

CHAPTER 4: TREATIES

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Whenever disputes arise among nations, the first question a lawyer asks is whether the disputing nations are each party to a treaty. If so, the treaty may contain provisions that govern the dispute. Some treaties, including recent multilateral conventions such as the Law of the Sea Convention, contain in addition elaborate dispute-resolving organs.¹ Much of the content of present-day international environmental law may be found in various multilateral conventions, including the important Law of the Sea Convention, the CITES Convention, the Basel Convention, the Antarctica Treaty, and the Vienna Convention on the Ozone Layer. Substantial excerpts from all of these conventions are contained in the Appendix to this Anthology.

The typical international law treaty is interpreted according to the rules of customary law codified in the Vienna Convention on the Law of Treaties. However, there are additional considerations affecting the interpretation of treaties on the environment. Interpretation of these treaties often differs from standard interpretive principles because the treaties themselves often lay out different standards for developing as opposed to developed countries and for regional aggregations. Moreover, treaties in the international environment area often contain incentives for different groups of countries to ratify the treaty and/or to enter into separate protocols. There have also been innovations, in order to respond to scientific changes, regarding the amendment process that avoid the traditional international law rule requiring unanimous consent to amend a treaty. Finally, the entire question of ad hoc treaty-making can be questioned—whether a new institutional law-making process should replace the separate and sometimes insular negotiations that result from conferences on specific treaties. These fascinating issues can be found in the readings for this Chapter.

A. Design and Structure²

The Framework-Protocol Approach. Contrary to popular myth, the international community has become very skilled at negotiating international agreements. Countries negotiated nine years (from December 1973 to December 1982) to conclude the Law of the Sea Convention, which admittedly was a herculean effort to conclude a comprehensive, detailed, and definitive agreement, which would in part codify the rules relating to the various uses of the oceans. By contrast, countries today are negotiating complicated agreements in only a few years, often developing entirely new areas of law. Countries negotiated the complex Climate Framework Convention in fifteen months (from February 1991 to May 1992). Negotiations for the Environmental Protocol to the Antarctic Treaty (which includes four detailed annexes) and for the Biological Diversity Convention required less than two years, as did the complex agreements on industrial accidents and volatile organic chemicals under the auspices of the U.N.-ECE. It is now rare for countries to need more than two years to negotiate even complicated, detailed international agreements. Agenda 21, a nonbinding instrument, offers perhaps the most striking evidence of the skill of the international community in achieving these ends. In less than two years, countries negotiated an approximately 850 page text setting forth strategies for the multiple and complex issues raised by environment and development. Thus, countries have evolved a negotiating process in the international environmental field that leads to rapid conclusion of agreements.

International agreements have become increasingly detailed and operational. The provisions of the 1940 Western Hemisphere Convention on the Conservation of Nature and the World Heritage Convention are broad and general. By contrast, the provisions included in the Biological Diversity Convention, the ASEAN Agreement on the Conservation of Nature and Natural Resources, or the Protected Areas Protocol to the Caribbean Regional Seas Convention are more detailed even if still somewhat general. Recent agreements controlling transboundary pollution have become much more specific and operational than previous efforts. The early U.N.-ECE Protocol on Sulphur Dioxide to the U.N.-ECE Long-Range Transboundary Air Pollution Convention sets forth a general obligation to reduce transboundary fluxes by thirty percent, while the new Protocol on Volatile Organic Chemicals provides far more detailed and specific reduction requirements. Similarly, very detailed obligations appear in the Montreal Protocol on Substances That Deplete the Ozone Layer and in the Basel Convention, which controls the transboundary shipment of hazardous wastes, both concluded in the last five years.

The design of agreements has also evolved. In contrast to the traditional practice of negotiating a single agreement for an issue, such as use of boundary waters, or negotiating comprehensively all of the issues in an international environmental matter, countries experimented in the first UNEP Regional Seas Convention in 1976 with adopting a framework convention complemented by at least one accompanying comprehensive protocol. This approach has been followed in all subsequent UNEP regional seas conventions. This more open-ended framework allowed countries to begin to take coordinated actions to conserve regional seas but avoided premature negotiations

on more complicated issues in the region. This piecemeal negotiation strategy was adopted by the countries of the U.N.-ECE countries establishing a monitoring system and controlling emissions of certain chemicals. Countries adopted a similar negotiating process to address the problem of global ozone depletion: first the Vienna Convention for the Protection of the Ozone Layer, which set forth a general framework for monitoring, exchanging information, and facilitating scientific research, followed by a more detailed Montreal Protocol setting forth a complex regime for controlling chemical depletion of the ozone layer.

In the case of regional seas, countries agreed that the framework agreement could only go forward if they had also concluded at least one protocol to accompany it. This meant that states had to demonstrate serious intent to participate in the arrangements to protect the regional seas in order to become a party to the framework agreement. On the other hand, this requirement broke the management scheme into individual pieces, so that states could develop protocols over time and become parties to some but not others. By contrast, in the context of controlling transboundary air pollution, protecting the ozone layer, and managing climate change countries have concluded the framework agreement before reaching agreement on, and often before negotiating, any detailed substantive protocols. In such cases, if countries agree to participate in the framework convention, they may become sufficiently engaged that they can subsequently agree upon supplementing protocols.

Adjustments to Scientific Uncertainty. Early agreements had no special processes for adjusting to changes in the scientific understanding of the problem. Even if there were schedules attached to the agreements, they could be amended only by the traditional process of establishing a negotiating forum, agreeing upon the changes, adopting them, and then obtaining the number of ratifications required by the treaty for them to enter into force. This traditional procedure has proved to be too cumbersome to address rapid scientific advances. Later agreements have eased the process by providing for periodic meeting of the parties, for the formulation of technical changes by experts or international secretariats subject to confirmation by the parties, and entry into force by agreement of the parties without ratification. For example, the Montreal Protocol on Substances that Deplete the Ozone Layer provides for parties to meet at regular intervals to respond to new scientific findings, for regular technical assessments to be made available to parties before a meeting, and for simplified adjustment procedures by which parties can agree to reduce consumption of listed chemicals faster and further than provided in the text without having to use formal and time consuming amendment procedures.

In an effort to promote flexibility the new Climate Framework Convention provides for a standing body to provide scientific and technological advice on a timely basis. This body will provide scientific assessments of climate change and its effects, and the impact of implementing measures under the Convention. It will also identify relevant new technologies, assist in building local capacity for scientific research and assessment, and respond to scientific inquiries of the parties. In sum, this body establishes a process for integrating scientific and technological advances into the operation of the Climate Framework Convention. In so doing, it reflects the experience of the negotiators to the Intergovernmental Panel on Climate Change, which helped to generate the scientific consensus among governments to move forward to negotiate the Convention.

