

THE CHANGING SHAPE OF SOVEREIGNTY IN
INTERNATIONAL ENVIRONMENTAL LAW

by

ELIZABETH AGNES KIRK

LL.B., The University of Glasgow, 1989
Dip.L.P, The University of Glasgow, 1990

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF LAWS

in

THE FACULTY OF GRADUATE STUDIES

(School of Law)

We accept this thesis as conforming
to the required standard

THE UNIVERSITY OF BRITISH COLUMBIA

March 1994

© Elizabeth Agnes Kirk, 1994

In presenting this thesis in partial fulfilment of the requirements for an advanced degree at the University of British Columbia, I agree that the Library shall make it freely available for reference and study. I further agree that permission for extensive copying of this thesis for scholarly purposes may be granted by the head of my department or by his or her representatives. It is understood that copying or publication of this thesis for financial gain shall not be allowed without my written permission.

Department of Law

The University of British Columbia
Vancouver, Canada

Date 31st March 1994

Abstract

The two main arguments made in this paper are that the basic principles of international law need to change from emphasising the rights of individual states to emphasising the promotion of the common good and that this change is already taking place, albeit it very slowly and rather haphazardly. The aim of this paper is to attempt to give some direction to and to help speed the progress of these changes.

To demonstrate the above thesis the paper looks at the developments in international environmental and natural resource law over approximately the last one hundred years. In so doing it looks at both how the law has developed generally and at the differences in the way different areas of the law have developed, so drawing out the haphazard nature of the development.

The areas discussed are case law, the non-navigational use of international rivers, declarations and conventions on international environmental law generally (those dealing with resources regarded as the common heritage of mankind and those dealing with resources generally regarded as belonging to individual states.) It will be shown that certain circumstances are required to prompt states to agree to limit their sovereignty. They must either perceive limitation as the only or best way to obtain a certain benefit, or perceive that they share certain interests with others or face a common threat. The problem is that this approach leaves certain areas of the law undeveloped which means that it is still possible to argue that the fundamental principle of international law is the supremacy of individual state sovereignty. The difficulty with this is that it allows states to act without regard for the effects of their actions on others.

For example, it allows them to refuse to take responsibility for the damage being done to the ozone layer because they can argue that they have the right to do as they wish within their territory. This takes us back to the first argument made above: that the law needs to change from promoting individual rights to promoting the common good.

Table of contents

Abstractii
Table of Contents	iv
Acknowledgement	vii
Introduction and Overview	1
Introduction	1
Overview	3
Chapter 1	
The Basic Thesis	5
Introduction	5
The Problems	7
International Law and the Notion of Sovereignty	11
Problems With Gradual Limitation	12
The Meaning of Internationalisation	13
Practical Effects of Internationalisation	17
Conclusion	23
Chapter 2	
The Case Law	26
Introduction	26
First Developments	27
The Corfu Channel Case	29
Development of the Basic Rule	33
Trail Smelter Developments	35
The Notion of Community Interest	36
Balancing Interests and Injurious Uses	37
Further Effects of State Liability	40
The End Result	44
Conclusion	53
Chapter 3	
International River Regimes	56
Introduction	56
Reasons for choosing the Non-navigational use of International Rivers for Discussion	57
Starting Points	57
Rules Applicable to the Use of International Rivers	60
Selected Agreements on the Non-Navigational Use of International Rivers	62
Preliminary Matters	62
The Nile River Regime	64
The 1929 Agreement	65
The 1959 Agreement	67

	Conclusion	72
	The Mekong River Regime	73
	The 1957 Statute and Rules	74
	The 1975 Declaration	77
	The 1978 Declaration	78
	The Columbia River Regime	80
	The Rhine River Regime	87
	The Berne Convention	88
	The Chemical Convention	89
	The Chlorides Convention	91
	The Plata Basin Regime	95
	The 1967 Declaration	96
	The 1968 Act	97
	The 1969 Treaty	98
	Conclusion	101
	Conclusion and Summary	102
Chapter 4	International Instruments Dealing With Environmental Law	107
	Introduction	107
	Declaratory Instruments	110
	The Stockholm Declaration	110
	More Recent Declarations	115
	The Rio Declaration	117
	International Conventions	122
	Conventions Dealing With Resources Owned Separably by States	122
	a) The Convention Relative to the Preservation of Fauna and Flora in Their Natural State 1933	122
	b) The Convention on Wetlands of International Importance Especially as Waterfowl Habitat 1971	127
	c) Convention on Biological Diversity	132
	Conventions Dealing With The Common Heritage of Mankind	137
	a) The United Nations Convention on the Law of the Sea 1982	137
	The Deep Sea Bed	138
	Conclusion	146
	b)(i) The Vienna Convention	147
	b)(ii) The Montreal Protocol	150
	Conclusion	155
Chapter 5	Conclusion	160
	Individual Summaries	160

