is towards *lex lata* or *lex ferenda*? Examining indicates that initially the Framework Convention, in terms of some indicators, was *lex lata* and in others it was *lex ferenda*. Subsequently, to address the shortcomings of the Convention, especially the lack of legally binding targets and timelines, the Kyoto Protocol shifted to a strong *lex lata*. Finally, due to the inefficiency of the Protocol arising from the institutional design failure, the Paris Agreement became a *lex ferenda*. Analyzing the *Sharm el-Sheikh* Implementation Plan (2022) indicates that the Regime is still mainly based on ideal values and non-binding commitments. For the future transformation of the Regime into an efficient *lex lata*, a gradual process, rather than a strong shift, shall be followed that is being done in the case of the fund for loss and damage that was previously *lex ferenda* and is becoming *lex lata*.

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INTRODUCTION

One of the adverse environmental effects caused by the increasing use of fossil fuels worldwide is global warming and eventually the phenomenon of climate change. At the present, the average global temperature is approximately 1°C above pre-industrial levels.[1] To deal with this problem, the international community has adopted legal solutions since the early 1990s. In this regard, the Framework Convention (the Convention), the Kyoto Protocol (the Protocol) and the Paris Agreement (the Agreement) have been ratified at the global level that shapes the legal regime of climate change (the Regime). The Regime continues to evolve as an identifiable set of legal norms and principles, which accumulate from changing international legal trends related to climate change.[2] It aims to stabilize the amount of greenhouse gas emissions, reducing the amount of greenhouse gas production and adapting to the consequences of climate change.[3] Under Article 7 of the Convention, the Conference of the Parties (COP) is held every year in order to assess the achievement of the objective of the Convention and the implementation of the Convention by the parties. According to the content of the twenty-six COPs held, several initiatives have been presented to achieve the aforementioned goals and improve the efficiency of the Regime. At COP27, held from November 6 to 18, 2022 in *Sharm el-Sheikh* (Egypt), it was stated that the world will exceed its temperature target.[4] Some believe the Regime arose out of lofty ideals of classical multilateralism, unnecessarily complicating the formal treaty architecture that constitutes the basic framework for international climate cooperation.[5] This means that despite some progress, the Regime still faces an efficiency challenge in achieving its goals.[6]

Since the efficiency of a regime in practice is related to its legal nature,[7] to assess the efficiency of global climate actions, the legal nature of the Regime shall first be determined in terms of *lex lata* and *lex ferenda*. *Lex lata*, the law as it exists, is opposite to the *lex ferenda*, the law as it should be. *Lex lata* is legally established enough, but *lex ferenda* is still not well established and needs further development and evolution for its legal establishment. If the Regime is considered *lex lata*, because its goals will be positivist, it will be practically expected to achieve them. In this case, the ability of the Regime to achieve its goals will prove the efficiency of the Regime. But if it is considered *lex ferenda*, because its goals will be ideal, it will be more difficult and unexpected to achieve them. In this regard, its efficiency will be assessed only from the point of view of laying the groundwork for becoming *lex lata*. Hence, *lex lata* is not necessarily efficient and *lex ferenda* is not necessarily inefficient.

In order to determine the legal nature of the Regime and finally assess its efficiency, the concepts of *lex lata* and *lex ferenda* will be explained in the first part. Then, the indicators of separation of *lex ferenda* and *lex lata* will be examined in each of the fundamental treaties of the Regime including the Convention, the Protocol and the Agreement in three parts respectively. Afterwards, the path ahead for the nature of the Regime will be examined in the light of the *Sharm-el-Sheikh* Implementation Plan (the Plan), as the latest development in the field of climate change. Finally, conclusions will be drawn from the discussed topics.

1: EXPLAINING THE CONCEPTS OF *LEX LATA* AND *LEX FERENDA*

From the positivist point of view, an international agreement is considered legal if its creators agree regarding its legally binding nature and this character is inferred from its form and content. According to this approach, an agreement is either binding or not part of law at all. This perception of law is based on the concept of *lex lata*. On the contrary, some believe that positivism is not suitable to adapt to the increasing complexities of contemporary international relations, but complementary normative tools are needed to regulate the multi-dimensional problems of the modern world.[8] They assume that if the parties consider an agreement and its provisions to be fair, they can voluntarily comply with its requirements, even if it is not binding in nature.[9] They argue that as opposed to the *lex lata* nature, the law can have a *lex ferenda* nature. *Lex ferenda* aims to replace inappropriate *lex lata* (existing law) with ideal and desirable law,[10] so unlike *lex lata* that is related to the codification of international law, *lex ferenda* is based on the development of international law. In principle, *lex ferenda* does not become a part of positive international law, but it develops and evolves over time to eventually become the *lex lata*. *Lex ferenda* can be used to fill legal gaps in the sources of international law listed in article 38 of ICJ statute. The emergence of *lex ferenda* in international law is the result of the need to voluntarily accept internationally supported norms and values on the one hand and avoid the costs of accepting international binding obligations on the other hand. Under this approach, the adherence of the states is based on their voluntary behaviour, without being mandatory for them. In general, if an agreement, whether binding or non-binding, includes an effective compliance mechanism, it can ensure and improve the adherence of the parties to their obligations in the agreement.[11] However, the indistinguishable nature of codification and progressive development combine *lex lata* and *lex ferenda*[12] and the separation between them requires the creation of international jurisprudence. In general, it is more difficult to separate them from each other in some areas of international law than in other areas.[13]