All environmental issues involve scientific uncertainty and hence risks. A major challenge to policymakers is to identify, assess, and manage the risks inherent in scientific uncertainty. This calls for systems for monitoring, providing early warning, and prioritizing risks because there are always limited resources available to address these risks. Recent international agreements, such as those on climate and on biological diversity, include at least some provisions along these lines.

A Systems Focus. As our understanding of the environment has grown, we have recognized that agreements need to be directed to conserving ecological systems, not only to controlling specific pollutants or conserving particular species. This insight has been increasingly reflected in international instruments. For example, the ASEAN Convention on the Conservation of Resources addresses the conservation of ecosystems and habitats as a central means of conserving endangered species. The new Biological Diversity Convention focuses on the conservation of ecosystems and habitats in full recognition that many of the species that should be conserved are microorganisms or other species about which we know little or nothing. The 1978 Great Lakes Water Quality Agreement modified language in the 1972 Agreement to include reference to basin-wide ecosystems in the Great Lakes. The 1987 Protocol to the Agreement includes annexes that explicitly address ground water pollution and atmospheric transport of pollutants as sources of Great Lakes contamination. The change reflects the recognition that what feeds into lakes through the air and ground water is as relevant as direct discharges into the lake in determining its quality. Similarly, in marine pollution the focus is no longer primarily on specific commodities that are dumped into the marine environment, but also on maintaining ecosystems as a whole. This is reflected in new protocols to protect designated areas in regional seas and to control land-based sources of marine pollution. The latter has become a subject of global concern, raised in part in Agenda 21.

Participation of Nongovernmental Organizations. Nongovernmental organizations (NGOs) have assumed an increasingly important role in the negotiation, ratification, implementation, and enforcement of international environmental agreements. They are a primary link between the public and national governments; they let individuals try to influence the international environmental agreement process.

The presence of NGOs at official negotiations of international environmental agreements has become routine. At the Climate Convention negotiations, for example, a wide array of NGOs monitored the negotiations, distributed material, lobbied delegations, and otherwise tried to influence the negotiators. Representatives of NGOs also are appearing on official country delegations, as in the negotiations for the Environmental Protocol to the Antarctic Treaty.

The process of interaction among NGOs, governments, and intergovernmental organizations is complicated. NGOs try to influence national governments directly and indirectly by increasing public awareness and public pressures on national legislatures. Governments, on the other hand, use NGOs to convey positions to the public. Ministries or agencies within governments may use NGOs to strengthen their views in relation to other parts of the bureaucracy by keeping them well informed about issues and providing venues for them to express their views to various parts of the bureaucracy. NGOs provide intergovernmental organizations with important, independent communication links with national governments; and NGOs rely on intergovernmental organizations to provide information and insights that are useful in influencing national governments.

In a few instances, NGOs have been integrated into the international institutional structure for implementing agreements. Two decades ago in the World Heritage Convention, states gave NGOs official status in the agreement as advisors and provided that the World Heritage Committee could call upon these organizations "for the implementation of its programmes and projects." The organizations have assumed important roles in evaluating proposed sites for inclusion on the World Heritage List.

B. Incentives and Standards³

In the wider field of international environmental agreements, options for making ambitious programs or better-than-minimum standards attractive to parties include selective incentives, differential obligations, recourse to regional solidarity, and promotion of over-achievement by lead countries.

Selective Incentives. The concept of "selective incentives" is well established in economic group theory as one motive for collective action. It simply means that certain fringe-benefits may persuade a party to participate in a program or standard that it would otherwise find unacceptable. The familiar parliamentary practice of coalition-building and majority-building by judicious distribution of special favors has obvious parallels in the negotiation of multilateral treaties.

A case in point is the 1987 Montreal *Protocol on Substances That Deplete the Ozone Layer*. Under Article 2(5), production increases by way of "transfers" were authorized between small-scale producers; by virtue of Article 2(6), the USSR was granted "grandfather rights" for factories under construction until the end of 1990; in Article 2(8), the member states of the European Community were authorized to aggregate their national consumption limits; in Article 5, developing countries were allowed to postpone compliance by ten years; etc.

It is easy to criticize the Montreal text as a compromise full of loopholes built in to accommodate special interests. But without these "rider" clauses, the agreement would either have lost some important signatories or jelled at a lower level of collective commitment. Paradoxically, loopholes can *upgrade* the overall standard of obligations in an agreement—raising them above the predictable common denominator.

In environmental treaty bargaining, the selective incentives commonly used are access to funding, access to resources, access to markets, and access to technology. Access to funding as an incentive to adhere to international conservation standards is perhaps best illustrated by the 1972 *Convention for the Protection of the World Cultural and Natural Heritage*—which, with 111 member states, is the most widely accepted environmental treaty today. Under Articles 13 and 19 of the convention, parties are eligible for financial assistance from the World Heritage Fund to support conservation measures for national sites included in a "world heritage list" if they maintain these sites at agreed standards of protection. The fund administered by the *United Nations Educational, Scientific and Cultural Organization* (UNESCO) now has an annual budget of \$2.2 million financed by both mandatory and voluntary contributions and split about evenly between projects for cultural and natural heritage sites.

Access to the sustainable use of natural resources is an economic incentive for participating in many international regimes aimed at reconciling rational exploitation and conservation. Wide-ranging examples of this incentive include the annual catch quota established under numerous agreements for marine fishing and seal hunting, and the worldwide 1946 *International Convention for the Regulation of Whaling* (until the entry into force of the moratorium in 1986), and the 1980 Canberra *Convention on the Conservation of Antarctic Marine Living*

Resources. The acceptance of environmental restrictions in return for the prospect of sharing mineral resources is as much a part of the UN Law of the Sea Convention as of the 1988 Wellington *Convention on the Regulation of Antarctic Mineral Resource Activities*. Similarly, access to the world market for wildlife and wildlife products, in return for observing agreed-upon conservation standards, has been recognized as an economic incentive for countries to join the 1973 Washington *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES), which led to specific quota schemes for marketing "controlled" crocodile hides and (until 1989) ivory.

A more recent addition to the catalogue of selective incentives in international regimes is access to technology. This was first and most prominently used as an incentive for participation in the 1968 *Treaty on the Non-proliferation of Nuclear Weapons*. While early environmental treaties (such as the United Nations Environment Program ("UNEP")-sponsored regional seas conventions and protocols since 1976) contain only general recommendations on technical assistance to developing countries, specific provisions to facilitate technology transfer have appeared in recent agreements, from the 1985 Vienna *Convention for the Protection of the Ozone Layer* to the 1989 Basel *Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*. In this context, the 1990 review of the Montreal Protocol will consider the establishment of an international trust fund for transferring technology and financial assistance to developing countries. Clauses for the preferential acquisition of new environmental technology have become a major bargaining issue not only in North-South negotiations but also in East-West relations. For instance, a provision on "procedures to create more favorable conditions for the exchange of technology to reduce emissions of nitrogen oxides" was considered by East European countries (faced with Western export restrictions on strategic high technology) as one prerequisite for accepting the 1988 Sofia Protocol to the *Convention on Long-range Transboundary Air Pollution*. An intergovernmental task force on technology exchange has since been set up under the auspices of the Executive Body for the Convention.

