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SOFT LAW AS *TOPOS*: THE ROLE OF PRINCIPLES OF SOFT LAW IN THE DEVELOPMENT OF INTERNATIONAL ENVIRONMENTAL LAW

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TABLE OF CONTENTS

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ABSTRACT

This dissertation addresses the impact of principles of soft law on the development of international regimes for environmental protection. It focuses on three such principles that have attracted a certain degree of consensus in international environmental law and are therefore influential in international environmental regimes: namely, the principle of common but differentiated obligations; the principle of common heritage of mankind and its corollary, the principle of common concern of humankind; and the precautionary principle. The regimes analysed are the Antarctic regime, the regime for control of trade in endangered species, the regime for protection of the stratospheric ozone layer, and the emerging regime governing conservation and management of straddling fish stocks. It is argued that these principles influence normative development in international environmental regimes through processes of discourse in which participants, both state and non-state actors, seek to determine the rules by which their mutual relations will be governed and their common interests protected. Such discourse also connects the evolution of legal rules with a broader set of concerns relating to the interest of human communities in achieving a certain level of environmental protection. In this respect, the legal rules may be contemplated within a moral framework in which members of international society seek to determine what they ought to do with respect to global environmental protection.

SOMMAIRE

Cette dissertation discute des principes de « soft law » et de leur influence sur le développement des régimes internationaux pour la protection de l'environnement. Elle vise plus précisément trois de ces principes qui sont l'objet d'un certain degré de consensus dans la société internationale et qui sont donc susceptibles d'avoir un impact important sur les régimes pour la protection de l'environnement global : soit, le principe des obligations communes mais différentes; le principe du patrimoine commun de l'humanité ainsi que le principe corollaire de l'intérêt commun de l'humanité; et le principe de précaution. Les régimes dont il est question sont le régime pour l'Antarctique, le régime pour le contrôle des échanges internationaux d'espèces en danger, le régime pour la protection de la couche d'ozone stratosphérique, et le régime émergeant pour la conservation et la gestion des stocks de poissons chevauchants. Il est soumis que ces principes exercent une influence sur le développement normatif des régimes internationaux pour la protection de l'environnement par le biais des discours par lesquelles leurs relations seront gouvernées et leurs intérêts communs protégés. De tels discours font également le lien entre l'évolution des règles juridiques et une problématique plus large concernant l'intérêt des communautés humaines à atteindre un certain niveau de protection environnementale. Ainsi, les règles juridiques peuvent être contemplées du point de vue d'un encadrement moral dans lequel les membres de la société internationale cherchent à déterminer ce qu'ils devront faire pour la protection de

l'environnement global.

ABBREVIATIONS

ASOC:	Antarctic and Southern Ocean Coalition
ATS:	Antarctic Treaty system
CCAMLR:	Convention on the Conservation of Antarctic Marine Living Resources
CEIT:	Country with Economy in Transition
CFC:	Chlorofluorocarbon
CHM:	Common Concern of Mankind
CITES:	Convention on International Trade in Endangered Species of Wild Fauna and Flora
COP:	Conference of the Parties
CP:	Consultative Party
CWG:	Criteria Working Group
EEZ:	Exclusive Economic Zone
FAO:	Food and Agricultural Organization
FCCC:	Framework Convention on Climate Change
GEF:	Global Environment Facility
ITLOS:	International Tribunal for the Law of the Sea
IUCN:	International Union for Conservation of Nature and Natural Resources
LOSC:	Law of the Sea Convention
MLF:	Multilateral Fund
MSY:	Maximum Sustainable Yield

NAFO:	North Atlantic Fisheries Organization
NGO:	Non-Governmental Organisation
NIEO:	New International Economic Order
ODS:	Ozone-Depleting Substances
PSNR:	Permanent Sovereignty over Natural Resources
UN:	United Nations
UNCED:	United Nations Conference on Environment and Development
UNDP:	United Nations Development Programme
UNEP:	United Nations Environment Programme
UNIDO:	United Nations International Development Organization

INTRODUCTION

This dissertation concerns itself with non-binding norms of international environmental law and their impact on the development of regimes for global environmental protection. Environmental protection poses challenges to traditional conceptions of international law in at least two ways. In its emphasis on ecosystems and the interconnectedness of environmental media, international environmental protection works against the jurisdictional and territorial frameworks of international law. Because of the inherently transboundary and often global nature of environmental problems and their potential solutions, environmental protection cannot readily be accommodated within a framework based on territorial jurisdiction. Second, in its emphasis on common goals and the need for cooperative action, environmental protection fits uncomfortably with the agnosticism that international law seeks to maintain with respect to goals, values and priorities. Environmental protection is only indirectly related to the goal of maintaining order among states. It is purposive in nature, designed to achieve ends that, although often understood as largely scientific and technical, possess important political, economic and social dimensions. International law has traditionally sought to relegate such matters, as far as possible, to the domestic jurisdiction of individual states. As a result, the stated aims of international environmental protection often outstrip the capacities of the international legal system, requiring the development of new approaches to law-making and implementation.

In this dissertation I explore a range of theoretical approaches to law and politics in an effort better to understand the processes through which norms of international environmental law are developed. I am concerned with discursive processes that take

place within regimes for global environmental protection and, more particularly, with the influence on these processes of emerging principles for international environmental protection. These principles, although they are not generally regarded as having the status of binding international law, nevertheless exercise significant influence on law and legal processes. Three such principles are explored: common but differentiated obligations; . common heritage of humankind and its corollary, common *concern* of humankind; and the precautionary principle, sometimes referred to as the precautionary *approach*.[1] Four case studies have been selected: the Antarctic Treaty regime; the regime controlling trade in endangered species; the regime for the protection of the stratospheric ozone layer; and the regime for the conservation and management of straddling fish stocks. Within each of these case studies, the operation of principles of soft environmental law is considered.

Three of the regimes, namely Antarctica, ozone protection and conservation of straddling stocks, address global commons resources, that is, resources over which no state has exclusive sovereign jurisdiction and to which many or all states have access. Global commons resources pose particular challenges to international law precisely because they lie beyond sovereign territory. All states that contribute to or are affected by the degradation of these resources therefore must cooperate, or at least coordinate their actions, to conserve and manage these resources. Resources on state territory, such as those with which the fourth regime for control of trade in endangered species is concerned, pose challenges of a different sort, in that states are reluctant to allow international scrutiny of their management of such resources. However, the conclusion of

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[1] Sustainable development is absent from this list. I regard sustainable development as an overarching goal or objective rather than a principle. It is reflected in various ways in the principles under

the Framework Convention on Biological Diversity,[2] with its preambular reference to biodiversity as a common concern of humankind, emphasises a certain degree of recognition of the international implications of domestic policies and laws. A further common feature of these regimes is that they are all relatively well-developed and robust,[3] which permits a more detailed analysis of the influence of principles of soft law on their development.

These case studies are drawn from various periods in the history of international environmental law. The Antarctic regime emerged before environmental protection had earned a place as a distinct issue on the international agenda; as a result, the central legal instrument in this regime does not make reference to environmental protection. The regime for trade in endangered species was concluded in the immediate aftermath of the United Nations Conference on the Human Environment, held in Stockholm, Sweden in 1972. As we shall see, this conference marked a watershed moment in the development of international environmental law. The convention at the centre of this regime is nevertheless a traditional document, showing great deference to domestic jurisdiction and to state sovereignty, while at the same time seeking to come to terms with the international dimensions of threats to endangered species. The legal instruments central to the ozone regime were concluded at a time when international environmental protection was well-established on the international agenda, and when international cooperative

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consideration here, and in virtually all discourses about global environmental protection. However, it operates at an even greater level of generality than principles.

[2] United Nations Framework Convention on Climate Change, *open for signature* 4 to 14 June 1992, *entered into force* 21 March 1994, 31 I.L.M. 848 (1992).

[3] This is true of the straddling stocks regime despite the fact that the agreement central to this regime has not yet entered into force. The legal instrument does not mark the formation of this regime, but rather a further stage in its development.

efforts to combat environmental degradation were well underway, but when international legal approaches to the articulation, implementation and promotion of compliance with environmental protection norms were in their infancy. The Straddling Stocks Agreement, the only one of the legal instruments under consideration that has not yet entered into force, benefited from developments in approaches to global environmental protection and more particularly to legal approaches to achieve this goal.

The environmental protection issues with which each regime is concerned are, in many respects, the same, but the resources under consideration and the nature of threats to those resources differ, thus requiring different approaches to management, conservation and protection. This divergence permits us to observe the potentially vast scope for the application of the principles under consideration, as well as the different shapes that these principles take in different contexts.

The dissertation focuses on the role played by a small number of soft law principles - principles that, although they may be reflected in binding rules in particular conventions, are not regarded as having attained the status of binding norms of international law enjoying general application. The dissertation does not seek to demonstrate that these principles have attained, or soon will or should attain, the status of customary international law. Rather, it analyses these principles *as norms of soft law*. Nevertheless, I am concerned with the *legal* significance of the principles under consideration. In order better to understand their legal significance, the principles will be analysed in the context of the legal regimes referred to above.

A few comments about the nature of these norms are in order. First, I draw a distinction between principles and rules. Principles differ from rules as to their structure: they are phrased in general terms. The principles under consideration here are often

criticised as being too broad and vague to serve as effective guides to action, or as saying nothing about the conditions under which they are to be applied. However, this criticism can be countered with reference to a second difference between principles and rules, namely difference as to function. Principles cannot guide action or speak to conditions of their application.[4] This is not their vocation. Rather, they serve to guide the processes through which one reaches conclusions about the way actors should behave. Principles serve to frame legal discourse, reasoning or argument. They may be referred to for guidance in the processes through which rules are articulated as well as in processes of interpretation and application of rules. The vagueness and generality of principles is a source of their strength and usefulness in international law.

Having clarified the question of principles, I now turn to a further common feature of the norms with which I am concerned, namely their status as *soft* law. I use the term 'soft law' with some reluctance, as it seems to suggest that norms falling within this category are somehow subordinate to binding norms of law - less substantial, weaker, more easily avoided or ignored. However, I do not accept a hierarchy between soft and binding law, any more than I accept a hierarchy of principles and rules of law. The two categories have different characteristics and different functions. Legal systems rely, in the final analysis, on both soft and binding norms of law for their effectiveness.

A further reason for my reluctance to adopt the term 'soft law' is my doubt that one can draw a clear and precise distinction between the categories of soft and binding

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[4] Although I regard rules as serving as guides to action, I do not mean by this that the process of applying a rule to a given fact situation and reaching a conclusion as to the forms of behaviour that are required or prohibited is a straightforward, mechanical matter. Nevertheless, actors may refer to rules and reach conclusions, through interpretive processes that depend on the application of practical reasoning, as to the course of action prescribed by the rules.

law, or that one can make unambiguous determinations as to whether a given norm falls into the former or the latter category. If a norm influences debate, action, outcomes etc., then surely its effectiveness on the ground is a more important quality than its formal status as binding or non-binding. I nevertheless accept that there is a meaningful and important distinction to be drawn between the categories of soft and binding law, even if the boundary is inevitably blurred and often contested. While I readily accept the argument that it is more accurate to speak of a continuum from binding to non-binding than of two discrete categories, I make the further argument that we must assume the existence of a point on this continuum that marks a boundary between law and non-law.[5] Again, the exact location of this point, or the sharpness and precision with which it is positioned, is not of concern here. I remain convinced, however, that to speak of law is to speak of a phenomenon distinct from other, necessarily related phenomena such as policy, morality, ethics, social mores, etc.

I do not wish to make too much of this distinction, because this dissertation does not depend on it and indeed treats it, for many purposes, as relatively unimportant. After all, I am concerned with the influence *across* this boundary - about the manner in which norms that do not rely for their influence or relevance on their legal pedigree operate on systems of norms that have crossed the threshold into the zone of law. Furthermore, the mechanism that I have chosen to study, although central to the phenomenon of law, is not a legal mechanism in the way that courts, legislatures, international negotiations on convention texts or international arbitration are legal mechanisms. The mechanism I am

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[5] Stephen J. Toope, *Emerging Patterns of Governance and International Law in* THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW (Michael Byers, ed., 2000) 91 at 91.

interested in is discourse, which includes but is not limited to processes of legal reasoning, that is, the processes through which rules are applied to facts to produce conclusions that translate into legal rights or obligations. Also included in discourse are processes of reasoning in which actors discuss policy, politics, ethics, morality, interests, practical problems and so forth, all with a view to assisting themselves and one another to understand a given problem and to persuade one another of the correctness of their respective positions.

Discourse is of relevance to principles of soft international environmental law in a number of ways, of which two concern me here: through processes of discourse, these principles emerge, take shape, and attract - or fail to attract - a certain degree of consensus. This consensus may relate to their substance, that is to say, one may identify a consensus on the content of a given principle. Consensus may also extend to the validity, legitimacy, usefulness or relevance of the principle, although it is difficult to achieve such a consensus in the abstract. Second, discourse is relevant to these principles when they are drawn into specific contexts, such as regimes for international environmental protection, and used to assist actors in articulating, interpreting and applying rules in those contexts. Through discursive processes at the level of a particular regime, arguments will be put forward, challenged and adapted as to the relevance of the principle to the issues and problems at stake in the regime, as to the manner in which rules could or should be crafted in light of the principle, and as to the scope of the principle's application to the issue-area with which the regime is concerned, to name a few possibilities.

I regard principles of soft environmental law as representing shared understandings, or topics, that can be used to chart a path through a particular factual context and to serve as the basis for justifying a given conclusion. In making this

argument, I draw on a rhetorical approach to law. Rhetoric is a type of argumentative process that is engaged in when the matter one is arguing about concerns something to be *decided*, that is, something about which it is not possible to derive a single, logical conclusion. This feature of rhetoric makes it well-suited to a discussion about international environmental law, which is in many respects an inherently political matter.

I stated above that actors in international society may engage in debates about the validity and legitimacy of rules of international environmental law. Questions of usefulness or relevance are practical matters, and have an obvious place in discussions of obligations at the international level. However, to speak of validity and legitimacy in the context of a society, such as international society, that is profoundly diverse and heterogeneous, raises a host of difficulties. For this reason, I turn to discourse ethics to determine whether and to what extent it is possible for actors who do not hold a common set of values or a common conception of the good nevertheless to agree to a set of norms by which they govern their behaviour. Discourse ethics concerns itself with communicative action, that is, action oriented to reaching understanding. It may be applied to emergence of common understandings about norms, both moral and legal. My analysis of discourse ethics draws on closely related work on social constructivism, which presents tools for analysing the creation, persistence, modification and decline of social institutions and shared understandings, as well as speech act theory, which analyses speech as a form of action capable of bringing about change in the world, including the reaching of understanding, agreement and consensus.

Discourse ethics suggests that it is possible for actors not sharing a common orientation toward the good nevertheless to reach agreement on both the content and validity of moral and legal norms. In other words, it is possible for actors from different

ethical horizons to agree that a given norm is valid, legitimate, right and just. I now must anticipate two questions: first, how is it possible to take discourse ethics, a philosophy applied at the domestic level to societies in which there is a fairly dense set of shared assumptions and understandings, to international society, where these shared understandings, to the extent that they are present at all, are very thin? Second, given the inherent difficulties of the task, why would one attempt such an application at all?

I will begin with the second question. There are many reasons why one would welcome discussions of questions of politics, morality and justice at the international level, but we may focus on one, namely the practical matter of international society's need to address the problem of global environmental degradation. In its emphasis on ecosystems and the interconnectedness of environmental media, the issue of global environmental protection works against the jurisdictional and territorial frameworks of international law. Because of the inherently transboundary and even global nature of environmental problems and their potential solutions, environmental protection cannot readily be accommodated within a framework based on territorial jurisdiction. Second, in its emphasis on common goals and the need for cooperative action, it fits uncomfortably with an agnostic stance to questions of goals, values and priorities. Environmental protection is only indirectly related to the goal of maintaining order among states. It is purposive in nature, designed to achieve goals that, although often understood as largely scientific and technical, possess important political, economic and social dimensions. As a result, the stated aims of global environmental protection often outstrip the capacities of available international structures and processes. If one attempts to address the problem of global environmental protection, one necessarily confronts issues of politics, morality and justice. Therefore, if we agree that international society must address this problem, we

need to think of ways in which it can do so given the pluralistic, heterogeneous nature of that society.

To return to the first question, namely how the discourse ethical approach can be transposed from domestic to international society, I suggest that this may best be accomplished through international regimes. Regimes offer several advantages, given the constraints imposed by the nature of international society. First, they do not require the development of elaborate governmental or administrative structures. Although regimes often possess fairly elaborate structures themselves, and although they draw heavily on the already very complex international bureaucracy, they do much of their work through governmental and administrative structures already existing at the domestic level. There is a certain degree of division of labour between international and domestic spheres that obviates the need to replicate domestic political, legal and administrative structures at the international level.

Second, regimes are designed to correspond to a given set of problems, or an issue-area. The issue-area with which a regime is concerned may be large and complex, and furthermore may be related to other issue-areas, thus adding to the complexity, but by focusing on an issue-area, regimes are able to concentrate their energies on a smaller set of problems that, hopefully, present a much more manageable set of issues than global environmental protection or international governance writ large.

A third advantage, closely related to the second, has to do with the various levels and degrees of formality within a regime. Regimes, unlike international organisations, may be built around a formal legal convention concluded among states, but they may equally have as their foundation a much less formal instrument, such as a policy document. Furthermore, they may have their origins, not in an instrument of law and

policy at all, but rather in a set of less formal interactions among states around a set of problems that come to be defined as an issue-area. The result is that regimes need not impose barriers to meaningful participation by non-state actors, such as scientists, experts in policy and law, members of domestic or international bureaucracies, and individuals and groups from domestic society. Because regimes are focused on solving problems related to a particular issue-area, the category of relevant participants may be defined in light of the expertise and interest of those participants - in other words, in terms of their relevance to the work of the regimes, rather than to their status as recognised international actors. Within regimes, the conditions for discourse leading to shared understandings and consensus on ideas, approaches and norms may be present.

The question whether regimes for international environmental protection are regarded as valid and legitimate is an important one because a legal system that enjoys the consent of its addressees is a better system, from a moral point of view, than one that relies on coercion and constraint to attract adherence. In addition, such a legal system is more efficient, effective and viable. This is particularly the case in international society, which is characterised by its decentralisation and horizontal structure. Structures and processes to impose legal rules on international actors and to ensure compliance with those rules through coercive mechanisms exist in international society only at a rudimentary level, if they can be said to exist at all. Therefore, international law must rely on different mechanisms to encourage or compel members of international society to bring themselves under that law and to govern their behaviour by its light. Perceptions of the legitimacy and effectiveness of this law may serve in no small measure to accomplish this goal.

A word is in order regarding the optimistic approach to international law and society taken in this dissertation. It may appear at times that I wish to suggest that international actors are motivated, not by self-interest, fear, or desire to ensure their survival or enhance their power relative to their rivals, but almost exclusively by a concern to ensure that the good of human communities, including the good of environmental protection, may be realised in a spirit of cooperation on the basis of consensus, shared understanding, and common adherence to both a moral and a legal framework for action. It is true that the darker side of international society receives very little attention in the pages that follow. This is not due to a belief in the non-existence or relative unimportance of power, self-interest, rivalry, violence etc. in international society, but rather in a concern to focus on other forces that influence outcomes in that arena. I do not wish to claim that a moral consensus on the appropriateness and validity of soft law principles of international environmental law is responsible, to the exclusion of other possible causal factors, for the development of regimes and the outcomes in which they are implicated. The deployment of power is a constant concern in international law and international relations scholarship, and for good reason, but other forces and causal factors operating in international society, including normativity, deserve and require attention as well. Nor do I wish to suggest that these regimes are functioning in an optimal manner and that the future of the biosphere is therefore secure. However, in order fully to develop an argument about the influence, actual and potential, of these principles through the medium of discourse in international environmental regimes, it is necessary to focus on discourse and communication leading to common understanding and consensus. Communication oriented toward understanding cannot overcome self-interested behaviour and cannot correct power imbalances and inequitable distributions of

resources. However, the role of communication in international society is of great importance. A better understanding this role is therefore essential to the study of international society.

CHAPTER 1 – DISCOURSE ETHICS AND INTERNATIONAL REGIMES: THEORETICAL BACKGROUND

1. INTRODUCTION

International law must reckon with two features of international society that often pull law in very different directions: pluralism and interdependence. The vast diversity of states, societies and peoples in the world and the absence of a value consensus upon which a community of international scope could be based pose significant challenges to law, particularly at a time in history when the demands on international law are great and often extravagant. Yet the notion that international law should respond to these demands simply by avoiding them on the ground that the absence of a value consensus prevents it from taking on substantive problems is highly unsatisfying. Current scholarship in international law and international relations reveals the uneasy coexistence of liberal and republican threads, the former tending to stress the importance of tolerance and the value of individual freedom to articulate a worldview, and the latter emphasising the need for consensus and the pursuit of common purposes.[1]

The traditional response of international law to conditions of pluralism is to seek to promote the maximum level of freedom for the members of international society compatible with a minimum level of order among those members. This approach is nourished by classical liberalism, and is exemplified in the earlier writings of Hedley

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[1] This difference in emphasis between liberal and republican approaches flows from their different conceptions of human beings. For liberals, human beings are individuals, alone capable of defining their own ends and maximising their own utility. For republicans, human beings are political beings: ARISTOTLE, POLITICS, I, ii (1253a9-10) (Stephen Everson, ed., 1984). *See* NICHOLAS GREENWOOD ONUF, THE REPUBLICAN LEGACY IN INTERNATIONAL THOUGHT (1998), chapter 2. Onuf writes: "In

Bull. Order in international society, writes Bull, is in tension with justice on a human scale; indeed, human rights and related issues are potentially subversive of order among states. He describes states as maintaining a "conspiracy of silence" with respect to the relationships between governments and citizens within state borders.[2] International order - order among states - depends, according to Bull, on this deferral of justice issues.[3] Bull proffers the argument that order should be pursued because it is the "condition of the realisation of other values,"[4] although he acknowledges that there are other possible organising principles.[5] From this perspective, international society - and with it, international law - are seen to be the creature of states. They are designed to meet the needs of states through three basic rules: security against violence; promises kept and agreements carried out; and stability in possessions.[6]

The classical liberal statesman depicted in Bull's early writings must resist succumbing to the *hubris* of acting on moral and ethical principles in the international realm. To seek to apply a particular conception of the good life to international society would be to unleash violent clashes among the many different conceptions of the good life that are held by the various domestic societies that participate, as states, in international society.[7] From the point of view of classical liberalism, it is the task of

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republican terms, society is neither an artefact of relations among self-regarding agents nor a jointly negotiated device to advance their several interests. Human association comes first:" ONUF, *ibid.* at 5.

[2] HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS (1977) at 82-3.

[3] *Ibid.* at 91.

[4] *Ibid.* at 96-7.

[5] *Ibid.* at 77.

[6] *Ibid.* at 4-5 and 13. The parallels with personal inviolabity, contract law and property law need hardly be emphasised.

[7] I draw this metaphor of statesman as tragic hero from Richard Ashley's account of realist descriptions of the international realm. He writes: "Beyond these margins [of the state] lurks the domain of political realism, of the children of the darkness, and of power politics. The height of folly, the source of

international law to remain value-neutral, and to seek to balance the rights of all to pursue their own conceptions of the good life with the rights of each to be free of interference in this pursuit.[8] This proposal is not presented as a cynical plea to abandon the world beyond one's borders to its fate, but rather as a sincere attempt to discover the conditions under which international law, with all its flaws and weaknesses, can best meet the needs of members of international society (that is, states) as well as the citizens of individual states. However, this approach is increasingly looked upon as unsatisfactory, not least by Bull himself in his later writings.[9]

The dissatisfaction with this minimalist approach to international law is the result of a change in the culture of international society in recent decades, with greater demands being placed on international law.[10] These demands are generally characterised as being linked to an increase in the level of interdependence among states, or perhaps more accurately to increasing attention to interdependence. In a ground-breaking publication entitled *Transnational Relations and World Politics*, Robert O. Keohane and Joseph S. Nye, Jr. discuss the relevance of phenomena such as transnational interaction, that is, interaction taking place among non-state actors across national borders, to international

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much danger, and the depth of tragedy, realist critics teach, inheres in the neglecting or overreaching of these limits:" Richard K. Ashley, *The Geopolitics of Geopolitical Space: Toward a Critical Theory of International Politics* 12 ALTERNATIVES 403 at 417 (1987). Bull's conception of international society differs in important respects from Ashley's; nevertheless, the comparison is apt.

[8] The same conception of classical liberalism is apparent in MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (1989) and Martti Koskenniemi, *The Future of Statehood* 32 HARV. INT'L L.J. 397 (1991), *passim.*

[9] Bull later became disillusioned with the pluralist promise of interstate order: Nicholas J. Wheeler and Timothy Dunne, *Hedley Bull's Pluralism of the Intellect and Solidarism of the Will* 72 INT'L AFF. 91 at 96-7 (1996). In later writings, Bull is seen to place greater emphasis on human justice as the ultimate goal and framing principle of international law: HEDLEY BULL, JUSTICE IN INTERNATIONAL RELATIONS (1984) at 12. He still places his faith in the states system, but begins to speak of the subjection of force in international society to the collective will of states: Wheeler, *ibid.* at 95.

[10] *See* PIERRE-MARIE DUPUY, DROIT INTERNATIONAL PUBLIC, 5th ed. (2000) at 345.

relations.[11] Increases in the frequency and intensity of these transnational interactions lead, the authors argue, to greater interconnectedness among states, which in turn create conditions in which interdependence, characterised by the sensitivity and vulnerability of one state to actions and events in other states, can develop.[12] Conditions of interdependence render it difficult or impossible for individual states to pursue their individual objectives in the absence of some form of coordination with other states. As I suggested in the introduction, environmental protection and resource conservation constitute issues that, for a variety of reasons, states are not in a position to confront through independent action.

Once states are perceived as being interdependent, classical liberal approaches to international law lose much of their explanatory power and come to be challenged by approaches that promise to explain how coordination or cooperation among states is possible. One such approach is neoliberal institutionalism, also known as regime theory or structural liberalism. This approach is, on its face at least, non-ideological, in that it seeks to leave questions of value to one side. As we shall see below, the objective of neoliberal institutionalism is to explain the existence of coordination and cooperation among states in the absence of centralised governance structures at the international level. The central explanatory tool employed by structural liberals is *interest*. When states perceive that it is in their interest to establish regimes at the regional or global level to

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[11] Robert O. Keohane and Joseph S. Nye, Jr., *Transnational Relations and World Politics: An Introduction* in TRANSNATIONAL RELATIONS AND WORLD POLITICS (Robert O. Keohane and Joseph S. Nye, Jr., eds., 1972).

[12] ROBERT O. KEOHANE AND JOSEPH S. NYE, JR., POWER AND INTERDEPENDENCE, 2d. ed. (1989) at 8-9 and 12-13. For an account of interdependence that emphasises the ethical and moral dimensions of relationships across state borders, see David Held, *Democracy, the Nation-State and the Global System in* POLITICAL THEORY TODAY (David Held, ed., 1991) 197.

manage the common problems that they are experiencing, they may cease to regard cooperation with other states as a threat to their security and come to see it as a means of furthering their own ends.[13] The neoliberal institutional approach is a sophisticated one, taking into account not simply the interests that states would hold if they behaved like self-interested utility maximisers, but also a wide range of pressures, such as protectionist leanings on the part of important domestic coalitions such as trade unions or consumer groups, that encourage states not to engage in international cooperation.[14] Neoliberal institutionalism has immense explanatory power, but it declines to address normative considerations or questions of value. It is not concerned with issues such as the relative merits of various forms of cooperation among states from the point of view of human well-being, happiness or fulfilment, and indeed, its proponents would argue that they do not have the tools necessary to make such assessments. Neoliberal institutionalism, therefore, is not a recipe for the articulation of a robust, substantive international law that concerns itself with issues of justice, fairness or legitimacy.[15] Such considerations are, however, thrown into relief by a further approach, focusing on the argument that Western liberal democracies have achieved what is described as a *democratic peace.*

Democratic peace arguments are essentially republican in nature, in that they concern themselves with the conditions under which community, shared values and common purposes may emerge at the international - or, in more modest accounts,

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[13] *See, e.g.*, Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables in* INTERNATIONAL REGIMES (Stephen D. Krasner, ed., 1983) 1; Robert O. Keohane, *The Demand for International Regimes in* INTERNATIONAL REGIMES, *ibid.*, 148; Andrew Moravscik, *Taking Preferences Seriously: A Liberal Theory of International Politics* 51 I.O. 513 (1997).

[14] *See* Keohane and Nye, *supra* note 11 at 41-2.

[15] An international law concerned with questions of justice, fairness and legitimacy is precisely the object of inquiry of the scholarship of Thomas Franck. *See* THOMAS M. FRANCK, FAIRNESS IN

regional - level. They are based on the observation that liberal democratic states do not go to war with one another, and seek to explain this empirical fact of peace through reference to liberal values and social and governance structures. This group of authors argues, on the one hand, that a sense of community - a "we-feeling," in the words of Emanuel Adler[16] - is fostered among liberal states as a result of similarities in the values they espouse. It is also argued that liberal values are in and of themselves conducive to a commitment to institutions, peaceful dispute settlement and the type of transnational dialogue that strengthens interdependence among states.[17] These authors see increasing interdependence as creating opportunities for states to engage in forms of cooperation and institution-building at the international level, but argue that these opportunities are most likely to be exploited by liberal states whose shared value systems constitute a basis for the sense of mutual trust and confidence in collective action necessary for collective, peaceable action at the international level. For international law to be effective in conditions of interdependence, then, some degree of "we-feeling" must be present. The notion that an international law based on the minimal consensus described by Bull could

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INTERNATIONAL LAW AND INSTITUTIONS (1995) [*hereinafter* FRANCK, FAIRNESS]; THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990) [*hereinafter* FRANCK, LEGITIMACY].

[16] Emanuel Adler, *Seeds of Peaceful Change: The OSCE's Security Community-Building Model* in SECURITY COMMUNITIES (Emanuel Adler and Michael Barnett, eds., 1998) 119 at 122 [*hereinafter Seeds of Peaceful Change*]; Emanuel Adler, *Imagined (Security) Communities: Cognitive Regions in International Relations* 26 MILLENNIUM 249 (1997) [*hereinafter Imagined (Security) Communities*] at 276.

[17] Adler, *Imagined (Security) Communities, supra* note 16 at 250, 259; Emanuel Adler and Michael N. Barnett, *Governing Anarchy: A Research Agenda for the Study of Security Communities* 10 ETHICS & INT'L AFF. 63 (1996) at 83; Moravcsik, *supra* note 13 at 525 ff., where he discusses ideational liberalism; Anne-Marie Slaughter, *International Law in a World of Liberal States* 6 EUROP. J. INT'L L. 503 at 509 ff (1995); John M. Owen, *How Liberalism Produces Democratic Peace* 19 INT'L SEC. 87 (1994); THOMAS RISSE-KAPPEN, COOPERATION AMONG DEMOCRACIES: THE EUROPEAN INFLUENCE ON US FOREIGN POLICY (1995); Thomas Risse-Kappen, *Exploring the Nature of the Beast: International Relations Theory and Comparative Policy Analysis meet the European Union* 34 J. COMMON MARKET STUD. 53 (1996).

be capable of addressing substantive issues such as human rights and environmental protection is rejected.[18]

There are many troubling aspects to the democratic peace approach, many of which may be drawn out by a consideration of John Rawls' recent work, *The Law of Peoples*.[19] Rawls articulates a series of moral principles governing the law of peoples.[20] These moral duties are to be met through respect for principles governing the law of peoples, drawn from the (liberal) practice and theory of international law.[21] Rational and

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[18] *But see* FRANCK, FAIRNESS, *supra* note 15 at 29, where he describes "four paradigms of 'right process', operating principles which legitimate the international system of rules and rule-making." These paradigms, although they do not directly correspond to the three conditions for order in international society identified by Bull, are nevertheless drawn from a traditional conception of international law. They are:

> (1) that states are sovereign and equal; (2) that their sovereignty can only be restricted by consent; (3) that consent binds; and (4) that states, in joining the international community, are bound by the ground rules of community. Once a state joins the community of states ... the basic rules of the community and of its legitimate exercise of community authority apply to the individual state regardless of whether consent has been specifically expressed: *ibid.*

However, Franck's use of the word 'community' is misleading here. Although he uses the word elsewhere to express a society grounded in shared values and a common moral outlook, or "persons self-consciously engaged in a common moral enterprise:" *ibid.* at 11, it is important to note that the notion of 'right process' to which he refers is strictly procedural, and that the constitution of such right process may be accomplished in the absence of community as common moral enterprise.

[19] JOHN RAWLS, THE LAW OF PEOPLES (1999).

[20] Rawls refers to the law of peoples rather than international law, since he envisages the content of this law as being worked out among peoples and not states. He conceives of international relations as taking place between peoples acting through their governments, rather than simply between governments or states themselves: *ibid.* at 23. Rawls thus seeks to distance his approach from conceptions of autonomous, sovereign states whose authority over their own populations cannot be challenged by international law: *ibid.* at 25-6. See also *ibid.* at 29, where Rawls argues that states, while capable of identifying and pursuing their rational interests, cannot limit those interests by reference to the reasonable. Nevertheless, Rawls' conception remains state-based, as he conceives of peoples acting through their governmental representatives who, in turn, hold moral duties as statesmen: thus, governments, not individuals, are the actors in international society: *ibid.* at 23. Rawls focuses on the role and duties of statesmen, who, he argues, "are in the most effective position to represent their people's aims and obligations:" *ibid.* at 97. See also *ibid.* at 96 and 126, where Rawls discussed the duties of the statesman with respect to the conduct of war and the delivery of assistance to disadvantaged societies, respectively.

[21] Rawls notes that the principles are inspired by the writings of J.L. Brierly and Terry Nardin: *ibid.*, fn. 42. *See also ibid.* at 41.

The full list reads as follows:

1. Peoples are free and independent, and their freedom and independence are to be respected by other peoples.
2. Peoples are to observe treaties and undertakings.
3. Peoples are equal and are parties to the agreements that bind them.

reasonable peoples are prepared, argues Rawls, to extend on the basis of reciprocity "the very same proper respect and recognition to other peoples as equals."[22]

Rawls conceives of a law of peoples as being achievable in a pluralistic society of peoples, but only among those members of that society that are 'reasonable.'[23] Thus, the law of peoples is not a universal legal system, but rather is limited to liberal peoples and to those to whom liberal peoples decide to grant toleration: so-called 'decent peoples.'[24] As in domestic society, in which reasonable peoples are obligated to respect and tolerate those professing different comprehensive doctrines than themselves, liberal peoples in the society of peoples are to respect and tolerate nonliberal peoples whose social institutions meet certain standards.[25]

Liberal peoples and decent peoples constitute for Rawls 'well-ordered peoples.'[26] Further categories of peoples[27] are outlaw states, which engage in war to pursue their rational - though not reasonable - self-interest; burdened societies, which cannot become well-ordered societies due to historical, social and economic circumstances;[28] and

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4. Peoples are to observe a duty of non-intervention.
5. Peoples have the right of self-defense but no right to instigate war for reasons other than self-defense.
6. Peoples are to honor human rights.
7. Peoples are to observe certain specified restrictions in the conduct of war.
8. Peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime: *ibid.* at 37 (footnote omitted).

[22] *Ibid.* at 35.

[23] *Ibid.* at 11.

[24] *Ibid.* at 59-60.

[25] These peoples must not be aggressive; they must pursue peaceful modes of interaction with other societies; they must recognise and respect the political and social orders of other societies; they must respect and protect human rights; they must possess legal systems which their members accept as legitimate and which are therefore not merely coercive; and their officials must sincerely believe that the society's laws and ordering principles reflect an idea of justice: *ibid.* at 64-6.

[26] *Ibid.* at 63.

[27] The list appears *ibid.* at 63.

[28] These societies are described *ibid.* at 90.

benevolent absolutisms, which respect human rights but deny members of their populations a meaningful role in political decision-making.[29] Rawls seems to stop short of calling for intervention in these societies, but does view a goal of the society of peoples as bringing these societies, and all others, into the liberal fold and convincing them to accept the law of peoples.[30] As for burdened societies, Rawls acknowledges that there may be obligations of assistance to such societies, but he focuses on institution building, particularly on the promotion of human rights protection, rather than on the provision of foreign aid. This approach follows from his conclusion that

> the causes of the wealth of a people and the forms it takes lie in their political culture and in the religious, philosophical, and moral traditions that support the basic structure of their political and social institutions, as well as in the industriousness and cooperative talents of its members, all supported by their political virtues.[31]

He goes on to conjecture "that there is no society anywhere in the world - except for marginal cases - with resources so scarce that it could not, were it reasonably and rationally organized and governed, become well-ordered."[32] Having laid the blame for poverty and social disarray at the feet of burdened societies, there is little more to be said regarding the obligation of well-ordered societies to render assistance.[33]

It must also be recalled that the processes through which non-liberal states are brought to accept liberal values take place against a backdrop of inequality. As Andrew Hurrell and Ngaire Woods have argued, there is an assumption in democratic peace arguments that liberal values are susceptible of being transmitted throughout international

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[29] *Ibid.* at 63.
[30] *Ibid.* at 93.
[31] *Ibid.* at 108.
[32] *Ibid.* at 108.
[33] Rawls is here presenting a radically ahistorical account of international society, one that makes it impossible to account for the implication of well-ordered societies in the disadvantaging of burdened societies. The colonial era, and much else, is ignored.

society because of their persuasiveness.[34] Hurrell and Woods note, however, that the bargaining power held by Western liberal states and their ability to set international agendae give them the capacity to influence weaker states and to push them to adopt international obligations that reflect liberal values. They write:

> We need to replace the liberal Kantian image of *progressive enmeshment* with the more complex idea of *coercive socialisation*, involving both a range of external pressures (both state-based and market-based) and a variety of transmission mechanisms between the external and the domestic.[35]

Other approaches to the building of communities of common values at the international level are more hopeful about the prospects of giving this community a universal compass, and less adamant that this be done on terms laid down by Western liberal democratic societies. Authors such as David Held, Andrew Linklater and Nayef Samhat seek to articulate a basis upon which an international community, characterised by shared values, could emerge, but are less concerned with the mechanisms through which liberal values could be transmitted to other societies than with the way in which a universally shared set of values could be articulated by all societies.[36] In this manner, their approach pays much greater attention to the concerns of pluralism and tolerance than does the democratic peace approach.

The perception of a need to ground international law in a community of shared values arises from an awareness of law's dependence on a belief on the part of its

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[34] Andrew Hurrell and Ngaire Woods, *Globalisation and Inequality* 24 MILLENNIUM 447 at 450 (1995). For a description of this argument see Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe* 54 I.O. 217 at 223-4 (2000).

[35] Hurrell and Woods, *supra* note 34 at 457.

[36] *See, e.g.*, DAVID HELD, DEMOCRACY AND THE GLOBAL ORDER: FROM THE SOVEREIGN STATE TO COSMOPOLITAN GOVERNANCE (1995) at 229; Held, *supra* note 12 at 228 ff; Andrew Linklater, *The Question of the Next Stage in International Relations Theory: A Critical-Theoretical Point of View* 21 MILLENNIUM 77 at 93 (1992); Andrew Linklater, *The Achievements of Critical Theory in* INTERNATIONAL THEORY: POSITIVISM AND BEYOND (Steve Smith, Ken Booth and Marysia Zalewski, eds., 1996) 279 at 292 ff; Nayef H. Samhat, *International Regimes as Political Community* 26 MILLENNIUM 349 at 363 (1997).

addressees in its legitimacy. Legitimacy, then, is driven in part by normative concerns relating to the justice and appropriateness of law, but equally importantly by concerns about law's effectiveness.[37] Yet the establishment of a set of genuinely shared values among states, peoples and individuals is an extremely tall order for international society. Furthermore, the existence of community is no guarantee against conflict and dissent. For these reasons, we do well to consider avenues for bolstering the legitimacy of international law even in the absence of a strong sense of "we-feeling" among actors in international society.

The discourse ethics approach articulated by Jürgen Habermas is of interest in that it seeks to strike a balance between the republican concern with common purpose and collective action, and the liberal concern with individual freedom and tolerance. Borrowing the insights of republicanism, discourse ethics maintains that the content of the rules and norms that govern a given society must be arrived at through processes of discourse leading to a consensus. Unlike republicanism, however, discourse ethics does not require that this consensus extend to the formulation of a common world-view or

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[37] *See, e.g.*, FRANCK, FAIRNESS, *supra* note 15 at 7.
Franck sets out a working definition of legitimacy as follows:

> Legitimacy is a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process: FRANCK, LEGITIMACY, *supra* note 15 at 24.

Franck regards legitimacy as one aspect of fairness, namely the procedural aspect. The other, substantive, aspect is distributive justice: FRANCK, FAIRNESS, *supra* note 15 at 7. I take a different approach to legitimacy, regarding it as being concerned both with substance and with process. Franck therefore believes that members of a society may be capable of reaching a shared understanding regarding legitimacy without possessing a set of shared values necessary for the existence of community, which in turn is necessary for shared understandings about what is fair: *ibid.* at 8. When international law comes to tackle allocative issues, such as resources conservation and management, fairness becomes crucial. Franck states:

> Fairness is the only basis for allocation on which 'everyone' is likely to agree. Only a fair formula can hope to succeed in limiting the (potentially ruinous) autonomous pursuit of goods. Put another way, the pursuit of a shared perception of fairness is the necessary

coherent community based on commitment to a shared ethical ideal. The limits of the consensus arrived at in society are to be discovered by the members of that society through discursive processes whose objective is to arrive at answers to the question: what ought we to do? Although Habermas focuses most of his scholarly attention on societies at the domestic level, his approach has been taken up by a number of international relations scholars interested in extending his conception of democratic decision-making through processes of deliberation to the international realm.[38]

My concern in exploring these and other theoretical approaches is to sketch the contours of a theoretical approach to international law that strikes an appropriate and acceptable balance between pluralism and interdependence. The interests of the several members of international society can no longer be well-served by a legal system whose scope is as narrowly defined as traditional conceptions of international law would require. The interdependence among states, the importance of non-state actors in international society, and the pressing nature of problems, such as environmental protection, for which coordinated action is required render such a minimalist international legal agenda

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starting point for devising any lasting allocational rules: rules which are likely to command respect and pull towards voluntary compliance: *ibid.* at 13.

[38] *See, e.g.*, Thomas Gehring, *Regieren im internationalen System. Verhandlungen, Normen und Internationale Regime* 2 POLITISCHE VIERTELJAHRESSCHRIFT 197 (1995); Hans-Martin Jaeger, *Konstruktionsfehler des Konstruktivismus in den Internationalen Beziehungen* 3 Z.I.B. 313 (1996); Harald Müller, *Internationale Beziehungen als kommunikatives Handeln. Zur Kritik der utilitaristischen Handlungstheorien* (1984) 1 Z.I.B 15 at 30-6 [*hereinafter* Müller, *Internationale Beziehungen*]; Harald Müller, *Spielen hilft nicht immer. Die Grenzen des Rational-Choice Ansatzes und der Platz der Theorie kommunikativen Handelns in der Analyse internationaler Beziehungen* 2 Z.I.B. 371 (1995) [*hereinafter* Müller, *Spielen*]; Michael Müller, *Vom Dissensrisiko zur Ordnung der internationalen Staatenwelt. Zum Projekt einer normativ gehaltvollen Theorie der internationalen Beziehungen* 3 Z.I.B. 367 1996); Thomas Risse-Kappen, *Reden ist nicht billig. Zur Debatte um Kommunikation und Rationalität* 2 Z.I.B. 171 (1995) [*hereinafter* Risse-Kappen, *Reden ist nicht billig*]; Thomas Risse, *Let's Argue!: Communicative Action in World Politics* 54 I.O. 1 (2000) [*hereinafter* Risse, *Let's Argue!*]; Thomas Schaber and Cornelia Ulbert, *Reflexivität in den Internationalen Beziehungen* 1 Z.I.B. 139 (1994); Rainer Schmalz-Bruns, *Deliberativer Supranationalismus. Demokratisches Regieren jenseits des Nationalstaats* 6 Z.I.B. 185 (1999) [*hereinafter* Schmalz-Bruns, *Deliberativer Supranationalismus*]; Rainer Schmalz-Bruns, *Die Theorie kommunikativen*

inappropriate. The notion of hermetically sealed international and domestic spheres is and always has been untenable. This is true both for pragmatic reasons related to the needs of members of international society for principles of social ordering that allow them to pursue their own several ends, and for reasons of justice. The argument that the domestic sphere must be regarded as inviolable, even in the face of the commission of grave injustices within it, generally proceeds on the assumption that interference in domestic jurisdiction would disrupt international order; therefore, turning a blind eye to injustices within sovereign borders could be regarded as the lesser of two evils. In the face of mounting evidence that the domestic jurisdiction demonstrates more continuity with international jurisdiction than distinctness,[39] this argument becomes increasingly dubious. For example, the notion that intra-state conflict may constitute a threat to peace and security has, in a relatively short time, gained widespread acceptance in mainstream international law. Furthermore, awareness of the transboundary, regional and even global environmental impacts of domestic activities has brought international scrutiny to bear upon such activities. Certainly, this scrutiny gives rise to lively and difficult controversies, but the notion that such activities constitute legitimate matters of concern for international law may no longer be rejected out of hand.

The more principled argument that intervention to prevent injustice must be based on a particular notion of justice for which no universal support exists suggests that we

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Handelns - eine Flaschenpost? Anmerkungen zur jüngsten Theoriedebatte in den Internationalen Beziehungen 2 Z.I.B. 347 (1995) [*hereinafter* Schmalz-Bruns, *Theorie kommunikativen Handelns*].

[39] The linkages between domestic and international law have been elucidated in the work of a number of scholars. *See, e.g.,* Harold Hongju Koh, *Bringing International Law Home* 35 HOUS. L. REV. 623 (1998); Koh, *Transnational Public Law Litigation* 100 YALE L.J. 2347 (1991); Thomas Risse-Kappen, *Did 'Peace through Strength' end the Cold War? Lessons from INF* 16 INT'L SEC. 162 (1991); Risse-Kappen, *supra* note 17; Andrew Moravcsik, *Federalism and Peace: A Structural Liberal Perspective* 3 Z.I.B. 123 (1996).

must heed the warning given by classical liberalism,[40] even if we do not accept the implications of this approach. After all, the protection and promotion of diversity in international society and the promotion of tolerance are in and of themselves laudatory goals, despite the fact that they have often been invoked in self-interested and cynical ways. Yet there is a pressing need in international society for principles of social ordering that take into account the interdependencies among international actors and the continuities across jurisdictional boundaries. The strains on international law exerted by pluralism and interdependence parallel those in domestic societies. Striking the right balance between the needs of the collectivity and those of the individuals that comprise it represents an intractable problem; no approach to law or social policy will produce the correct formula.[41] However, the search for a principled basis on which to address them must not be regarded as futile.

If international law is not to be justified with reference to the balance between maximum freedom for individual states and minimum conditions of order among states, and if it cannot be justified with reference to universally valid conceptions of the good, some other basis for its legitimation must be found. The remainder of this chapter is concerned with articulating a theoretical framework for addressing this issue. I shall begin this task by considering the significant theoretical advances made by international

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[40] Martti Koskenniemi, who can by no means be regarded as a liberal apologist, argues that alternatives to a Westphalian view of international law with state sovereignty playing a central role would be highly dangerous, tending to lead to totalitarianism. He argues against attempts to ascribe to law a particular social purpose based on one conception of human ends, due to the impossibility of identifying or creating universalisable standards of human justice: Koskenniemi, *supra* note 8, *passim* but especially at 402 and 407; Martti Koskenniemi, *Theory: Implications for the Practitioner in* THEORY AND INTERNATIONAL LAW: AN INTRODUCTION (1991) 3 at 41. While I do not agree that the only or even the best solution to this dilemma is to rely on state sovereignty and non-intervention, I believe that Koskenniemi's concerns about the dangers of seeking to universalise a particular set of values must be taken seriously.

relations scholarship, particularly neoliberal institutionalism and neofunctionalism, that have drawn attention to the existence and fundamental importance of transnational civil society. This scholarship, by examining the role of phenomena such as transnational interactions, rising interdependence, the influence of non-state actors on the articulation of state interests, and the mechanisms through which cooperation among states is fostered, lays the groundwork for theorising about the role of transnational civil society in the formation of legal rules and principles.

Neoliberal institutionalism and neofunctionalism provide us with insights into the phenomenon of international cooperation and the role that transnational civil society plays in this phenomenon. These insights describe the process from the outside, with the aid of empirical data, and as a result tell us little about the meaning that these phenomena might have to those involved in them. For this interpretive perspective we turn to constructivism and speech act theory. This scholarship discusses the manner in which meaning, and more specifically shared meaning, is established between actors, and also provides insights into the reaching of agreement and consensus on normative issues. This discussion prepares the ground for an elucidation of discourse ethics, which provides us with theoretical tools to analyse the formation of norms, both moral and legal, in a society such as international society characterised by a lack of consensus on values and worldviews - what Habermas calls the 'postconventional society.' Further assistance in this exploration into the legitimacy of law is provided by the New Rhetoric scholarship of Chaim Perelman, and by the interactionist approach of Lon L. Fuller.

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[41] *See* Koskenniemi, *supra* note 40 at 45.

In order to link these discussions explicitly to processes of law-making and - application in international society, I then turn to the issue of fora for the debate and discussion, which I hold to be necessary for the legitimacy of law. I am assisted once again by neoliberal institutionalism and constructivism, and in particular by discussions in this scholarship of the creation and operation of international regimes. The republican strains of my argument will come to the fore here. Through discursive processes taking place among members of transnational civil society, consensus regarding the appropriateness and legitimacy - or lack thereof - of proposed or actual legal rules and principles may be arrived at.[42] The paths taken from these discursive processes to the articulation and interpretation of formal legal rules are not readily traced, and the capacity of discourse to influence formal processes of law-formation is often difficult to ascertain. The robustness of these discursive processes and the extent of their influence on the shape of legal rules and principles depends in large measure on the presence and strength of fora at the international level that are accessible to members of civil society. It need hardly be pointed out that these fora are not at present adequate to ensure the adoption of legal rules and interpretations of those rules enjoying widespread legitimacy in international society. However, it is hoped that the discussion that follows will shed light on the processes through which international law is created and interpreted, and will point to ways in which its legitimacy might be strengthened.

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[42] *See, e.g.*, Schmalz-Bruns, *Deliberativer Supranationalismus, supra* note 38 at 200-1.

2. INTERNATIONAL SOCIETY BETWEEN PLURALISM AND INTERDEPENDENCE

Westphalia: Pluralism and the Social Contract

Retellings of the story of international society begin, almost inevitably, with the Peace of Westphalia. Whether or not Westphalia actually gave rise to the sovereign state is, of course, a matter of interpretation. Nevertheless, it operates as international society's myth of origin, and an examination of this myth is crucial to our understanding of contemporary international legal discourses. Westphalia has come, somewhat anachronistically, to signify the social contract by which liberal international society came into being. In a bid to put an end to the Thirty Years' War, the principle of *cuius regio, eius religio*, according to which the territorial ruler determined the faith of his or her territory, was reverted to. This meant that princes from other territories could not be called in aid by religious minorities to overthrow a sovereign of one confession and replace him or her with one professing a different faith.[43] Since it was impossible for the European rulers to agree as to which religion was the correct one, and since disputes over this question had had such a devastating impact, it was determined that the matter should be pushed out of the international sphere down into the state. A foreshadowing of the modern interpretation of this solution can be detected in the statement of a seventeenth-century observer to the effect that "reason of state is a wonderful beast, for it chases away all other reasons."[44] The benefits of this solution were apparent as early as 1893, when S.R. Gardiner noted that, while religious 'self-determination' did not produce religious

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[43] RONALD G. ASCH, THE THIRTY YEARS WAR: THE HOLY ROMAN EMPIRE AND EUROPE, 1618-48 (1997) at 145; S.R. GARDINER, THE THIRTY YEARS' WAR, 1618-1648 (1893) at 211; FRANZ XAVER PERREZ, COOPERATIVE SOVEREIGNTY: FROM INDEPENDENCE TO INTERDEPENDENCE IN THE STRUCTURE OF INTERNATIONAL ENVIRONMENTAL LAW (2000) at 19-25.

[44] GEOFFREY PARKER, THIRTY YEARS' WAR (1984) at 219.

tolerance, it did prevent disputes over religion from erupting into full-scale war. Dissenters might still be stifled and persecuted by the leader of a given territory, but at least that leader need no longer regard dissenters as potential or actual traitors to his or her rule. Religious conflicts could, in a post-Westphalian environment, be contained, although they by no means disappeared. Local suppression and persecution were to be preferred to large-scale armed conflict.[45]

The classical liberal gloss on the story about the Peace of Westphalia reads roughly as follows. The Thirty Years' War taught the leaders of Europe that to permit questions relating to the nature of the good life to be debated at the international level was to subject the communities professing different conceptions of the good to endless, irresolvable conflict. If these different conceptions cannot be reconciled or ranked in any authoritative manner, it was concluded, better that they remain the private business of each individual community. States are assimilated to individuals in civil society, in which the solution to competition among different notions of the good is to bestow upon each individual a realm within which he may pursue his own conception of the good life unmolested by his neighbours or the state. This realm of freedom is secured by rights to individual liberties, rights to equality, and rights to equal protection before the law.[46] As the individual could be compared to a mini-sovereign within this realm, so too could the state be compared to an individual enjoying enough protection from his neighbours that he is able to interact with them on a basis of equality.

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[45] GARDINER, *supra* note 43 at 211. *See also* PARKER, *supra* note 44 at 219.

[46] JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg, transl., 1998) at 122.

This essentially atomistic view of international society, although enjoying predominance, has consistently been subject to criticism from various sources, not least because it contradicts observations regarding several features of international society and the interaction of its members. For example, the notion of sovereign equality does not square with vast imbalances in power and capacity that translate into very different levels of influence on the articulation, interpretation and application of legal norms.[47] Furthermore, actors other than states have an influence in international society that is becoming increasingly difficult for international legal theory to ignore or explain away. Finally, conditions of interdependence among states give rise to demands that an international law whose reach is restricted to the international realm cannot adequately meet. The process of coming to understand these features of international society is greatly facilitated by a consideration of that society from the perspective of international relations theory.

Beginning in the 1970s, scholars who became associated with the school of international relations known as neoliberal institutionalism began developing theories about the bases of cooperation and collaboration in an anarchical system whose units behave in an essentially self-interested manner.[48] These scholars dispute the claim that self-interested behaviour in an anarchical system would tend to exclude possibilities for

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[47] *See, e.g.,* Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law* 40 HARV. INT'L L.J. 1 (1999) on the false universalism of 19th-century positive international law; Hurrell and Woods, *supra* note 34 at 457.

[48] *See* TRANSNATIONAL RELATIONS AND WORLD POLITICS, *supra* note 11; POWER AND INTERDEPENDENCE, *supra* note 12. For a synthesis and contextualisation of this scholarship see Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda* 87 A.J.I.L. 205 at 206 (1993).

cooperation among states.[49] With the development of theories seeking to explain cooperation, institution-building and reliance on norms and rules in the international sphere came a heightened interest among international relations scholars in the institution of international law. A small number of international lawyers have come to be interested in international relations scholarship as a means to expand their understandings about the functioning and effectiveness of legal rules.[50] These scholars see themselves as being able to contribute to this discussion, as their understanding of legal rules differs in important respects from that of international relations scholars.[51]

In the section that follows, I will present a brief overview of neoliberal institutionalism and other, related schools of thought, particularly neofunctionalism. These approaches provide some useful insights into international society that are of particular relevance from the point of view of international law, in that they are premised on a theoretical basis for explanations of law's effectiveness superior to that of positivist legal theory. However, the conception of normativity held by these approaches is more sociological than legal; norms tend to be regarded as patterns or regularities of behaviour rather than as 'ought' statements whose validity cannot be measured in strictly empirical

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[49] Some realist scholars acknowledge the possibility for coordinated action in international society, and have themselves made contributions to regime theory. See the discussion on power-based approaches to international regimes in ANDREAS HASENCLEVER, PETER MAYER AND VOLKER RITTBERGER, THEORIES OF INTERNATIONAL REGIMES (1997) at 83 ff. and Arthur A. Stein, *Coordination and Collaboration: Regimes in an Anarchic World in* INTERNATIONAL REGIMES, *supra* note 13, 115.

[50] *See* Slaughter Burley, *supra* note 48 at 207; Jutta Brunnée and Stephen Toope, *Environmental Security and Freshwater Resources: Ecosystem Regime Building* 91 A.J.I.L. 26 (1997) [*hereinafter* Brunnée and Toope, *Environmental Security*]; Brunnée and Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law* 39 COLUMBIA J. TRANSNAT'L L. 19 (2000) [*hereinafter* Brunnée and Toope, *International Law and Constructivism*]; MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW (1999).

[51] Brunnée and Toope, *International Law and Constructivism, supra* note 50.

terms. I will then proceed to a discussion of constructivism in international relations theory and to the richer conception of normativity held by this and related approaches.

Neoliberal Institutionalism: Managing Interdependence

In the interests of situating neoliberal institutionalism on the spectrum of international relations scholarship, a few brief comments about its main rival, neorealism, are in order. Realism and related schools of international relations thought reject the social contract notion of international society presented above - indeed, they reject the conception of international society *tout court.* Neorealists in particular maintain that the international sphere comprises a system rather than a society, and that the nature of the system is determined by patterns of interaction among states. States are regarded as functionally like units interested in ensuring their own survival, and in pursuing this goal in a rational fashion they must assume that other states pose a potential threat to them.[52] Thus, cooperative behaviour would not be indicated by rational calculations as the risk of mistakenly regarding another state as friendly is too great. From the fundamental insecurity of states flows a disinclination to cooperate even in those instances where cooperation would be of benefit to each state, since each must be concerned not only about its own capacities in absolute terms, but also in relative terms. Relative gains by other states that must always be treated as potential enemies are regarded as a source of threat to one's own survival.[53] The core assumptions of realism have been summarised as follows:

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[52] *See* David Dessler, *What's at Stake in the Agent-Structure Debate?* 43 I.O. 441 at 448-9 and 461(1989); Anthony Clark Arend, *Do Legal Rules Matter? International Law and International Politics* 38 VIRGINIA J. INT'L L. 107 at 111-3 (1998).

[53] *See* Arend, *supra* note 52 at 113 (1998); THEORIES OF INTERNATIONAL REGIMES, *supra* note 49 at 84; KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS (1979) at 105.

> (1) [S]tates are the key actors in world politics; (2) states can be treated as homogeneous units acting on the basis of self-interest; (3) analysis can proceed on the basis of the assumption that states act as if they were rational; and (4) international anarchy - the absence of any legitimate authority in the international system - means that conflict between self-interested states entails the danger of war and the possibility of coercion.[54]

Realists regard legal structures and processes as being epiphenomenal.[55] The real determinants of state behaviour are state interests, which are themselves determined, wholly or in significant part, by power distributions in the international sphere.[56]

Neoliberal institutionalist scholars attack these basic assumptions on various grounds and provide new theoretical bases from which to understand the forms of cooperation and integration that do in fact occur in international society. The contributions made to an understanding of collaboration, cooperation, norm-guided behaviour and the power of ideas by various strands of essentially liberal, rationalist international relations theory is enormous. Certain key elements will be indicated here.

Conditions of interdependence

Against realism and neorealism, theories that posit independent, autonomous states interacting with one another in only minimal ways (the so-called billiard ball conception of the international sphere), liberal scholars such as Robert Keohane, Joseph Nye, Ernst Haas and Oran Young note that conditions of *interdependence* in the international sphere render states unable independently to pursue their interests.[57] The

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[54] Peter J. Katzenstein, Robert O. Keohane and Stephen D. Krasner, INTERNATIONAL ORGANIZATION *and the Study of World Politics* 52 I.O. 645 at 658 (1998).

[55] *See* Slaughter Burley, *supra* note 48 at 207.

[56] Arend, *supra* note 52 at 114-5.

[57] *See* ERNST B. HAAS, WHEN KNOWLEDGE IS POWER: THREE MODELS OF CHANGE IN INTERNATIONAL ORGANIZATIONS (1990) at 181; POWER AND INTERDEPENDENCE, *supra* note 12 at 8-9 and 12-13; Beate Kohler-Koch, *Interdependenz in* THEORIEN DER INTERNATIONALEN BEZIEHUNGEN: NESTANDSAUFNAHME UND FORSCHUNGSPERSPEKTIVEN (Volker Rittberger, ed., 1990) 110; ORAN R. YOUNG, RESOURCE REGIMES: NATURAL RESOURCES AND SOCIAL INSTITUTIONS (1982) at 11, where he refers to the need to account for the interconnectedness of ecosystems in making policies about resource conservation and exploitation.

consequences of individual state actions spill out of the domestic into the international realm, and the factors that states must control in order to pursue their goals often lie beyond their reach, either in the jurisdiction of other states or in the international realm. Furthermore, transnational relations, such as, most obviously, economic relations among private parties, escape, to a significant extent, the control of individual governments. Add to this considerations such as ethnic, linguistic, familial or other socio-cultural ties reaching across borders, domestic and international non-governmental organisations with transnational operations, and the myriad other forms of individual interaction that extend across state borders, and the billiard-ball representation of the international sphere becomes difficult to sustain. The issue of environmental protection is a prime example of a problem that cannot be contained within national borders, and to which solutions cannot be found through the several actions of individual states.

A particularly influential and useful school, neofunctionalism, posits that under conditions of interdependence, states will perceive it to be in their interest to cooperate to achieve goals that they hold in common.[58] Contrary to realist approaches, Ernst Haas argues: "States prefer to act autonomously, but the realization of their interdependence results in their decision to create principles and norms that reduce autonomy in order to make possible the production of more joint gains."[59] As actors become aware of conditions of interdependence, they (may) engage in processes of learning whereby they seek to develop new understandings of the problems with which they are faced and of the cause-effect linkages that give rise to these problems, rendering particular solutions more

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[58] HAAS, *supra* note 57 at 181 ff.
[59] *Ibid.* at 172.

or less effective. Haas describes this process as learning to manage interdependence.[60] Although greater integration at the international level does not automatically result from the simple fact of interdependence or from the creation of organisations and regimes for the purpose of managing interdependence,[61] the normative project of Haas and other functionalists is to bring about greater integration.[62] Functionalists argue that this may be accomplished if states concentrate on issues of 'low politics' oriented toward human welfare and fulfilment, such as labour standards, health issues, and environmental protection, instead of on issues of 'high politics' oriented toward the accumulation of power.[63] Issues related to human welfare are regarded as being essentially technical issues susceptible of resolution by expert groups rather than by politicians.[64] With respect to 'technical' issues, cooperation and integration may occur in the absence of a common set of values or thick ties of community. Instead, actors pursuing their own objectives in a self-interested fashion may *unintentionally* work toward integration. Haas writes:

> There is no common good other than that perceived through the interest-tinted lenses worn by the international actors. But international interest politics causes the tinting to fall into converging patterns, and Functionalism sensitizes us to spotting the tasks responsible for the pattern.[65]

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[60] *Ibid.* at 128.

[61] *See* Ernst B. Haas, *Words Can Hurt You; or, Who said What to Whom about Regimes in* INTERNATIONAL REGIMES, *supra* note 13, 23 at 58; Jürgen Bellers and Erwin Häckel, *Theorien internationaler Integration und internationaler Organisationen in* THEORIEN DER INTERNATIONALEN BEZIEHUNGEN, *supra* note 57, 286 at 287-8.

[62] *See* ERNST B. HAAS, BEYOND THE NATION-STATE: FUNCTIONALISM AND INTERNATIONAL ORGANIZATION (1964) at 8 ff. and especially 13, where he discusses functionalist scholarship; *ibid.* at 486, discussing his own projections of the future international system; HAAS, *supra* note 57 at 192.

[63] Functionalists regard the focus of sovereign states on power, rather than on the welfare of individuals, as the cause of conflict in international society. They regard human welfare as a largely technical rather than political matter, and that therefore "technicians and administrators dedicated to the common weal" should be granted greater authority: see HAAS, *supra* note 62 at 8-9, where he describes the functionalism of David Mitrany and others.

[64] Ernst Haas does not accept the functionalist argument that the pursuit of power is detrimental to the pursuit of welfare; he does, however, argue that "*functionally specific international programs, if organizationally separated from diffuse orientations, maximize both welfare and integration*:" HAAS, *supra* note 62 at 47 (emphasis in original).

[65] *Ibid.* at 35.

Functionalists hold that it is through convergences of interests and decisions by actors to pursue these interests by means of collaboration in international organisations, rather than through the creation of a world community based on shared values,[66] that international integration may be accomplished.

Neofunctionalism takes up the argument that actors other than states - in particular, international organisations and groups of experts in domestic and international bureaucracies - play a significant role in the emergence of coordinated and cooperative activity. The notion that international society includes non-state entities is fundamental to liberal international scholarship and, as we shall see, plays a key role in theoretical approaches that focus on discursive processes in international law and relations.

The role of civil society

Keohane, Nye and other scholars addressing interdependence are particularly alive to the significance of non-state actors in international society. Further work in this direction has been carried out by liberal international relations scholars, who push the analysis somewhat further to encompass the formation of state interests and the impact of domestic culture, opinions, interest groups etc. at the domestic level.[67] Attention has also been focused on the role of non-governmental organisations in the creation and

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[66] *Ibid.* at 40-1, where he criticises approaches to international law based on value consensus. He writes:

> [T]hese scholars still adopt sociological patterns of reasoning that would condemn international law to continued futility simply because their demands are too formal and too high. Generalized agreement on values among national elites is probably the most elusive way of conceiving consensus, especially if the rights of the individual are selected as a focus; the claims upon clashing ideologies, social structures, and conflicting policies are gargantuan.

[67] *See, e.g.,* Katzenstein, Keohane and Krasner, *supra* note 54 at 658; RISSE-KAPPEN, *supra* note 17; Slaughter Burley, *supra* note 48 at 226 ff.; Moravcsik, *supra* note 39; Michael Zürn, *Bringing the*

functioning of regimes.[68] The role of experts, particularly scientists, in the shaping of the foreign policy of states and the policies of international bureaucracies has been considered in an extensive body of literature.[69]

Anne-Marie Slaughter Burley proposes a liberal agenda for international law and international relations theory, based on a theory whose core assumptions focus attention on actors in domestic society and their importance for policy and law at the international level. Rather than beginning with an analysis of the state system or of the nature of the state, Slaughter Burley argues that individuals and groups in domestic society pursue their own interests *inter alia* by seeking to gain influence over governments. Governments, in turn, represent segments of domestic society, and the policies that they pursue are influenced by the interests of these segments of society. State behaviour at the international level reflects state preferences, as influenced by the most successful of the domestic actors.[70]

Learning: The nexus between civil society and managing interdependence

Processes of acquiring and assimilating, not merely new information, but new understandings and conceptualisations, are of relevance to several schools and approaches within liberal international relations theory. Much of the groundwork was laid by authors associated with scholarship on epistemic communities, including neofunctionalist authors

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Second Image (Back) In: About the Domestic Sources of Regime Formation in REGIME THEORY AND INTERNATIONAL RELATIONS, (Volker Rittberger and Peter Mayer, eds., 1993), 282 at 282.