Determining the legal nature of a regime is important because depending on the nature, the assessment of the level of regime efficiency will be different. If the evolution

of the Regime in international treaties is towards *lex lata*, the non-fulfillment of emission reduction goals can be interpreted as a manifestation of the inefficiency of the Regime, but if it is towards the *lex ferenda*, the non-fulfillment of those goals is not in itself a reason for inefficiency. In this regard, the inefficiency occurs when those goals do not become positivist goals over time. Hence, therefore, the criterion for assessing efficiency in *lex lata* is different from *lex ferenda*. In spite of this fact, it is very difficult to measure the efficiency of a particular instrument in the complexities of climate change. There are many non-binding documents that do not qualify as *lex lata*, but have a great effect, and conversely, there are many binding documents that are not effective despite being *lex lata.*

For a regime to be efficient, it must attract broad participation, it must produce deep reductions in global greenhouse gas emissions, and it must be followed.[14] In other words, the efficiency of a regime is a function of the stringency of commitments, levels of participation and compliance of states.[15] Considering the relationship between the nature of the Regime and its efficiency, the three distinguishing indicators of *lex lata* from *lex ferenda* for a regime are "the nature of the obligations", "the amount of the committed states" and "the architecture of the adherence".

Firstly, initially, it should be noted that environmental treaties often include elements of both "soft" and "hard" features: both legally and non-legally binding obligations.[16] The line between legally and non-legally binding is somewhat fluid.[17] Furthermore, a treaty's legally binding obligations may be substantive, for example, obligations to reduce greenhouse gas emissions or adapt to climate change, or procedural, such as obligations to report on actions taken to reduce greenhouse gas emissions.[18] The existence of many binding obligations in a regime indicates that it is *lex lata*, and the existence of non-binding obligations and ideal recommendations indicates that it is *lex ferenda*.[19]

Secondly, making an instrument legally binding will lead to less participation,[20] whilst climate change is a common concern of humankind and requires global participation.[21] One of the main challenges in the negotiations was to agree on the issue of who is responsible for the historical emission of greenhouse gases and who is most at risk of changing climate conditions?[22] This issue led to the discussion of how to differentiate between member states in terms of historical patterns of greenhouse gas emissions and the level of their socio-economic Vulnerability.[23] The challenge was crystallized in the concept of "common but different responsibilities" as the explicit basis for the very different commitments of developed and developing state parties.[24] This principle consists of two elements: the shared responsibility of all member states in protecting the environment, and the need to consider different circumstances of them, especially its ability to prevent and mitigate this problem.[25] Hence, the term "committed member states" can be used which is not the same as the member states. It refers to the member states that are legally bound to comply with the obligations contained in the treaty, not member states that lack legally binding obligations. There is a direct relationship between number of legally committed member states in international agreements and *lex lata nature* of a regime.

Thirdly, the adherence mechanism can be an important means of ensuring that the agreement achieves its goal of preventing dangerous climate change.[26] The purpose of these compliance procedures is not to establish guilt for sanctions purposes, but to assist member states in meeting their treaty obligations.[27] An agreement that emphasizes the compliance mechanism plays a very important role in guiding the parties towards compliance rather than non-compliance.[28] In general, the top-down or enforcement approach considers coercive methods necessary to promote compliance, while the bottom-up or management approach emphasizes facilitating compliance. As a result, they seem to be in complete conflict with each other.[29] The issue of top-down (mandatory) or bottom-up (voluntary) obligations is always one of the challenges of designing an adherence system in climate agreements. The top-down approach is characterized by strong coordination, timelines, and legal goals based on internationally agreed rules. It is based on this perception that solving environmental problems only required executive orders and severe controls,[30] but a bottom-up approach means maintaining the role of states in determining their contributions.[31] In any case, it should be noted that basically there is no absolute top-down architecture in international law[32] because its design requires that there be a centralized entity to distribute and authoritatively enforce rights and obligations among downstream units.[33] Obviously, there is no such centralized institution at the international level and principally, enforcement mechanisms in international law are weaker than domestic laws'. Unlike domestic law, which is based on hierarchy and has a strong compliance structure from top-down, international law lacks a true top-down adherence system. In light of the principle of national sovereignty, states are not very inclined to accept a top-down structure, and this is a little more obvious in the UNFCCC. Therefore, in theory, no international agreement can have a fully top-down adherence system. The top-down adherence architecture is suitable for *lex lata* and bottom-up adherence architecture is suitable for *lex ferenda.* In other words, the simplest bottom-up approach is that climate change policies should be designed and implemented at the lowest possible level of the organization.[34]

To sum up, The existence of binding obligations for a limited number of legally committed states based on a top-down compliance architecture in a regime indicates

that it is *lex lata,* while the existence of non-binding norms and values for a large number of non-committed member states based on a bottom-up compliance architecture are compatible with the nature of *lex ferenda*.