Differential Obligations. Since selective incentives by definition lead to special treatment for selected parties, they skew an otherwise symmetrical system of reciprocal rights and obligations. Such manifest discrimination, particularly in the case of last-minute "add-ons," can seriously undermine the credibility of a multilateral agreement. Consequently, a more straightforward alternative is to start out with an asymmetrical regime that does not even pretend to treat states equally, and instead differentiates treaty obligations according to each party's special circumstances.

As an example, the European Community's *Directive on the Limitation of Emissions of Certain Pollutants into the Air from Large Combustion Plants* of 24 November 1988 lays down a country-by-country timeplan, taking into account the particular economic and technological situation in each of the twelve member states. While Belgium, France, the Netherlands, and the Federal Republic of Germany are to reduce their sulphur dioxide emissions 70 percent by the year 2003, the target for Denmark was set at 67 percent, for Italy at 63 percent, and for Luxembourg and the United Kingdom at 60 percent; at the same time, Greece, Ireland, and Portugal were allowed to increase emissions temporarily.

Skewed as these obligations may seem, they resemble the differential assessment scales that have been developed for multilateral funding of numerous environmental agreements. Under the 1976 Bonn *Convention for the Protection of the Rhine Against Pollution by Chlorides*, for instance, the four riparian countries--the Netherlands, the Federal Republic of Germany, France, and Switzerland--agreed to share abatement costs (currently estimated at a total of \$136 million) in percentages of 34:30:30:6, respectively.

The various UN trust funds set up since 1977 to finance joint programs under the Mediterranean Convention (annual budget \$3.8 million), the Endangered Species Convention (\$1.6 million), the Transboundary Air Pollution Convention (\$1 million), and the Ozone Layer Convention (\$1 million with the Montreal Protocol) all use weighted contributions based on the global assessment scale laid down by the UN General Assembly. In this system, countries are rated according to a combination of economic, geographic, and demographic criteria. (The only political limit to this pro-rated scheme is a 25-percent "ceiling" for individual contributions, introduced in 1972 at US insistence that no single party should be assessed at more than one-quarter the total budget.)

Differential scales enable even the smallest countries to participate on an equal footing without de-stabilizing a treaty's budget. Indeed, under the Vienna/Montreal ozone layer agreements, Singapore contributes \$1500 annually but exercises the same membership rights as the United States, which pays \$300,000.

Such skewing is carried one step farther by the "critical loads" approach now being developed in the context of the Transboundary Air Pollution Convention. As defined in the 1988 Sofia *Protocol Concerning the Control of Emissions of Nitrogen Oxides or Their Transboundary Fluxes*, critical load means "a quantitative estimate of the exposure to one or more pollutants below which significant harmful effects on specified sensitive elements of the

environment do not occur according to present knowledge." When this approach is translated into national abatement targets, it is bound to lead to differential obligations (equitable rather than equal) for each party. The basic logic resembles that behind the concept of "safe minimum standards" in natural resources management, which also aims at the equitable allocation of a common property resource without jeopardizing its long-term conservation for all users. Yet, the transition from "egalitarian" flat rates to highly individualized allocations also introduces a new level of complexity in environmental regimes witness the amount of computer time now being spent on allocation models.

Regionalization. Custom-built asymmetrical regimes are, of course, more easily achieved among regional groups of countries, where economic trade-offs can compensate for the asymmetries. Furthermore, if broadening the scope of an international regime means lowering its common denominator (with universal membership at the absolute bottomline), then the reverse should also be true: restricting membership should raise the standard, particularly where such restriction reflects an element of geographic or other affinity between members.

Does international experience in environmental governance bear out this observation? Certainly, the degree of institutional cooperation accomplished under regional agreements for marine environment protection--such as the 1975 Helsinki and Paris Conventions for the Baltic and North Sea and the UNEP regional seas agreements starting with the 1976 Barcelona *Convention for the Protection of the Mediterranean Sea Against Pollution*--has consistently been higher than under comparable global regimes, except possibly for ship-based pollution regulation by the International Maritime Organization (IMO). At a time when the UN Law of the Sea Convention (with its Chapter XII on global protection and preservation of the marine environment) has still not entered into force, more than 50 states are already legally bound by conventions and protocols concluded under UN environment programs for the Mediterranean, the Caribbean, the West-Central African coast, the Red Sea, the gulf, and the Southeast Pacific. And while UNEP's own global guidelines on off-shore mining (1982) and on land-based marine pollution (1985) generated little more than lip-service from governments, many countries did accept emission standards and specific regional commitments to prevent and abate marine pollution under the UNEP-sponsored Athens (1980) and Quito (1983) Protocols on pollution from land-based sources and under the Kuwait (1989) Protocol on pollution from exploration and exploitation of the continental shelf.

But if regionalization can raise the level of standards, it can also introduce further asymmetries or reinforce existing ones. Far from offering a panacea for all transnational environmental problems, regional regulation may be manifestly unsuitable for some. For instance, when the *Organization for Economic Cooperation and Development* (OECD) in 1984 initiated a regional draft convention for transboundary shipments of hazardous wastes, it was able to draw on a higher level of solidarity and consensus among its membership (limited to Western industrialized states) than would have been conceivable under a worldwide treaty. On the other hand, it soon became clear that the very prospect of tightened waste controls in the OECD region had an undesired spill-over effect, reorienting trade flows to countries outside the region that were unlikely to abide by OECD-imposed regulation. The OECD member states eventually had to abandon their project in favor of a less ambitious but globally applicable regime under UNEP auspices, the 1989 Basel Convention. However, with the *Organization of African Unity* (OAU) now drafting a separate regional agreement on the topic, the waste trade issue will continue to provide trial-and-error lessons in transnational regime-building.

Promoting Over-Achievement. To be sure, the Basel Convention does not prevent additional regional action. Article 11 actually reserves the right of any party to enter into other arrangements that are "not less environmentally sound" than the agreed-upon global standards. The European Community has already announced its intention to implement the convention by tighter requirements, as it previously did with such other treaties as the Council of Europe's 1968 *Strasbourg Agreement on the Restriction of the Use of Certain Detergents in Washing and Cleaning Products*. (The Strasbourg Convention, which required detergents to be at least 80-percent "biodegradable," was upstaged by a 1973 European Economic Community (EEC) Detergents Directive requiring at least 90-percent biodegradability.)