The Thesis	160
The Case Law	161
The Law Pertaining to the Non-Navigational Use of International Rivers	162
Instruments Dealing With International Environmental Law . . .	162
General Summary	163
Comparison of Aims and Findings	165
Conclusion	170
 Bibliography	 176

Acknowledgements

I would like to thank a number of people without whose help I would have been unable to produce this work. First of all I should like to thank Professor Ian Townsend-Gault for being my kind of a perfect supervisor. I think I also owe a particularly large thankyou to Professor Karin Mickelson for action above and beyond the call of duty of a secondary reader. My third thankyou is addressed to my parents for all the support they have given me throughout my education, for what they have taught me and of course for the one way ticket to Canada they bought me. Lastly I should like to thank all those other people who have helped me in various ways as I journeyed on my quest for knowledge.

Introduction and Overview

Introduction

I wanted to introduce this paper by explaining the origin of my ideas so I turned to my roots and to a poem written by a far distant (in time) cousin Màiri Nic A' Phearsain.¹ The poem is about the battle between landlords and tenants over the introduction of a new land law, in the Highlands of Scotland. I hoped that it would encapsulate the underlying concepts of my thesis: the idea that there is more than one way to envisage and structure a land holding system, at a local or, international level, and that perhaps it is time to look at some of those other ways to find means to correct the defective parts of the present system. Unfortunately, the quotation I had in mind does not quite fit, at least not without more explanation than would be prudent, relevant, or interesting, but in looking at my source once again I found a quotation which might just work. In talking about Gaelic poetry in general and work songs in particular, Meg Bateman made the following observation: "[M]any have composite authorship. Thus modern notions of the poet as an individual dissolve: the song becomes the possession and the utterance of the group."²

So too, in Gaelic society the land was the possession of the group, although someone looking at the system with modern concepts in mind might think that the land belonged to individuals. In practice each individual had a plot large enough for the use of their family which passed from generation to generation usually, but not always, through the family. The land

¹ Mary MacPherson also known as Màiri Mhor Nan Oran (Big Mary of the songs) (1821-'98). A politically active gael, she is said to have influenced election results and was even imprisoned on trumped up charges of theft in an attempt to silence her, Catherine Kerrigan, ed., *An Anthology of Scottish Women Poets* (Edinburgh: Edinburgh University Press) 1991; my mother, Morag M. Kirk.

² Meg Bateman "Gaelic Women Poets" in Kerrigan *supra* note 1 at 12.

belonged to the clan and was allocated according to need. In ensuring that each had enough to meet their needs the community ensured "a balanced economy" - there was no need for anyone to support another. Each could concentrate on producing the maximum sustainable yield from their land and a state of equilibrium could be reached and maintained. The acceptance of the underlying concepts of the system, community ownership and equitable use, facilitated the reallocation of resources when required for the benefit of individuals and the community. That is, it encouraged land and resource transfers when the economic equilibrium of the community was in flux due to demographic or environmental changes. No thought was given to the idea of private enrichment of individuals, everything was done for and by the community as a whole.

I learned of this type of system at my mother's knee and always it was contrasted to the ways of "the South", that is the lowlands of Scotland and England. It was presented as and has become something of an ideal to me, something to strive for once more in my home country and now, as will become plain below, I am beginning to see its relevance to the global community. The aim of this thesis is to demonstrate that relevance to others; to argue why sovereignty under international law needs to be changed from individual to shared or community sovereignty; to show that this change is, in fact, already taking place (although it is not generally recognised for what it is) and to demonstrate why the changes that are taking place need to be recognised for what they are if they are to continue in the right direction and to ensure that the law does not regress.

Overview

This shall be done by laying out the basic thesis, the basic problems and traditional notions of international law and sovereignty in Chapter 1. Then outlining the development of international environmental law over the last century, beginning in Chapter 2 with case law dating from around the turn of the century to the 1950s. Chapter 3 will then look at developments in international river law in the 1950s and '60s and Chapter 4 at the developments in international environmental law over the last twenty-five years or so.