2-LEGAL NATURE OF THE CONVENTION: A COMBINATION OF *LEX LATA* AND *LEX FERENDA*

The United Nations Framework Convention on Climate Change (UNFCCC 1992)[35] constitutes the primary framework for international cooperation to combat climate change, and obliges states to significantly reduce greenhouse gas emissions mainly caused by fossil fuels. It is not a complete regulatory regime, but rather, a framework convention to establish a process to achieve greater agreement on specific policies and actions to tackle climate change.[36] The goal of the Convention is not to reduce greenhouse gas emissions but under article 2, to stabilize the concentrations of greenhouse gases (GHG) in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.

2-1: DOMINANCE OF NON-BINDING OBLIGATIONS

Under article 4, the Convention provides solutions for states to take measures to reduce climate change. The provisions of the Agreement have been written in a vague and aspirational manner to provide the states with the necessary flexibility.[37] This ambiguity is also partly due to the uncertainty of the legal impact of climate change, which is classified as a 'common concern of mankind'.[38] Because the Agreement is a basic document regarding the establishment of the Regime, it lacks explicit references and strict legal requirements regarding mitigation goals.[39] Article 4 does not, by itself, create substantial substantive obligations for parties to limit climate change. Instead, it emphasizes on calling for continued scientific research focused on climate change, as well as regular meetings, negotiations, and setting future policies.[40] Furthermore, the scope of its provisions is so wide that it does not entail any specific obligations for the contracting parties. Providing national inventories of anthropogenic emissions (Article 4, paragraph 1- a), Formulating, implementing, publishing and updating national regional programs (Article 4- paragraph 1- b), technology transfer (Article 4- paragraph 1- c), promoting Promote sustainable management (Article 4- paragraph 1-d) and such concepts, which have been codified without sufficient legal requirements and outside quantitative and deterministic measurement mechanisms indicate the existence of a series of imprecise and non-binding general obligations. Although Article 4.1b of the Convention obliges states to set up and implement national and regional programs to facilitate "adequate adaptation" to climate change, there is ambiguity regarding the meaning and manner of fulfilling this obligation; because the word "adequate" is not defined in the Convention, and the determination of how to take adequate measures is left to the state members' discretion. In addition, article 4.2 also includes the goal of returning the amount of greenhouse gas emissions of the annexed countries to the level of 1990 by the end of 2000. But, this progressive wording is not a binding obligation and does not lead to the creation of responsibility for emissions;[41] So if the member states do not want or cannot achieve the necessary reduction by the end of 2000, it will not have any direct legal effects on them. Although in most parts of the Convention, the term "shall" has been used, but it is clear that this legal requirement cannot be considered proof of the strictness of the provisions of the Convention. Therefore, the Convention only encourages member states to reduce greenhouse gas emissions without imposing explicit commitment to reduce greenhouse gas emissions by a specific date.[42] This type of phrasing regarding obligations is based on the request of states that wants to compile the general and vague obligations of the Regime in a legal text without specifying the limits and manner of their fulfilment.

2-2: SMALL NUMBER OF LEGALLY COMMITTED STATES

Article 4 of the Convention clearly emphasizes the special role of developed countries. Annex I to the Convention, which has precisely listed the developed countries targeted by the Convention, is a complete view of the dual order that is formed according to the differences between the countries in accepting obligations. Based on this dual order, member states are divided into two main groups, developed and developing. On this basis, all members, regardless of the level of development, are encouraged and recommended for economic, scientific and technological cooperation (Article 4). Under Article 4, based on the classification of the parties (Annex-I, Annex-II, Non-annex), the Convention contains certain general commitments. While there are specific legally binding commitments for all Annex I member states within a specific time frame (2008–2012), there are no specific obligations for developing countries (Non-annex parties).

The second part of the obligations related to developed countries or included in Annex I, has codified the reduction approach regarding the emission of greenhouse gases. Article 4.2 mentions that Annex I countries shall limit emissions with the aim of returning to the emission levels of 1990 to 2000. They are also required to submit more frequent and detailed national reports on their greenhouse gas emissions. In fact, the

burden of reducing greenhouse gas emissions as well as the responsibility of technical and financial assistance to the developing members is placed on the countries listed in Annex II.[43] There are no specific obligations regarding developing countries. Although the commitments related to the developed countries are also written as non-quantitative, indefinite and non-binding, the dual order institutionalized the system of climate commitments.[44] If the obligations of the Convention were binding, this dual approach could reduce the willingness of developed countries to ratify the Convention.