A number of environmental agreements expressly confirm the right of parties to take more stringent measures individually or collectively. Examples are the 1973 Endangered Species Convention, the 1985 Ozone Layer Convention, and its 1987 Montreal Protocol. Under "framework" conventions, this right is frequently exercised in optional additional protocols concluded between some parties only. Within the 1979 *Geneva Convention on Long-range Transboundary Air Pollution*, a ten-member "club" of countries first moved ahead in 1984 by declaring a voluntary 30-percent reduction of sulphur emissions, a commitment not all of the 31 parties to the convention were prepared to share at that time. When the 30-percent reduction was formally adopted as a protocol to the convention at Helsinki in 1985, 21 states signed it. During the negotiation of a further protocol on nitrogen oxides in 1987, a club of five like-minded states again pressed for a 30-percent reduction target; and, even through the target did not

become part of the protocol finally signed at Sofia in 1988, twelve of the protocol's 25 signatories eventually agreed to commit themselves to a voluntary 30-percent reduction.

In each of these cases, the initiative was taken by a "club within a club" played a pilot role in overall target-setting. It also had a bandwagon effect, with other parties climbing aboard as it gathered political momentum.

By calling for sulphur emission reductions by at least 20 percent, the 1985 Helsinki Protocol had introduced an "upwardly mobile" dynamic target. Since national reduction achievements and pledges are recorded annually, compared internationally and widely publicized, any over-achievement pays political dividends in terms of public attention and recognition. As of 1988, twelve of the parties of the Helsinki Protocol thus reported that they had already reached the 30-percent target ahead of schedule, and ten parties announced that they would go on to reduce emissions by more than 50 percent.

A similar trend can be documented for the Montreal Protocol on ozone-depleting substances. While the 1987 meeting had after much bargaining settled for chlorofluorocarbons (CFCs) reductions of only 50 percent until 1999, the London Conference pledge by the 12-member European Community in March 1989 to 85 percent as soon as possible and 100 percent by the year 2000 led eventually to the Helsinki Declaration in May 1989--with 82 countries calling for a complete CFC phase-out by the end of the century. This upward revision of the original bottomline was motivated partly by new scientific evidence of the "ozone hole," but media coverage and the worldwide publicity given to individual or collective pledges of over-achievement also proved influential.

Legally, there is ample room for stricter national rules on *bona fide* environmental grounds--provided they are non-discriminatory--under Article XX of the *General Agreement on Tariffs and Trade* (GATT) and under the 1979 Tokyo Round's *Agreement on Technical Barriers to Trade*. The 1988 US- Canadian *Free Trade Agreement* similarly recognizes environmental restrictions as "legitimate domestic objectives."

In regional integration regimes, however, difficulties can arise. In the EEC, for instance, there have been protracted quarrels over stricter national standards regarding fuel quality and engine emissions and over national subsidies for the purchase of "clean cars." Although Article 130T of the EEC Treaty as revised by the 1986 *Single European Act* expressly authorizes more stringent national measures for environmental protection "compatible with this treaty," and Article 100A(4) enables member states to derogate from agreed harmonization measures for environmental reasons, a country planning to do so must first notify the EEC Commission (which may object in case of non-compatibility) so as to avoid arbitrary restraints of trade. In the end, it is the trade regime that determines, if not the "bottomline," at least the margin of tolerable asymmetries in the EEC's environmental regime.

C. Consent⁴

The whole structure and content of treaty law is based on the principle of consent, usually quite specific consent. The Vienna Convention on the Law of Treaties deals with the subject of consent explicitly.⁵ Article 11 provides: "The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed." There follow a number of articles spelling out when consent is present or when it can be inferred. The law is rooted in the requirement of consent. Indications that a state can be bound without its consent do not appear in the Vienna Convention, but some limited exception to the rule of unanimous consent is afforded under Article 41, which makes provision for agreements to modify multilateral treaties between certain parties only.

This clear feature of treaty law bothered one of the leading writers on the subject, Lord McNair. He recognized the "underlying principle that no State can be bound by any treaty provision unless it has given its assent, and [that] that principle is applicable equally to all types of treaty."⁶ Obviously, there has been an enormous growth in multilateral treaties which have an almost legislative character about them. These treaties often regulate matters in detail. The changing character of international treaty law, however, has not been followed by sufficient changes in the rules about how a nation becomes bound. In his discussion of the revision of treaties, Lord McNair made the following observation:

[W]e touch here one of the weakest spots in the now existing system of States, and it must be admitted that no national society which is not equipped with legislative and administrative machinery for effecting changes could hope to hold together for long. International society is clearly groping its way towards the creation of some escape from the present effect of the rule requiring the consent of all the parties affected by a change, and some of the attempts to mitigate that rule should be noted.

Lord McNair noted that some technical multilateral treaties contain provisions by which, within certain narrowly defined limits, the parties agreed to permit modifications by majority vote. Many years earlier, in 1934, Lord McNair had made some observations about the need to develop an international legislative process--a means of making binding rules for everyone. Since he wrote, there have been developments in the way some international

organizations create norms. In some cases, the world is well on the way toward having the international legislative process Lord McNair thought so necessary. Consequently, it is now possible for nations that do not agree with a particular norm to be bound by it. Unanimous consent is not required. This development has been achieved by a process of prolepsis. The proleptic method of avoiding the rule of unanimous consent has already been employed in the environmental sphere in the Montreal Protocol on Substances that Deplete the Ozone Layer of 1987. Some little-noticed innovations were made that certainly go beyond the technical and change the rule of unanimous consent in dramatic ways. To understand the nature and quality of the achievement, we need to review the general history of the ozone issue. It took some time and quite a lot of scientific research before the ozone problem was fully revealed. In 1974, when the first reports began to appear that there was a problem, the industry that produced the depleting substances contested the evidence and warned against precipitate action. The chlorofluorocarbons industry persisted in that stance for some years: We need more evidence, was the refrain. The argument that policy makers should wait until the scientific evidence is clear and compelling is a recurrent theme; it is both reasonable and persuasive. It can also be fundamentally wrong, as it was in the ozone case, and as is now accepted by the chlorofluorocarbons industry. Scientific disagreement can always be found and much can be made of the uncertainty. Arguments based on uncertainty often succeed with political decision makers; doing nothing is a policy option that succeeds more than most.

In the three years preceding the conclusion of the Vienna Convention for the Protection of the Ozone Layer in 1985, the evidence was strongly contested and conflicting studies were published about it. As a result, the Vienna Convention was very much a framework convention; that is, it did not decide anything specific about reductions in the use of substances that deplete the ozone layer but, rather, established mechanisms to study the question and voiced some general obligations to cooperate. The Convention provided for a secretariat and a conference of the parties, as well as a dispute settlement mechanism. This technique of slicing the salami thinly was the key to success regarding the ozone problem. Although the specifics could not be agreed upon, a process was established that led progressively to the 1987 Montreal Protocol and the London agreement.