These chapters are intended to show not only the chronological development of the law, but also the different ways in which it has developed in different areas. Chapter 2 contains the generally accepted rules of customary international law which courts have been willing to recognise and apply. Chapter 3 shows how states are willing to limit or change their sovereignty in certain narrowly defined cases, where they are dealing with specific resources. Chapter 4 looks at the differences between the regimes concerning natural resources and those perceived as the common heritage of mankind, and at the differences between what is agreed to in general declarations and conventions containing binding obligations.

The unevenness of the changes to sovereignty which are taking place will be demonstrated by showing that states are more willing to share sovereignty where they are dealing with a specific resource and precise rules, for example, in dealing with international rivers³ or when dealing with resources which they do not already perceive as their own, for example, the deep sea bed,⁴ than they are when dealing with national resources. States have

³ Discussed in Chapter 3.

⁴ Discussed in Chapter 4.

also proved more willing to agree to the application of principles like the common heritage of mankind in general declarations such as the Stockholm Declaration⁵ than in the context of binding regimes affecting particular national resources. Throughout, the shortcomings of the law will be drawn out as much as possible and finally, in Chapter 5, the findings of the earlier chapters shall be compared to each other and to the concept of internationalisation to persuade the reader of the nature of the changes which are occurring and of the changes which need to occur if the global community is to survive.

⁵ *Stockholm Declaration of the United Nations Conference on the Human Environment, 1972. U.N. Doc. A/CONF. 48/14 (1972) discussed in Chapter 4.*

Chapter 1 The Basic Thesis

Introduction

The idea I am proposing is a type of global community arrangement with resources owned¹ in common but, individual states having something like a *usufruct*² over them. The community ownership aspect would mean that uses would have to serve the best interests of the whole community and not just a particular individual or state. In practice this should mean that each state uses what it has as it needs it, but in so doing it must ensure that it does not appreciably harm³ other states or the environment. (Harm to the environment would of course amount to harm to others as all states would "own" the environment in common.)

Perhaps I should say that I wish to dissolve modern notions of state sovereignty⁴ over resources and press for a completely new order based on group ownership, with overall benefits shared by the community,⁵ but in carrying out my research, I found that I do not have to argue

¹ That is all states would share an interest in the resources and would share the right to have the final say on which uses would and would not be permitted. It does not mean that each would have actual physical control over all resources, nor would it necessarily mean that each would have the right to appropriate the resource for their own use, rather it would mean that the resources could only be used in accordance with the community will.

² A usufruct in Roman Law was "the right to use and enjoy the property of another and to take the fruits thereof so long as the substance of the thing was not affected." J.A.C. Thomas M.A., *The Institutes of Justinian: Text, Translation and Commentary* (Wynberg, South Africa: Juta & Company Limited) 1975 at 88.

³ The term "appreciably harm" is unfortunately a rather woolly one but I use it here as it is now commonly used in international law discussions on resource use. See, for example, Article 7 of the International Law Commission's *Draft Articles on the Law of the Non-Navigational Uses of International Watercourses, Draft Report of the International Law Commission*, U.N. GAOR, 43rd Sess., at 1, U.N. Doc.A/CN.4/L.463/Add.4(1991) [hereinafter "I.L.C. Draft Articles".]

⁴ Defined below at pages 11-12.

⁵ In a similar vein see B.J. Theutenberg "The International Environmental Law Some Basic Viewpoints" in Hague Academy of International Law *The Future of the International Law of the Environment 1984 Hague Academy of International Law Workshop* 233 where he discusses the need for the abolition of frontiers. For a contrasting view on the efficacy of such an approach see Carl August Fleischer "The International Concern for the Environment: the Concept of Common Heritage" in *International Union for Conservation of Nature and Natural Resources Trends in International Environmental Law and Policy* (Chicago: Gland) 1980, 321.

for a complete change as the notion of sovereignty has already begun to metamorphose into something like my desired form.⁶ It appears that the notion is moving away from individual sovereignty over resources to joint or shared sovereignty with the benefits from the use (or non use as the case may be) of the resources shared by several or all states. This despite the fact that it might appear that in some cases sovereignty is retained by the individual state. It should also be noted that the generally accepted view of scholars and states is that individual sovereignty has only been subjected to very limited incursions into it and that the old concept of sovereignty has been maintained more or less as it always was.