2-3: THE DUAL ARCHITECTURE OF TOP-DOWN AND BOTTOM-UP ADHERENCE

The Convention has elements of both architectures. On the one hand, it establishes a system of "commitment and review" in which states submit nationally determined policies and measures subject to international review. On the other hand, it establishes an internationally negotiated greenhouse gas emission target for developed countries and other parties listed in Annex I of the Convention.[45] Article 4(2) states that Annex 1 countries shall limit emissions with the aim of returning to 1990 emission levels until 2000. This wording is not exactly target and time-table, and perhaps it can be called quasi-target and quasi-timetable';[46] whereas, in principle, the emission shall be reduced by a certain percentage (target) until a certain date (timetable).

In the Convention, the problem-oriented approach is dominant and is often formed based on scientific recommendations.[47] In fact, negotiators first analyze the problem scientifically and then decide to deal with it. Therefore, in the Convention, scientific recommendations of the Intergovernmental Panel on Climate Change (IPCC) is used, although vaguely. Article 13 of the Convention stipulates that the COP shall consider establishing a Multilateral Consultative Process (MCP) to resolve implementation issues. Decision 10 of the COP 4 establishes a multilateral consultation process in the form of a multilateral advisory committee. Its objectives include providing advice on helping the parties to overcome the problems encountered in the implementation of the Convention, improving understanding of the Convention and preventing disputes. Member states can send issues regarding their own or other party's performance to the committee, which may subsequently provide advice or recommendations regarding the provision of technical and financial resources to solve a member's problems, or regarding the collection and communication of information. Decisions and recommendations should be sent to the relevant member state. Although the COP 5 was supposed to implement this process following the resolution of important issues regarding the combination of the multilateral consultation process, so far such a thing has not been done.[48] This mechanism was never implemented and replaced by the facilitative branch of the Compliance Committee. However, under article 7, COP can be considered as the supreme decision-making body of the Convention.[49] However, it can be concluded that the Convention is an excellent example of the simultaneous use of a facilitative and consultative approach with the problem-oriented approach regarding member compliance problems.

In general, due to the existence of non-binding obligations and dual compliance architecture and the exclusion of developing countries from emission reduction obligations, it can be inferred that the Convention has the elements of *lex lata* and *lex ferenda* simultaneously. The main reason for adopting this conservative approach is probably that the Convention, as the framework and primitive document of the Regime, while trying to establish minimum obligations for the member states, tries to attract their maximum participation.

3: LEGAL NATURE OF THE PROTOCOL: STRONG SHIFT FROM TO *LEX LATA*

To solve the shortcomings of the Convention, especially the lack of legally binding emission reduction targets and timelines, the member states decided to ratify and implement an additional protocol according to article 17 of the Convention. The Protocol[50] was unanimously approved by 159 participating countries at the COP3 on December 11, 1997 in Kyoto, Japan, and operated from 2005 to 2020. It is the first important legal document regarding implementation measures under the Convention.[51] Detailed rules for its implementation were adopted at the COP7 in 2001, known as "The Marrakesh Accords".

3-1: DOMINANCE OF BINDING OBLIGATIONS

The main difference between the Protocol and the Convention is that the Convention encourages developed countries to stabilize their greenhouse gas emissions, but the Protocol sets internationally binding targets for greenhouse gas emissions.[52] It sets binding international emission reduction targets that require developed countries to reduce their greenhouse gas emissions by 5.2% by the end of the first commitment period (CP1) (2008–2012). In general, the commitments contained in the Protocol are binding and precise in terms of targeting and timing. By confirming that the developed countries are basically responsible for the high amount of greenhouse gases in the atmosphere resulting from their industrial activities, the Protocol imposes clear and severe obligations on them. In contrast to the commitments of developed countries to reduce greenhouse gas emissions, which are completely objective and specific, the obligations of developing countries are mainly advisory and encouraging. Articles 2 and 3 of the Protocol require developed member states to reduce their emissions of

six greenhouse gases, between 8 and 10 percent, so that their emissions in the range of 2008–2012 should be at least 5% lower than their emissions in 1990.[53] They are committed to specific, quantified, and binding reduction commitments. The Protocol allows countries to achieve their emission reductions using three carbon market mechanisms.

Article 3 aims to objectify the general targets stated in Article 2 through the introduction of time-based mechanisms. The aim of adopting this periodical schedule is to accurately evaluate the performance of the member states and the demonstrable progress in achieving their commitments under the Protocol. In other words, in the Protocol, not only the reduction of pollutant emissions is determined separately and mandatory for each of the Annex I countries, but a specific time-frame is determined, which is called the commitment period (2008–2012). Following the end of the first commitment period in 2012, the parties agreed on a second commitment period at the 2012 Doha Climate Change Conference from 2013 to 2020. The Doha Amendment[54] to the Protocol (UNFCCC 2012) commits some member states to limit or reduce their greenhouse gas emissions in the second commitment period. To achieve this goal, the Protocol provides a two-dimensional solution: To adopt national measures such as enhancing energy efficiency and promoting renewable energy; and use of international market mechanisms including joint implementation, clean development mechanism and emissions trading. According to Article 10, and in light of the common but differentiated responsibility principle (CBDR), all member states (Annex I and non-Annex I parties) have general obligations.