[68] *See* Virginia Haufler, *Crossing the Boundary between Public and Private: International Regimes and Non-State Actors in* REGIME THEORY AND INTERNATIONAL RELATIONS, *supra* note 67 at 94.

[69] *See* HAAS, *supra* note 57 at 21-2; Peter M. Haas, *Epistemic Communities and the Dynamics of International Environmental Cooperation in* REGIME THEORY AND INTERNATIONAL RELATIONS, *supra* note 67 at 168.

[70] Slaughter Burley, *supra* note 48 at 227-8.

such as Ernst Haas. This literature describes processes by which organisations 'learn,' that is, come to new understandings - or come to adopt new cognitive frameworks - regarding issue areas and linkages between issues.[71] The process of learning is distinguished from the simpler process of adapting, whereby new solutions to existing problems are found.[72] In learning, the conceptualisation of the problem itself is altered, and the understanding of the context in which the problem is embedded changes. Furthermore, through learning, actors' perceptions of their interests and goals will be affected.[73] This process often involves the development of new definitions of issue areas, as actors come to new understandings about cause and effect linkages and about the most effective way to conceptualise and isolate specific issues. For example, the dominant paradigm for addressing the problem of transboundary flows of pollutants was, some thirty years ago, defined in terms of state sovereignty, territorial integrity, and state responsibility for harm caused on the territory of another state.[74] This paradigm continues

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[71] HAAS, *supra* note 57 at 23; Haas, *supra* note 69 at 175 ff.

[72] See table in HAAS, *supra* note 57 at 3; *see also ibid.*, 36 ff.

[73] HAAS, *supra* note 62 at 48.

[74] Ian Brownlie, in an article published in 1974, commented on the contemporary state of customary international environmental law as follows:

> Though the position may soon change, general international law (or customary law) contains no rules or standards related to the protection of the environment as such. Three sets of rules have major relevance nonetheless. First, the rules relating to state responsibility have a logic and vitality not to be despised or taken for granted. Secondly, the territorial sovereignty of States has a double impact. It provides a basis for individualist use and enjoyment of resources without setting any high standards of environmental protection. However, it also provides a basis for imposition of State responsibility on a sovereign State causing, maintaining, or failing to control a source of nuisance to other States. Thirdly, the concept of the freedom of the seas (and its clear equivalent in the case of outer space and celestial bodies) contains elements of reasonable user and non-exhaustive enjoyment which approach standards for environmental protection, although they are primarily based upon the concept of successful sharing rather than conservation in itself: *A Survey of International Customary Rules of Environmental Protection in* INTERNATIONAL ENVIRONMENTAL LAW (Ludwik A. Teclaff and Albert E. Utton, eds., 1974) 1 at 1.

Prior to the Stockholm Declaration, environmental degradation was treated by international law as a problem of balancing the rights and interests of sovereign states at the point at which they come into

to exercise significant influence on the conceptualisation of transboundary environmental issues, but now competes with a different paradigm according to which the health of ecosystems, rather than territorial integrity, is the objective to be met, and in which the continuity of environmental problems across state borders influences the nature of solutions developed.[75]

The epistemic communities literature is primarily concerned with groups of experts - scientists in particular, but also bureaucrats and lawyers - who come to a consensus regarding the nature of a given problem and the appropriate approaches to resolving it.[76] For example, Peter Haas has described the emergence of a consensus within an epistemic community involved in marine environmental protection in the Mediterranean. This consensus involves the appropriateness of an ecosystem approach to marine pollution, which competes with a more conventional approach according to which ocean spaces are divided into jurisdictions and the environmental problems typically encountered within each jurisdiction are treated in piecemeal fashion. The epistemic community developed and distributed widely sets of data regarding pollution flows throughout the Mediterranean basin, thus supporting a conception of pollution problems

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conflict. Transboundary flows of pollution that caused damage on the territory of another state were thus the central focus of early approaches to international environmental law. This approach is exemplified in the Trail Smelter Arbitration, R.I.A.A. III (1905) and the *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania) (Merits)*, 9 April 1949, I.C.J. Rep. 4 (1949), in which the principle of good neighbourliness, or *sic utere tuo alienum non laedus*, is invoked. *See* ALLEN L. SPRINGER, THE INTERNATIONAL LAW OF POLLUTION: PROTECTING THE GLOBAL ENVIRONMENT IN A WORLD OF SOVEREIGN STATES (1983) at 32-3; PERREZ, *supra* note 43 at 61-4.

[75] *See, e.g.*, Brunnée and Toope, *Environmental Security, supra* note 50 on the application of an ecosystem approach to the management of transboundary fresh water resources. The Rio Declaration recognises in its preamble "the integral and interdependent nature of the Earth" and its art. 7 calls upon states to cooperate to protect and restore the ecosystem: United Nations Conference on Environment and Development, Rio Declaration on Environment and Development, *concluded* 14 June 1992, 31 I.L.M. 874 (1992).

[76] *See* HAAS, *supra* note 57 at 21-2.

as interrelated and of the Mediterranean countries as interdependent with respect to this issue. This, in turn, lent support to a holistic and cooperative approach.[77]

Although this literature concentrates on the development and diffusion of scientific data and its effect on dominant paradigms, the types of consensus described move beyond scientific conceptions to address the policy and legal implications of such conceptions. The scientific discourses intersect with political and legal discourses, thus fostering the emergence of a consensus with potential normative implications. Although the epistemic communities literature is ground-breaking, it does not provide an adequate basis for discussions of the *normative* implications of such consensus.[78]

Liberal institutional analyses focus on the manner in which "institutions govern the entry of ideas into the policymaking process ... [and] affect the access of policymakers to these ideas."[79] As we shall see, this is a theme of great significance to the question of institutional design. As Habermas argues, the permeability of decision-making centres to ideas and opinions formed in public spheres within civil society is a crucial determinant of the legitimacy of the resulting decisions.[80] These approaches add to the epistemic communities literature in that they provide a more systematic account of the processes of penetration and transmission of ideas and of the features of institutions that constrain or facilitate these processes.[81] However, such approaches also present defects. As Albert Yee notes, the relevant authors

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[77] PETER M. HAAS, SAVING THE MEDITERRANEAN: THE POLITICS OF INTERNATIONAL ENVIRONMENTAL COOPERATION (1990).

[78] *See, e.g.*, Schaber and Ulbert, *supra* note 38 at 146-7.

[79] Albert S. Yee, *The Causal Effect of Ideas on Policies* 50 I.O. 69 at 92 (1996).

[80] See the discussion on transnational civil society, *infra* at 79.

[81] Yee, *supra* note 79 at 92.

> generally argue that ideas and beliefs "shape," "constrain," "orient," "guide," etc. the policy preferences of decision makers. These depictions of the tasks performed by ideations are useful, but they do not reveal how ideas and beliefs possess and exercise the capacity to perform all these tasks.[82]

A further problem, which these approaches hold in common with epistemic community approaches, is the lack of attention paid to the capacity of consensus and shared understandings to lend legitimacy, and therefore effectiveness, to rules and norms.

The approaches considered above all fall within the broader category of 'rational' approaches. As defined by Peter Katzenstein, Robert Keohane and Stephen Krasner, rationalists "rely on the assumption of instrumental rationality to provide the crucial link between the environment and actor behavior."[83] Constructivists, by contrast, "insist on the primacy of intersubjective structures that give the material world meaning."[84] In other words, the material world must, according to constructivists, be subjected to processes of interpretation leading to understanding before it can be rendered relevant to human activity. From the point of view of international law, constructivism offers the advantage of taking seriously the role of norms - in the sense of 'ought' statements - in international society. Constructivism does not regard norms as constraints on behaviour, as patterns or regularities, or as the simple reflection of the interests and preferences of actors, but

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[82] *Ibid.* at 94.

[83] Katzenstein, Keohane and Krasner, *supra* note 54 at 679. *See also* THEORIES OF INTERNATIONAL REGIMES, *supra* note 49 at 23 ff.:

> A most important point of agreement between realist and neoliberal theories of international regimes is their shared commitment to rationalism, a meta-theoretical tenet which portrays states as self-interested, goal-seeking actors whose behavior can be accounted for in terms of the maximization of individual utility (where the relevant individuals are states). Foreign policies as well as international institutions are to be reconstructed as outcomes of calculations of advantage made by states. These calculations, in turn, are informed, though not exclusively determined, by the preferences (utility functions) of actors.

[84] Katzenstein, Keohane and Krasner, *supra* note 54 at 679.

rather as intersubjective understandings that affect behaviour by affecting the interpretations, understandings and reasoning processes of actors.

3. CONSTRUCTIVISM: THE INTERSUBJECTIVE CREATION OF MEANING

According to a constructivist interpretation of international society, what matters most for the nature of that society, of the actors within it and of their interests and patterns of interaction are ideas.[85] Material factors cannot be neglected, of course, but more crucial than the simple existence of material constraints such as geography, distribution of natural resources etc. is what actors do within these constraints, and first and foremost how they interpret them.[86] Nicholas Onuf, who coined the term and who has pioneered constructivist work in international relations, regards our knowledge of the world as being necessarily limited and mediated by discourse. He does not deny the existence of the material world, or 'brute facts,' in John Searle's parlance,[87] but argues that our attempts to understand the phenomenal world do not succeed in producing a pure representation of reality. Our interpretations are, to an important extent, constructions: "We construct worlds we know in a world we do not."[88] Onuf regards material and social realities as interacting:

> The constructivism I prefer ... does not draw a sharp distinction between material and social realities - the material and the social contaminate each other, but variably - and it does not grant

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[85] *See* MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY (1996) at 6; John Gerard Ruggie, *What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge* 52(4) I.O. 855 at 878 (1998); ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS (1999) at 96.

[86] *See* WENDT, *supra* note 85 at 20, 78, 95 and 110-12. Wendt argues against the position that international relations is "ideas all the way down," employing what he refers to as a "rump materialist" approach. Thus, he posits five basic human needs: physical security, ontological security, sociation (contact with others), self-esteem and transcendence (growth, development and improvement): *ibid.* at 131-2.

[87] JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY (1995) at 2.

[88] NICHOLAS GREENWOOD ONUF, WORLD OF OUR MAKING: RULES AND RULE IN SOCIAL THEORY AND INTERNATIONAL RELATIONS (1989) at 38.

> sovereignty to either the material or the social by defining the other out of existence. It does find socially made content dominant in and for the individual without denying the independent, 'natural' reality of individuals as materially situated biological beings. To say that people and societies construct each other is not to imply that this is done wholly out of mind ... .[89]

Searle makes a similar point, which begins with his distinction between institutional and brute facts. "Institutional facts," he writes, "are so called because they require human institutions for their existence;" brute facts require no such institutions.[90] Thus, Searle draws a "distinction between those features of the world that exist independently [namely, brute facts such as material objects] and those that are dependent on us for their existence."[91] A further distinction, one that is in accord with Onuf's approach, is drawn by Searle between the *features* of physical objects "that are intrinsic in the sense that they do not depend on any attitudes of observers or users," on the one hand, and "other features that exist only relative to the intentionality of the agent," such as, most significantly, the assignment of function to an object.[92]

The notion of the assignment of function is crucial to the creation of social institutions. Thus, constructivists regard international society as an essentially human creation, composed of the interpretations and perceptions of individual actors, shared knowledge and understandings among actors, and rules developed on the basis of shared knowledge. This hearkens back to Bull's description of international society as being based on a social contract among states rather than on the essential features of the

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[89] *Ibid.* at 40. Ernst Haas holds a similar conception. He states:

> [W]e cannot know the reality 'out there' because our notion of what it contains changes with every twist of the scientific enterprise. Man-the-knower is the victim of his methods of acquiring knowledge and is therefore condemned to settle for successive approximations to reality. My commitment is nevertheless to an ontogeny postulating that understanding at any given time can be shared and can form the basis for a temporary consensus: Haas, *supra* note 61 at 25.

[90] SEARLE, *supra* note 87.

[91] *Ibid.* at 9.

members of that society or of the environment in which they operate.[93] Constructivism pushes the analogy further, however, holding that the identities and interests of actors are in large part constructed through encounters with one another and through participation in society.[94] Alexander Wendt employs George Herbert Mead's symbolic interactionist approach as a framework for discussing complex learning that affects the identities and interests of actors,[95] summarising this approach as follows:

> [I]dentities and their corresponding interests are learned and then reinforced in response to how actors are treated by significant Others. This is known as the principle of 'reflected appraisals' or 'mirroring' because it hypothesizes that actors come to see themselves as a reflection of how they thing Others see or 'appraise' them, in the 'mirror' of Others' representations of the Self.[96]

In international society, the construction of agents is even more thorough-going, since the most important agents in international society are corporate rather than physical, and therefore owe their existence to networks of rules and shared understandings rather than to the brute physical fact of embodiment.[97] A similar distinction may be made with respect to the construction of the interests of corporate as opposed to physical agents: with respect to human beings, there are certain needs and interests that may safely be regarded as fundamental and immutable, without one's running the risk of falling into foundationalist arguments. With respect to corporate entities, the identification of such

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[92] *Ibid.* at 10.

[93] BULL, *supra* note 2 at 4-5 and 13.

[94] *See* FINNEMORE, *supra* note 85 at 2 and 15; Ruggie, *supra* note 85 at 863; Anne-Marie Slaughter, Andrew S. Tulumello and Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship* 92 A.J.I.L. 367 at 381 (1998); Nicholas Onuf, *Constructivism: A User's Manual in* INTERNATIONAL RELATIONS IN A CONSTRUCTED WORLD (Vendulka Kubàlkovà, Nicholas Onuf and Paul Kowert, eds., 1998) 58; ONUF, *supra* note 88, Chapter 1; Alexander Wendt, *Anarchy is What States Make of It: The Social Construction of Power Politics* 46 I.O. 391 (1992); WENDT, *supra* note 85 at 264.

[95] WENDT, *supra* note 85 at 327.

[96] *Ibid.* at 327.

[97] For a discussion of the manner in which states as sovereign entities are constructed, see Thomas J. Biersteker and Cynthia Weber, *The Social Construction of State Sovereignty in* STATE SOVEREIGNTY AS SOCIAL CONSTRUCT (Thomas J. Biersteker and Cynthia Weber, eds., 1996) 1.

basic needs and interests is much more difficult, and the resulting lists are more contingent.[98]

The shared understandings upon which agent and structure in international relations are based emerge in large part through interactions among agents, which permit them to gather knowledge about one another and about the environment in which they are operating. The process of gathering knowledge is not a simple matter of inputs from the system, as the perceptions of agents will influence their further actions, thereby influencing the shape and content of the shared understandings.[99] Through repeated interactions, patterns will emerge upon which agents will come to rely in deciding on courses of action and making predictions about the actions of others. These patterns will soon acquire a taken-for-granted quality, and the agents may cease to regard themselves as the authors of the patterns.[100] Furthermore, they will be largely unaware of the extent to which their reliance on the patterns, as well as their deviations from them, serve to perpetuate or modify the patterns.

The constructivist notion of shared knowledge and rules is based on the concept of common knowledge. In participating in and relying on patterns of interaction, agents are not simply making more or less informed predictions about the consequences of their own behaviour and the actions of others. Rather, they are referring to a body of knowledge to which all members of a given society contribute and to which they all have access. Wendt describes this body of knowledge as follows:

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[98] WENDT, *supra* note 85 at 233 ff.

[99] *See* ANTHONY GIDDENS, NEW RULES OF SOCIOLOGICAL METHOD: A POSITIVE CRITIQUE OF INTERPRETATIVE SOCIOLOGIES, 2d ed. (1993) at 20.

[100] ANTHONY GIDDENS, THE CONSTITUTION OF SOCIETY: OUTLINE OF THE THEORY OF STRUCTURATION (1984) at 4.

> Common knowledge concerns actors' beliefs about each other's rationality, strategies, preferences, and beliefs, as well as about states of the external world. ... Knowledge of a proposition *P* is 'common' to a group *G* if the members of *G* all believe that *P*, believe that the members of *G* believe that *P*, believe that the members of *G* believe that the members of *G* believe that *P*, and so on. ... [C]ommonness is not established simply by everyone believing that *P*, since unless each actor believes that *others* believe that *P*, this will not help them coordinate their actions. Common knowledge requires 'interlocking' beliefs, not just everyone having the same beliefs. This interlocking quality gives common knowledge, and the cultural forms it constitutes, an at once subjective and intersubjective character. Common knowledge is subjective in the sense that the beliefs that make it up are in actors' heads, and figure in intentional explanations. Yet because those beliefs must be accurate beliefs about others' beliefs, it is also an *inter*subjective phenomenon which confronts actors as an objective social fact that cannot be individually wished away.[101]

This approach to the concept of common knowledge has the advantage of being based on subjective knowledge, that is, knowledge within the heads of individual actors. However, the fundamentally *inter*subjective nature of this knowledge is better captured by Searle, who argues that common knowledge - or, to use his expression, collective intentionality - cannot be derived from a series of individual beliefs, but rather from a collective belief in which a range of actors participate. Thus, rather than collective intentionality being made up of an infinite regress of beliefs about what others believe about what one believes, it consists of what *we* believe.[102] Commonly-held values and world views are based on such intersubjective knowledge. However, it is not the case that intersubjective knowledge leads to the construction of communities of values. The intersubjective knowledge in question may, for example, relate to the belief on the part of two actors that they are in competition with one another and that gains by one side are to be interpreted as actual or potential threats to the other.

Collective intentionality permits the creation of social institutions, such as sovereign states, international diplomacy and law, and international regimes. It is also, as

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[101] WENDT, *supra* note 85 at 159-60 (emphasis in original; footnotes omitted).

[102] SEARLE, *supra* note 87 at 24-6. This position is also held by Ruggie: *see supra* note 85 at 869.

we shall see below, the means by which rules, including moral and legal rules, are created. Thus, as John Ruggie notes, "collective intentionality also has a deontic function within the system of states - that is, it creates new rights and responsibilities."[103] Ruggie, summarising his own conclusions regarding the creation of an international liberal trade regime following World War II, states:

> At the most routine level, collective intentionality creates meaning. ... The Bretton Woods negotiations and the corresponding efforts to establish an international trade regime produced more than external standards of behaviour and rules of conduct in monetary and trade relations. They also established intersubjective frameworks of understanding that included a shared narrative about the conditions that had made the regimes necessary and the objectives they were intended to accomplish and generated a grammar, as it were, on the basis of which states agreed to interpret the appropriateness of future acts that they could not possibly foresee.[104]

As I will argue in the following chapter, principles of soft environmental law similarly operate to create shared narratives that, even when their application to a given set of circumstances is refuted by other participants in debate, provide those participants with insight into the arguments being presented.

As noted above, the fact that identities, interests and institutions are based in large part on ideas - their *ideational* nature - is often not apparent to those who employ them. In the normal course of events, we do not recognise ourselves as the authors of these constructs; rather, they confront us as "objective social fact[s] that cannot be individually wished away."[105] However, constructivism does not regard agents as automatons who have simply internalised rules and understandings and apply them blindly. Rather, as Anthony Giddens has expressed it, agents are knowledgeable: they possess a wealth of knowledge about the nature and function of the institutions with which they deal on an

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[103] Ruggie, *supra* note 85 at 870.

[104] *Ibid. See also* John Gerard Ruggie, *Embedded Liberalism and the Postwar Economic Regimes in* Ruggie, CONSTRUCTING THE WORLD POLITY: ESSAYS ON INTERNATIONAL INSTITUTIONALIZATION (1998) 62.

ongoing basis, and are capable of applying this knowledge in the course of their day-to-day lives.[106] A perfect example of the knowledgeability of agents is language use.[107] Language is an exceedingly complex construct that people employ with apparently little effort, and that they are further capable of employing even in the absence of an understanding of the rules they are so skilfully using. Habermas describes this unreflecting skilled behaviour as 'know-how'. Native speakers of a language may go through their entire lives never turning their minds to the language's grammatical and syntactical rules, without impairing their performance. However, they are also capable of reflecting on the structures of the language and of identifying the regularities and rules on which the language is based. At this point, the 'know-how' of the native speaker is transformed into 'know-that', that is, into an understanding of the rules.[108] It is through this capacity for reflection on the institutions on which we rely that we are able to recognise our own agency in these institutions, and to come to new understandings about their nature and functions. When we take on the role of observers and critics of these institutions, we are not capable of setting aside our role as participants; therefore, the understandings we thus arrive at are in fact interpretations.

Constructivism thus provides us with the theoretical framework necessary to inquire into the relevance of interpretive processes to the constitution of the world we inhabit. It also points to a basis for understanding the relevance to this world of norms, including legal norms, that positivism, with its emphasis on enforcement and sanction,

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[105] WENDT, *supra* note 85 at 159-60.

[106] GIDDENS, *supra* note 99 at 3 and 281.

[107] *See* JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE (1969) at 12-13; GIDDENS at 109.

cannot provide. In order better to grasp the implications of constructivism for a non-positivistic understanding of normativity, we need to explore in some depth the insights of speech act theory, which will enable us to draw the connection between the use of language, particularly in the context of discursive processes, and the development of shared understandings and consensus regarding the content and validity of norms.

Speech act theory: Rules as products of consensus

The formation of shared understandings is described in speech act theory, and in particular in the notions of illocutionary and perlocutionary speech acts. Speech act theory analyses language as a form of action, focusing attention not only on the content of statements but also on the effects they create between speakers and hearers.[109] The content of statements remains important, but speech as a form of action has as its primary purpose the communication of intentions between speakers and hearers. Thus, speech is not simply employed to describe reality or to relate information about the world, but to persuade, to reach agreement, to make plans for the future, to coordinate action - in short, to make possible social integration.[110]

Speech act theory identifies three categories of acts, described by Habermas as follows:

> Through *locutionary* acts the speaker expresses states of affairs; he says something. Through *illocutionary* acts the speaker performs an action in saying something. The illocutionary role establishes the mode of a sentence ... employed as a statement, promise, command, avowal, or the like. Under standard conditions, the mode is expressed by means of a performative verb in the first person present .... Finally, through *perlocutionary* acts the speaker produces an effect upon the hearer. By carrying out a speech he brings about something in the world. Thus the three acts ...

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[108] Jürgen Habermas, *Was heißt Universalpragmatik? in* SPRACHPRAGMATIK UND PHILOSOPIE (Karl-Otto Apel, ed., 1976) 174 at 188. *See also* SEARLE, *supra* note 107 at 14.

[109] FRIEDRICH R. KRATOCHWIL, RULES, NORMS AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS (1989) at 7. *See also* Searle, *supra* note 107 at 23-5.

[110] ONUF, *supra* note 88 at 81; HABERMAS, *supra* note 46 at 18.

> can be characterized in the following catch-phrases: to say *something*, to act *in* saying something, to bring about something *through* saying something.[111]

At a generic level, illocutionary statements are employed by speakers to convey intentions to a hearer, and are successful when the hearer understands the speaker's intention.[112] Certain types of illocutionary acts, most notably assertives, whereby the speaker makes a statement about something's being the case; commissives, whereby the speaker commits herself to a future course of action; and directives, whereby the speaker seeks to get the hearer to do something, constitute the basis of rules. Onuf refers to such statements as rule candidates, in that they require something else to transform them into rules. This something else is, in the case of generic rules, acceptance by the hearer.[113] In the case of legal rules, as we shall see below, there are further criteria that must be met in order to transform the utterance into a rule of law,[114] thereby giving the hearer reasons other than his belief in the truth, truthfulness or validity of the statement to accept its content. These additional criteria are found in the institutional structures through which legal rules are created and applied.[115] Speech act theory describes these institutional structures as being created through further rules that are themselves the result of speech acts of various kinds.

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[111] JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION, VOL. I: REASON AND THE RATIONALIZATION OF SOCIETY (Thomas McCarthy, transl., 1984) at 288-9. See also the discussion of this passage in ONUF, *supra* note 88 at 83.

[112] SEARLE, *supra* note 107 at 43 and 46-7.

[113] ONUF, *supra* note 88 at 84. *See also* HABERMAS, *supra* note 111 at 300.

[114] *See* JOHN R. SEARLE, EXPRESSION AND MEANING: STUDIES IN THE THEORY OF SPEECH ACTS (1979) at 7; SEARLE, *supra* note 87 at 100 ff.; ONUF, *supra* note 88 at 136-7.

[115] Non-legal rules depend extensively on institutional structures as well.

A distinction is drawn between two different types of rules, or two different functions of rules: regulative and constitutive.[116] Regulative rules tell the hearer what to do in particular circumstances,[117] and are regarded as 'typical' legal rules in that they state the type of behaviour that is required in given circumstances if the hearer wishes to avoid sanction. As I will argue below, however, the regulatory function of rules does not permit such a direct connection to be drawn between the rule and the consequent behaviour of the rule's addressees. The reasons for obeying the rules may well have nothing to do with sanctions. They may flow from other types of consequences that will follow from non-compliance. Failure to follow rules regarding the load-bearing capacity of certain building materials will result in the erection of an unsound structure; failure to follow conventions regarding the writing of dissertations will result in work that will not be regarded as competent by members of one's examining committee. The fact that these rules may also be backed by formal sanctions, such as the issuance of a demolition order or withholding of a degree, is significant but not sufficient to explain the effectiveness of legal rules, that is, their acceptance by the hearer and the consequent decision to adopt behaviour in conformity with the rules.

Social institutions, including the legislators and courts through which legal rules are adopted and applied, but also extending to institutions such as statehood, diplomacy

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[116] There is some controversy regarding the utility or possibility of distinguishing between regulative and constitutive rules. SEARLE (*supra* note 87 at 27 ff.), KRATOCHWIL (*supra* note 109 at 26) and Ruggie (*supra* note 85 at 871 ff.) make this distinction, whereas Onuf (*supra* note at 51) and WENDT (*supra* note 85 at 165) reject it, arguing instead that all rules have both regulative and constitutive aspects. While acknowledging that it is probably not possible to make a clear distinction between categories of constitutive and regulative rules, I believe that distinguishing between the constitutive and regulative *functions* of rules is fundamental. In the discussion that follows, I will occasionally refer to constitutive and regulative rules as though they were different types without, however, wishing to disregard the possibility that these rules may nevertheless display both functions.

[117] SEARLE, *supra* note 107 at 34-5.

and negotiating procedures,[118] are created by constitutive rules.[119] Constitutive rules create institutional facts. For example, the institutional fact of the international convention owes its existence to a series of constitutive rules. There are rules regarding the characteristics a given corporate entity must possess in order to count as a sovereign state; there are further rules according to which certain office-holders may be deemed to speak on behalf of the state; and there are rules according to which certain utterances by those office-holders are to be interpreted as engagements entered into by a state to observe certain forms of behaviour in the future.[120]

If an utterance such as a command is issued by a speaker legally authorised to issue such commands and to punish disobedience, the *perlocutionary force* of the utterance is enhanced. Recall that perlocutionary acts are those that produce an effect on the hearer, in this case, compelling him to obey the command. In the absence of a declaration attributing the force of law to a command, the command might (but by no means must)[121] be taken merely as an expression of a desire that a particular state of affairs be brought about. The attribution of law-making authority might, then, be regarded as a means of attributing perlocutionary force to certain types of utterances.

Thus, law might be regarded as coming into being through the utterance of a declarative speech act supported by further declarations in the form of constitutive rules

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[118] *See* Biersteker and Weber, *supra* note 97 at 1.

[119] SEARLE, *supra* note 87 at 44.

[120] *See ibid.* at 54; ONUF, *supra* note 88 at 136-7; HABERMAS, *supra* note 111 at 300.

[121] There are many ways having nothing to do with law-making authority in which a person might ensure that her commands are obeyed. The most obvious is that the command is backed by a threat of violence that is not itself sanctioned by law - the famous gunman example comes to mind.

that provide the necessary authority to make the speech act count as law.[122] Such is the description of law provided by Onuf:

> [L]egality is a function of the degree to which (1) rules are formally stated, (2) their external dimension of support is institutionalized, and (3) the personnel responsible for formalizing and institutionally supporting rules are specifically and formally assigned these tasks, for which they are often also specifically trained.[123]

On the subject of the formality of law, Onuf states: "Those rules that are legal in function take the form of declarative speech acts, i.e., those that are successful, or performatively sufficient, *without depending on hearers' assent to implicate hearers in their normativity.*"[124]

The difficulty with this approach is that it does not explain why a hearer might obey a legal rule for reasons other than a wish to avoid sanctions or other unpleasant consequences that would follow in the case of disobedience. It does not appear to provide us with a basis upon which to describe law as a system of rules enjoying legitimacy; nor does it go very far in explaining the functioning of legal systems in the absence of centralised mechanisms for sanctioning breaches of rules. This conception of legal rules and legal systems put forward by speech act theorists tends to rely on hierarchical structures of authority for the production and application of legal rules.[125] It is not clear to what extent a link between law and morality is provided for in these conceptions. Law

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[122] *See* the discussion *supra* at 52.

[123] ONUF, *supra* note 88 at 136.

[124] *Ibid.* at 136-7 (emphasis added). Habermas takes a different approach, finding in the theory of communicative action a means for distinguishing the purely perlocutionary effect of legal rules - the fact that they should or must be obeyed - from their illocutionary effect - the fact that they may also be regarded as valid or legitimate *as norms*: HABERMAS, *supra* note 111 at 300.

[125] Brunnée and Toope, *International Law and Constructivism, supra* note 50 at 38-9.

is distinguished from other forms of rule by reference to formal criteria of validity described in terms of hierarchical structures of authority.[126]

A different approach to law as the product of speech acts is taken by Habermas. He regards perlocutionary acts as examples of strategic action, by which goal-oriented actors pursue their interests, rather than communicative action, whereby actors seek to reach understandings with one another.[127] Thus, the issuance of a command which the hearer chooses to obey because of knowledge he possesses regarding the capacity of the speaker to impose sanctions in the case of non-compliance is not regarded by Habermas as an instance of communicative action.[128] This is so because the knowledge possessed by the hearer of the speaker's issuing the command in the expectation that it be obeyed has nothing to do with an agreement reached between the speaker and hearer regarding the speaker's entitlement to be obeyed, these reasons being external to the speech act exchanged between speaker and hearer. Habermas describes communicative action as providing a means for speaker and hearer to coordinate their action plans, which they do through the acceptance by the hearer of the validity of the speaker's illocutionary statement. Commands, including commands based on legal rules, such as those uttered by officials legally empowered to issue them, appear quite different when contemplated as instances of communicative action. In this case, the speaker refers, not to her capacity to impose sanctions on the hearer in case of non-compliance, but to a norm recognised as valid, and to an institutional framework that authorises her to invoke the norm in the given situation as regards the hearer. The hearer, in complying with the 'command,' is

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[126] *Ibid.*
[127] HABERMAS, *supra* note 111 at 289-90.
[128] *Ibid.* at 300.

accepting the validity of the speaker's illocutionary statement. If he wishes to deny this validity, he is expected to supply reasons relating to the absence of legality or legitimacy of the norm invoked.[129]

As Habermas acknowledges, formality is of importance to law, as to base a legal system entirely on the compatibility of its norms with the discourse principle would be to place too great a burden on the addressees of those norms and would render the legal system ineffectual. It is necessary for society to possess a set of rules whose validity may be called into question but cannot be defeated by the simple invocation of arguments against them.[130] As Habermas expresses it, laws must be capable of operating as facts that their addressees take into account in making strategic decisions about various possible courses of behaviour.[131] However, efforts to make law's validity and legitimacy depend entirely or substantially on formal criteria established by a hierarchy of authority encounter significant difficulties. Neither the simple fact of the effectiveness of rules in influencing behaviour nor the perception on the part of addressees that the system is legitimate can be explained on this basis, yet in international law perceptions of effectiveness and legitimacy are central to the system's functioning.

Law as the Product of Democratic Process

The pluralism of international society imposes certain constraints on law. Although the legitimacy of law can be analysed from the point of view of conceptions of the good, the lack of agreement in international society regarding the nature of the good

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[129] *Ibid.* at 301.

[130] HABERMAS, *supra* note 46 at 26-7 and 30-1. *See also* Klaus Günther, *Communicative Freedom, Communicative Power, and Jurisgenesis in* HABERMAS ON LAW AND DEMOCRACY: CRITICAL EXCHANGES (Michel Rosenfeld and Andrew Arato, eds., 1998) 207 at 207 and 236.

[131] HABERMAS, *supra* note 46 at 30.

renders these analyses contingent and relative. In order to find a basis for an analysis of legitimacy capable of attracting a broad - even a universal - consensus, we must turn from abstract principles to processes for reaching agreement. The approaches that will be considered below examine the possibility that law may derive its legitimacy through adherence to *democratic* principles.

The notion that law's legitimacy depends on its capacity to achieve acceptance among the members of the society to which it is addressed is central to Fuller's notion of a legal system that supports the self-determination of its addressees.[132] In the first place, Fuller rejects the notion that law's effectiveness can be based on the notion of public order,[133] on the use or threat of force,[134] or on a formal hierarchy of authority.[135] Fuller argues that legal systems cannot be regarded as structures of authority to which their addressees are subject,[136] but rather consist of "the enterprise of subjecting human conduct to the governance of rules,"[137] an enterprise in which legislators, the administrators of law (administrative authorities and judges) and addressees participate.[138] Gerald Postema refers to this as Fuller's vertical interaction thesis.[139] He describes Fuller's approach to the influence of law on its addressees' behaviour as follows:

> First, law regulates or guides actions of citizens by addressing reasons or norms to them. Rather than altering the social or natural environment of action, or manipulating (nonrational) psychological determinants of action, law seeks to influence behavior by influencing deliberation.

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[132] For a discussion of the connections between constructivism, to which discourse ethics is related, and Fuller's approach, see Brunnée and Toope, *International Law and Constructivism, supra* note 50.

[133] LON L. FULLER, THE MORALITY OF LAW (1964) at 107.

[134] *Ibid.* at 108.

[135] *Ibid.* at 110.

[136] *Ibid.* at 63 and 145.

[137] *Ibid.* at 106.

[138] *Ibid.* at 91 on cooperation between legislator and interpreting agent.

[139] Gerald J. Postema, *Implicit Law in* REDISCOVERING FULLER: ESSAYS ON IMPLICIT LAW AND INSTITUTIONAL DESIGN (Willem J. Witteveen and Wibren van der Burg, eds., 1999) 255 at 255 and 260.

> It addresses norms to agents and expects them to guide their actions by those norms. Moreover, it expects those norms to figure in deliberation not as contextual features setting the environment or parameters of choice, but as *reasons for* deliberate choice. Thus, rules are intended to be 'internal' in two respects: (a) they figure in the deliberation of agents, and (b) they figure as reasons for, and not merely parameters of, deliberation and choice.
> Second, law seeks to influence deliberation in a wholesale fashion, not through detailed step-by-step instructions, but through general norms that agents must interpret and apply to their specific practical situations.[140]

This notion of legal rules influencing deliberation finds an echo in Habermas's principle of democracy - to which I will turn in a moment - and particularly in the notion that addressees of legal rules should be able to obey those rules out of a conviction, based on reasons, that the rules are appropriate. If this is the case, an addressee should be able to adopt the reasons for a rule's validity as his own reasons for acting in a particular manner. Ruggie takes a similar approach, describing rules not as *causes* of but rather as *reasons* for behaviour.[141] In contrast to a command theory of law, according to which law's addressees are forced to obey the rules, or a behaviouralist point of view, according to which they are regarded as having internalised the rules through forms of social conditioning and as obeying out of blind habit, the approaches of Fuller, Habermas and others regard addressees as active participants in the realisation of law.[142] This participation is vital to the formation of legal rules and to the validity and viability of the legal system, but it is also crucial, as the above passage indicates, to the interpretation and application of the rules. Postema's description of the vertical interaction thesis reminds us that interpretation and application begin not with judges, bureaucrats or other officials, but with the individuals to whom the rules are addressed. As obvious as this notion

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[140] *Ibid.* at 262.

[141] Ruggie, *supra* note 85 at 869. *See also* ONUF, *supra* note 88 at 49.

[142] H.L.A. Hart is well aware of the importance of interpretation and application of rules by individuals without reference to officials such as judges, and points to this immediate interaction of

appears, legal theory often treats rules' addressees as passive subjects rather than active participants in the interpretation and application processes. In the international legal system, in which the addressees of norms - particularly states - are actively involved in very obvious ways in the interpretation and application of law, this notion of law as a participatory process is of particular importance.

Further elucidation of this notion of the participation of addressees in the project of law, and the dependence of law's legitimacy on the possibilities for such participation, is provided by Perelman and other scholars associated with the New Rhetoric approach. Perelman argues that law is an instance of practical reasoning rather than of deductive or inductive logic, as it is concerned with matters that fall to be decided, that is, matters related to choices among competing values, rather than matters that may simply be demonstrated by arguments that necessarily follow from given premises. Judges therefore do not simply apply rules by subsuming fact patterns under rules; rather, they must engage in processes of problem-solving and interpretation in order to arrive at conclusions whose truthfulness cannot be proven, and which therefore must be supported by reasons by which the parties, the legal community and the general public subject may be convinced. Because the compromises that judges must make in coming to a decision are difficult, and because there are different routes that judges could conceivably take to resolve a given conflict, the only way to test the appropriateness or acceptability of the conclusion arrived at is by considering whether the parties involved, the legal community and the public at large are persuaded by the reasons given and convinced that the conclusion reached is the right one:

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individuals with the law as one reason why rules cannot be conceived of as orders: H.L.A. HART, THE

> Quand le *consensus* s'établit sur une pratique ou sur un type de solution, dans un conflit judiciaire, la justification de la décision, son rattachement au système, tout en étant souhaitable, sera considérée comme secondaire. Ce n'est que dans les cas douteux au point de vue de la solution à adopter que des raisons purement méthodoliques pourraient imposer une solution donnée. C'est parce que l'unique bonne solution d'un conflit de valeurs ne s'impose que rarement ... que le rôle du juge est central et déterminant.[143]

Thus, for example, when judges rely on notions of reasonableness in reaching and justifying their decisions, they are not making reference to objective, immutable concepts of reasonableness but rather to a notion supported by a social consensus.[144] Perelman goes one step further and asserts that law in general should be conceived of as "l'expression d'un *consensus* politique et social sur une solution raisonnable dans une société en rapide évolution."[145] This social consensus, rather than a simple reference to the formal legal validity and enforceability of judgments, is what underlies their authority, according to Perelman:

> Le rôle de la rhétorique devient indispensable dans une conception du droit moins autoritaire et plus démocratique, quand les juristes insistent sur l'importance de la paix judiciaire, sur l'idée que le droit ne doit pas seulement être obéi, mais aussi reconnu, qu'il sera d'ailleurs d'autant mieux observé, qu'il sera plus largement accepté.[146]

Rhetorical approaches to law hold that it is never possible simply to apply a rule to a fact pattern; rather, this process is one of interpretation.[147] This is the case because

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CONCEPT OF LAW 38 (1961, reprinted 1965).

[143] CHAIM PERELMAN, LE RAISONNABLE ET LE DÉRAISONNABLE EN DROIT: AU-DELÀ DU POSITIVISME JURIDIQUE (1984) at 80 and 100. *See also* THEODOR VIEHWEG, TOPIK UND JURISPRUDENZ: EIN BEITRAG ZUR RECHTSWISSENSCHAFTLICHEN GRUNDLAGENFORSCHUNG, 4th Edition (1969) at 26.

[144] PERELMAN, *supra* note 143 at 79.

[145] *Ibid.* at 79.

[146] *Ibid.* at 87.

[147] *See* Stéphane Rials, *Les standards, notions critiques du droit in* LES NOTIONS À CONTENU VARIABLE EN DROIT (Chaim Perelman and Raymond Vander Elst, eds., 1984) at 39 and 46. Rials argues that vague and open-ended rules, and more in particular standards, do not give rise to discretion on the part of decision-makers, but rather to interpretive processes.

The argument that legal reasoning is an interpretive process is made forcefully by Ronald Dworkin. Dworkin's hermeneutic approach describes legal reasoning as a process in which the judge seeks to discover the intention lying within the legal text - legislation, case law, doctrine, etc. The intention at issue is not that of the authors of the texts, but of the collection of the texts themselves. The process is one of *imputing* intention through a process of interpretation in which the texts are taken to express a purpose in

legal systems do not possess the characteristics of formal axiomatic systems, in which rules may be applied through processes of deductive or inductive logic.[148] Legal reasoning is not systematic in this sense, but rather problem-oriented.[149] One begins not with the system of rules but with the problem, which is placed within a particular framework, or topic, within which a solution may be found. If the topic does not permit the problem to be solved, another topic will be sought. While these various topics may be regarded as comprising systems of rules, the systems themselves cannot be ordered in a systematic fashion; in other words, they do not form part of a further, more comprehensive system.[150]

The Role of Topics in Legal Reasoning

The function of topics is to provide frameworks for the consideration and resolution of problems. Topics permit participants in discussion to orient their arguments, by providing the basis for the characterisation of problems and pointing toward particular paths which the process of problem-solving may take.[151] The problem-oriented nature of legal reasoning and other forms of practical reasoning works against the systematisation of such reasoning. Topics must remain linked to the problems, which they were created

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which the judge seeks to participate. The notion that the rules themselves are capable of revealing the correct outcome of the problem to which they are applied is rejected: RONALD DWORKIN, LAW'S EMPIRE (1986). This approach is compatible with New Rhetoric and may tell us much about the manner in which arguments in favour of a particular reading of the legal landscape are created. However, Dworkin does not go on to describe the process by which the judge convinces the parties of the correctness of one reading as opposed to another. The process of reasoning that he describes is monological, whereas New Rhetoric, like discourse ethics, attends to the fate of the argument once it is presented to an audience. This is important in international law, where one cannot rely on third-party adjudication or on the existence of a broad social and cultural consensus to do the work of rendering conclusions of legal processes authoritative.

[148] *See* VIEHWEG, *supra* note 143, *passim*; Perelman, *supra* note 143 at 57 ff.

[149] VIEHWEG, *supra* note 143 at 18.

[150] *Ibid.* at 18-19. See also KRATOCHWIL, *supra* note 109 at 232.

[151] *See* VIEHWEG, *supra* note 143 at 25; KRATOCHWIL, *supra* note 109 at 219; PERELMAN, *supra* note 143 at 158.

to solve. If topics were to be transformed into chains of deductive or inductive reasoning, they could be made to function as coherent systems but would thereby become unsuitable to the task of problem-solving, as they would have drifted away from their moorings.[152] The process of legal reasoning cannot stray from the problem, but rather must come back to it at every turn. The solution is therefore not a logical artefact with an independent existence rooted in the legal system, but rather is dependent on the context provided by the problem.[153] This is seen by the manner in which the correctness of the reasoning process and the conclusion arrived at are evaluated: as Theodor Viehweg notes, rather than asking whether the conclusion is true or false, one asks to what extent it is justifiable.[154] Friedrich Kratochwil describes this process, to which he refers as the path of legal argument, as follows:

> [T]he same results can be reached by different routes. Furthermore, while the paths can be traced, following them is not reducible to clear algorithms, or to subsumptions of the particular norms and rules under the more general principles or higher-level norms. Such an interpretation is faulty if for no other reason than the fact that at each turning-point a 'practical judgment' is required as to how a certain factual situation is to be appraised. It is precisely this going back and forth between 'facts' and norms in which the 'artfulness' of legal reasoning (*ars legis*) consists. If this argument is correct, it has an important corollary: it appears that 'justice' is not so much an attribute of the formal principles contained in positive law as it is the result of reasonable and principled use of norms in making practical judgments about factual situations.[155]

The notion of topics requires further elucidation. As noted above, they function as frameworks to guide the problem-solving process. They consist of 'commonplaces' or common understandings, which structure problem-solving without, however, leading to a solution.[156] Topics are arranged in opposing pairs, such that the choice of one over

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[152] VIEHWEG, *supra* note 143 at 23.

[153] *Ibid.* at 23 and 70.

[154] *Ibid.* at 27.

[155] KRATOCHWIL, *supra* note 109 at 240.

[156] Constructivism, as we have seen, elucidates the processes through which these common understandings come into being and the manner in which they operate. *See* discussion *supra* at 44.

another will lead to different approaches to problem-solving and different types of solutions. Kratochwil provides examples of topics drawn from the Vienna Convention on the Law of Treaties: a rule of interpretation according to which the ordinary meaning of the language in the text is to be relied upon is opposed to a rule stating that the intention of the parties is to be discovered through a perusal of preparatory documents. Kratochwil argues that the attempt to create a hierarchy among these rules fails due to contradictions among them.[157] However, this does not lead to the conclusion that the rules themselves are inappropriate or unhelpful. Rather, it is merely the attempt to systematise them that is fruitless.

This conception of legal argumentation as consisting of a series of encounters between opposing arguments finds an echo in the work of Myres McDougal, Harold Lasswell and other scholars associated with the policy-oriented approach, or New Haven approach.[158] Like New Rhetoric, the policy approach regards the ambiguity of rules in international law as a normal, even a positive, characteristic.[159] In particular, it is noted that this ambiguity contributes a welcome measure of flexibility to the process of legal argumentation and decision.[160] These authors regard international law as a dynamic process of claim, response and authoritative decision-making, guided by the interest of the community of states. In the words of Jan Schneider, "the basic purpose of any group association, including international organization, is the furtherance of common and the

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[157] KRATOCHWIL, *supra* note 109 at 234-5.

[158] *See, e.g.*, MYRES S. McDOUGAL ET AL., STUDIES IN WORLD PUBLIC ORDER (1987). For an application of the New Haven approach to international environmental law, see JAN SCHNEIDER, WORLD PUBLIC ORDER OF THE ENVIRONMENT: TOWARDS AN INTERNATIONAL ECOLOGICAL LAW AND ORGANIZATION (1979).

[159] Myres S. McDougal and Norbert A. Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security in* STUDIES IN WORLD PUBLIC ORDER, *supra* note 158, 763 at 777.

rejection of special interests."[161] More difficult are the cases of conflict between inclusive interests – such as an interest in the conservation of fish stocks – that potentially benefit a wide range of actors, and exclusive interests – such as access to fisheries resources – whose satisfaction involves potential competition among different actors.[162] In the context of specific instances of legal argumentation, one group of states may put forward a claim, say, to the protection of coastal state interests, while another group of states may put forward opposing claims to freedoms to fish and engage in other activities in the high seas and the right of innocent passage.[163] As observed by New Rhetoric scholars, there is no way to reconcile these opposing claims in the abstract by choosing one over the other. However, in specific contexts, states making and responding to claims are guided by the reciprocity of the process of legal argument: a claimant state in one instance becomes a state against which claims are made in another. "From this necessary reciprocity," write McDougal and Burke, "arise the recognition and clarification of a community interest which permits an appropriate compromise of competing claims and affords sanction for decision."[164]

There are, however, several difficulties with this approach, difficulties that are avoided by New Rhetoric. For example, the belief that a community interest exists and

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[160] *Ibid.* at 773 and 786.

[161] SCHNEIDER, *supra* note 158 at 9. Schneider goes on to state: "All nations and all peoples ... have a common interest in the protection and enhancement of the human environment; certain activities, such as excessive pollution of the oceans or atmospheric nuclear testing, clearly serve only special ends and are destructive of the common good or heritage:" *ibid.* In the context of the law of the sea, McDougal and Burke argue that the international community has an interest in maintaining an appropriate balance between "the special exclusive demands of coastal states and other special claimants and the general inclusive demands of all other states in the world arena:" Myres S. McDougal and William T. Burke, *Crisis in the Law of the Sea: Community Perspectives versus National Egoism in* STUDIES IN WORLD PUBLIC ORDER, *supra* note 158, 844 at 844.

[162] SCHNEIDER, *supra* note 158 at 10-11.

[163] McDougal and Burke, *supra* note 161 at 852.

must simply be located on the spectrum between particular and general claims, such as those put forward by claimant and maritime states, is rather optimistic, to say the least. New Rhetoric does not suggest that the opposing pairs of topics can be reconciled or balanced against one another, but that arguments framed with reference to one topic will be more persuasive than those referring to the opposing topic. There is no suggestion that a golden mean exists or that the parties will be capable of identifying the right balance between conflicting objectives. A related weakness of the policy approach is revealed in the notorious argument defending hydrogen bomb tests conducted by the United States in 1950. Myres McDougal and Norbert Schlei argued that they had identified an appropriate balance between the particular interests of citizens of the Marshall Islands and Japan, on the one hand, and the general interest in global peace and security, on the other. While the injuries sustained by individuals were acknowledged to be regrettable, the consequences of the test were regarded as justifiable.[165] The policy approach drains law of normative content, reducing even the concept of human dignity to a matter of interest.[166] States are restrained only by the reciprocal nature of the process of claim and response. Interest is therefore the motor that drives the international legal machinery, but it is believed that the interplay of interests will steer the process in the direction of the common interest, namely the enhancement of human dignity. In light of the very different levels of influence held by various states in international society, the interests of powerful states will inevitably bear more weight and will often prevail for reasons that have nothing to do with justice or fairness. An approach to law that takes its normative

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[164] *Ibid.* at 870.

[165] McDougal and Schlei, *supra* note 159.

[166] *See* Brunnée and Toope, *Environmental Security, supra* note 50 at 30.

vocation seriously would maintain that law itself should be capable of tempering the capacity of the strongest actors to prevail when their interests come into conflict with those of weaker actors.[167]

New Rhetoric suggests a different approach to legal reasoning, one that does not suggest the possibility of arriving at the 'correct' result through a process of logical deduction. One perspective on rhetoric is that it is the art of persuading an audience to accept one's argument. The content of the argument may be correct or incorrect, true or false, but the audience may be won over through the use of techniques of persuasion, including plays on emotion and other such tactics. However, another, to my mind preferable, approach is to regard rhetoric as an intersubjective search for truth.[168] By regarding the process as intersubjective, that is, by assigning the audience an active rather than a passive role, it is possible to construe rhetoric as a method for testing the truthfulness of conclusions arrived at through practical reasoning. In fact, the acceptance or rejection of rhetorical proofs by an active, judging audience is the only available means to test these proofs. This is so because of the nature of the problems with which rhetoric is concerned, that is, matters that need deciding. These are matters, including political questions, for which more than one possible interpretation or solution presents itself, and which humans through their actions can affect.[169] Rhetorical propositions are *likely* to be true, in that they contain elements of possibility or contingency, whereas dialectical

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[167] *See* Francis A. Boyle, *International Incidents: The Law That Counts in World Politics* 83 A.J.I.L. 403 (1989). Boyle remarks that the approach taken by New Haven scholars tends to reinforce the impression that in international society "the strong do what they will and the weak suffer what they must:" *ibid.* at 403, referring to Thucydides' Melian Dialogue.

[168] Troels Engberg-Pedersen, *Is There an Ethical Dimension to Aristotelian Rhetoric? in* ESSAYS ON ARISTOTLE'S RHETORIC (Amélie Oksenberg Rorty, ed., 1996) 116 at 124.

propositions are necessary.[170] In rhetorical arguments, a conclusion is presented, backed by examples, or topics. The examples make possible a generalisation, which, if accepted as appropriate, provides the basis for the conclusion arrived at. This form of proof differs from logical proof in that the generalisation is merely probable, rather than necessary; its acceptance depends on the persuasiveness of the arguments made in support of it.[171]

Topics may consist of moral principles such as those described by Kratochwil as falling within Pufendorf's hypothetical laws of nature. These laws of nature "concern the principle of good faith underlying human practices, which in turn create rights and duties on the basis of certain actions." Examples are "the principle of veracity ..., of keeping one's promises, of fulfilling one's contractual obligations, and of taking an oath ... ."[172] The topical nature of these principles is elucidated as follows:

> [T]he laws of nature represent only certain 'starting points' for the discussion of value-claims. They provide 'contexts' and help with the selection of relevant facts; furthermore, they lead the actor in a certain sequence and order through the articulation of a claim. Precisely because these laws are in a way 'transcendental' to a discourse on grievances, in that they provide for the possibility of a moral argument, they are not determinative of any particular decision that invokes them.[173]

Of course, Habermas would argue that these principles are not in fact transcendental and must rather be derived through discourse. Nevertheless, this rhetorical conception of the connection between moral principles and legal rules is enlightening.

The effectiveness of rules is not based on their ability to inform their addressees precisely what forms of behaviour are required of them, or the ability of a judge to apply

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[169] Mary Margaret McCabe, *Arguments in Context: Aristotle's Defense of Rhetoric in* ARISTOTLE'S RHETORIC: PHILOSOPHICAL ESSAYS (David J. Furley and Alexander Nehamas, eds., 1994) 129 at 144 and 148.

[170] *Ibid.* at 151; KRATOCHWIL, *supra* note 109 at 215.

[171] KRATOCHWIL, *supra* note 109 at 217-8.

[172] *Ibid.* at 140.

[173] *Ibid.* at 141 (footnotes omitted).

the rules without having to engage in interpretive processes.[174] Once the rule has been articulated, its addressees and those charged with its application must begin the process of determining what it means in individual cases. In international law, this task tends to fall to the addressees themselves, as third-party adjudication is not often resorted to. In this respect, it is the conception put forward by Fuller of interactional law, in which law's addressees are regarded as participants in its application that is of particular relevance. As noted above, Fuller's approach implies that "law seeks to influence deliberation in a wholesale fashion, not through detailed step-by-step instructions, but through general norms that agents must interpret and apply to their specific practical situations."[175] The deliberation to which Fuller refers could be that engaged in by legal officers, such as judges and administrators, but extends also to the individuals who must apply legal norms in the course of their day-to-day lives. Because of the pluralism of international society, this process is rendered particularly difficult, as the underlying social consensus upon which the validity of rules and decisions depends is often thin and fragile. Nevertheless, as the above discussion of the constructivist view of international society sought to demonstrate, that society is composed of webs of shared understandings and rules of various kinds that permit its members to communicate and interact with one another.

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[174] Hart has given extensive consideration to the problem of interpretation of legal rules. He argues that legal rules have an "open texture," the consequence of which is that, at some point, rules will prove indeterminate: HART, *supra* note 142 at 124. This indeterminacy, in Hart's conception, appears around the edges of the scope of a rule's application - rules possess a "core of settled meaning" surrounded by a "penumbra" of uncertainty: H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY (1983) at 63.

The approach taken here differs in that the rule's "core of settled meaning" is not regarded as an inherent quality of the rule itself, but rather as the result of a shared understanding regarding the meaning of the rule and the scope of its application. At one point in time, it may seem beyond dispute that a rule receive a particular interpretation: for example, it once appeared self-evident that state sovereignty implied a right of the sovereign to define and pursue domestic policy goals without interference from other states. This interpretation of sovereignty remains highly persuasive and pervasive, but has lost its self-evidence. The content of the "core of settled meaning" will change and evolve with changes in the shared understandings surrounding the rule.

These shared understandings should not be confused with consensus on values and the hierarchy among them, but they do provide a potential basis upon which communication oriented towards understanding, as Habermas puts it, may take place.

Having sketched an understanding of processes of legal reasoning as dependent on discursive processes among the members of the society in which the law is to be applied, we must now consider more carefully the connection between law's legitimacy and processes of public deliberation. This discussion will prepare the ground for the section to follow, in which the insights of Fuller, Perelman, Habermas and others will be placed in the context of international society.

Discourse ethics

Habermas's theory of universal pragmatics seeks to reconstruct the conditions under which communication oriented toward understanding takes place. He argues that in engaging in speech acts, a speaker raises a series of claims regarding the validity of her statements, thus enabling the hearer to rely on her and enabling speaker and hearer to reach consensus. The four validity claims are: that what is said is intelligible; that its propositional content is true; that the speaker's intentions in making the utterance are truthfully expressed (or, as it is more commonly put, that the utterance's performative content is correct); and that the truthfulness or authenticity of the speaker can be relied on by the hearer, such that both can reach an agreement based on the utterance.[176] When engaging in discourse, Habermas argues, participants *counterfactually* assume an ideal

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[175] Postema, *supra* note 139 at 262.

[176] Habermas, *supra* note 108 at 176. *See also* SEYLA BENHABIB, CRITIQUE, NORM AND UTOPIA: A STUDY OF THE FOUNDATIONS OF CRITICAL THEORY (1986) at 283-4; JOHN B. THOMPSON, UNIVERSAL PRAGMATICS IN HABERMAS: CRITICAL DEBATES (John B. Thompson and David Held, eds.,

speech situation, whose features would guarantee that any consensus arrived at through discourse would be based solely on the acceptance of all participants of the arguments put forward by the speaker to ground rationally the content of her utterance.[177] This counterfactual assumption makes argumentation and the reaching of consensus possible, even though the discursive processes engaged in can never attain the standards set by the ideal speech situation. The act of assenting to a statement involves an acceptance of these validity claims, which in turn gives rise to what Habermas refers to as an action norm. Action norms are devised by actors in order to answer the question 'what ought we to do?'[178] Action oriented toward understanding - communicative action - is the basis upon which valid rules, both moral and legal, are created, recognised or tested.[179] Such rules must conform to a discourse principle: "Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses."[180] They are distinguished, however, in terms of the type of arguments employed to justify them and the reasons for their validity, and also with respect to the criteria that they must meet in

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1982) 116 at 121; DAVID HELD, INTRODUCTION TO CRITICAL THEORY: HORKHEIMER TO HABERMAS (1980) at 332-3.

[177] *See* HABERMAS, *supra* note 46 at 228. A particularly lucid description of the ideal speech situation is provided by Benhabib, as follows:

> [F]irst, each participant must have an equal chance to initiate and to continue communication; second, each must have an equal chance to make assertions, recommendations and explanations, and to challenge justifications. ... Third, all must have equal chances as actors to express their wishes, feelings and intentions; and fourth, the speakers must act *as if* in contexts of action there is an equal distribution of chances "to order and resist orders, to promise and to refuse, to be accountable for one's conduct and to demand accountability from others:" BENHABIB, *supra* note 176 at 285 (footnote omitted; emphasis in original).

[178] HABERMAS, *supra* note 46 at 158-9.

[179] [T]he concept of *communicative action* refers to the interaction of at least two subjects capable of speech and action who establish interpersonal relations (whether by verbal or by extra-verbal means). The actors seek to reach an understanding about the action situation and their plans of action in order to coordinate their actions by way of agreement. The central concept of *interpretation* refers in the first instance to negotiating definitions of the situation that admit of consensus: HABERMAS, *supra* note 111 at 86 (emphasis in original).

order to be regarded as valid. Moral questions are to be distinguished from ethical questions, about which, Habermas argues, consensus cannot be formed in a postconventional society. Ethical questions have, in such societies, become subjective;[181] they "are oriented to the telos of my/our own good (or not misspent) life;"[182] to cultural values, particular orientations toward the good, or conceptions of the ethical life - what Habermas refers to as material ethics.[183] The loss of authority that tradition, religion and other sources of conceptions of the good life have undergone make it necessary to justify rules, rights, principles and other institutions necessary to life in society on the basis of reasons.[184] These latter questions are the province of moral discourse.

In a classical liberal conception, law in a pluralistic, postconventional society is legitimated through its ability to preserve a maximum amount of freedom for its members compatible with a minimum level of order within society. The legitimacy of law thus depends primarily on its capacity to preserve private autonomy from intrusion by government or other members of society. Habermas acknowledges the importance of protection of private autonomy to the legitimacy of law, although, as we shall see, he conceives of private autonomy differently than does classical liberalism. A further fundamental distinction is Habermas's emphasis on what he refers to as public autonomy, or rights to participate in the formation of law. These two forms of autonomy are reflected in the notions of human rights and popular sovereignty. Habermas describes human rights and popular sovereignty as "the precipitate left behind, so to speak, once the

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[180] HABERMAS, *supra* note 46 at 107.
[181] *Ibid.* at 96-9.
[182] *Ibid.* at 97.
[183] *Ibid.* at 97.
[184] *Ibid.* at 97-8.

normative substance of an ethos embedded in religious and metaphysical traditions has been forced through the filter of posttraditional justification."[185] At the risk of oversimplification, human rights may be conceived of as protecting the capacity of individuals to pursue their own life-plans based on their own conceptions of the good life and thereby to achieve self-realisation. Popular sovereignty, by contrast, reminds us that the individual is author as well as addressee of the legal rules within her society, and that these rules are products of processes of discourse through which members of society arrive at consensus or agreement on the rules and principles that facilitate their collective life.[186]

Habermas does not conceive of legal rules as descending from moral rules, but rather sees the two types of rules as addressing themselves to different questions, although the legal and moral rules articulated for a given society must accord with one another. The morality of law is assured through a democratic principle, which directs itself toward the formal and the substantive aspects of law. Formally speaking, the democratic principle requires that rules of law be adopted through democratic procedures that permit members of society to regard themselves not merely as the addressees of law, but also as its authors. Substantively speaking, the addressees of rules must be able to accept, on the basis of reasons, the content of rules.[187] Note that both these criteria are

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[185] *Ibid.* at 99.

[186] *Ibid.* at 32 and 38.

[187] A very similar argument is made by Kratochwil, although he derives it in a different manner. Kratochwil's moral principles are described in light of Pufendorf's distinction between absolute and hypothetical laws of nature, the former being based on the injunction against doing harm to another and its corollaries that harm should be made good, and that each should treat others as equals by nature, and the latter "concern[ing] the principle of good faith underlying human practices, which in turn create rights and duties on the basis of certain actions." After discussing the manner in which principles derived from the laws of nature assist in the articulation of specific, particularly legal, rights and duties, Kratochwil states:

procedural. Habermas posits no criteria of his own by which the validity or appropriateness of the substantive content of legal rules may be measured. The capacity of a given society to find answers to the question, What ought we to do? - answers that are recognised as appropriate and legitimate by members of that society - depends, in Habermas's conception, on the robustness of communicative action in public spheres and the permeability of centres of political decision-making to the opinion- and will-formation that is produced in these spheres.[188]

Of course, it is not possible for all citizens actually to participate in legislative processes, nor to contemplate the entire body of rules and decide whether or not each may be accepted on the basis of reasons.[189] However, Habermas is not here posing a counterfactual. He is not suggesting, for example, that representative institutions such as parliaments may stand in for public deliberations among citizens, or that laws must meet abstract criteria of reasonableness or rationality, such that they would be acceptable to a hypothetical reasonable person. Rather, he argues that public communication among citizens must be capable of occurring and must in fact occur, and that this communication must influence processes of law-formation.[190] This requires a robust public sphere in

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> [This argument] shows a substantial similarity between legal and moral reasoning insofar as both involve judgments on practical matters, and both have to be arrived at through a process of *principled argumentation*. Second, since both moral and legal reasoning are designed to lead to principled choices, the element of 'heteronomy' that is involved in the decisions is different from the imposition of a superior will. The heteronomy refers to general principles which are constitutive of the individual 'self' as well as the existence of society: KRATOCHWIL, *supra* note 109 at 141-2 (emphasis in original).

[188] HABERMAS, *supra* note 46 at 38.

[189] *See* discussion *supra* at 57.

[190] As Postema has argued, a very similar point is made by Fuller, whose interactional approach to law requires a high degree of cooperation between legislators and citizens and on a "congruence between enacted laws and background informal social practices and conventions." Postema describes this as Fuller's "congruence thesis:" Postema, *Implicit Law, supra* note 139 at 260. *See also* Fuller, *supra* note 133 at 102 and Brunnée and Toope, *International Law and Constructivism, supra* note 50. A particularly

which citizens engage in communicative action with one another and in which the information thus generated is transmitted across various groupings of citizens, both formal and informal. It also requires a political system that is permeable to the results of opinion- and will-formation taking place within this public sphere. However, these communicative processes, though ultimately dependent on face-to-face encounters, also take place in more impersonal, abstract ways, through "subjectless communications [which] form arenas in which a more or less rational opinion- and will-formation can take place for political matters."[191] Thus, information media, interest groups, associations of various kinds, academia and a wide range of other media and fora become sources and means of transition for information and ideas through which social consensus may gradually emerge.

Habermas's discussion focuses on law as articulated in statutes and judicial decisions, although he is careful not to limit his definition of law to such instruments. Habermas distinguishes moral from legal norms on the basis of the different types of reasons and argumentative processes that support these different norms. Legal discourses are distinct from moral discourses in that they seek to answer different types of questions; they call upon the full range of practical reasons; they may be produced by argumentation oriented towards understanding as well as bargaining oriented towards the satisfaction of respective interests; and the resulting rule may be based on an agreement or compromise, as well as a consensus, and may be assented to by participants on the basis of different reasons. Moral rules must meet a higher threshold than legal rules. This threshold is

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effective way of achieving such congruence is to ensure that decision-making systems remain open to influence from flows of discourse taking place in the wider society.

[191] HABERMAS, *supra* note 46 at 299.

defined by the principle of universalisation: "For a norm to be valid, the consequences and side effects that its *general* observance can be expected to have for the satisfaction of the particular interests of *each* person affected must be such that *all* affected can accept them freely."[192] Habermas writes:

> In the case of moral questions, humanity or a presupposed republic of world citizens constitutes the reference system for justifying regulations that lie in the equal interest of all. In principle, the decisive reasons must be acceptable to each and everyone. With ethical-political questions [with which legal rules are concerned], the form of life of the political community that is 'in each case our own' constitutes the reference system for justifying decisions that are supposed to express an authentic, collective self-understanding. In principle, the decisive reasons must be acceptable to all members sharing 'our' traditions and strong evaluations.[193]

Legal rules, on the other hand, although ideally the object of consensus, may also result from processes of negotiation oriented toward compromise:

> Oppositions between interests require a rational balancing of competing value orientations and interest positions. Here the totality of social or subcultural groups that are directly involved constitute the reference system for negotiating compromises. Insofar as these compromises come about under fair bargaining conditions, they must be acceptable in principle to all parties, even if on the basis of respectively different reasons.[194]

Furthermore, as noted above, the validity of legal rules requires that they be adopted through certain procedures that meet criteria of democratic decision-making. Thus, formal criteria for law-making are important, although they do not alone define the

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[192] JÜRGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION (Christian Lenhardt and Shierry Weber Nicholsen, transl., 1995) at 120 (emphasis in original). Moral norms are concerned with questions of justice: HABERMAS, *supra* note 46 at 153.

[193] HABERMAS, *supra* note 46 at 108.

I note in passing a potential problem that this conception poses for international law. International society does not possess in the same measure as domestic societies a form of life common to its members nor traditions that its members can call its own. It must cast a wider net, and be acceptable to a larger set of individuals and groups who differ from one another in often fundamental ways. I would argue that international law evades this challenge in that this work is done - at least in theory - by domestic societies. International law, despite its significant effect on the lives of individuals, particularly as its subject-matter and scope expand, remains primarily concerned with structuring relationships among groups.