By 1987 fresh scientific discoveries about the ozone hole over Antarctica spurred the movement to curb the emission of ozone-depleting substances. Indeed, the science was changing so fast that it was hard for the policy makers to keep up. Hardly was the ink dry on the Montreal Protocol, which required a 50 percent reduction in the production and use of ozone-depleting substances by 1999 (calculated on 1986 base figures), than it became evident that the reductions would not be sufficient. That led, in turn, to the Helsinki Declaration and the London Amendments of 1990, which should result in the virtual elimination of emissions of ozone-depleting substances by January 1, 2000.

The Montreal Protocol requires an assessment and review of the control measures beginning in 1990 and "at least every four years thereafter." Parties must convene panels of experts and the secretariat must report the conclusions of these experts to the parties. On the basis of those assessments, the parties are to decide whether adjustments to the ozone-depleting potentials of the controlled substances should be made and "what the scope, amount and timing of any such adjustments and reductions should be." If adjustments are proposed, six months' notice must be given. All of that seems quite unexceptional until Article 2(9) is reached:

In taking such decisions, the Parties shall make every effort to reach agreement by consensus. If all efforts at consensus have been exhausted, and no agreement reached, such decisions shall, as a last resort, be adopted by a two-thirds majority vote of the Parties present and voting representing *at least fifty per cent of the total consumption of the controlled substances of the Parties*.

The next provision makes it explicit that the decisions taken are binding on all the parties. This provision, however, applies only to adjustments in ozone-depleting substances mentioned in the annex to the Montreal Protocol. To add new substances, as the London conference did, requires application of the ordinary rule.

This most instructive departure from the unanimous consent rule was further fine-tuned in the 1990 London Amendments to the Montreal Protocol. The developing countries objected to the weighting provisions, which gave power to those representing 50 percent of the combined total consumption of the substances (which meant that a few large chlorofluorocarbon-producing countries could block a new agreement). The final sixteen words of the provision above were deleted and the following words substituted: "a majority of the Parties operating under paragraph 1 of Article 5 present and voting and a majority of the Parties not so operating present and voting." In effect, this new provision gives a veto to both developed and developing countries. A two-thirds majority is required and it must include a simple majority of each group. Future adjustments should be easier to achieve than before.

The issue obviously arises as to what a nation will do if it does not agree with an adjustment made in accordance with the foregoing rule. The country is bound if it is a party to the Protocol. Withdrawal under the Vienna Convention itself is permitted at any time after four years from the date on which the Convention entered

into force, which was September 22, 1988. Withdrawals can take effect one year after receipt of written notification. As amended in London in 1990, the Protocol now provides that any party may withdraw from it at any time after four years of assuming the obligations of reducing the consumption of controlled substances. The withdrawal takes effect one year after giving notice. Consequently, while there are fetters on the withdrawal of nations that do not get their own way, the system is nonetheless vulnerable to withdrawal.

On the other hand, there are provisions prohibiting nations that are parties to the treaty system from exporting controlled substances to nations that are not parties, or importing from them. These prohibitions may in time be extended to trade in products produced with controlled substances but not containing them. While these measures will certainly tend to discourage nations from trying to thwart the system, they are not certain to prevent it.

The ozone system is also vulnerable because of the nations that do not join. While arguments about customary international law and *jus cogens* may eventually be available to induce compliance, it is wholly impractical for nations to be able to please themselves about the production of ozone-depleting substances when great effort has been made to put a fair and balanced international system into place. It renders the entire enterprise open to subversion. The ozone example demonstrates that, while a framework treaty can be used to set standards later by means that do not involve unanimous consent, the consequences of the rule of consent cannot be avoided altogether.

There is more support for getting rid of the rule of unanimous consent than may be thought. That attitude was strikingly in evidence at the International Summit on the Protection of the Global Atmosphere, held at The Hague in March 1989. The twenty-four nations that signed the Hague Declaration laid down some new principles that would constitute a new approach to making international rules and enforcing them. Of course, the instrument that put them forward is of a soft law character.

The Hague Declaration calls for the "development of new principles of international law including new and more effective decision-making and enforcement mechanisms." Since the problems are planet-wide, solutions can only be devised on a global level. In designing the solutions, the different levels of development of nations must be taken into account. The declaration states that most of the emissions affecting the atmosphere originate in industrialized countries. Special obligations will have to be undertaken to assist developing countries. In concrete terms the nations that signed the declaration acknowledged several principles and undertook to promote them. What they undertook to do by a soft law method was to promote a new species of hard law. The first casualty was to be the rule of unanimous consent. They thus pledged themselves to promote

[t]he principle of developing, within the framework of the United Nations, new institutional authority, either by strengthening existing institutions or by creating a new institution, which, in the context of the preservation of the earth's atmosphere, shall be responsible for combating any further global warming of the atmosphere and shall involve such decision-making procedures as may be effective even if, on occasion, unanimous agreement has not been achieved.

In terms of traditional international law, this statement is radical. It is the embryo of a legislative system for international environmental issues. Nations that do not agree with a rule and will not consent to its inclusion in a treaty may be obliged to follow the rule anyway. This principle opens up the opportunity for the creation of a new organization with the ability to create norms by special majorities. If state sovereignty is the foundation of international law, the Hague Declaration may be the first nail in its coffin.

The statement leaves a good many questions unanswered. When will it be judged that effective decision-making requires the suspension of the rule of unanimous agreement? What sort of procedures must be followed to reach that conclusion? What sort of majority is sufficient to make a rule binding on a state that has refused to accept it? Furthermore, there is a troublesome first-principles question of how to get there from here. If the existing rule is unanimous consent and unanimous consent to changing the rule does not exist, how can it be changed? These issues were not addressed and they were not addressed deliberately.

Acceptance that nations can be bound without their consent opens the door to a quite different legal context from that in which international law has developed. It offers the prospect of fashioning an international legislative process for global environmental issues. It offers the practical means of securing the higher standards that may be required by an objective assessment of the scientific evidence, however politically inconvenient a particular measure may be for an individual country. The search for the lowest common denominator in environmental matters, as in others, can be a grinding and laborious diplomatic search that hungrily consumes energies and time--both of which are too scarce. Nations that do not want to change can sit tight and avoid change. A recurring theme at international conferences is the last-minute effort to persuade one country or another to go along. Language is softened, material is removed, and much of substance is lost. Herein lies a fundamental difference between the legislative and the diplomatic process. With legislation everyone is bound by the outcome, including those who do not agree. With treaties those who do not agree simply do not become bound.