3-2: LARGE NUMBER OF LEGALLY COMMITTED STATES

In the process of drafting the Protocol, the dual order that was formed in the Convention was continued and even strengthened.[55] The main goal of the Protocol is to reduce greenhouse gas emissions by obligating developed countries (Annex I). Therefore, the obligations under the Protocol include only a limited number of developed countries.[56] Comparable commitment is not included to developing countries.[57] Under Article 2, the developed member states should take policies and actions according to their national circumstances to achieve the general goals. Articles 2–8, 10 and 11 have defined special obligations for the developed members. Even according to Article 25(1), in order for the protocol to enter into force, the acceptance of 'incorporating parties included in Annex I which accounted in total for at least 55 per cent of the total carbon dioxide emissions for 1990 of the parties included in Annex I' is considered the prerequisite.

The dual order was gradually considered as one of the negative points of the Protocol. The Protocol faced many difficulties during the implementation phase due to the fact that the implementation of the obligations was left solely to the developed countries.[58] One of the first major shocks to the Regime was the reluctance of the United States, as the largest emitter of greenhouse gases, to join the Protocol under the pretext of not including all important polluting countries. In addition, another important emitter, Canada, withdrew from it in 2011. The absence of emerging economies such as China, Brazil, India, and South Africa in the Regime showed a deep gap between the ultimate goals of the Protocol in reducing the amount of emissions and the realities in the field. In addition, the Russian Federation and Japan did not commit to the Doha Amendment for the period 2013–2020. Therefore, even if the Doha Protocol and Amendment symbolize hope for a better system, they do not promise great opportunities to deal with climate change.[59]

3-3: THE TOP-DOWN ADHERENCE ARCHITECTURE

Basically requiring one of the parties to develop a compliance plan, make supplementary reports, issue a statement of non-compliance, and suspend the rights and privileges of the non-compliant party are the punitive measures available in the existing compliance mechanisms.[60] What made the Protocol unique from a legal point of view is its top-down adherence architecture.[61] It established the most prescribed and potentially costly penalties for non-compliance with multilateral environmental agreements.[62]

The Compliance Committee of the Protocol will "facilitate, promote and implement commitments under the Protocol".[63] In this regard, it provides assistance, addresses cases of non-compliance, and formulates an enforcement mandate.[64] It also follows a dual track system through two important branches: the Facilitative Branch (FB) and the Enforcement Branch (EB). The main role of the FB is to provide advice and facilitate assistance to parties, particularly to developing countries (Non-annex parties). Through this assistance, it aims to ensure and enhance their compliance with their obligations under the Protocol.[65] In case of non-compliance, if necessary, it can bring effects such as providing advice and facilitating assistance and providing financial and technical assistance, including technology transfer and capacity building.[66] The Enforcement Branch (EB) has a quasi-judicial nature. It has the power to impose severe consequences taking into account the cause, type, degree and frequency of non-compliance. For example, if a party exceeds a set amount of greenhouse gas emissions under the Protocol, the branch could, among other things, suspend its right to sell emission quotas.[67] However, in practice, its purpose is not to punish the non-compliant party, but only to encourage it to fulfil its obligations. These include a public declaration of non-

compliance, submission of a compliance action plan, and suspension of trading in the Kyoto Carbon Market.[68]

In short, the existence of binding obligations based on a top-down compliance system for developed countries shows that the Protocol has shifted the legal nature of the Regime to a strong *lex lata*. Despite this fact, the Protocol became inefficient in practice. It was a case of institutional design failure with the design itself bearing substantial blame for this outcome. Its short time frame for action and preparation for future commitment periods led to short-sighted behaviour by member states and track-dependent structures that failed to make a significant impact on the climate problem.[69] Also, its market enforcement mechanisms and focus on carbon production instead of carbon consumption made the Protocol unable to prevent the emission of greenhouse gases.