[194] *Ibid.* at 108.

category of legal rules and, more importantly, they are not relied on to provide the entire basis of the validity of those rules.[195]

4. A DISCOURSE-ETHICAL APPROACH TO INTERNATIONAL LAW

As we have seen, Habermas's discourse ethics describes legal and moral norms as carrying out different tasks but as nevertheless being interrelated. Legal norms must meet moral criteria both in respect of the procedure through which they are adopted and in respect of their content. Efforts to articulate a legal theory that links legal with moral systems without making appeals to objective, universal truths are of particular relevance to international society, in which attempts to ground law's legitimacy on universal truths cannot succeed. On the other hand, applications of these insights to international society encounter significant difficulties. Discourse ethics, as developed by Habermas, applies for the most part to the domestic context, where a certain level of social consensus exists on which appeals to the reasonableness, appropriateness, acceptability, legitimacy and justice of law can be based. In international society, certain shared understandings exist, but they are much thinner, more fragile and less comprehensive than those liable to be found in domestic societies. This is of fundamental importance, as Habermas's discourse ethics presupposes the existence of certain structural preconditions, most notably a

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[195] The approach taken here is not radically incompatible with Hart's conception of a legal system as consisting of primary rules of obligation and a secondary rule of recognition. It is acknowledged that something like a rule of recognition (or, more accurately in the case of the international legal system, a series of rules of recognition) operates as a criterion for the enactment of valid law: HART, *supra* note 142 at 97 ff. However, the question whether or not a given primary rule has passed through the gateway established by the rule of recognition is not the only question that must be asked in order to discover whether a given rule may be regarded as a validly created legal rule. The rule of recognition is not a necessary condition, as rules may enter the international legal system in a variety of ways. Furthermore, non-legal rules exercise enormous influence on the interpretation and implementation of legal rules, such that it is not appropriate to regard the two types of rules as being radically separate. The rule of recognition is not a sufficient indicator of a rule's validity, as we must also concern ourselves with questions such as the legitimacy of the rule, the extent to which it continues to be the object of consensus in international society, and other such questions.

'lifeworld,' or set of common understandings and values, that constitutes a background for discourse and that permits participants to refer to mutually understood touchstones in seeking to convince one another of the rightness of their respective positions.[196] Meeting these conditions at the international level is a difficult challenge. In the discussion that follows, I shall argue that a constructivist understanding of regimes provides us with a basis for doing so. As we shall see, the ability to link legal with moral rule systems and thus to provide a basis for international law's legitimacy depends on the existence of a robust civil society or public sphere at the international level, one that makes room for non-state actors. I will argue that international regimes constitute nascent public spheres, and that they may prove capable of supporting the discourse and debate upon which the legitimation of international law depends.

Legitimacy of international law

At first glance, the international legal system may appear capable of attaining a high degree of legitimacy, since the process of law-formation is based on state consent. If states are regarded as the only subjects of international law, and if the fiction of the separate domestic sphere is maintained, one may regard international law as a consensual and therefore legitimate system. However, as we have seen, rising interdependence and an increasing preoccupation by international law with 'domestic' matters threatens the viability of this particular conception of international law's legitimacy. The impact of international law on domestic society is particularly apparent as international law begins to move into areas such as environmental law and human rights protection. Although the

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[196] *See, e.g.,* Michael Müller, *supra* note 38 at 369; Harald Müller, *Internationale Handlungstheorien, supra* note 38 at 26 (1984). On the concept of the lifeworld see HABERMAS, *supra,* note 111 at 70-1 and 335-7.

rules continue to be addressed, formally at least, to states, the very limited access of individuals and other non-state actors to international law-creating fora creates a legitimacy gap, insofar as those who are affected by the rule have only limited opportunities to participate in its creation.[197]

Applying these insights to law-making at the international level highlights the importance of transnational civil society to the legitimacy of these processes. Making international fora more permeable to influence from civil society would require, on the one hand, rendering these fora more accessible to members of that society, for example through the admission of observers or the acceptance of expert reports and briefings by members of non-governmental organisations. However, it also depends on the creation and maintenance of public space at the international level where members of civil society may assemble and engage in the debate and discussion that leads to opinion- and will-formation.

The legitimacy of international law thus depends in large measure on the presence of certain structural elements, most notably a shared horizon of commonly-agreed meaning on which participants in discourse can draw in making themselves intelligible to one another and in seeking to persuade one another. This is necessary because there are certain risks inherent in making the transition from strategic to communicative action, and in order for participants to be persuaded to run these risks they must have some confidence in the possibility of the success of communicative action and in one another's

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[197] See Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?* 93 A.J.I.L. 596 (1999) for a discussion of the problem of the legitimacy of international environmental law.

trustworthiness.[198] There is a good deal of debate regarding the thickness of the shared horizon that is necessary for the articulation of rules possessing legitimacy. For example, Thomas Franck argues that this shared horizon must take on the nature of a community whose members share certain fundamental values that become the basis for international law.[199]

As I will argue below, international regimes may be regarded as nascent public spheres at the international level within which the discourse upon which legitimate international law depends may take place. Regimes are of interest to this inquiry because they address themselves to a particular issue-area or set of problems and thus present participants with a limited and manageable field upon which to work. Because they constitute fora for ongoing interaction among participants, they also create conditions favourable to the establishment of common approaches, conceptions and understandings. Such a process is described by Jutta Brunnée and Stephen Toope as the establishment of a contextual regime, which precedes the establishment of a legal regime and permits participants gradually to build up a stock of shared understandings upon which they can draw in later stages.[200]

Much of the discussion, debate and information-sharing taking place within regimes is of an informal nature, partly because of the range of actors participating in these exchanges and partly because their purpose, while ultimately being to create and

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[198] Harald Müller, *Internationale Handlungstheorien, supra* note 38 at 28; Risse-Kappen, *Reden ist nicht billig, supra* note 38 at 179.

[199] FRANCK, FAIRNESS, *supra* note 15 at 10. Franck appears to have nuanced his position in his most recent work, THE EMPOWERED SELF: LAW AND SOCIETY IN THE AGE OF INDIVIDUALISM (1999), as he now speaks of a global "community of communities:" *ibid.* at 100. *See also* Brunnée and Toope, *International Law and Constructivism, supra* note 50 at 33.

[200] Brunnée and Toope, *Environmental Security, supra* note 50 at 33.

implement legal rules, is also concerned with more general types of problem-solving and policy articulation. Furthermore, these exchanges link up with discussions in other fora, both domestic and international. A comparison may be drawn to the public spheres in domestic society described by Habermas, in which opinion- and will-formation take place that have the potential to influence more formal discursive processes. As noted above, Habermas regards as fundamental to law's legitimacy the existence of a pluralistic, unorganised, spontaneously emerging public sphere in which unconstrained discourse takes place, resulting in opinion- and will-formation upon which the legitimacy of authoritative decision-making depends.[201] He presents a communication model of political decision-making in which discussion and debate taking place within parliamentary bodies and other official deliberative fora - institutionalised opinion- and will-formation - links up with discourse in informal public spheres. "This linkage," he writes,

> is made possible neither by the homogeneity of the people and the identity of the popular will, nor by the identity of a reason that is supposedly able simply to *discover* an underlying homogeneous general interest. ... If the communicatively fluid sovereignty of citizens instantiates itself in the power or public discourses that spring from autonomous public spheres but take shape in the decisions of *democratic, politically accountable* legislative bodies, then the pluralism of beliefs and interests is not suppressed but unleashed and recognized in revisable majority decisions as well as in compromises.[202]

He is particularly insistent on the unorganised form of discourse in public spheres:

> Here new problem situations can be perceived more sensitively, discourses aimed at achieving self-understanding can be conducted more widely and expressively, collective identities and need interpretations can be articulated with fewer compulsions than is the case in procedurally regulated public spheres. Democratically constituted opinion- and will-formation depends on the supply of informal public opinions that, ideally, develop in structures of an unsubverted political public sphere.[203]

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[201] *See, e.g.*, HABERMAS, *supra* note 46 at 185-6 and 307-8.
[202] *Ibid.* at 185-6 (emphasis in original; footnote omitted).
[203] *Ibid.* at 308.

The opinion- and will-formation that Habermas envisages taking place in public spheres presupposes face-to-face interactions among individuals who reach consensus or agreement, but does not exclusively take this form. He describes

> the *higher-level intersubjectivity* of processes of reaching understanding that take place through democratic procedures or in the communicative network of public spheres. Both inside and outside the parliamentary complex and its deliberative bodies, these subjectless communications form arenas in which a more or less rational opinion- and will-formation can take place for political matters ... .[204]

International society presents many fewer occasions than does domestic society for individuals to participate directly in processes of opinion- and will-formation. The regime is potentially capable of providing such occasions. The formal role of non-state actors in international legal fora is generally restricted to that of observer, although in a number of international regimes, such as the regime controlling international trade in endangered species, particular non-governmental organisations play a much more active role. Because regimes are issue-specific, the barrier to entry is defined in part in terms of interest in and knowledge about the relevant issue area, and not exclusively in terms of the status of potential participants. Actors who do not participate directly in regime activities may nevertheless exercise diffuse influence, for example by issuing reports or commentaries on issue-areas or by contributing knowledge or expertise to general debates. The factors that determine the capacity of a non-state actor to have a significant influence on processes of law-formation are many and complex, and in any event beyond the scope of this paper. It is not the case that opportunities to participate are equitably distributed, or that such participation is always meaningful and effective. Furthermore, there is a danger in assuming that participation by non-state actors *ipso facto* renders legal

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[204] *Ibid.* at 299 (emphasis in original).

processes more democratic or more legitimate, as the question of the ability of non-state actors faithfully and effectively to represent 'the public interest' is a particularly difficult one. Flawed as they may be, such processes of opinion- and will-formation in international society are vital to international legal processes.

The regime as a locus of legitimacy in international law

A significant portion of the business of making, interpreting and applying international law takes place within international regimes. Theories regarding international regimes are articulated by scholars occupying very different positions on the spectrum of international relations theory, but may be loosely classified, following Andreas Hasenclever *et al.*, into power-based, interest-based and knowledge-based approaches.[205] Although, as discussed above, realism is generally hostile to the notion of international collaboration or cooperation, certain realist scholars have argued that states may, under certain conditions, form regimes to further their respective ends.

Discussions of international regimes begin, almost inevitably, with reference to the so-called consensus definition articulated by Krasner:

> Regimes can be defined as sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations. Principles are beliefs of fact, causation, and rectitude. Norms are standards of behavior defined in terms of rights and obligations. Rules are specific prescriptions or proscriptions for action. Decision-making procedures are prevailing practices for making and implementing collective choice.[206]

Krasner argues that "the basic function of regimes is to coordinate state behavior to achieve desired outcomes in particular issue-areas."[207] Krasner and others initially sought to make essentially realist, power-based arguments about regime formation and

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[205] THEORIES OF INTERNATIONAL REGIMES, *supra* note 49, *passim*.
[206] Krasner, *supra* note 13 at 2.
[207] *Ibid.* at 7 (footnote omitted).

change: states seek to maximise their own interests, which are determined by the nature of the system in which they participate, and outcomes within that system are mediated by power. As a result, Krasner predicts that regimes will arise when their existence and operation benefits the hegemon in the system.[208] Arthur Stein, another realist regime theorist, denies the existence of shared understandings or common knowledge within regimes. He argues that "[t]he outcomes that emerge from the interaction of states making independent decisions are a function of their interests and preferences."[209] This theory encounters difficulty in the face of evidence of regime persistence despite the decline of hegemony,[210] although Stein, arguing that the distribution of power is only one of the factors determining actor interests, is able to point to a number of reasons for regime persistence despite structural change that do not depart in any significant manner from realist premises.[211]

Interest-based regime theorists employ assumptions about the interests and preferences of actors that are distinct from those found in power-based approaches. In particular, interest-based theorists argue that cooperation in general and regime formation in particular is more readily achieved than realism would suggest. Scholars such as Keohane apply a social contract model based on rational-choice assumptions to the

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[208] Katzenstein, Keohane and Krasner, *supra* note 54 at 660-1. See also THEORIES OF INTERNATIONAL REGIMES, *supra* note 49 at 104 ff. for a discussion of approaches that a hegemon can take to manipulate the preferences of other actors to make cooperation more likely. *See also* Stein, *supra* note 49 at 116: "The conceptualization of regimes developed here is rooted in the classic characterization of international politics as relations between sovereign entities dedicated to their own self-preservation, ultimately able to depend only on themselves, and prepared to resort to force."

[209] Stein, *supra* note 49 at 116.

[210] THEORIES OF INTERNATIONAL REGIMES, *supra* note 49 at 89 and 103.

[211] Stein, *supra* note 49 at 138. Thus, regimes may persist because other factors affecting interest support the continuation of the regime; because states do not reassess their interests on an ongoing basis, but rather fall into patterns of behaviour; or because states develop an interest in the regime itself, for example as a result of sunk costs or the predicted cost of short-term changes.

question of regimes,[212] arguing that states may decide, based on calculations of self-interest, to coordinate their behaviour in order to reduce the risks and uncertainties associated with anarchy.[213] The interest posited by realists that states have in preventing other states from making relative gains is overridden, in Keohane's view, by interests of a different order, namely interests in reducing uncertainty, lowering transaction costs, gaining information, etc.[214] Power distributions in the international system play a role in the formation of state interests, but are not decisive.[215]

Finally, knowledge-based regime theories focus on the manner in which interests and preferences are formed, and argue that participation in the regime can influence these processes. Hasenclever *et al.* distinguish between weak and strong knowledge-based approaches, the former complementing interest-based approaches while the latter propose a fundamentally different approach to regime theory.[216] Exemplary of the weak cognitivist approach is theorising on epistemic communities and institutional learning.[217]

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[212] Keohane, *supra* note 13, 141 at 141; THEORIES OF INTERNATIONAL REGIMES, *supra* note 49 at 29.

[213] Keohane, *supra* note 13 at 148. Keohane argues that specific agreements among states that allow them to coordinate their behaviour are not *ad hoc*, but rather are nested within broader agreements. He writes:

> Within this multilayered system, a major function of international regimes is to facilitate the making of specific agreements on matters of substantive significance within the issue-area covered by the regime. International regimes help to make governments' expectations consistent with one another. Regimes are developed in part because actors in world politics believe that with such arrangements they will be able to make mutually beneficial agreements that would otherwise be difficult or impossible to attain. In other words, regimes are valuable to governments where, in their absence, certain mutually beneficial agreements would be impossible to consummate. In such situations, *ad hoc* joint action would be inferior to results of negotiation within a regime context: *ibid.* at 150. *See also* THEORIES OF INTERNATIONAL REGIMES, *supra* note 49 at 30 ff; ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (1984) at 246.

[214] Keohane, *supra* note 13 at 152 ff.; THEORIES OF INTERNATIONAL REGIMES, *supra* note 49 at 34.

[215] *See* Katzenstein, Keohane and Krasner, *supra* note 54 at 662.

[216] THEORIES OF INTERNATIONAL REGIMES, *supra* note 49 at 137.

[217] *See* discussion on epistemic communities, *supra* at 41.

Ernst Haas, a pioneer of this approach, accepts the position that regimes arise in response to the interests of states,[218] but disputes the realist premise that interests are determined by conditions of anarchy in the system. In the first place, he argues that "international relations are characterized by the condition of complex interdependence: neither hierarchy nor anarchy prevails and states rarely practice self-help."[219] Second, he denies that complex interdependence, or any other structural conditions, determines the interests of states.[220] Third, Haas disputes the realist assumption of objective rationality, arguing instead that the interests of states are affected by values as well as information, and that these values are subject to change through processes of learning.[221] Regimes constituted to meet converging needs may come to transform perceptions of these needs.[222] Cooperative behaviour, although it may come about in an instrumental manner, may come to be 'locked in' as participation in regimes and compliance with the rules and practices that constitute them comes to be expected of the participants and they begin to make calculations regarding future behaviour on the basis of assumptions regarding the persistence of the regime.[223]

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[218] Haas, *supra* note 61 at 28.

[219] *Ibid.* at 27. See also Krasner, *supra* note 13 at 7, where he discusses the approach of Haas and others: "[R]egimes may have significant impact in a highly complex world in which *ad hoc*, individualistic calculations of interest could not possibly provide the necessary level of coordination."

[220] Haas, *supra* note 61 at 58. Some neofunctionalists regard conditions of complex interdependence as creating a tendency toward greater integration at the international level, particularly through the creation of international institutions. Haas disputes the position that "[c]oping with complexity ... implies more complex organizational forms:" *ibid.*, at 56. He argues instead that "adaptive behaviour may well take the form of reduced collaboration, the unlinking of issues, and withdrawal from the international arena. Coping with complexity may involve the rational effort to curb it."

[221] See the discussion of the influence of knowledge on interests in HAAS, *supra* note 57 at 9. Haas defines learning as "the process by which consensual knowledge is used to specify causal relationships in new ways so that the result affects the content of public policy:" *ibid.* at 23. *See also* THEORIES OF INTERNATIONAL REGIMES, *supra* note 49 at 140. See discussion of learning, *supra* at 36.

[222] Haas, *supra* note 61 at 57.

[223] *See* THEORIES OF INTERNATIONAL REGIMES, *supra* note 49 at 147-8.

The strong cognitivist approach represents what Hasenclever *et al.* describe as a sociological turn in international relations theory and a break with the rationalist assumptions that characterise the other approaches discussed above.[224] Strong cognitivists regard the behaviour of actors as driven by rules in addition to calculations of interest maximisation.[225] As Hasenclever *et al.* express it,

> Proponents of a strong cognitivism in regime analysis subscribe to an ontology which emphasizes the dependency of state identities and cognitions on international institutions and relates the formation and maintenance of particular international regimes to these pre-established identities. Thus, a 'shadow of institutions' comes to join forces with the famous 'shadow of the future' ... in producing cooperation.[226]

Regimes are based on often quite elaborate networks of convergent expectations, practices and rules that affect not only decisions about behaviour in particular circumstances, but also the self-understanding of the actors participating in them, the manner in which issues and problems are framed,[227] the capacity of actors to predict the likely consequences of different courses of action, and the processes of justification that actors engage in to explain their behaviour to other interested actors. Once again in the words of Hasenclever *et al.*:

> [R]egimes are more than mere incentive-manipulators affecting the utility calculations of rational actors. They comprise understandings shared by the members concerning the right conduct in circumscribed situations. Not only do they prescribe certain actions in defined circumstances, they also serve as commonly used points of reference for the determination and the assessment of individual behavior. ... They embody shared social knowledge, and they have both a *regulative* and a *constitutive* dimension: that is, on the one hand, they operate as imperatives requiring states

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[224] *Ibid.* at 154-5.
[225] *Ibid.* at 156.
[226] *Ibid.* at 157.
[227] See Martha Finnemore and Kathryn Sikkink, *International Norm Dynamics and Political Change* 52(4) I.O. 887 (1998) for a discussion of the creation of cognitive frameworks. Finnemore and Sikkink argue that "norm entrepreneurs" play a vital role in putting forward conceptualisations of problems and their solutions that may evolve into shared understandings. The success of a norm entrepreneur in putting forward a new cognitive framework is measured, at least in the first instance, by reference to the extent to which the framework resonates with the broader public: *ibid* at 897.

> to behave in accordance with certain principles, norms, and rules; on the other hand, they help create a common social world by fixing the meaning of behavior.[228]

Similarly, Ruggie states that

> ... we know international regimes not simply by some descriptive inventory of their concrete elements, but also by their generative grammar, the underlying principles of order and meaning that shape the manner of their formation and transformation. Likewise, we know deviations from regimes not simply by a categorical description of acts that are undertaken, but also by the intentionality and acceptability others attribute to those acts in the context of an intersubjective framework of meaning.[229]

These international regimes represent "'particles' of governance" at the international level.[230] State sovereignty is not overcome or dissolved, but rather "unbundled."[231] Just as the fiction of the embassy being located on foreign soil was devised to facilitate diplomatic exchanges following the rise of the territorial state,[232] so, to take one example, is the mechanism of delegating authority to municipal authorities to implement the objectives of an international convention employed to overcome jurisdictional constraints. The domestic law-making and -enforcing authorities thereby become, in a manner of speaking, the agents of international law for the purpose of implementing a given regulatory regime to achieve a purpose that transcends the jurisdictional boundary between international and domestic realms.[233] The practice of

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[228] THEORIES OF INTERNATIONAL REGIMES, *supra* note 49 at 163 (emphasis in original).

[229] RUGGIE, *supra* note 104 at 63.

[230] Alexander Wendt, *Collective Identity Formation and the International State* 88 AM. POL. SCI. REV. 384 at 392 (1994).

[231] John Gerard Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations* 47 I.O. 139 at 165 (1993).

[232] *Ibid.* at 165.

[233] This mechanism is commonly employed in international environmental conventions in order to account for the fact that pollutants, unlike regulatory authority, flow across international boundaries. By bringing together different levels of jurisdiction, it becomes possible to create a regime with the jurisdictional reach necessary to control pollutants from their source to their ultimate destination.

The conception of states as the agents of international law is by no means novel. Hans Kelsen describes states as receiving delegated authority from the international legal order and as acting on its behalf in implementing and enforcing legal rules: DAS PROBLEM DER SOUVERÄNITÄT UND DIE THEORIE DES VÖLKERRECHTS: BEITRAG ZU EINER REINEN RECHTSLEHRE (1981) at 204 ff. Georges Scelle has famously referred to this phenomenon as 'dédoublement fonctionnel': *Le phénomène juridique de dédoublement*

drawing together domestic and international law-making authorities into an issue-specific regime does not represent an attempt to create a jurisdiction or authority over states, and the usefulness and effectiveness of the practice does not depend on its capacity to move in this direction. It does, however, represent an acknowledgement of the *continuity* of issue-areas across national boundaries and of the need for governance mechanisms similarly capable of extending across these boundaries.

Wendt traces the emergence of such particles of governance through the development of new shared understandings among states regarding appropriate means for addressing common problems once those states have come to regard themselves as interdependent rather than independent. These new understandings and self-descriptions lead, in turn, to changes in the manner in which international and domestic spheres, international governance, and state sovereignty are understood - and therefore, to changes in their nature. Wendt argues that the state is not likely to disappear as a result of these new shared understandings, but rather that "the spatial coincidence between state-as-actor and state-as-structure" is in the process of breaking down.[234] At present, states are understood to have sovereign authority over a particular population and territory: they are actors who take positions and implement decisions, while at the same time they are structures comprising territory, population, mechanisms of governance, and so on. However, as international governance structures such as regimes develop, the governance of certain issue-areas may come to be internationalised.[235] The state remains a powerful actor in international society, but the territory, population, administrative structures, and

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fonctionnel in RECHTSFRAGEN DER INTERNATIONALEN ORGANIZATION: FESTSCHRIFT FÜR HANS WEHBERG (Walter Schätzel and Hans-Jürgen Schlochauer, eds., 1956) at 324.

[234] Wendt, *supra* note 230 at 393.

so on that were once regarded as being identical to the state may now be understood as having an existence independent of it.

With respect to issues with transnational or international implications, international regimes may be constituted, initially with the aim of coordinating actions among states, but having the potential to assume more extensive authority with respect to that issue. Where this occurs, governance ceases to be based exclusively on sovereign control over population and territory. It is internationalised in the sense that several states are implicated in governance, but it is decentralised in that the authority of each regime is delimited by the scope of the issue-area for which the regime is responsible.[236] In this manner, several such structures may be implicated in the governance of a given population and territory at once. The comparison made by Bull to medieval society, characterised by networks of authority and multiple, often intersecting, allegiances, seems a particularly appropriate manner in which to describe these internationalised governance structures,[237] in that the multiple spheres of governance are defined in functional rather than spatial terms. Furthermore, they do not constitute a hierarchically ordered system. As Ruggie notes, the regime does not become "superordinate vis-à-vis its members" as jurisdiction is not transferred upwards, but rather "is exercised collectively by states. ...

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[235] *Ibid.* at 392.

[236] *Ibid.*

[237] Bull, *supra* note 2 at 254-5. *See also* Robert W. Cox, *Towards a Post-Hegemonic Conceptualization of World Order: Reflections on the Relevancy of Ibn Khaldun in* GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS (1992) 132 at 143-44; Ruggie, *supra* note 231; Linklater, *supra* note 36; DAVID HELD, ANTHONY MCGREW, DAVID GOLDBLATT and JONATHAN PERRATON, GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE (1999) at 85.

Thus, international authority may be conceived as a *transordinate* structure, in contradistinction to superordinate and subordinate structures."[238]

It has been noted that the approach to regimes taken by international relations theorists "is not entirely satisfying from the perspective of the international lawyer,"[239] as the definition of normativity commonly employed in these writings does not make a distinction between sociological and legal norms; the sense of norms as 'ought' statements is difficult to describe or explain in light of this literature. A constructivist approach to norms, with its emphasis on shared meanings, is more congenial to a consideration of the legal normativity at work in regimes. Such an approach looks beyond the adoption of formal legal documents to the network of rules and shared understandings that the actors participating in regimes develop over the course of their interaction. The advantages of this approach to an understanding of regimes are many. In the first place, it becomes evident that the regime and the network of rules and understandings of which it consists has an impact on the behaviour of its participants that cannot be explained by reference to the authority of the legal rules contained therein or by coercive power upon which these rules may rely.[240] This is because the rules, legal and non-legal, as we have seen, do much more than set out prescribed or proscribed forms of behaviour. They also affect the decision-making processes of the participants, their understandings of the environment in which they operate and of one another, their interests, etc.[241]

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[238] RUGGIE, *supra* note 104 at 61.

[239] Brunnée and Toope, *Environmental Security, supra* note 50. *See also* Friedrich Kratochwil and John Gerard Ruggie, *INTERNATIONAL ORGANIZATION: A State of the Art on the Art of the State* 40 I.O. 753.

[240] Brunnée and Toope, *Environmental Security, supra* note 50 at 44.

[241] See list of authors, *supra* note 38.

A number of international relations scholars have begun the task of applying Habermas's discourse ethics to processes of bargaining, negotiation, argumentation and discourse at the international level.[242] These authors are quick to acknowledge the inherent difficulties of the task they set for themselves. Discourse ethics is a theory about domestic politics, and in seeking to apply it to the international sphere, one must address the following problems. In the first place, although discourse ethics is conceived of with the postconventional society in mind, the extent of diversity and of the lack of value consensus renders agreement across domestic societies particularly difficult. As Michael Müller argues, the reaching of consensus through discursive processes depends, in Habermas's conception, on the presence of a shared lifeworld or horizon of shared understandings, on which participants in discourse can draw.[243] Although participants can disagree about a good deal and can hold very different conceptions of the good life and still be able to reach consensus, there must be some background or foundation of shared meaning on which they can draw. A second difficulty is that coordination and cooperation at the international level must take place in the absence of centralised enforcement mechanisms.[244] The approaches to international relations and law discussed above help us to address the second objection, by demonstrating the extent to which law *does not* rely on enforcement for its effectiveness, and by presenting a view of international society as constituted by a web of shared understandings - not to say shared *values*. The first objection is more difficult to overcome.

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[242] *See, e.g.,* Harald Müller, *Internationale Handlungstheorien, supra* note 38.
[243] Michael Müller, *supra* note 196 at 371.
[244] Gehring, *supra* note 38 at 198. *See also* Michael Müller, *supra* note 196 at 374.

Regimes play a dual role in international society as political and legal decision-making centres and as fora for negotiations and discourse. Regimes may operate to build the confidence of participants in one another and in the possibilities of collective action, thus laying the groundwork that makes communicative action possible. Harald Müller notes six preconditions for communicative action in international society: extending mutual recognition to other participants in discourse as equal partners; making the often risky transition from strategic action based on assessments of interests and capabilities to communicative action oriented to reaching understanding; testing the authenticity of partners on the basis of a relatively thin background of shared understanding; finding or creating a basis for the reaching of common understandings, particularly in relation to issues of justice, in the absence of a shared lifeworld; and the creation of a common normative framework for evaluating the fairness of the results of common action.[245] The conception put forward by Brunnée and Toope of the contextual regime, in which actors engage in preliminary interaction to build confidence in one another and in the regime,[246] is instructive in this respect. Each of these preconditions described by Müller may take place within contextual regimes, enabling the participants to prepare the ground for riskier forms of interaction involving the pursuit of common objectives based on mutual understanding. The success of these preliminary forms of interaction in the contextual regime should, as Müller notes, be assessed not only in light of the concrete agreements or accomplishments of the parties, but also on the extent to which the preferences of the

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[245] Harald Müller, *Internationale Handlungstheorien, supra* note 38.
[246] Brunnée and Toope, *Environmental Security, supra* note 50 at 33.

actors, or indeed their approaches for assessing and analysing the issue at hand, have been affected in the process.[247]

In addition to providing a forum for actors such as states and intergovernmental organisations, international regimes may also serve as public fora within which discourse taking part in transnational civil society may be focused and channelled to decision-making centres. The manner in which constructivist insights are employed in the democratic theory conception described above indicates that the regime may permit a certain responsiveness to the interests of human communities because of its relatively high degree of accessibility to civil society, at least when considered in comparison to formal processes of international diplomacy and rule-making taking place among territorial states. The regime may function as a locus of legitimacy by offering a forum for interactions among state and non-state actors.[248] Regimes are involved not only in formal processes of law-making but also more informal processes of information gathering and dissemination. Through interactions with other related organisations and various cooperative initiatives of a practical nature, they are likely to be more permeable to interventions from civil society than would be the case in much state-to-state

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[247] Harald Müller, *Internationale Handlungstheorien, supra* note 38 at 36-7.

[248] The implication is that non-state actors themselves have a role to play in the articulation and development of norms that form part of, or exercise influence on, the international legal system. This seems to run counter to the central role that Wendt ascribes to the state: *supra* note 230 at 385. However, it is not a particularly novel position. As noted above, Fuller, *supra* note 190, and Hart, *supra* note 142, as well as Habermas, *supra,* text corresponding to note 180, recognise, the crucial role played by individuals within systems of legal rules. These authors concentrate on the role of the individual in bolstering the validity and legitimacy of rules. The argument is taken to its next step by Finnemore and Sikkink in their discussion of non-state actors as norm entrepreneurs: *supra* note 227. Lowe discusses the potential role of non-state actors in the formation of interstitial norms that inform judicial decision-making: Vaughan Lowe, *The Politics of Law-Making: Are the Method and Character of Norm Creation Changing? in* THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW (Michael Byers, ed., 2000) [*hereinafter* ROLE OF LAW] 207 at 214 ff. Michael Walzer has also explored the role of individuals in the generation of norms, specifically in the field of distributive justice: MICHAEL WALZER, SPHERES OF JUSTICE (1983), particularly at 4.

interaction. As Seyla Benhabib has argued, discursive processes require "a 'public sphere' of opinion-formation, debate, deliberation and contestation among citizens, groups, movements and organizations in a polity."[249] The regime may be regarded as a nascent public sphere devoted first and foremost to policy-making, but providing some openings for the participation of members of opinion-forming spheres.

Because regimes offer a forum for ongoing interaction among actors, state and non-state, in international society, they may create the necessary conditions for communication oriented to understanding, as opposed to exchanges in which participants are seeking to advance their own individual interests through interaction and coordination with others.[250] Within the regime, actors have an opportunity to build confidence in one another and in the regime itself, and to lay down a foundation of shared meaning on which to build a consensus with respect to the issue-area with which they are concerned.[251] Once this has been accomplished, the regime and the history of interactions and resulting shared understandings that have developed within it serve as a limited horizon for discussions about the appropriate interpretations to place on the actions of regime participants and the best way to apply rules and norms to these actions.[252]

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[249] Seyla Benhabib, *Deliberative Rationality and Models of Democratic Legitimacy* 1 CONSTELLATIONS 26 at 39 (1994).

[250] *See* Gehring, *supra* note 38 at 208.

[251] This is the process of contextual regime-building described by Brunnée and Toope: *Environmental Security, supra* note 50 at 28.

[252] Gehring, *supra* note 38 at 213. Gehring notes that

> international regimes such as the GATT and the regime for ozone protection have at their disposal their own mechanism for achieving stability. As long as a community of actors that has passed through the phase of normative development is capable of communicative action and collective decision-making, the relevant issue-area is regulated by a series of norms, and the community can address a given conflict within the framework of an organised negotiating process of long standing, that is to say, through a process of communicative action. ... This integrated decision-making process permits the members of a regime to draw discussions about violations of a norm and the reasons for such

Furthermore, because regimes implicate both state and non-state actors, there is an opportunity for the substance of discourses taking place in other spheres, particularly within domestic civil societies, to be transmitted to participants in the regime.[253]

Although regimes cannot readily be compared to domestic civil society, and although the lifeworlds that may be constructed at the international level are much thinner than those in domestic societies, they may nevertheless be sufficient to provide a background to debate and discourse at the international level.[254]

5. CONCLUSION

In this chapter, I have sought to lay the theoretical groundwork for the arguments to follow. The concept of law on which I rely departs from a positivist account in several important respects. Law is not conceived of as a logically ordered, self-contained system of rules embedded in hierarchical relations of authority but rather as part of a vast and complex network of shared understandings elaborated over the course of a history of interactions. Law enjoys, as Toope argues, relative independence from this broader network.[255] However, the extent of this independence does not, as I will argue in the following chapter, permit the drawing of a sharp boundary between law and non-law.

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violations into the context of their concerns about the stability of the community of actors. At the same time their interpretation of the behaviour in question need not be cast in terms of a rigid dichotomy between compliance (cooperation) and non-compliance (lack of cooperation). The only thing that can be demanded of an actor in violation of a norm is that he justify his behaviour to the community of actors. However, in doing so, he will be in a position to call into question the justifiability of the norm: *ibid.* at 213 (author's translation).

[253] See the discussion, *supra* at 41, regarding the role of epistemic communities in the transmission of consensual knowledge to participants in regimes.

[254] *See* Risse, *Let's Argue!, supra*, note 38 at 15. *See also* Harald Müller, *Internationale Handlungstheorien, supra* note 38 at 33-5.

[255] Stephen J. Toope, *Emerging Patterns of Governance and International Law in* ROLE OF LAW, *supra* note 248, 91 at 91.

The description of law on which I rely is appropriate for international society, in that it is able to explain the operation of a legal system in the absence of a centralised, hierarchical power structure. Furthermore, because the shared understandings on which rules in the constructivist sense are based do not depend on the existence of common orientations to the good, the absence of a true sense of community at the international level does not pose an insurmountable obstacle to the development of structures and processes through which law can be created and implemented. Far more difficult to resolve are questions about law's legitimacy, an element that is essential to the conception of law on which I rely. I have argued that international regimes constitute a locus for the argumentative and discursive processes on which the legitimation of law depends, and will seek to develop this argument in my exploration of discursive processes within four international environmental regimes. Before proceeding to this discussion, however, I will address the role of norms of international environmental soft law, focusing on their role in discourse.

CHAPTER 2: THE ROLES AND FUNCTIONS OF PRINCIPLES OF SOFT LAW

1. INTRODUCTION

Because global environmental protection is achieved through policies and norms that bridge the gap between international and domestic spheres, and because these norms and policies are often rooted in values and ideals that are contested or contestable, it is often very difficult for states to agree on binding environmental obligations. The development of international environmental law must therefore rely extensively on processes and mechanisms that are often described as extra-legal or quasi-legal. The vast and varied body of documents, instruments, arguments and ideas that has come to be described as soft law has proven to be an important means both of promoting the goal of environmental protection and of prompting developments in the international legal system.

Although it is often assumed that soft law norms are rule candidates and will eventually either be articulated as legally binding norms or abandoned as unacceptable, some of the most important contributions to the development of international law are made by norms that, because of their vagueness and generality or their aspirational content, are not reducible to binding legal obligations. These norms have been described as emerging rules of international law;[1] as international policy;[2] and as interstitial norms that "operate to modify the normative effect of other, primary

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[1] Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment* 12 MICH. J. INT'L L. 420 at 420 (1991).

[2] *Ibid.*

norms."[3] In the realm of environmental protection, there exists a series of such norms that take the form of principles of environmental law and that reflect what may be described as a moral perspective underlying environmental law and policy. As we shall see, this moral perspective is by no means coherent and comprehensive. It contains different strands that are in tension with one another. Furthermore, even to the extent that a certain level of consensus exists respecting specific principles that make up this perspective, it is by no means the case that rules consistent with these principles may be discovered or articulated through processes of deduction. Nevertheless, these principles nourish legal argument and as a result come to be reflected, to varying degrees, in the corpus of rules concerning international environmental protection.

After addressing and critiquing the positivist conception of soft law, I will present an alternative conception, in which soft law is described and certain of its functions in international law, particularly international legal discourse, are identified. I will then discuss three of the major principles of international environmental soft law: common but differentiated obligations; the common heritage of mankind and its corollary, the common concern of humankind; and the precautionary principle.

2. THE LIMITATIONS OF POSITIVISM

According to a positivist approach to international law, a category distinction must be made between law and non-law, soft law falling into the latter.[4] The

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[3] Vaughan Lowe, *The Politics of Law-Making: Are the Method and Character of Norm Creation Changing? in* THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW (Michael Byers, ed., 2000) [*hereinafter* ROLE OF LAW] 207 at 213.

[4] WOLFGANG HEUSEL, "WEICHES" VÖLKERRECHT: EINE VERGLEICHENDE UNTERSUCHUNG TYPISCHER ERSCHEINUNGSFORMEN (1991) at 287.

proposition that soft law, like any social, economic or political phenomenon, is potentially significant to legal structures and processes as constituting an aspect of the environment in which the legal system operates is not terribly controversial.[5] This proposition, however, is generally qualified by arguments to the effect that a distinction between norms that give rise to legal effects and those that do not is fundamental to an understanding of legal systems, as well as to their functioning.[6] To accept arguments that international legal normativity could be a relative question, with various norms possessing different degrees of binding effect, would, in the eyes of such authors, lead to a weakening of the authoritativeness and effectiveness of international law. If the addressees of international norms may argue that they are committed only to a certain extent or only in certain circumstances to follow international legal rules, the argument goes, then the capacity of international law to compel and prohibit behaviour and to order interactions in the international sphere would be seriously threatened.[7]

From this perspective, there are two problems with norms of soft law that render them ineffective and threaten the effectiveness of the international legal system as a whole. The first is their ambiguous legal status, and the second is their indeterminacy. It is feared that binding rules whose content is sufficiently clear as to impose unambiguous constraints on the behaviour of international actors are being

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[5] *Ibid.* at 289; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 5th ed. (1998) at 2; JEAN COMBACAU and SERGE SUR, DROIT INTERNATIONAL PUBLIC, 4th ed. (1999), § 3; PIERRE-MARIE DUPUY, DROIT INTERNATIONAL PUBLIC, 5th ed. (2000) at 342 ff.; OPPENHEIM'S INTERNATIONAL LAW (Sir Robert Jennings and Sir Arthut Watts, eds., 1992), § 17 on the relevance of morality to international law; MALCOLM N. SHAW, INTERNATIONAL LAW, 4th ed. (1997) at 92-3.

[6] *See, e.g.,* OPPENHEIM'S INTERNATIONAL LAW, *supra* note 5 at § 1; SHAW, *supra* note 5.

[7] *See* Prosper Weil, *Towards Relative Normativity in International Law?* 77 A.J.I.L. 413 (1983). See also the discussion and critique of Weil's article in DUPUY, *supra* note 5.

slowly replaced by vague commitments of uncertain legal status that do not and cannot create clear rights and obligations. However, the extent to which international legal rules are in any event capable of providing such clear guidance to actors is open to doubt.

Unambiguous legal status

Norms become law, according to positivist authors, through the granting of consent by states to be legally bound by them.[8] This granting of consent makes it possible for a norm to bring about legal effects, as understood in the Hohfeldian conception.[9] Thus, for example, while states may feel obliged, in a certain manner of speaking, to observe non-binding political, moral or religious norms, they are not in fact bound to do so, and violations of these norms, while they may well have consequences of a political, moral or religious nature, do not constitute delicts in international law.[10] The example of courtesy is instructive in this regard. Rules of courtesy bear a strong resemblance to rules of customary international law, in that they emerge from and are reinforced by state practice, and in that they possess a certain normative element: states *should* obey such rules, as they facilitate

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[8] HEUSEL, *supra* note 4 at 42 and 287; COMBACEAU and SUR, *supra* note 5 at 48; OPPENHEIM'S INTERNATIONAL LAW, *supra* note 5 at § 5, where the consent is described not in relation to individual rules but to the proposition that members of the international community govern their conduct by reference to a body of rules that constitute international law. See Ulrich Fastenrath, *The Legal Significance of CSCE/OSCE Documents in* OSCE YEARBOOK 1995-1996 (1997) 411 at 419 for an exposition of this position. But see Ryichi Ida, *Formation des normes internationales dans un mode en mutation: Critique de la notion de soft law in* LE DROIT INTERNATIONAL AU SERVICE DE LA PAIX, DE LA JUSTICE ET DU DÉVELOPPEMENT: MÉLANGES MICHEL VIRALLY (1991) 333 at 335, where he argues that the difference between soft and hard law is to be drawn according to the content, rather than the form, of norms. Soft law norms, according to Ida, are simply norms that give to the state a larger margin of manoeuvre. Although slightly unorthodox, this is a much more accurate and useful distinction than the more well-recognised formal distinction.

[9] WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING (1964), particularly at 39, where he discusses the correlation between rights and duties.

[10] HEUSEL, *supra* note 4 at 275.

international relations and demonstrate respect for other members of international society. They are not free to disregard the rules in the sense that no consequences follow from their violation; other states may retaliate by ceasing to observe rules of courtesy in dealings with the violating state, or the reputation of that state may suffer, or, in the case of repeated violations, the rules themselves may be weakened. More serious consequences may also follow, as for example when the violation of a rule of courtesy is interpreted not merely as a disrespectful but as a hostile act, and relations between the states in question begin to deteriorate as a result. Observance of such rules thus serves to open or to maintain channels of communication between members of society, and their violation may endanger these channels, with potentially very serious consequences. Failure to observe rules of the game, or tacit understandings between parties that would not be included in a positivist categorisation of international rules but which often constitute "the most crucial international obligations of our time"[11] could in certain circumstances threaten the stability of international society. Thus, while it may indeed be important for certain purposes to draw a distinction between legal and non-legal rules and consequences, in the end this distinction tells us little about the nature and functioning of a legal system. It tells us even less about the international legal system, in which the causal link between violations of legal rules and the imposition of legal sanctions is weaker.

Focusing on the sources of law as a means to distinguish between legal and non-legal rules is similarly helpful for certain purposes but problematic in many

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[11] Oscar Schachter, *Towards a Theory of International Obligation* 7 VA J. INT'L L. 300 at 305 (1966). The examples referred to by Schachter include the tacit agreement between the superpowers not to employ force in one another's zones of influence or not to supply third parties with nuclear weapons.

important respects. It is particularly difficult to distinguish the categories of legal and non-legal norms in the international system because of the absence of a legislative body responsible for promulgating rules. Although art. 38 of the Statute of the International Court of Justice[12] is generally regarded as an authoritative enumeration of the sources of international law, it can neither purport to be exhaustive nor to limit the capacity of international actors to enact legal norms through means other than those identified in the provision. In the words of Alfred Verdross and Bruno Simma, there is no *numerus clausus* of sources of international legal norms.[13] Rules of positive international law are created through state consent, whose expression need not meet any specific formal requirements. As Ulrich Fastenrath argues, in the absence of an exhaustive list of criteria for determining the legal validity of a proposition, the question whether a rule of law exists will inevitably be subject to competing and contending claims, for the resolution of which international law provides no basis. Reliance is often placed on determining the legal character of a proposition based on the existence of a general consensus regarding the legal validity

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[12] Statute of the International Court of Justice, Article 38, states:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
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> > a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> > b. international custom, as evidence of a general practice accepted as law;
> > c. the general principles of law recognized by civilized nations;
> > d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
>
> 2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.

Article 59 states:

> The decision of the Court has no binding force except between the parties and in respect of that particular case: Statute of the International Court of Justice, *annexed to* Charter of the United Nations, *concluded* 26 June 1945, *entered into force* 24 October 1945, 59 Stat. 1031.

of a given norm.[14] Different types of indications of state intentions regarding the legal validity of a proposition are likely to coexist, and contradictions may occur among them.

It may be objected that the above argument points to a practical difficulty in the identification of legal norms rather than the conceptual impossibility of doing so. I acknowledge that this is the case, and as I am not interested in doing away with the category distinction, I am satisfied to make the argument that the identification of legal norms is a question of interpretation rather than deduction, and the further argument that to assert the non-legal status of soft law norms still tells us little about their relevance to international society and international law.

Indeterminacy of soft law norms

The New Rhetoric approach demonstrates that the process of rule-application is actually an interpretive process, even when the content of the rule seems clear and unambiguous. Furthermore, it indicates the vital role that principles - including principles that do not have the status of law - have in this interpretive process. Recall the argument that legal rules "influence deliberation in a wholesale fashion, not through detailed step-by-step instructions, but through general norms that agents must interpret and apply to their specific practical situations."[15] Chaim Perelman *et al.*, although focusing on the manner in which judges reach decisions rather than on the manner in which the addressees of rules approach those rules, similarly describe the

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[13] ALFRED VERDROSS AND BRUNO SIMMA, UNIVERSELLES VÖLKERRECHT: THEORIE UND PRAXIS, 3d ed. (1984) at 323.

[14] Fastenrath, *supra* note 8 at 419.

[15] Gerald J. Postema, *Implicit Law in* REDISCOVERING FULLER: ESSAYS ON IMPLICIT LAW AND INSTITUTIONAL DESIGN (Willem J. Witteveen and Wibren van der Burg, eds., 1999) 255 at 262

application and interpretation of legal rules as a matter of practical reasoning and deliberation rather than a simple exercise in deductive logic.

Rather than seek to devise a categorisation that will permit the drawing of a distinction between law and non-law, it is much more fruitful to focus on the range of normativity and the variety of norms in international law, and to inquire into the different functions that these norms play. The effectiveness of norms is influenced but not determined by a presence or absence of formal binding character. Other qualities of norms, variously described as their legitimacy, normative force, capacity to exert compliance pull, etc., are arguably more important to the power of norms than is their legally binding character. This is, however, not to say that the notion of a legal system, as opposed to other possible systems of rules, should be discarded as irrelevant. The category of the legal norm retains its relevance at the very least as an ideal type, which helps us to answer questions about the nature and function of the international legal system. The most fruitful approaches to the specificity of legal norms are based not on a category distinction between rules that qualify as legal and those that do not, but rather on the nature of the legal system and on procedures and discourses specific to that system. However, the system should not be regarded as self-contained and self-replicating. It depends on and intersects with other normative systems, most particularly moral and political.[16]

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[16] See the discussion in JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg, transl., 1998), s. 3.2. A fundamental premise of Lon Fuller's approach is that law and morality are interrelated, and that law reflects and is shaped by moral concerns: LON L. FULLER, THE MORALITY OF LAW (1964).

3. DEFINITION AND DESCRIPTION OF SOFT LAW

Soft law manifests itself in an infinite variety of forms, including preambular statements to international conventions, declarations and statements of intent concluded by states at multilateral conferences, unilateral declarations, codes of conduct, action plans or guidelines issued by international organisations, non-binding recommendations and resolutions adopted by international organisations, and so forth. The category of soft law is distinguished from that of binding law by its lack of legally binding force. However, this tells us little about the way in which soft law norms function and the influence they have on the international legal system. Pierre-Marie Dupuy's description of soft law as not yet or not only law[17] provides an appropriate point of entry into this discussion. The notion that soft law is not yet law is the most prevalent, as norms of soft law are often regarded as emerging norms of binding international law, lacking, for the time being, the consent or specificity necessary to push them over the threshold between legal and non-legal.[18] By adding to this the notion that a legal system contains not only law, Dupuy recognises that rules, norms and principles widely regarded as non-binding may play an independent and potentially very significant role in the legal system. We have seen the relevance of this role within regimes, which are launched not by the conclusion of a binding convention but rather by forms of interaction, coordination and cooperation over the

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[17] Dupuy, *supra* note 1 at 420.

[18] *See, e.g.,* Pierre-Marie Dupuy, *Le droit de l'environnement et la souveraineté des États: Bilan et perspectives in* L'AVENIR DU DROIT INTERNATIONAL DE L'ENVIRONNEMENT: COLLOQUE DE L'ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE (René-Jean Dupuy, ed., 1985) 29 at 35.

course of which participants build up a network of shared understandings that facilitates the subsequent process of rule-articulation.[19]

Dupuy divides norms of soft law into two general categories, namely, *principes directeurs*[20] and *principes inspirateurs*.[21] This first category includes guidelines and standards that are drafted in very specific terms and that give to actors precise guidance as to what forms of behaviour they should engage in. They fall into the category of soft law not because of the 'softness' or indeterminacy of their contents, but because they are either promulgated by actors who do not have formal law-making authority, such as non-governmental or inter-governmental organisations, or by actors who do have such authority but have indicated that they do not consider these norms to be legally binding.[22] In the field of environmental law, these types of norms often take the form of recommendations by scientific or technical committees regarding processes, standards or equipment to be employed in certain fields of activity, such as industry, agriculture or municipal sanitation. They most closely resemble regulations in municipal law, and are intended to address technical, non-normative matters within a broader framework of legal and aspirational norms setting out general obligations and objectives. Because of their specificity and their largely technical content, they are not susceptible of generalisation to other fields of endeavour.

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[19] See the discussion of contextual regimes in Jutta Brunnée and Stephen Toope, *Environmental Security and Freshwater Resources: Ecosystem Regime Building* 91 A.J.I.L. 26 (1997) at 33.

[20] Dupuy, *supra* note 1 at 39.

[21] *Ibid.* at 44.

[22] Dupuy notes that these types of provisions are so precise that they could easily be incorporated into treaty texts; indeed, as he states, they are often negotiated with as much care as if they

The fact that these norms are formally non-binding does not significantly affect their status or effectiveness. For example, in the context of the regime for marine environmental protection of the North Sea, the relevant Commission is authorised to adopt binding decisions and non-binding recommendations, the former being subject to more rigorous adoption procedures. However, the two sets of rules are treated in a virtually identical manner for the purpose of compliance. The Commission is to review the implementation of recommendations as well as decisions, although it is to bring about full compliance with the latter and merely to promote compliance with the former.[23] Particularly given the fact that the Commission has no authority to find states in violation of decisions or to enforce them against states, it is questionable whether this distinction between decisions and recommendations is significant. Furthermore, it is doubtful whether states are really free simply to disregard recommendations, without fear of suffering any effect. In short, it is not at all obvious that a failure to respect non-binding recommendations does not create legal effects. Nevertheless, treating such guidelines and standards as soft law may be necessary from the point of view of the comfort level of adherents to the treaty regime. These norms tend to address matters considered well within the domain traditionally reserved to the jurisdiction of states, and it is likely that describing them in softer terms makes the norms seem more palatable to states.

Dupuy includes in the category of *principes directeurs* procedural rules such as requirements of prior notification of activities undertaken in the territory of one

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were binding rules: Pierre-Marie Dupuy, *A Hard Look at Soft Law: American Society of International Law Conference* 82 PROCEEDINGS AM. SOC. INT'L LAW CONF. 371 at 385 (1988).

state that are likely to have environmental impacts beyond state borders; principles of non-discrimination and equality of treatment of nationals of neighbouring states respecting transboundary environmental impacts; and obligations to conduct environmental impact assessments prior to undertaking activities likely to have a transboundary impact.[24] Certain of these rules, particularly prior notification and environmental impact assessments, have been incorporated as binding rules into treaties,[25] but may readily be lifted out of these specific contexts and applied more broadly as indications of appropriate, if not legally binding, conduct. These principles, because the substantive obligations they imply are determinate and readily rendered operational, and because they lend themselves to general application, are excellent candidates for inclusion among the customary rules of international law.

The second category, *principes inspirateurs*, differs from binding international legal rules not only in that they have not yet attracted the requisite state consent to transform them into such rules, but also in that they do not have as their vocation to guide immediately the behaviour of international actors. They may take the form of policy documents in which general guidelines for problem-solving, programme design and norm creation are set out for a given issue area, or new paradigms, concepts and

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[23] André Nollkaemper, *The Distinction between Non-Legal and Legal Norms in International Affairs: An Analysis with Reference to International Policy for the Protection of the North Sea from Hazardous Substances* 13 INT'L J. MARINE & COASTAL L. 355 at 360-1 (1998).

[24] See in particular Principle 19 of the United Nations Conference on Environment and Development, Rio Declaration on Environment and Development, *concluded* 14 June 1992, 31 I.L.M. 874 (1992) [*hereinafter* Rio Declaration], which provides: "States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith."

[25] Provisions on prior notification appear, for example, at art. 15 of the Protocol on Environmental Protection to the Antarctic Treaty, *concluded* 4 October 1991, *entered into force* 14 January 1998, 30 I.L.M. 1461 (1991), regarding responses to environmental emergencies; at art. 14 of the Convention on Biological Diversity, *concluded* 5 June 1992, *entered into force* 29 December 1993,

approaches are outlined which are intended to guide the development of international law and policy. Examples of such documents are action plans, codes of conduct or declarations. These policy documents are often adopted by international organisations such as the Food and Agricultural Organisation (F.A.O.)[26] or the United Nations Environment Programme (U.N.E.P.),[27] although they may also take the form of declarations concluded by states in the course of international meetings or conferences, or resolutions of international organisations, the most famous example being United Nations General Assembly resolutions.

Alternately, these *principes inspirateurs* may take the form of principles, which, although they find expression in various international documents and instruments, are not exhaustively defined therein. Like the policy documents described above, their content is vague and general and therefore not susceptible directly of guiding the behaviour of their addressees. Unlike such documents, however, the principles are readily lifted out of the contexts in which they are formulated and may receive more widespread application. Their vocation is to

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31 I.L.M. 818 (1992); and at art. 3 of the Convention on Environmental Impact Assessment in a Transboundary Context, *concluded* 25 February, 1991, *not in force*, 30 I.L.M. 800 (1991).

[26] One example is the United Nations Food and Agricultural Organization's Code of Conduct for Responsible Fisheries, 28th Session, 31 October 1995, http://www.FAO.org/WAICENT/FAOINFO/FISHERY/agreem/codecond/codecon.asp [*hereinafter* F.A.O. Code of Conduct]. Another is the Codex Alimentarius, http://www.FAO.org/WAICENT/FAOINFO/ECONOMIC/ESN/codex/default.htm, *reprinted in* Commission Procedural Manual 4 (10th ed. 1997), which sets international food standards for consumer health protection.

[27] U.N.E.P. is actively involved in the promulgation of soft law instruments, including the Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States; the Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes; the Goals and Principles of Environmental Impact Assessment; the London Guidelines for the Exchange of Information on Chemicals in International Trade; the Code of Ethics on the International Trade in Chemicals; the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities; and the International Technical Guidelines for Safety in Biotechnology: United

provide basic orientations for normative development, interpretation and application. Dupuy lists as examples of such principles environmental stewardship; cooperation and solidarity; permanent sovereignty over natural resources; equitable utilisation of natural resources; and common heritage of mankind.[28]

4. FUNCTIONS OF SOFT LAW

As argued above, an identification of soft law norms based on their absence of binding force or on their inability to produce legal effects is of limited assistance. As a result, a number of authors prefer to describe soft law norms in terms of their nature and specificity,[29] the circumstances surrounding their creation and invocation,[30] and the manner in which they are regarded by their authors and addressees.[31] It is probably most accurate to say, with Olufemi Elias and Chin Lin, that the criteria by which soft law norms may be identified are both formal and substantive.[32] It is not possible to choose a definitive set of criteria by which soft law norms may be identified, any more than it is possible in the case of binding norms; these various criteria are employed for purposes of conceptual rather than categorical clarity.

I will once again turn to Pierre-Marie Dupuy, who notes that soft law is to be found in situations in which there is either a desire for or a fear of law.[33] When international actors conclude that the existing rules in a given issue-area are

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Nations Environment Programme, Environmental Legal Instruments, Non-Binding Environmental Instruments, 7 July 1988, http://www.unep.org/SEC/non3.htm.

[28] Dupuy, *supra* note 18 at 44-47.

[29] Dupuy, *supra* note 1 at 430.

[30] This is the approach taken by Georges Abi-Saab: *see Éloge du "droit assourdi:" Quelques réflexions sur le rôle de la soft law en droit international contemporain in* NOUVEAUX ITINÉRAIRES EN DROIT: HOMMAGE À FRANCOIS RIGAUX (1993) 59 at 61-2.

[31] *See, e.g.*, Fastenrath, *supra* note 8 at 309-10.

[32] Olufemi Elias and Chin Lin, *"General Principles of Law," "Soft Law" and the Identification of International Law* 28 NTHLDS Y.B. INT'L L. 3 at 45 (1997).

inadequate or inappropriate, they may put the process of legal development in motion by describing the direction and indicating the path that such legal development should take. Such proposals may then result in the conclusion of international instruments or in the evolution of customary law. In other words, soft law lends to international law a dynamism that, given the cumbersome nature of international norm-creating processes, provides a necessary motor to legal development.[34] Soft law is also relevant in those situations, increasingly common today, in which the needs of international society for norms to regulate a certain area of endeavour outstrip the capacity of international law to provide regulatory mechanisms, particularly in cases in which the types of rules or norms required would reach across state borders and into the domestic jurisdiction of states. In such cases, states may seek a principled basis upon which to resolve a given problem, but will resist attempts to develop legally binding rules that might then enjoy general applicability.

Soft law has also been described as a means of covering up significant divergences and disagreements and creating an appearance of consensus and common purpose. For example, Moragodage Pinto, discussing the adoption of the principle of common heritage of mankind in the context of the law of the sea, contends that "lack of agreement on the meaning of [a] concept contained in a charismatic original metaphor, and thus on its legal potential, fostered the emergence of a measure of illusion or self-deception among the participants." To avoid such situations, argues Pinto, lawyers should assume

> a special duty of care to ensure that words and phrases are used responsibly and with as much precision as possible; that the relation of fact and experience to the inspiring central phrase is

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[33] Dupuy, *supra* note 1 at 382.

[34] Abi-Saab, *supra* note 30 at 65; Lowe, *supra* note 3.

> clear and demonstrable at all times; and that formulation of a treaty should be undertaken only when there is a manifest meeting of minds on the scope and content of basic principles and that it should, in fact, be abandoned or postponed where basic agreement has not been reached; and finally, that they not apply their skills to papering over differences, and thus condone the use of "constructive ambiguity."[35]

Martti Koskenniemi has also noted the tendency, in international environmental law in particular, to make reference to grand principles that are described as reflecting the common interests of the participants in negotiations, but which in fact simply juxtapose incompatible concepts or goals and defer the working out of the tension between them to future fora.[36] The concept of sustainable development may be understood as reflecting such a desire to create a superficial image of harmony of interests while ignoring, or seeking to disguise, the serious and often fundamental conflicts that have not been resolved among the participants.

It cannot be denied that principles such as those under consideration here may be invoked in a spirit of excessive optimism or cynicism. However, to argue that the articulation of such broad principles can do nothing more than create illusions goes too far. In particular the notion that precision and determinacy are hallmarks of effective norms obscures the role that soft law norms play in international law, and the role played by principles in any legal system. Fastenrath has described soft law as performing norm-generating, norm-regulating and norm-legitimating or -delegitimating functions. In their norm-generating role, soft law norms may take the form of norms on trial, that is, proposed rules of law that will, if they attract the

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[35] *See, e.g.*, Moragodage C.W. Pinto, *"Common Heritage of Mankind:" From Metaphor to Myth, and the Consequences of Constructive Ambiguity in* THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOUR OF KRYSZTOF SKUBISZEWSKI (Jerzy Makarczyk, ed., 1996) 249 at 250.

[36] Martti Koskenniemi, *Peaceful Settlement of Environmental Disputes* 60 NORDIC J. INT'L L. 73 at 78 (1991).

requisite state consent, be transformed into binding law. In their norm-regulating function, soft law may determine what norms become law, may govern the interpretation of binding law, and may influence the content of norms. As legitimators or de-legitimators of rules of international law, soft law norms give expression to considerations of equity and justice, and may be used as a measure against which to judge the appropriateness, fairness or justice of existing legal rules.[37]

With respect to norm-generation, such principles are not themselves rule candidates. They are rather paradigms that influence approaches to law-making and guide the formation of specific rules.[38] Paradigms prepare the ground, as it were, on which legal norms are to be established. They identify the basis on which problems are to be addressed by redefining the jurisdictional parameters within which international law operates. As topics, they provide support for a particular reading of the legal landscape. As Vaughan Lowe suggests, the principles under discussion here can be used in legal discourse to assist in the process of characterising a set of facts, aiding in the process of subsuming these facts under one of a number of eligible legal principles.[39]

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[37] Fastenrath, *supra* note 8 at 420-4.

[38] In some cases, these principles are simply available to those who wish to bring them into specific legal debates, and participants can choose to invoke them or not, depending on whether they are perceived as furthering the argument that participants seek to make. In other cases, however, principles have attracted such a high degree of consensus that it is virtually impossible to avoid them. Participants in discourse about issues in international environmental law can hardly avoid discussing the relevance of the precautionary principle to the issues at hand, even if they wish to argue that the principle should not be applied.

[39] Lowe goes on to argue that these principles, or "interstitial norms," tell decision-makers such as judges how conflicts between and overlaps among potentially applicable rules may be resolved: Lowe, *supra* note 3 at 216. This, in my view, places too high an expectation on such norms. While the interstitial norms described by Lowe provide important and useful information and guidance to decision-makers, they cannot themselves do the work of the decision-maker. Conflicts and overlaps among rules can be resolved only through the exercise of judgment supported by practical reason.

States may prefer to conclude soft law instruments in order to avoid restrictions on their freedom to manoeuvre. For example, paradigms of environmental law such as the ecosystem approach require that legal norms be adopted at the international level that imply an incursion into what was traditionally regarded as the domestic jurisdiction of states. As Georges Abi-Saab notes, the flexibility of soft law permits it to make such incursions, thus expanding the international legal agenda and laying the groundwork for the further development and extension of international law.[40]

Another aspect of the norm-generating function of soft law is to establish frameworks within which the creation of norms (may) take place. Soft law principles set the terms of debate, bolstering the relevance of certain arguments and excluding others.[41] They also provide a conceptual approach, which guides and influences the substantive development of new rules of law. While these principles cannot be transformed into legal rules, which guide the behaviour of states, they can and do shape and guide the processes by which such rules are developed.

The norm-regulating functions of principles of soft law are of particular relevance with respect to the interpretation and application of international law. Principles of soft law provide a basis upon which ambiguities in legal provisions may be resolved. David Kennedy and Martti Koskenniemi argue that collisions between state rights and interests cannot be resolved on the basis of international law, as this law is necessarily agnostic with respect to the ultimate ends pursued in international

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[40] Abi-Saab, *supra* note 30 at 64-5.

[41] Daniel Bodansky, *Customary (and not so customary) International Environmental Law* 3 INDIANA J. GLOBAL LEG. STUD. 105 at 119 (1995); R.R. Baxter, *International Law "In Her Infinite Variety"* 29 INT'L & COMP. L.Q. 549 at 565 (1980).

society by its various members and therefore cannot provide the basis upon which priorities among different rights and interests are established. Any preference of one state's objectives over those of another, therefore, could be represented as an unjustifiable violation of sovereign equality and integrity.[42] However, international environmental law, and particularly principles of environmental soft law, refer to a set of objectives that are only indirectly related to the protection and promotion of state rights and interests. Indeed, the basis for the resolution of environmental problems is often not conceived of in terms of the rights, duties and obligations of states, but rather in terms of objectives, programmes, measures and mechanisms that should be adopted and implemented. While the question of balancing state rights and interests remains central to international environmental law, the *raison d'être* of such law lies elsewhere, namely in the protection of ecosystems and environmental resources.

As a result, principles of soft international environmental law assist in the process of interpretation by imposing on international rules a set of purposes or a conceptual framework on the basis of which ambiguities in such rules and conflicts over their interpretation may be resolved. Particular principles of soft law tend to pull the interpretation of legal provisions in particular directions by suggesting the interests or objectives, which the outcomes of such interpretive processes should favour. They do so by imposing on the statist framework another framework oriented toward what I shall describe as public interests in international society. The emergence of a category of public interests in international law parallels a similar development in municipal law. The increased attention paid to environmental protection in domestic societies

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[42] MARTTI KOSKENIEMMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (1989); DAVID KENNEDY, INTERNATIONAL LEGAL

contributed to an awareness that private law rules of tort and obligation, contract and property provide an inadequate basis for environmental protection, in that they assume a series of individual rights-holders requiring protection from incursions into their rights and interests by other private actors. It was often the case that these private rights could not provide a basis for relief from environmental degradation, particularly when this degradation affected public spaces and resources, including parks, bodies of water, air quality, etc. The framework of private law, based on the model of reciprocal rights and duties among atomistic and self-interested actors, had to be supplemented with regulatory machinery whose objective was not the protection of individual, private rights but rather the securing of public goods such as environmental quality. These regulatory instruments impose duties for which the reciprocal rights-holder is the public at large rather than a similarly-situated private actor.[43]

A similar process has taken place at the international level, with recognition that principles of territorial integrity and state responsibility are not sufficient as legal bases for the protection of complex environmental systems and the conservation of resources.[44] Public interests in environmental quality cannot adequately be protected through the interplay of reciprocal rights and duties among states, although the imposition on states of duties with respect to environmental protection is central to international environmental protection. When these public interests are considered alongside state interests, they provide a possible basis upon which to resolve conflicts

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STRUCTURES (1987).

[43] Jutta Brunnée, *The Responsibility of States for Environmental Harm in a Multinational Context – Problems and Trends* 34 C. DE D. 818 at 829-30 (1993).

[44] *Ibid., passim.*

between the rights and interests of sovereign states by pointing beyond these rights and interests to a further set of objectives to be attained. While, from a statist perspective, international law can provide no basis for preferring the rights and interests of one state to those of another, from a public interest perspective, such a basis can be provided in objectives relating to environmental and resource protection, among others.

It would of course be misleading to speak of a singular public interest in international society. Interests such as environmental protection, while no doubt widely held, inevitably come into conflict with other interests, and there is no basis in international society for ranking these various interests and therefore resolving conflicts among them. Nevertheless, superimposing such objectives and interests on structural or systemic interests such as maintaining order in international society, respecting the autonomy and independence of states, etc. introduces a dynamism into debates regarding international law which disputes about the relative merits of various claims to the protection of state rights and interests cannot provide.

Finally, with respect to the legitimising and de-legitimising functions of principles of soft international environmental law, such principles may be employed as a basis upon which to evaluate the adequacy or appropriateness of existing rules, and may bolster the legitimacy of rules that are emerging or that are in the process of expanding their range of application. To the extent that a given principle enjoys a certain amount of support, it will operate in the background to bolster the validity and influence of certain rules and diminish that of others.[45] This process is particularly

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[45] Christine M. Chinkin, *The Challenges of Soft Law: Development and Change in International Law* 38 INT'L & COMP. L.Q. 850 at 866 (1989). The capacity of a norm to attract support

apparent in times of turbulence in international law, where rules based on paradigms whose influence is waning come to be challenged or replaced. This process of legitimising and de-legitimising is particularly important in the international legal system, in which third-party dispute resolution mechanisms are resorted to with much less frequency than in municipal law and in which enforcement mechanisms are largely absent.

5. EMERGENCE OF SOFT ENVIRONMENTAL LAW

Principles of soft environmental law flow from a vast number of sources in domestic and international society. They tend to be closely associated, at least in their early stages, with particular intellectual or ideological approaches with strong normative implications. The principles under consideration here have their origins, by and large, in ecological movements and in the New International Economic Order (N.I.E.O.), although other intellectual and policy approaches have also had an influence on the development of these principles. Ecological thinking, in broad outline, challenges an instrumental approach to environmental resources, emphasising instead the intrinsic value of the environment and the interconnected nature of ecosystems. The N.I.E.O. emerged out of the post-colonial era, during which newly independent states, having acquired the legal equality to which sovereignty entitled them, sought to realise this equality by addressing perceived injustices in the distribution of wealth and power in the international system and the propensity of economic and legal structures to perpetuate these injustices. Both approaches issue challenges to prevailing paradigms in international law, in that they place emphasis on

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and adherence has been described as its "compliance pull:" *see* THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990) at 24.

the interdependence rather than the independence of states and the pursuit of substantive goals in the international system rather than an emphasis on value-neutrality in the interest of preserving order among states. Of course, neither of these tendencies was absent from international law prior to the emergence of these approaches; for this reason, the ideas and arguments that were put forth by proponents of these approaches were able to find a purchase and to wield influence in international law and policy.