The danger is that the generally held view that states basically retain their sovereignty intact might derail the process. There is, therefore, a need to ensure that the process does not stop. It would also be beneficial if it could be speeded up. This need to ensure the continuation of the process also stems from the fact that the world is "shrinking" in the sense that states are becoming more and more dependent on each other due to developments in technology, which have made over-exploitation of resources possible and/or led to the production of harmful byproducts on a scale that can lead to global problems.⁷ Both of these problems require increased cooperation between states if they are to be controlled and both are gaining more and

⁶ But see W.D. Verwey "Adapting International Law to the Development of the Third World" in F.E. Snyder & S. Sathurathai, eds., *Third World Attitudes Toward International Law* (Boston: Martinus Nijhoff Publishers) 1987 801 particularly 846, where he said "the principle of national sovereignty reigns supreme and is even making a triumphal advance within the realm of the law of the sea - where the "Common Heritage of Mankind" is squeezed out from all sides by 200 mile exclusive economic zones, covering one-third of the oceans' waters and bed and claiming over 90 per cent of the oceans' fish and oil".

⁷ For example, global warming and depletion of the ozone layer.

more attention world wide.⁸ Technology also demands increased cooperation in trade *et cetera* to ensure adequate supplies of raw material, markets for products and sites for waste disposal.

To illustrate these points I shall briefly discuss some of the problems facing the world today and why international law is failing to tackle them properly. Having done so I shall discuss the international community system I am proposing and the pros and cons of alternatives to it.

The Problems

Part of the problem would seem to be that for the last few centuries it has seemed that the world was growing - new lands were being discovered along with new uses for existing lands (or seas).⁹ The traditional problem facing international law and international lawyers was how to create rules to ensure that once a state had possession and/or use of a resource or territory it did not lose it to another state, or, to put it another way, that states did not interfere with the rights of others.¹⁰ At present, two of the main problems are the redistribution and the

⁸ See R. Eshbach "A Global Approach to the Protection of the Environment: Balancing State Sovereignty and Global Interest" (1990) 4 Temple International and Comparative Law Journal, 271 [hereinafter "A Global Approach"] at 278-'81.

⁹ For example, oil production and mining of the deep sea bed.

¹⁰ "Since the Renaissance, the principle objective of international law has been to confine states to their own borders except where they engage in trade." D. Tarlock, "Stewardship Sovereignty: The Next Step in Former Prime Minister Palmer's Logic" (1992) 42 Washington University Journal of Urban and Contemporary Law 21 [hereinafter "Stewardship Sovereignty"]. See also G. Elian *The Principle of Sovereignty Over Natural Resources* (Germantown, Maryland: Sijthoff & Noordhoff) 1979, Chapter 1; H. Grotius, *The Rights of War and Peace* translated with notes by A.C. Campbell, M.A., (Washington: M.Walter Dunne Publisher) 1901, particularly Chapter III; H. Kelsen, *Principles of International Law* 2nd ed. (U.S.: Holt, Rinehart and Winston Incorporated) 1966; J.L. Brierly *The Law of Nations: An Introduction to the International Law of Peace* 6th ed. (Oxford: Clarendon Press) 1963, Chapters I and V.

preservation of resources.¹¹ This arises from the growth of the human population¹² and increases in economic activities¹³ in recent years which have resulted in extra demands being placed on some resources and others being concentrated in the hands of a select few individuals.¹⁴

If states are left to act autonomously with no consideration for others the distribution of resources will remain inequitable and may actually get worse as "those that have gain more and those that have not have theirs taken away." As it is the countries of the North,¹⁵ representing approximately 20% of the world's population, consume approximately 83% of the world's resources.¹⁶ Of the other 75% of the world's population, one billion have to live on less than

¹¹ For general background and context see Dr R.K.L. Panjabi in "The South and the Earth Summit: The Development/Environment Dichotomy" (1992) 11 Dickinson Journal of International Law 77 [hereinafter "The South and the Earth Summit"] and A Global Approach *supra* note 8. For more detail see the *Charter of Social and Economic Rights and Duties of States* G.A.Res 3281 (XXIX), 29 U.N. GAOR Supp.(No.31) at 50, U.N. Doc.A/9631 (1974); D.B. Magraw, "The Legal Treatment of Developing Countries: Differential, Contextual and Absolute Norms" (1990) 1 Colorado Journal of International Environmental Law and Policy 69; T.S. Rama Rao, "The New International Economic Order and the North-South Dialogue" in S.K. Agrawala, T.S. Rama Rao & J.N. Saxena, eds., *New Horizons of International Law and Developing Countries* (India: N.M.Tripathi Private Limited) 1983.

¹² See the World Commission on Environment and Development, *Our Common Future* (New York: Oxford University Press) 1987 [hereinafter, "Our Common Future"] Chapter 4.

¹³ *Ibid*, at 31 and Chapter 8.

¹⁴ Recent in terms of the world and human history.