D. DEBATE: Innovations in International Environmental Treaties: Is There a Price-Tag?

1. Affirmative

a. Normative Indeterminacy⁷

The need to facilitate international environmental decision-making of a less cumbersome and time-consuming nature without sacrificing at the same time on the objective of broad state adherence to adequate environmental standards, has prompted a restructuring of multilateral legislative processes: Diplomatic "ad hoc" is being abandoned for institutionalized, periodic and informal review of international regulatory regimes with simplified amendment procedures.

The resulting intrinsic flexibility or adaptability of the legislative process comes, as some might be apt to object, with a substantial price-tag. The framework-cum-implementing protocols approach necessarily entails a significant degree of indeterminacy of the normative landscape thus being created: States tend to settle first broad policy outlines through the device of framework conventions and leave nettlesome details to be worked out in future protocols. This institutionalizes international law-making within the individual environmental context as defined by the framework convention. By necessity, this approach thus also signals a certain open-endedness of the legislative enterprise.

More significantly still, states may leave the definition of key legal parameters regarding the scope and very nature of conventional obligations to which they contract to be settled at a later date. Consider, for example, the Basel Convention: The finalization of at least two such concepts, namely that of "environmentally sound management of wastes" and of "liability," have been left for decision by the parties until after the Convention formally enters into force.

International legislation under this guise is no longer a single well-defined product carried by expectations of stability for a foreseeable future. It is rather a fragile, temporary legal sign-post in an institutionalized process in which legal positions are subject to constant review and susceptible to frequent and speedy alteration. Those who might be troubled by this fact might do well to heed Prof. Sax's admonition on the function of domestic environmental law which applies with equal, indeed greater force to international legal mechanisms for protecting environmental resources globally:

"[W]e must put aside the dominating idea that the legal system is to be designed to institutionalize stability and security. Probably nothing is more urgently required than institutions for controlled instability."

Some aspects of this development may be undesirable. For example, the institutional dynamics of multilateral regimes (with regard to both the setting and implementation of standards), may be such as to de-couple decision-making within the regime from traditional national processes of control and supervision. In this sense, the new type of environmental regime may signal an emerging "democratic deficit." Other implications of such regimes might be merely inconvenient. However, on balance, there can be little doubt that the evolving international legislative process represents progress towards better international legal management of increasingly demanding global environmental problems.

b. "Treaty Congestion"⁸

Ironically, the success that countries have had in negotiating a large number of new international environmental agreements has led to an important and potentially negative side effect: treaty congestion. This affects the international community as a whole, particularly international institutions, as well as individual governments that may want to participate in the negotiation and implementation of agreements but have scarce professional resources.

One of the characteristics of the treaty congestion problem is operational inefficiency. It is not yet clear that we will be able to make the new system of international agreements function efficiently. Moreover, efficient operation is, in part, a function of risk assessment and presently there is no generally accepted system for assessing risks, and even more importantly, none for prioritizing them.

The transaction costs in negotiating international agreements are high. A normal negotiation may require four or five intergovernmental negotiating sessions of one to two weeks each during a period of eighteen months to two years. The Climate Convention negotiations required six sessions of two weeks each in less than sixteen months, in addition to regular meetings of the Intergovernmental Panel on Climate Change and various other informal meetings involving subsets of countries. Despite this very full and expensive schedule of negotiations, the Climate Convention negotiations were only one of more than a half dozen global or regional environmental agreement negotiations occurring more or less at the same time. During this period there were also important international negotiations for the conclusion of nonbinding legal instruments, such as the Arctic Protection Strategy, the Rio Declaration on Environment and Development, Forest Principles, and Agenda 21.

Many countries, especially those with limited resources, have complained about the demands these negotiations place on them for staffing and funding in order to participate in the negotiations. While the industrialized countries have provided some assistance to developing countries to participate in certain negotiations, such as the Climate Convention, such assistance has been insufficient to allow many developing countries to participate with fully staffed delegations, or sometimes to participate at all in particular sessions.

Moreover, the international community has not developed a systematic process for coordinating the negotiations. Treaty congestion results in a tendency to take language from one treaty and transfer it to another because it has already received clearances from home governments, even though a different approach, or different language, might be more appropriate. There is sometimes little attention devoted to examining anew what the best approach or language might be for the special circumstances in the agreement under negotiation.

With such a large number of international agreements, there is great potential for the additional inefficiency of overlapping provisions in agreements, inconsistencies in obligations, significant gaps in coverage, and duplication of goals and responsibilities. This issue was recognized during the simultaneous negotiations for the climate and biological diversity conventions and forest principles. All three legal instruments, for example, affect the management of forests. Informal efforts were made to ensure that the obligations were consistent with each other. In particular, the Convention on Biological Diversity addresses the issue of consistency with other agreements explicitly, by including a separate article entitled "Relationship with Other International Conventions."

In still other cases, issues arise that require analyzing the intersection between provisions of different agreements, such as those between the London Ocean Dumping Convention and the Basel Convention on Controlling Transboundary Shipments of Hazardous Waste. Both Conventions address the use and shipment of hazardous wastes that may be ultimately intended for marine disposal. Similarly, there are important legal questions arising from the intersection of the Antarctic Treaty and the Law of the Sea Convention. The intersection of issues is likely to become more frequent as countries conclude ever increasing numbers of agreements, which must be interpreted in conjunction with existing international obligations.

Treaty congestion has also created significant inefficiencies in implementing international agreements. Normally there are separate secretariats, monitoring processes, meetings of parties, sources of scientific advice and presentation of scientific material, financing mechanisms, technical assistance programs, and dispute resolution procedures for each treaty. At a minimum there is a need for coordination of agreements. Agenda 21, which was prepared for the U.N. Conference on Environment and Development, suggests the collocation of secretariats. While this may be desirable, housing the secretariats under one jurisdictional roof does not necessarily guarantee coordination. Although several agreements are located in the United Nations Environment Programme (UNEP), the secretariats are not located in the same place, nor is there necessarily greater coordination as a result of housing the agreement under one jurisdictional roof. It may be possible to address the coordination problem at the international level in a less centralized way, at least initially, by encouraging regular meetings of secretariats or by increasing use of the rapid advances in information technology. The information revolution can assist by making communication easier and less costly and by facilitating the gathering, analysis, and dissemination of data.

Finally, treaty congestion leads to overload at the national level in implementing the international agreements. A country needs sufficient political, administrative, and economic capacity to be able to implement agreements effectively. Today a large number of international environmental institutions, including most pointedly the numerous secretariats servicing international environmental agreements, have some claim on the administrative capacity of national states. Even industrialized states with well-developed regulatory mechanisms and bureaucracies show signs of being overwhelmed. As attention shifts to the importance of implementing and complying with the agreements that have been negotiated, this burden on the administrative capacity of states will become even more acute. Attention must be given to developing local capacity within countries to implement and comply with international environmental agreements effectively and efficiently. New technologies will be useful, but cannot substitute for other capacity-building measures, such as the training of personnel, development of economic resources, and restructuring of institutions for accountability.