4: LEGAL NATURE OF THE AGREEMENT: RETREAT TO *LEX FERENDA*

As the Protocol ultimately failed to significantly reduce emissions on a global scale,[70] the Agreement[71] was adopted by 195 countries on December 12, 2015, within the Convention during COP 21 in Paris. The purpose of this document is to hold the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels. The aspirational 1.5°C goal was a core demand of small island developing states and least developed countries that are most vulnerable to climate change and its impacts.[72]

4-1: COMBINATION OF THE BINDING AND NON-BINDING OBLIGATIONS

The Agreement introduces requirements for parties to determine, plan, and regularly report on their Nationally Determined Contributions (NDCs) that each party will determine to reduce their impact on climate change.[73] The drafters of the Agreement emphasized the assumption that increasing the willingness of the member states to the soft provisions of the Agreement such as voluntary action and non-intrusive and non-punitive manner would help its more effective implementation.[74] Therefore, only a limited number of the provisions of the Agreement became binding legal obligations for the parties.[75] For example, NDCs are binding procedurally and non- binding substantively.[76] In other words, parties are legally bound to report and account for their NDCs, while achieving the substance of the NDCs is not legally binding for them. However, some doubt the efficiency of the Agreement by relying on voluntary measures and non-binding commitments.

Under article 3, all the member states are committed to preparing and presenting the amount and manner of their participation in the realization of the goals of the Agreement in accordance with the rules set in the Agreement. But it seems that this commitment is an obligation of conduct, not an obligation of result; because the submission of NDCs are self-proclaimed commitments undertaken by each party and will only involve the efforts of the member states in terms of their circumstances.[77] Although the obligations of conduct are not less legal than obligation of result, since there is no exact yardstick for assessing compliance with due diligence obligations, it is difficult to assess the fulfilment of these obligations. Reaching global peaking of GHG emissions as soon as possible, and undertaking rapid reductions thereafter in accordance with the best available science, are qualitative obligations, not quantitative.[78]

In any case, there is always a considerable concern that Article 15 will be weak and, when combined with the voluntary nature of NDCs will create obligations that are non-binding. Because on the one hand, there is no requirement to determine a specific amount of emission reduction or a specific method of binding in order to achieve the goal of the Agreement, and this is left to the discretion of the states.[79] On the other hand, there is no penalty for them if they are unable to fulfil the emission reduction obligations declared in their NDCs based solely on their national conditions.

4-2: SMALL NUMBER OF LEGALLY COMMITTED STATES

Since the Sustainable solutions to the climate crisis must be founded on the participation of all stakeholders,[80] the commitments of the Agreement are applicable to all member states. The Agreement does not differentiate between Annex I and non-Annex I countries, but it commits all its member states to mitigation and adaptation actions. It requires all member states to prepare and submit their NDCs and to assess collective progress on mitigation, adaptation, and means of implementation every five years through a Global Stock Take (GST). This means that for the first time in the Regime, developing countries, like developed countries, are subject to compliance and implementation of emission reduction obligations. By formulating the principles contained in article 15.2, provides significant comfort to developing countries in accepting the practical competence of the committee regarding their actions. Under this article, it should pay "particular attention to the respective national capabilities and circumstances of parties". While according to article 2.2 the entire agreement operates under the principle of common but differentiated responsibilities (CBDR), in the light of the national requirements of the members, it is emphasized here again in a different way. What is finally formed in the Agreement is a compromise between all parties, including those who want a detailed set of provisions and those who are satisfied with only minimal rules.[81]

4-3: THE HYBRID ADHERENCE ARCHITECTURE

Since the top-down approach included in the Protocol has not been effective in solving the problem of climate change,[82] the Agreement reflected the hybrid architecture and adopted a combined top-down and bottom-up approach. Communicating, Preparing, and maintaining NDCs displays its bottom-up dimension, and oversight mechanisms including transparency framework, GST process, and compliance mechanism indicate its top-down dimension.[83] This hybrid approach provides flexibility for all countries to deliberately test the new system to their capacity.[84] This means a shift from the global distribution of emission reductions to a focus on NDCs to a global effort.[85] The drafters of the Agreement believed that, in principle, an authoritarian top-down system could decrease national participation and might even be objected to.[86] But, the voluntary participation of states in national emission reduction targets could increase the motivation of states to participate in the Regime.

The trend towards a more transparent and facilitating system, taking into account the respective national capabilities of the parties, is one of the achievements of the Agreement.[87] In this regard, the provisions of Article 15 are noteworthy. Given that a strict adherence mechanism or binding regime for Article 15 does not make sense in an agreement framework where many obligations are non-binding, focusing on the facilitation element in all provisions is a relatively novel arrangement. Article 15(1) sets out two distinct functions that the mechanism shall fulfil: facilitation of implementation and promotion of compliance. Consequently, it established a mechanism to facilitate implementation and promote compliance by parties under the Agreement. Under Article 15.1, despite the desire of some parties to enforce or ensure compliance, the parties could only agree on promoting compliance and only in relation to facilitating implementation. They eventually proposed the creation of an institution in the form of a single committee with dual duties. However, despite specifying the functions of the mechanism, paragraph 1 does not specify how the mechanism should perform these functions.[88]

Under article 15.2, the committee of the mechanism as "expert-based and facilitative in nature", operate under the principle of differentiation in a "transparent, non-adversarial and non-punitive manner." The term "expert-based" indicates that the committee shall be scientifically based, not political. Also, its members shall be experts who serve in their own capacity, not government representatives. As can be seen, the concern and fear of the states of reviving the compliance committee of the Protocol (which can impose sanctions in certain cases of non-compliance) have been resolved by the Agreement by including the "non-punitive" criterion in Article 15.[89] It has been strongly emphasized that the Agreement represents an almost *sui generis* approach, combining top-down prescriptive legal commitments with bottom-up NDCs commitments.[90]

Briefly, having gained experience from the legal policy-making in previous documents and with a hybrid adherence architecture and application of multiple non-binding obligations to all member states, the Agreement retreated from the rigid and strong *lex lata* in the Protocol towards *lex ferenda*. If the members did not consent to establish a voluntary adherence structure based on non-punitive and non-binding rules, it would not be possible to apply obligations to all member states.

