

## СУЧАСНА СИСТЕМА МІЖНАРОДНОГО ПРАВА

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### **INTERNATIONAL CLIMATE CHANGE REGIME AND NATIONAL LAW: CASE-STUDY ON UKRAINE**

### **МІЖНАРОДНИЙ РЕЖИМ БОРОТЬБИ ЗІ ЗМІНОЮ КЛІМАТУ ТА НАЦІОНАЛЬНЕ ПРАВО: ДОСВІД УКРАЇНИ**

### **МЕЖДУНАРОДНЫЙ РЕЖИМ БОРЬБЫ С ИЗМЕНЕНИЕМ КЛИМАТА И НАЦИОНАЛЬНОЕ ПРАВО: ОПЫТ УКРАИНЫ**

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**Abstract.** *The article considers the inter linkages and overlaps in climate change regime at the national level. The purpose of this research is to prove that fragmentation in climate change regime at the international level can lead to fragmentation and non-compliance at the domestic level. The author stipulates that the fact that climate change is governed by multiple international regimes affects national laws and policies. The author examines different pieces of Ukrainian legislation relating to combating climate change and draws to the conclusion that Ukrainian law on climate change mitigation and adaptation is sporadic and not coherent, it lacks integrated and systematic governance. All sectoral legal acts on energy, energy efficiency, renewable energy sources, agriculture, protection of the atmosphere, etc. require deep reconsideration in light of Ukrainian international obligations on the climate change mitigation and adaptation. New legislation on monitoring, reporting, and verification of the GHGs emissions in various sectors should be adopted.*

**Key words:** *climate change, national legislation, Ukraine, compliance, regime.*

**Анотація.** *Стаття присвячена аналізу взаємозв'язків та проблемних питань правового регулювання боротьби зі зміною клімату на національному рівні. Метою цієї статті є доведення того факту, що фрагментація правового режиму боротьби зі зміною клімату на міжнародному рівні може призводити до фрагментації та проблем з виконанням на рівні національного права. Автор припускає, що той факт, що питання зміни клімату регулюється різними міжнародно-правовими режимами, впливає на національне законодавство і політику. Автор аналізує різні сфери законодавства України, присвячені*

боротьбі зі зміною клімату та приходять до висновку, що українське законодавство щодо пом'якшення та адаптації до кліматичних змін є спорадичним та незв'язаним, воно не забезпечує інтегрованого та системного управління. Всі галузеві правові акти з питань енергетики, енергоефективності, відновлюваних джерел енергії, сільського господарства, охорони атмосфери та ін. потребують глибокого перегляду в світлі міжнародних зобов'язань України щодо пом'якшення та адаптації до зміни клімату. Назріла необхідність ухвалити нове законодавство про моніторинг, звітність та верифікацію викидів парникових газів у різних секторах.

**Ключові слова:** зміна клімату, національне законодавство, Україна, виконання, режим

**Аннотація.** Стаття посвячена аналізу взаємосв'язей і проблемних вопросов правового регулювання боротьби з изменением климата на национальном уровне. Целью этой статьи является доказательство того факта, что фрагментация правового режима борьбы с изменением климата на международном уровне может привести к фрагментации и проблемам с выполнением на уровне национального права. Автор предполагает, что тот факт, что вопрос изменения климата регулируется различными международно-правовыми режимами, влияет на национальное законодательство и политику. Автор анализирует различные сферы законодательства Украины, посвященные борьбе с изменением климата и приходит к выводу, что украинское законодательство по смягчению и адаптации к климатическим изменениям является спорадическим и несвязанным, оно не обеспечивает интегрированного и системного управления. Все отраслевые правовые акты по вопросам энергетики, энергоэффективности, возобновляемых источников энергии, сельского хозяйства, охраны атмосферы и др. требуют глубокого пересмотра в свете международных обязательств Украины по смягчению и адаптации к изменению климата. Назрела необходимость принять новое законодательство о мониторинге, отчетности и верификации выбросов парниковых газов в различных секторах.