The principles take the form, in their early stages, of paradigms for the resolution of problems and the development of norms in particular issue-areas. Because of their novelty and their incompatibility with prevailing paradigms, they must succeed in challenging the hegemony of those prevailing paradigms in order to be integrated into international law and policy. For example, the prevailing approach in international law to environmental damage prior to the Stockholm Conference was based on concepts of territorial integrity and state responsibility. Environmental damage was assimilated to other types of damage that one state might inflict on the territorial interests of another. The state on whose territory the flow of a pollutant originated could, under certain conditions, be held responsible for the damage thus caused. As a result, the relevance of environmental law tended to be restricted to situations in which a causal link was established between an activity on the territory of one state, for which that state could be held responsible, and environmental damage to the territory of another state. Furthermore, the approach was inherently reactionary, and could not provide for obligations to prevent environmental damage.[46] The

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[46] *See, e.g.*, Francisco Orrego Vicuña, *State Responsibility, Liability, and Remedial Measures under International Law: New Criteria for Environmental Protection in* ENVIRONMENTAL CHANGE

ecosystem approach, on the other hand, abstracts from state interests and focuses instead on the integrity of environmental media and ecosystems, and has as its objective to minimise or eliminate the impacts of human activity on ecosystems, regardless of the immediate interests of states in the quality of the environmental medium in question.

These broad approaches operate as paradigms or frameworks within which issue-areas are understood and appropriate approaches to problem-solving identified and selected. Paradigms permit us to organise the masses of information with which we are confronted by providing criteria to distinguish relevant from irrelevant information and to prioritise and categorise, and by providing theoretical frameworks to relate this information to our general understanding about the world. They are used, for example, in the process of reading the legal landscape described in the previous chapter. In the field of international environmental law, paradigms based on principles of state territoriality and sovereignty operate alongside, and generally in tension with, paradigms based on the irrelevance of state boundaries to the protection of ecosystem integrity and on the inherent value of environmental resources. Similarly, paradigms based on sovereign equality, coexistence and value neutrality in the international arena exist parallel to paradigms based on historic and structural inequality and on the need to transform law into an instrument for the pursuit of justice and equity.

When these broad paradigms are applied to specific issue-areas, such as stratospheric ozone protection or fisheries conservation, they are often expressed in

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AND INTERNATIONAL LAW: NEW CHALLENGES AND DIMENSIONS (Edith Brown Weiss, ed., 1992) 124 at 124-6.

normative but still very general terms, in the form of principles that guide further normative development and policy-making in the issue area. Their application to the issue-area may be worked out in detail, as is the case with the principle of common heritage of mankind and its application to the international seabed, or they may be stated in a manner that provides little guidance to interested actors regarding the manner of their application, such as the notion of the interests of mankind in the Antarctic regime. Once the principles have come to be relatively well accepted within one issue-area, arguments may be made that the principle's scope of application should be expanded to other issue areas, including those whose relationship with the original context is somewhat tenuous. Arguments regarding the expanded scope of the principle are generally accompanied by attempts to distil the essence of the principle and to identify the bases for its application. Thus, if air pollution shares important characteristics with marine pollution, it will come to be argued that the precautionary principle, applicable in the former context, should be made applicable in the latter. These arguments are not based solely on the problem-solving capacities of the principle in the original context, although to the extent that the principle is effective in one context, it seems logical that it would be in other, similar contexts as well. Rather, the arguments are often explicitly normative, based on the principle that like cases should be treated alike.

The ability of novel paradigms and principles to gain influence in international legal fora depends on a variety of factors, including the influence of the individuals or organisations - the norm entrepreneurs[47] - that articulate them, their resonance with

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[47] Martha Finnemore and Kathryn Sikkink, *International Norm Dynamics and Political Change* 52(4) I.O. 887 at 897 (1998).

existing or emerging ideas carrying some influence, their compatibility with the interests of powerful actors, and their ability to attract the consent and support of international actors. The role played by epistemic communities in articulating and championing particular paradigms and in transmitting them to decision-makers has been well-documented, although the literature on epistemic communities tends to focus on the formation of consensus regarding scientific and technical information rather than normative beliefs or opinions. Epistemic communities are able to influence decision-making processes at the international level partly because of the credibility that their expert status conveys on the information which they transmit, partly because this credibility is enhanced by the consensus this information attracts within the community, and partly because members of the community have access to centres of decision-making or are themselves positioned in such centres. The approaches that members of epistemic communities champion depend for their acceptance on processes of learning among decision-makers. The success of new paradigms depends in large measure on the influence wielded by those championing them and the receptivity of decision-makers to new ways of thinking, but also on the capacity of the new paradigm to explain phenomena in a more comprehensive or satisfactory manner and to offer problem-solving techniques that prove to be more effective.

As powerful an explanation as the epistemic communities approach is, it does not address the normative elements of new paradigms or the significance of persuasion in their influence. It is doubtful that the influence of the principles under consideration here has only to do with their success in explaining or describing phenomena with which decision-makers have to deal or in solving current problems.

The principles are certainly not devoid of instrumental or strategic appeal. However, arguments for their acceptance are also presented in explicitly normative terms, often with a strong moral component. A more promising approach is that taken by Martha Finnemore and Kathryn Sikkink in their discussion of norm formation. They describe the life-cycle of a norm as proceeding through three stages: norm emergence, in which a norm entrepreneur articulates and champions the norm; broad norm acceptance or norm cascade, during which phase the norm entrepreneur seeks to persuade a number of states to invoke and adopt the norm; and internalisation, in which phase the norm acquires a taken-for-granted quality.[48]

It is generally the case that soft law principles gain acceptance in the context of particular regimes, and from there come to be proposed and accepted in other contexts. Since the normative power of soft law principles depends in large measure on their generalisability, this power is enhanced if the principles are taken up in a wide variety of contexts. Debates about the applicability of accepted principles to novel contexts are often very intense and profound, taking place over the course of many years and attracting the attention of a range of participants. The content of these principles is enhanced through such debates, as is their normative power, at least in those contexts in which arguments for their validity and application enjoy some success and gather some support. Strong resistance to the application of a given principle as a rule of law in a particular issue area is, furthermore, no guarantee that the principle will not exercise significant influence, at the very least by shaping the debate about further legal developments in the area.

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[48] *Ibid.* at 896.

The capacity of the principle to be lifted out of the context in which it was developed and applied more widely, while contributing to its normative power, may also have the effect of neutralising its more radical reformist qualities. It is often said in such cases that the principles have been co-opted. For example, the principle of common heritage of mankind has been transformed into a principle of environmental protection, common concern of humankind. In this incarnation, the principle says nothing about addressing imbalances and injustices in the distribution of the world's resources, or of enhancing the position of developing countries vis-à-vis developed countries. Instead, it represents a recognition that, due to the interrelatedness of ecosystems, there are certain environmental resources or phenomena that should be protected regardless of their lack of immediate relevance to the territorial or strategic interests of states, but rather because of their importance to the well-being of human communities or because of their intrinsic value. The application of this principle to territorial resources such as biodiversity may go beyond neutralising the radical implications of common heritage and actually operate to deprive developing countries of control over and access to their resources.

No matter how broad the consensus regarding a given soft law principle, such principles do not hold normative monopolies; rather, they operate parallel to other principles which may be consistent, compatible, or contradictory. The tension between these competing principles is not susceptible of ultimate resolution, for example through the adoption of specific legal rules. The manner in which a balance between competing principles will be struck, or one principle chosen to the exclusion

of another,[49] must be worked out in specific circumstances through processes of argumentation. This cannot be accomplished at the level of rule articulation, as the discussion of rhetorical approaches to law in the previous chapter sought to demonstrate.

These principles should not, therefore, be regarded as first principles or *Grundnormen* from which more specific norms and rules descend.. There may be agreement regarding the core contents and spheres of application of such principles, but even this level of agreement is contingent upon the persistence of underlying shared understandings. Beyond this, the principles are the objects of discussion and disagreement, particularly when their normative background is controversial. In particular contexts, a group of interested actors may be capable of establishing a certain level of consensus regarding the meaning and application of a principle, even where there is no consensus about the normative background from which the principle draws inspiration. When attempts are made to take the principle out of its specific context and to apply it to other issue-areas, this consensus must be re-established with respect to this new issue-area. Nevertheless, actors are able to refer to the principle in its original context and to employ it as a form of common vocabulary, thereby making discourse in the novel context parasitic on the consensus developed in the initial context. With further repetition in novel contexts, the principles come to be well-understood even if consensus regarding their applicability has not emerged. This

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[49] For a discussion of the role of argumentation in creating shared understandings and reaching consensus in international society, see Thomas Risse, *Let's Argue!: Communicative Action in World Politics* 54 I.O. 1, *passim*, particularly at 6-7. Risse states that the validity and applicability of norms are matters for practical discourse. He states: "Where argumentative rationality prevails, actors do not seek to maximize or to satisfy their given interests and preferences, but to challenge and to justify the validity claims inherent in them - and they are prepared to change their views of the world or even their interests in light of the better argument:" *ibid* at 7.

facilitates processes of argumentation since, as actors invoke principles, they are able to refer to past debates taking place among the same group of actors or in parallel fora, thereby exploiting this common vocabulary further.

6. THE ROLE OF PRINCIPLES

It is important in any legal system to make the distinction between rules and principles. The former assist their addressees in making decisions concerning action to be taken, whereas the latter operate at a slightly greater distance from action, influencing the rules and their application. Ota Weinberger describes legal principles as abstract legal rules that operate as maxims that provide frameworks for the development of rules and contribute to the making of legal decisions and to their justification.[50] Ronald Dworkin distinguishes principles from rules by pointing to the inability of the former to give rise to legal consequences; instead, principles provide reasons for making particular arguments without, however, pointing to a specific conclusion.[51] Werner Stocker describes them as articulating the basic values upon which legal rules are based.[52] Weinberger points to another peculiarity of principles: it is possible in a given instance for two principles that pull in different directions to apply simultaneously. Both may then be considered in the process of decision-

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[50] OTA WEINBERGER, NORM UND INSTITUTION: EINE EINFÜHRUNG IN DIE THEORIE DES RECHTS (1988) at 96.

[51] RONALD DWORKIN, THE PHILOSOPHY OF LAW (1977), chapter 2. Kratochwil endorses this approach: *see* FRIEDRICH KRATOCHWIL, RULES, NORMS, AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS (1989) at 193-4.

[52] WERNER STOCKER, DAS PRINZIP DES COMMON HERITAGE OF MANKIND ALS AUSDRUCK DES STAATENGEMEINSCHAFTSINTERESSES IM VÖLKERRECHT (1993) at 140-1.

making, whose outcome will depend on the manner in which the two principles are balanced.[53]

The significance of a principle's crossing the threshold between soft and binding law, great though it is, can easily be exaggerated. If states consent to be bound by a principle, this threshold has been crossed, but the principle remains a *principle* and continues to operate at the same level of generality as prior to its transformation into a legal norm. Principles, whether of soft or binding law, may exercise influence over the shape and content of more specific rules, but this is not to say that the principle itself ceases to operate as a principle and becomes a rule. Furthermore, the process of developing rules in light of principles is not a simple matter of derivation. Different possible approaches to rule-making may be equally consistent with a given principle, and a determination regarding which is the most appropriate or accurate cannot be made in an objective, definitive manner. Furthermore, principles, unlike the emerging rules of international law discussed earlier, do not indicate the scope of their application, and may be thoroughly inappropriate when applied to certain matters. In other words, they are not valid *a priori*; rather, the range of their validity and applicability must be determined with respect to specific issue-areas. Furthermore, once it is decided that their application in a given context is appropriate, further work must be done in terms of defining the principle in a given context – that is to say, creating a rule that reflects the principle - and specifying its scope of application.

The distance between principles of environmental law that have the status of law and those that do not is not particularly great. In particular, soft law principles

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[53] WEINBERGER, *supra* note 50 at 96.

that are the object of a great degree of social consensus have as much influence on legal discourse as those that have been recognised as binding norms. Even in instances where a given principles does not enjoy the status of law, such as is the case with the common heritage principle in Antarctica, participants in regimes often find it extremely difficult to avoid having to justify their own behaviour, either to one another or to other actors in international society, in light of that principle. The principle may also operate in a more subtle manner, namely as a framework that helps participants in discourse orient themselves, describe the problem they are occupied with, and find an approach to solving it. In short, the principle may take on the characteristics of a topic, or common understanding. Soft law principles can play this role even in instances where participants in discourse call their validity or applicability into question; as we have seen, topics tend to be arranged in opposing pairs that provide different frameworks for understanding and solving problems and therefore tend to lead toward different types of solutions. Thus, even where the applicability of a given topic to a particular problem is resisted, the participants in discourse will be in a position to gain insight into one another's positions, as the principles to which the various participants make reference will refer to shared understandings regarding particular problem-solving approaches and certain moral ideas, thus operating as a sort of common vocabulary. Participants in discourse may invoke different principles, thus presenting dramatically different readings of the legal landscape and favouring different, incompatible solutions to the problem at hand. However, since the principles in question are well-understood and enjoy, at least at a general level, a certain degree of consensus, different participants in discourse championing different principles will not simply be talking past each other.

Arguments to the effect that legal discourse between opposing parties cannot lead to agreement between the parties regard discourse as static.[54] The picture thus presented is one of two participants holding fundamentally different conceptions of the problem to be solved, informed by different premises that exclude one another. For example, it might appear that one state - State A - arguing that a given natural resource is subject to exclusive domestic jurisdiction, and another - State B - arguing that the resource is the common heritage of mankind, will not be able to reach agreement on whether international obligations should or could be imposed to protect the resource. In a legal system featuring obligatory, binding third-party dispute settlement, it would be possible for an authoritative decision to be reached. However, as long as legal argumentation is regarded as a static process, the solution to the argument will simply involve selecting between the two positions, in the absence of any means of providing an explanation from within the legal system as to why one position is preferred to the other. However, there are other ways of conceptualising the process of legal argumentation.

Although the principles invoked by the two states stand, in the context of this dispute, in opposition to one another, the fact that the principles themselves are well-understood in international society and have attracted a degree of consensus means that the parties will not be likely to face each other in mutual incomprehension.

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[54] Koskenniemi argues that states holding opposing positions will be able to find support for their respective positions in the same legal text: KOSKENNIEMI, *supra* note 42 at 42. With this I am in agreement. However, as Stephen Toope notes, the process of resolution begins rather than ends with this assertion of opposing positions: Stephen J. Toope, *Emerging Patterns of Governance and International Law in* ROLE OF LAW, *supra* note 3, 91 at 102.

This discourse is seldom limited to the two states most intimately involved in a dispute. Other states will have an interest in its outcome; furthermore, other actors in international society, including epistemic communities and norm entrepreneurs, will be paying attention to the debate and making their

Instead, they will understand, if not accept, the arguments being advanced by one another. Furthermore, the process of discourse permits the participants to interact with one another, rather than requiring them to continue reiterating their respective positions. We may substitute for the image of two parties standing on their mutually conflicting rights an image of two parties engaged in a problem-solving exercise in which they seek to understand the extent of their respective rights and the implications of various interpretations and applications of those rights. As Friedrich Kratochwil, Chaim Perelman and others demonstrate, legal reasoning conceived of as practical reasoning is such a problem-oriented process. Thus, at every turn, the parties to discourse will be invited to consider the practical consequences of the application of the solution they champion. They will then be in a position to consider ways in which the unacceptable consequences of such an application might be eliminated, mitigated or compensated for. Thus, the starting point may be an opposition between one position according to which international law has no say in the exploitation of resources on state territory, and another according to which states are answerable in international law for harm caused to extra-territorial interests through the exploitation of domestic resources. However, in the subsequent stages of discourse, the parties have opportunities to concern themselves with the question of tailoring international obligations to suit the circumstances and to answer to the needs of the various actors involved. The manner in which this problem-solving in the course of legal reasoning proceeds is the subject of the chapters that follow.

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contributions where they can. The populations of the respective states will also pay attention to the debate.

7. PRINCIPLES OF SOFT INTERNATIONAL ENVIRONMENTAL LAW

Common but differentiated obligations

The International Environmental Agenda and Developing Countries

The Stockholm Conference on the Human Environment in 1972 was a watershed in more ways than one, in that it gave to the countries of the South a rare opportunity to express their demands in a context that made it likely that they would have an attentive audience.[55] At the Preparatory Commissions held prior to the Stockholm Conference, representatives of developing countries took many in the North by surprise with their reaction to the notion of pursuing environmental protection measures through cooperative action among states.[56] It was argued in the South that the often desperate need to alleviate poverty outweighed the need for environmental measures;[57] that developing countries could not in any event afford to implement environmental measures, with the expense and foregone economic development that this would entail;[58] that they, unlike countries of the North, had not

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[55] *See* Adil Najam, An Environmental Negotiation Strategy for the South, 7 INT'L ENVT'L AFF. 249 (1995); G.F. Maggio, *Inter/Intragenerational Equity: Current Applications under International Law for Promoting Sustainable Development of Natural Resources* 4 BUFFALO ENVT'L L.J. 161 at 204 (1997); Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse* 16 WISCONSIN INT'L L.J. 353 at 388 (1998); Alexandre Kiss, *The Protection of Environmental Interests of the World Community through International Environmental Law in* ENFORCING ENVIRONMENTAL STANDARDS: ECONOMIC MECHANISMS AS VIABLE MEANS? (Rüdiger Wolfrum, ed., 1996) [*hereinafter* ENFORCING ENVIRONMENTAL STANDARDS]1 at 3-4. Bodansky notes that the dependence of the North on the South gave the latter an opportunity to press for objectives expressed in the N.I.E.O., including more equitable distribution of resources (in particular in the form of technology transfers and financial assistance) and participation in institutions: Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary* 18 YALE J. INT'L L. 453 at 480 (1983).

[56] *See* Tim E.J. Campbell, *The Political Meaning of Stockholm: Third World Participation in the Environmental Conference Process* 8 STANFORD J. INT'L STUD. 138 at 139-40 (1975).

[57] *Ibid.* at 139-40; Bodansky, *supra* note 56 at 463.

[58] Asit K. Biswas, *Environment and Law: A Perspective from Developing Countries in* L'AVENIR DU DROIT INTERNATIONAL DE L'ENVIRONNEMENT, COLLOQUE DE L'ACADÉMIE DE LA HAYE (René-Jean Dupuy, ed., 1985) 389 at 390; Subrata Roy Chowdhury, *Common but Differentiated State Responsibility in International Environmental Law: From Stockholm (1972) to Rio (1992) in*

benefited from industrialisation and had not made significant contributions to the pollution that results from industrial processes;[59] and that the types of environmental problems with which developed countries were concerned were of a different nature than environmental problems in the South.[60] On a more general level, there was resistance to the manner in which the new environmental agenda had been drawn up, namely with little attempt being made to include countries of the South in the initial processes of formulation.[61]

Since the success of international environmental protection efforts depended on Third World participation, these arguments did not fall on deaf ears. Efforts were made to bring developing countries into the process. A series of regional seminars was organised to focus on the needs and interests of developing countries, and at a special meeting of experts, an influential report on environmental problems in developing countries was produced.[62] Despite some attempts to take into consideration the perspectives of developing countries, these countries were not successful in having inserted into the Stockholm Declaration a provision stating that the global community should take responsibility for alleviating the economic consequences of the assumption of environmental obligations by developing

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SUSTAINABLE DEVELOPMENT AND GOOD GOVERNANCE (Konrad Ginter, Erik Denters and Paul J.I.M. de Waart, eds., 1995) 322 at 334.

[59] Chowdhury, *supra* note 58 at 333; Bodansky, *supra* note 55 at 479.

[60] Mickelson, *supra* note 55 at 388; Kiss, *supra* note 55 at 3.

[61] It has been argued that the northern approach to the issue of international environmental protection involved those countries identifying their own problems and interests related to environmental issues and assuming that these were of a global nature: *see* NEIL MIDDLETON, PHIL O'KEEFE AND SAM MOYO, THE TEARS OF THE CROCODILE: FROM RIO TO REALITY IN THE DEVELOPING WORLD (1993) at 5.

[62] The report was entitled the Founex Report on Development and Environment (1971), *reproduced in* INTERNATIONAL CONCILIATION no. 586 (1972). On the Founex Report, see also Maggio, *supra* note 55 at 177. *See generally* Ulrich Beyerlin, *The Concept of Sustainable Development in* ENFORCING ENVIRONMENTAL STANDARDS, *supra* note 55, 95 at 97; Campbell, *supra* note 56 at 140.

countries.[63] They did, however, gain recognition for permanent sovereignty over natural resources, expressed in the first half of the famous Principle 21.[64] At the Rio Conference on Environment and Development, held twenty years later, symbolically, in Brazil, the relationship between environment and development appeared to have been accepted, at least in principle. As Karin Mickelson notes, however, difficulties arise in carrying this approach through to the level of concrete problem-solving.[65]

The fear of many in the South is that the international environmental agenda will be used as a means for developed countries to intervene in the affairs of countries of the South for their own benefit and to impose conditions on aid to and trade with developing countries, once again in their own interest. Concern with the potential neo-colonial implications and consequences of international environmental law and policy was succinctly expressed by the participants at a meeting of the Non-Aligned Movement shortly after the Rio Conference, at which it was concluded that developed countries should not seek to use environmental issues as a means of interfering in the internal affairs of developing countries or of imposing conditionalities on them.[66]

The New International Economic Order

The concern felt by states of the South over the international environmental agenda must be understood in historical context, and more specifically in relation to the ongoing efforts of developing countries to recover from the lingering effects of the

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[63] Campbell, *supra* note 56 at 143-4.

[64] "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies:" Declaration of The United Nations Conference on the Human Environment *adopted* June 16, 1972, 11 I.L.M. 1416 (1972).

[65] Mickelson, *supra* note 55 at 390.

colonial era and to overcome inequities and imbalances in international society. These concerns find expression in the various documents and the broader debate relating to the N.I.E.O., a broad and sweeping approach to international legal, commercial, economic and political interaction that came into being in the era of decolonisation.[67] The N.I.E.O. sought to provide a new basis for relations between former colonies and former colonisers and for the emergence of the newly independent countries as actors in their own right and subjects and authors, rather than objects, of international law.[68] More particularly, it has as its objective the establishment of new forms of international economic cooperation in which developed and developing countries are united in a common project to improve the level of economic development of countries of the South and improve the standard of living of their populations.[69]

The principle of common but differentiated obligations reflects the approach behind the N.I.E.O. It stresses the use of international law as an instrument to redress imbalances and inequities in international society through the engagement of all states in a common project to assist developing countries in the achievement of various goals, including but not limited to economic development. The application of the principle in the sphere of environmental law implies that, just as the North depends on

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[66] Final Documents of the Tenth Conference of the Heads of State or Government of Non-Aligned Countries, Jakarta, 1-6 September 1992, 37, para. 68. *See* NICO SCHRIJVER, SOVEREIGNTY OVER NATURAL RESOURCES: BALANCING RIGHTS AND DUTIES (1997) at 275-6.

[67] *See* SCHRIJVER, *supra* note 66; FRANZ XAVER PERREZ, COOPERATIVE SOVEREIGNTY: FROM INDEPENDENCE TO INTERDEPENDENCE IN THE STRUCTURE OF INTERNATIONAL ENVIRONMENTAL LAW (2000) at 83 ff.

[68] The transformation of former colonies from objects to authors of international law is described by Manohar L. Sarin, *The Asian-African States and the Development of International Law in* L'AVENIR DU DROIT INTERNATIONAL DANS UN MONDE MULTICULTUREL (René-Jean Dupuy, ed., 1984) 117 at 125.

the South to protect environmental resources on which all members of international society depend, the South depends on the North for assistance of various forms in meeting environmental obligations at the international level and environmental protection goals at the national and regional level.

The provision of such assistance may be justified on strategic terms: if the South proceeds with economic development plans without such assistance, given the interdependencies of ecosystems, the environmental effects will be felt in the North as well. However, a moral argument is also available: countries of the South attribute their current low levels of economic development to historical colonial relationships, which resulted in the undermining of existing economic, political and social infrastructures and the exploitation of the human and natural resources of colonised regions for the benefits of the colonising countries, and to current legal and economic structures, which continue to favour the interests of the North and to reinforce relationships of dependence between South and North. In order to address this situation, countries of the North must make available to the South forms of assistance that will permit the latter to reduce their dependence on the former.

When this logic is applied to international environmental protection obligations, an argument is made that states of the South should not be bound to the same level of obligation as states of the North, and furthermore, that the North should provide technological, financial and other forms of assistance to the South so that these countries can participate in international environmental protection efforts. Thus, the reaction of the South to the international environmental agenda is not one of

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[69] *See* Jorge Castañeda, *Introduction to the Law of International Economic Relations in* INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS (Mohammed Bedjaoui, ed., 1991) 591 at 592.

wholesale rejection; rather, there is an attempt to find terms on which developing countries can pursue environmental protection goals on their own territories and participate in the realisation of such goals beyond their borders without having to pay excessive costs. The concept of common but differentiated obligations is seen as a means to this end.

The notion that developing countries have needs and interests that must be taken into account when developing international obligations is not a novel concept, but its introduction in the field of international environmental law in the context of ozone layer protection gave rise to some controversy. The principle was incorporated into the Vienna Convention on the Protection of the Ozone Layer in fairly cautious terms: in the preamble, mention is made of "the circumstances and particular requirements of developing countries," and a broadly-worded obligation to assist developing countries in the acquisition of new technologies and information is provided.[70] The Montreal Protocol on Substances that Deplete the Ozone Layer goes further, giving developing countries a ten-year grace period before obligations to reduce and eliminate production and use of ozone-depleting substances covered by the Protocol begin to apply.[71]

The principle won wider acceptance at the 1992 Earth Summit. The Rio Declaration recognises the principle of common but differentiated obligations at Principle 7 in the following terms:

> States shall cooperate in a spirit of global partnership to conserve, protect and restore the

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[70] Vienna Convention on the Protection of the Ozone Layer, 26 I.L.M. 1516 (1987), *concluded* 22 March 1985, *entered into force* 22 September 1988.

[71] Montreal Protocol on Substances that Deplete the Ozone Layer, *concluded* 16 September 1987, *entered into force* 1 January 1989, 26 I.L.M. 1541; *as amended* http://www.unep.org/ozone/mont_t.shtml. *See* Chapter 5.

> health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.[72]

The common but differentiated obligations concept is central to the Framework Convention on Climate Change (F.C.C.C.).[73] It has been argued that its inclusion in that convention, and the fact that the obligations undertaken by different groups of countries were determined in light of the principle, reflects the incorporation of equitable considerations into the Convention.[74] The centrality of the concept to the F.C.C.C. is no doubt due to the participation of developing countries throughout the negotiating process.[75] The preamble contains several references to the special situation and needs of developing countries, and makes explicit reference to the concept of common but different obligations. Thus, it is recognised that "environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply, and that standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries;" of "the special difficulties of those countries, especially developing countries, whose economies are particularly dependent on fossil fuel production, use and exportation, as a consequence of action taken on limiting greenhouse gas emissions;" of the need to coordinate measures and programmes "with social and economic development in an

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[72] Rio Declaration, *supra* note 24.

[73] United Nations Framework Convention on Climate Change, *open for signature* 4 to 14 June 1992, *entered into force* 21 March 1994, 31 I.L.M. 848 (1992) [*hereinafter* F.C.C.C.].

[74] Christine Batruch, *"Hot Air" as Precedent for Developing Countries? Equity Considerations* 17 J ENVT'L L 45 at 49-50 (1998/99).

[75] Bodansky, *supra* note 55 at 470.

integrated manner with a view to avoiding adverse impacts on the latter, taking into full account the legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty;" and of the fact

> that all countries, especially developing countries, need access to resources required to achieve sustainable social and economic development and that, in order for developing countries to progress towards that goal, their energy consumption will need to grow taking into account the possibilities for achieving greater energy efficiency and for controlling greenhouse gas emissions in general, including through the application of new technologies on terms which make such an application economically and socially beneficial.

Article 4 of the Convention sets out the obligations of the parties, which are divided into different groupings.[76] All parties are subject to the general obligations relating to information collection and dissemination, scientific research, and cooperation.[77] The obligations related to reduction of greenhouse gas emissions are, however, made applicable only to developed countries.[78] Those countries assume further obligations relating to transfers of technology and the provision of financial and other forms of assistance.[79] Furthermore, the implementation by developing countries of their obligations under the convention is made contingent on the compliance of developed countries with their obligations.[80] The same approach is taken in the Kyoto Protocol to the F.C.C.C.: substantive emissions reduction obligations apply only to developed countries.[81]

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[76] On the commitments of the respective parties, see *ibid.* at 505 ff.

[77] F.C.C.C., *supra* note 73, art. 4(1).

[78] *Ibid.*, art. 4(2).

[79] *Ibid.*, art. 4(3) and (5).

[80] *Ibid.*, art. 4(7).

[81] Protocol to the United Nations Framework Convention on Climate Change, *open for signature* 16 March 1998 to 15 March 1999, *not yet in force*. *See* Ved P. Nanda, *The Kyoto Protocol on Climate Change and the Challenges to its Implementation: A Commentary* 19 COLO. J. INT'L ENVT'L L. & POL. 319 (1999).

Common heritage of mankind

Origins and Current Application

The concept of the common heritage of mankind was initially presented in 1967 by Arvid Pardo, Malta's ambassador to the United Nations, in the context of the United Nations Conference on the Law of the Sea and more specifically with respect to the mineral resources of the deep seabed beyond sovereign jurisdiction.[82] Pardo's proposal was prompted by concerns that developed countries would employ their financial and technical capacities to exploit deep seabed resources before developing countries were in a position to do so, thus effectively excluding the latter from participation in the benefits of the exploitation of these resources. The debt that this concept owes to the N.I.E.O. is obvious. In addition to concerns regarding access to resources on their own territories, developing countries seek to protect their access to resources in international space.[83] The law governing access to international resources was for the most part developed in the colonial era,[84] and tends to take a *laissez-faire* approach to the question of access to resources, thus favouring developed countries with the financial and technological wherewithall to exploit resources located outside sovereign territorial boundaries.[85] However, the concept also finds an echo in the preambular statement in the Antarctic Treaty, which states that "it is in the interest of

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[82] *See* KARL STEINACKER, THE LEGAL PRINCIPLE OF THE COMMON HERITAGE OF MANKIND AND DEEP SEA-BED MINING OUTSIDE THE UN CONVENTION ON THE LAW OF THE SEA (1985) at 13-4. Pardo's authorship of the concept is not uncontested: see Rüdiger Wolfrum, *The Principle of the Common Heritage of Mankind* 43 Z.A.Ö.R.V. 312 at 312 (1983), where he notes a reference in 1967 by Aldo A. Cocca to the concept of *res communis humanitatis* in the context of the peaceful uses of outer space.

[83] A HANDBOOK ON THE NEW LAW OF THE SEA (René-Jean Dupuy and Daniel Vignes, eds., 1991) at 581; Stocker, *supra* note 52 at 127-8 and 138.

[84] *See* R.P. Anand, *The Role of Asian States in the Development of International Law in* L'AVENIR DU DROIT INTERNATIONAL DANS UN MONDE MULTICULTUREL (René-Jean Dupuy, ed., 1984) 105 at 110-1.

all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord."[86]

When Pardo introduced the concept to the Law of the Sea Conference, he outlined a series of principles on which could be based a declaration that the resources of the deep sea-bed are the common heritage of mankind. The ocean floor beyond national jurisdiction would be declared not subject to appropriation by states; resource activities on the ocean floor in international waters would be consistent with the principles and purposes expressed in the United Nations Charter; sea-bed activities would be undertaken for the benefit of mankind; the financial benefits derived from resources exploitation would be used, in part, to promote development; and the sea-bed would be reserved for peaceful purposes.[87] The controversial Part XI of the Law of the Sea Convention[88] operationalises the common heritage concept with respect to the resources of the deep sea-bed, subject to the modifications made under the Agreement relating to the Implementation of Part XI of the Convention,[89] adopted in 1994. The deep seabed of the Area, which is that portion of the oceans not subject to

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[85] *See* René-Jean Dupuy, *The Notion of the CHM as Applied to the Seabed* 8 ANN. AIR & SPACE L. 347 at 349 (1983).

[86] Antarctic Treaty, *concluded* 1 December 1959, *entered into force* 23 June 1961, *reproduced in* ANTARCTICA AND INTERNATIONAL LAW: A COLLECTION OF INTER-STATE AND NATIONAL DOCUMENTS, vol. I (W.M. Bush, ed., 1982) 46; http://www.antcrc.utas.edu.au/opor/Treaties/at.html.

[87] *See* Report of the Ad Hoc Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, G.A. Official Records, Twenty-Third Session, A/7230, 1968; STEINACKER, *supra* note 82 at 14.

[88] United Nations Convention on the Law of the Sea, *open for signature* 10 December 1982, *entered into force* 16 November 1994, U.N.T.S. 31363 [*hereinafter* L.O.S.C.].

[89] Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, *concluded* December 4 1995, *entered into force* 28 July 1996, G.A. Res. 48/263 (July 28, 1995).

state sovereignty or jurisdiction, is declared to be the common heritage of mankind,[90] by virtue of which it is declared to be beyond sovereign jurisdiction, and rights in its resources are vested in humankind, on whose behalf the Authority, the governing body created under Part XI,[91] is to act.[92] Exploitation of these resources is to be carried out in conformity with the rules established in Part XI and with rules, regulations and procedures promulgated by the Authority,[93] and the activities of states in the Area are to be in conformity with "the principles embodied in the Charter of the United Nations and other rules of international law in the interests of maintaining peace and security and promoting international cooperation and mutual understanding."[94] The resources of the Area are to be employed for the benefit of mankind, and the Authority is to provide for equitable sharing of the financial benefits of resource exploitation.[95] Finally, the Area is to be used exclusively for peaceful purposes.[96]

Difficulties have been encountered in the course of attempts to operationalise the provisions regarding benefits to mankind and equitable sharing of financial benefits.[97] In fact, it has been argued that the Implementation Agreement, which modifies Part XI, has substantially diluted the C.H.M. provisions.[98]

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[90] L.O.S.C., *supra* note 88, arts. 1 1. (1), defining the Area, and 136, on the common heritage of mankind.

[91] The Authority is established by art. 156 *ibid.*

[92] *Ibid.*, art. 137.

[93] *Ibid.*, art. 137(2).

[94] *Ibid.*, art. 138.

[95] *Ibid.*, art. 140.

[96] *Ibid.*, art. 141.

[97] See the extensive discussion of the concepts of equal participation in benefits, on the one hand, and equal participation in seabed activities, on the other, in Wolfrum, *supra* note 82 at 320-32.

[98] *See, e.g.*, Pinto, *supra* note 35 at 263-5, in which he describes the Implementation Agreement as "dismantling the myth" of common heritage. On the Implementation Agreement generally see Bernard H. Oxman, *Law of the Sea Forum: The 1994 Agreement on Implementation of the Seabed Provisions of the Convention on the Law of the Sea: The 1994 Agreement and the*

The principle of common heritage has also been incorporated into the 1967 Outer Space Treaty,[99] and into the Agreement governing the Activities of States on the Moon and other Celestial Bodies,[100] and persistent but less than successful attempts have been made to incorporate the principle into the Antarctic Treaty.[101]

Common Heritage as a Principle of Customary International Law

By abstracting from the context of the law of the sea and seeking to identify the fundamental elements of the common heritage principles, a number of commentators have sought to demonstrate that the principle is a rule of customary international law that applies "to govern the use of areas which lie outside the limits of national jurisdiction."[102] As I will argue below, even in instances in which the principle has not been accepted as a binding norm of international law, it may nevertheless be persuasive and therefore equally effective. This persuasiveness is derived from the principle's influence and the level of consensus that has developed around it, which may render it difficult to argue against its relevance. At the very least, the principle has a significant effect on the development and interpretation of norms applicable to non-sovereign areas.

Convention 88 A.J.I.L. 687 (1994); ENTRY INTO FORCE OF THE LAW OF THE SEA CONVENTION (Myron H. Nordquist and John Norton Moore, eds., 1995).

[99] Treaty on Principles Governing the Activities of States in the Exploration and the Use of Outer Space, including the Moon and Other Celestial Bodies, *concluded* 27 January 1967, *entered into force* 10 October 1967, 610 U.N.T.S. 205. The exploration and utilisation of outer space were declared to be the "province of mankind". *See* Ulrich Beyerlin, *State Community Interests and Institution-Building in International Environmental Law* 56 Z.A.Ö.R.V. 602 at 609 (1996); Nicolas Mateesco Matte, *The Common Heritage of Mankind and Outer Space: Towards a New International Economic Order for Survival* 12 ANN. AIR & SPACE L. 313 at 318-19 (1987).

[100] Agreement governing the Activities of States on the Moon and Other Celestial Bodies, *concluded* January 27 1967, *entered into force* October 10 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205. *See* Beyerlin, *supra* note 99 at 609; Matte, *supra* note 99 at 318-19.

[101] *See* Chapter 3.

[102] Wolfrum, *supra* note 82 at 314; STOCKER, *supra* note 52 at 106.

Rüdiger Wolfrum states that the basis of the principle lies in three related concepts that were at one point brought together and articulated as the common heritage principle. These three concepts are the status of the non-sovereign area as being the heritage or patrimony of the world community; the use of this heritage for the benefit of developing countries; and the establishment of the necessary legal regime.[103] Other aspects of the principle, such as demilitarisation, peaceful uses, and environmental protection are, according to Wolfrum, implied by these three elements.[104] Thus, Wolfrum's list is not fundamentally different from that provided by Stocker: prohibition on occupation of the area by states; promotion of scientific research; environmental protection; demilitarisation of the area and its reservation for peaceful uses; and channelling of benefits of exploitation in the area to developing countries.[105] Absent from this list is provision for a legal regime, but of course the features identified by Stocker could not be secured in the absence of such a regime. In any event, as Wolfrum notes, the basic principle does not require the establishment of an international organisation to realise the goals of common heritage. This could in principle be accomplished by individual states acting in accordance with the principle's precepts.[106] Christopher Joyner's list differs from these others in two respects: he argues that the management of the common area would be in the hands of

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[103] Wolfrum, *supra* note 82 at 314-5. These three elements are pithily conceptualised by Pinto as common sovereignty, common benefit and common management: *supra* note 35 at 254.

[104] Wolfrum, *supra* note 82 at 319.

[105] STOCKER, *supra* note 52 at 106.

[106] Wolfrum, *supra* note 82 at 317.

humanity, with states acting only in a capacity of representative agents; and he does not refer to environmental protection.[107]

At the outset, the common heritage principle drew on the distinction in international law between *res nullius*, namely, territory or resources that were not the object of jurisdictional claims and could therefore be occupied or appropriated by any state, and *res communis*, or those areas or features which could not be brought under the jurisdiction of any state but rather remained open to the enjoyment of all. The high seas have for centuries been regarded as being by their very nature not subject to appropriation by states, and therefore *res communis*, but with respect to the resources found in the high seas, sovereign freedom was the rule.[108] The principle of common heritage has as its goal to restrict sovereign freedom through the recognition of an interest in the resources of the deep seabed that transcends that of state interests in access to those resources. Paragraph 137(2) L.O.S.C. states: "All rights in the resources of the Area are vested in mankind as a whole on whose behalf the Authority shall act."[109] The Authority, on the other hand, is described at paragraph 157(1) as "the organization through which States Parties shall, in accordance with this Part,

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[107] Christopher Joyner, *Legal Implications of the Concept of the Common Heritage of Mankind* 35 INT'L & COMP. L.Q. 190 at 191-2 (1986).

[108] Convention on the High Seas, *concluded* 29 April 1958, *entered into force* 30 September 1962, 450 U.N.T.S. No. 6465 82 (1958), states:

> The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, inter alia, both for coastal and non-coastal States:
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> 1. Freedom of navigation;
> 2. Freedom of fishing;
> 3. Freedom to lay submarine cables and pipelines;
> 4. Freedom to fly over the high seas.
>
> These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

[109] *Supra* note 88.

organize and control activities in the Area, particularly with a view to administering the resources of the Area."[110] This would therefore mean, on the one hand, that, since rights to the resources have been vested in an entity not capable, legally or practically speaking, of exercising them, an institutional mechanism has been created at the international level to act on its behalf. The mechanism, however, is the creature and the instrument of states, which, by virtue of paragraph 137(1), may not claim sovereign rights to the resources in question.[111] This movement back and forth among humanity, states and the Authority appears to rob the former of significance. This is not, however, altogether true. It simply means that an understanding of the concept of humanity as the bearer of rights and interests in non-sovereign resources must be very carefully nuanced.

Given the pluralism of international society, the lack of a common system of values, and the presence of conflicts of interests among actors in that society, the harmonious image of all of humanity united behind the achievement of common goals must cede to the reality of conflict, disagreement and a multiplicity of values.[112] Furthermore, the legal system and institutional structures of international society, although certainly not closed to non-state actors and indeed often strongly influenced by them, retain at least a state-centric core. Mankind, as Wolfrum notes, is not in a

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[110] *Ibid.*

[111] Wolfrum notes this ambiguity, stating that, on the one hand, the Authority must represent mankind with respect to the disposal of the seabed and its resources: *supra* note 82 at 317. On the other hand, the Authority has not been vested with the capacity to represent mankind, thereby enabling mankind to participate directly in seabed activities: *ibid.* at 319.

[112] *See, e.g.*, Dupuy, *supra* note 85 at 347. Striking a particularly disillusioned tone, Pinto describes the principles as being "[i]nspiring to many ...[but having] no obvious connection with real experience, convey[ing] not precise meaning and ... [being] of uncertain legal content:" *supra* note 35 at 253.

position to replace states through the intervention of the Authority.[113] The reality of conflict among different actors in international society is addressed through elaborate mechanisms for the participation of different groups of states in the process of managing the Area's resources and in the benefits of resource exploitation. As René-Jean Dupuy and Daniel Vignes have remarked, participation of developing countries in activities in the Area is provided for in three ways, or as they express it, these countries are integrated into the activities at three levels: at the level of institutions, through the elaboration of a complex voting structure which is intended to ensure appropriate representation of developing state interests; at the level of the activities of the Enterprise, with opportunities for participation of developing countries to be promoted, particularly in the interests of acquiring technological expertise; and at the level of profits, with benefits being redistributed and with provision being made for the impact on world commodities markets of the influx of minerals from deep sea-bed mining.[114]

It may seem curious to refer to the interests of humanity and then to provide for their representation, as in classical international law doctrine, by states. However, as René-Jean Dupuy argues, this reference was not intended to create a new international legal person in whom rights and interests could be vested. The notion of humanity is here intended to be ideational and aspirational; to appeal to a "universalistic and egalitarian" conception of the interests at stake.[115] Other commentators have described the notion of humanity as invoking the interests of future generations, thus necessitating consideration for goals such as conservation and

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[113] Wolfrum, *supra* note 82 at 319.

[114] A HANDBOOK ON THE NEW LAW OF THE SEA, *supra* note 83 at 583.

environmental protection;[116] as making reference to a set of finalities other than those of states, such as peace, human happiness and the preservation of the planet;[117] and as bearing witness to the inability of states adequately to represent the interests and needs of their populations through pursuit of their own interests.[118] In other words, the reference to humanity gives decision-makers some information regarding the manner in which they should approach their task and the interests and values to which they should refer. It places restrictions on the freedom of states to exploit common pool resources, referring not to the coexisting rights of other states, as would be the case in an international law of coordination, but to interests and values such as the preservation of the resource for future generations, the equitable distribution of resource exploitation to help correct current imbalances in distributions of wealth and power among different groups of states, and - a somewhat more recent development - the protection of the environment against the harmful consequences of resource exploitation.

References to the interests of humankind may be found in other conventions, including the Bonn Convention on the Conservation of Migratory Species of Wild Animals,[119] the Berne Convention on the Conservation of European Wildlife and

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[115] Dupuy, *supra* note 85 at 348.

[116] Wolfrum, *supra* note 82 at 318-9.

[117] Mohammed Bedjaoui, *General Introduction in* INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS, *supra* note 69, 1 at 114-6.

[118] Jean Charpentier, *L'humanité: Un patrimoine, mais pas de personnalité juridique in* LES HOMMES ET L'ENVIRONNEMENT: QUELS DROITS POUR LE VINGT-ET-UNIÈME SIÈCLE? (Michel Prieur and Claude Lambrechts, eds., 1998) 17 at 18-20.

[119] Convention on the Conservation of Migratory Species of Wild Animals, *concluded* June 23 1979, *entered into force* 1 November 1983, 19 I.L.M. 15 (1980). The preamble states: "Recognising that wild animals in their innumerable forms are an irreplaceable part of the earth's natural system which must be conserved for the good of mankind ... ."

Natural Habitats,[120] the Convention on Biological Diversity,[121] and the F.C.C.C.[122] A slightly more vague reference to the concept of common interests may also be found in the Ramsar Convention.[123] As Ulrich Beyerlin argues, such references to common interest are best read as recognition of the idea that, while states retain their sovereign rights, they must seek to exercise these rights in light of the need to protect broader interests that transcend those of individual states.[124] The nature of these interests and of the obligations or responsibilities that states assume in order to protect and promote them are, as we shall see below, poorly understood and highly controversial. Nevertheless, as I will argue, such concepts contribute to the frameworks within which international legal discourse takes place and more generally within which international rules and norms are understood and applied.

The notion of environmental protection cannot be found in the early formulations of the principle, and, as certain commentators have argued, the capacity of the principle adequately to account for environmental protection is a matter of some doubt, since the principle's vocation, at least initially, was to regulate resource exploitation in the interests of a more equitable sharing of the benefits of resource

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[120] Convention on the Conservation of European Wildlife and Natural Habitats, *concluded* 19 September 1979, *entered into force* 1 June 1982, U.K.T.S. No. 56 (1982). The preamble states, inter alia: "Recognising that wild flora and fauna constitute a natural heritage of aesthetic, scientific, cultural, recreational, economic and intrinsic value that needs to be preserved and handed on to future generations; ... ."

[121] *Supra* note 25. The preamble states, *inter alia*: "Affirming that the conservation of biological diversity is a common concern of humankind, ..."

[122] *Supra* note 73. The preamble states, *inter alia*: "Acknowledging that change in the Earth's climate and its adverse effects are a common concern of humankind, ..."

[123] Convention on Wetlands of International Importance, especially as Waterfowl Habitat, *concluded* Feb. 2, 1971, *entered into force* Dec. 21, 1975, 996 U.N.T.S. 245, 11 I.L.M. 963. The preamble states, *inter alia*: "Being convinced that wetlands constitute a resource of great economic, cultural, scientific, and recreational value, the loss of which would be irreparable; ...Recognising that waterfowl in their seasonal migrations may transcend frontiers and so should be regarded as an international resource; ... ."

activities.[125] Environmental protection and resource conservation concerns are, on this reading, at best an afterthought, and in at least potential conflict with resource extraction concerns.[126] On the other hand, it would be difficult to argue that the interests of humanity in the Area and its resources could adequately be protected in the absence of environmental and conservation measures.

As we shall see in the context of Antarctica, environmental protection came to be central to the general concept of common heritage/common interest, and, conversely, the notion of common interest has proven to be a good vehicle by which to express the justificatory basis for international environmental protection measures. This constellation of concepts "give[s] expression to the acknowledgement that there are some environmental issues which are so serious and fundamental in nature that they are of immediate concern for the whole (universal or regional) State community."[127] The notion that there exist in international society interests beyond those of states that are worthy of protection and in whose name state rights and freedoms may be limited is fundamental to the current framework of international environmental law.[128] This idea is expressed in the emerging principle of common concern of humankind, which seeks to apply elements of the common heritage

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[124] See Beyerlin, *supra* note 99 at 608-9, for a discussion of the notion of common interest, concern or good in international environmental conventions.

[125] *Ibid.* at 609-10; Wolfrum, *supra* note 82.

[126] Provision for environmental protection measures was made in the L.O.S.C. provisions at art. 145: *supra* note 88. However, the article merely authorises the Authority to adopt rules for purposes of environmental protection and resource conservation, and contains no substantive protection measures. This has led to concern that environmental protection will be subordinated to resource extraction: *see* Leval B. Imnadze, *Common Heritage of Mankind: A Concept of Cooperation in our Interdependent World?* 24 LAW OF THE SEA INSTITUTE PROCEEDINGS 312 at 312-4 (1990).

[127] Beyerlin, *supra* note 99 at 606. Beyerlin cites as examples of such matters of immediate concern sea-level rise, desertification, threats to non-renewable natural resources, and severe degradation of ecosystems: *ibid. See also* STOCKER, *supra* note 52 at 33-4.

principle to transboundary and territorial environmental resources which, as described above, has to date been expressed in preambular statements to a small number of international conventions.

The expansion of the common heritage principle, applicable only to non-sovereign territory and resources, to the common concern principle, potentially applicable to any resource or object that is of value beyond the borders of the territory in which it is found, raises justifiable concerns that pressure will be brought to bear by international society on those states harbouring such valuable resources to restrict their own use of them in the interests of humankind. The neocolonial overtones of such pressure are obvious,[129] particularly as it is often the case that the valuable resources in question are found in states of the South, while those in a position to exploit them are in the North. One response has been to reject the imposition of duties under international law to protect or conserve territorial resources in the interests of humanity, calling in aid principles associated with the N.I.E.O. Another response has been to accept such obligations in exchange for financial, technical and other forms of assistance to protect the resource in question and to compensate for restrictions placed on its exploitability. As Stocker has expressed it, the principle of common concern as applied to territorial resources is potentially applicable in any situation in which a resource of value to humanity cannot be protected, and the interests of humanity thus not promoted, through the actions of the territorial state, but rather requires

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[128] *See* Jutta Brunnée, *"Common Interest" - Echo from an Empty Shell? Some Thoughts on Common Interest and International Environmental Law* 49 Z.A.Ö.R.V. 791 at 792 (1989).

[129] *See, e.g.,* Pierre-Francois Mercure, *Le rejet du concept de patrimoine commun de l'humanité afin d'assurer la gestion de la diversité biologique* 33 CDN Y.B. INT'L L. 281 (1995); Maggio, *supra* note 55 at 161.

cooperative action.[130] In this formulation, obligations to protect the resource and obligations to assist the territorial state in this protection constitute two sides of the same coin.

The Precautionary principle

The precautionary principle as a norm of international environmental soft law has been the object of extensive scholarly attention.[131] The precautionary principle was introduced at the international level by German delegates to the First Ministerial Conference on the North Sea in 1987, and was included in the ministerial declarations issued at subsequent North Sea Conferences[132] before being incorporated among the binding provisions in the 1992 Paris Convention.[133] It followed a similar trajectory in the context of the Helsinki Convention, being incorporated as a binding rule in the 1992 Convention.[134] The principle is now well-established in the field of marine environmental protection, having also been incorporated into the 1996 Protocol to the

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[130] STOCKER, *supra* note 52 at 4.

[131] *See, e.g.*, Wybe Th. Douma, *The Precautionary Principle* 49 ÚLFLJÓTUR 417 (1996); David Freestone, *The Precautionary Principle in* INTERNATIONAL LAW AND GLOBAL CLIMATE CHANGE (Robin Churchill and David Freestone, eds., 1991), 21; THE PRECAUTIONARY PRINCIPLE IN INTERNATIONAL LAW: THE CHALLENGE OF IMPLEMENTATION (David Freestone and Ellen Hey, eds., 1996) 133; Ellen Hey, *The Precautionary Concept in Environmental Law and Policy: Institutionalising Caution* 4 GEORGETOWN INT'L ENVT'L L. REV. 303 (1992); HARALD HOHMANN, THE PRECAUTIONARY PRINCIPLE: INTERNATIONAL ENVIRONMENTAL LAW BETWEEN EXPLOITATION AND PROTECTION (1994); Pascale Martin-Bidou, *Le principe de précaution de droit international de l'environnement* 103 REV. GÉN. DR. INT'L PUB. 631 (1999); Owen McIntyre and Thomas Mosedale, *The Precautionary Principle as a Norm of Customary International Law* 9 J. ENVT'L L. 221 (1997); Edmund G. Primosch, *Das Vorsorgeprinzip im internationalen Umweltrecht* 51 Z.Ö.R. 227 (1996).

[132] Freestone, *supra* note 131 at 22-3; Douma, *supra* note 131 at 421.

[133] Convention for the Protection of the Marine Environment of the North-East Atlantic, *concluded* 22 September, 1992, *entered into force* 25 March 1998, 32 I.L.M. 1069 (1993) [*hereinafter* 1992 Paris Convention].

[134] Convention on the Protection of the Marine Environment of the Baltic Sea Area, *concluded* 9 April 1992, *entered into force* 17 January 2000, O.J. (C 226) 9 1993 [*hereinafter* 1992 Helsinki Convention].

1972 London Dumping Convention,[135] and has since moved beyond that field to find application in the field of fisheries conservation[136] and international law relating to genetically modified organisms.[137] Reference to precaution is made in virtually every sphere of international environmental law and policy,[138] making the principle an excellent candidate for status as a principle of customary international law.[139]

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[135] Protocol to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, *concluded* 8 November 1996, *not in force*, 36 I.L.M. 1 (1997) [*hereinafter* 1996 Protocol to the London Convention].

[136] The F.A.O. Code of Conduct, *supra* note 26, describes a precautionary approach to fisheries conservation policy. The Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, *open for signature* 4 August 1995, 34 I.L.M. 1542 (1994), *not in force* [*hereinafter* Straddling Stocks Agreement] incorporates the precautionary approach in its article 6. Finally, in a series of resolutions, the General Assembly has placed a moratorium on the use of large-scale pelagic driftnets on the high seas, justified through the application of the precautionary principle: Large-Scale Pelagic Drift-Net Fishing and its Impact on the Living Marine Resources of the World's Oceans and Seas, U.N.G.A., 79th Plenary Meeting, 46th Session, 20 December 1991, A/RES/46/215. The moratorium has been reaffirmed in a series of United Nations General Assembly Resolutions: 81st Plenary Meeting, 50th session, Agenda item 96 (c), 4 January 1996, A/RES/50/25, UN Doc.A/50/L.36 and Add.1; 77th Plenary Meeting, 51st session, 9 December 1996, A/RES/51/36; 57th Plenary Meeting, 52nd Session, 26 November 1997, A/RES/52/29; Plenary Meeting, 53rd Session, Agenda Item 38 (b), 6 January 1999, A/RES/53/33, UN Doc. A/53/L.45 and Add. 1.

[137] Protocol on Biosafety, *concluded* 15 May 2000, *not in force*, 39 I.L.M. 1027 (2000) [*hereinafter* Biosafety Protocol].

[138] It has been called "the most important new policy approach in international environmental co-operation:" Freestone, *supra* note 131 at 36.

[139] Indeed, the argument is convincingly made that it is a norm of customary international law: *see, e.g.*, James Cameron and Juli Abouchar, *The Status of the Precautionary Principle in International Law in* THE PRECAUTIONARY PRINCIPLE, *supra* note 131, 29 at 29; HOHMANN, *supra* note 131 at 12; McIntyre and Mosedale, *supra* note 131 at 235. This was also the opinion of Judge Palmer in the Nuclear Test Case II: *Request for an Examination of the Situation in accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, I.C.J. 288 (dissenting opinion of Judge Palmer) at para. 91(d). Primosch suggests that the principle may have attained the status of a general norm of public order: *supra* note 131 at 238-9. A more cautious assessment is offered by Freestone, who states that the principle may now have reached such a level of acceptance in international law that it is beginning to have an impact on concepts of due diligence and foreseeability: Freestone, *supra* note 131 at 37. Hey describes the principle as having "at least approached the status of a rule of customary international law:" *supra* note 131 at 307. *But see* John M. MacDonald, *Appreciating the Precautionary Principle as an Ethical Evolution in Ocean Management* 26 OCEAN DVMT & INT'L L. 255 at 256 (1995).

Precaution is, first and foremost, a policy and normative approach to decision-making.[140] It challenges the previously dominant paradigm in international environmental protection based on assumptions that environmental media have a certain capacity to assimilate pollutants, and that science is capable of identifying the limits of this capacity with some precision.[141] This assimilative capacity approach places a burden on proponents of environmental protection measures to justify the imposition of such measures based on scientific data demonstrating that assimilative capacity has been or is about to be exceeded, thus requiring restrictions on human activities known to have undesirable environmental effects. An assumption underlying this approach is that social goods other than environmental protection, such as resource exploitation and economic development, are to be given priority unless a clear threat to environmental integrity is established. Furthermore, environmental protection is not regarded as being an end in itself, but rather a means to protect human interests in environmental resources and natural resources generally.[142] The precautionary principle, by contrast, points to the poor state of

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[140] *See* Konrad von Moltke, *The Relationship between Policy, Science, Technology, Economics and Law in the Implementation of the Precautionary Principle in* THE PRECAUTIONARY PRINCIPLE AND INTERNATIONAL LAW, *supra* note 131, 97 at 106; Hey, *supra* note 131, particularly at 307, where she describes precaution as "a policy-making strategy involving assumptions about inter-relations between policy and the environment."

[141] Warwick Gullett, *Environmental Protection and the "Precautionary Principle": A Response to Scientific Uncertainty in Environmental Management* 14 ENVT'L & PLANNING L.J. 52 at 56 (1997); Ellen Hey, *Hard Law, Soft Law, Emerging International Environmental Law and the Ocean Disposal Options for Radioactive Waste* 40 NTHLDS INT'L ENVT'L L. REV. 405 at 441 (1993); Hey, *supra* note 131 at 305; John S. Gray, *Integrating Precautionary Scientific Methods into Decision-Making in* THE PRECAUTIONARY PRINCIPLE AND INTERNATIONAL LAW, *supra* note 131 at 133.

[142] Hey describes three phases in the regulation of ocean uses: the interference avoidance phase, the mitigation phase, and the proactive phase. In the first phase, international rules sought to facilitate ocean uses; thus, environmental protection measures that placed restrictions on such uses were relatively rare. In the second phase, as it became clear that environmental impacts could themselves interfere with ocean uses, environmental protection measures were adopted that had as their aim preventing environmental degradation serious enough to affect ocean uses. In the third phase, which is characterised by the adoption of a precautionary approach to environmental protection, the aim of

scientific understanding of the nature and function of ecosystems and of the effects of human activities upon them. It promotes a different approach to the question of risks of environmental impacts, noting that environmental protection is a goal worth pursuing even where human interests are not immediately or obviously at play. Precaution implies a new division of labour between scientists and political decision-makers. Whereas it was previously the case that political decision-makers deferred to science, awaiting proof of causal links between activities and harm before placing restrictions on the activities, the precautionary principle acknowledges that the identification of the threshold at which action becomes necessary is a matter of policy rather than science.[143] The identification of risks of environmental damage posed by human activities and the assessment of the nature and level of these risks is a matter of scientific assessment, but the question at what point risks become unacceptable, and at what point the minimisation of risks imposes excessive social and economic costs, are political matters that involve the establishment of priorities among various values and interests and the assessment of the consequences of various courses of action on interested actors.[144]

There is no single accepted definition of the precautionary principle. The version found in the Rio Declaration at Principle 15, although perhaps the best known, contains a reference to serious or irreversible damage which is not a ubiquitous feature

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environmental measures came to be the protection of the environment itself rather than the facilitation of uses: *see* Ellen Hey, *The Protection of Marine Ecosystems, Science, Technology and International Law* HAGUE Y.B. INT'L L. (1997) 69 at 70-2.

[143] *See* von Moltke, *supra* note 140 at 101.

[144] David S. Favre, *The Risk of Extinction: A Risk Analysis of the Endangered Species Act as compared to CITES* 6 N.Y.U. ENVT'L L.J. 341 (1998), *passim;* Holly Doremus, *Listing Decisions under the Endangered Species Act: Why Better Science isn't always Better Policy* 75 WASH. UNIV. L.Q. 1029 (1997), *passim*; Hey, *supra* note 131 at 310-11.

of definitions of the principle.[145] Thus, the common elements of various expressions of the principle - a baseline version - might be captured as follows: Where threats of harm to the environment exist, scientific uncertainty will not be used as a reason to postpone the taking of environmental protection measures. The use of negative terms implies that the principle does not give rise to an obligation to take environmental protection measures regardless of the state of scientific information relating to a causal link between a given activity and environmental impacts. Attempts are often made to identify a threshold for the principle's application, either through the identification of a certain type of risk[146] or level of risk,[147] or through reference to the cost-effectiveness of measures available to reduce risks.[148] An identification of this threshold in abstract terms is not possible, as the nature of risks, the availability of measures to counteract risks and the social, economic and other consequences of regulating or prohibiting activities will vary widely from one context to another, and indeed from one instance to another.

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[145] *Supra* note 24.

[146] A review of the conventions incorporating the precautionary principle indicates, however, that the identification of a risk threshold is not a fundamental element. The 1992 Paris Convention, *supra* note 133, and the 1992 Helsinki Convention, *supra* note 134, set a fairly low threshold in this respect, referring, in arts. 2(2) and 3(2), respectively, to "hazards [to] human health, harm to living resources and marine ecosystems, damage [to] amenities or interfere[nce] with other legitimate uses of the sea." The 1996 Protocol to the London Convention, *supra* note 135, refers at art. 3 simply to harm. The provision on precaution in the Straddling Stocks Agreement, *supra* note 136, art. 6(2), contains no reference to a risk threshold, stating instead the need for caution "when information is uncertain, unreliable or inadequate." Principle 15 of the Rio Declaration, *supra* note 24, which has been incorporated into art. 1 of the Biosafety Protocol, *supra* note 137, employs the higher threshold of threats of serious or irreversible damage.

[147] Referring, once again, to the above examples, the 1992 Paris Convention, *supra* note 133, employs the threshold of "reasonable grounds for concern" of harm (art. 2(2)), while the 1992 Helsinki Convention, *supra* note 134, refers to "reason to assume" environmental impacts (art. 3(2)). The Biosafety Protocol, *supra* note 137, and the F.C.C.C., *supra* note 73, refer simply to threats of environmental harm. Article 3(1) of the 1996 Protocol to the London Convention, *supra* note 135, refers to reason believe in a likelihood of harm.

Furthermore, identification of such risk thresholds is not a scientific matter, although science can assist by providing information on the basis of which such a threshold might be identified. It is rather a political matter, involving a consideration and weighing of various values and priorities. In each context, it is necessary for decision-makers to determine the nature and levels of risk that may, for a given society at a given point in time, be considered acceptable. Beyond this point, measures to reduce risk - there can be no question of its elimination - must be taken. However, even once the threshold is crossed and the precautionary principle is triggered, a series of political decisions, informed by scientific information, must be made, involving the stringency with which a potentially harmful activity should be regulated. To expect that the principle could be rendered specific enough to identify the threshold for its application is to misunderstand its vocation. The principle guides decision-making procedures; thus, it may indicate to decision-makers the manner in which the threshold of risk should be identified, for example by referring to certain considerations to be taken into account. This is the case in the context of the F.A.O. Code of Conduct and the Straddling Stocks Agreement, in which an effort has been made to describe the manner in which the precautionary approach is to be applied. However, even in such cases, the principle operates as a principle and not as a rule; that is to say, it guides decision-making processes, articulates goals and objectives, and provides a framework for the elaboration of rules.

In some contexts, a stronger version of the principle is invoked. According to this version, once a certain threshold is crossed, the proponent of an activity must

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[148] This is the approach taken in the F.C.C.C., *supra* note 77, art. 3(3): "[P]olicies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the

produce scientific evidence of its environmental safety. In the absence of such evidence, the activity will be prohibited. This approach has been taken with respect to the dumping of low-level nuclear waste at sea,[149] the utilisation of large-scale pelagic driftnets,[150] and the harvesting of whales.[151] It is, however, extremely difficult to generalise with respect to the application of the strong version of the principle. Given the stringency of the threshold that proponents of activities must meet in instances in which the strong version applies, some means of justifying foregoing the economic and other benefits flowing from the proposed activity must be presented. If the activity in question is highly hazardous, for example, or if the risks it engenders are risks of particularly serious harm, then a reversal of the burden of proof may seem acceptable. However, one may wonder whether the maritime disposal of low-level radioactive waste may be described as an ultra-hazardous activity. Clearly, other considerations come into play here. With respect to the harvesting of whales, considerations such as the very real danger of extinction and the slow rate of recovery of whale populations may be referred to. On the other hand, the application of this principle to the harvesting of food sources, particularly in the case of driftnet fishing, gives rise to serious controversy, as I will describe below.[152]

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lowest possible cost." *See* Martin-Bidou, *supra* note 131 at 638-9.

[149] A moratorium on the dumping of low-level radioactive waste pending further studies was adopted by the parties to the London Convention in 1983: International Maritime Commission home page, Background on Radioactive Wastes, revised March 25, 2001, http://www.londonconvention.org/. Dumping of materials containing other than *de minimis* levels of radioactive substances is prohibited pursuant to Annex 1, para. 3 of the 1996 Protocol to the London Convention, *supra* note 135. *See* Patricia Birnie, *Are Twentieth-Century Marine Conservation Conventions Adaptable to Twenty-First Century Goals and Principles?: Part II* 12 INT'L J. MARINE & COASTAL L. 488 at 523 (1997).

[150] *Supra* note 136.

[151] A moratorium on commercial whaling was declared by the International Whaling Commission at its 34th meeting in 1982: *Chairman's Report of the 34th Meeting of the International Whaling Commission,* REP. INT. WHAL. COMMN 34 (1983).

[152] *See* Chapter 6.

The precautionary principle is often criticised for its vagueness and generality, and in particular for the uncertainty that it creates for decision-making. As a result, proposals are often made to clarify the substance and scope of application of the principle. However, as Ellen Hey argues, the principle instils by its very nature a certain degree of uncertainty. Two types of challenges to law are identified by Hey as a result of the principle's operation: a substantive challenge, in that the principle works against the traditional legal notion of the creation of standards and the identification of thresholds between legal and illegal behaviour; and procedural challenges, in that the principle requires the continual incorporation of new information, such as scientific advances, into decision-making processes. Thus, both thresholds between permitted and prohibited or controlled behaviour and the decision-making procedures that permit identification of these thresholds are in constant motion.[153] Even once permits are issued, the precautionary principle requires that information continue to be gathered on the impacts of the permitted activities to determine whether the threshold, in virtue of which the activity was allowed to take place, should be raised, thus bringing it into the domain of controlled or prohibited activity. Thus, a faithful translation of the precautionary principle into decision-making procedures would, argues Hey, require the creation of "revocable and adjustable user rights," with attendant legal uncertainty.[154] Such levels of uncertainty strike certain commentators as unacceptable, particularly from the point of view of economic planning.[155] Nevertheless, Hey is right to argue that, in situations of

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[153] Hey, *supra* note 142 at 75 ff.

[154] *Ibid.* at 83.