2. Negative⁹

Traditionally, international standards have been set through treaties. An *ad hoc* diplomatic conference negotiates and adopts a treaty, which then has to undergo national ratification (usually by parliaments) to become legally binding. International environmental law-making poses no exception to this rule: typically, therefore, most recent proposals for international action on global warming envisage a convention on climate change or on a "law of the atmosphere," along the lines of the United Nations' 1982 Montego Bay *Convention on the Law of the Sea*.

As distinct from national environmental legislation, however, treaty rules laid down by conventional

diplomatic "ad-hocracy" have two fundamental drawbacks: First, they are based on the consensus or unanimity of all participants since no sovereign state is obliged to sign or ratify any treaty. Unlike decisions by a national legislature, which normally result in a median standard determined by majority vote that also binds the outvoted minority, internationally agreed-upon standards thus tend to reflect the lowest common denominator--the bottomline.

Second, parliamentary ratification takes time, so the effectiveness of international agreements is deliberately delayed. Unlike national laws which can fix their own dates of application, even allowing for immediate applicability or amendment multilateral treaties can be brought into force, or amended, only after a specified number of signatories ratifies them. The purpose, of course, is to ensure a measure of reciprocity and to avoid situations in which initial compliance by a few diligent parties creates disproportionate beliefs to the "free-riders" remaining outside the treaty. Setting a threshold number, however, also delays implementation to the speed of the slowest boat in the convoy.

It has often been pointed out how antiquated and cumbersome this conventional process is. Diplomatic treaty-making may be a useful way to formulate principles of behavior and a framework for intergovernmental relations. But are traditional treaty techniques suitable for effective environmental governance at the global or regional scale once international action must pass from declarations to operations? Environmental problems frequently involve unforeseeable changes of circumstances sometimes under crisis conditions in the face of continuous scientific-technological progress. Critical to successful international management, therefore, is a normative system's capacity to respond to frequent and rapid change.

E. Types of Norms¹⁰

The treatment of developing countries arises in virtually every discussion of international environmental protection and resource management. This serious and difficult issue must be confronted successfully in order to realize effective solutions to international environmental problems.

One hopes, of course, for a consonance between the international legal regime--as it presently exists and as it evolves in the future--and the political, practical, and moral considerations just mentioned. In this article, I examine the existing international legal regime with respect to three types of norms--differential, contextual, and absolute--and conclude that international environmental norms should be fashioned to take into account in an appropriate situation the specific capabilities and needs of developing countries.

I. Analytical Framework: Types of Norms

There are three general types of international norms. These types delimit the treatment that international law can and does provide developing countries.

a. Differential Norms

The first type of norm is what I call a "differential" norm, by which I mean a norm that on its face provides different, presumably more advantageous, standards for one set of States than for another set. In theory, the sets of States can be distinguished on any ground (other than simply that one set is composed of States that are acting and the other set consists of the States that are affected by the action).¹¹ The differential norms of greatest interest here are those that distinguish between developing countries and developed countries. An example of a differential environmental norm is contained in the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, which allows developed countries five years to decrease pollution to a specified level, but developing countries--defined in terms of annual per capita consumption of ozone-depleting substances--ten years to reach that same level.¹²

The Montreal Protocol is highly unusual, perhaps unique, because it defines "developing countries." The other conventions and instruments (such as UN General Assembly declarations) that provide differential treatment to "developing countries" may be relying on a common sense definition of the term or on the treatment of countries within the UN system (the United Nations, for example, maintains a list of "least-developed" developing countries). In the absence of a specific definition, countries as different as Burundi and Brazil are presumably treated the same--i.e., as "developing countries" and disputes may arise regarding whether or not a country qualifies as "developing."

By singling out one set of countries for different treatment, differential norms effectively take into account more than one type of interest. In the case of the Montreal Protocol, for example, the interests in not unduly interfering with improving standards of living in developing countries and in preserving the ozone layer are concurrently protected. That protection can be provided more or less flexibly. The Montreal Protocol provides very specific rules. In contrast, the earliest example of a differential norm distinguishing between developing and developed countries is very general: It allows each developing country to decide for itself how far it will provide economic rights to non-nationals.

b. Contextual Norms

The second type of norm is what I call a "contextual" norm, by which I mean a norm that on its face provides identical treatment to all States affected by the norm but the application of which requires (or at least permits) consideration of characteristics that might vary from country to country. Applying a contextual norm thus typically involves balancing multiple interests and characteristics.

Contextual norms, e.g., "reasonable" or "equitable," thus usually are indeterminate (that is also the case with differential norms that contain contextual elements). Depending on what factors may be considered, contextual norms allow disputing States wide latitude for arguing compliance or noncompliance. They also provide little, if any, certainty in predicting the outcome of the few international disputes settled by third parties such as courts and arbitral tribunals. Moreover, they permit such third parties to manipulate results within a broad range. Obviously, these effects can interfere with public order.

On the other hand, the indeterminacy of contextual norms or, in some cases, the flexibility of contextual norms that arises from the attributes that give rise to indeterminacy, can be advantageous in four types of situations. First, it is often easier to reach agreement on a contextual norm than on a more definite and precise norm, because of indeterminacy; and the fact that a contextual norm exists indicates, at the least, a recognition that the situation in question is of legitimate concern to all or part of the international community.

The second type of situation in which indeterminacy of contextual norms—or, more precisely, the attributes of contextual norms that create indeterminacy—is desirable involves problems that are clouded by uncertainty, either about scientific knowledge or about the range of factual situations to be covered by the norm, with the result that the precise contours of the optimal (or even suboptimal but still desirable) solution are unknowable, even by States otherwise willing to agree to an applicable norm.

A related set of issues regarding which flexibility is desirable is that in which the costs of determining all the possible factual situations to be covered by a norm (or group of norms) and of articulating and agreeing on a precise norm are so high that they outweigh the benefits that would be gained from having a precise norm. A flexible contextual norm may be the most efficient means of providing a standard to deal with these issues.

Fourth, flexibility can be advantageous even with respect to issues whose current solution is clear, if significant changes in the relevant milieu are likely to occur. Examples of such changes include advances in scientific understanding about the environmental (or other) effects of particular behavior, developments in the technology applicable to solving a given pollution problem, or changes in pressures on the ecosystem at risk. Flexibility enables a contextual norm to adapt to changed circumstances and thus eliminates the need to negotiate and agree upon a new standard—a process that can be time-consuming, expensive, or impossible.