**Ключевые слова:** изменение климата, национальное законодательство, Украина, выполнение, режим.

**Formulation of the problem.** The multi-layered realm of climate change governance is marked by fragmentation in both substance and scale [Khan, 2017: 132]. It's impossible to effectively tackle climate change problems without enhanced interdisciplinary cooperation between different international self-contained regimes such as climate change, ozone protection, and protection of the atmosphere from pollution, weather modification, marine environment, biodiversity, human rights, trade and energy. The same is true for the national governance of climate change topics. Climate change-related issues gradually transcend the borders of international law and become an additional topic of national legal agenda of states. As a result, there are problems with effective domestic implementation and enforcement. In order to ensure that a country safeguard system is developed and implemented efficiently, one should examine synergies with other safeguard systems of related processes in the country [Tegegne, 2017: 2], namely, in Ukraine.

**Analysis of recent research and publications.** The issue of international climate change regime as well as its fragmentation and synergies was studied by the following foreign scholars: S. A. Khan, R. Rayfuse, Sh. V. Scott, W. Boyd, H. van Asselt, F. Sindico, M. A. Mehling, K. W. Abbott, Th. Etty, V. Heyvaert, C. Carlarne, D. Farber, J. Scott, E. Fisher, E. Scotford, E. Barritt, L. Rajamani, A. Huggins, M. S. Karim and many others. The study of international climate change regime and implementation of relevant international legal rules into national law has re-

cently become the subject of special attention of Ukrainian scientists, legal practitioners and experts of different fields. Among the doctrinal legal research of these issues the works of A. Andrusevych, S. Kravchenko, O. Bardina, S. Kozhushko, A. Samura, N. Shpeg, K. Prohorenko, N. Udodand other scientists are worth mentioning. However, recent trends of legal regulation of this sphere in Ukraine require an individual research.

**The purpose of the article.** The purpose of this research is to prove that fragmentation in climate change regime at the international level can lead to fragmentation and non-compliance at the domestic level. The author stipulates that the fact that climate change is governed by multiple international regimes affects national laws and policies.

**The main research.** Climate change is an issue that cuts across many domains, deeply implicates all areas of international law and policy [13: 5]. The CC regime is fragmented into various functional and sector-specific areas [Boyd, 2014: 515]. Climate change challenges demand high level of coordination and cooperation in different sectors of international and national law. At first blush, international environmental law may be recognized as best suited for this task, but it suffers lack of coherence itself, thus, more integrated approach is needed. As Patricia Birnie, Alan Boyle and Catherine Redgwell rightly point out, ‘the sectoral approach, which has traditionally dominated international regulation of the environment, is plainly inappropriate to the interconnected and global character of climate change’ [Birnie, 2009: 356]. Thus, policy-makers need to build synergies within climate change regime, as well as between climate change regime and regimes for the protection of ozone, atmosphere, marine environment, biodiversity, human rights and governing the geoengineering, trade or energy activities.

Separate climate change issues are regulated by the UN Framework Convention on Climate Change (1992) (hereinafter – the UNFCCC), the Kyoto Protocol (1997), the Paris Agreement (2015), the Montreal Protocol on Substances that Deplete the Ozone Layer (1987), the Convention on Long-Range Transboundary Air Pollution (1979), the 1999 Protocol to the Convention to Abate Acidification, Eutrophication and Ground-Level Ozone, the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (1977), the International Convention for the Prevention of Pollution from Ships (1973/1978), the London Protocol (1996) to the Convention on the Prevention of the Marine Pollution by Dumping of Wastes and Other Matter (1972), the Convention on Biodiversity (1992), the Energy Charter Treaty (1994), the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects (1994), the Energy Community Treaty (2005), Human Rights Council resolutions, WTO rules, ICAO instruments (e.g. Resolution for a global market-based measure to address CO<sub>2</sub> emissions from international aviation), etc. There are some examples of efficient cooperative efforts between the climate change regime and other relative regimes. Still, much has yet to be done to overcome the negative consequences of fragmentation and existent inconsistencies between climate change and other international legal regimes through cooperative efforts and unified position on the nature and impacts of the climate change phenomenon.

Ukraine ratified the UNFCCC, Kyoto Protocol and Paris Agreement. It defined that its National Determined Contribution will not exceed 60% of 1990 GHG emissions level in 2030 [16]. Ukraine is also a Party to all above-mentioned agreements, except the Gothenburg Protocol. Ukraine didn't ratify the Doha Amendment to the Kyoto Protocol [8], though expressed its intention to be bounded by the second commitment period. Ukraine was a leader in the amount of Clean Development Projects implementation due to the efficient national legislation on this particular topic. There are some other achievements that should be mentioned. Ukraine has laws on Energy Efficiency (1994), Electricity (1997), Alternative Types of Fuel (2000), Alternative Types of Energy (2003), amendments to some laws concerning competitive conditions for electricity

from alternative energy sources (2015), National Action Plan on the Implementation of the Kyoto Protocol Provisions (2005), the Sustainable Development Strategy till 2020 (2015), the Conception of the Implementation of Climate Change National Policy till 2030 (2016). Ukrainian law on refugees and persons who need additional or temporary protection (2011) incorporates the notion of climate refugees.