[155] *See, e.g.,* James E. Hickey, Jr. And Vern R. Walker, *Refining the Precautionary Principle in International Environmental Law* 14 VA ENVT'L L.J. 423 (1995).

scientific uncertainty and evolving scientific knowledge, previously unknown risks will manifest themselves, and safeguards that were at one point considered adequate may reveal themselves to be insufficient. The economy of precaution runs counter to the continued recognition of rights to engage in activities in the face of mounting evidence of their detrimental environmental effects.

Once again it must be recalled that the precautionary principle is not a rule of law and cannot fix with certainty behavioural prescriptions and proscriptions. It is appropriate and indeed necessary to attempt to clarify the implications of the principle's application in particular settings, but even in such cases the principle is not translated into a rule of law. It can and does guide the process of formulating rules of law, and can serve as a measure against which existing or proposed rules are evaluated, but is not itself a rule. Efforts to encapsulate the principle within the four corners of a legal text might have the effect of robbing the principle of its capacity to point to innovative approaches to decision-making and the adoption of environmental protection measures.

8. CONCLUSION

The importance of the question whether principles of soft international environmental law are legally binding or not is not denied, but a discussion of the relevance of such principles to the international legal system should not begin and end with this question. If legal reasoning is conceived of as a process of practical reasoning in which these principles are employed as topics to orient problem-solving, their influence on legal discourse and thus on the legal system in general becomes evident. As suggested in the previous chapter, the effectiveness of legal rules depends on perceptions by the addressees of those rules that the rules are legitimate. This is

particularly so in the absence of obligatory, binding third-party dispute settlement. In the chapters that follow, I will seek to supplement this argument with a series of discussions regarding the manner in which principles of soft international environmental law influence legal discourse in the context of specific regimes.

CHAPTER 3: THE ANTARCTIC TREATY SYSTEM

1. INTRODUCTION

The international soft law principle of common heritage/common concern occupies a central place in discourses about the Antarctic continent and the regime responsible for its governance, the Antarctic Treaty System (A.T.S.). While consistently rejecting calls to have the common heritage/common concern principle applied to Antarctica as a formal legal rule, the parties to the Antarctic Treaty depend on central aspects of the principle in justifying their administration of the continent. The parties cannot rely on territorial sovereignty, one of the most fundamental institutions of international law, as a basis for their interest in and *de facto* authority over Antarctica. They have instead invoked the amorphous notion of the interests of mankind, and more recently the interests of the international community, to justify their governance of the continent.[1] This has meant, however, that when the parties are called to account for their activities in Antarctica, they cannot claim the prerogative of sovereign states to non-interference on the part of other members of international society, but rather must defend their record in light of a wider set of interests in Antarctica.

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[1] It is difficult to find a manner of describing the nature of the Antarctic Treaty parties' role in Antarctica. To say that they govern the continent is inaccurate in many respects. In the first place, such an assertion raises the question on what basis the parties exercise this authority. Second, non-parties to the Antarctic Treaty and other Antarctic instruments are not formally bound to respect the obligations contained in these instruments. The parties themselves refer to their 'special responsibility' over Antarctica and do not assert governing authority. Nevertheless, I choose to refer to Antarctic governance by the Treaty parties as this most accurately describes the role that those parties in fact play in Antarctica. *See* CHRISTOPHER C. JOYNER, GOVERNING THE FROZEN COMMONS: THE ANTARCTIC REGIME AND ENVIRONMENTAL

In the 1980s, the Antarctic regime faced a major crisis of legitimacy. The triggering event was the negotiation and conclusion of a convention to govern mineral resources activities on the continent,[2] which awakened fears that the Antarctic Treaty parties were positioning themselves to exploit Antarctic mineral resources to the exclusion of other states, and that Antarctica's pristine environment would be severely threatened by such activities. The parallels to the prospect of the exploitation of deep sea-bed minerals raised the cogency of the common heritage concept in the Antarctic context. The parties to the Treaty managed to weather this crisis of legitimacy by jettisoning the Minerals Convention and rushing to adopt and bring into force an environmental protocol.[3] In the process, elements of the common heritage/common concern principle were incorporated into the regime, although this language does not appear in any of the regime's legal instruments. In fact, the parties to the Antarctic Treaty were able to resist the pressure to transform the regime into a common heritage structure with international - preferably U.N. - governance only by moving the regime markedly in the direction of common heritage.

The argument that the standard rules of territorial sovereignty are somehow inadequate or inappropriate for the Antarctic context was articulated long before the development of the common heritage concept in the protracted negotiations over the Law

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PROTECTION (1998). Joyner notes that these states "in effect ... decide law and policy for the region:" *ibid.* at 98.

[2] Convention on the Regulation of Antarctic Mineral Resource Activities, *concluded* 2 June 1988, *not in force*, 17 I.L.M. 860 (1988) [*hereinafter* Minerals Convention].

[3] Protocol on Environmental Protection to the Antarctic Treaty, *concluded* 4 October 1991, *entered into force* 14 January 1998, 30 I.L.M. 1461 (1991) [*hereinafter* Madrid Protocol].

of the Sea Convention (L.O.S.C.). In ongoing debates about the fate of Antarctica, the common heritage concept is only one of a number of possible frameworks that have been mooted. In certain respects the articulation of common heritage in the L.O.S.C. has been detrimental to discussions about Antarctica, as these discussions often focus on an overly rigid concept of common heritage that is, for many reasons, inappropriate to the Antarctic context. The more vague and fluid notion of common concern of humankind, despite its not having the legal pedigree of the common heritage concept in which it is rooted, may in fact be more influential precisely because of the flexibility it affords. The unique and highly complex character of Antarctica, and of the regime that governs it, resists the application of rigid legal formulae and requires the articulation of solutions that are *sui generis*, ambivalent, and bear the stamp of a certain inevitable *ad hocery*. These solutions are nevertheless articulated with reference to certain overarching concepts, among them common heritage/common concern, that form part of the discourse that influences Antarctic governance.

The complexity of the Antarctic regime necessitates a fairly extensive discussion of its history and structure and a consideration of questions of the legal status of Antarctica, jurisdiction, and the role of third parties in the regime. Following this, the study proceeds to consider the regime's legitimacy, in which the interplay of moral and more strictly legal discourses within the regime will be drawn out. Consideration of the debate over exploitation of mineral resources in Antarctica and the subsequent adoption of the Protocol on Environmental Protection will provide the framework for this

discussion. Finally, the analysis turns more specifically to the principle of common heritage/common concern and its influence on the Antarctic regime.

2. THE LEGAL REGIME

History and Structure

The Antarctic Treaty System is a complex, multi-layered regime that was set in motion by a small group of states, including the two superpowers, at the height of the Cold War.[4] The parties to the Antarctic Treaty,[5] which was signed in 1959 and entered into force in 1961, were driven by two objectives: the avoidance of international conflict in and with respect to Antarctica; and the facilitation of scientific research.[6] Both objectives were under threat as a result of conflicting territorial claims[7] and the potential strategic significance of the continent to the two superpowers.[8] These threats were

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[4] For discussions of the negotiation and signing of the Antarctic Treaty, see Donald Rothwell, *The Antarctic Treaty: 1961-1991 and Beyond* 14 SYDNEY L. REV. 62 (1992); DONALD ROTHWELL, THE POLAR REGIONS AND THE DEVELOPMENT OF INTERNATIONAL LAW, chapter 3 (1996); JEFFREY P. MYHRE, THE ANTARCTIC TREATY SYSTEM: POLITICS, LAW AND DIPLOMACY (1986); René-Jean Dupuy, *Le traité sur l'Antarctique* 6 ANN. FRAN. DR. INT'L 111 (1960).

[5] Antarctic Treaty, *concluded* 1 December 1959, *entered into force* 23 June 1961, *reproduced in* ANTARCTICA AND INTERNATIONAL LAW: A COLLECTION OF INTER-STATE AND NATIONAL DOCUMENTS, vol. I (W.M. Bush, ed., 1982) [*hereinafter* ANTARCTICA AND INTERNATIONAL LAW] 46; http://www.antcrc.utas.edu.au/opor/Treaties/at.html.

[6] These objectives are reflected in the preamble to the Antarctic Treaty, *ibid.*, which reads, in part:

> Recognizing that it is in the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord;
>
> Recognizing the substantial contributions to scientific knowledge resulting from international cooperation in scientific investigation in Antarctica;
>
> ...
>
> Convinced also that a treaty ensuring the use of Antarctica for peaceful purposes only and the continuance of international harmony in Antarctica will further the purposes and principles embodied in the Charter of the United Nations; ...

[7] The claimant states are Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom: Rothwell, *supra* note 4 at 62.

[8] *See* Joyner, *supra* note 1 at 21 and 55.

addressed, if not resolved, in the following manner. First, a 'freeze,' as it is appropriately called, was placed on all territorial claims through the Treaty's famous Article IV.[9] Second, the continent was demilitarised[10] and denuclearised.[11] Third, cooperation in scientific research and sharing of data was provided for.[12] Governance of Antarctica is, for all intents and purposes, carried out by a group of states known as the Contracting Parties (C.P.s),[13] whose role will be described below.

The original twelve signatories to the Antarctic Treaty[14] have been joined by thirty others.[15] Although the Treaty may be acceded to by any member of the United Nations,[16]

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[9] Article 4 of the Antarctic Treaty, *supra* note 5, states:

> 1. Nothing in the present Treaty shall be interpreted as:
>
> (a) A renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;
>
> (b) A renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;
>
> (c) Prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica.
>
> 2. No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

For a discussion of the possible interpretations which may be placed on art. IV, see Rothwell, *supra* note 4 at 76; Gillian Triggs, *The Antarctic Treaty Regime: A Workable Compromise or a 'Purgatory of Ambiguity'?* 17 CASE W. RES. J. INT'L L. 195 at 199-201 (1985).

[10] Antarctic Treaty, *supra* note 5, art. I.

[11] *Ibid.*, art. V.

[12] *Ibid.*, art. III.

[13] Meetings of the C.P.s are provided for at art. IX, *ibid.* The issues which the C.P.s are to address at such meetings are set out at art. IX(1)(a)-(e) as follows: use of Antarctica for peaceful purposes; facilitation of scientific research and of international scientific cooperation; facilitation of the exercise of rights of inspection provided for at art. VII; jurisdictional questions; and preservation and conservation of living resources. The parties having a right to participate in the meetings are identified in paras. (1) and (2).

[14] The original signatories are Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, the Soviet Union, Great Britain, and the United States: *ibid.*, preamble.

[15] The acceding parties that have not acquired C.P. status are, in chronological order, Denmark, Romania, Bulgaria, Papua New Guinea, Hungary, Cuba, Greece, the Democratic People's Republic of

there are certain obstacles to states' becoming full and active members of the A.T.S.[17] The original signatories, plus fifteen of the acceding parties,[18] have the status of Consultative Parties, which means that they may participate in and vote at the Consultative Meetings,[19] the main institutional mechanism of the A.T.S. Other signatories, Canada included,[20] have not met the criteria required to accede to Consultative Party status and are therefore able to participate as observers in Consultative Meetings by invitation only.[21] A further distinction is drawn between the original C.P.s and those who have subsequently been granted this status, in that the latter group of states must maintain a certain level of activity in Antarctica or risk losing their status.[22] René-Jean Dupuy describes the original signatories as "les prévalants," those subsequently

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Korea, Austria, Canada, Colombia, Switzerland, Guatemala, the Ukraine, the Czech People's Republic, Slovakia and Turkey. *See* Rothwell, *supra* note 4 at 88-9; Joyner, *supra* note 1 at 61.

[16] Antarctic Treaty, *supra* note 5, art. XIII(1).

[17] Article IX(2), *ibid.*, provides that parties which have acceded to the Treaty

> shall be entitled to appoint representatives to participate in the [consultative] meetings ... during such time as that Contracting Party demonstrates its interest in Antarctica, by conducting substantial scientific research activity there, such as the establishment of a scientific station or the dispatch of a scientific expedition.

This requirement of "substantial scientific research activity" has the practical effect of rendering active participation in the regime difficult for many states because of the prohibitive cost of such activity. *See* S.K.N. BLAY, R.W. PIOTROWICZ AND B.M. TSAMENYI, ANTARCTICA AFTER 1991: THE LEGAL AND POLICY OPTIONS at 2 and 9 (1989); Dupuy, *supra* note 4 at 119; Bradley Lanschan and Bonnie C. Brennan, *The Common Heritage of Mankind Principle in International Law* 21 COL. J. TRANSNAT'L L. 305 at 311 (1983).

[18] These states are, in chronological order, Poland, the Federal Republic of Germany, Brazil, India, China, Uruguay, the German Democratic Republic, Italy, Spain, Sweden, Finland, the Republic of Korea, Peru, Ecuador and the Netherlands. With the reunification of Germany this number was reduced to fourteen. *See* Rothwell, *supra* note 4 at 88-9; Joyner, *supra* note 1 at 61.

[19] Antarctic Treaty, *supra* note 5, art. IX. Article IX(2) provides for participation at Consultative Meetings of parties which have attained the status of C.P.s pursuant to art. XIII.

[20] Rothwell, *supra* note 4 at 71.

[21] Revised Rules of Procedure of Antarctic Treaty Consultative Meetings, arts. 26-29, adopted as Recommendation XIII-15, *reproduced in* ANTARCTICA AND INTERNATIONAL LAW, *supra* note 5, Booklet AT3, AT22061987.3. *See also* ROTHWELL, *supra* note 4 at 91.

accorded C.P. status as "les élus," and the non-C.P.s as "les appelés."[23] Dupuy describes the former as constituting "une véritable aristocratie conventionnelle."[24] As we shall see below, the exclusivity and hierarchical nature of the Antarctic club has been a major point of contention.

Even among the members of this group, however, differences in positions render the reaching of consensus difficult. In particular, the C.P.s hold incompatible and often irreconcilable positions respecting the possibility of making claims to territorial sovereignty in Antarctica. As a result, the basic structure of the Treaty and other instruments within the A.T.S. must satisfy three groups of states: claimants, or those who assert claims to territorial sovereignty over parts of Antarctica; non-claimants, or those who do not themselves assert such claims but do not deny the possibility of doing so; and finally non-territorialists, or states that refuse to recognise the possibility of making claims to territorial sovereignty in Antarctica. The basis of the balancing of these positions is art. IV of the Antarctic Treaty. The effect of art. IV is, as noted above, to place a freeze on territorial claims over the continent. The operation of the mechanisms within public international law whereby sovereignty over territory is asserted, consolidated, recognised, denied or lost are suspended. States' activities and statements, or lack thereof, following the entry into force of the Antarctic Treaty are deprived of their

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[22] Antarctic Treaty, *supra* note 5, art. IX(2); ANTARCTICA AND INTERNATIONAL LAW, *supra* note 5, vol. 1, AT01121959C, notes to Article IX(1); ROTHWELL, *supra* note 4 at 90.

[23] Dupuy, *supra* note 4 at 119.

[24] *Ibid.* at 115.

capacity to contribute to or detract from claims to sovereignty.[25] The provision's usefulness lies not in its having resolved the conflict among the various parties - because this it has clearly not done - but rather in its creating a basis upon which parties with incompatible positions on the difficult question of Antarctic sovereignty may participate in an Antarctic regime.[26]

Gillian Triggs has coined the phrase "bifocal approach"[27] to describe art. IV, as it was designed to lend itself to different and irreconcilable interpretations by the various signatories. It is worded in such a way that it neither acknowledges nor denies the possibility of making territorial claims. In this manner, all parties are able to interpret the provision in a manner compatible with their own positions.[28] As we will see below, this bifocal approach must be replicated in the other instruments within the A.T.S., which makes it difficult to identify the basis on which the parties assert their authority to enact rules and measures and to ensure implementation of and compliance with them. Nevertheless, the bifocal approach is invaluable and likely indispensable, at least for the foreseeable future. The alternative, namely arriving at an agreement as to the status of sovereign claims in Antarctica and as to the legal basis of Antarctic governance, remains beyond the grasp of the parties to the treaty and international society more generally. The immediate threat of conflict resulting from sovereignty claims having been allayed, the

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[25] *See* Triggs, *supra* note 9 at 201; Rolph Trolle-Anderson, *The Antarctic Scene: Legal and Political Facts* in THE ANTARCTIC TREATY REGIME: LAW, ENVIRONMENT AND RESOURCES (Gillian D. Triggs, ed., 1987) 57 at 60; Dupuy, *supra* note 4 at 123. Joyner refers to this provision as "legal legerdemain:" Joyner, *supra* note 1 at 57.

[26] Joyner, *supra* note 1 at 58.

[27] Triggs, *supra* note 9 at 199.

parties are able to turn their attention to the two main objectives articulated in the Antarctic Treaty: demilitarisation and scientific research, along with the more recently identified objectives of environmental protection and resource conservation.

Legal Status of Antarctica

There are a number of legal categories that present themselves as candidates to describe the Antarctic continent. The first possibility, that the Antarctic is the sovereign territory of one or more states, has not been rejected definitively, although the likelihood of international society accepting claims to territorial sovereignty on the continent is small and growing smaller. A second, that Antarctica is *res nullius*, the property of no one and therefore available for appropriation, is equally difficult to support. Third, the continent might be described as *res communis*, a common property resource not susceptible of appropriation but available for exploitation by all. The existence of claims to parts of the continent creates obvious difficulties for this proposition. However, a greater hindrance to the acceptability of this concept in the Antarctic context is the fear of provoking a tragedy of the commons on the continent.[29] Unhindered access to Antarctica must be rejected because of the grave threat this would pose to the fragile Antarctic ecosystem. The principle of common heritage/common concern has been employed by non-parties to the Antarctic Treaty, as well as by C.P.s, although in a different manner, as an overarching normative framework for the development of rules governing activities on the continent. While the assertion that the continent is a global commons is disputed,

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[28] Triggs, *ibid.* at 200.

particularly by the claimant C.P.s, access to Antarctic resources is open to all as a result of the suspension of territorial claims.[30] A regime is therefore required to govern this access and the exploitation of those resources.[31] As Christopher Joyner states,

> As a philosophical precept, common heritage projects a legal reach farther than *res communis* by embracing the quality of being *territorium commune humanitatis*. By this concept the common heritage of mankind applies to commonly held spaces whose management, exploitation, and distribution of natural resources would be determined by the international community, rather than left to the sole discretion of individual governments, corporations, or persons. Decisions affecting allocations and exploitation of common spaces under *territorium commune humanitatis* are to be made by the international community as a whole.[32]

Finally, arguments have also been made that Antarctica is, or should be declared, a world park.[33] Movement in this direction was made by the C.P.s through the adoption of the Madrid Protocol, which declared Antarctica to be a natural reserve.[34] Rather than seek to choose among these categories, I will seek to develop an argument that

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[29] *See* Joyner, *supra* note 1 at 29.

[30] The resources of Antarctica include not only living and non-living resources such as fish and minerals, but also more intangible resources such as the opportunity to carry out scientific research and the knowledge that flows from that research: *ibid.* at 253.

[31] Joyner argues that the Antarctic already has the status of a global commons, albeit with some qualifications: *ibid.* at 53 and 258. Richard Falk moots the same position in *The Antarctic Treaty System: Are There Viable Alternatives? in* THE ANTARCTIC TREATY SYSTEM IN WORLD POLITICS (Arnfinn Jørgensen-Dahl and Willy Østreng, eds., 1991) 399 at 405. Although objections may be raised against this argument, particularly relating to the existence of sovereignty claims, I would agree that the notion of global commons most accurately describes the status of Antarctica. However, as Joyner is well aware, the unique nature of the Antarctic context cannot be forgotten, and the temptation to fit the regime into one legal category or another must be resisted in favour of remaining cognisant of the specific characteristics of the Antarctic continent and regime.

[32] Joyner, *supra* note 1 at 230.

[33] *See* Falk, *supra* note 31 at 408; Lee Kimball, *The Role of Non-Governmental Organisations in Antarctic Affairs* in THE ANTARCTIC LEGAL REGIME (Christopher C. Joyner and Sudhir K. Chopra, eds., 1988) 33 at 38; Michael T. Kyriak, *The Future of the Antarctic System: An Examination and Evaluation of the 'Common Heritage' and 'World Park' Proposals for an Alternative Antarctic Regime* 7 AUKLAND UNIV. L. REV. 105 at 120 ff. (1992); DONALD R. ROTHWELL, A WORLD PARK FOR ANTARCTICA? FOUNDATIONS, DEVELOPMENT AND THE FUTURE (1990), *passim*; Ellen S. Tenenbaum, *A World Park in Antarctica: The Common Heritage of Mankind* 10 VA ENVT'L L.J. 109 (1990).

[34] Madrid Protocol, *supra* note 3, art. 2.

demonstrates the manner in which these different concepts have nourished the Antarctic regime over time.

Third parties in Antarctica

The C.P.s do not purport to assert exclusive jurisdiction or control over Antarctica, but they have assumed *de facto* authority over and responsibility for activities on the continent. Article X of the Antarctic Treaty provides that the signatories are to employ all appropriate means to ensure that third parties respect the provisions laid out in the Treaty,[35] a provision that is repeated in the other major instruments within the regime.[36] At the least, this provision reflects an awareness on the part of the signatories that the activities of third parties in and around Antarctica could pose problems for the regime's objectives. The question whether it indicates an intention on the part of the signatories to create rights and obligations for third parties, however, is more controversial.[37] Even if such an intention could be discerned, it is highly unlikely, given

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[35] *See* Jonathan I. Charney, *The Antarctic System and Customary International Law* in INTERNATIONAL LAW FOR ANTARCTICA / DROIT INTERNATIONAL DE L'ANTARCTIQUE (Francesco Francioni and Tullio Scovazzi, eds., 1987) 55 at 68-9 [*hereinafter* INTERNATIONAL LAW FOR ANTARCTICA]; FRANCISCO ORREGO VICUÑA, ANTARCTIC MINERAL EXPLOITATION: THE EMERGING LEGAL FRAMEWORK 434 (1988); Stefan Brunner, *Article 10 of the Antarctic Treaty Revisited* in INTERNATIONAL LAW FOR ANTARCTICA, *ibid.*, 27 at 27.

[36] *See* Minerals Convention, *supra* note 2, art. 7(5) and (8); Madrid Protocol, *supra* note 3, art. 13(2) and (5); Convention on the Conservation of Antarctic Marine Living Resources, *concluded* 20 May 1980, *entered into force* 7 April 1982, 19 I.L.M. 841 (1980) [*hereinafter* C.C.A.M.L.R.].

[37] The question whether Antarctica constitutes an objective regime, that is, a set of norms applicable as against third parties, has been the object of a good deal of controversy. Indeed, the legal category of objective regime is itself controversial: *see* Bruno Simma, *The Antarctic Treaty as a Treaty providing for an Objective Regime* 19 CORNELL INT'L L.J. 189 (1986) [*hereinafter* Simma, *Objective Regime*]. Other types of arguments regarding the applicability of A.T.S. norms, or certain among them, are also made. For example, Orrego Vicuña argues that certain of the obligations set out in the Antarctic Treaty, particularly those with respect to nuclear tests and the disposal of nuclear wastes, may have come to possess binding effect on third parties. He does not invoke the Vienna Convention in support of this position, however, noting that it postdates the Antarctic Treaty and has no retroactive effect: ORREGO

the culture of contemporary international society, that third parties would regard such rights and obligations as legitimate or valid. Even so, the C.P.s have assumed an obligation to protect and further the interests of humankind in the region. A situation in which the C.P.s had no legal or practical means at their disposal to ensure that such interests were not harmed at the hands of third parties appears unacceptable. The parties may thus claim some moral justification in the eyes of international society in taking actions to prevent violations of norms respect for which is deemed to be in the interests of international society. In a sense, members of international society critical of the C.P.s cannot have it both ways. If they rely on common heritage or some related concept to evaluate actions of the C.P.s, it is difficult to deny to the C.P.s the ability to rely on the interest of international society to justify actions to ensure compliance with certain norms by third parties.

Even to the extent that norms contained within the A.T.S. are not legally opposable to third states, this certainly does not mean that they are irrelevant, or that they can be disregarded at will. These norms and the system in which they are embedded enjoy a certain degree of legitimacy in international society.[38] It is difficult to predict

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VICUÑA, *supra* note 37 at 425. *See also* Charney, *supra* note 35. For the contrary position, see Simma, *Objective Regime, ibid.*, and Bruno Simma, *Le traité Antarctique: Crée-t-il un régime objectif ou non?* in INTERNATIONAL LAW FOR ANTARCTICA, *supra* note 35, 137 at 137 [*hereinafter* Simma, *Le traité Antarctique*].

[38] The central aspects of the A.T.S., particularly demilitarisation, have widespread support in international society and, according to certain commentators, have the status of customary international law: see ORREGO VICUÑA, *supra* note 37 at 425; Patricia Birnie, *The Antarctic Regime and Third States* in ANTARCTIC CHALLENGE II: CONFLICTING INTERESTS, COOPERATION, ENVIRONMENTAL PROTECTION, ECONOMIC DEVELOPMENT (Rüdiger Wolfrum, ed., 1985) 239 at 251-2. This cannot be said, however, of the environmental protection and resource exploitation norms: *ibid.*, 433.

what consequences would flow from a serious violation of Antarctic norms, and what ramifications such a violation would have for the regime itself. However, the importance of the fact that third states are not formally bound to respect A.T.S. norms may easily be exaggerated.[39]

Jurisdiction of the C.P.s

The question of jurisdiction within the Antarctic is fundamental, as it points to the very issue whether and on what legal basis the C.P.s may assume responsibility for governance of Antarctica. As we have seen, the legal categories for territory provided by traditional international law - sovereignty, *res nullius* and *res communis* - do not provide appropriate frameworks for governance in Antarctica. In particular, no mechanisms are available within these categories for the protection of the interests of international society as a whole or the interests of future generations in the resource or territory not subject to assertions of sovereignty. Only the rights of individual states are protected, and the only obligation assumed by states relate to non-interference with access by other states. By making reference to the 'interests of mankind' in the Antarctic Treaty, the C.P.s were anticipating a category or framework that was not yet available to them as a legal justification for action. The A.T.S. was instead based on the assumption by the C.P.s of a moral obligation towards mankind "that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord." To the extent that the C.P.s acquit this obligation, members of

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[39] *See* Charney, *supra* note 35 at 76-7.

international society will likely refrain from inquiring too deeply into the uncomfortable subject of the legal basis for Antarctic governance. Furthermore, when questions are raised about the actions of the C.P.s, those parties cannot deflect the question by pointing to their legal rights but rather must be prepared to justify their behaviour in light of this moral obligation.

Although the moral argument has proven relatively successful as a basis for Antarctic governance, the question of the jurisdictional basis for action by the C.P.s continues to pose problems of a practical, legal and philosophical nature. The exercise of jurisdiction by the parties, particularly as concerns implementation and compliance, is *ratio personae*, that is, the various states exercise jurisdiction over the activities of their respective nationals on the continent. The jurisdictional provisions of the instruments within the A.T.S. replicate the bifocal approach described above. Claimants may interpret their exercise of jurisdiction over their own nationals within the territory they claim as being consonant with territorial sovereignty, while non-territorialists may rely on the absence of specific provisions regarding territorial sovereignty. The *ratio personae* principle leaves an important gap with respect to the nationals of third states. As discussed above, there is no obvious answer to this dilemma.

The awkward question of territorial claims poses a serious obstacle to the effectiveness of environmental protection measures. The parties could neither act as administrators of an international territory, as this would be unacceptable to claimant states, nor as sovereign states, as this would be unacceptable to non-territorialists. Until the conclusion of the Minerals Convention in 1988, which never entered into force, this

jurisdictional ambiguity also posed an obstacle to the creation of the sort of machinery - secretariats, commissions, committees and so on - typically established under international environmental conventions. To create an international body responsible for administering instruments on environmental protection would be to trench on the purported jurisdiction of claimant states.[40] The solution adopted in the Agreed Measures for the Conservation of Antarctic Fauna and Flora (Agreed Measures)[41] and other earlier environmental instruments was to give responsibility for implementation and compliance to national authorities, an approach that was agnostic enough to assuage the claimant states while not alienating the non-territorialists. Further difficulties were caused by the reluctance of the C.P.s to extend the application of environmental protection and resource conservation norms to the oceans,[42] thus permitting the parties to avoid a situation in

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[40] *See* JOYNER, *supra* note 1 at 119.

[41] Agreed Measures for the Conservation of Antarctic Fauna and Flora, *concluded* 2 June 1964, *entered into force* 1 November 1982, 17 U.S.T. 991, T.I.A.S. No. 6058 and 10,485 [*hereinafter* Agreed Measures].

[42] The Antarctic Treaty, *supra* note 5, states, at art. VI: "nothing in the present Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas within that area." This self-imposed limitation is reproduced at art. I(1) of the Agreed Measures, *supra* note 41, which states that "nothing in these Agreed Measures shall prejudice or in any way affect the rights, or the exercise of the rights, of any state under international law with regard to the high seas within the Treaty Area ... ." Art. I(1) of the Convention for the Conservation of Antarctic Seals, *concluded* 1 June 1972, *entered into force* 11 March 1978, 11 I.L.M. 251 (1972) [*hereinafter* Seals Convention] makes the Convention applicable to the seas south of 60°S. As Joyner notes, one of the reasons that the C.P.s decided to adopt a separate convention rather than enacting measures under the Antarctic Treaty was the unwillingness and perceived incapacity of the C.P.s to enact measures applicable to the high seas: JOYNER, *supra* note 1 at 121. For discussions of the interplay between the Antarctic Treaty Regime and the law of the sea, see Christopher C. Joyner, *The Antarctic Treaty System and the Law of the Sea - Competing Regimes in the Southern Ocean?* 10 INT'L J. MARINE & COASTAL L. 301 (1995); CHRISTOPHER C. JOYNER, ANTARCTICA AND THE LAW OF THE SEA (1992); Donald R. Rothwell, *Environmental Protection in Antarctica and the Southern Ocean: A Post-U.N.CED Perspective in* OCEANS LAW AND POLICY IN THE POST-UNCED ERA: AUSTRALIAN AND CANADIAN PERSPECTIVES (Lorne K. Kriwoken *et al.*, eds., 1996) 327; Donald D. Rothwell and Stuart Kaye, *Law of the Sea and the Polar Regions* 18 MARINE POL. 41 (1994).

which claimant states would argue that the Agreed Measures trenched on their spheres of sovereign jurisdiction.

With the adoption of the Convention on the Conservation of Antarctic Marine Living Resources (C.C.A.M.L.R.),[43] the parties began to take a less cautious approach. The area of application of the Convention extends to the Antarctic Convergence, the point at which the cold waters of the Southern Ocean encounter warmer northerly subtropical waters, a line taken to delineate biologically the Antarctic ecosystem.[44] However, the Convention is made to apply only to the marine living resources in this area, and not to the ecosystem itself.[45] A further shift in the attitude of the C.P.s is represented by the creation of institutional machinery to implement the Convention.[46] With the further development of an environmental protection regime for Antarctica, this reluctance to insert an institutional layer between the C.P.s and activities on the continent has diminished.

The Treaty as initially conceived sought to facilitate scientific research by providing for free access to all parts of the continent by the nationals of all states. The manner in which scientific research was carried out was subject to certain restrictions, particularly those geared toward environmental protection, but these restrictions were to be elaborated and applied by states to their own nationals. This is not an unusual

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[43] C.C.A.M.L.R., *supra* note 36.
[44] *See* Joyner, *supra* note 1 at 2.
[45] C.C.A.M.L.R., *supra* note 36, art. I(1).
[46] The Commission for the Conservation of Antarctic Marine Living Resources is established by art. VII of the Living Resources Convention, *ibid.*, while art. XIV establishes the Scientific Committee for the Conservation of Antarctic Marine Living Resources.

approach to international environmental regulation; on the contrary, it is commonly the case that obligations in environmental protection conventions call upon states to adopt regulations, standards, programmes or measures rather than applying directly to individuals involved in activities with potential environmental impacts. The Antarctic regime, however, has increasingly become a governance mechanism in its own right, mediated only to a limited extent by the states parties to the Treaty and other instruments. Francisco Orrego Vicuña makes the interesting, but perhaps overly ambitious, argument that the "normative link" between the international legal order in Antarctica and the individual is stronger than that between the national legal order and the individual.[47] In other words, the legal order of the state to whose jurisdiction the individual is subject does not play as strong a mediating role between international law and the activities of the individual in Antarctica as it does in other contexts. Furthermore, Orrego Vicuña argues that the international and national legal orders are integrated in the Antarctic context, such that the question is not one of determining whether a particular matter falls within the sovereign sphere of the nation-state or is left to be resolved by the international legal order. Rather, Orrego Vicuña states, the two different orders are assigned competencies on a functional basis.[48] Thus, with respect to the resources regimes in particular, states have delegated prescriptive jurisdiction to the Antarctic regime while retaining enforcement jurisdiction.[49] Furthermore, jurisdiction does not, according to Orrego

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[47] ORREGO VICUÑA, *supra* note 35 at 79.
[48] *Ibid.* at 83.
[49] *Ibid.* at 85.

Vicuña, operate the same way in Antarctica as it does in international law generally, given the prevalence of concurrent rather than mutually exclusive jurisdiction. He argues that jurisdictional issues are resolved, first and foremost, by reference to the delicate balancing of interests in the Antarctic context, rather than by reference to broad principles such as territoriality or nationality.[50] A functional approach prevails.[51] The result is that moral discourses must routinely be engaged to ensure that the processes of problem-solving along functional lines do not stray from the overarching objectives of the regime and from the interests of a wide range of actors in the outcome of such processes.

Orrego Vicuña does not argue that territorial sovereignty has been eclipsed by the international regime, but rather that it is integrated into the latter. Thus, attributes of territorial sovereignty cannot be exercised without reference to the international legal order governing Antarctica, because this order sets out various obligations and empowerments that must be taken into account. Furthermore, and of particular interest, these obligations and empowerments are relevant not only to the state but to all individuals carrying out activities on the continent. Both legal orders come into play, as jurisdiction over human activity is shared between them. Individuals are subject to both legal orders simultaneously, in much the same way that an individual in a federal state is governed by both provincial and federal governments.

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[50] *Ibid.* at 109.
[51] *See also* Dupuy, *supra* note 4 at 130.

3. LEGITIMACY OF THE ANTARCTIC REGIME

Discussions about the particular status of Antarctica and about ways in which the interests of international society or humankind in the continent might be safeguarded commenced at least as early as 1910, when Thomas Willing Balch suggested that parts of the continent be declared "common possessions of all the family of nations."[52] Some years later J.S. Reeves characterised Antarctica as *res communis*, and suggested that "its future international character might well be established by general agreement and the conservation of its resources guaranteed."[53] In 1948, the United States presented its Antarctic policy, which recommended that the continent be declared a special U.N. trusteeship, to be administered by the eight states that were at that time involved in negotiations over Antarctica's future.[54] As we have seen, events took a different turn. The U.N. did not become involved in Antarctic administration, and sovereignty over the continent was not internationalised. However, the notion that humankind has interests in Antarctica was recognised in the Treaty.[55]

For many decades it was not a difficult matter for the C.P.s to make a convincing argument that the interests of humankind were being served by their governance of the continent. Certainly the twin goals of demilitarisation and freedom of scientific research hold immense altruistic appeal, and the fact that human activities in Antarctica have

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[52] Thomas Willing Balch, *The Arctic and Antarctic Regions and the Law of Nations* 4 A.J.I.L. 265 at 275 (1910).

[53] J.S. Reeves, *George V Land* 28 A.J.I.L. 117 at 119 (1934).

[54] *See* MYHRE, *supra* note 4 at 27-8.

[55] Antarctic Treaty, *supra* note 5, preamble.

proceeded, by and large, on the basis of cooperation rather than competition or conflict[56] tends to reinforce the position that Antarctica is a place apart from the usual course of international politics. The fact that there appeared to be few tangible benefits to be reaped by individual states in Antarctica, at least prior to the minerals controversy,[57] made the C.P.s appear more altruistic. The cooperative pursuit of scientific research and the sharing of the results of that research constituted something of a victory over Cold War tensions. The C.P.s could therefore make a fairly justifiable claim that they were acting in the interests of humankind in Antarctica.[58] This claim was bolstered by the heavy investments required to establish and maintain a presence in Antarctica and the fact that the chief benefit to be reaped was a contribution to scientific knowledge, a benefit that was, in principle at least, available to all. Furthermore, because the principle of free access by nationals of all countries to all parts of Antarctica was preserved in the Antarctic Treaty, and because any member state of the United Nations could become a signatory and, eventually, a C.P., the existing C.P.s could argue that both the continent itself and the regime that governed activities on the continent were accessible.

The need for some sort of internationalised administration of Antarctic territory and affairs has, as we have seen, been apparent to many over the course of the entire century. With the rise in salience of the issue of global environmental protection, a great

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[56] ORREGO VICUNA, *supra* note 35 at 519-20.

[57] This is increasingly the case as the standard of environmental protection in Antarctica increases: Tenenbaum, *supra* note 33 at 130-1. Its designation as a nature reserve will also have an impact on the manner in which state interests in the continent are defined.

[58] *See* Francesco Francioni, *Antarctica and the Common Heritage of Mankind in* INTERNATIONAL LAW FOR ANTARCTICA, *supra* note 35, 101 at 117-8.

deal of international attention has been focused on Antarctica. This is not simply because of its relatively pristine and extremely fragile environment, but also because two of the most significant environmental issues of our day - global climate change and ozone depletion - have special significance for Antarctica.[59] The possibility of mineral resources exploitation on the continent has created fears of disruption of the Antarctic ecosystem and doubts as to the altruism of the C.P.s. Finally, the unresolved nature of the territorial claims raises the spectre of conflict among the parties and of the withdrawal of the continent from the *de facto* international status it has enjoyed. When one considers in addition the precarious nature of the C.P.s' claim to Antarctic governance, it becomes clear that attempts to apply the principle of common heritage/common concern to the continent will continue to be made, and that the principle will continue to exercise significant influence over Antarctic affairs.

For all its apparent instability, particularly with respect to its legal basis, the A.T.S. has proven quite resilient and is firmly entrenched. The most serious challenge to date to the legitimacy of the A.T.S. was issued by developing countries in the United Nations General Assembly as a result of the prospect of mineral resources development on the continent. As a result, a flurry of proposals was made from various quarters regarding possible alternative arrangements for Antarctic governance, virtually all of them either drawing inspiration from or reflecting elements of common heritage/common

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[59] The hole in the ozone layer over Antarctica attracted immense public and scientific attention, as did the hypothesis that increased temperatures at the South Pole would lead to melting of ice and thus to a rise in sea level. *See* KEITH SUTER, ANTARCTICA: PRIVATE PROPERTY OR PUBLIC HERITAGE? (1991) at 5.

concern. The response was to jettison the Minerals Convention, which was concluded in 1988 but never entered into force, and to move rapidly to draft and bring into force the Madrid Protocol. In the process, the parties have incorporated elements of common heritage/common concern to such an extent that, in the eyes of many commentators, Antarctica has effectively been transformed into a common heritage regime.[60]

The Minerals Controversy

Beginning in the early 1980s, the A.T.S. faced a crisis of legitimacy the most immediate cause of which was the opening of negotiations among the C.P.s on an agreement on mineral resource activities in the Antarctic. The controversy over the Minerals Convention took place against the backdrop of widespread changes in the culture of international society, most notably those brought about by the process of decolonisation. The newly independent states, in particular, were highly suspicious of arguments that their interests in Antarctica were being protected by a group composed primarily of industrialised nations, through processes that were not open to public scrutiny. Furthermore, many of these states were seeking to use their newfound status as full subjects of international law to introduce sweeping changes to that legal system. These actors sought to make international law more equitable and more responsive to the needs, interests and perspectives of countries of the South and of historically underprivileged states and peoples. In the wake of decolonisation, questions of justice and equity, particularly relating to relationships between North and South, figured

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[60] *See* Francioni, *supra* note 58 at 131; JOYNER, *supra* note 1 at 252; Zou Keyuan, *The Common*

prominently on the international agenda. Developing countries had gained momentum with the inclusion of the common heritage principle as a rule of law within the L.O.S.C. These factors made it more difficult for the C.P.s, a group of mainly industrialised countries, to justify their continued prevalence in Antarctica. The paternalistic argument that the C.P.s were in the best position to discern and protect the interests of international society in Antarctica, while not completely undermined, was weakened. In this overall context, the mere suggestion that the C.P.s might turn the A.T.S. to their advantage by appropriating Antarctic mineral resources was bound to attract strident criticism.

Despite the efforts of the C.P.s to assure their critics that conclusion of the convention was intended to prevent unregulated exploitation of Antarctic minerals rather than to open up the continent to mining, the issue proved extremely controversial and brought high levels of scrutiny to bear on the flaws and weaknesses of the A.T.S. The two major concerns were that the C.P.s would exploit their privileged position in Antarctica to gain access to resources to the exclusion of other parties[61] and that prospecting and mining would damage the fragile Antarctic environment.[62] As a result of these concerns, a much broader range of questions was posed regarding Antarctic governance and the role of the C.P.s, many of which attacked the foundations of the regime, thus threatening to undermine its legitimacy.

Heritage of Mankind and the Antarctic Treaty System NTLDS INT'L L. REV. 173 at 191-2 (1991).

[61] *See* ANTARCTICA AFTER 1991, *supra* note 17 at 2; Rodney R. McCollock, *Protocol on Environmental Protection to the Antarctic Treaty - The Antarctic Treaty - Antarctic Minerals Convention - Wellington Convention - Convention on the Regulation of Antarctic Mineral Resource Activities* 22 GA J. INT'L & COMP. L. 211 at 223 (1992).

[62] McCollock, *supra* note 61 at 215; Kyriak, *supra* note 33 at 119.

The signatories to the Minerals Convention sought to address these concerns in two ways: first, by attempting to take into account the interests of developing countries, and second, by establishing high standards for environmental protection that would have to be met by any proponent of minerals activities. The former effort, taking into account the interests of developing countries, reflects the approach in the L.O.S.C., wherein attempts were made to provide to developing countries access to and sharing in the benefits of resource development. The Minerals Convention addresses this task quite half-heartedly. A series of provisions calls for the encouragement of participation of developing countries in mineral activities[63] and in the activities of regulatory committees established pursuant to the Convention.[64] In addition, a provision calls for revenue surpluses to be spent, *inter alia*, on promoting the participation of developing countries in scientific research in Antarctica.[65]

The latter effort, providing for a high standard of environmental protection, is consonant with the notion of common interest/common concern that has proven particularly relevant in the context of protection of global environmental resources. The parties to the Convention demonstrated a greater concern for this issue than for that of distribution of benefits. In the context of the Minerals Convention, the expressions 'interests of mankind' and 'interests of the international community' are employed not in relation to the sharing of access to resources or the revenues derived from resource

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[63] Minerals Convention, *supra* note 2, art. 2(3)(f) and (g) and art. 6.
[64] *Ibid.*, art. 29(3)(b).
[65] *Ibid.*, art. 35(7).

exploitation. Rather, they apply to the more traditional concerns of the C.P.s, notably scientific research, as well as the issues of environmental protection and resource conservation.[66] Opinions differ as to the nature and likely impact that the adoption of this convention would have had on mineral resources activities and on environmental protection on the continent.[67] Exploitation of mineral resources in Antarctica is currently only a remote possibility, as it is not known whether resources exist in viable quantities or whether their extraction is geophysically practicable. Furthermore, there has been little commercial indication of interest in engaging in minerals activities. Nevertheless, the prospect of a small group of mostly developed states positioning themselves to expropriate the potential mineral wealth of the Antarctic continent to the exclusion of other states was met with serious and stringent objections on the part of non-governmental organisations (N.G.O.s), the United Nations, and individual states.[68] Furthermore, the possibility of mineral resources exploitation in the fragile Antarctic

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[66] The preamble to the Minerals Convention, *ibid.*, reiterates the famous preambular statement from the Antarctic Treaty, *supra* note 5, that "it is in the interest of all mankind that the Antarctic Treaty area shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord." The preamble also states that "the effective regulation of Antarctic mineral resource activities is in the interest of the international community as a whole." The interests of the international community also figure in art. 2(3)(g), addressing objectives and principles of the convention. Finally, the Commission is charged at art. 21(1)(x) with "keep[ing] under review the conduct of Antarctic mineral resource activities with a view to safeguarding the protection of the Antarctic environment in the interest of all mankind."

[67] See ROTHWELL, *supra* note 4 at 338 for a summary of these positions. *See also* I.D. Henry, *How Much Environmental Protection in the 1988 Wellington Convention? in* THE ANTARCTIC ENVIRONMENT AND INTERNATIONAL LAW (Joe Verhoeven, Philippe Sands and Maxwell Bruce, eds., 1992) 63; JOYNER, *supra* note 1 at 77-8; CHRISTOPHER C. JOYNER, CRAMRA'S LEGACY OF LEGITIMACY: PROGENITOR TO THE MADRID ENVIRONMENTAL PROTOCOL (1995); Catherine Redgwell, *Environmental Protection in Antarctica: The 1991 Protocol* 43 INT'L & COMP. L.Q. 599 at 608 (1994); ORREGO VICUÑA, *supra* note 35 at 194.

[68] *See* McCollock, *supra* note 61.

environment, regulated by a regime which has a far from unblemished record with respect to environmental protection,[69] was also cause for serious concern.

Proposals for changes to the A.T.S.

Various U.N. agencies had already begun expressing an interest in Antarctica by the mid-1970s.[70] The minerals issue attracted more such attention. In the mid-1980s, the U.N.[71] and other international organizations, including the Organization for African Unity and the Non-Aligned States,[72] had begun to criticize the Antarctic regime and to press for a certain degree of internationalisation of the regime.[73] The C.P.s resisted this pressure,

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[69] *See, e.g.,* James N. Barnes, *Legal Aspects of Environmental Protection in Antarctica in* THE ANTARCTIC LEGAL REGIME, *supra* note 33, 241 at 244-5; Laura Pineschi, *The Antarctic Treaty System and General Rules of International Environmental Law in* INTERNATIONAL LAW FOR ANTARCTICA, *supra* note 35, 187 at 211-13.

[70] In 1975, U.N.E.P. sought to become involved in Antarctica, proposing that the C.P.s and other interested governments consult with a view to drafting new treaty provisions concerning resource exploration and exploitation. The C.P.s responded to this initiative by adopting Recommendation VIII-13, summarizing their environmental protection initiatives and asserting their responsibility for Antarctic matters: ORREGO VICUÑA, *supra* note 35 at 474. In 1976-78, the Food and Agricultural Organization expressed an interest in Antarctica, particularly with respect to food resources. The C.P.s were once again capable of asserting their primary responsibility over Antarctic matters, and the F.A.O. acknowledged their authority respecting Antarctic ecosystem protection: Fernando Zegers, *The Canberra Convention: Objectives and Political Aspects of its Negotiation in* ANTARCTIC RESOURCES POLICY: SCIENTIFIC, LEGAL, AND POLITICAL ISSUES (Francisco Orrego Vicuña, ed., 1983) 149 at 152.

[71] In 1983, the pressure on the C.P.s was renewed, with Antigua, Baruda and Malaysia requesting that the question of Antarctica be placed on the agenda of the U.N. General Assembly: ORREGO VICUÑA, *supra* note 35 at 476. *See also* McCollock, *supra* note 61 at 223-4. The matter was placed on the agenda and after lengthy and contentious discussions, the General Assembly adopted a resolution requesting the Secretary-General to conduct a study of Antarctica and the Treaty System: Question of Antarctica, U.N.G.A., Res. 77, Plenary Meeting, Thirty-Eighth Session, 15 December 1983, A/RES/38/77. *See* John Warren Kindt, *A Regime for Ice-Covered Areas: The Antarctic and Issues involving Resource Exploitation and the Environment in* THE ANTARCTIC LEGAL REGIME, *supra* note 33, 187 at 189-90; ORREGO VICUÑA, *supra* note 35 at 476.

[72] Kindt, *supra* note 71 at 190; Charney, *supra* note 35 at 80.

[73] *See* JOYNER, *supra* note 1 at 236 ff.

summarizing their record with respect to Antarctic environmental and resource protection issues and asserting their primary responsibility over the continent.[74]

The Antarctic regime was able to withstand this pressure and to avoid significant internationalisation of the regime by shelving the Minerals Convention[75] and by moving quickly to adopt and bring into force the Madrid Protocol. In addition, efforts were made to render the proceedings of the C.P. meetings more accessible to non-C.P.s and N.G.O.s, to subject regime documentation to greater publicity, and to foster linkages with international organizations involved in issues relating to Antarctica.[76] Although Antarctica remains on the U.N. agenda and continues to be scrutinized from various quarters, the intensity of criticism and pressure for the regime's internationalisation has abated, particularly since the adoption of the Madrid Protocol.[77]

Environmental Record of the C.P.s

The Minerals Convention was adopted at a time when there existed no comprehensive structure for Antarctic environmental protection, and when the existing

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[74] The C.P.s objected to the inclusion of Antarctica on the agenda of the 38th meeting of the General Assembly by a letter dated October 5, 1983, from the Permanent Representative of Australia to the United Nations Secretary-General on the Question of Antarctica, U.N. Doc. A/38/439/Rev.1 (1983). They and the other Treaty parties then refused to vote on the General Assembly resolution: Kindt, *supra* note 71 at 189. The C.P.s reacted to the inclusion of the matter on the agenda of the 40th session with a statement describing the accomplishments of the Antarctic regime and noting that revision of the Treaty could destabilize the regime: ORREGO VICUÑA, *supra* note 35 at 476.

[75] The Convention, in order to enter into force, must be signed and ratified by all signatories to the Antarctic Treaty. The withdrawal of support for the convention by France and Australia therefore had the practical result of killing the convention: McCollock, *supra* note 61 at 216; Robert E. Money, Jr., *The Protocol on Environmental Protection to the Antarctic Treaty: Maintaining a Legal Regime* 7 EMORY INT'L L. REV. 163 at 177 (1993); ROTHWELL, *supra* note 4 at 335.

[76] McCollock, *supra* note 61 at 229.

instruments, organisations and processes for environmental protection and resource conservation were less than satisfactory. Environmental protection and resource conservation were not priorities for the parties at the time of the conclusion in 1959 of the Antarctic Treaty,[78] although the need for rules and standards relating to these issues soon became apparent. The provisions for environmental protection consisted of sectoral conventions on resource conservation issues and a series of decisions and recommendations on various environmental protection issues. The structure and functioning of this regime has been well-documented[79] and will not be considered in detail here. Rather, I will draw attention to critiques of the regime that adoption of the Madrid Protocol sought to address.

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[77] *See* ROTHWELL, *supra* note 4 at 107; JOYNER, *supra* note 1 at 164; Falk, *supra* note 31 at 401; W.M. BUSH, AUSTRALIA, ANTARCTICA, THE MINERALS CONVENTION AND ENVIRONMENTAL PROTECTION (1995) at 71.

[78] The Antarctic Treaty, *supra* note 5, art. X(1), authorises the C.P.s to adopt measures addressing, *inter alia*, "preservation and conservation of living resources in Antarctica."

[79] *See* Barnes, *supra* note 69 at 241; Laurence Cordonnery, *Area Protection and Management in Antarctica: A Proposed Strategy for the Implementation of Annex V of the Madrid Protocol based on Information Management* 14 ENVT'L & PLANNING L.J. 38 (1997) [*hereinafter* Cordonnery, *Area Protection*]; Laurence Cordonnery, *Environmental Protection in Antarctica: Drawing Lessons from the CCAMLR Model for the Implementation of the Madrid Protocol* 29 OCEAN DVMT & INT'L L. 125 (1998) [*hereinafter* Cordonnery, *Environmental Protection in Antarctica*]; John A. Heap, *The Role of Scientific Advice for the Decision-Making Process in the Antarctic Treaty System in* ANTARCTIC CHALLENGE III: CONFLICTING INTERESTS, COOPERATION, ENVIRONMENTAL PROTECTION, ECONOMIC DEVELOPMENT (Rüdiger Wolfrum, ed., 1987) 21; Matthew Howard, *The Convention on the Conservation of Antarctic Living Marine Resources: A Five-Year Review* 38 INT'L & COMP. L.Q. 104 (1989); JOYNER, *supra* note 1 at 66-81, 116 ff. and 147 ff.; Kindt, *supra* note 71 at 187; Rainer Lagoni, *Convention on the Conservation of Marine Living Resources: A Model for the Use of a Common Good? in* ANTARCTIC CHALLENGE: CONFLICTING INTERESTS, COOPERATION, ENVIRONMENTAL PROTECTION, ECONOMIC DEVELOPMENT (Rüdiger Wolfrum, ed., 1984) 93; McCollock, *supra* note 61 at 211; Money, *supra* note 75 at 163; Pineschi, *supra* note 69 at 187; Redgwell, *supra* note 67; Rothwell, *supra* note 42; Rothwell and Kaye, *supra* note 42; DONALD R. ROTHWELL, THE MADRID PROTOCOL AND ITS RELATIONSHIP WITH THE ANTARCTIC TREATY SYSTEM (1992); Francisco Orrego Vicuña, *The Effectiveness of the Decision-making Machinery of CCAMLR: An Assessment in* THE ANTARCTIC TREATY SYSTEM IN WORLD POLITICS, *supra* note 31, 25 at 25; Zegers, *supra* note 70.

The Protocol was preceded by a number of instruments that addressed various environmental protection issues. The first of these was the Agreed Measures for the Conservation of Antarctic Fauna and Flora,[80] adopted in 1964. This instrument is noteworthy in that it declared the area covered by the Antarctic Treaty to be a "special conservation area."[81] The parties later adopted the Convention on the Conservation of Antarctic Seals[82] and, later, the much more ambitious Convention on the Conservation of Antarctic Marine Living Resources.[83] This latter instrument is noteworthy for several reasons. It is based on an ecosystem approach, and therefore takes into account interrelationships of target with dependent species and with the broader marine environment.[84] It must be recalled that at the time this convention was adopted, there was no broad set of norms relating to Antarctic ecosystem protection in place, and this failure on the part of the C.P.s caused commentators,[85] including two C.P.s,[86] to cast doubt on their commitment to the ecosystem approach expressed in the C.C.A.M.L.R.

One significant flaw in the C.C.A.M.L.R. is its failure to adopt a precautionary approach, a problem that has been exacerbated by the attitude taken by the Commission established under the convention regarding the need for scientific evidence to justify

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[80] *Supra* note 41. This instrument has legally binding status: *see* JOYNER, *supra* note 1 at 62.

[81] Agreed Measures, *supra* note 41, preamble.

[82] Seals Convention, *supra* note 42.

[83] C.C.A.M.L.R., *supra* note 36.

[84] *Ibid.*, art. 3(b) and (c). The latter paragraph refers to "prevention of changes or minimization of the risk of changes in the marine ecosystem which are not potentially reversible over two or three decades ... with the aim of making possible the sustained conservation of Antarctic marine living resources." On the ecosystem approach within C.C.A.M.L.R., see Cordonnery, *Environmental Protection in Antarctica, supra* note 79 at 126-8.

[85] Barnes, *supra* note 79 at 264, ROTHWELL, *supra* note 4 at 130-1; Howard, *supra* note 79 at 131.

conservation measures.[87] According to one commentator's assessment, the Commission, in expecting the Scientific Committee, also created under the convention, to provide it with justificatory evidence, is avoiding its own responsibility to manage fisheries and delegating it to the Committee.[88] The Commission has begun, very gradually, to adopt precautionary quotas, notably for catches of krill,[89] and in 1993 adopted the Scientific Committee's recommendation that establishment of quotas in the face of scientific uncertainty should be guided by a precautionary approach.[90]

In addition to the conservation conventions, the C.P.s have over the years adopted a series of recommendations to address various environmental protection issues. Other instruments of note are a series of recommendations. These include the Code of Conduct for Antarctic Expeditions and Station Activities,[91] adopted in 1975; Recommendation VIII-13 on the Antarctic Environment;[92] and Recommendation IX-5 on Man's Impact on the Environment.[93] An unfortunate demonstration of the ineffectiveness of these recommendations occurred in 1979 with the construction by the French government of an

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[86] Howard, *supra* note 79 at 135. The parties were Australia and New Zealand.

[87] Cordonnery, *Environmental Protection in Antarctica, supra* note 79 at 128-9; Heap, *supra* note 79, *passim.*

[88] Heap, *supra* note 79 at 24-5.

[89] Cordonnery, *Environmental Protection in Antarctica, supra* note 79 at 129. *See also* JOYNER, *supra* note 1 at 133.

[90] Cordonnery, *Environmental Protection in Antarctica, supra* note 79 at 133, referring to Commission for the Conservation of Antarctic Marine Living Resources, *Report of the Twelfth Meeting of the Commission, Hobart, Australia, 25 October - 5 November 1993* (Hobart, 1993) 10.

[91] Code of Conduct for Antarctic Expeditions and Station Activities, *reproduced in* ANTARCTICA AND INTERNATIONAL LAW, *supra* note 5, AT09061975.22, 325; annexed to Recommendation VIII-11, entitled *Man's Impact on the Antarctic Environment*, reproduced *ibid.*, 324.

[92] Recommendation VIII-13 on the Antarctic Environment, *reproduced ibid.*, AT09061975.24, 327.

airstrip in Terre d'Adélie.[94] Each of these recommendations, in addition to the Agreed Measures, was applicable to this construction project. However, it fell to the Antarctic and Southern Oceans Coalition (A.S.O.C.), an N.G.O. active in Antarctic environmental protection matters, to notify the French government of its obligations under these instruments.[95] One commentator stated that "[t]here is no evidence that France complied with [the Code of Conduct for Antarctic Expeditions and Station Activities], nor is there much indication of compliance by other governments prior to new bases and other facilities being built."[96] In this case, an impact assessment was prepared, but it was initiated only once construction was underway[97] and was described as "naive and completely inadequate" by the French National Academy of Science.[98] Pressure from N.G.O.s, including A.S.O.C. and Greenpeace International, was instrumental in bringing the project to a temporary halt for the purposes of further study.[99] The only apparent

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[93] Recommendation IX-5 on Man's Impact on the Environment *reproduced ibid.*, 19091977.09, 353.

[94] Barnes, *supra* note 79 at 258. *See also* Pineschi, *supra* note 69 at 211-13. Joyner refers to the Terre d'Adélie incident along with two other examples of non-compliance with rules of environmental protection: the opening of the Chinese Great Wall station in 1981, the celebration of which included the release of doves (needless to say, a non-indigenous species) and particularly egregious mistreatment of penguins; and the under-reporting by Soviet fishers of fish and krill catches in the Southern Ocean. He notes, however, that these cases may be interpreted differently when the larger context of the Antarctic regime is considered. In the case of Terre d'Adélie, for example, he argues that the C.P.s opted against reacting to French violations of environmental norms in order to maintain regime cohesion. In the latter two cases, he points to more subtle forms of pressure and suasion that were brought to bear on the respective parties. *See* JOYNER, *supra* note 1 at 109-10.

[95] Barnes, *supra* note 69 at 244.

[96] *Ibid.* at 244.

[97] Pineschi, *supra* note 69 at 211.

[98] Barnes, *supra* note 69 at 258.

[99] *Ibid.* at 259.

formal action taken by other C.P.s was a request by the governments of Australia and New Zealand for information on the project.[100]

The less than satisfactory record of the C.P.s in protecting and preserving the Antarctic environment did not help the parties reassure the international community at the time of the conclusion of the Minerals Convention. The adoption of a comprehensive set of norms for Antarctic environmental protection and ecosystem management was long overdue. The C.P.s were prompted to invest heavily in this project in order to restore equilibrium to the A.T.S. following the heated debate over mineral exploitation.[101]

The Madrid Protocol

The Madrid Protocol was adopted on 4 October 1991 and entered into force on 14 January 1998. The preamble reasserts the "special responsibility" of the C.P.s "to ensure that all activities in Antarctica are consistent with the purposes and principles of the Antarctic Treaty," and to the "interests of mankind as a whole." Article 2 refers to the "comprehensive protection of the Antarctic environment and dependent and associated ecosystems" and declares Antarctica "a natural reserve, devoted to peace and science." Mineral resource activities in Antarctica are prohibited, scientific research excepted.[102] The moratorium on mineral activities is not permanent, however. The Protocol, including the minerals activity moratorium, is to be reviewed fifty years after the Protocol's entry

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[100] *Ibid.* at 259.

[101] *See* JOYNER, *supra* note 1 at 243.

[102] Madrid Protocol, *supra* note 3, art. 7. On the mining moratorium in the Madrid Protocol see generally JOYNER, *supra* note 1 at 166 ff.

into force,[103] and can be lifted through unanimous agreement of the parties.[104] There is a caveat, however; a regime for the governance of minerals activity must be in place before the moratorium can be lifted.[105]

A central feature of the Madrid Protocol, of particular interest from the point of view of common heritage, is the designation of Antarctica as a "natural reserve, devoted to peace and science."[106] With mineral resource activities off the agenda for the medium term and the continent declared a natural reserve, the regime clearly has moved in the direction of common heritage. In fact, the embrace by the C.P.s of significant elements of the common heritage/common concern principle may have obviated the perceived need radically to restructure the regime. If the C.P.s can demonstrate to international society that they are doing an acceptable job of protecting the Antarctic environment, and in supporting their argument that they remain in the best position to assume responsibility for Antarctic governance, they may succeed in taking the wind out of the sails of those pressing for the internationalisation of the regime. The capacity of common heritage/common concern in its incarnation as a moral principle to influence the Antarctic regime permitted that principle to succeed where the more rigid, formulaic legal principle of common heritage has failed.

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[103] Madrid Protocol, *supra* note 3, art. 25(5)(a).

[104] *Ibid.*, art., 25(1), referring to Antarctic Treaty, *supra* note 5, art. XII(1)(a) and (b). Art. XII(1)(a) requires unanimous agreement of the C.P.s.

[105] Madrid Protocol, *supra* note 3, art. 25(5)(a). On the subject of the mineral activity moratorium see ROTHWELL, *supra* note 79 at 17-18.

This caveat could be met through the revival of the Minerals Convention, *supra* note 2, which could be accomplished by the accession to and ratification of this convention by the remaining C.P.s.

[106] Madrid Protocol, *supra* note 3, art. 2.

4. THE FUTURE OF COMMON HERITAGE IN THE A.T.S.

As Joyner has remarked, it is paradoxical that the C.P.s have been able, thus far, to deflect pressure to have the continent declared the common heritage of mankind by demonstrating to international society the extent to which it is already treated as such.[107] The legitimacy of the Antarctic regime depends, to a great extent, on the ability of the C.P.s to demonstrate that it is the interests of international society, rather than their own particular interests, that drive Antarctic governance. In this manner, the principle of common heritage/common concern exercises enormous influence within the regime and over Antarctic discourse taking place within international society. Its normative power cannot be gainsaid, and its absence of formal status within the legal regime, although not meaningless, is of relatively little importance. The influence of common heritage/common concern manifests itself in various ways. As Rüdiger Wolfrum argues, general principles such as the common heritage of mankind (C.H.M.) constitute representations of interests and expectations of the addressees of international law.[108] In any legal system, but perhaps more emphatically in a decentralised legal system such as international law, interests and expectations are not merely of practical or political but also of normative importance. In the course of the justificatory discourses that the C.P.s are continually compelled to engage in, their ability to persuade members of international society that their governance is in line with and responds to interests and expectations within that society is crucial to the regime's legitimacy and thereby its effectiveness.

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[107] JOYNER, *supra* note 1 at 252.

The two most obvious obstacles to the application of C.H.M. to Antarctica are the existing claims to territorial sovereignty and the existence of a well-developed, stable regime, which, despite its uncertain legal status, is firmly entrenched. An explicit incorporation of common heritage in the Antarctic regime would mean that sovereignty claims would have to be abandoned and future claims declared inadmissible, as well as that the current regime of governance by the C.P.s would be replaced by an internationalised regime. One of the most immediate practical difficulties with such an approach would be its destabilizing effect on the existing regime.[109] Such disruption might well outweigh the benefits to be derived by the internationalisation of the regime and the importation of the common heritage principle. However, a more immediate obstacle is that posed by resistance on the part of the C.P.s to the application of common heritage in Antarctica. Any such application, therefore, would have to be accomplished through a parallel regime, one that excludes the parties with the greatest interest and involvement in the continent.

The practical obstacles to the application of the common heritage principle to Antarctic governance exist alongside the fact that the regime is normatively entrenched in the international legal system. This entrenchment can be explained, in part, by the fact that the regime enjoys a significant measure of legitimacy in international society. It is true that the regime has been subject to regular, pointed criticism since the initiation of

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[108] Rüdiger Wolfrum, *The Use of Antarctic Non-Living Resources: The Search for a Trustee? in* ANTARCTIC CHALLENGE, *supra* note 79, 147.

[109] *See* Falk, *supra* note 31 at 407.

negotiations toward the minerals convention, but, as certain commentators have observed, this criticism may not have been as fundamental as it appeared.[110] There has always been considerable support for the initial goals of the Treaty, and an acknowledgment that, in many important respects, the regime not only has been successful on its own terms, but also has been of some advantage to the wider international society.[111] Rainer Lagoni argues that a certain artificiality exists in the premise that the C.P.s act in the interests of mankind in their governance of Antarctica.[112] However, the amount of international attention paid to Antarctica over the last two decades, coupled with the response of the C.P.s to criticism of the regime, suggest that this is not entirely accurate. It is open to the C.P.s to act in an overtly self-interested way with respect to Antarctica only as long as the interests of the C.P.s coincide more or less with those of other actors concerned about Antarctica. When such is the case, concerns about the regime's legitimacy are not likely to be high on the international agenda. On the other hand, when non-C.P.s and other actors begin to see a divergence between the interests of the C.P.s and other interests - which is precisely what occurred with respect to the minerals issue - the C.P.s must adapt both their rhetoric and their approach to governance accordingly.

Whether or not the C.P.s are prepared to accept the designation of Antarctica as the common heritage of mankind, reference in the Antarctic Treaty to the interests of mankind and of the international community have fostered certain expectations among

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[110] Charney, *supra* note 35 at 82-3; Brunner, *supra* note 35 at 49-50; Wolfrum, *supra* note 108 at 161.

[111] *See* JOYNER, *supra* note 1 at 21.

other members of international society. As events demonstrated, one such expectation was that the parties would not seek to appropriate the benefits of the continent to the exclusion of others. Another was that the activities of the C.P.s on the continent would not be such as to render the continent of no benefit to others, in particular through environmental degradation.

The controversy surrounding the possibility of mineral resources exploitation on and around the continent was generated in part by concern among non-party states that they would be excluded from access to those resources. However, it is unlikely that the Antarctic regime would have become as significant an issue as it did were it not for the threats to international expectations and common understandings posed by the prospect of mineral resource exploitation by the C.P.s. The impact of decolonisation on the culture of international law, and the availability of the common heritage principle as a vehicle for non-parties to articulate their interests in Antarctica, provided a set of normative frameworks through which the Antarctic regime could be challenged.

Common heritage/common concern has proven to be a powerful principle in the Antarctic context, in large part because it is capable of expressing in a unified, coherent manner the wide range of concerns which third states have about Antarctic governance by the C.P.s. Springing from the discourse in the 1970s surrounding the N.I.E.O., common heritage reflects the North-South dynamic that became a fundamental aspect of Antarctic affairs, while also consonant with democratic principles of particular significance to

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[112] Lagoni, *supra* note 79 at 106-7.

newly independent states. That the issue concerns resource exploitation in a region wherein territorial claims are of questionable validity means that significant overlap exists with the issue of deep sea-bed minerals. The principle has also proven well-suited to issues of environmental protection in global commons areas, making it relevant to the Antarctic continent in terms of resource management and environmental protection.