Contextual norms are either general, in which case the terms of the norm do not place a limit on the characteristics that may be considered, or limited, in which case the norm is phrased such that the set of relevant characteristics is defined (more or less precisely). Restricting the factors that may be considered in applying a contextual norm limits the indeterminacy (and flexibility) of the norm. The 1972 Convention on International Liability for Damage Caused by Space Objects, which provides for absolute liability on the part of the State from whose territory the space object was launched, contains general contextual norms: The injured State is allowed to make a claim until one year after that State "could reasonably be expected to have learned of the facts," and compensation is to be determined according to "principles of justice and equity."¹³ In contrast, an example of a limited contextual norm in the environmental area is the 1972 World Heritage Convention's requirement that a country, in protecting natural and cultural heritage, "do all it can to this end, to the utmost of its own resources."¹⁴

c. Absolute Norms

The third type of norm is what I call an "absolute" norm, by which I mean a norm that provides identical treatment to all countries and does not require or permit consideration of factors that vary between countries. An example of an absolute norm is the 1987 Nuclear Accident Notification Convention's requirement of "immediate" notification of pending transboundary harm.¹⁵ Applying an absolute norm often involves inquiring into the facts of the specific case (e.g., one must determine when a nuclear accident occurred and when notification occurred in order to ascertain whether notification was "immediate"); and reasonable people differ about what facts are relevant to such inquiries. No bright line thus exists between absolute and contextual norms. It is usually clear, however, on which side of the line a rule or principle falls.

Absolute norms have the capacity for being very precise (as do differential norms that do not contain contextual elements). Absolute norms are not necessarily precise, however. Sometimes they are ambiguous or undefined. An example would be an agreement providing that damages must be paid for transboundary harm, without defining the terms "damages" or "harm." Such a lack of clarity can, but does not automatically, result in the disadvantages and advantages of flexible contextual norms.

2. Conclusion

International norms, including international environmental norms, take three general forms. One form is to provide what I call "differential" treatment to developing countries per se; i.e., the norm by its terms provides different, presumably more favorable, treatment to developing countries. The second form is what I call "contextual" treatment; i.e., the norm, without specifically mentioning developing countries, requires or allows consideration of characteristics that typically vary according to the economic developmental situation in a country. The third general form of norm is what I call "absolute" norms, i.e., norms that provide a common standard for all countries and that do not require or allow contextual treatment. These three types of norms have different advantages and disadvantages, and thus are appropriately used in different situations.

Norms providing differential or contextual treatment can be directed at, or have the effect of, benefiting developing countries in a variety of ways. For example, they can: impose additional burdens on developed countries or international organizations vis-a-vis developing countries; 130 require that future conventional regimes take developing countries' interests into account; 131 provide what effectively is a lower standard of care for developing countries than is required for developed countries; or require developing countries to pay less in compensation (or other forms of reparation) than would be required of otherwise similarly situated developed countries. Such norms -- particularly those providing differential treatment -- may also have the perhaps unintended effect of disadvantaging developing countries. Absolute norms can have the effect of benefiting developing countries, e.g., (arguably), a prohibition on all international transfers of hazardous wastes.

Although absolute norms predominate, the contemporary international legal system is replete with differential and contextual norms. Instances of each type occur in the evolving and interconnected areas of economic development, human rights, and environmental protection/resource management law. Indeed, there arguably is an existing, general customary obligation, stemming primarily from State practice in those three areas, to take the effect on sustainable development in developing countries into account -- in order to foster, or at least avoid unduly interfering with, such development and in order to ensure that norms are not impossible to comply with -- when fashioning international environmental norms. Similarly, it is arguable that developed countries have a customary law duty to assist developing countries meet international environmental norms relating to progressive realization of international human rights.

The most important customary international environmental principles already contain a contextual element, although this is not always expressed. Customary environmental law does not contain any examples of differential treatment, with the possible exceptions of the principles discussed in the immediately preceding paragraph.

The conventional environmental regimes examined in this article reflect widely differing resolutions of the desirability of providing standards sensitive to disparities in economic development and contain various mixtures of absolute, differential, and contextual norms. In part, those differences fall into a pattern: After the 1972 Stockholm Declaration on the Human Environment and even more after the 1974 triad of NIEO documents, environmental conventions are increasingly likely to contain economic-development-based differential norms and contextual norms that refer to resource availability and technical and regulatory capability.

FOOTNOTES CHAPTER 4

¹ The dispute mechanism of the Law of the Sea provides for the creation of a Seabed Chamber, a special chamber of the International Tribunal for the Law of the Sea, and an ad hoc chamber of the Sea-bed Disputes Chamber. Their functions are set forth in the Convention itself, contained in the Appendix to this Anthology.

² Edith Brown Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, 81 GEO. L.J. 675, 685-94 (1993). Copyright 1993. Reprinted by permission.

³ Peter H. Sand, *Lessons Learned in Global Environmental Governance*, 18 B.C. ENVTL. AFF. L. REV. 213, 220-27, 230-36 (1991). Copyright 1991. Reprinted by permission.

⁴ Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L L. 259, 272-78 (1992). Copyright 1992. Reprinted by permission.

⁵ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331, reprinted in 8 ILM 679 (1969).

⁶ A. MCNAIR, *THE LAW OF TREATIES* 162 (1961).

⁷ Gunther Handl, *Environmental Security and Global Change: The Challenge to International Law*, 1 Y.B. INT'L ENVTL. L. 3, 5-14 (1990). Copyright 1990. Reprinted by permission.

⁸ Edith Brown Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, 81 GEO. L.J. 675, 697-02 (1993). Copyright 1993. Reprinted by permission.

⁹ Peter H. Sand, *Lessons Learned in Global Environmental Governance*, 18 B.C. ENVTL. AFF. L. REV. 213, 213-220 (1991). Copyright 1991. Reprinted by permission.

¹⁰ Daniel Barstow Magraw, *Legal Treatment of Developing Countries: Differential, Contextual, and Absolute Norms*, 1 COLO. J. INT'L L. & POL'Y 69, 73-76, 98-99 (1990). Copyright 1990. Reprinted by permission.

¹¹ Thus, the rules of diplomatic immunity are not differential norms, even though they speak in terms of "sending States" and "receiving States."

¹² Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, art. 5, *reprinted in* 26 I.L.M. 1550 (1987); *see also id.* art. 10.

¹³ 1972 Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, arts. 2, 10, 12, 24 U.S.T. 2389, T.I.A.S. No. 7762, 961 U.N.T.S. 187 (emphasis added).

¹⁴ Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, art. 4, 27 U.S.T. 37, T.I.A.S. No. 8226, 1037 U.N.T.S. 151 (emphasis added); *see also id.* at arts. 5, 11.

¹⁵ Convention on Early Notification of a Nuclear Accident, Sept. 26, 1986, *reprinted in* 25 I.L.M. 1369 (1986).

By using the term "absolute," I do not mean to imply that an absolute norm is impervious to excuses for nonperformance, such as necessity and self-defense.