The international standards of the above-mentioned self-contained regimes are being incorporated into Ukrainian legislation, though mainly through secondary legal acts. Meanwhile, Ukraine experiences huge problems in implementing the international standards on the climate change mitigation and adaptation in its national legal order. The legal regulation of these questions in Ukraine is fragmented and lacks synergies. There is no long-term low GHG emission development strategy in Ukraine as envisaged in Article 4 (19) of the Paris Agreement [7]. Strategy for the Development of Agriculture and Agricultural Areas for 2015–2020 (2015) does not have any obligations and measures in the climate change mitigation and adaptation sector [5]. There is no reference to the climate change in the Ukrainian Law on the Protection of Natural Environment (1991) [3]. Law on the Protection of the Atmospheric Air (1992) contains respective references in Articles 16 (obligation to cut down the emission of pollutants impacting climate), 22 (on benefits in introducing the energy efficient technologies and regulation of activities impacting climate) and 33 (on responsibility for unlawful activities impacting climate and weather) [2]. However, there is no proper implementation mechanism except for the environmental tax provided in the Tax Code (2010): Article 243 stipulates tax rates for emissions of pollutants from stationary sources into the air, including GHGs (methane, CO<sub>2</sub> and nitrogen oxides) [1]. The tax rate for carbon dioxide emissions comprises of 0.37 hryvnia per 1 ton, which is considerably cheaper in comparison to developed countries. There is no tax rate for emissions from civil aviation, shipping or automobile transport in Ukraine.

Ukraine acceded to the Energy Community Treaty in 2010 and is obliged to implement EU Directives 2006/32 on energy end-use efficiency and energy services, 2010/31 on the energy performance of buildings, 2010/30 on the indication by labeling and standard product information of the consumption of energy and other resources by energy-related products which are most linked to the issue of combating climate change. Despite Ukraine adopted National Plan on Energy Efficiency till 2020, National Plan on Renewable Energy till 2020 and Energy Strategy till 2030 with a goal to enforce some relevant EU directives, Ukraine still lacks legislation on energy efficiency fund. Ukraine has obligations on climate change mitigation and adaptation due to the EU – Ukraine Association Agreement (2014) [6]. Thus, Ukraine has to implement EU Directive 2003/87 establishing a scheme for GHG emission allowance trading within the Community, but there is no national law on this subject yet.

The National Agency of Environmental Investments, responsible for the implementation of the Kyoto flexible mechanisms which also had accumulated some experience in integrated climate policy management, was liquidated; its functions were transmitted to the Climate Policy Department of the Ukrainian Ministry for Environment and Natural Resources. Intergovernmental Commission on the UNFCCC implementation is not active, meanwhile, national policy on specific industrial sectors that are major sources of GHG emissions is formed by different ministries (of energy, regional development, construction and housing, agriculture and food, infrastructure, etc.), which lack proper coordination and synergy.

The most vivid examples of national climate change legal regime's fragmentation and inconsistency are cases concerning non-compliance by Ukraine with relevant international treaties. On 12 October 2011, the Enforcement Branch of the Kyoto Protocol Compliance Committee adopted a final decision concerning Ukraine and declaring that our country was in non-compli-

ance and not eligible to participate in the market-based mechanisms of the Kyoto Protocol. The question of implementation related to compliance with the Guidelines for national systems for the estimation of anthropogenic GHG emissions by sources and removals by sinks under Article 5 (1) of the Kyoto Protocol. In particular, the expert review team found that the national system of Ukraine failed to perform some of the general and specific functions required by the Guidelines and didn't ensure that Ukraine's 2010 annual submission was sufficiently transparent, consistent, comparable, complete and accurate [9]. Very shortly, however, this sanction was lifted: in March 2012 the Enforcement Branch adopted a decision that Ukraine's implementation was no longer questioned [10]. In 2012, however, two more questions of implementation concerning Ukraine appeared on the agenda. The first question relates to the late submission by Ukraine of its true-up period report and inconsistencies between information submitted by it and the international transaction log maintained by the Secretariat. The second question relates to Ukraine's emission reduction target for the first commitment period of the Kyoto Protocol [17]. In the final decision, the Enforcement Branch confirmed its preliminary finding that Ukraine was not in compliance with Article 7 (1) and 7 (4) of the Kyoto Protocol and the guidelines adopted thereunder; reversed its preliminary finding with respect to compliance with the registry requirements and prescribed the following consequences to be applied with immediate effect to Ukraine: Ukraine was declared to be in non-compliance and required to submit a plan to address its non-compliance within three months [17].