The impact of the postcolonial environment generally, and pressure from newly independent states more particularly, appears in the rhetoric of the C.P.s in their seeking to justify the existence and continued viability of the Antarctic regime. Attention has been drawn repeatedly to the fact that any member of the United Nations is capable of becoming a party to the Antarctic Treaty, and to the presence of a small number of developing countries within the group of C.P.s. The record of the Antarctic regime in maintaining peace and security in Antarctica, fostering scientific research, and protecting the environment is presented as evidence that the C.P.s are acting in the interests of humankind in their governance of Antarctica. In the event, however, that the Antarctic environment should come under serious threat, either as a result of the activities of the C.P.s or from some other source, the attention of international society will certainly be drawn back to the viability of the Antarctic regime.[113]

With respect to substantive issues, countries not party to the treaty, particularly developing countries, were initially concerned with the inequitable nature of possible expropriation by the C.P.s of the mineral wealth of Antarctica, for the latters' benefit, and

to the exclusion of other parties. Not only are territorial claims in Antarctica contested, but there is a strong line of argument stretching back to at least the beginning of the century that Antarctica is not subject to claims of territorial sovereignty and is a *res* in international society.[114] While arguments are made that the C.P.s hold primary responsibility for the governance of Antarctic affairs, the C.P.s have never suggested - and international society has never accepted - that they should assert exclusive or even partial ownership over the resources of the continent. This is emphatically the case with respect to non-renewable resources.

However, in the 1980s, the debate began to focus less on the issue of distribution of Antarctic resources and more on the more fundamental question of the appropriateness of mineral resource activities in Antarctica. The fragile Antarctic ecosystem would require stringent protection if resource exploitation were to go ahead, and, as noted above, the C.P.s had given international society cause for concern about their capacity to implement and enforce the necessary high environmental standards. Many argued that, particularly in light of uncertainty over the environmental impact of resource exploitation, no such exploitation should go forward at all.[115] Largely as a result of pressure from non-governmental organizations, the issue of environmental protection came to eclipse the issue of equitable distribution of benefits, and has since become the predominant Antarctic issue.

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[113] Keith Brennan, *Criteria for Access to the Resources of Antarctica: Alternatives, Procedures and Experience Applicable in* ANTARCTIC RESOURCES POLICY, *supra* note 70, 217 at 225.

[114] Balch, *supra* note 52; Reeves, Tenenbaum, *supra* note 33.

Protection of the environment proved to be critical as an issue for the Antarctic regime. The pristine condition of Antarctica's environment, the fragility of its ecosystem, and the significance of environmental quality to scientific research on the continent made environmental protection an issue of immense practical importance. The C.P.s had to deal very carefully with this issue, since the legitimacy of the Antarctic regime had always depended and continues to depend heavily on the altruistic appeal of the C.P.s' activities on the continent. The argument that the C.P.s must be permitted to govern the continent without undue interference from third parties or international organizations may be provisionally accepted as long as the C.P.s can make out a plausible case that such governance is in the interests of international society or humanity as a whole. The prospect of the C.P.s' employing their positions in Antarctica to exploit the continent's resources to the exclusion of other states undermines such a case.

It must be recalled that the Minerals Convention sought to regulate any mineral resources activities primarily for the purpose of environmental protection. The convention was adopted, according to the C.P.s, as a precautionary measure to ensure that eventual resource activities would not cause undue harm to the environment. International hostility toward the Minerals Convention appears to have been based on a simple misunderstanding of its objectives and an inadequate knowledge of its provisions. However, given the questionable propriety of any and all mineral resources activities on the continent, and given the undeniable advantage that the C.P.s would have in gaining

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[115] The Antarctic and Southern Ocean Coalition, Greenpeace International and the Fondation

access to resources, the adoption of the minerals convention was more than a public relations blunder. It upset the delicate balance struck through processes of external accommodation, and it did so because it prompted serious questions about the appropriateness of continuing to leave the protection of the interest of humankind in Antarctica in the hands of the C.P.s.

The difficulty which the C.P.s faced in justifying their governance of Antarctica may be expressed in the following manner. With the advent of the common heritage principle, an alternative framework for Antarctic governance presented itself.[116] This framework possessed a certain amount of credibility, having been employed in two other international conventions.[117] Although it posed immense practical difficulties in terms of adaptation to and implementation in the Antarctic context, common heritage had the advantage of appealing to democratic, egalitarian principles and thus fostered a strong claim to legitimacy. It had, therefore, to be taken seriously by the C.P.s.

Given the consistent refusal of the C.P.s to incorporate the common heritage principle into the A.T.S., this principle cannot be described as a rule of law validly applicable in Antarctica. The sources of its influence on the regime must therefore be explained in another manner. Common heritage may be regarded as a topic, which stands

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Cousteau are opposed to mineral resources activities in Antarctica: McCollock, *supra* note 61 at 215.

[116] *See* Triggs, *supra* note 9 at 223.

[117] Treaty on Principles Governing the Activities of States in the Exploration and the Use of Outer Space, including the Moon and Other Celestial Bodies, *concluded* 27 January 1967, *entered into force* 10 October 1967, 610 U.N.T.S. 205; Agreement governing the Activities of States on the Moon and Other Celestial Bodies, *concluded* January 27 1967, *entered into force* October 10 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205; United Nations Convention on the Law of the Sea, *open for signature* 10 December 1982,

in opposition to the various topics comprising the Antarctic regime. The C.P.s, when subjected to challenges from third states, international organizations and N.G.O.s, present, to borrow the words of Friedrich Kratochwil, a particular reading of the legal landscape.[118] They refer to the now-familiar arguments regarding their long-standing interest and involvement in Antarctic affairs, their proven capacity to enact and enforce environmental obligations, the benefits which their governance of Antarctica has provided to international society and humankind, the threats to the stability of the regime and to the interests of international society which internationalisation would pose, and so on. Those challenging the regime may begin by criticising elements of the existing regime, including its undemocratic nature, the inadequacy of existing environmental protection measures and doubts regarding the ability of the C.P.s to improve these measures, or the appropriateness of specific decisions made by the C.P.s. They may then present the relative merits of an internationalised regime based on the common heritage principle. The C.P.s may respond by arguing that, for various reasons, this option is unfeasible or inappropriate. However, it is not possible for the C.P.s simply to assert that the existing treaty and related instruments represent a regime valid in law whereas the common heritage has no legal application in Antarctica. They may well raise such an argument, but, in a decentralized system where, as Wolfrum has noted, the interests and

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entered into force 16 November 1994, U.N.T.S. 31363 [*hereinafter* L.O.S.C.], arts. 1 1. (1), defining the Area, and 136, on the common heritage of mankind.

[118] Friedrich Kratochwil, *Of Law and Human Action: A Jurisprudential Plea for a World Order Perspective in* INTERNATIONAL LEGAL STUDIES IN INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE (Richard Falk, Friedrich Kratochwil and Saul H. Mendlovitz, eds., 1985) 639 at 643.

expectations of the various actors are of particular importance,[119] they must go further and convince other participants in that system of the validity of the argument.

Another implication of the decentralized nature of the international legal system is the absence of a central decision-maker capable of issuing an authoritative resolution to the conflict. As a result, the process of discourse through which opposing topics are presented and the respective parties seek to demonstrate the overriding applicability of their own reading of the legal landscape continues until the parties reach a mutually acceptable solution, or until discursive processes are abandoned in favour of other processes such as bargaining or the use of force. It is to be expected that, to the extent that discourse continues, the parties will continually revise their respective positions to take into account particularly forceful arguments made by the other side or to accommodate changes in the broader context of debate. This is precisely what has happened in the Antarctic context. The most telling example is the abandonment of the minerals convention and the turn to the Madrid Protocol, but also of interest are the various efforts toward greater openness and accessibility to non-parties, including international organisations, of the processes of Antarctic governance.[120] Pressure on the regime has eased considerably since the adoption of the Madrid Protocol, but it should be

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[119] Wolfrum, *supra* note 108 at 147.

[120] Article XXIII(3) C.C.A.M.L.R., *supra* note 36 provides for cooperation between the Commission and Scientific Committee, on the one hand, and international governmental and non-governmental organizations, on the other. Article XXIII(4) *ibid.* makes possible invitations to such organizations to send observers to meetings of the Commission and Committee. Informal arrangements exist with international organizations: Howard, *supra* note 79 at 122. Article 11(4) of the Madrid Protocol, *supra* note 3 provides for invitations to "scientific, environmental and technical organisations which can

noted that the regime itself has undergone significant changes. Several commentators have opined for an explicit incorporation of common heritage into the existing regime.[121] As Jonathan Charney has noted, such an incorporation might answer the most serious objections of non-C.P.s and other critics of the existing regime.[122] However, the result would be a greater internationalisation of Antarctic governance,[123] something that is certain to have significant ongoing repercussions on the regime.

One such repercussion concerns the continued viability of sovereignty claims in Antarctica. Article IV of the Antarctic Treaty, as discussed above, was intended to suspend these claims, such that, once the provision ceased to apply, the states would take up their claims, in essence, where they left off in 1959. However, it need hardly be emphasised that the intervening decades of international cooperation and of governance under the regime have had a significant impact on the status of these claims. More specifically, the legitimacy of claims to sovereign territory has been, to some extent at least, undermined. Triggs has argued that the current structures and processes of governance in Antarctica have resulted in a "chipping away" of the traditional attributes of sovereignty.[124] Although the C.P.s have been careful, with the adoption of each new instrument for Antarctic governance, to respect the Antarctic Treaty and in particular its

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contribute to [the Committee's] work" to participate in meetings of the Committee as observers. A.S.O.C. has been granted observer status at committee meetings: McCollock, *supra* note 61 at 229.

[121] *See, e.g.,* Tenenbaum, *supra* note 33 at 130-1; Wolfrum, *supra* note 108 at 145-6; Simma, *Objective Regime, supra* note 37 at 208; Francioni, *supra* note 58 at 135-6; Kindt, *supra* note 71 at 208; Kyriak, *supra* note 62 at 122-3.

[122] Charney, *supra* note 35 at 82, 89.

[123] Tenenbaum argues that Antarctic governance is experiencing a progressive internationalization: *supra* note 33 at 111.

art. IV, Triggs states that the Antarctic regime as a whole is greater than the sum of its parts.[125] The claimant states may, by pointing to each of the instruments, demonstrate that they have consistently reaffirmed their right to make sovereign claims; however, when these instruments, along with the more informal practices and usages which make up the Antarctic regime, are considered as a whole, it cannot be said that the claimants have succeeded in preserving intact their capacity to claim territorial sovereignty.

The Antarctic regime is not altogether incompatible with territorial sovereignty, but this sovereignty is attenuated, largely by the operation of the international regime. In addition, the expectations of the various actors implicated in the regime, including non-parties and international organizations that have demonstrated a high degree of interest in Antarctic governance, have an impact on the capacity of states to put forward territorial claims. As we have seen, the Antarctic regime came under an immense degree of pressure from various quarters in international society over the issue of mineral exploitation, pressure that brought its legitimacy into question. Only with the adoption of the Madrid Protocol were the C.P.s able to quiet this criticism. Any attempt to reinvigorate territorial claims would be highly controversial, to say the least. The pressure from international society has been for movement in the opposite direction, that is, toward a greater internationalisation of the regime. The high degree of legitimacy enjoyed by the common heritage concept, and the extent to which it has influenced the

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[124] Triggs, *supra* note 9 at 227.
[125] *Ibid.* at 227.

C.P.s' approach to Antarctic governance, would mitigate against the success of such claims.

5. CONCLUSION

The Antarctic regime has, since its inception, been a unique and somewhat anomalous entity. Its fit within the major institutions of international law, including the cornerstone of state territorial sovereignty, is awkward at best, and as such it serves to draw attention to many major weaknesses and limitations of the international legal system. It very much depends on legal discourses to give it meaning and to permit its continued existence and operation. These discourses draw heavily, as do legal discourses generally, on other normative discourses, but they do so here in a more obvious way than is usually the case. The dependence of the Antarctic regime on the success of appeals to moral frameworks shared, or at least comprehended, by other members of international society is a significant feature of that regime. As a result, the regime is particularly instructive as an example of the role and function of principles of soft international law. The uncertain legal status of the regime and the threat to its effectiveness posed by potential non-compliance by third parties contribute to a situation in which the C.P.s rely on their capacity validly to claim responsibility for Antarctic governance. The fact that the parties themselves make reference to the interests of mankind in justifying their governance further contributes to this reliance.

CHAPTER 4: THE CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES

1. INTRODUCTION

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (C.I.T.E.S.)[1] provides an excellent case study of international legal discourse and decision-making in the absence of consensus on fundamental principles concerning the objectives of collective action and the values informing those objectives. It has been observed that C.I.T.E.S. reflects a fundamental tension between competing principles of preservation - the protection of fauna and flora based on its intrinsic value - and conservation - providing a level of protection consistent with sustainable use of specimens by humans.[2] The debates within the C.I.T.E.S. regime over both broad principles and specific regulatory and policy issues have reproduced on a smaller scale many of the debates over sustainable development more generally, and have thrown into relief questions relating to the perspectives of North and South on environment and development. Although the parties have enjoyed some success in developing policy and legal responses to the problem of international trade in endangered species and to the

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[1] *Concluded* 3 March 1973, *entered into force* 1 July 1975, 12 I.L.M. 1085 (1973); text as amended in 1979, 1983; 1995: http://www.CITES.org/CITES/eng/index.shtml (*hereinafter* C.I.T.E.S.).

[2] Catharine L. Kreips, *Sustainable Use of Endangered Species under CITES: Is it a Sustainable Alternative?* UNIV. PENN. J. INT'L ECON. L. 461 at 468-9 (1996). *See also* John L. Garrison, *The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Debate over Sustainable Use* 12 PACE ENVT'L L. REV. 301 at 305 (1994). Preservation is reflected in the first paragraph of the preamble: "Recognizing that wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come," while a conservationist mentality is reflected in the paragraph immediately following:

problems that regulation of such trade entails, it is difficult to argue that they have done so on the basis of a convergence of either values or interests in the course of interaction and dialogue. They have instead depended on practical reason to develop solutions to particular problems. These processes of practical reasoning have been informed both by the normative framework of the convention and by general norms of soft international law; however, the development of solutions to common problems has not depended either on a general convergence of values or on agreement with basic principles from which specific solutions proceed. While the working out of solutions clearly depends heavily on *ad hoc* decisions, compromises and horse-trading, this process also involved principled, reasoned argument and efforts to reach consensus through persuasion rather than bargaining.

The C.I.T.E.S. regime presents an interesting study of the translation of the aspirational concept of sustainable development into legal obligations, and constitutes an interesting example of the manner in which the influence of the precautionary principle may be limited, despite the high degree of consensus it has attracted. The convention makes no reference to the precautionary principle, which made its way into the legal regime with the adoption in 1994 of a resolution of the parties.[3] However, the principle does not enjoy the status of a defining concept in this regime, as it does in the straddling stocks regime. The parties seem to have taken care to circumscribe precaution's influence and to define the terms on which it would be incorporated into the regime.

"Conscious of the ever-growing value of wild fauna and flora from aesthetic, scientific, cultural,

Despite its somewhat diminished role in the legal regime, precaution's influence may more readily be seen in discourses on the development of legal rules and approaches. Those seeking to argue against the adoption of a robust precautionary approach in the context of the C.I.T.E.S. regime must be prepared to justify their stance in terms that are consistent with concern for the environment and for conservation of species. Such arguments have met with a fair degree of success in the C.I.T.E.S. regime but, as is the case in Antarctica, the price to be paid for limiting the influence of the soft law principle seems to be a demonstration that the approach taken is consonant with the broad objectives for which the principle stands. Even to the extent that the principle is excluded or its inclusion in the regime limited, its influence on the development of legal rules can nevertheless be felt.

One factor explaining the limited role of precaution in the C.I.T.E.S. regime as it has evolved over the years is the dynamic between North and South. Numerous species, both of fauna and flora, either benefit from protection under C.I.T.E.S. or have come under the scrutiny of the regime; moreover, several of these species are located in industrialised countries of the North. Nevertheless, much of the work of the regime focuses, arguably to a disproportionate extent, on species in Africa and Asia, including elephant, crocodile, rhinoceros and tiger populations. In particular, the elephant in particular has become, literally[4] and figuratively, a symbol of international conservation efforts. The debate over protection of the African elephant has had a significant, perhaps

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recreational and economic points of view:" C.I.T.E.S., *supra* note 1.

determinative effect on the regime more generally, and as a result has implications for the protection of other species under the convention. For this reason, this chapter will examine the evolution of C.I.T.E.S. by way of a discussion of the regime's approach to the conservation of the African elephant.

2. THE LEGAL REGIME

C.I.T.E.S. was signed in March 1973 following a decade-long collaborative effort between the International Union for Conservation of Nature and Natural Resources (I.U.C.N.) and the United Nations Environment Programme (U.N.E.P.).[5] C.I.T.E.S. is not a broad conservation convention, but rather focuses on one source of threat to wild fauna and flora, namely international trade.[6] The objectives to be achieved through regulation of international trade in endangered or threatened species are not clearly identified in the convention. As noted above, the preamble to C.I.T.E.S. makes reference both to the intrinsic value of wild fauna and flora and to their use value for humans, thus incorporating both conservationist and preservationist philosophies. The convention includes three appendices containing, respectively, "all species threatened with extinction which are or may be affected by trade" (Appendix I);[7] species not currently threatened with extinction but which may become so in the absence of trade regulations, as well as

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[3] *See infra* at 219.

[4] The C.I.T.E.S. Secretariat logo is a stylized elephant.

[5] *See* Philippe J. Sands and Albert P. Bedecarre, *Convention on International Trade in Endangered Species: The Role of Public Interest Non-Governmental Organisation in Ensuring the Effective Enforcement of the Ivory Ban* 17 B.C. ENVT'L AFF'S L. REV. 799 at 800 (1990). *See also* Laura H. Kosloff and Mark C. Tessler, *The Convention on International Trade in Endangered Species: Enforcement Theory and Practice in the United States* 5 BOSTON UNIV. L.J. 327 (1987).

look-alike species that must be protected in order effectively to protect those endangered by trade (Appendix II);[8] and species subject to domestic protection by individual signatories and for whose protection the cooperation of other parties is required (Appendix III).[9] The regulation of trade in specimens of these species or parts thereof is carried out through the issuance of export,[10] import[11] and re-export[12] permits, access to which depends on approval by scientific[13] and management authorities[14] appointed by the state parties.[15]

The protection regime created by C.I.T.E.S. is subject to important limitations. The convention contains no reference to habitat protection, the creation of protected areas, the regulation of hunting, capture or killing, or the domestic consumption of

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[6] Kosloff and Tessler argue that an international convention on habitat destruction was deemed to impinge too much on domestic jurisdiction: *supra* note 5 at 337.

[7] C.I.T.E.S., *supra* note 1, art. II(1).

[8] *Ibid.*, art. II(2).

[9] *Ibid.*, art. II(3).

[10] *Ibid.*, arts. III(2), IV(2) and V(2).

[11] *Ibid.*, arts. III(3) and IV(4).

[12] *Ibid.*, arts. III(4) and IV(5).

[13] With respect to the export or import of Appendix I specimens, the Scientific Authority must conclude that the trading of the specimen will not be detrimental to the survival of the species: *ibid.*, art. III(2)(a) and III(3)(a); for the issuance of an import permit for a live specimen, the Scientific Authority must further determine that the recipient is equipped to house and care for it: *ibid.*, art. III(3)(b). Similarly, the Scientific Authority must assess the threat to the survival of an Appendix II species posed by the export of a specimen: *ibid.*, art. IV(2)(a). He or she must also monitor the issuance of export permits for Appendix II species and their actual export and, where necessary, advise the Managing Authority of measures necessary to limit the granting of export permits: *ibid.*, art. IV(3). The Scientific Authority is also charged with ensuring that the introduction of specimens of Appendix I and II species from the sea will not be detrimental to the survival of that species: *ibid.*, arts. III(5)(a) and IV(6)(a).

[14] The responsibilities of the Management Authority vary according to the species and type of permit in question. He or she must, depending on the situation, ensure that the specimen was not obtained in contravention of domestic law (*ibid.*, arts. III(2)(b), IV(2)(b) and V(2)(a)); that a live specimen will be transported and housed in an appropriate manner (*ibid.*, arts. III(2)(c), III(4)(b), III(5)(b), IV(2)(c), IV(5)(b). IV(6)(b) and V(2)(b)); that an import permit has been granted (*ibid.*, art. III(2)(d) and III(4)(c)); that provisions of the Convention are not contravened (*ibid.*, arts. III(4)(a), IV(5)(a) and V(2)(a)) and that the specimen is not to be used for primarily commercial purposes (*ibid.*, arts. III(3)(c), III(5)(c) and V(4)).

endangered or threatened species. Furthermore, it does not ban outright trade in endangered or threatened species, but rather seeks to control and restrict it. In addition, the convention contains a series of exemptions, including those respecting specimens obtained prior to the convention's entry into force;[16] specimens bred in captivity;[17] and certain specimens used for scientific and research purposes.[18] It is also possible for parties to enter reservations against the listing of species in the appendices.[19] In short, the convention provides for a limited number and variety of legal and policy instruments for the protection of endangered and threatened species, and leaves the parties with broad discretion as to how these instruments are to be deployed. Furthermore, as we shall see below, the regulation of international trade constitutes a rather blunt instrument with which to extend protection to wild natural resources, as it may, in different contexts, prove to be either over- or under-inclusive. The convention nevertheless provides the basis for an extensive web of political, legal and administrative activity at the international and domestic levels. When the involvement of N.G.O.s such as I.U.C.N. is taken into account, the extent of this activity is even greater. The parties have made extensive use of the provision for resolutions and decisions to develop regimes within the regime addressing the monitoring of illegal trade, ranching and domestic breeding of endangered species, and, as will be discussed in greater detail below, the regulation of

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[15] *Ibid.*, art. IX.

[16] *Ibid.*, art. VII(2).

[17] *Ibid.*, art. VII(4). Appendix I specimens bred in captivity for commercial purposes are deemed to be Appendix II specimens and as such are subject to less strict controls.

[18] *Ibid.*, art. 6.

[19] *Ibid.*, art. XXIII.

trade in elephant hunting trophies, meat, hides and ivory. Through the development of these soft law instruments, the parties have been able to broaden the scope of the regime, both in terms of subject-matter and jurisdictional reach, and have, as a result, made the instruments available to them under the convention more flexible. This, as I will argue below, has rendered the regime more equitable, because more responsive to the specific needs and interests of parties, and more effective as a means of protecting endangered species, because more adaptable to the features of particular situations and contexts.

3. THE LISTING OF SPECIES: SCIENCE, POLITICS AND PRECAUTION

One of the most important lacunae in the convention is the absence of a specific procedure or set of criteria by which to make a determination whether a species is threatened with extinction or is endangered. The parties have since provided themselves with instruments to guide the decision-making process. Listing decisions involve extensive debate in which scientific data on population levels, rates of decline, sources of threat and so on play a crucial but not determining part. The decisions are inevitably highly political and therefore controversial, and depend for their authoritativeness on the capacity of the parties to justify their positions and convince others of their correctness or reasonableness. They depend as well on the ability of the parties to justify the consequences of those decisions once they are implemented. The convention itself, even when supplemented by the instruments setting out listing criteria, is not sufficient to enable the parties to make a determination when a species requires protection. These decisions must be arrived at and justified discursively, for which continuous interaction among the parties in the context of a regime is required.

At the first Conference of the Parties (C.O.P.) in Berne, Switzerland in 1976, the parties adopted by resolution a document entitled the Berne Criteria,[20] which established two sets of prerequisites for the listing of a species in Appendices I or II: indications of threats to population levels; and indications of impacts flowing from international trade. The first set of prerequisites, those addressing population levels, has been described as a "list of preferred evidence concerning the threat of extinction."[21] The factors were listed in order of preference, beginning with comparative population surveys, and proceeding to factors such as habitat destruction and acceleration of trade.[22] In addition, it was necessary to show that the species was or might be affected by trade. In practice, however, the parties demonstrated a willingness to list species on the appendices in the presence of evidence of *either* population decline *or* effects from international trade.[23]

Downlisting or delisting of a species - that is, its transfer from Appendix I to II or its removal from Appendix II - is not provided for in the convention, and was therefore addressed at the Berne C.O.P.[24] The parties opted for a precautionary approach with respect to downlisting and delisting decisions, setting out stricter requirements than those

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[20] First Meeting of the Conference of the Parties to the Convention on Trade in Endangered Species of Wild Fauna and Flora, Resolution on Criteria for the Addition of Species and Other Taxa to Appendices I and II and for the Transfer of Species and Other Taxa from Appendix II to Appendix I, Berne, Switzerland, 2-6 November 1976, Conf. 1.1 [*hereinafter* Berne Criteria].

[21] David S. Favre, *Tension Points within the Language of the CITES Treaty* 5 BOSTON UNIV. INT'L L.J. 247 at 250 (1987).

[22] *Ibid.* at 250. *See also* Kevin Eldridge, *Whale for Sale? New Developments in the Convention on International Trade in Endangered Species of Wild Fauna and Flora* 24 GA J. INT'L & COMP. L. 549 at 558-9 (1995).

[23] Favre, *supra* note 21 at 251-2.

[24] First Meeting of the Conference of the Parties to the Convention on Trade in Endangered Species of Wild Fauna and Flora, Resolution on Criteria for the Deletion of Species and Other Taxa from Appendices I and II, Berne, Switzerland, 2-6 November 1976, Conf. 1.2.

for listing: scientific evidence was required, including population surveys, that the species could withstand a resumption in trade.[25]

The Berne Criteria proved to be controversial. Some commentators argued that the Criteria permitted listing when it was not warranted,[26] while others criticised them as being insufficiently scientific, making listing decisions too political.[27] To place this controversy in context, the results of a premature listing decision merit brief consideration. The listing of a species in Appendix I generally has the effect of lowering or eliminating the commercial value of that species. The extension of protection to endangered species being a central goal of C.I.T.E.S., the removal of endangered species from commercial use would seem to be entirely appropriate. Difficulties arise, however, as a result of many factors. Because of the vagueness of the Berne Criteria, and also because of the tendency of the parties to list species in Appendix I even where the two prerequisites therefore were not met, it was often the case that species were listed in that appendix in circumstances that were difficult to justify in light of the convention and the Criteria.[28] When, as is often the case, such listing decisions concern species located in

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[25] *Ibid. See also* Favre, *supra* note 21 at 253.

[26] Botswana, Malawi, Zambia and Zimbabwe in particular were critical of the criteria; see Eldridge, *supra* note 22 at 559. South Africa and Namibia shared many of the opinions of this core group on issues relating to sustainable use generally and the listing of the African elephant more particularly: David Favre, *Debate within the CITES Community: What Direction for the Future?* 33 NAT. RES. J. 875 at 877 (1993).

[27] *See, e.g.,* Scott Hitch, *Losing the Elephant Wars: CITES and the 'Ivory Ban'* 27 GA INT'L & COMP. L. REV. 167 at 178 (1998).

[28] *See* Favre, *supra* note 21 at 254, and more generally at 250-7. As we will see below, the highly controversial listing of the African elephant may have been one such case, at least with respect to certain populations of the species. The parties acknowledged as much in their subsequent decision to consider downlisting certain elephant populations: see Tenth Meeting of the Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, Resolution on Consideration of Proposals for the Transfer of African Elephant Populations from Appendix I to Appendix

developing countries for which the revenue generated by commercial use of such species can only with great difficulty be foregone, the decisions can have significant repercussions.[29] Beyond the costs of regulating the import and export of such species, listing, particularly in Appendix I, lessened or eliminated altogether the commercial value of that species. In the case of the African elephant, additional costs in the form of anti-poaching programmes, wildlife management programmes and controls on the illegal trade in ivory imposed further costs. Finally, in those range states in which the elephant population rebounded after the imposition of the ivory ban, there were costs associated with conflicting land uses, that is to say, between human settlements and their exploitation of elephant range land and the elephant populations themselves.[30] With the exception of the costs related to regulating the importation of ivory and to the ivory ban more generally, non-range states did not assume these costs.

Other commentators have argued that it is not possible, and perhaps not desirable, to exclude political, economic and other factors from consideration in listing decisions. Indeed, it has been argued that it was the parties' intention to maintain a high degree of flexibility in this decision-making process in order to allow for consideration of the

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II, Harare, Zimbabwe, 9-20 June 1997, Conf. 10.9, which states in part: "Recognizing that the transfer of the African elephant to Appendix I was agreed by the Conference of the Parties in 1989 although populations in certain range States may not have met the criteria in Resolution Conf. 1.1, adopted at the first meeting of the Conference of the Parties (Berne, 1976) ... ." On this point see DAVID HARLAND, KILLING GAME: INTERNATIONAL LAW AND THE AFRICAN ELEPHANT (1994), Chapter 8.

[29] *See* Favre, *supra* note 21 at 254.

[30] For a general discussion of the costs associated with wildlife protection, see Krieps, *supra* note 2 at 482-4. On conflicts between human settlements and elephant populations, see Bill Padgett, *The African Elephant, Africa and CITES: The Next Step* 2 IND. J. GLOBAL L. STUD. 529 at 542 (1995); Shawn M. Dansky, *The CITES 'Objective' Listing Criteria: Are they Objective Enough to Protect the African Elephant?* 73 TULANE L. REV. 961 (1999).

factors affecting each species.[31] David Favre and Holly Doremus argue that a decision to provide protection to a species in order to reduce the risk of endangerment is one in which science can assist, but which ultimately must be made on the basis of a political assessment of the level of risk of extinction that is acceptable in a given society.[32] This decision-making process must take into account not only pressures on the species, but also, as Favre notes, the pressures that would be placed on human communities as a result of protective measures, and the likelihood of success of such measures.[33]

The debate over the Berne Criteria was brought to the eighth C.O.P., held in 1992 in Kyoto, at which a group of southern African states[34] put forward a proposal to replace the Berne Criteria. These criteria would have, among other things, adopted the same standard for listing and de-listing, namely, a twenty percent chance of extinction of the species in question within ten years, and would have permitted commercial trade in endangered species according to a quota system.[35] Although the proposal was not accepted, the parties did agree that the Berne Criteria were in need of revision,[36] and the Standing Committee was directed to take up the matter and prepare recommendations for

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[31]Dr. Ronald I. Orenstein of the International Wildlife Coalition, who took part in the N.G.O. Working Group on C.I.T.E.S. Revision Criteria, states that "listing decisions were clearly intended by the signers to include a political, or at least a diplomatic, component. The listing process was never intended to be an 'impartial' or strictly 'scientific' one:" cited in Garrison, *supra* note 2, footnote 43 (1994).

[32] *See* David S. Favre, *The Risk of Extinction: A Risk Analysis of the Endangered Species Act as Compared to CITES* 6 N.Y.U. ENVT'L L.J. 341 (1998) and Holly Doremus, *Listing Decisions under the Endangered Species Act: Why Better Science Isn't Always Better Policy* 75 WASH. UNIV. L.Q. 1029 (1997).

[33] Favre describes these three considerations, respectively, as follows: risk of extinction; public policy risks; and implementation risks: *supra* note 32.

[34] Botswana, Malawi, Zambia and Zimbabwe.

[35] David Favre, *Trade in Endangered Species* 3 YBIEL 317 at 318 (1992).

[36] Eighth Meeting of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, Resolution on Development of New Criteria for Amendment of the Appendices,

the next C.O.P.[37] The matter was taken up once again at the Fort Lauderdale C.O.P. in 1994, at which time the Fort Lauderdale Criteria[38] were adopted, replacing the Berne Criteria. The adoption of these new criteria is generally regarded as representing a victory for those parties in favour of the sustainable use of wild species,[39] but it has also been welcomed as representing a move toward objective, scientific criteria for listing and de-listing species.[40] These criteria make explicit reference to the precautionary principle, stating that "when considering any proposal to amend Appendix I or II the Parties shall apply the precautionary principle so that scientific uncertainty should not be used as a reason for failing to act in the best interest of the conservation of the species." They then provide that, for a species to be listed in Appendix I, it must first qualify as being affected or potentially affected by trade,[41] and then must meet "at least one of the biological

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Kyoto, Japan, 2-13 March 1992, Conf. 8.20 [*hereinafter* New Criteria for Amendment]. *See also* HARLAND, *supra* note 28 at 125-6; Favre, *supra* note 21.

[37] New Criteria for Amendment, *supra* note 36. *See also* Favre, *supra* note 35 at 319 and Dansky, *supra* note 30 at 965.

[38] Ninth Meeting of the Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, Resolution on Criteria for Amendment of Appendices I and II, Fort Lauderdale, United States, 7-18 November 1994, Conf. 9.24 [*hereinafter* Fort Lauderdale Criteria].

[39] Eldridge, *supra* note 22 at 560; Barnabas Dickson, *CITES in Harare: A Review of the Tenth Conference of the Parties* COLO. J. INT'L ENVT'L L. & POL. 55 at 65 (1997).

[40] Dansky, *supra* note 30 at 965. Dansky concludes that the Fort Lauderdale Criteria are not sufficiently objective: *ibid.* at 977.

[41] As defined in the Resolution:

> [A] species 'is or may be affected by trade' if:
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> i) it is known to be in trade; or
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> ii) it is probably in trade, but conclusive evidence is lacking; or
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> iii) there is potential international demand for specimens; or
>
> iv) it would probably enter trade were it not subject to Appendix-I controls:"
>
> Fort Lauderdale Criteria, *supra* note 38.

A proposal to modify this text was made by the Criteria Working Group. The suggested text reads as follows:

> [A] 'species' "is or may be affected by trade" if:
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> i) it is known to be in international trade, and that trade has a detrimental impact on the status of the species; or

criteria listed in Annex I."[42] No other criteria are indicated as relevant to the decision. With respect to listing in Appendix II, the Fort Lauderdale Criteria require the knowledge, an inference or a projection that failure to regulate trade would either place the species within the criteria for inclusion in Appendix I or would result in an unsustainable level of exploitation of the species.[43]

The higher standard of proof for downlisting a species has been retained under the Fort Lauderdale Criteria, and reference to the precautionary principle has been formally incorporated into the decision-making procedure.[44] Annex IV of the Fort Lauderdale Criteria, entitled Precautionary Measures, provides that a species cannot be downlisted unless it meets one of a series of conditions pertaining to demand for trade in that species or look-alike species; appropriate management of populations and enforcement and control of international trade; the establishment of export quotas; and the establishment of a ranching quota.[45] In short, downlisting of a species can be accomplished as long as

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> ii) it is probably in international trade, although conclusive evidence is lacking, and that trade has a detrimental impact on the status of the 'species'; or
> iii) there is a potential international demand, and any international trade would have a detrimental impact on the status of the 'species;' or
> iv) it would probably enter international trade, with a detrimental impact on the status of the 'species,' were it not subject to Appendix I controls: Report of the First Meeting of the Criteria Working Group, available at the C.I.T.E.S. home page, http://www.cites.org/CITES/eng/index.shtml.

[42] The biological criteria are found in Annex I to the Fort Lauderdale Criteria, *supra* note 38.

[43] *Ibid.* There is some attempt to clarify the notion of unsustainable levels of exploitation. Such levels will be deemed to have been reached if

> [i]t is known, inferred or projected that the harvesting of specimens from the wild for international trade has, or may have, a detrimental impact on the species by either: i) exceeding, over an extended period, the level that can be continued in perpetuity; or ii) reducing it to a population level at which its survival would be threatened by other influences:" *ibid.*

[44] Annex 4, *ibid.*

[45] *Ibid.*

appropriate policy safeguards are in place to ensure that a resumption of trade will not result in renewed threats to the species, but it is not sufficient to demonstrate that the biological criteria for listing in Appendix I are no longer satisfied.

The Fort Lauderdale Criteria are open to the criticism that they seek to de-politicise what is of necessity a political issue, namely the making of decisions regarding the acceptable levels of risk of extinction in light of economic, social and other contexts.[46] Certainly, the new criteria represent an attempt to render the listing and downlisting decisions more regular and scientific, with extensive and exhaustive lists of criteria to be considered and procedures described for the weighing of these criteria. Furthermore, attempts have been made to define key terms[47] in an effort to render the listing and delisting processes more transparent. However, the new criteria neither resolve the debate between preservationist and conservationist points of view nor determine the status of sustainable use within the regime. While the criteria provide greater guidance to the parties and structure to the decision-making process, there is a danger that the parties will, in attempting to live up to the scientific aspirations of the new criteria, close off opportunities for the debates about policy and underlying principles that are a necessary component of the decision-making process.

A further potential criticism is the limited role accorded in the Fort Lauderdale Criteria to the precautionary principle. Precaution is referred to in the preamble to the Criteria, and is invoked again in the body of the text as a principle to guide decisions to

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[46] Favre, *supra* note 32 at 356-7. *See also* Doremus, *supra* note 32 at 1029.

amend Appendices I and II.[48] The Fort Lauderdale Criteria represent an attempt to be as specific as possible about the basis on which a species will be considered eligible for Appendix I listing, but even in a case in which excellent data on the state of the species is available, it will be necessary at the end of the day to make a *judgment* regarding inclusion. In the making of this judgment, precaution can be called in aid as a principle to which decision-makers may refer, not to remove doubt and uncertainty, but to guide the manner in which such doubt and uncertainty is resolved.

The economy of the provisions regarding listing and uplisting suggest, nevertheless, that listing decisions are to be justified on scientific criteria and that, where scientific evidence is lacking, precaution cannot be called in aid to make up the difference. A slightly different approach is taken to the decision to downlist or delist a species. In such cases, precaution is given a greater role. Precaution is built into the process whereby a decision is made to remove a species from Appendix I.[49] If a downlisting to Appendix II is accomplished, a review procedure is created through which problems in the management of the downlisted species may be reported to the Secretariat.

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[47] Annex 5 to the Fort Lauderdale Criteria, *supra* note 38.

[48] A third reference to precaution, in the first paragraph of Annex 4 to the Fort Lauderdale Criteria, reiterates the earlier provision according to which the precautionary principle is to be applied by the parties in any decision to amend Appendices I or II. The Criteria Working Group has earmarked this provision for deletion. *See* Fort Lauderdale Criteria, *supra* note 38, which includes a recommendation that the Criteria be reviewed at the twelfth C.O.P.; Eleventh Meeting of the Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, Decision 11.2, Terms of Reference for the Review of the Criteria for Amendment of Appendices I and II, Gigiri, Kenya, 10-20 April 2000, whereby the Criteria Working Group was mandated to review the Fort Lauderdale Criteria; and Report of the First Meeting of the Criteria Working Group, *supra* note 41.

[49] The species must first be moved to Appendix II and the impact on trade of this decision monitored for a period of time; certain criteria regarding trade in and management of the species must be met; export quotas or a ranching proposal must be in place; and the party proposing the downlisting must

In certain cases the Secretariat may recommend a suspension of trade with the party whose management is found to be inadequate, or an uplisting to Appendix I.[50] The precautionary principle has thus been given a greater role in decisions to downlist or delist than in decisions to list or uplist. This is not surprising, given the fact that the Fort Lauderdale Criteria represent a response to the argument heard on both sides of the debate that listing decisions were too political.

Similar hesitation regarding the role of precaution in the C.I.T.E.S. regime is reflected in a policy document adopted by the parties at their most recent C.O.P. in Gigiri, Kenya. In this document, entitled Strategic Vision through 2005, the precautionary principle is described as the "ultimate safeguard" to be employed "where uncertainty remains as to whether trade is sustainable." The document goes on to note that "a successful outcome of the implementation of the Strategic Plan will be a reduction in the need to bring the precautionary principle into play."[51] It would appear that this reduction in reliance on precaution is to be brought about, at least in part, through the realisation of

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not have entered a reservation with respect to the species: Annex 4 to the Fort Lauderdale Criteria, *supra* note 38.

[50] This procedure is described in the Fort Lauderdale Criteria, *ibid.*, Annex 4 – Precautionary Measures, para. C. The notice to the Secretariat may originate from the Plants Committee, the Animals Committee or a party. The provision continues:

> [I]f the Secretariat fails to resolve the matter satisfactorily, it shall inform the Standing Committee which may, after consultation with the Party concerned, recommend to all Parties that they suspend trade with that Party in specimens of CITES-listed species, and/or request the Depositary Government to prepare a proposal to transfer the population back to Appendix I.

[51] Eleventh Meeting of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, Decision 11.1 regarding the Strategic Plan for the Convention, Annex I, Strategic Vision through 2005, Gigiri, Kenya, 10-20 April 2000.

one of the goals identified in the Strategic Vision, namely strengthening the scientific basis of decision-making under C.I.T.E.S.

The parties' concern with strengthening the role of science in listing decisions represents an attempt to avoid unjustified and arbitrary listing that may have a significant negative impact on range states without promoting the goal of conservation. However, I suggest that the dichotomy drawn between science and politics is inappropriate. Precaution is not a principle that can be invoked to trump science. Nor can improvements in scientific knowledge and methodology eliminate the need for considerations such as precaution. As I have suggested, the precautionary principle tells us about the respective roles of science and 'politics' in decisions about environmental protection and resource conservation. Precaution is useful in that it can provide guidance to decision-makers on those questions on which science is not an effective guide. As a result, the objective expressed in the Strategic Vision to reduce the regime's reliance on principles and concepts by increasing the emphasis on science can only go so far. In the end, reference to some decision principle, whether precaution or something else, will be necessary if listing decisions are not to be made on an *ad hoc* basis.

Many commentators may be disappointed to find that precaution is not given a greater role in listing or uplisting decisions. Although this could be attributed to a victory of sustainable use over conservation/preservation, I would suggest that this is not an appropriate conclusion. C.I.T.E.S. was concluded in the immediate aftermath of the Stockholm Convention, at a time at which the issue of environmental protection was only beginning to make its mark on the broader framework of international law. The parties to

C.I.T.E.S. identified trade in endangered species as a matter that could be addressed through international regulation. However, trade restrictions have proven to be a rather blunt instrument in the service of the conservation objective. As Barnabos Dickson indicates,[52] the precautionary principle can tell us that action is required even where we are uncertain about the nature and extent of the threats to the resource we seek to protect. However, it tells us nothing about the type of action that should be instituted. In the present case, the consequences of bringing a species under C.I.T.E.S. protection may be insignificant from the point of view of protecting the species because they do not address the source of the threat. The consequences on the range state, however, may be serious. Precaution has had to cede ground in favour of other principles and approaches. It must, however, be borne in mind that the influence of precaution and other soft law principles does not depend on their inclusion in legal instruments within regimes. The principle remains relevant in processes of discourse even where there has been an attempt to circumscribe its role in the regime.

4. THE DEBATE OVER SUSTAINABLE USE

The debate over the listing criteria is part of a much larger, continuing debate about the basic objectives that the C.I.T.E.S. regime should pursue. Although the convention's purpose is clearly to provide some measure of protection to fauna and flora in actual or potential danger of extinction, it is not hostile to the notion of exploitation of

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[52] Barnabos Dickson, *Precaution at the Heart of CITES? in* ENDANGERED SPECIES, THREATENED CONVENTION: THE PAST, PRESENT AND FUTURE OF CITES (Jon Hutton and Barnabos Dickson, eds., 2000) [*hereinafter* ENDANGERED SPECIES] 38 at 45-6.

wild species. Both the intrinsic and the anthropocentric value of wild fauna and flora are recognised. However, since under the Berne Criteria it was relatively easy to justify listing species and thus effectively to remove them from commercial markets, certain states began to argue that their capacity to exploit their natural resources was being unjustifiably limited by international trade restrictions and bans. They thus sought greater recognition for the notion of sustainable use of species, including, in some instances, endangered and threatened species.

Sustainable use is a concept derived from the broader notion of sustainable development,[53] and as such it possesses a certain resonance in international legal discourse. Sustainable use does not exclude the possibility of exploitation of resources for human ends, but rather implies exploitation at levels that do not exceed the capacity of the resource to replenish itself. It represents an attempt to balance human interests in resources with the intrinsic value of such resources. As articulated by I.U.C.N., sustainable use incorporates a series of obligations[54] whose objective is to ensure that exploitation of species does not threaten their viability. Furthermore, it implies a

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[53] Catharine Krieps argues that the concepts of sustainable use and sustainable development should be distinguished in the following manner: sustainable development, as defined in WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE (1987) at 46, which refers to "a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations." Krieps notes that sustainable use is a narrower concept. The I.U.C.N. articulates it as an objective: "Species and ecosystems should not be so heavily exploited that they decline to levels or conditions from which they cannot easily recover:" INTERNATIONAL UNION FOR CONSERVATION OF NATURE AND NATURAL RESOURCES, WORLD CONSERVATION STRATEGY (1980), Chapter 7, para. 1. *See* Krieps, *supra* note 2 at 463-4.

[54] These obligations include the gathering of scientific data on the state of species and the ecosystems on which they depend; the adoption and implementation of conservation and management

modification of the manner in which the value of resources is calculated such that both commercial and non-commercial considerations are reflected.[55]

Sustainable use of wild fauna and flora is not *per se* a controversial concept, but immense controversy surrounds the prospect of exploiting species listed on the C.I.T.E.S. appendices. Many observers would regard the notion as an oxymoron, arguing that any level of exploitation of an endangered species represents an unacceptable risk. Proponents of sustainable use argue that, given sufficient scientific data and proper management of the species in question, it is in theory possible to identify a level of exploitation that does not contribute to the extinction of the species. The difficulty lies, quite obviously, in distinguishing populations that may sustainably be exploited from those that cannot, and further in identifying the appropriate level of exploitation and the conditions under which it may go forward. Even given extensive scientific data, such decisions must be made in conditions of enormous uncertainty. Furthermore, the competing values and different conceptions of the purposes being pursued that will inevitably be at play in the context of such decisions cannot be resolved through better information or more sophisticated evaluation processes. They must instead be resolved on the basis of judgments as to what is appropriate or acceptable in the circumstances.

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programmes; regulation of access to and exploitation of species; protecting habitat; and regulating international trade, among others: WORLD CONSERVATION STRATEGY, *supra* note 53, Chapter 7.

[55] *Ibid.*, Chapter 4, paras. 6-9.

The I.U.C.N. has proposed the following categories of values: consumptive use value, or the value of the product when it is consumed directly; productive use value, or the value of the product on commercial markets; non-consumptive use value, which refers to ecosystem functions of the resource; option value, or the values of keeping options open; and existence value, or the knowledge that the species exists: Jeffrey A. McNeely, *What Value of Wildlife?* I.U.C.N. Bulletin at 4 (Dec. 1990). *See also* Garrison, *supra* note 2, footnote 67 and corresponding text.

The notion of sustainable use of wild fauna and flora, being linked to the well-respected and widely recognised concept of sustainable development, and being compatible with the language of C.I.T.E.S., has enjoyed a certain degree of legitimacy within the C.I.T.E.S. regime. This legitimacy has most certainly been fostered to a great extent by the support it has received from I.U.C.N., which has invested considerable resources into developing the concept, beginning in 1980 with the publication of its World Conservation Strategy.[56] In 1990, I.U.C.N. adopted a series of resolutions in which the principle of sustainable use was recognised[57] and an initiative launched to develop guidelines for its implementation.[58] In these resolutions, I.U.C.N. acknowledges the limitations of area protection as a central means of conservation, given the great potential for clashes between conservation and other forms of land use of more direct benefit to human communities.[59] In the context of Africa, this is a crucial policy shift, since the colonial wildlife protection regimes depended almost entirely on area protection and, in pursuit of this policy, forced populations off the land to be protected and denied

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[56] *Supra* note 53. *See also* Krieps, *supra* note 2 at 474-5; Favre, *supra* note 21 at 876-7; Garrison, *supra* note 2 at 317 ff.

[57] International Union for Conservation of Nature and Natural Resources, Conservation of Wildlife through Wise Use as a Renewable Natural Resource, Resolution 18.24, http://www.IUCN.org/themes/sui/resolutions.html. [*hereinafter* I.U.C.N. Resolution 18.24].

[58] International Union for Conservation of Nature and Natural Resources, Sustainability of Nonconsumptive and Consumptive Uses of Wild Species, Resolution 19.54, http://www.IUCN.org/themes/sui/resolutions.html.

[59] Protection area management as a conservation tool is not renounced; however, the significance of competing land uses is recognised and the constraints posed by these uses on the maintenance of natural habitat acknowledged. The Resolution notes the need to find more effective conservation mechanisms that balance development and conservation goals: I.U.C.N. Resolution 18.24, *supra* note 57.

them access to it and its resources.[60] In 1994, pursuant to these resolutions, I.U.C.N. developed a list of criteria for the sustainable use of species, as follows:

> a. [the use] does not reduce the future use potential of the target population or impair its long term viability;
> b. it is compatible with maintenance of the long term viability of supporting and dependent ecosystems; [and] c. it does not reduce the future use potential or impair long term viability of other species.[61]

Through its Sustainable Use Initiative, launched in 1995, I.U.C.N. has sought to operationalise these criteria by carrying out case studies and by organising regional information-gathering groups.[62]

In a parallel fashion, the southern African countries have been pursuing the issue of sustainable use within the C.I.T.E.S. regime. However, there are important differences between the concept of sustainable use put forward by I.U.C.N. and that found in the proposals of the southern African countries. The latter proposals were roundly criticised by commentators for concentrating exclusively on the commercial value of wildlife as realised through its consumption,[63] whereas, as noted above, the concept of sustainable use promoted by I.U.C.N. emphasises the range of ways in which value can be attributed to wildlife. Nevertheless, the proposals did move the debate forward, and certain concessions were made to the southern African countries at the eighth C.O.P. held in

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[60] HARLAND, *supra* note 28 at 68; Sean T. McAllister, *Community-Based Conservation: Restructuring Institutions to involve Local Communities in a Meaningful Way* 10 COLO. J. INT'L ENVT'L L. & POL. 195 at 195 (1999).

[61] INTERNATIONAL UNION FOR CONSERVATION OF NATURE AND NATURAL RESOURCES, SUSTAINABLE USE OF LIVING NATURAL RESOURCES, DRAFT GUIDELINES FOR THE ECOLOGICAL SUSTAINABILITY OF NON-CONSUMPTIVE AND CONSUMPTIVE USES OF WILD SPECIES (1984), para. 18. *See also* Garrison, *supra* note 2, footnote 79.

1992 in Kyoto, Japan,[64] including the adoption of a resolution entitled Recognition of the Benefits of Trade in Wildlife.[65] The preamble to this resolution, which is several times longer than the resolution itself, sets out a series of justifications for the position that legal trade may be regarded as a component of conservation measures. The preamble notes that much of the costs associated with protecting the species identified by C.I.T.E.S. falls to developing countries, and makes reference to the pressure that expanding populations of protected species places on local populations. It also notes the competition between the use of land as range-land for such species, on the one hand, and other uses of more obvious and immediate benefit to local populations, on the other. It then sets out a utilitarian calculation according to which, if incentives for sustainable use of protected species are not created, unsustainable uses may be reverted to, thus defeating the goal of protecting the species in question. The possibility is then acknowledged that, by investing revenue from legal trade in wildlife management, such legal trade could indirectly benefit the protected species. Following this preamble, it is recognised "that commercial trade may be beneficial to the conservation of species and ecosystems and/or to the development of local people when carried out at levels that are not detrimental to the survival of the species in question."

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[62] *See* International Union for Conservation of Nature and Natural Resources, Sustainable Use Initiative web site: http://www.IUCN.org/themes/sui/overview.html.

[63] Favre, *supra* note 28 at 883.

[64] *See generally ibid.;* Kreips, *supra* note 2.

[65] Eighth Meeting of the Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, Resolution on Recognition of the Benefits of Trade in Wildlife, Kyoto, Japan, 2-13 March 1992, Conf. 8.3 [*hereinafter* Benefits of Trade].

The acknowledgement of the compatibility of sustainable use with the objectives and overall philosophy of C.I.T.E.S. indicates a shift in focus within the regime rather than a fundamental reorientation. It is unlikely that parties favouring consumptive use will find it significantly easier to overcome objections to the lifting or relaxing of trade bans in particular instances or to the downlisting of particular species. They have, however, succeeded in doing two things. First, they have altered the manner in which debates about the consumptive use of particular protected species will be framed; that is, they have expanded the range of permissible arguments and of factors the parties will generally acknowledge as actually or potentially relevant. Second, they have added to the policy and normative means of the regime for the regulation of both the international trade in and, to some extent, the domestic management of, protected species. The policy and normative tools that the parties employed to provide for a regulated and delimited trade in elephant products became practicable only after the conceptual basis for trade in endangered species was established.

5. DOWNLISTING OF THE AFRICAN ELEPHANT

To place these issues in context, I will turn briefly to a discussion of the debate surrounding the 1989 listing[66] and 1997 downlisting[67] of the African elephant. The

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[66] The African elephant was originally listed in Appendix II and subject to a system of export quotas: Fifth Meeting of the Conference of the Parties to the Convention on Trade in Endangered Species of Wild Fauna and Flora, Resolution on Trade in Ivory from African Elephants, Buenos Aires, Argentina, 22 April to 3 May 1985, Conf. 5.12. The system proved ineffectual, which is not surprising given that each country was permitted to establish its own quota with no attempt made at the international level to determine whether these quotas provided an adequate level of protection to the elephant population in that country. *See* HARLAND, *supra* note 28 at 85-6. The African elephant was then uplisted to Appendix I: Seventh Meeting of the Conference of the Parties to the Convention on Trade in Endangered Species of

decision to place this species on Appendix I in the first place was controversial, not least because, as the parties themselves acknowledged, certain of the populations did not meet the Berne Criteria then in force.[68] For this reason, the parties at the same time adopted a procedure whereby states could seek to have their populations downlisted, namely, a review by a panel of experts of the state of their elephant populations, management programmes and measures to control illegal trade.[69] Botswana, Namibia and Zimbabwe invoked this procedure prior to the tenth C.O.P. in Harare, Zimbabwe in 1997.[70] The three range states received favourable reviews from the Panel of Experts on the population status and management of their elephant populations, but problems were noted with the control of the illegal ivory trade in Zimbabwe and in Japan, the country to which legally harvested ivory was to be sold.[71]

The outcome of this debate was the adoption of a resolution downlisting the Botswanan, Namibian and Zimbabwean populations of African elephants to Appendix

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Wild Fauna and Flora, Resolution on Terms of Reference for the Panel of Experts on the African Elephant and Criteria for the Transfer of Certain African Elephant Populations from Appendix I to Appendix II, Lausanne, Switzerland, 9-20 October 1989, Conf. 7.9 [*hereinafter* Terms of Reference].

[67] The African elephant populations of Botswana, Namibia and Zimbabwe have been downlisted to Appendix II, subject to a series of conditions to be discussed below.

[68] Terms of Reference, *supra* note 66.

[69] The terms of reference of the panel of experts appear at Fifth Meeting of the Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, Resolution on Special Criteria for the Transfer of Taxa from Appendix I to Appendix II, Buenos Aires, Argentina, 22 April to 3 May 1985, Conf. 5.21, para. (h). The panel's conclusions are not binding on the parties, but are to be taken into account: *ibid.*, para. (i).

[70] *See* Dickson, *supra* note 39 at 57.

[71] *Ibid.* at 58. Japan was selected as the recipient of ivory sales because ivory can be both worked and consumed in Japan, obviating the need for further international trade in ivory: TRAFFIC Network Briefing, July 1997, http://www.traffic.org/briefings/brf_elephants_CITES.html.

II.[72] However, the parties also adopted a series of restrictions on commercial trade in elephant products that goes far beyond the import and export permitting system provided for under the convention. Trade by all three countries in sport hunting trophies and live animals is now permitted; furthermore, Zimbabwe may export elephant hides, leather goods and ivory carvings for non-commercial purposes.[73] A series of conditions that must be met prior to the resumption of the ivory trade was imposed,[74] and a system for monitoring of illegal hunting and illegal trade in ivory was outlined.[75] A quota system for ivory exports was reintroduced, but it differs significantly from an earlier quota system, widely acknowledged to have been ineffectual,[76] in that the Secretariat is responsible for comparing national quotas with information on the state of elephant populations. Although the Secretariat has not been authorised to refuse to accept proposed quotas, the requirement that population data be taken into account allows for an assessment of the

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[72] *See* Dickson, *supra* note 39 at 57; Phyllis Mofson, *Zimbabwe and CITES: Illustrating the Reciprocal Relationship between the State and the International Regime in* THE INTERNATIONALIZATION OF ENVIRONMENTAL PROTECTION (Miranda A. Schreurs and Elizabeth Economy, eds., 1997) 162 at 162-3; Michael 't Sas-Rolfes, *Assessing CITES: Four Case Studies in* ENDANGERED SPECIES, *supra* note 52, 69 at 74 ff.

[73] TRAFFIC Network Briefing, *supra* note 71. Sale of elephant leather and ivory goods to tourists for their personal consumption is deemed a non-commercial use: *ibid.*

[74] Among these conditions are the following: the deficiencies regarding enforcement and control measures identified by the Panel of Experts must be remedied to the satisfaction of the Secretariat; mechanisms must be established to reinvest revenues from ivory sales into conservation efforts; and mechanisms to report and monitor illegal trade must be established at the international and regional level: Tenth Meeting of the Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, Decision on Conditions for the Resumption of Trade in African Elephant Ivory from Populations Transferred to Appendix II at the 10th Meeting of the Conference of the Parties, Harare, Zimbabwe, 9-20 June 1997, Decision 10.1.

[75] Tenth Meeting of the Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, Resolution on Trade in Elephant Specimens, Harare, Zimbabwe, 9-20 June 1997, Conf. 10.10 (Rev.) [*hereinafter* Trade in Elephant Specimens].

[76] *See, e.g.,* HARLAND, *supra* note 28 at 84-86; Dickson, *supra* note 39 at 57; Mofson, *supra* note 72.

sustainability of such quotas. Provision has been made for one-time sales of government stockpiles of ivory for the purpose of raising funds for conservation programmes and measures.[77] A further source of control of illegal trade is a database established independently by TRAFFIC, a non-governmental organisation that works within the C.I.T.E.S. regime. This database contains entries on confiscated ivory. A second database containing information on illegal elephant hunting is to be established by the Secretariat in consultation with I.U.C.N. and TRAFFIC.[78]

6. THE POLITICS OF C.I.T.E.S.

Certain commentators saw the debate over the downlisting of the African elephant as a test of the objectivity of the new Fort Lauderdale Criteria.[79] It must, however, be recalled that these criteria, like the Berne Criteria, establish a different process for the downlisting of a species than for its listing in Appendix I or II. In the case of listing, there is, as described above, an attempt to exclude consideration of non-scientific factors. In the case of downlisting, however, the process is more explicitly political, particularly as a result of reference to the precautionary principle. The structure of these criteria is such that one begins with scientific data regarding the status of the species, and then moves on to a consideration of the repercussions that a decision to downlist could have

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[77] Eleventh Meeting of the Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, Decision 11.3 on Conditions for the Disposal of Ivory Stocks and Generating Resources for Conservation in African Elephant Range States, Gigiri, Kenya, 10-20 April 2000.

[78] *See* Memorandum of Understanding between the Secretariat of the Convention on International Trade in Endangered Species of Wild Fauna and Flora and the International Union for Conservation of Nature and Natural Resources, Annex to Forty-Second Meeting of the Standing Committee, Lisbon, Portugal, 28 September - 1 October 1999, Doc. SC.42.10.1.1.

and of the measures that could be taken to limit these repercussions. This procedure is interesting in that it represents an attempt to identify the relevant considerations and to structure the debate such that there will be some consistency from one decision-making process to the next. However, it is clear that the parties considered other criteria to be equally relevant. Conspicuous by its absence is any reference to the repercussions on human populations of decisions regarding de-listing, yet these repercussions figured prominently in the debate.

When these criteria are taken together with the listing criteria, it becomes apparent that nowhere may the parties explicitly address the political question what level of risk of extinction is acceptable in a given society for a given species.[80] It may be argued that such a discussion has no place in a convention dedicated to preservation of species, but this argument is difficult to accept in light of the compatibility of the convention with the competing notion of conservation and in light of the openness that the parties have since shown to the concept of sustainable use. However, as the debate regarding the elephant demonstrates, the parties have devised policy mechanisms for the regulation not only of international trade but also of domestic policies for the management of populations and the control of hunting and trade. One such policy mechanism, referred to above, is the quota system. The convention itself makes no reference to the establishment of quotas for the export of specimens of endangered or threatened species, as its objective is to

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[79] Dansky, *supra* note 30 at 974; Dickson, *supra* note 39 at 66.

[80] Favre identifies this question as the first that a given society must answer in determining whether and to what extent an endangered or threatened species should be protected: Favre, *supra* note 32 at 345.

regulate international trade and not to promote domestic management schemes. However, the parties clearly regard quotas as a legitimate regulatory tool with which they may indirectly influence domestic wildlife management.

The open-ended nature of C.I.T.E.S. is often described as one of its greatest weaknesses, and the adoption of the Fort Lauderdale criteria was, in part, a response to this perceived problem. The lack of a consensus on the fundamental objective underlying C.I.T.E.S. certainly contributed to the difficulty of devising clear, determinate rules regarding the listing of species, but such rules would not in any event have been realisable given the very subject-matter of the convention. The debate between preservation and conservation, when carried on at the level of principle, is politically and ethically charged, and probably not susceptible of definitive resolution in a society as diverse as international society. But even if a resolution of this debate were likely, this would not translate into a significantly simpler decision-making process in particular cases. Such decisions are necessarily political, involving not only the reconciliation of different sets of interests but also of fundamentally different sets of assumptions. Furthermore, the costs and benefits involved in accepting different levels of risk of extinction are not necessarily borne by the same population, but rather are distributed in ways that give rise to inequities. Finally, the decisions must be made in light of highly imperfect information and will inevitably give rise to unforeseen and unintended consequences that must then be the factored into further decisions.

As Favre notes, C.I.T.E.S. provides a framework for continuing negotiations among the parties, within which they are able to address the "tension points" within the

convention.[81] It is true that the text itself seeks to give the impression that tensions between, for example, the intrinsic worth of fauna and flora, on the one hand, and their value to humans, on the other, have been resolved or are resolvable through an adequate balancing of relevant factors. Certainly, many commentators speak of this controversy as though it involves a simple misunderstanding regarding the fundamental objectives of the convention.[82] Nevertheless, the debates among the parties demonstrate that this tension is continually addressed in particular situations. The result is not a resolution of the tension, but rather the elaboration of mechanisms and procedures within which debates on particular issues can move forward.

A large number of the parties to C.I.T.E.S. are developing countries, and the most high-profile and contentious issues over the history of the convention have involved the protection of species in the South, particularly the African elephant, tiger and rhinoceros.[83] As a result, much of the debate within C.I.T.E.S. takes on a North-South spin, although it is not the case that countries of the South are consistently aligned against the North with respect to these issues. In recent years, and particularly since the United Nations Conference on Environment and Development (U.N.C.E.D.) conference in Rio in 1992 and the conclusion of the Biodiversity Convention, questions regarding the equitableness of the conservation agenda have received a good deal of attention. In particular, it is noted that much of the biodiversity that states are intent on conserving is

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[81] Favre, *supra* note 26 at 247-8.
[82] *See, e.g.,* for example, Hitch, *supra* note 27 at 167.
[83] *See* 't Sas-Rolfes, *supra* note 72.

located in the South, while the firms with an interest in exploiting these resources, and with the necessary capacity to do so, are in the North.[84]

It is often argued that C.I.T.E.S. reflects a Western-oriented conservationist philosophy.[85] As I have suggested, there has been an attempt to accommodate other points of view, but some of the commentary on the convention suggests a belief that countries of the South, particularly in Africa and Asia, must be brought around to this point of view.[86] What is often absent from such discussions is a consideration of the costs imposed on range states by wildlife protection measures, such as the creation of nature reserves.[87] An image of countries of the South as being anti-conservationist is often presented; for example, one commentator states that "preservation of the African elephant is a non-priority to most Africans," and that even those African countries that appear to have embraced "a conservationist ethic are in reality driven by the prospect of attracting Western travellers." He argues that African countries regard "the Western preservationist ethic" as undermining economic development goals, and that "economic strife and antagonism toward Western ideals" compelled African countries to lobby against the

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[84] *Ibid.* at 282; McAllister, *supra* note 60 at 195-6. The fact that most of the species that benefit from protection are found in the South was acknowledged by the parties in Benefits of Trade, *supra* note 65.

[85] *See, e.g.,* Favre, *supra* note 26 at 876.

[86] *See, e.g.,* Hitch, *supra* note 27 at 189, who describes the failure of African countries to grasp the message taught by Aldo Leopold, a well-known Western conservationist author, that land management, and more particularly the creation of nature reserves, is the most effective means of protecting endangered wildlife. He describes the unsuccessful efforts of Western conservation efforts to teach this lesson to African wildlife managers, and concludes that the creation of additional nature reserves in Africa is an unrealistic goal. He does not, however, refer to the reasons that might be advanced against the creation of such reserves.

ivory ban.[88] The North is thus portrayed as idealistic and driven by normative goals, while the South is seen as driven by economic self-interest.

Another theme that often appears in the literature has to do with the market for tiger and rhinoceros parts for use in pharmaceutical products consumed primarily in Asia. The demand for such products is often portrayed as irrational, in particular in that a belief in the efficacy of these products runs counter to Western science.[89] Unilateral trade sanctions were contemplated by the United States against China,[90] and imposed against Taiwan,[91] prompting movement on the part of Taiwan, China, Singapore, Japan and Hong Kong to restrict illegal trade in wildlife parts,[92] but it is of more than passing interest to note the large volume of trade in such products that takes place with the United States.[93]

The concern that many developing countries have with sovereignty over natural resources as a matter of principle and with economic development as a matter of practical interest certainly has some effect on the positions that these countries adopt with respect to conservation issues. However, territorial sovereignty and economic development are of interest to countries of the North as well, just as status as a developing country does not preclude concern with conservation. The African Convention on the Conservation of

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[87] For such a discussion, see McAllister, supra note 60 at 195; G.F. Maggio, *Inter/intragenerational Equity: Current Applications under International Law for Promoting Sustainable Development of Natural Resources* 4 BUFFALO ENVT'L L.J. 161 at 199-200 (1997).

[88] Hitch, *supra* note 27 at 169-70.

[89] *See, e.g.*, Julie Cheung, *Implementation and Enforcement of CITES: An Assessment of Tiger and Rhinoceros Conservation Policy in Asia* 5 PACIFIC RIM LAW & POL. J. 125 (1995). Cheung speaks of the use of rhinoceros horn in medicines as an "archaic cultural stronghold:" *ibid.*

[90] Amy E. Vulpio, *From the Forests of Asia to the Pharmacies of New York City: Searching for a Safe Haven for Rhinos and Tigers* 11 GEORGETOWN INT'L ENVT'L L. REV. 463 at 480 (1999).

[91] *Ibid.;* Cheung, *supra* note 89 at 137-8.

[92] Cheung, *supra* note 89 at 138.