5- THE FUTURE OF THE REGIME: GRADUAL PAVING OF THE PATH BY *LEX FERENDA* FOR *LEX LATA*

The existence of *lex ferenda* indicates that *lex lata* is imperfect.[91] According to ICJ in the North Sea Continental Shelf case, a new rule applies when it has made the transition from *lex ferenda* to *lex lata.* Such processes regarding the provisions of the Stockholm Declaration (1972) and the Rio Declaration (1992) have already been followed, and the *lex ferenda* contained in them has gradually become *lex lata.* Such a transition should also be followed in the climate change regime. Until the realization of the transition, the *lex ferenda* may not yet be able to completely or adequately solve the issues related to climate change, but it can fill the gaps in the legal solutions of the Regime.[92]

To implement of the provisions of the Agreement, the *Sharm El-Sheikh* Climate Change Conference, as COP 27, convened in Egypt from 6–20 November 2022. In this conference for the first time, countries agreed to establish "the fund for loss and damage associated with the adverse effects of climate change"[93]. The establishment of the fund for loss and damage indicates the acceptance of a non-binding obligation by developed countries to provide for losses in developing countries.[94] It has been a desire of many developing countries for three decades in the climate negotiation fora.[95] Developing countries have continuously tried to consider loss and damage as the third pillar of climate action, along with mitigation and adaptation.[96] Although no decision has been made regarding its details, it seems that this initiative, which used to be part of the *lex ferenda*, is gradually becoming the *lex lata*. However, a transitional committee was formed to make recommendations to operationalize the new funding arrangements, which will be discussed and adopted at next year's COP28.[97]

The parties also approved the *Sharm El-Sheikh* Implementation Plan (the Plan).[98] Examining the contents of the Plan shows that most of its parts still have the aspect of *lex ferenda* and are desirable, and their transformation into *lex lata* is deferred to the progress that will be assessed in future COPs. They

are two overarching and open-ended cover decisions which will be used to capture the progress made in the negotiations.[99] In line with the *lex ferenda* nature of the Agreement, some non-binding obligations have been included in the Plan that still has the *lex ferenda* aspect in the hope that they can gradually find the *lex lata* aspect in the subsequent treaties of the Regime.

5-1: NON-BINDING COMMITMENT OF LEADERSHIP FOR DEVELOPED COUNTRIES

The leadership of developed countries means creating grounds for public movement to achieve the goals of the Regime, which includes reducing the per capita greenhouse gas emissions in all countries using economic and technical resources. While states have a shared obligation to address climate change, developed countries have historically contributed most to the problem and have more resources to remedy it.[100] On the one hand, developing countries should have the support of developed countries such as the United States to finance clean technologies and sustainable infrastructure.[101] Therefore, on the other hand, developed countries have a non-binding obligation to design a way of life for the entire world that does not depend on high energy consumption, and they should also provide a model of energy consumption that other countries can follow.[102] The principle of CBDR, enshrined in the Convention, which requires developed countries to take the lead in climate action, continues to apply in the Plan.[103] In paragraphs 39 and 47, special attention has been paid to the leadership role of developed countries to provide enhanced support, including through technology transfer, financial resources and capacity building. This requirement is only a requirement based on *lex ferenda* and does not have a binding, precise and definite aspect. It only urges and calls on developed countries to provide and increase their support.

5-2: NON-BINDING COMMITMENT TO A TRANSITION TO SUSTAINABLE LIFESTYLES AND PATTERNS

The Agreement should be implemented in a way that reflects equity and the principle of CBDR, taking into account different national circumstances.[104] One of the examples of CBDR is an obligation to transition to sustainable lifestyles and patterns.[105] This obligation is fulfilled through the formation of fair partnerships and cooperation among developed and developing countries. Based on this obligation, the energy consumption pattern of developing countries should be according to their potential and economic and social infrastructure so that a burden should be placed on them to transition their energy consumption pattern to sustainable patterns. In the Plan, the desirable commitment for developing countries has been repeatedly mentioned in the expressions of "transition to sustainable lifestyles and sustainable patterns of consumption and production", "transitions to low-emission and climate-resilient development", "transitions to renewable energy", "transition towards low-emission energy systems", "global transition to low emissions" and "just and equitable transition". However, the shift in lifestyles should be accompanied by the fostering patterns of development. In other words, developing countries should not avoid taking climate action under the pretext of underdevelopment, but their responsibility to do so reflects their smaller capacity and smaller responsibility compared to developed nations.