There are also two cases of non-compliance concerning Ukraine within the framework of the Energy Community regime. In September 2016, the Secretariat opened the case ECS-13/16 addressing the lack of complete transposition of the EU Directive 85/337 on the assessment of the effects of certain public and private projects on the environment. In its preliminary legal assessment, the Secretariat points out the lack of transposition of the Directive's provisions on transboundary environmental impact assessment and the improper or incomplete transposition of the provisions on the projects to be covered by an environmental impact assessment, on the information to be included in the impact assessment report and on public participation, therefore, the Secretariat concluded that Ukraine did not fulfill its obligation to transpose the Environmental Impact Assessment Directive into national law [18]. On 12 January 2017, the Secretariat sent a Reasoned Opinion to Ukraine in this case. On 19 May, the Secretariat submitted this dispute settlement case to the Ministerial Council, which will take a decision on the alleged breaches of the Energy Community acquis by Ukraine at its meeting on 20 October 2017. On 11 February 2013, the Energy Community Secretariat sent Opening Letters to Albania, Bosnia and Herzegovina, FYR of Macedonia, Serbia and Ukraine noting that these five Contracting Parties have not yet transposed and implemented the requirements of Directive 1999/32 relating to a reduction in the sulphur content of certain liquid fuels as required by Article 16 and Annex II of the Treaty (see case ECS-5/13 regarding Ukraine) [19].

Ukraine's failure to adopt a Law on Environmental Impact Assessment became the cornerstone of the case ECS-13/16. Among activities subject to obligatory environmental impact assessment, Article 3 lists all sectors of energy industry, including all types of power plants; it explicitly refers to climate, climate change and GHGs emissions in Articles 1(1)(1), 6(2)(4) and 6(2)(5). The proposed law was vetoed by the President of Ukraine in October 2016. Then the revised and amended law was sent to Ukrainian Parliament for reconsideration. It was finally adopted and took effect on 23 May 2017, but it will become operative just on 18 December 2017 [4].

Some cases initiated by Ukrainian NGOs against governmental institutions dealing with the climate change or related topics also indicate existing problems with enforcement of international

obligations of the state and lack of integrated coherent climate change policy. National NGO 'Environment-People-Law' has a record of such cases dealing with the failure of the Ministry of Environmental Protection of Ukraine to duly fulfill its climate change obligations, violation of the legislation on the right to information and public participation in climate change issues, inaction of the governmental bodies towards information dissemination and disclosing the information on international emissions trading under the Kyoto Protocol to the UNFCCC, and failure of the National Agency of Environmental Investments to provide access to information in National Electronic Registry of Anthropogenic Emissions, etc. [20].

**Conclusions.** Once predominantly a global issue addressed by the international community, the climate change slowly transcends the borders of international law and appears on national legal agenda. However, this does not necessarily bring about positive results, as there are still problems with efficient domestic implementation and enforcement.

Ukrainian legislation on the climate change mitigation and adaptation is sporadic and not coherent, it lacks integrated and systematic governance. Ukraine does not have any strategic document on cutting down the GHGs emissions. All sectoral legal acts on energy, energy efficiency, renewable energy sources, agriculture, protection of the atmosphere, etc. require deep reconsideration in light of Ukrainian international obligations on the climate change mitigation and adaptation. New legislation on monitoring, reporting, and verification of the GHGs emissions in various sectors should be adopted. The most vivid examples of national climate change legal regime fragmentation and inconsistency are cases concerning non-compliance by Ukraine with relevant international treaties.

By means of enhanced cooperation at universal, regional and national levels, strong political will and enthusiasm of different state and non-state actors, the dream of harmonious, safe and integrated Earth may finally become the reality.

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