Nature and Natural Resources demonstrates,[94] like C.I.T.E.S., concern with both conservation and development issues,[95] but is much more comprehensive than the latter convention in that it goes well beyond simple protection of flora and fauna to embrace protection of soil,[96] water[97] and habitat.[98] The Biodiversity Convention[99] also contains references to both preservationist and conservationist goals, on the one hand, and sustainable use of resources and economic development, on the other.[100] Recognition of the status of fauna and flora as resources as well as entities having intrinsic value is of course not restricted to the North. Furthermore, it is to be recalled that unsustainable pressure on fauna and flora in countries of the South may be traced back to the colonial period. One need only reflect on the markets that were created in Europe for ivory during this period and of the continuing demand in the North for ivory products that fuelled the international ivory trade over the following centuries to appreciate that conservationist

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[93] Vulpio, *supra* note 90 at 484-5.

[94] African Convention on the Conservation of Nature and Natural Resources, No. 14689, 1001 U.N.T.S. 3 (1976), *concluded* 15 September 1968, *entered into force* 16 June 1969 [*hereinafter* African Convention].

[95] The African Convention lists the following among its fundamental principles: "The Contracting States shall undertake to adopt the measures necessary to ensure conservation, utilization and development of soil, water, flora and faunal resources in accordance with scientific principles and with due regard to the best interests of the people:" *ibid.*, art. II.

[96] *Ibid.*, art. IV.

[97] *Ibid.*, art. V.

[98] *Ibid.*, articles VI, VII and X.

[99] Convention on Biological Diversity, *concluded* 5 June 1992, *entered into force* 29 December 1993, 31 I.L.M. 818 (1992).

[100] *Ibid.*, preamble. Reference is made, for example, to both the intrinsic and the anthropocentric value of biological diversity; to both conservation and sustainable use; and to the importance of biological diversity to the "food, health and other needs of the growing world population."

principles are not the property of the North any more than unsustainable exploitation is a characteristic of the South.[101]

7. THE INFLUENCE OF THE NEW INTERNATIONAL ECONOMIC ORDER

The debates over environment and development that have gained prominence since Stockholm may be regarded as a continuation of the debates over the N.I.E.O. As Pierre-François Mercure argues, the constitutive elements of the N.I.E.O. have resurfaced in international legal discourse in various guises,[102] including common but differentiated obligations, common heritage of mankind, and, in the context of C.I.T.E.S., sustainable use. The arguments and justifications for permanent sovereignty and other elements of the N.I.E.O. remain available to developing states and provide a background against which more specific arguments regarding the articulation and application of international environmental norms may be made.

As the above discussion indicates, the southern African states framed their challenge to the Berne Criteria as an argument for sustainable use. Other parties were suspicious of the argument, as the proponents did not emphasise the intrinsic value of the species in question, but rather focussed on their commercial value. The relative success of the argument can be explained in light of various factors. In the first place, as a

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[101] An awareness of the unsustainable levels of exploitation during the colonial period appears to be reflected in the preamble to the Convention between the Congo Free State, France, Germany, Great Britain, Italy, Portugal and Spain for the Preservation of Wild Animals, Birds and Fish in Africa, *concluded* 19 May 1900, *not in force*, C.S.T. 418 (1900), which states: "Animés du désir d'empêcher les massacres sans-contrôle et d'assurer la conservation des diverses espèces animales vivant à l'état sauvage dans leurs possessions Africaines qui sont utiles à l'homme ou inoffensives, ..."

[102] Pierre-François Mercure, *Le rejet du concept de patrimoine commun de l'humanité afin d'assurer la gestion de la diversité biologique* 33 CAN. Y.B. INT'L L. 281 (1995) at 292.

practical matter, the parties were aware that certain species, or certain populations of species, could in all likelihood sustain some level of exploitation. This was the case for the elephant populations in certain of the southern African countries. The problem with which the parties were faced was the absence of policy mechanisms at the level of the regime to ensure that such exploitation was carried on at sustainable levels. Thus, while the argument that even endangered or threatened species should be made available to commercial exploitation was not accepted as such by the parties, the notion of sustainable use as articulated in particular by I.U.C.N. and as applied to certain species and populations could nevertheless be accepted in principle. In order to implement this notion, however, the parties required a more extensive array of policy and legal mechanisms than those provided by the convention; they made such mechanisms available through the adoption of resolutions and decisions.

It may also be argued that the relative success of the sustainable use concept can be explained, at least in part, by the availability of a series of norms of soft law that constitute a common vocabulary among states and that made it possible to frame certain notions related to international equity as legal arguments. The concept of sustainable development invokes questions related to the economic development of developing countries; the differences between environmental problems of North and South; the differential impact of international environmental obligations on developed and developing countries; and a range of other related issues. As a result, it was easier for the southern African countries to draw attention to the uneven distribution of costs and benefits related to the regulation of the ivory trade and the protection of elephant

populations, and it was easier for these countries to frame these problems in such a way as to make them legally relevant. The earlier international debate surrounding the N.I.E.O. and the adoption of declarations and other such instruments setting out its programme contributed to the development of a vocabulary that developing countries could employ to frame their arguments relating to the equitableness of international law and the need for international cooperation to promote the decolonisation and development processes.

Ivory was certainly a commodity well before the colonial period, but massive and highly lucrative international markets for ivory were the creation of colonial regimes. Certainly, there had been recognition on the part of those regimes that the slaughter of elephants and other animals was unsustainable (although it was not described as such at the time). However, serious and effective efforts at regulating the ivory trade were not made prior to the adoption of C.I.T.E.S. The proposed ban on ivory was not a northern invention; indeed, early support for the ban came from Kenya and Tanzania.[103] Nevertheless, the southern African countries were able to make a case for the inequitableness of an arrangement that prohibited access for commercial purposes to a resource of great value whose exploitation could be of enormous benefit to the national population.[104] Furthermore, the unequal and inequitable distribution of the costs and

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[103] HARLAND, *supra* note 28 at 92.

[104] Clearly, such an argument must be taken with a grain of salt, as it does not necessarily follow that legalised exploitation of elephants would hold any benefit for national populations. However, certain countries, particularly Zimbabwe, could credibly make such an argument, as their elephant management programme, CAMPFIRE, does involve the investment of revenues from elephant exploitation into local communities. On the CAMPFIRE programme, see McAllister, *supra* note 60 at 211 ff.

benefits of protecting the elephant and controlling the ivory trade could readily be seen as a legally significant issue in light of the principle of common but differentiated obligations. References to these two principles do not appear to have been made very often or very forcefully. Nevertheless, it seems unlikely that the notion of the sustainable use of an endangered or threatened species could have made much headway in the absence of these background notions.

A schematic representation of this debate as a series of discursive moves may shed light on the role played by the principles of soft law referred to above in the debates within the C.I.T.E.S. regimes. As a first move, the concept of sustainable development as articulated in the Stockholm and Rio Declarations may be put forward. Thus, international legal protection is extended to wild fauna and flora in order to emphasise the intrinsic value of species and to prevent their over-exploitation due to a narrow conception of their value and short-sighted conceptions of state interest in those resources. However, sustainable development also reminds us of the economic needs of states and their populations and of the jurisdiction of states over environmental resources on their territories. Thus far, the discourse involves competing conceptions of sustainable development, with emphasis being placed on environmental protection by one participant in discourse and on economic development by the other.

A further discursive move might involve the precautionary principle. Thus, the right to economic development could be acknowledged, but it would be argued that the importance of protecting natural resources must be given priority in light of the much greater and more serious repercussions of species extinction and loss of biological

diversity, as compared with the opportunity costs consequent upon resource protection. A counter-move might involve invocation of common but differentiated obligations, thus drawing attention to the inequitable distribution of the costs and benefits of protecting resources. A number of claims might flow from this counter-move: demands for financial, technical and other resources; adjustments in the obligations imposed on countries that bear the burdens associated with resource protection in a given instance; or the development of programmes and policies to help the range states address the consequences of resource protection, to name a few.

In the context of the debate over the listing of the African elephant, while requests for and offers of financial and technical assistance in line with the principle of common but differentiated obligations were made, they were not central to the debate. Instead, the southern African parties argued that they could themselves raise revenue to support conservation and wildlife management programmes if the ban on the ivory trade were lifted or relaxed. It was acknowledged that, under certain conditions, a limited level and type of exploitation of elephants could be tolerated. It was further acknowledged that such exploitation could provide certain benefits to local communities, thus compensating to some extent for the burdens imposed on the range states by listing of the elephant. The decision may also be viewed as a means of creating incentives and eliminating disincentives for effective wildlife management programmes.[105] Certain of the risk factors involved in lifting or relaxing the ivory ban, particularly those associated with

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[105] *See* HARLAND, *supra* note 28 at xiv, 42.

increases in poaching and illegal traffic, could be controlled by the range states only to a limited extent, particularly in the absence of active assistance from other actors in international society.[106] It may have appeared inequitable to hold that, since any resumption of ivory trade created the risk of an escalation of poaching and illegal traffic, no such resumption could be undertaken. The downlisting of the elephant may be conceived of as a type of reward to those range states that have wildlife management programmes in place and that have made efforts faithfully to implement the convention's provisions, whereas the Appendix I listing had the unintended consequence of punishing those states for factors that were, practically speaking, beyond their control.

8. CONCLUSION

The debates leading up to the downlisting of certain African elephant populations did not resolve in a fundamental way the conflict between the underlying philosophies embraced by C.I.T.E.S. This is hardly surprising, as this conflict is part of a larger search for an equilibrium point between environmental protection and economic development; between state sovereignty and international cooperation; between human needs and

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[106] The regime has committed itself to providing various forms of assistance to range states. For example, pursuant to Trade in Elephant Specimens, *supra* note 75, an international system for monitoring illegal hunting and trade in elephants and parts is to be established under the direction of C.I.T.E.S.' Standing Committee. Annex I to the resolution invokes the assistance of TRAFFIC in tracking illegal ivory, while Annex II states the need for international monitoring of illegal hunting, a process which is to be carried out with the assistance of I.U.C.N./S.S.C. and TRAFFIC. A vaguely-worded call to states to provide assistance to range states "to improve their capacity to manage and conserve their elephant populations through improved law enforcement, surveys and monitoring of wild populations" is also issued, and funds are sought from "governments, non-governmental conservation organizations and other appropriate agencies ... for the resources required in the Secretariat and producer States to ensure that the recommendations in this Resolution can be effectively implemented." Clearly, these commitments are in the nascent stage and their implementation may prove less than successful. They do, however, represent a recognition of the need to redistribute somewhat the burdens of resource protection.

interests and the intrinsic value of ecosystems and environmental resources; and so on. It is, however, possible to develop rules and policy mechanisms to address particular problems, taking into account these conflicting objectives and seeking, not a perfect balance between them in a particular situation, but rather an acceptable accommodation whereby the consequences do not seriously compromise one or the other objective.

CHAPTER 5: THE OZONE REGIME

1. INTRODUCTION

The international regime for the protection of the ozone layer is among the most well-developed and successful of the international environmental regimes. It has been the object of extensive scholarly attention, in large part because of its innovative approach to encouraging compliance[1] and because of the unprecedented importance of scientific evidence to the development of the regime,[2] but also because it provides fertile ground for an analysis of the role of ideas, cognitive frameworks and discourses on the building of consensus and the development of rules and norms.[3]

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[1] *See, e.g.*, Elizabeth P. Barratt-Brown, *Building a Monitoring and Compliance Regime under the Montreal Protocol* 16 YALE J. INT'L L. 519 (1991); RICHARD ELLIOTT BENEDICK, OZONE DIPLOMACY: NEW DIRECTIONS IN SAFEGUARDING THE PLANET, enlarged ed. (1998), chapter 17; David Hurlbut, *Beyond the Montreal Protocol: Impact of Nonparty States and Lessons for Future Environmental Regimes* 4 COLO. J .INT'L ENVT'L L. & POL. 344 (1993); Martti Koskenniemi, *Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol* 3 Y.B.I.E.L. 123 (1992); Jason M. Paltis, *The Multilateral Fund of the Montreal Protocol: A Prototype for Financial Mechanisms in Protecting the Global Environment* 25 CORNELL INT'L L.J. 181 (1992).

[2] *See, e.g.*, BENEDICK, *supra* note 1; David C. Caron, *Protection of the Stratospheric Ozone Layer and the Structure of International Environmental Lawmaking* 14 HASTINGS INT'L & COMP. L. REV. 755 (1991); Peter M. Haas, *Banning Chlorofluorocarbons: Epistemic Community Efforts to Protect Stratospheric Ozone* 46 I.O. 187 (1992); John Warren Kindt and Samuel Pyeatt Menefee, *The Vexing Problem of Ozone Depletion in International Environmental Law and Policy* 24 TEXAS INT'L L.J. 261 (1989); Karen T. LITFIN, *Framing Science: Precautionary Discourse and the Ozone Treaties* 24 MILLENNIUM 251 (1995); KAREN T. LITFIN, OZONE DISCOURSES: SCIENCE AND POLITICS IN GLOBAL ENVIRONMENTAL COOPERATION (1994); Joel A. Mintz, *Keeping Pandora's Box Shut: A Critical Analysis of the Montreal Protocol on Substances that Deplete the Ozone Layer* 20 UNIV. MIAMI INTER-AM. L. REV. 565 (1989); Joel A. Mintz, *Progress Toward a Healthy Sky: An Assessment of the London Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer* 16 YALE J. INT'L L. 571 (1991); EDWARD A. PARSON, PROTECTING THE OZONE LAYER: THE EVOLUTION AND IMPACT OF INTERNATIONAL INSTITUTIONS (1991).

[3] *See, e.g.*, Michael David Ehrenstein, *A Moralistic Approach to the Ozone Depletion Crisis* 21 UNIV. MIAMI INTER-AM. L. REV. 611 (1990); Haas, *supra* note 3; Litfin, *supra* note 2; LITFIN, *supra* note

The relative success of the ozone regime is rarely explained in normative terms. Attention is instead paid to its innovative approach to designing incentives and disincentives; to the balance struck among various interests, including developed and developing countries; and to the influence that scientists were able to wield in negotiations and discussions taking place within the regime, among other factors. These explanatory approaches are of fundamental importance in understanding the effectiveness of the regime, but they cannot do all the work. An understanding of the ozone regime and its rules as being imbued with normative authority, flowing from common understandings and consensus built up within the regime, must also be considered.

In making the case that a normative understanding of the ozone regime is valid and appropriate, I must go some distance in demonstrating the gaps left in our understanding by other approaches. I will therefore consider the functioning of the regime before focusing on the role of the relevant norms of soft law. I begin with some brief comments on the regime and its structure. I then examine the Implementation Committee and Non-Compliance Procedure and the Multilateral Fund (M.L.F.) to provide financial assistance to developing countries in meeting their obligations. Then follows a discussion of the precautionary principle and the principle of common but differentiated obligations.

2; PARSON, *supra* note 2; Brenda M. Seaver, *Stratospheric Ozone Protection: IR Theory and the Montreal Protocol on Substances that Deplete the Ozone Layer* 6 ENVT'L POL'S 31 (1997).

2. EMERGENCE OF THE OZONE REGIME

The ozone regime[4] was formally created by the Vienna Convention on the Protection of the Ozone Layer,[5] a framework convention containing no substantive provisions but providing for a basic institutional structure and for cooperation among the parties, particularly with respect to scientific research. Prior to the adoption of the convention, however, the regime had already begun to take shape. The United Nations Environment Programme (U.N.E.P.) took the first steps toward regime formation by fostering international cooperation in the field of scientific research and monitoring, and more generally by bringing together representatives of governments, international organisations and the scientific community to consider an international response to the threat to the ozone layer.[6] With the support of a group of like-minded states,[7] U.N.E.P.

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[4] For discussions of the history of the ozone regime, see BENEDICK, *supra* note 1; JUTTA BRUNNÉE, ACID RAIN AND OZONE LAYER DEPLETION: INTERNATIONAL LAW AND REGULATION (1988); Caron, *supra* note 2; Diane M. Doolittle, *Underestimating Ozone Depletion: The Meandering Road to the Montreal Protocol and Beyond* 16 ECOL. L.Q. 407 (1989); Timothy C. Faries, *Clearing the Air: An Examination of International Law on the Protection of the Ozone Layer* (1990) 4 ALTA L. REV. 818; Anne Gallagher, *The 'New' Montreal Protocol and the Future of International Law for Protection of the Global Environment* 14 HOUS. J. INT'L L. 267 (1992); Kindt and Menefee, *supra* note 2; Winfried Lang, *Is the Ozone Depletion Regime a Model for an Emerging Regime on Global Warming?* 9 U.C.L.A. J. ENVT'L L. & POL. 161 (1991); Alice M. Noble-Allgire, *The Ozone Agreements: A Modern Approach to Building Cooperation and Resolving International Environmental Issues* 14 S ILLINOIS UNIV. L.J. 265 (1990).

[5] Vienna Convention on the Protection of the Ozone Layer, 26 I.L.M. 1516 (1987), *concluded* 22 March 1985, *entered into force* 22 September 1988 [*hereinafter* Vienna Convention].

[6] In 1975, U.N.E.P. funded a technical conference organised by the World Meteorological Association to consider the research on ozone depletion; in 1977 it convened a meeting of governments and international organisations to consider possible international action on ozone layer protection. This latter meeting resulted in the World Plan of Action on the Ozone Layer, which recommended scientific research and monitoring. Pursuant to this recommendation, U.N.E.P. established the Coordinating Committee on the Ozone Layer, a scientific committee mandated with assessing the risk of ozone depletion. *See* BENEDICK, *supra* note 1; Caron, *supra* note 2; Doolittle, *supra* note 4; Kindt and Menefee, *supra* note 2.

[7] These states were Canada, Finland, Norway, Sweden and the United States. They were later joined by West Germany, and came to be known as the Toronto Group: BENEDICK, *supra* note 1 at 41-2.

began pushing for the adoption of an international framework convention under which international controls on ozone-depleting substances (O.D.S.) could be developed. U.N.E.P. began working on an international convention in 1981, and convened an Ad Hoc Working Group of Legal and Technical Experts for the Preparation of a Global Framework Convention for the Protection of the Ozone Layer in January 1982.[8] The Vienna Convention was signed in 1985.

The centrepiece of the ozone regime is the Montreal Protocol on Substances that Deplete the Ozone Layer,[9] adopted in 1987. The Protocol contains substantive provisions for the control of certain O.D.S. in the form of a freeze on their production and consumption, followed by a staged phase-out. Through amendments to the Protocol,[10] the schedules for phase-outs have been accelerated, and control measures have been implemented with respect to additional O.D.S.[11]

The central institution of the ozone regime is the Meeting of the Parties to the Montreal Protocol, which takes place annually.[12] The Meeting of the Parties may adopt

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[8] BENEDICK, *supra* note 1 at 41. For further discussion of the evolution of the Vienna Convention, see Barratt-Brown, *supra* note 1.

[9] Montreal Protocol on Substances that Deplete the Ozone Layer, *concluded* 16 September 1987, *entered into force* 1 January 1989, 26 I.L.M. 1541; *as amended* http://www.unep.org/ozone/mont_t.shtml [*hereinafter* Montreal Protocol]. Unless otherwise indicated, all references are to the Montreal Protocol as amended.

[10] The Protocol has been amended five times: in 1990 at London; in 1992 at Copenhagen; in 1995 at Vienna; in 1997 at Montreal; and in 1999 at Beijing.

[11] The control measures are set out in arts. 2A-2H and accompanying annexes of the Montreal Protocol, *supra* note 9.

[12] Rule 4, Rules of Procedure for Meetings of the Conference of the Parties to the Vienna Convention and Meetings of the Parties to the Montreal Protocol, Report of the Parties to the Montreal

amendments to the Protocol, and may also adopt decisions by a two-thirds majority.[13] Assessment panels to conduct research into the economic, environmental, scientific and technological implications of actual or possible control measures on ozone-depleting substances were established by decision, along with terms of reference for studies to be conducted by these panels.[14] In addition to procedural and administrative matters, the parties employ the decision-making procedure to clarify terminology in the Convention and Protocol and to clear up ambiguities in the interpretation of provisions.[15] Two of the most important initiatives taken under the regime, the establishment of the M.L.F. to provide financial assistance to developing countries in meeting their obligations, and the adoption of a non-compliance procedure, were accomplished by decision.

Protocol on the Work of their First Meeting, U.N.E.P./OzL.Pro.1/5, 6 May 1989 [*hereinafter* Report of the First Meeting of the Parties].

[13] Rule 40, *ibid.*

[14] Decision I/3 and I/4, Report of the First Meeting of the Parties, *supra* note 12. Article 11 of the Montreal Protocol, *supra* note 9, authorises the parties at their meetings to adopt by consensus decisions on various topics, including the establishment of panels to review control mechanisms. Article 6 provides for the assessment and review of control measures. The Protocol does not address the issue whether these decisions are binding, and there is some controversy on the topic: *see* O. Yoshida, *Soft Enforcement of Treaties: The Montreal Protocol's Noncompliance Procedure and the Functions of Internal International Institutions* 10 COLO. J. INT'L ENVTL. L. & POL. 95 at 119 ff. (1999).

[15] *See, e.g.,* Decision I/12, Report of the First Meeting of the Parties, *supra* note 14; Decision IV/12, Report of the Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, U.N.E.P./OzL.Pro.4/15, 25 November 1992 [*hereinafter* Report of the Fourth Meeting of the Parties]; Decision VI/11, Report of the Sixth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, U.N.E.P./OzL.Pro.6/7, 10 October 1994; Decision VII/5, Report of the Seventh Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, U.N.E.P./OzL.Pro.7/12, 27 December 1995 [*hereinafter* Report of the Seventh Meeting of the Parties]; Decision VIII/14, Report of the Eighth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, U.N.E.P./OzL.Pro.8/12, 19 December 1996 [*hereinafter* Report of the Eighth Meeting of the Parties].

The presence of the assessment panels within the regime ensures close collaboration between scientists and other regime participants, and facilitates the dissemination of scientific information among the parties and agencies associated with the regime.[16] The Technology and Economic Assessment Panel was created to study and report on the feasibility of possible control measures, in light of the availability of alternative substances and procedures.[17] By bringing this evaluative process into the regime, the parties limit their ability to argue against proposed control measures based on internal evaluative processes; and an independent source of information regarding feasibility is created. Because the feasibility analyses conducted by this panel include economic aspects, they provide information on the assistance measures needed to permit developing countries, known as article 5 countries,[18] to bring themselves into compliance with actual or proposed control measures, thereby integrating to some extent the

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[16] PARSON, *supra* note 1 at 34.

[17] *See, e.g.,* Decision II/13, Report of the Second Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, U.N.E.P./OzL.Pro.2/3, 29 June 1990 [*hereinafter* Report of the Second Meeting of the Parties], which requested the Panel to assess "the earliest technically feasible dates and the costs for reductions and total phase-out of ... methyl chloroform ... ." The Panel was to consider the following factors:

> (a) An evaluation of the need for transitional substances in specific applications;
> (b) An analysis of the quantity of controlled substances required by Parties operating under paragraph 1 of Article 5 for their basic domestic needs, both at present and in the future, and the likely availability of such supplies; and
> (c) A comparison of the toxicity, flammability, energy efficiency implications and other environmental and safety considerations of chemical substitutes, along with an analysis of the likely availability of substitutes for medical uses ... .

[18] The Montreal Protocol, *supra* note 9, art. 5, contains a list of countries designated as developing countries. Membership in this group entitles the parties to financial and technical assistance; furthermore, a different timetable for the phase–out targets is established for these countries. *See infra* at 264.

respective control and assistance obligations of art. 5 and non-art. 5 parties.[19] It has been suggested that the formation of this panel had the perhaps unintended effect of creating a forum at the international level for the development of solutions to technical problems regarding the replacement of O.D.S. and processes depending on these substances.[20]

Implementation Committee and Non-Compliance Procedure

The Implementation Committee and Non-Compliance Procedure have their basis in art. 8 of the Montreal Protocol.[21] Both were established on an interim basis in 1990[22] and definitively in 1992.[23] The Implementation Committee consists of ten parties elected by the meeting of the parties on the basis of equitable geographic distribution. The non-

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[19] *See, e.g.,* Decision III/12, Report of the Third Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, U.N.E.P./OzL.Pro.3/11, 21 June 1991:

> (a) To request the Assessment Panels and in particular the Technology and Economic Assessment Panel to evaluate, without prejudice to Article 5 of the Montreal Protocol, the implications, in particular for developing countries, of the possibilities and difficulties of an earlier phase-out of the controlled substances, for example of the implications of a 1997 phase-out;
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> (b) Taking into account the London Resolution on transitional substances (Annex VII to the report of the Second Meeting of the Parties to the Montreal Protocol), to identify the specific areas where transitional substances are required to facilitate the earliest possible phase-out of controlled substances, ...

[20] PARSON, *supra* note 1 at 30.

[21] Koskenniemi, *supra* note 1; Thomas Gehring, *International Environmental Regimes: Dynamic Sectoral Legal Systems* 1 Y.B.I.E.L. 35 at 50-54 (1990).

[22] Decision II/3, Non-Compliance Procedure, Report of the Second Meeting of the Parties, *supra* note 17.

[23] Decision IV/5, Non-Compliance Procedure, Report of the Fourth Meeting of the Parties, *supra* note 23. The Non-Compliance Procedure was subsequently modified: Report of the Tenth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, U.N.E.P./OzL.Pro.10/9, 3 December 1998 [*hereinafter* Non-Compliance Procedure 1998].

compliance procedure may be invoked by any of the parties to the Montreal Protocol,[24] including the party in breach of its obligations,[25] or by the Secretariat of the ozone regime.[26] The Implementation Committee takes up such submissions and considers them, "with a view to securing an amicable solution of the matter on the basis of respect for the provisions of the Protocol."[27] It has no decision-making authority itself; rather, it submits recommendations to the Meeting of the Parties, which makes a decision regarding action to be taken.[28] The nature of the recommendations that the Implementation Committee may make is left open-ended, although an indicative list of such measures has been adopted, naming the provision of assistance, the issuing of cautions, or the suspension of rights and privileges under the Protocol.[29] Although, as will be discussed below, the

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[24] Non-Compliance Procedure 1998, *supra* note 24. The procedure is invoked by the parties upon the sending of a notice to the Secretariat, which then transmits the information, along with any reply by the party alleged to be in non-compliance, to the Implementation Committee: *ibid.*, art. 2.

[25] *Ibid.*, art. 4.

[26] *Ibid.*, art. 3. When the Secretariat invokes the procedure, it begins by advising the party concerned and, if no resolution is reached within three months or a longer time period if circumstances so require, it includes this information in a report to the Meeting of the Parties and advises the Implementation Committee: *ibid.* From this point, there appears to be no difference in the manner in which the Implementation Committee proceeds: art. 7 *ibid.* provides that the Committee "receive, consider and report on any submission made in accordance with paragraphs 1, 2 and 4."

[27] *Ibid.*, art. 8.

[28] *Ibid.*, art. 9. As discussed *supra* note 14, the Montreal Protocol does not specify whether these decisions are binding. The Implementation Committee seeks to negotiate its draft decisions with the parties in non-compliance and to obtain their agreement thereto, but this is not always possible. For example, in 1995, the Committee's draft decision regarding Russia's non-compliance met with an objection from Russia regarding monitoring and trade restrictions: Report of the Seventh Meeting of the Parties, *supra* note 28, para. 44. *See also* Yoshida, *supra* note 28 at 135 ff. Benedick reports that the Russian delegation sought unsuccessfully to block the passage of this decision and subsequently walked out of the meeting: BENEDICK, *supra* note 1 at 281-2. Russia was represented at the subsequent Meeting of the Parties in San José and has since cooperated with the Implementation Committee.

[29] Indicative List of Measures that Might be Taken by a Meeting of the Parties in respect of Non-Compliance with the Protocol, Annex V, Report of the Fourth Meeting of the Parties, *supra* note 15.

Implementation Committee has shown a good deal of inventiveness and innovation in crafting responses to non-compliance, it has come to treat the indicative list rather as an authoritative statement of the extent of its recommendatory powers.[30]

The Non-Compliance Procedure has been invoked on numerous occasions. In each case the process has been initiated as a result of a communication to the Implementation Committee by the party itself. As I will explain below, the Non-Compliance Procedure places emphasis on bringing parties into compliance, through the provision of assistance in certain cases, rather than on punishing non-compliance. Parties that are having difficulties with compliance, specifically countries of the former Eastern Bloc, or Countries with Economies in Transition (C.E.I.T.s), submit to this procedure in order to explain and justify their non-compliance to other parties. These countries are not eligible for art. 5 status and are themselves obligated to provide financial and technical assistance to art. 5 countries. They are also subject to voluntary assessment for contributions to the M.L.F. This has posed a particular challenge to the Implementation Committee and to the parties, as in these cases the major incentive for compliance,

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[30] The decisions respecting compliance contain a recital of the measures that could be or are being taken. A typical formulation is as follows:

> Azerbaijan should continue to receive international assistance to enable it to meet these commitments in accordance with item A of the indicative list of measures that might be taken by a Meeting of the Parties in respect of non-compliance. However, through this decision, the Parties caution Azerbaijan, in accordance with item B of the indicative list of measures, that in the event that the country fails to meet the commitments noted above in the times specified, the Parties shall consider measures, consistent with item C of the indicative list of measures. These measures could include the possibility of actions that may be available under Article 4, designed to ensure that the supply of C.F.C.s and halons that is the subject of non-compliance is ceased, and that exporting Parties are not

namely the provision of assistance, is not formally provided for in the convention or protocol.

At the 1992 Meeting of the Parties, Russia, Hungary, Bulgaria and Poland stated that they were having difficulties with compliance. Russia sought special status under the regime, stating that it would be unable to meet the new control measures being adopted. It was joined in 1993 by Belarus, Bulgaria, Romania and Ukraine.[31] The parties declined to grant special status, but in 1993 a subcommittee was struck to consider the possibility for C.E.I.T.s to make in-kind contributions to the M.L.F. This initiative was ultimately unsuccessful.[32] In 1994 U.N.E.P. organised a workshop for C.E.I.T.s to assist them with implementation, and that same year the Technological and Economic Assessment Panel established an Ad Hoc Working Group on C.E.I.T. Aspects, in which the International Bank for Reconstruction and Development (the World Bank) and the Global Environment Facility (G.E.F.) cooperated.[33] The problem was not resolved, however, and in 1995 Russia, Belarus, Poland and Ukraine proposed that they be granted a 5-year grace period

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contributing to a continuing situation of non-compliance: Decision X/20, Report of the Tenth Meeting of the Parties, *supra* note 23.

[31] BENEDICK, *supra* note 1 at 279.

[32] *Ibid.* at 279. This initiative was the subject of Decision V/10, Report of the Fifth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, U.N.E.P./OzL.Pro.5/12, 19 November 1993.

[33] *See* BENEDICK, *supra* note 1 at 280.

within which to implement their obligations, a temporary exemption from M.L.F. contributions, and financial assistance.[34]

The Non-Compliance Procedure was finally invoked with respect to Russia, in a rather indirect manner. Russia refused to invoke the procedure under art. 4, and so the Implementation Committee decided to interpret Russia's admissions of its inability to meet its commitments as notice under that article.[35] The procedure was also invoked with respect to Belarus and Ukraine. The response of the Implementation Committee involved the imposition of reporting requirements, controls on exports, and the provision of financial and technical assistance, the latter to be conditional on fulfilment of the two former requirements.[36] Assistance was provided by the G.E.F., the World Bank and the United States government.[37] The Implementation Committee has continued to follow up on the compliance of these and other countries, and progress in reducing consumption and production of O.D.S. has been noted.

The Implementation Committee has been extremely active almost since its inception, and the countries with respect to which the non-compliance procedure is invoked have, by and large, been moving toward fulfilment of their obligations under the Protocol. This bears testament to the level of confidence that the parties have developed

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[34] Report of the Eleventh Meeting of the Implementation Committee, UNEP/OzL.Pro/ImpCom/11/1, 14 September 1995.

[35] *Ibid.* at 280-1.

[36] Decisions VII/7,; Decision VII/8, and VII/9, Report of the Seventh Meeting of the Parties, *supra* note 15; BENEDICK, *supra* note 1 at 281.

[37] *Ibid.* at 284-5.

in the Committee. Although the Committee has recommended that measures having the nature of sanctions be brought to bear upon parties in non-compliance, this is not its primary *modus operandi*. In fact, the sanctions tend to be structured with practical ends rather than punishment in mind. For example, where the Committee recommends that strict reporting obligations and schedules be followed in order to ensure that a party is moving towards compliance, it also imposes, in many instances, restrictions on exports of controlled substances. In this manner, parties must demonstrate that they are not benefiting from their failure to comply by increasing their exports of controlled substances, and that their inability to make the required production and consumption reductions is genuinely a result of problems related to domestic needs, unavailability of substitutes and alternatives, and other practical obstacles to compliance. Furthermore, the Committee will generally make the provision of financial and technological assistance conditional on the fulfilment by the country in breach of the obligations and restrictions that have been imposed. In this manner, sanctions provide both a general disincentive for non-compliance and a more carefully tailored means of encouraging the party to bring itself into compliance.

The relative success of the Implementation Committee, and the legitimacy with which it is imbued, may be attributed to a number of factors. For example, the ever-smaller supply of O.D.S. and the prospect of even tighter controls on its production, use and trade in the future create an incentive for countries to regulate these substances and to switch to substitutes and alternatives as rapidly as possible. Furthermore, the availability

of assistance, whether from the M.L.F. or from other sources to which the parties have indirect access, creates a further incentive for compliance. The relative efficacy of the reporting procedures, giving the parties and other actors in international society some access to data on production and consumption, no doubt plays a role in encouraging countries to comply. Finally, the Implementation Committee, and more generally the meetings of the parties, have demonstrated a good deal of creativity in crafting responses to non-compliance. In other words, there are many reasons having to do with the mechanics of the non-compliance procedure and of the ozone regime more generally - reasons to do with regime design - to explain the capacity of the Implementation Committee to affect state behaviour. However, it is also possible to explain the Committee's legitimacy with reference to the shared understandings that have developed within the regime.

The capacity of the parties to construct systems of incentives and disincentives to bring parties into compliance is in large measure a result of the interdependence of the regime's norms, both binding and non-binding. For example, the fact that parties anticipate that supplies of O.D.S. will diminish and that they are interested in converting to alternatives and substitutes is a function of their expectation that the schedules for future phase-outs will be met and, in some cases where the parties have manifested such an intent in the form of non-binding declarations, of an expectation that these schedules will be accelerated. Both existing and projected or possible control measures influence parties' decisions.

The best illustration of this interdependence of norms is the operation of the Implementation Committee. The reluctance of states to submit themselves to binding third-party dispute resolution has been well-documented.[38] The vagueness and fluidity of much of the body of international law renders it extremely difficult for states to predict what the outcome of adjudicative procedures will be; therefore, submission of a dispute to such procedures translates into a loss of control over both process and outcome. For this reason in particular, states prefer to settle disputes through diplomatic channels, or, more recently, through negotiations and rhetoric in multilateral fora. The non-compliance procedure was constructed with these preferences in mind: hence the decision to emphasise amicable solutions and the approach to non-compliance as a problem to be solved collectively among the parties. Nevertheless, the prospect of sanctions is present, and even a simple finding that a country is in breach of its obligations can be damaging. Therefore, it is not altogether surprising that the first country to submit to the proceedings did so reluctantly, with a good deal of prodding from the Implementation Committee. It is perhaps more surprising that any party was willing to place itself in the position of being brought before the newly-minted and untested Committee, as this constituted a step into the unknown.

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[38] Koskenniemi notes that, given the open-ended nature of international environmental norms, disputes between states can only be settled by reference to what he describes as a contextual reasonableness test. As a result, states prefer to resolve disputes through diplomatic channels, rather than involve other parties in the process of determining what is reasonable under the circumstances: Martti Koskenniemi, *Peaceful Settlement of Environmental Disputes* 60 NORDIC J. INT'L L. 73-92 at 81-2 (1991).

Since the purpose of the non-compliance procedure is to find a way to bring parties into compliance, the effectiveness of the incentives, means of assistance and sanctions at the disposal of the parties is of fundamental importance, yet in the early days of the Non-Compliance Procedure was subject to uncertainty. This was particularly the case with respect to the C.E.I.T.s that came before the Committee, as they are not formally eligible for assistance under the protocol and therefore faced the prospect of sanctions without the benefit of assistance or incentives. The ability of the Committee to mobilise resources on behalf of these countries had not yet been determined, although the parties had shown a certain willingness to seek solutions to the problems faced by C.E.I.T.s through workshops and other means. In the case of art. 5 countries, which are technically eligible for assistance under the protocol, the most significant source of doubt has been, and continues to be, the level of commitment of the non-art. 5 parties to contribute to the M.L.F. The capacity of the Implementation Committee to deliver on its promise to seek an amicable solution to compliance difficulties and to provide assistance where appropriate to countries unable to comply depends in large measure on the fulfilment by non-art. 5 countries of a *voluntary* undertaking to contribute to the M.L.F. However, it should be noted that the more broadly-worded obligation to provide assistance is *not* voluntary. On the other hand, the C.E.I.T.s, which are not formally entitled to assistance, have nevertheless received some form of assistance as a result of recommendations by the Implementation Committee and decisions by the parties. This experience may increase the level of confidence that art. 5 countries have in the non-

compliance process. In the meantime, where there is an allegation that non-compliance is a result of inadequate implementation of the assistance obligations on the part of non-art. 5 countries, it is possible for art. 5 parties to bypass the Implementation Committee and submit issues relating to compliance directly to the meetings of the parties.[39] The practical result of this manner of proceeding is to avoid the imposition of sanctions while maintaining access to assistance.

The successful operation of the Implementation Committee is thus heavily dependent not only on the efficiency of the regime's formal obligations and other institutions and processes, but also on the level of confidence that the parties have in each other, in the regime and more particularly in the Committee. Submission to the non-compliance procedure involves running a series of risks, but the level of risk is acceptable because the Committee operates within the context of the regime and relies extensively on the network of informal norms and shared understandings that the parties have established through almost two decades of interaction. It is important, as Martti Koskenniemi notes, that non-compliance procedures take a contextual and collective approach,[40] for at least two reasons. First, as mentioned above, the ozone regime is not limited to its formally binding norms. In order for recommendations of the Implementation Committee to be accepted as valid and legitimate - prerequisites to their effectiveness - they must reflect the parties' common understandings of the whole

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[39] Montreal Protocol, *supra* note 9, art. 5.
[40] Koskenniemi, *supra* note 21 at 136.

complex of norms comprising the ozone regime. Second, more traditional forms of dispute resolution emphasise the invasion of the rights of one state by the actions of another, and seek to re-establish a balance on an essentially bilateral basis. In the context of the ozone regime, and for that matter of international environmental regimes generally, of fundamental importance is the striking and maintenance of a balance among the interests of all the parties. To abstract a particular dispute from the context of the regime would be to disrupt this balance.[41]

Multilateral Fund

The Montreal Protocol is the first international environmental agreement to set out differential obligations for developed and developing countries. The latter, the art. 5 parties, benefit from a 10-year grace period prior to being required to meet phase-out schedules for O.D.S. In addition, as provided by arts. 10 and 10A, art. 5 countries are eligible for financial and technological assistance with the process of converting to non-ozone depleting substances and technology. Furthermore, the fulfilment by art. 5 countries of their obligations under the Protocol is made conditional on effective implementation of the provisions on financial and technological assistance.[42] An art. 5

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[41] *Ibid.* at 136-7.

[42] The relevant provisions of the Montreal Protocol, *supra* note 9, are found at art. 5, paras. 5-8:

> 5. Developing the capacity to fulfil the obligations of the Parties operating under paragraph 1 of this Article to comply with the control measures set out in Articles 2A to 2E, and any control measures in Articles 2F to 2H that are decided pursuant to paragraph 1 bis of this Article, and their implementation by those same Parties will depend upon the effective implementation of the financial co-operation as provided by Article 10 and the transfer of technology as provided by Article 10A.

state unable to meet its obligations may notify the Secretariat, alleging inadequate implementation of the assistance obligations, in which case non-compliance measures cannot be taken against that country until the Meeting of the Parties has had the opportunity to consider the matter.

The obligation of developed countries to provide financial and technological assistance to developing countries led to the creation of the M.L.F. and its Executive Committee.[43] The purpose of the M.L.F. is to "meet all agreed incremental costs of such Parties in order to enable their compliance with the control measures of the Protocol;" to finance clearinghouse functions; and to finance the costs related to the operation of the M.L.F.[44] The M.L.F. is funded by voluntary contributions by non-art. 5 states according

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> 6. Any Party operating under paragraph 1 of this Article may, at any time, notify the Secretariat in writing that, having taken all practicable steps it is unable to implement any or all of the obligations laid down in Articles 2A to 2E, or any or all obligations in Articles 2F to 2H that are decided pursuant to paragraph 1 bis of this Article, due to the inadequate implementation of Articles 10 and 10A. The Secretariat shall forthwith transmit a copy of the notification to the Parties, which shall consider the matter at their next Meeting, giving due recognition to paragraph 5 of this Article and shall decide upon appropriate action to be taken.
> 7. During the period between notification and the Meeting of the Parties at which the appropriate action referred to in paragraph 6 above is to be decided, or for a further period if the Meeting of the Parties so decides, the non-compliance procedures referred to in Article 8 shall not be invoked against the notifying Party.
> 8. A Meeting of the Parties shall review, not later than 1995, the situation of the Parties operating under paragraph 1 of this Article, including the effective implementation of financial co-operation and transfer of technology to them, and adopt such revisions that may be deemed necessary regarding the schedule of control measures applicable to those Parties.

[43] *Ibid.*, art. 10, as amended by the Second Meeting of the Parties to the Montreal Protocol, *supra* note 9.

[44] Montreal Protocol, *supra* note 9, art. 10. Incremental costs are the difference between the cost of ozone-depleting and non-ozone depleting substances and technology: *see ibid.*, Annex VIII: Indicative List of Categories of Incremental Costs, adopted by Decision IV/18, Report of the Fourth Meeting of the Parties, *supra* note 15.

to the U.N. scale of assessment. Despite these contributions being voluntary, the parties, with the exception of the C.E.I.T.s, are now meeting their funding commitments.[45] The Executive Committee, the governing body of the M.L.F., is comprised of seven members each from art. 5 and non-art. 5 countries. It makes decisions by a two-thirds majority comprising separate simple majorities from North and South. It is assisted in its work by the World Bank, U.N.E.P. and the United Nations Development Programme (U.N.D.P.).[46] The United Nations Industrial Development Organization (U.N.I.D.O.) has been working with the M.L.F. since 1992.

As noted above, the obligations of art. 5 countries to implement control measures refer to the obligations in art. 10 and in art. 10A, which calls for transfers of technology.[47] The former are not made conditional upon the latter; rather, an allegation of inadequate implementation of assistance obligations by an art. 5 party in breach of its control

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[45] *See infra* note 50.

[46] *See* BENEDICK, *supra* note 1, at 184-7.

[47] This is reflected in the amended text of art. 5, paras. 5 ff. of the Montreal Protocol, *supra* note 9:

> 5. Developing the capacity to fulfil the obligations of the Parties operating under paragraph 1 of this Article to comply with the control measures set out in Articles 2A to 2E and their implementation by those same Parties will depend upon the effective implementation of the financial cooperation as provided by Article 10 and transfer of technology as provided by Article 10A.
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> 6. Any Party operating under paragraph 1 of this Article may, at any time, notify the Secretariat in writing that, having taken all practicable steps it is unable to implement any or all of the obligations laid down in Articles 2A to 2E due to the inadequate implementation of Articles 10 and 10A. The Secretariat shall forthwith transmit a copy of the notification to the Parties, which shall consider the matter at their next Meeting, giving due recognition to paragraph 5 of this Article and shall decide upon appropriate action to be taken.
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> 7. During the period between notification and the Meeting of the Parties at which the appropriate action referred to in paragraph 6 above is to be decided, or for a further period

obligations triggers consideration of the matter by the meeting of the parties and suspends the application of the non-compliance procedure. This provision reinforces the reciprocity between the obligations to render assistance and the obligations to implement control measures, and gives to art. 5 countries a certain capacity to lay claim to fulfilment of the obligations to provide assistance. It also permits the immediate consequences of failure to provide assistance to be felt by non-art. 5 countries and provides additional incentive for the fulfilment of their obligations in this respect.

By emphasising the mutuality of the respective obligations of North and South, this provision also enhances a sense of shared responsibility for fostering compliance. It had been feared that the non-compliance procedure would in the vast majority of instances be brought to bear by the North on the South; in fact, this has not occurred, as the Implementation Committee has focussed on C.E.I.T.s. The link between compliance by art. 5 countries with control obligations and compliance by non-art. 5 countries with assistance obligations, and more particularly the suspension of non-compliance procedures in cases where a breach is alleged to be the result of inadequate assistance, reinforces the notion that non-compliance is to be approached as a problem to be solved by the parties as a whole.

Although it is in the interest of developed country parties to provide assistance where necessary to encourage compliance by developing countries, this interest appears

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if the Meeting of the Parties so decides, the noncompliance procedures referred to in Article 8 shall not be invoked against the notifying Party.

to be too general and diffuse to ensure that assistance obligations are met. Prior to the London meeting in 1990, developed country parties were vague with respect to their commitment to provide funds for developing countries, and the parties were slow to agree on the modalities of such funding.[48] Even once the M.L.F. was set up, art. 5 countries had suspicions regarding the depth of the commitment of developed countries to following up on their obligations.[49] Ongoing funding is not assured. The M.L.F. is funded on a three-year rolling basis, and the overall amount by which the M.L.F. is to be replenished is subject to debate at the end of each three-year period. Difficulties continue to be encountered with respect to contributions by C.E.I.T.s,[50] and apparently by those parties that were late in ratifying the London Amendments: a one-time waiver of arrears in contributions to the M.L.F. by those countries was granted in 1997.[51] While there has been a good deal of attention paid to non-compliance, actual or potential, on the part of developing countries, compliance problems experienced to date with respect to control

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[48] Günther Handl, *International Efforts to Protect the Global Atmosphere: A Case of Too Little, Too Late?* 1 E.J.I.L. 250 at 253-4 (1990).

[49] During the lead-up to the 1992 Copenhagen meeting, negotiations broke down due to disputes over the amount of contributions to the M.L.F. Many parties were in arrears in their contributions, and there was a negative reaction to U.N.E.P.'s suggestion that the amount of contributions be increased. In the end, no agreement could be reached regarding the amount of the contributions to be made in 1994-6: BENEDICK, *supra* note 1 at 210-2.

[50] *Ibid.* at 302. In his report to the Seventh Meeting of the Parties, the Executive Director of the Multilateral Fund had made reference to arrears on the part of O.E.C.D. countries, accounting for twenty-two percent of total arrears: Report of the Seventh Meeting of the Parties, *supra* note 15. By the eighth meeting, the only countries in arrears were C.E.I.T.s and one developing country not operating under art. 5. Eighty-eight percent of the assessed contributions had been paid at this time: Report of the Eighth Meeting of the Parties, *supra* note 15.

[51] Decision IX/38; Annex X to the Report of the Ninth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, U.N.E.P./OzL.Pro.9/12, 25 September 1997.

measures have been on the part of C.E.I.T.s. This situation may begin to change now that the grace periods granted to art. 5 countries have expired and phase-outs have begun to apply to these countries.[52] This fact makes the question of developed country compliance with assistance obligations even more important.

3. SOFT LAW PRINCIPLES AND THE REGIME'S EVOLUTION

The role of principles of soft law in the ozone regime is difficult to discern. The two principles most commonly referred to in connection with the regime are the precautionary principle and the principle of common but differentiated obligations, yet most explanations of the regime's development are essentially non-normative, placing emphasis on the interests of states, the role of committed actors such as U.N.E.P. and certain entrepreneurial states, successful regime design, and the influence of science. Various aspects of the regime's normative structure may be identified as being compatible with the principles mentioned above, but the further question, whether the existence of these principles may be described as a causal factor in the regime's development, is difficult to answer.

The actors involved in the ozone regime had not only to contend with the material fact of ozone layer depletion and its effects on human and animal health and environmental integrity, but also with an emerging understanding of environmental

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[52] The first of these control measures took effect with respect to art. 5 countries in 1999, and the first phase-outs will take effect in 2005: Summary of Control Measures, Handbook for the International Treaties for the Protection of the Ozone Layer, 5th ed. (2000), http://www.unep.ch/ozone/Handbook2000.htm.

degradation as a global problem requiring concerted international efforts for its solution. This understanding came up against a competing understanding of environmental degradation as being the problem of industrialised countries to whose solution developing countries should and could not be expected to contribute. The understanding, or cognitive framework, that various participants in the debate brought to bear on the 'brute facts' conditioned their interpretation of these facts and the nature of the response that they believed appropriate.

The precautionary principle

The ozone regime is often described as having been inspired or at least influenced by the precautionary principle, as both the Vienna Convention and the Montreal Protocol were concluded before conclusive scientific evidence of their necessity or efficacy had been released. The motivation to take initiatives at the international level to protect the ozone layer arose from a variety of factors, including, to varying degrees, state interest,[53] pressure from industry[54] and interest groups, scientific evidence respecting the ozone layer, and the nature of the scientific and political discourses taking place within and around the ozone regime.[55] However, it would be difficult to argue that the normative compliance pull of the precautionary principle was such that it brought the states around

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[53] For an interest-based analysis of the ozone regime, see Detlef Sprinz and Tapani Vaahtoranta, *The Interest-based Explanation of International Environmental Policy* 48 I.O. 77 (1994).

[54] This bears some explanation. The position of many representatives of industry in the United States favoured the adoption of control measures at the international level because they feared that, in the absence of international measures, domestic measures would be imposed that would decrease the competitiveness of United States industry. *See, e.g.*, Haas, *supra* note 2 at 207.

to the position that controls on O.D.S. could not await scientific proof of their efficacy. The precautionary principle is influential within the ozone regime because of its capacity to frame and shape discourse among participants in the regime.

The control measures as initially conceived were consistent with a precautionary approach.[56] The fact that international society took steps to regulate O.D.S. prior to proof of their effect on the ozone layer and of the effect of ozone layer depletion on human health and environmental integrity is indeed significant. On the other hand, it must be noted that the parties, in the course of negotiations on the text of the Montreal Protocol, decided not to take into account the evidence of an ozone hole over Antarctica, since the findings and the link between ozone depletion and anthropogenic substances had yet to be confirmed.[57] Although the discovery of the ozone hole had a significant effect on the progress and outcome of the negotiations,[58] the decision not to use these preliminary findings as a basis for regulatory action is not consistent with precautionary action. Edward Parson argues that the fifty percent reduction in chlorofluorocarbons (C.F.C.s) agreed to in Montreal was the result of bargaining rather than science. If it was accepted, or provisionally accepted in a manner consistent with the precautionary principle, that C.F.C.s caused ozone depletion, then Parson argues that an eighty-five percent cut would

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[55] *See* LIFTIN, *supra* note 2, chapter 6; Seaver, *supra* note 3.

[56] LIFTIN, *supra* note 2 at 119. Benedick describes the adoption of the Vienna Convention as the first instance of international society seeking to address an environmental issue whose effects had not yet been felt: BENEDICK, *supra* note 1 at 45.

[57] LIFTIN, *supra* note 2 at 97.

[58] *Ibid.* at 97.

have been more appropriate.[59] To the extent that international action on the ozone was at the outset precautionary in nature, evolving scientific understandings of ozone depletion quickly revealed that this was not in fact the case: the cuts agreed to in Montreal were demonstrated to be inadequate soon after the ink on the Protocol was dry.[60] Liftin argues that from this point the reaction of international society to ozone depletion can more accurately be described as conservationist than as precautionary.[61] Although the characterisation of the ozone regime as an example of the precautionary principle in action must be qualified, it remains the case that the Vienna Convention, and to a lesser extent the Montreal Protocol, were concluded before the state of scientific knowledge on ozone depletion was sufficiently advanced to indicate the necessity of proceeding with control measures.

There are a number of proposed explanations for the adoption of international control measures for ozone-depleting substances. For example, Peter Haas argues that an international epistemic community composed of scientists and enjoying access to both domestic and international policy-making institutions successfully pushed for the adoption and subsequent strengthening of control measures.[62] This epistemic community consisted of scientists who shared a common system of values relating to environmental

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[59] PARSON, *supra* note 2 at 25.

[60] Benedick notes that interim findings from an Antarctic research project released two weeks after the Protocol was signed indicated that ozone depletion was increasing: BENEDICK, *supra* note 1 at 108. *See also* Mintz, *supra* note 2 at 571.

[61] LITFIN, *supra* note 2 at 119.

[62] Haas, *supra* note 2.

protection, and who agreed on both causal factors and scientific method regarding ozone depletion.[63]

The question is how the scientists participating in the epistemic community were able to prevail vis-à-vis the domestic and international decision-makers, when there were other scientists who held different views regarding the science of the ozone layer. Haas describes the manner in which these scientists shared information with one another and disseminated it to the wider scientific and policy-making community. He notes that members of the epistemic community were well-represented within the bureaucracy of U.N.E.P. and the Environmental Protection Agency in the United States. He refers to one occasion on which the epistemic community reached a compromise with other scientists, agreeing to support a fifty percent cut in C.F.C. production and consumption rather than the much higher cut they had initially advocated.[64]

Another aspect of the answer might lie in the fact that the epistemic community was not limited to scientists. Karen Liftin discusses the role of knowledge brokers in the process of interpreting the scientific information in particular ways - framing the information - such that it supported particular policy initiatives.[65] The manner in which

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[63] *Ibid.* at 189.

[64] *Ibid.* at 211, referring to United Nations Environment Programme, *Ad Hoc Scientific Meeting to Compare Model-Generated Assessments of Ozone Layer Change for Various Strategies for C.F.C. Control* U.N.E.P./WG 167/INF 1, 1987.

[65] LITFIN, *supra* note 2. Litfin sees her argument as differing significantly from Haas's, but I read the two authors as holding rather similar positions. Litfin characterises Haas's argument as stressing the influence of a scientific consensus on the parties, whereas she disputes the existence of such a consensus, arguing instead that one group of knowledge brokers gained influence over decision-makers as a result of its ability to frame scientific knowledge in a convincing manner. Haas makes a very similar

the framers of knowledge went about this task had to do, according to Liftin, with their attitudes toward risk.[66] The epistemic community, it would appear, took a precautionary stance that affected their further stance on the control measures that should be adopted. Following Liftin's argument, the precautionary approach prevailed because the epistemic community of scientists and policy-makers (although she does not use this terminology) successfully framed the scientific knowledge to support the point of view that ozone depletion required a strong policy response in the form of strict control measures. I agree with Liftin's conclusion that the discovery of the ozone hole had a galvanising effect on the negotiations over the text of the Montreal Protocol, and made policies consistent with a precautionary approach seem more credible and appropriate.[67] Although the Antarctic hole was not formally on the table during the negotiations on the Montreal Protocol and the scientific findings had not yet been confirmed, this did not serve significantly to curb its influence on the process of negotiations. The possibility that anthropogenic substances had led to dramatic thinning of the ozone layer lent strong support to one approach to framing of scientific information and tended to discredit others. This was even more emphatically the case once the findings were confirmed. According to Haas, this information also brought about a high level of scientific consensus. Liftin notes that,

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argument. The consensus to which he refers is not consensus in the scientific community as a whole, but rather in a sub-set of that community. This sub-set constituted an epistemic community, sharing a broad set of values oriented toward environmental protection and agreeing on the causal connection between O.D.S. and ozone-depletion and on scientific method: Haas, *supra* note 2 at 189.

[66] LITFIN, *supra* note 2 at 103-4.

[67] *Ibid.* at 80.

although the modelling of ozone depletion given various control scenarios proved to have been inaccurate, this did not diminish the credibility and legitimacy of the atmospheric scientists. What it did do was to discredit modelling in favour of an approach known as chlorine loading, which concentrates not on the ozone-depleting capacity of various substances but rather on their atmospheric lifetimes.[68] The result, notes Parson, was to focus attention on a new range of chemicals.

The adoption of control measures was very much driven by science, and the role of scientists in the regime was enhanced by institutional factors that facilitated contact between scientists and policy-makers.[69] However, science was not the sole determinant of either the decision to adopt control measures or the strictness of the measures themselves. Other actors, who may be described *per* Haas as members of an epistemic community or *per* Liftin as knowledge brokers, played a role in promoting certain scientific approaches over others. As we have seen, the precautionary principle itself carries normative weight in international environmental law, even in those contexts in which it has not been formally recognised as a rule of law. Proponents of precautionary action in the context of the ozone regime were able not only to interpret scientific evidence of greater-than-expected ozone depletion in such a way as to provide support for precautionary action, but they were also able to refer to a broader normative

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[68] *Ibid.* at 99. Modelling involves charting the effect over time of cuts to ozone-depleting substances on the stratospheric ozone layer. Chlorine loading, on the other hand, measures levels of chlorine in the atmosphere and tends to shift the focus from the most ozone-depleting substances to substances with the longest atmospheric lifetimes: *ibid.* at 99-100; PARSON, *supra* note 2 at 27.

understanding of the value and significance of environmental resources and of the responsibility of states and more generally of international society to protect these resources for their own sake. References to the costs of regulatory action to individual states or to industry became in some measure de-legitimised as the weight of countervailing interests, combined with a growing sense of urgency, lent credence to a precautionary manner of framing the issue.

Common but differentiated obligations

While equitable arguments are available to support both aspects of the principle of common but differentiated obligations, it is possible to explain acceptance of this principle in the context of the Montreal Protocol by reference to more instrumental motivations. In particular, both developed and developing countries must have been aware of the extent to which the former required the cooperation and participation of the latter in order for control measures to be effective.[70] Developing countries were able to refer to both their limited capacity to adopt expensive substitute technology and to the inequity of requiring them to compromise economic development by renouncing cheap and readily available technology in favour of expensive and inaccessible substitutes.[71]

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[69] PARSON, *supra* note 2.

[70] Handl, *supra* note 48 at 253.

[71] Bing Ling, *Developing Countries and Ozone Layer Protection: Issues, Principles and Implications* 6 TULANE ENVT'L L.J. 91 (1992); Gallagher, *supra* note 4 at 305-13. On the subject of technology transfers to art. 5 countries, see Peter Lawrence, *Technology Transfer Funds and the Law - Recent Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer* 4(1) J. ENVT'L L. 15 (1992); Handl, *supra* note 48 at 253. For a criticism of common but differentiated obligations, see Victor Williams, *Ozone Depletion, Developing Countries and Human Rights: Seeking Better Ground on which to Fight for Protection of the Ozone Layer* 10 J. NAT. RES. & ENVT'L L. 83 (1995).

Thus, the principle of common but differentiated obligations was invoked by both groups for both ethical and pragmatic reasons.

The need to bring developing countries into the regime clearly provided a significant incentive for developed countries to make concessions and to take their assistance obligations seriously. However, such an explanation remains incomplete without an understanding of the normative pull of common but differentiated obligations. As described above with respect to the Implementation Committee, Russia and certain other C.E.I.T.s attempted for several years to convince the other parties to grant them special status under the regime in light of their economic difficulties, yet they were unsuccessful. Concessions and assistance were granted to these countries on what may be described as an informal basis; that is, the structure of obligations within the Protocol was not altered. It would appear that only certain elements of the equitable arguments justifying common but differentiated obligations were available to these countries. While their economic difficulties made it much more difficult for these countries to meet the stringent control obligations put in place for developed countries, and while it could be anticipated that they would face hardship if required to do so, it could not be argued that they had not contributed significantly to ozone depletion; quite the contrary. It may be argued that claims on the part of C.E.I.T.s to special status did not resonate with the parties because they were not able, in framing their claim, to refer back to the emerging common understanding that, with respect to international environmental protection issues,

developed and developing countries are differently situated and must therefore be treated differently.

4. CONCLUSION

The precautionary principle helped the participants in the ozone regime formulate an approach to the risk of ozone depletion, of whose existence and seriousness the scientific community was providing ever more conclusive evidence. The principle of common but differentiated obligations, for its part, placed a limitation on the scope of precaution's application. It is possible to view acceptance of precaution and common but differentiated obligations in light of expediency and self-interest, but equally possible to reconcile this acceptance with the process of a discourse about the validity of these principles and their application to this context. The fact that participants in the regime came to regard it as being in their interest to, on the one hand, adopt control measures in the absence of proof of their necessity and, on the other hand, establish a separate timetable for and provide assistance to developing countries, can be explained with reference to the normative discourse through which an increasing number of participants came to be convinced of the appropriateness of these measures. The legitimacy of the two principles under consideration here seems to have prompted participants to reinterpret and redefine their interests in light of the policy and normative objectives on which light was thrown by the discourse through which the principles were articulated.

CHAPTER 6: THE STRADDLING STOCKS AGREEMENT

1. INTRODUCTION

In 1995, the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks[1] (the Straddling Stocks Agreement) was concluded. This Agreement was negotiated as a result of the perceived failure of the 1982 Law of the Sea Convention (L.O.S.C.)[2] to set out a satisfactory framework for the conservation and management of straddling stocks and highly migratory species. In addition to dissatisfaction with the specific solutions adopted in the L.O.S.C., there has been frustration with the perceived vagueness and indeterminacy of many of the rules relevant to straddling and highly migratory stocks. An effort has been made to address these shortcomings through the adoption of the Straddling Stocks Agreement, and more particularly, through provisions on cooperation between coastal and fishing states for the adoption of compatible fisheries conservation and management measures and provisions on the institutionalisation of such

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[1] Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, *concluded* 4 August 1995, 34 I.L.M. 1542 (1994), *not in force* [*hereinafter* Straddling Stocks Agreement].

cooperative efforts through regional fisheries organisations. In this chapter, I focus instead on the emerging consensus on the validity and applicability of the precautionary principle - referred to within the Agreement as the precautionary *approach* - which, I argue, may prove to be of equal if not greater significance. Furthermore, it will be argued that this consensus surrounding the principle is at least as important as the inclusion of the principle among the legally binding provisions of the Agreement.

As indicated in Chapter 2, the Straddling Stocks Agreement is one of an increasing number of international conventions to give to the precautionary principle the status of a binding rule. The transformation of the principle from soft to binding law has raised hopes that its influence, both within specific regimes and in international environmental law generally, will be enhanced. Certainly, such a transformation speaks to the level of commitment that the parties have to operationalising that principle. However, the precautionary principle, as a norm of soft law, is a powerful tool in the development of international fisheries conservation rules and policies.

The precautionary principle, as a norm of soft law or as a binding rule, has the potential to exercise significant influence over the interpretation and application of rules within the straddling and highly migratory stocks regime. The principle may be used to bolster the legitimacy of certain types of arguments regarding the manner in which

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[2] United Nations Convention on the Law of the Sea, *open for signature* 10 December 1982,

obligations are to be interpreted and applied and may be used as a basis upon which to choose between competing interpretations of the rights and duties of states. In short, one of the significant contributions of the precautionary principle to the straddling and highly migratory stocks regime – and to international environmental law generally – is its capacity to provide a framework for discourse about the interpretation and application of legal obligations.

In the section that follows, some general comments will be made about the process of interpreting the L.O.S.C. and the Straddling Stocks Agreement, with particular attention to the relevance of the precautionary principle to this process. The regime for exclusive economic zone (E.E.Z.) and high seas fisheries conservation put in place by the L.O.S.C. will then be discussed, again with a focus on the rules whose interpretation could be influenced by the precautionary principle. Finally, the Straddling Stocks Agreement and its treatment of the precautionary approach will be considered. Attention will be paid not only to the manner in which precaution is expressed in the textual provisions, but also to possibilities for its further application to the high seas fisheries regime more generally.

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entered into force 16 November 1994, U.N.T.S. 31363 [*hereinafter* L.O.S.C.].

2. THE PROCESS OF INTERPRETATION

The main thrust of the L.O.S.C. is the division of ocean spaces into different jurisdictional units and the specification of the rights, prerogatives and duties of states within those various units. Some attempt is made, however, to overcome the rigidity of this framework. For instance, in the preamble, it is recognised that "the problems of ocean space are closely interrelated and need to be considered as a whole;" furthermore, states are obligated to cooperate or to negotiate in order to address transjurisdictional problems such as conservation of straddling and highly migratory stocks.

The provisions concerning the management and conservation of high seas fisheries put in place by the L.O.S.C. constitute one of the most contentious and problematic aspects of that convention. Over the course of negotiations for the L.O.S.C., coastal states sought recognition of a special interest in stocks in adjacent high seas areas, such a special interest being intended to serve as a basis for coastal state authority or jurisdiction to impose and enforce conservation measures in those areas. This solution was rejected, however. Instead, provisions were adopted obligating coastal and fishing states to cooperate to adopt conservation measures for marine living resources that cross the boundaries between adjacent exclusive economic zones and between E.E.Z.s and the high seas.[3] In addition, freedom of fishing on the high seas was subjected to a series of

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[3] L.O.S.C., *supra* note 2, arts. 63 (straddling stocks); 64 (highly migratory species); 65 (marine mammals); 66 (anadromous species) and 67 (catadromous species). In addition, art. 118 *ibid.* obliges states

limitations, including those implied by the rights, duties and interests of coastal states.[4] These provisions did not prove to be of great assistance in resolving the increasingly serious conflicts over the exploitation and conservation of marine living resources on the high seas. While this deficiency was often attributed to the general language in which the provisions were phrased, it may also be attributed to a lack of consensus regarding the approach to be taken to the interpretation and application of the provisions.

A further source of difficulty regarding the L.O.S.C. arose with respect to the interpretation of the provisions on conservation measures. The nature of the balance to be struck between conservation and exploitation was unclear, as was the nature of the objectives to be attained by conservation measures. For example, did states have an obligation merely to conserve living resources at levels at which they could continue to be exploited, or was there a further obligation to protect the resource for ecological ends? Furthermore, the obligation of states to refer to the best available scientific evidence gave rise to uncertainties whether the necessity of conservation measures had to be proven. Attempts to balance the various interests of states led, inevitably, to a text susceptible of numerous and often mutually contradictory readings.

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whose nationals exploit the same fisheries resources or different resources in the same area to enter negotiations with a view to adopting conservation measures.

[4] *Ibid.*, art. 116.

Following the approach of David Kennedy[5] and Martti Koskenniemi,[6] one could argue that the provisions of the L.O.S.C. do not permit, on their own terms, a determination of the manner in which interests are to be balanced, contradictory objectives to be respected, and legal from illegal behaviour to be distinguished. Instead, the resolution of conflicts is consistently deferred to other fora.[7] However, this feature of legal texts need not be regarded as evidence of failure on the part of its drafters, or as evidence of the inability of international law generally to provide guidance to its addressees in their relations with one another. The provisions of the L.O.S.C. on straddling and highly migratory stocks certainly failed to resolve conflicts on this issue, and conflicts will no doubt continue to emerge once the Straddling Stocks Agreement enters into force. However, a number of developments over the course of the ensuing years, including a growing consensus on the applicability of the precautionary principle to fisheries conservation, contributed to the emergence of shared understandings regarding the interpretation and application of the rules contained within the regime.

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[5] DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES (1987) particularly at 201 ff.

[6] MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (1989) particularly at 48-50.

[7] The provisions on straddling and highly migratory stocks and on high seas conservation measures, for example, make reference to regional fisheries organisations and agreements. The many matters left unresolved by the L.O.S.C. itself are referred to such further processes and fora. *See, e.g.*, L.O.S.C., *supra* note 2, arts. 63, 64 and 118.