5-3: NON-BINDING COMMITMENT TO ACHIEVING THE SUSTAINABLE DEVELOPMENT

Until the introduction of the Millennium Development Goals and Sustainable Development Goals by the United Nations, climate change has never been an important focus of countries' development policies. The SDG 13 addresses its goals in conjunction with the United Nations Framework Convention on Climate Change by integrating climate change programs into national policies, strategies and planning. Under Article 4 of the Convention, "the Parties have a right to, and should, promote sustainable development". Despite endorsing the principle of sustainable development, it does not explain detailed modalities on how to achieve it in relation to climate.[106] To operationalize this principle, the Protocol established a Clean Development Mechanism (CDM) to help developed countries reduce greenhouse gas emissions and help developing countries achieve sustainable development. In this regard, reducing energy consumption through the channel of efficiency and energy conservation are options in line with sustainable development. Sustainable development and efforts to eradicate poverty have been mentioned several times in the Plan.[107] The preamble and sections, simply calls on member states to pursue their development policies within the framework of sustainable development. This statement shows that the regime is still far from its main goal, which is to achieve sustainable environmental development. Overall, despite the fact that the world must commit to tackling climate change for a better sustainable development future,[108] binding commitments in this regard have not yet been formed.

Examining the Plan indicates the fact that the dominant aspect of the Regime is still the *lex ferenda* which was designed in the Agreement. The re-emphasis on non-binding commitments based on the hybrid compliance mechanism on the one hand and establishing the fund, on the other hand, shows that the Regime is seeking to gradually move from *lex ferenda* to *lex lata*. The establishment of the Fund, which is based on global acceptance of climate justice, has been an aspiration for more than three decades but is gradually becoming reality.

CONCLUSION

Modern international law is based on positivist law and considers law as existing law or *lex lata* when it is included in resources listed in article 38 of ICJ statute. The distinctive feature of *lex lata* is the existence of binding obligations based on top-down compliance architecture for member states. But on the other hand, there is a non-positivist approach that considers international law beyond the official sources contained in Article 38 and provides other tools and methods to regulate international rules. *Lex ferenda,* which is the opposite of *lex lata*, includes non-binding obligations based on bottom-up adherence architecture for member states. However, in some areas, the separation of *lex lata* from *lex ferenda* is difficult and needs to be explained by international judicial procedure.

Determining the legal nature of the Regime has always been a challenge. Considering the Regime as *lex ferenda* indicates that its values have an ideal aspect and there are no precise and specific obligations for member states. But considering it as *lex lata* illustrates that the Regime is completely positivist and established, and it has clear and specific legal obligations for the member states. Certainly, the answer to this challenge can be useful in evaluating the efficiency of the Regime, because the efficiency of *lex lata* is assessed in the light of reaching its precise and positivist goals, and the efficiency of *lex ferenda* in smoothing the path to becoming *lex lata.*

Examining the evolution process of the Regime shows that it is essentially fluctuating between *lex lata* and *lex ferenda*. The Convention as a general and preliminary framework provides vague and non-binding obligations that, while separating the contracting states, encourage them to adhere to international obligations. With its dual architecture, it has elements of *lex lata* and *lex ferenda* simultaneously. Subsequently, the Protocol was adopted to promote the Convention, which aims to establish specific and detailed obligations based on a fully top-down compliance structure, especially for the developed countries listed in Annex I. It is the clearest manifestation of *lex lata* for the Regime. Finally, in the light of the inefficiency of the Protocol in making committed member states to adhere due to institutional design failure the Agreement retreated from the strict and ambitious position of the Protocol and tried to manage the Regime through the design of facilitative and non-punitive compliance architecture and NDCs commitments. Therefore, the Agreement mostly has the aspect of *lex ferenda*.

In order to increase the efficiency of the Regime, there is no other way for the transition from *lex ferenda* to *lex lata* to be gradual, rather than a strong shift that happened in the Protocol. The Plan, as the latest development in the Regime, while recognizing the need to establish a fund for climate loss and damage, re-emphasizes some non-binding obligations such as commitment to achieve Sustainable development and commitment to a transition to sustainable lifestyles. By adopting this method, on the one hand, it emphasizes its idealistic goals, and on the other hand, it paves the way for the realization of positivist goals. In other words, while gaining experience from the inefficiency of the Protocol, instead of a strong shift towards *lex lata*, the Regime is trying to gradually provide the grounds for moving from *lex ferenda* to *lex lata.*

ANNEX I

Australia, Austria, Belarus, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, European Economic Community, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia ,Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America.

ANNEX II

Australia, Austria, Belgium, Canada, Denmark, European Economic Community, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, United States of America.

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