The nature and content of the shared understandings that assist in processes of interpretation are subject to change over time, as a result both of changing circumstances and of developments in conceptual approaches. The L.O.S.C., like any legal instrument, must be responsive to these changes. The text cannot in and of itself resolve conflicts; rather, it provides a basis for discourse about contentious issues and for interactions among interested actors. The ability of this discourse to give rise to practical solutions depends on the capacity of the parties to find or create a consensus on a particular reading of the relevant provisions. The precautionary principle assists in this process, as it provides a framework to which actors can refer in presenting their own arguments and in analysing arguments presented by others. Precaution helps actors make their positions intelligible to one another, and provides grounds for the justification of preference for one position over another.

3. THE PRECAUTIONARY PRINCIPLE AS AN INTERPRETIVE DEVICE

The precautionary principle as an interpretive device provides a basis on which to take account of interests and considerations that may not adequately be represented by states. I shall refer to these interests as attributable to humankind, or international society. If the issue of conservation and management of straddling and highly migratory stocks is viewed from the perspective of competing and conflicting rights and interests of sovereign states, it may be described in one of two ways. In the first place, it may be seen as a conflict between conservation-minded coastal states and exploitation-minded fishing

states. Coastal states have argued that, due to their long-term interest in the health of the living resources in and adjacent to their E.E.Z.s, they are in the best position to adopt and enforce conservation measures for these resources. Thus, the most appropriate response would be to extend coastal state jurisdiction outward to encompass a larger percentage of fish stocks. However, this perspective is too simplistic, as it cannot be denied that coastal states are interested in protecting their own access to living resources for purposes of exploitation.

Second, the conflict could be described in terms of competition among self-interested states for increasingly scarce resources. If we take this approach, it is not clear where the impetus for conservation is to come from. Furthermore, there is no basis upon which to prefer the rights of coastal states to those of fishing states, particularly since both groups of states are able to find support for their respective positions within the text of the L.O.S.C. Thus, these conflicts appear intractable. However, debate about the interpretation of rules is not limited to this plane. The precautionary principle provides one means through which interests and concerns of a different order may come to be introduced into the debate.

This is particularly true of *erga omnes* norms such as environmental and ecosystem protection. With respect to environmental protection obligations, the immediate objective is not the protection of state rights and interests, but rather the protection of the broader interest of international society in a clean and healthy

environment and in the sustainable exploitation of resources, among others.[8] Such norms fit uncomfortably within a statist framework. The development of rules of soft environmental law such as the precautionary principle represents an attempt to provide a normative basis for the pursuit of such public interest objectives that goes beyond a balancing and accommodation of state rights and interests.

Principles such as precaution cannot tell actors precisely what result they are to achieve, make distinctions between legal and illegal behaviour, or identify particular equilibrium points between competing sets of interests. They are, rather, frameworks, which help actors to articulate the problem with which they are faced and which lend normative support to particular resolutions.[9] They are also particularly useful in determining the meaning in particular consequences of obligations such as the duty to act reasonably or the duty to cooperate.[10] This is of particular importance in cases in which, viewed from the point of view of competing or conflicting state rights, there is no legal basis for preferring one set of rights to another.[11] These principles point in a different direction, namely to objectives such as conservation or environmental protection that

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[8] *See* Ellen Hey, *Reconceptualization of the Issues Involved in International Fisheries Conservation and Management in* DEVELOPMENTS IN INTERNATIONAL FISHERIES LAW (Ellen Hey, ed., 1999) 577 at 578.

[9] *See* Ellen Hey, *The Protection of Marine Ecosystems, Science, Technology and International Law* HAGUE Y.B. INT'L L. (1997) 69 at 74-5. Hey argues that principles do not impose concrete obligations; rather, they provide guidance for the development of obligations.

[10] I am indebted to Aaron Dantowitz for this argument.

have only tangentially to do with state interests. As such, they provide an alternative basis for discourse about the rights and duties of states.

Although precaution may have more relevance to public interest objectives, it may also be invoked by states in a self-interested manner. For example, precaution may be used as a means to advance an argument for the extension of coastal state authority to extend conservation measures to adjacent high seas areas. Once it has been invoked, however, the state in question is drawn into discussions of the public interests that precaution is intended to promote. Debate and discussion cannot remain at the level of state interests because the framework provided by precaution will tend to pull the debate in the direction of these public interests. A state that invokes precaution must be capable of justifying its arguments on the terms defined by precaution, namely with reference to the ultimate objectives of environmental protection, resource conservation and management, ecosystem protection and so on. These arguments therefore must refer to interests beyond those of states, and in particular to the interests of human communities.

The manner in which conflicts regarding the application of the L.O.S.C. and related texts are resolved at any point in time naturally depends on the broader context in which the conflicts arise. The legal provisions themselves may not change, but with changes in the common understandings upon which parties to disputes draw in making

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[11] See generally *KOSKENNIEMI*, supra *note* 6.

their arguments come significant shifts in the meaning that is attributed to those provisions. The nature of these shifts was considered in the Gabcíkovo-Nagymaros case before the International Court of Justice,[12] particularly in the separate judgment by Judge Weeramantry.[13] The Court specifically addressed the influence of developments in customary law on the interpretation of treaties. However, developments in general thinking and approaches will also influence the interpretation and application of legal rules. As Patricia Birnie notes in the context of the L.O.S.C., concepts such as precaution, sustainable development and ecosystem management, whose influence was only beginning to be felt in the early stages of the Conference on the Law of the Sea, had only a limited influence on the final text.[14] Nevertheless, as Birnie goes on to argue, these concepts have come to play a significant role in the interpretation and application of the provisions.[15] For example, the preambular statements in the L.O.S.C. recognising the interrelation of ocean spaces and referring to the importance of conservation and environmental protection readily lend themselves to an interpretation that incorporates more recently-developed environmental concepts. The open-endedness of legal

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[12] *Case Concerning the Gabcíkovo-Nagymaros Project (Hungary v. Slovakia)*, 25 September 1997, 7 I.C.J. (1997) [*hereinafter Gabcíkovo-Nagymaros Case*]. *See* Donna R. Christie, *The Conservation and Management of Stocks Located Solely within the Exclusive Economic Zone in* DEVELOPMENTS IN INTERNATIONAL FISHERIES LAW, *supra* note 8, 395 at 407 ff.

[13] *Gabcíkovo-Nagymaros Case, supra* note 12 (separate opinion of Judge Weeramantry).

[14] Patricia Birnie, *Are Twentieth Century Marine Conservation Conventions Adaptable to Twenty-First Century Goals and Principles?: Part I* 12 INT'L J. MARINE & COASTAL L. 307 at 307-8 (1997).

provisions necessitates an interpretive approach that takes into account contemporary developments in thinking about environmental protection issues.

4. THE L.O.S.C. AND STRADDLING AND HIGHLY MIGRATORY STOCKS

The extent to which the issue of straddling and highly migratory stocks would become contentious appears not to have been anticipated during negotiations for the L.O.S.C. During the course of those negotiations and subsequent to the conclusion of the L.O.S.C., coastal states sought recognition of a special interest in straddling and highly migratory stocks on the high seas,[16] similar to that which had been accorded under the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas.[17] That convention, which attracted few ratifications by fishing nations,[18] recognised "a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea."[19] It further provided that coastal and fishing states were to enter into negotiations to conclude conservation

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[15] *Ibid.* at 338.

[16] Djamchid Momtaz, *L'accord relatif à la conservation et la gestion des stocks de poissons chevauchants et grands migrateurs* XLI ANN. FR. DR. INT'L 676 at 638 (1995).

[17] Convention on Fishing and Conservation of the Living Resources of the High Seas, *concluded* 29 April 1958, *entered into force* 20 March 1966, 559 U.N.T.S. 285 [*hereinafter* Geneva Convention on Fishing].

[18] Howard L. Brown, *The United Nations Conference on Straddling Stocks and Highly Migratory Fish Stocks: An Analysis of International Environmental Law and the Conference's Final Agreement* 21 VERMONT L. REV. 547 at 565 (1996).

[19] Geneva Convention on Fishing, *supra* note 17, art. 6(1).

measures applicable to the adjacent high seas area,[20] and that the conservation measures adopted by fishing states for their own nationals could not be "opposed to those which have been adopted by the coastal state."[21] Of particular interest to coastal states was a further provision according to which those states were authorised unilaterally to adopt conservation measures applicable to the adjacent high seas area if negotiations had not resulted in an agreement within six months.[22]

In the course of the L.O.S.C. negotiations, this claim to recognition of a special coastal state interest was rejected.[23] The creation of the E.E.Z., which contains the vast majority of fish stocks,[24] shifted the balance considerably in favour of coastal nations. Thus, it was believed that granting to coastal states jurisdiction in the E.E.Z. would give those states sufficiently extensive authority to manage stocks. However, the creation of the E.E.Z. set into motion its own dynamics, as coastal states declared E.E.Z.s and as foreign fishing fleets were excluded from waters that had previously been international. These fleets put increasing pressure on straddling stocks as they began to search for

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[20] *Ibid.*, art. 6(3).

[21] *Ibid.*, art. 6(4).

[22] *Ibid.*, art. 7(1). Article 7(2) *ibid.* sets out conditions to which such measures were to be subjected: there had to be an urgent need in light of existing knowledge; the measures had to be based on scientific findings; and they could not discriminate against foreign fishers.

[23] Momtaz, *supra* note 16 at 638; Peter G.G. Davies and Catherine Redgwell, *The International Legal Regulation of Straddling Fish Stocks* 67 BRITISH Y.B. INT'L L. 199 at 241 (1996).

[24] Davies and Redgwell, *supra* note 23 at 221.

resources farther afield.[25] At the same time, coastal fisheries began to encounter severe difficulties as it was discovered that estimates and projections of the size of stocks and their capacity to withstand exploitation were too optimistic.[26]

The practical effect of the various provisions on E.E.Z. and high seas conservation is to subject straddling and highly migratory stocks to two separate regimes, one for the E.E.Z. and one for the high seas. In fact, any given stock may be subject to a myriad of conservation measures, as all states fishing those stocks are obliged to adopt conservation measures applicable to their nationals.[27] Cooperation is clearly required, as the sustainability of any given state's exploitation will depend on the overall level of exploitation to which the stock is subject, and any conservation measures adopted on a unilateral basis may be rendered ineffective in light of the transboundary movements of the stocks and the fishing activities of the nationals of other states. No basis on which to rank the range of plausible claims regarding acceptable management and conservation measures is provided in the L.O.S.C.[28] Conservation and management measures adopted

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[25] *Ibid.*

[26] Edward L. Miles and William T. Burke, *Pressures on the United Nations Convention on the Law of the Sea of 1982 from New Fisheries Conflicts: The Problem of Straddling Stocks* 20 OCEAN DVMT & INT'L L. 343 at 344-5 (1989).

[27] L.O.S.C., *supra* note 2, art. 117.

[28] *See* Grant Hewison, *Balancing the Freedom of Fishing and Coastal State Jurisdiction in* DEVELOPMENTS IN INTERNATIONAL FISHERIES LAW, *supra* note 8, 161 at 184; Momtaz, *supra* note 16 at 680; Miles and Burke, *supra* note 26 at 344-5; Tullio Scovazzi, *The Application of the United Nations Convention on the Law of the Sea in the Field of Fisheries: Selected Questions* 16 ANN. DR. MARITIME & OCÉANIQUE 195 at 196 (1998).

by regional fisheries organisations became the subjects of contention as soon as it became apparent that the fisheries were over-exploited. In certain cases, most notably in the North Atlantic Fisheries Organisation, serious conflict erupted over the establishment of quotas and their allocation to various parties.[29]

The relevant provisions on straddling and highly migratory stocks are contained in Part V, respecting the E.E.Z., and Part VII, respecting the high seas. Within its E.E.Z., the coastal state is granted rights[30] and duties[31] to provide for the conservation and management of living resources.[32] The duty is specified in the following manner. First, the coastal state must establish total allowable catches for living resources in the E.E.Z.; second, the measures adopted must be based on the best scientific evidence available to ensure that the resources are not endangered from over-exploitation; third,

> [s]uch measures shall also be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards;

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[29] *See eg.* Miles and Burke, *supra* note 26 at 344-5.

[30] L.O.S.C., *supra* note 2, art. 56(1).

[31] *Ibid.*, art. 61.

[32] *See* David A. Balton, *Strengthening the Law of the Sea: The New Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks* 27 OCEAN DVMT & INT'L L. 125 at 126-7 (1996); Chris Carleton, *The Responsibilities of Coastal States on the Ratification or Accession to UNCLOS in* INTERNATIONAL BOUNDARIES AND ENVIRONMENTAL SECURITY: FRAMEWORKS FOR REGIONAL COOPERATION (Gerald Blake et al., eds., 1997) 15 at 22; Brown, *supra* note 18 at 570.

and fourth, the effects of such measures on dependent and associated species must be taken into account.[33] The conservation obligations set out in art. 61 should also be considered in light of the obligations in art. 62 respecting utilisation of fisheries resources. Of particular interest is the obligation to promote "the objective of optimum utilization of the living resources in the exclusive economic zone."[34]

Articles 63 and 64 L.O.S.C. address straddling and highly migratory stocks, respectively. In both instances, the states concerned are obliged to collaborate to implement conservation measures.[35] Agreement between coastal and fishing states is required as a result of the recognition of the freedom of high seas fisheries, enshrined in art. 87(1)(e). The exercise of the freedom is made subject to a series of conditions, including respect for the exercise of high seas freedoms by other states;[36] existing treaty obligations; provisions respecting the conservation of marine living resources on the high seas; and provisions regarding respect for "the rights and duties as well as the interests of coastal States provided for, *inter alia*, in article 63, paragraph 2, and articles 64 to 67."[37]

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[33] L.O.S.C., *supra* note 2, art. 61.

[34] *Ibid.*, art. 62.

[35] *Ibid.*, para. 63(1) obliges coastal states in whose E.E.Z. straddling stocks occur to seek to agree upon conservation measures; para. 63(2) imposes the same obligation on coastal states and states fishing for straddling stocks in adjacent high seas areas (art. 63(2)); and para. 64(1) requires coastal states and states fishing for highly migratory stocks in the region to cooperate to ensure the conservation and promote the optimum utilisation of such stocks.

[36] *Ibid.*, art. 87(2).

[37] *Ibid.*, art. 116. Articles 65 to 67, *ibid.*, address, respectively, marine mammals; anadromous stocks; and catadromous stocks.

The conservation obligations respecting high seas fisheries are contained in Section 2. Fishing states are to adopt conservation measures applicable to their own nationals[38] and are to cooperate with other states engaged in high seas fisheries with the aim of adopting conservation measures.[39] Article 119(1)(a) sets out the same objective respecting the qualified concept of maximum sustainable yield that appears in art. 61, and also requires measures to be designed based on the best available scientific evidence. Paragraph (b) requires states to take into consideration the effects of conservation measures on associated and dependent species.

In the course of argumentative processes in which various alternative interpretations of these provisions are debated, influential principles such as precaution may be employed to throw light on the text to be interpreted and to bolster the persuasiveness of arguments for a particular interpretation. References to the precautionary principle as an interpretive tool may therefore be influential despite the absence of explicit reference to the principle in the text of the L.O.S.C. Furthermore, with the adoption of the Straddling Stocks Agreement, which incorporates a precautionary approach, the occasions for this principle's application will increase.

Three potential sources of difficulty within the E.E.Z. and high seas conservation provisions provide openings for reference to the precautionary principle: best available

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[38] *Ibid.*, art. 117.

scientific evidence, the modified conception of maximum sustainable yield, and the promotion of optimum utilisation. The influence of the precautionary principle as a general approach to decision-making renders plausible a precautionary interpretation of the requirement that the best available scientific evidence be used in designing conservation and management measures. According to such an interpretation, states would be obligated to base their decisions on such evidence but would not be required to delay the adoption of measures until conclusive evidence of their necessity has been provided. The obligation to employ the best available scientific evidence could as easily be read to require that states take seriously evidence of, for example, declines in stocks and take action to restrict fishing as a result.[40] However, this is by no means the only plausible interpretation. Such provisions have been interpreted to require a demonstration of the necessity and utility of conservation measures rather than the sustainability of exploitation.[41] Given the fact that fishing is not an inherently harmful activity,[42] and the

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[39] *Ibid.*, art. 118.

[40] Freestone and Makuch argue that the primary obligation in art. 61 is one of conservation, and that the putative exploiter of fisheries resources should bear the burden of proving, on the basis of the best available scientific evidence, the sustainability of exploitation. While I submit that this goes too far, their subsequent argument that in the absence of scientific evidence the conservation obligation continues to apply is a plausible interpretation of art. 61: David Freestone and Zen Makuch, *The New International Environmental Law of Fisheries: The 1995 United Nations Straddling Stocks Agreement* 7 Y.B.I.E.L. 3 at 19 (1996).

[41] Burke champions this position in the context of international fisheries conservation: *see* William T. Burke, Mark Freeburg and Edward L. Miles, *United Nations Resolutions on Driftnet Fishing: An Unsustainable Precedent for High Seas and Coastal Fisheries Management* 25 OCEAN DVMT & INT'L L.

further fact that some balance must be struck between conservation and exploitation, such arguments may continue to enjoy some support.

A second source of difficulty in the L.O.S.C. has to do with the interpretation of the concept of maximum sustainable yield (M.S.Y.).[43] The requirement of compatibility with M.S.Y. contained in paragraphs 61(3) and 119(1) is potential fodder for extensive debate about the balance to be struck between exploitation and conservation. Doubt has been cast on the appropriateness of M.S.Y. as a fisheries conservation and management tool, due in large measure to the difficulty of determining what the M.S.Y. for a given stock might be.[44] Scientific uncertainty, fluctuations in stock levels, and the interdependence of different fish stocks and of fish stocks and other features of the

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127 at 128 (1994); WILLIAM T. BURKE, THE NEW INTERNATIONAL LAW OF FISHERIES: UNCLOS AND BEYOND (1994) at 109.

[42] *See, e.g.*, John M. MacDonald, *Appreciating the Precautionary Principle as an Ethical Evolution in Ocean Management* 26 OCEAN DVMT & INT'L L. 255 (1995) at 270; Burke, Freeburg and Miles, *supra* note 41 at 172-3; BURKE, *supra* note 41 at 116.

[43] Maximum sustainable yield is defined as the highest point on a curve between the annual standard fishing effort by all fleets and yields that should result if the effort level were maintained until equilibrium was reached. *See* Reference Points for Fisheries Management: Their Potential Application to Straddling and Highly Migratory Resources, UN Doc. A/CONF.164/INF/9, 1994, para. 27, *reproduced in* UNITED NATIONS CONFERENCE ON STRADDLING AND HIGHLY MIGRATORY FISH STOCKS: SELECTED DOCUMENTS (Jean-Pierre Lévy and Gunnar Schram, eds., 1996) 577; Gunnar Schram and André Tahindro, *Developments in Principles for the Adoption of Fisheries Conservation and Management Measures in* DEVELOPMENTS IN INTERNATIONAL FISHERIES LAW, *supra* note 8, 251 at 257.

[44] BURKE, *supra* note 41 at 206; Hey, *Protection of Marine Ecosystems*, *supra* note 9 at 73; Birnie, *supra* note 14 at 319; Jon M. Van Dyke, *The Straddling and Migratory Stocks Agreement and the Pacific* 11 INT'L J. MARINE & COASTAL L. 406 at 412 (1996); André Tahindro, *Conservation and Management of Transboundary Fish Stocks: Comments in light of the Adoption of the 1995 Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* 28 OCEAN DVMT & INT'L L. 1 at 5 (1997).

environment contribute to this difficulty. The manner in which the concept has been qualified in the above provisions adds to its ambiguity by subjecting M.S.Y. to a non-exhaustive list of additional factors, which coastal states must take into consideration. Furthermore, M.S.Y. is not the objective that states are obliged to attain; rather, stock levels must be such that they *could* produce M.S.Y.

In light of these qualifying factors, a threshold argument may be made. An interpretation of art. 61 according to which the coastal state cannot adopt conservation measures more conservative than those which would be required to maintain M.S.Y. must be excluded. Even in the absence of a reference to the precautionary principle, art. 61 cannot be read to require coastal states to ensure that their conservation measures are not so strict as to maintain stocks above M.S.Y. levels.

A further question is whether the necessity of conservation measures must be proved on the basis of scientific evidence, and if so, what the result of a precautionary reading of this provision would be. In the first place, the list of factors in light of which the necessity of the measures is to be evaluated is expansive. If the burden of proof were to rest on proponents of conservation measures, this would complicate enormously the task of presenting scientific evidence of necessity, as data concerning a vast range of factors would have to be collected and analysed. This reading of art. 61 should therefore be rejected as inappropriate and implausible, as it would limit the ability of states to achieve the obligation contained in art. 61, namely to ensure that living resources are not

endangered through over-exploitation. While the precise manner in which scientific evidence must be employed in making conservation and management decisions is unclear, an argument that the burden of proof must rest on conservation is, in light of the text of art. 61, difficult to support. A reversal of the burden of proof is equally difficult to support, however, particularly in light of the obligation to promote optimum utilisation, discussed below. Reference to the precautionary principle would support an argument according to which scientific evidence should be used to present a range of scenarios and options to policy-makers, who then must make a decision based on such information, but based also on reference to the range of interests and values that conservation measures are intended to promote. The priority assigned to conservation among other competing objectives would thus not be made to depend on scientific proof that any lower priority would result in an inability to obtain the objective.

The difficulties in the provisions on E.E.Z. and high seas fisheries conservation have been addressed to some extent by the Straddling Stocks Agreement, which will be discussed below. However, the L.O.S.C. provisions remain relevant. In the first place, they provide a framework for the Straddling Stocks Agreement. Second, the Agreement does not apply to all living resources of the E.E.Z. and high seas, but only to straddling and highly migratory stocks and associated and dependent species; therefore, the L.O.S.C. provisions remain applicable without further elaboration to all stocks falling outside the scope of the Agreement. If the notion of ocean spaces as interdependent is taken

seriously, it will be difficult to argue that a precautionary approach to conservation should be taken with respect to certain species and not others. As a result, the provisions of the Straddling Stocks Agreement, and in particular the precautionary approach as articulated within that Agreement, will exercise significant influence on the interpretation of the L.O.S.C. provisions.

A third point of contention within the L.O.S.C. is not squarely addressed by the Straddling Stocks Agreement, and the precautionary principle can provide only general guidance to its resolution. This is the provision regarding the obligation of the coastal state to promote optimum utilisation of the living resources of the E.E.Z. The concept refers to the modified version of M.S.Y. contained in art. 61.[45] It is invoked in art. 62 on utilisation of the living resources and in art. 64 on highly migratory species. These references remind us that conservation must be balanced against exploitation, thus providing some limitation on the extent to which conservation goals may be pursued and, more pertinent for the purposes of this discussion, setting some constraints on the application of the precautionary principle. For this reason, a complete reversal of the burden of proof, such that proponents of exploitation would have to prove its compatibility with long-term sustainability, would be difficult to justify. What is

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[45] Rüdiger Wolfrum, *Fisheries, International Regulation in* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rudolph Bernhardt, ed., 1989) 109 at 112; Freestone and Makuch, *supra* note 40 at 9.

accomplished by the application of the precautionary principle to this balancing process is to underscore the importance of conservation as a goal, such that it need not always cede priority to exploitation. Thus, it excludes certain types of arguments and makes others not only possible but plausible.

5. SUBSEQUENT DEVELOPMENTS WITH RESPECT TO STRADDLING AND HIGHLY MIGRATORY STOCKS

As noted above, dissatisfaction with the L.O.S.C. provisions on straddling stocks was apparent even before the convention was concluded. A number of initiatives were undertaken by coastal states and international organisations to resolve perceived difficulties and weaknesses in the L.O.S.C. In 1990, Canada convened a conference of coastal states in St. John's, at which the participants agreed to strive for recognition of a special coastal state interest based on which fishing nations would be required to make their conservation measures conform to those of the coastal state.[46] A conference on straddling and highly migratory fish stocks was convened by the United Nations, which resulted in the adoption of the Straddling Stocks Agreement in 1995. In the same year, the F.A.O. adopted a non-binding Code of Conduct for Responsible Fisheries.[47]

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[46] Momtaz, *supra* note 16 at 679 and 684; Moritaka Hayashi, *The Straddling and Highly Migratory Fish Stocks Agreement in* DEVELOPMENTS IN INTERNATIONAL FISHERIES LAW, *supra* note 8, 55 at 57.

[47] United Nations Food and Agricultural Organization, Code of Conduct for Responsible Fisheries, 28th Session, 31 October 1995,

The F.A.O. Code, a non-binding instrument, seeks to supplement the rather exploitation-oriented framework within the L.O.S.C. with a set of objectives related to ecosystem protection and management.[48] Thus, it makes reference to conservation of ecosystems;[49] conservation for the benefit of present and future generations;[50] protection of critical fisheries habitats;[51] integrated coastal zone management;[52] long-term conservation and sustainable use;[53] the reduction of excess fishing capacity;[54] the maintenance of aquatic biodiversity;[55] recovery of depleted stocks;[56] environmental impacts of fishing gear and techniques;[57] and, of particular interest for present purposes, the precautionary approach.[58] With respect to straddling stocks, the Code calls on states to cooperate to conclude conservation and management measures.[59] It also provides that "fisheries management should be concerned with the whole stock units over its entire area

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http://www.fao.org/WAICENT/F.A.O.INFO/FISHERY/agreem/codecond/codecon.asp [*hereinafter* F.A.O. Code of Conduct].

[48] *See generally* Gerald Moore, *The Code of Conduct for Responsible Fisheries in* DEVELOPMENTS IN INTERNATIONAL FISHERIES LAW, *supra* note 8, 85 at 85.

[49] F.A.O. Code of Conduct, *supra* note 47, art. 6.1.

[50] *Ibid.*, art. 6.2.

[51] *Ibid.*, art. 6.8.

[52] *Ibid.*, art. 6.9.

[53] *Ibid.*, art. 7.1.1.

[54] *Ibid.*, art. 7.1.8.

[55] *Ibid.*, art. 7.2.2(d).

[56] *Ibid.*, art. 7.2.2(e).

[57] *Ibid.*, art. 7.2.2(g).

[58] *Ibid.*, arts. 6.5 and 7.5.

[59] *Ibid.*, arts. 7.1.3-5.

of distribution."[60] Conservation and management of transboundary, straddling and highly migratory fish stocks throughout their range is to be accomplished through cooperation among interested states, with a view to achieving compatibility of measures across different jurisdictional zones "in a manner consistent with the rights, competences and interests of the States concerned."[61] In this respect the only significant departures from the L.O.S.C. framework are the objective of developing measures applicable throughout the range of transjurisdictional fish stocks, and the objective of achieving compatibility of measures across jurisdictional zones. The Code's major contribution to international fisheries law and policy is its orientation toward the goals of conservation and ecosystem management, as opposed to the protection and promotion of state rights and interests. Furthermore, it is a comprehensive document, seeking to take into account all aspects of fisheries management.[62] Its status as a non-binding document gives it more latitude to address itself to non-state actors, including individual fishers, and to treat topics falling within the domestic jurisdiction of states.[63]

Like the F.A.O. Code, the Straddling Stocks Agreement is concerned to place the issue of fisheries conservation and management in an ecological framework by applying

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[60] *Ibid.*, art. 7.3.1.
[61] *Ibid.*, art. 7.3.2.
[62] Moore, *supra* note 48 at 94.

the large marine ecosystem approach, which seeks to overcome the jurisdictional division of the ocean into artificial zones and to emphasise the interconnectedness and interdependence of ocean spaces.[64] To this end, it makes reference not only to the qualified M.S.Y. concept found in the L.O.S.C.,[65] but also to environmental impact assessment,[66] the minimisation of environmental impacts of fishing,[67] the protection of biodiversity,[68] the elimination of excess fishing capacity,[69] and the precautionary approach.[70] The conservation obligation is phrased as an obligation to ensure the long-term sustainability of marine living resources; however, this obligation must be balanced against that of promoting optimum utilisation.[71]

The Straddling Stocks Agreement will have an impact on the conservation regime within E.E.Z.s, as the provisions contained in art. 6 regarding the precautionary approach and art. 7 regarding the compatibility of conservation and management measures are to apply to straddling and highly migratory stocks both on the high seas and in areas under

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[63] *Ibid.*, at 104; Rosemary Rayfuse, *The Interrelationship between the Global Instruments of International Fisheries Law in* DEVELOPMENTS IN INTERNATIONAL FISHERIES LAW, *supra* note 8, 107 at 110.

[64] *See* Schram and Tahindro, *supra* note 43 at 260.

[65] Straddling Stocks Agreement, *supra* note 1, art. 5(a).

[66] *Ibid.*, art. 5(d).

[67] *Ibid.*, art. 5(f).

[68] *Ibid.*, art. 5(g).

[69] *Ibid.*, art. 5(h).

[70] *Ibid.*, art. 5(c) and 6.

[71] *Ibid.*, art. 5(a).

national jurisdiction.[72] Furthermore, the provisions setting out the general principles of fisheries conservation and management are to be applied by coastal states to straddling and highly migratory fish stocks located in areas of national jurisdiction.[73] This approach maintains the artificial distinction between straddling and highly migratory stocks, on the one hand, and other marine living resources found in the E.E.Z., on the other. Such a distinction is not in keeping with an ecosystem approach to ocean spaces and resource conservation, and will hopefully be addressed in the context of regional fisheries organisations.

While reliance on such jurisdictional boundaries demonstrates that the parties to the Agreement continue to employ a state-based framework and are therefore concerned to protect the rights and interests of states in fisheries resources, this framework is attenuated by reference to the precautionary approach, which is oriented toward conservation and environmental protection goals *per se*, rather than as elements of state rights and interests. In art. 6(2) of the Straddling Stocks Agreement, the precautionary approach is set out as follows: "States shall be more cautious when information is uncertain, unreliable or inadequate. The absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures." The strong version of the principle, in which the burden of proving the

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[72] *Ibid.*, art. 3(1).

environmental soundness of a given activity lies on the proponent,[74] is not applied in this case, as a result of concerns that this would render fisheries exploitation virtually impossible and would therefore strike an unacceptable balance between environmental protection and other social and economic goals.[75] This is one of the reasons that the parties chose to refer to the precautionary *approach*, rather than *principle*: they wished to avoid a reversal of the burden of proof.[76] The objective to be achieved in managing stocks is the same as that identified in the L.O.S.C., namely the modified M.S.Y. concept, or optimum utilisation.[77] The influence of the precautionary approach can be seen in four major categories of obligations:[78] first, obligations related to information collection and exchange;[79] second, obligations related to the manner in which decision-making is to

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[73] *Ibid.*, art. 3(2).

[74] *See* Alan E. Boyle, *Protecting the Marine Environment: Some Problems and Developments in the Law of the Sea* 16 MARINE POL. 79 at 81-2 (1992).

[75] MacDonald, *supra* note 42 at 270; Burke, Freeburg and Miles, *supra* note 41 at 168.

[76] *See* David Freestone, *Implementing Precaution Cautiously: The Precautionary Approach in the Straddling and Highly Migratory Fish Stocks Agreement in* DEVELOPMENTS IN INTERNATIONAL FISHERIES LAW, *supra* note 8, 287 at 318.

[77] Straddling Stocks Agreement, *supra* note 1, art. 5(b). On the implications of optimum utilisation for straddling stocks, *see* ELLEN HEY, THE REGIME FOR THE EXPLOITATION OF TRANSBOUNDARY MARINE FISHERIES: THE UNITED NATIONS LAW OF THE SEA CONVENTION COOPERATION BETWEEN STATES (1989) at 56.

[78] See Tahindro, *supra* note 44 at 12-13 for a discussion of the application of the precautionary approach in the Agreement.

[79] Assessments of environmental impacts on target as well as associated and dependent stocks are to be carried out: Straddling Stocks Agreement, *supra* note 1, art. 5(d); scientific research is to be promoted and conducted: *ibid.*, art. 5(k); the best scientific information on fisheries is to be obtained and shared: *ibid.*, art. 6(3)(a); data collection and research programmes to assess environmental impacts are to be developed: *ibid.*, art. 6(3)(d).

proceed;[80] third, obligations related to the nature of measures to be implemented;[81] and fourth, obligations relating to measures to be taken when certain triggering events occur.[82] Beyond these specific categories, the approach may be employed as a basis for interpreting the text of the Agreement and other instruments within the regime in a manner favourable to conservation goals.

The Agreement devotes a good deal of attention to the nature of the conservation measures to be adopted, and to triggering mechanisms in the event that conservation standards are not met. The application of the M.S.Y. concept, as we have seen, was already attenuated in the L.O.S.C. with the introduction of additional factors to be taken into account in establishing conservation and management measures. This modified version of M.S.Y. is taken up in the Straddling Stocks Agreement and is subject to a

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[80] States are to "be more cautious when information is uncertain, unreliable or inadequate:" *ibid.*, art. 6(2); conservation and management measures are to be based on the best available scientific evidence: *ibid.*, art. 5(b); decision-making techniques for dealing with risk and uncertainty are to be adopted: *ibid.*, art. 6(3)(a); uncertainties related to a range of factors including the size and productivity of stocks, mortality, impact of fishing activities on non-target species and oceanic, environmental and socio-economic conditions are to be taken into account: *ibid.*, art. 6(3)(c).

[81] States are to adopt both limit and target reference points for individual stocks. As will be discussed below, the limit reference point is a point below which the stock should not be allowed to fall, whereas the target reference point, set at a much more conservative level, is to be used in ongoing fisheries management decisions such as the setting of total allowable catch: *ibid.*, art. 6(3)(b) and Annex II. Further obligations are provided for new or exploratory fisheries: states must adopt "cautions conservation and management measures" for such fisheries, and the measures are to remain in force "until there are sufficient data to allow assessment of the impact of the fisheries on the long-term sustainability of the stocks:" *ibid.*, art. 6(6). Similarly, emergency conservation and management measures are to be adopted where a natural phenomenon has a significant adverse impact on fish stocks covered by the agreement: *ibid.*, art. 6(7).

further restriction. States maintain a discretionary margin under arts. 61 and 119 with respect to the levels at which stocks must be maintained, as long as levels can produce the modified M.S.Y., but the modified M.S.Y. is now to operate as an upper limit which is not to be exceeded.[83] The reference point which is to be employed in the establishment of measures such as total allowable catch is the management, or target, reference point and is set at a more conservative level.[84] These reference points are to be established for each stock, taking into account a range of factors, including reproductive capacity and resiliency, and allowing for sources of uncertainty.[85] Measures such as the establishment of total allowable catch are thus to be designed around these two reference points, and further conservation measures are to be implemented as these levels are approached:[86] this is referred to as a "green light - yellow light" approach.[87]

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[82] States are to determine in advance actions to be taken when reference points are approached or exceeded: *ibid.*, arts. 6(3)(b) and 6(4); states are to conduct enhanced monitoring "where the status of ... stocks ... is of concern:" *ibid.*, art. 6(5).

[83] This is the conservation or limit reference point, defined in *ibid.*, art. 2, Annex II, as follows: "Limit reference points set boundaries which are intended to constrain harvesting within safe biological limits within which the stocks can produce maximum sustainable yield." *See* Freestone, *supra* note 76 at 301; Rayfuse, *supra* note 63 at 128-9 and 131.

[84] Straddling Stocks Agreement, *supra* note 1, art. 2, Annex II. On the question of reference points see generally Tahindro, *supra* note 44 at 12-13; Davies and Redgwell, *supra* note 23 at 262; Van Dyke, *supra* note 44 at 412.

[85] The Straddling Stocks Agreement, *supra* note 1, art. 3, Annex II provides that the reference points are "to account, inter alia, for the reproductive capacity, the resilience of each stock and the characteristics of fisheries exploiting the stock, as well as other sources of mortality and major sources of uncertainty." *See generally* Tahindro, *supra* note 44 at 5-6.

[86] Straddling Stocks Agreement, *supra* note 1, art. 6(4).

[87] Davies and Redgwell, *supra* note 23 at 262.

6. APPLICATION OF THE PRECAUTIONARY PRINCIPLE TO THE BALANCING OF COASTAL AND FISHING STATE INTERESTS

The precautionary principle, as Ellen Hey has argued, carries with it significant implications for decision-making processes. Standards cannot serve to define clear thresholds between legal and illegal behaviour, as ongoing processes of monitoring and analysis may demonstrate that existing measures are insufficient and need to be strengthened. Thus, if permits are granted or quotas allocated, mechanisms must exist to make adjustments if circumstances so require. The necessary flexibility to make such adjustments must be built into conservation programmes. Furthermore, some account must be taken of the disruptions and uncertainties that will result to those involved in exploitation, and provisions made accordingly. Hey states that, because of the legal uncertainty that this process of monitoring and adjustment will entail, the procedures by which decisions to alter conservation measures and thus to amend permits and allocations are made must meet high standards of fairness.[88]

It does not appear that serious efforts were made to address the problem of legal uncertainty with respect to the existing triggering mechanisms established under the Straddling Stocks Agreement. The contingency plans which the parties are required to have in place in the event that target and limit reference points are approached will have to address this issue, and the precautionary approach militates, as Hey argues, in favour of

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[88] Hey, *The Protection of Marine Ecosystems*, *supra* note 9 at 75 ff.

a flexible permitting scheme under which acquired rights will not serve to defeat precaution. In this manner, the precautionary approach may be referred to in order to determine whether contingency plans established by the parties may be regarded as adequate.

A further deficiency of the Agreement is the absence of what Peter Davies and Catherine Redgwell describe as a red light to supplement the green and yellow lights: it contains no provision for action to be undertaken if the limit reference point is exceeded.[89] Application of the precautionary approach would suggest that, if stock levels reach a critical point, the fishery should be suspended until the stock recovers. In such an instance, it may be appropriate to apply the strong version of the precautionary principle, namely the reversal of the burden of proof, requiring that the fishery should not be resumed until it has been scientifically demonstrated that the fish stocks have returned to a safe level and that exploitation can be carried out without endangering the stocks. The drafters of the Agreement may have chosen not to include such a provision precisely because of concerns regarding the legal uncertainty that would result. The matter can be dealt with at the level of regional fisheries organisations, as the option of suspension of fisheries is certainly not excluded by the Agreement. However, the failure to make provision for such a possibility leaves open the opportunity to argue that suspension of

fisheries is an invasion of the rights of states, and that it can only be accomplished upon scientific proof of its necessity.

The precautionary principle, in its guise as a norm of soft international environmental law, provides a basis upon which arguments for the adoption of a red light may be advanced, and, furthermore, makes it difficult for states to restrict their own justificatory arguments to the language of state rights and interests. In response to an argument that the letter of the Agreement does not require suspension of a fishery, proponents of conservation may argue that making provisions for suspension in certain circumstances is nevertheless in keeping with precaution. States will, at a minimum, be required to frame their counter-arguments with reference to precaution, and to the goals of conservation and ecosystem protection, in order to lend legitimacy to such arguments.

The effective implementation of the Straddling Stock Agreement's conservation provisions depends on the success of the central mechanism of the Agreement, namely cooperation between coastal and fishing states. It is generally agreed that the balance is tipped in favour of coastal states,[90] as the Agreement requires, for the first time, that

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[89] *See* Davies and Redgwell, *supra* note 23 at 261; Freestone, *Implementing Precaution Cautiously*, *supra* note 76 at 321 and 323.

[90] *See* Brown, *supra* note 18 at 575; Habib Gherari, *L'accord du 4 août 1995 sur les stocks chevauchants et les stocks de poissons grands migrateurs* 100 REV. GÉN. DR. INT'L PUB. 367 at 376-7 (1996); Hewison, *supra* note 28 at 172 and 186; Peter Örebech, Kettil Sigurjonsson and Ted L. McDorman, *The 1995 United Nations Straddling and Highly Migratory Fish Stocks Agreement: Management, Enforcement and Dispute Settlement* 13 INT'L J. MARINE & COASTAL L. 119 at 121 (1998). But see Brown, *supra* note 18 at 575 and Rayfuse, *supra* note 63 at 133-4, where they note that coastal states have assumed

conservation and management measures applicable to straddling stocks on the high seas and in E.E.Z.s be compatible. In adopting such measures, states are to take into account measures adopted by the coastal state pursuant to art. 61 L.O.S.C.; furthermore, international measures are not to undermine the effectiveness of coastal state measures.[91] This does not give coastal states the authority to extend the application of their E.E.Z. measures to adjacent high seas areas, but it does elevate coastal state measures to the status of a standard that high seas measures must meet. Nor does the provision state that straddling stocks are to be treated as an integrated whole for the purposes of conservation and management measures, although such an approach may be taken within the regional fisheries organisations contemplated by the Agreement, and is recommended in the F.A.O. Code of Conduct.[92] As a result, questions will continue to be posed concerning the extent to which E.E.Z. and high seas stocks are interrelated; the point at which this relationship triggers an obligation to cooperate to adopt compatible measures; and the compatibility of high seas measures with those adopted by the coastal state. Reference to the precautionary principle will be of great assistance in answering these questions.

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obligations in the form of factors to be taken into account, such as the biological unity of stocks, in designing conservation measures. These obligations are contained in the Straddling Stocks Agreement, *supra* note 1, art. 7(2).

[91] Straddling Stocks Agreement, *supra* note 1, art. 7(2)(a).

[92] F.A.O. Code, *supra* note 47, art. 7.3.1.

The application of a precautionary approach to the question of interrelationships between coastal and high seas fish stocks was proposed by William Burke in support of his argument that failure of coastal and fishing nations to reach agreement on conservation measures would result in the authorisation of unilateral measures by the coastal state.[93] Although I do not accept Burke's argument that the L.O.S.C. supports unilateral coastal state action on the high seas, and although the entry into force of the Straddling Stocks Agreement will go some way to resolving the problem identified by Burke, the underlying argument that a precautionary approach may be relevant to frameworks for cooperation between coastal and fishing states is worth exploring.

While Burke is wary of the application of the precautionary principle to fisheries, and in fact argues that its application may be incompatible with the L.O.S.C.,[94] this conclusion appears to be based on an assessment of the strong version of the principle, according to which fisheries activities must be proven to be sustainable before they can be undertaken. As we have seen, this is not the version of the principle that was incorporated into the Straddling Stocks Agreement. However, his argument in support of coastal state authority over high seas fish stocks bears a strong resemblance to the

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[93] William T. Burke, *Fishing in the Bering Sea Donut: Straddling Stocks and the New International Law of Fisheries* 16 ECOL. L.Q. 285 (1989).

[94] Burke, Freeburg and Miles, *supra* note 41. See also William T. Burke, *Current Development: Implications for Fisheries Maangement of U.S. Acceptance of the 1982 Convention on the Law of the Sea*

precautionary approach as it appears in the Agreement. He states that such unilateral action is justified upon the failure of good faith efforts to negotiate management and conservation measures if there is a reasonable scientific basis for believing that high seas and coastal stocks are interrelated. He argues that scientific proof of this relationship should not be required; substantial and uncontradicted evidence should suffice.[95]

The Straddling Stocks Agreement puts to rest the question of the legality of unilateral coastal state action respecting high seas resources: the recourse available to coastal states upon the failure of negotiations is set out in art. 7(4), namely the invocation of the dispute settlement mechanism provided for in Part VIII. However, interpretive problems will continue to present themselves, and reference to the precautionary principle may point to particular ways to address them. The first question relates to the threshold for cooperative action. It must be determined which stocks are covered by the agreement and for which compatible high seas and E.E.Z. measures must be adopted. It may well be of interest, both to coastal and fishing states, to seek to exclude certain stocks from the agreement's scope, as the conservation obligations set forth in the agreement are stricter than the default obligations in the L.O.S.C. Furthermore, high seas fishing states may seek to avoid the agreement's application in order to avoid having to meet the standard

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89 A.J.I.L. 792 at 802-3, where he argues against acceptance of the strong version of the principle, which would imply that fisheries exploitation must be proven safe.

[95] *Ibid.* at 299-300.

set by the coastal state in adopting conservation measures for its E.E.Z. States may be able to exploit uncertainty regarding the status of a stock as straddling in order to argue against the agreement's application. Furthermore, they may seek to avoid a designation of stocks as associated with straddling stocks, since associated stocks are, according to art. 63 L.O.S.C., to be granted the same status as straddling stocks. In light of the recognition in the Straddling Stocks Agreement of the importance of maintaining the marine ecosystem,[96] it would be appropriate to adopt a generous approach toward the question of the agreement's application. The precautionary principle lends further support to such an interpretation.

As noted above, coastal state conservation and management measures, although not directly applicable to third parties, become standards which fishing nations must meet in setting out their own measures. This gives rise to questions concerning the compatibility of coastal and fishing state measures, and concerning the nature of the obligation placed on fishing states to avoid undermining coastal state measures applicable to the E.E.Z. Although the provision does not require that coastal and fishing states' measures be identical, it may be difficult for fishing states to justify substantial deviations from coastal state measures. Furthermore, if the coastal state declares a moratorium or

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[96] Straddling Stocks Agreement, *supra* note 1, preamble.

imposes drastic emergency measures to permit a severely depleted stock to recover, once again, the measures adopted for the high seas will have to follow suit.

If the precautionary principle were employed to help in the resolution of conflicts about the extent to which proposed high seas measures are compatible with E.E.Z. measures, such conflicts would tend to be resolved in favour of enhanced conservation. However, given the need to balance the goals of conservation and optimum utilisation, this conclusion does not follow automatically. While the precautionary principle pulls in the direction of stronger conservation measures, at a certain point it will be open to those seeking to exploit the stocks in question to argue that the balance between the two goals is being compromised. As the L.O.S.C. does not provide much guidance on the manner in which such conflicts are to be resolved, and as the precautionary principle cannot be relied upon to the exclusion of sustainable development, such disputes must be resolved on a different level at which the specific contours of the situation can be taken into account. Regional fisheries organisations have a significant role to play in this respect, as rules of general application must be considered in light of particular circumstances and the consequences of various possible interpretations of these rules must carefully be thought out, having due regard to the context.

A further problem is likely to arise respecting the point of view from which the compatibility of E.E.Z. and high seas measures is to be assessed. In order to determine whether high seas measures undermine the effectiveness of E.E.Z. measures, it will be

necessary to identify the objectives being sought by the coastal state. Thus, measures may not be designed to accomplish directly the goal of conserving a given stock; they may instead be aimed at associated or dependent species or at ecosystem management. Furthermore, where the coastal state has taken a precautionary approach to the adoption of conservation measures, the effectiveness of such measures cannot be assessed simply by reference to the objective of maintaining the commercial viability of a given stock. Thus, it becomes necessary to determine by what standard the compatibility of measures is to be assessed. One possibility is to refer to an international standard, having reference to the objectives of conservation and optimum utilisation articulated in the L.O.S.C. Another is to refer to the standards of effectiveness established by the coastal state. However, the international standard may be phrased at too great a level of generality, and states may be unwilling to permit their nationally-established standards to be assessed internationally. However, the inconveniences of the second approach are, I would submit, greater still. Taking such an approach would have the practical effect of giving coastal states a veto over high seas conservation measures and would risk upsetting the balance between coastal and fishing state interests.

The precautionary approach may be of some assistance in lending substance to the international standard. The application of this approach to the question whether the effectiveness of coastal state measures would be undermined by high seas measures would tend to favour stronger high seas conservation measures. First, the invocation of

the precautionary principle would place upward pressure on the international standard to be met. Second, its invocation would tend to pull in the direction of greater compatibility of E.E.Z. and high seas measures. International tribunals could make a cautious assessment of the likely impact of high seas measures on E.E.Z. measures, thus treating significant divergences between the two sets of interests as potentially damaging to the effectiveness of coastal state measures.

The most effective approach to designing compatible conservation measures is to proceed on a regional basis, treating the relevant ocean space as an integrated whole and adopting measures that apply to stocks throughout their range. There has been some resistance to this approach, as coastal states have been unwilling to permit the internationalisation of the setting of conservation measures within their E.E.Z.s.[97] However, the artificiality of jurisdictional boundaries makes such an approach necessary. In resolving conflicts between different groups of states, one must bear in mind that the purpose of conservation measures is only indirectly to protect the interests of states; it is first and foremost to protect the resource itself. The beneficiaries of such protection measures are individuals and groups within states, and possibly the ecosystem. The International Tribunal for the Law of the Sea (I.T.L.O.S.) recognised this fact by taking as the objective of provisional measures the prevention of damage to the marine

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[97] *See* Momtaz, *supra* note 16 at 696.

environment, and by simply assuming without needing to demonstrate that this would result in harm to the interests of the states concerned. A closer look at this decision is warranted.

The Southern Bluefin Tuna Case

The judgment of the International Tribunal for the Law of the Sea in the Southern Bluefin Tuna case[98] provides some indication of the potential influence of the precautionary principle in the context of straddling and highly migratory stocks.[99] The judgment is relevant for at least two reasons: first and foremost, for the reliance placed by various members of the tribunal on the precautionary principle; and second, for the manner in which the question of scientific evidence of the stock's endangerment was addressed.

The case arose out of a dispute between Australia, New Zealand and Japan over the allocation of quotas for bluefin tuna. National allocations had been established by the Commission for the Conservation of Southern Bluefin Tuna, but Japan disputed the scientific validity of the quota allocated to it and unilaterally initiated a programme of experimental fishing, causing it to exceed its quota. Australia and New Zealand claimed

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[98] International Tribunal for the Law of the Sea, *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan) (Provisional Measures)*, 27 August 1999, http://www.un.org/Depts/los/ITLOS/Order-tuna34.htm.

[99] For a discussion of the Bluefin Tuna Case see *Symposium: Southern Bluefin Tuna Cases Preliminary Measures* 10 Y.B.I.E.L. 7 (1999).

that the experimental fishing programme would endanger the stock, which no one disputed was over-exploited,[100] and claimed that Japan was in breach of its conservation and cooperation obligations under the L.O.S.C. The matter was submitted to arbitration pursuant to Annex VII of the L.O.S.C.,[101] and Australia and New Zealand sought the provisional suspension of Japan's experimental fishing programme and the interim application of the quota established by the Commission. In particular, they sought an order obligating the parties to apply the precautionary principle in harvesting the stock in question while awaiting the outcome of the arbitral process. A majority of the court decided in favour of the granting of provisional measures, but did so without making explicit reference to the precautionary principle.

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[100] But see David Freestone, *Caution or Precaution: "A Rose by Any Other Name ..."* 10 Y.B.I.E.L. 25 at 28-9 on the difficulties that policy-makers face in making determinations about the extent to which fish stocks, particularly highly migratory stocks, are overexploited.

[101] The arbitral panel ruled that it did not have jurisdiction to hear the dispute: Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS): *Southern Bluefin Tuna Case (Australia And New Zealand V. Japan) (Award On Jurisdiction And Admissibility)*, August 4 2000, 39 I.L.M. 1359 (2000). The jurisdictional issue turned on the question whether all parties to the dispute had to accept the jurisdiction of the panel. Although art. 286 L.O.S.C., *supra* note 2, provides for the submission of disputes to compulsory dispute resolution procedures "at the request of any party," this is qualified by art. 281 L.O.S.C., which requires, where the parties to the dispute have agreed to seek a resolution through peaceful means, that their agreement not exclude recourse to further procedures. In this case, all three parties are bound by the Convention for the Conservation of Southern Bluefin Tuna, *open for signature* 10 May 1993, *entered into force* 20 May 1994, A.T.S. No 16 (1994), whose art. 16(2) provides that disputes arising under that convention are to be submitted to the International Court of Justice or to arbitration "with the consent in each case of all parties to the dispute." The arbitral panel held that this language excludes recourse to dispute resolution procedures under art. 286 L.O.S.C. where, as here, not all parties to the dispute agreed to invoke such procedures.

The principle was nevertheless of central importance to the decision, as three of the concurring judges noted in separate opinions. The language used in the order is decidedly precautionary.[102] The tribunal states that "the parties should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna."[103] The tribunal also noted "that there is scientific uncertainty regarding measures to be taken to conserve the stock of southern bluefin tuna and that there is no agreement among the parties as to whether the conservation measures taken so far have led to the improvement in the stock of southern bluefin tuna,"[104] and that "although the Tribunal cannot conclusively assess the scientific evidence presented by the parties, it finds that measures should be taken as a matter of urgency to preserve the rights of the parties and to avert further deterioration of the southern bluefin tuna stock."[105] In a joint declaration, a majority of the judges[106] noted that scientific evidence indicated that the tuna stocks were severely depleted, and that scientific opinion as to their prospects for recovery was

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[102] *See* Adriana Fabra, *The LOSC and the Implementation of the Precautionary Principle* 10 Y.B.I.E.L. 15 at 17 (1999). But see Francisco Orrego Vicuña, who states that the tribunal "did not expressly address the issue [of precaution] but ... made use of the concept and its implications:" *From the 1893 Bering Sea Fur-Seals Case to the 1999 Southern Bluefin Tuna Case: A Century of Efforts at Conservation of the Living Resources of the High Seas* 10 Y.B.I.E.L. 40 at 43.

[103] Southern Bluefin Tuna Case, *supra* note 98, para. 77.

[104] *Ibid.*, para. 79.

[105] *Ibid.*, para. 80.

[106] *Ibid.* (joint declaration by Vice-President Wolfrum, Judges Caminos, Marotta Rangel, Yankov, Anderson and Eiriksson).

divided. They also stated that cooperation among the interested states had been ineffective and that new entrants to the fishery placed further pressures on the stocks. This conclusion is completely in line with precautionary thinking. On the basis of scientific evidence that the stocks were at risk and uncertainty as to the extent of the risk and the likely effects of further exploitation, in addition to evidence that pressures on the stock were likely to continue or increase, the court decided in favour of provisional measures.

A minority of the judges, in separate but concurring opinions, made explicit reference to the precautionary *approach*, rather than the precautionary *principle*, apparently wishing to avoid incorporating certain aspects of the latter, particularly the reversal of the burden of proof, into their conclusions. None of these judges concluded that the approach has acquired the status of a norm of customary international law, but they justified their reliance on it in various ways. Judge Laing, who concluded that "it cannot be denied that UNCLOS adopts a precautionary approach," referred to the compatibility of the conservation provisions of the L.O.S.C. with precaution,[107] and to two soft law instruments, namely Agenda 21 and the F.A.O. Code of Conduct for Responsible Fisheries, and to the Straddling Stocks Agreement, which has not yet entered

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[107] *Ibid.* (separate opinion by Judge Laing), para. 17.

into force.[108] Judge Treves also referred to the Straddling Stocks Agreement.[109] Judge Shearer simply stated: "I believe that the measures ordered by the Tribunal are rightly based upon considerations deriving from a precautionary approach,"[110] apparently seeing no need to justify his reference to precaution.

Judges Laing and Treves noted that not only are the contents of the order consistent with the precautionary approach, but the fact that the tribunal made the order is itself an instance of precautionary action.[111] They argued that the tribunal has taken a precautionary approach to the interpretation of art. 290(5) L.O.S.C., which authorises the ordering of provisional measures "if ... the urgency of the situation so requires." In concluding that the state of the tuna stocks in question was such that experimental fisheries created a situation of urgency, the tribunal applied, in the words of Laing, "the discretionary element of appropriateness" rather than "the much stricter standard of irreparability,"[112] thus adopting a precautionary approach.[113] Treves stated that "the requirement of urgency is satisfied only in the light of such [a] precautionary approach"

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[108] *Ibid.* (separate opinion by Judge Laing), para. 20.

[109] *Ibid.* (separate opinion by Judge Tullio Treves), para. 10.

[110] *Ibid.* (separate opinion by Judge Shearer).

[111] *See* Malcolm D. Evans, *The Southern Bluefin Tuna Dispute: Provisional Thinking on Provisional Measures?* 10 Y.B.I.E.L. 7 at 11 ff. (1999). Evans argues that the tribunal was not sufficiently clear on the criteria that must be satisfied before provisional measures could be ordered.

[112] Southern Bluefin Tuna Case, *supra* note 98 (separate opinion by Judge Laing), paras. 3 and 4.

[113] *Ibid.*, para. 19.

which he saw as justifiable given the inherently precautionary nature of provisional measures.[114]

It is also interesting to note, as Judge Treves stated, that the basis upon which the tribunal acted was not interference with the rights of the parties, although such interference could be inferred from harm to fish stocks in whose viability they all had an interest. Rather, the situation of urgency was assessed in terms of harm to the stocks themselves.[115] This is consistent with art. 290(1) L.O.S.C., which states that provisional orders may be made "to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment." This demonstrates an openness in international legal discourse to considerations of environmental and ecological interests, which refer to actors other than states.

The order rendered by the tribunal demonstrates that the precautionary principle is capable of exercising influence over the interpretation and application of rules even where it is not explicitly invoked and relied upon. Furthermore, its capacity to exercise this influence does not appear to depend on its recognition as a binding rule of international law. Its expression as a non-binding norm in soft law instruments and in treaties not yet in force appears to be sufficient to lend it normative authority. It is also interesting to

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[114] *Ibid.* (separate opinion by Judge Tullio Treves), paras. 8 and 9.
[115] *Ibid.*, para. 6.

note that the vagueness and generality of the principle does not prevent its being relied upon in law-application processes, although this shapes and conditions its function.

7. CONCLUSION

I have argued that the precautionary principle may be used as a general guiding principle to assist in the interpretation of the L.O.S.C. and Straddling Stocks Agreement. I have also argued that the relevance of the principle to these instruments does not depend either on its formal inclusion within those instruments nor on its being recognised as a norm of customary international law. Certainly, the incorporation of the principle into the Agreement and its application by I.T.L.O.S. to the realm of fisheries conservation enhances its relevance within this realm. However, the normative force of the principle also has its sources outside the scope of the fisheries conservation regime.

The principle assists in the interpretation of textual provisions in the first place by enhancing the credibility of certain types of arguments and diminishing that of others; second, by providing a framework within which conservationist arguments can be presented such that their relevance to the interpretation of legal texts is made clear; and third, by pointing to interests and values other than those of states as legitimate objectives which the conservation regime should pursue.

The role of the principle is not to point to specific results or to set out criteria for preferring one set of rights, interests or values to another. The manner of its application to specific conservation problems is limited only by the plausibility of arguments in

favour of its application and the acceptance of these arguments by other actors within the regime. Furthermore, precaution is not the only principle of soft law relevant to the regime. As I have suggested, the notion of optimum utilisation, which is a specific embodiment of the principle of sustainable development, is also of significance. This principle operates to place limits on the play of the precautionary principle within the regime. The tension between these two principles can be resolved only in specific circumstances through discourse in which the consequences of various courses of action are carefully considered in light of the rights and interests of the parties concerned. Such discourse is more likely to take place in the more specific setting of regional fisheries organisations than at the global level. However, particular resolutions to conflicts in regional settings will exercise influence on the further development of the global regime.

If one looks to the provisions of the L.O.S.C. and the Straddling Stocks Agreement for definitive answers to the question how to balance conflicts between state rights and interests, one will be persuaded by the objections raised by Kennedy and Koskenniemi. These texts are not capable of resolving such conflicts; however, this is not their function. Rather, they provide a framework within which certain arguments come to appear more cogent and persuasive than others. Reference to principles of soft law such as precaution may provide a normative basis for preferring certain arguments to others, or for working out a priority among competing values and interests. However, the precise manner in which conflicts will be resolved cannot be determined by legal rules. This

process depends on discourse among interested actors in which the consequences of various possible interpretations of legal provisions are examined and choices among different possible solutions is made. These choices are, ideally, susceptible of normative justification, but their contours will depend on the exercise of practical reason. In short, political debate regarding the balance to be struck among the various relevant interests recognised in legal texts remains necessary.

CONCLUSION

The failures and shortcomings of global environmental protection regimes are often more spectacular than their relatively modest successes. These regimes often fail to address serious inequities among the states that participate in them, and obstacles to meaningful participation by members of civil society remain immense. While it might be possible to talk about democratic influences in these regimes, we are clearly far away from truly democratic, transparent, accessible structures and processes for international environmental law and policy. It might therefore seem strange to pay so much attention to processes of discourse leading to consensus when these processes occupy such a small portion of action and interaction at the international level. I have sought to demonstrate that the discourse centred around these principles matters a great deal in international society, and that its role in the development of international environmental regimes is far from negligible.

I make four broad arguments in my discussion of discourse within international environmental regimes regarding principles of soft international environmental law. My first, threshold, argument is that the influence of the principles under consideration here exercise an influence in international legal discourse that cannot be explained by their legal pedigree. The three further arguments have to do with the manner in which this influence operates. My second argument, therefore, is that these principles are capable of exercising influence in part because they have attracted a certain degree of consensus among actors in international society. There is widespread, broadly-based agreement on a certain minimum content for these principles, and agreement as to their potential relevance for the development of international environmental law. Their application in

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ought to do about the problem of global environmental degradation. Each refers back to a set of shared understandings about how problems in international society are to be addressed. The principles are, to some extent, in tension with one another, and this tension can manifest itself in specific discourses. At the risk of oversimplification, we may say that common but differentiated obligations speaks in particular to the interest in ensuring access to the means to economic development, whereas precaution and common heritage are of greater relevance to the conservation or preservation of environmental resources. It would, however, be inappropriate to describe these three principles as pairing off in a debate pitting development *against* environment. The concept of sustainable development serves to remind us of the relevance of both these ends to the viability and happiness of human communities. The manner in which the tensions between these objectives will work themselves out is dependent both on the context in which specific issues arise and on the points of view that influential participants in discourse take and the decisions that they make.

The principles do not merely represent bundles of interests, although they may be invoked or rejected out of self-interested motives. A significant contribution that these principles make to discourse about international environmental law is their reference away from self-interest and toward moral frameworks. Each of these principles allows issues of justice, equity and fairness to be brought to the table. For example, common but differentiated obligations refers to historical and current inequities and injustices in international society, and remind us that one of the results of these inequities is differential capacity among states to absorb the costs of environmental protection measures. Precaution and common concern underline the importance of environmental

protection as an end in itself and of the need to accord it a higher ranking among the priorities we pursue. By framing discourse in light of one or more of these principles, participants in discourse seek to make their arguments intelligible and compelling to those to whom arguments based on self-interest would not be compelling. In the process, discourse often moves away from the language of self-interest or even mutual interest to concern itself with questions of equity, fairness and justice.

The Consultative Parties (C.P.s) to the Antarctic Treaty were able to make a strong legal argument that the principle of common heritage of mankind was not binding on them. The principle was not incorporated into the treaty, and the existence of unresolved territorial claims to parts of the continent made it difficult to argue that it lay beyond the jurisdiction of any state. However, this legal position was weakened, as we have seen, by doubts about the legitimacy of C.P. governance of Antarctica. When the prospect of mineral resource exploitation in Antarctica was raised, arguments to the effect that such exploitation should benefit countries other than the C.P.s were heard. The crucial problem, however, lay in the concern held by many members of international society regarding the vulnerability of the Antarctic environment and the level of threat that mineral resources exploitation would pose to that environment. In the final analysis, then, the C.P.s were compelled to justify their governance of Antarctica by reference to their capacity to protect the interest that international society has in the maintenance of a high standard of environmental protection on the continent. Self-interest is certainly not absent from the debate, but what is particularly striking is the extent to which the matter turned on moral arguments regarding *what we ought to do* with reference to Antarctic governance.

The regime for the control of trade in endangered species sought at the outset to respect a distinction between the domestic and international aspects of endangered species protection. A great deal of deference to state jurisdiction over the domestic sphere is apparent in the convention. The trade measures available under the convention proved to be a rather blunt instrument, often not capable of meeting the objectives of the convention, and at other times promoting these objectives only at significant costs to the range states. As a result, the parties have been striving to develop more flexible mechanisms while at the same time seeking not to decrease the regime's effectiveness. The precautionary principle has been incorporated into the regime, but its position is somewhat equivocal because of the ramifications of precaution on the range states. States supporting beneficial use of endangered or threatened species had to find a set of arguments with which to justify their positions, thereby constraining the influence of precaution on the regime. The role that precaution played in the debate over downlisting the elephant was influenced in part by processes of practical reasoning in which the implications of a strong conservationist approach would have on domestic populations and economies.

It is possible to explain the acceptance of common but differentiated obligations in the ozone regime in terms of self-interest. One may argue that developed states realised that the only way to bring developing countries into the regime was to offer them a less stringent set of obligations. The interest-based argument is overlaid, however, with an argument that refers to equity and fairness. Precaution is also prevalent in debates regarding ozone layer protection, helping to push environmental protection higher up on the list of priorities that actors set for themselves. It is difficult to isolate the role played

by the precautionary principle from that played by the scientific consensus that drastic reductions in the release of ozone-depleting substances are required. However, these two factors complement one another, the scientific information injecting a sense of urgency and the precautionary principle providing a justificatory framework for the adoption of control measures even in the absence of clear scientific evidence of their necessity.

The straddling stocks regime is strongly marked by the precautionary principle, which has proven to be very influential and widely accepted. Reference to precaution helped participants in discourse move away from the difficult terrain of coastal versus fishing state interests, and to bring into the debate more explicit reference to a broadly-based concern with conserving fisheries resources. As long as this issue is considered solely through the lens of state rights and duties, it is extremely difficult to devise a formula to reconcile these rights and duties. The emerging regime for straddling fish stocks reveals a concern with conservation of the resource that, although still framed in terms of the rights and interests of states, goes beyond these rights and interests to a more general and overarching preoccupation with wise and appropriate management of the resource for the benefit of human communities.

The invocation of these principles in debates taking place within these four regimes does not explain the development of legal rules within the regimes. Reference must be made to interplays of power, interest, and capacity as well. However, what I have sought to do here is to indicate that power, interest and capacity alone do not suffice to explain outcomes. Invocation of the principles places specific debates in the broader context of global environmental protection, and reminds us of the range of needs and

interests at stake. More particularly, it reminds us of the interests and needs of human communities and pushes the debate past the rather narrow ground of state interests.

The role of principles of soft law in international environmental regimes suggests that legal norms depend for their relevance, validity and efficacy, as well as for their legitimacy, on their acceptance by those affected by them. This acceptance could be the result of perceptions that a given rule helps an actor to achieve her aims, or perceptions that failure to follow the rule would lead to undesirable consequences. The instrumental importance of rules is reflected in Habermas's observation that legal rules are capable of functioning as facts, that is, phenomena that have consequences in the world. However, as Habermas understands, an instrumental understanding of rules does not suffice. We must also understand legal systems as forming part of, or interacting with, moral projects pursued by societies. The use of soft law principles in international environmental discourse reflects one point at which legal and moral frameworks are interwoven.

I give the last word, not to Habermas, but to Hannah Arendt, speaking of "the power generated when people gather together and 'act in concert;'"

> The force that keeps them together, as distinguished from the space of appearances in which they gather and the power which keeps this public space in existence, is the force of mutual promise or contract. Sovereignty, which is always spurious if claimed by an isolated single entity, be it the individual entity of the person or the collective entity of a nation, assumes, in the case of so many men mutually bound by promises, a certain limited reality. The sovereignty resides in the resulting, limited independence from the incalculability of the future, and its limits are the same as those inherent in the faculty of making and keeping promises. The sovereignty of a body of people bound and kept together, not by an identical will which somehow magically inspires them all, but by an agreed purpose for which alone the promises are valid and binding, shows itself quite clearly in its unquestioned superiority over those who are completely free, unbound by any promises and unkept by any purpose. This superiority derives from the capacity to dispose of the future as though it were the present, that is, the enormous and truly miraculous enlargement of the very

dimension in which power can be effective.[1]

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[1] HANNAH ARENDT, THE HUMAN CONDITION (1958) at 244-5.

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