In relation to freshwater, in border areas, the problem has been expressed thus: "[t]he rapid growth in human settlements and economic activities in many border areas has brought with it alarming increases in the demand for water, not only for drinking and other domestic uses, but for the expanding industrial, agricultural and municipal uses." R.D. Hayton & A.E. Utton, "Transboundary Groundwaters: The Belagio Draft Treaty" (1989) 29 Natural Resource Journal 663. See also *Our Common Future*, *supra*, note 12 at 33, Table 1.2 - Distribution of World Consumption Averages for 1980 -82 and at 170, Table 7.1 - Global Primary Energy Consumption Per Capita 1984; A Global Approach *supra* note 8; and The World Bank *World Development Report 1991 The Challenge of Development* (New York: Oxford University Press) 1991 [hereinafter "World Development Report 1991"] 15 Box 1.1 "Innovations that changed the world".

¹⁵ I use the term "North" in the sense in which it is now commonly used that is, to mean the developed countries. Similarly "South" means the developing countries.

¹⁶ United Nations statistics quoted by Dr Rane K.L. Panjabi in "The South and the Earth Summit" *supra*, note 11 at 95.

one dollar a day.¹⁷

Those, then, that have too little to live on are making increasing demands of those that have more than enough, as seen in, for example, the Somalian and Ethiopian crises. This is to no one's advantage: the states in crisis become dependent on others for hand outs and are unable to develop their economies and the rest lose established and potential trading partners. In addition, resources are stripped by debtor countries in generally futile endeavours to service their debts. For example, Indonesia attempted to gain control of a large portion of the global market in plywood to increase its profits and help pay off its debts to Japan. Although it succeeded in gaining control of 50% of the market it did so only by lowering its prices to an uneconomic level. This finally lead to a net reduction in the value of the timber crop of 40% with the result that its debt position was not much, if at all, improved.¹⁸

The problem is that states are vying with each other in a very competitive market place and with only limited resources at their disposal. In endeavouring to "win" in the market their natural tendency is to pay little attention to environmental concerns or to the concerns of each other, the only goal is "cash now".¹⁹ Moreover, traditional international law places no obligations on them in relation to each other except that they may not interfere in each others affairs, such that each can legitimately pursue its aims at the expense of its competitors.

This leads to two problems noted above. First, resources are concentrated in the hands

¹⁷ *Ibid* at 86.

¹⁸ *Ibid*, at 95, see also *A Global Approach*, *supra*, note 8.

¹⁹ That cash is needed both to feed the peoples of the developing countries and to service foreign debt, "A Global Approach" *ibid*.

of the few,²⁰ leading to overconsumption both by those that have plenty and by those that have too little. (The latter are forced to over use what they have simply to survive, for example, forests are completely logged to generate cash and often under sold.)²¹ The result is often environmental and economic disaster. In the case of timber exploitation, top soil is washed away, water for irrigation drains away and flooding increases. The Environmental Secretary of the Philippines explained that his nation, after logging most of its forests has "lost the fertility of [its] soil, the fish bearing capacity of [its] rivers and [its] seas."²² He went on to say "[w]e've lost our healthy corals, our mangroves, we've lost the opportunity to feed millions of Filipinos through good agricultural practices and we've lost water for irrigation that would have fed the farms."

Traditional international law does nothing to combat these problems. The dominant rule is the supremacy of state sovereignty which meant it

focused on recognising and preserving each state's sovereignty. Its underlying assumption was the freedom of control over activities within a state's national jurisdiction. The 1933 Montevideo Convention on the Rights and Duties of States sets out the fundamental character of this freedom. It provides that '[n]o state has the right to intervene in the internal or external affairs of another.'²³ [footnote omitted]

In relation to resources this means that each has absolute control over, and the only rights to use of, the resources within its territory. No other state has any right to use or prescribe how

²⁰ For and indication of this see the world Bank statistics on GNP, population, GNP per capita and growth of GNP per capita in the World Development Report 1991, *supra*, note 14, 182, Table A.2.

²¹ The Philippines, for example, realised only approximately 16.7% of the value of its timber through logging, The South and the Earth Summit *supra* note 11 at 96

²² Quoted in The South and the Earth Summit *supra* note 11 at 96.

²³ S.H. Bragdon, "National Sovereignty and Global Environmental Responsibility: Can the Tension Be Reconciled for the Conservation of Biological Diversity?" (1992) 33 Harvard International Law Journal 381.

those resources should be used, nor does any other state have the right to have its interests taken into account when the "owning" state is considering how to use its resources.

International Law and the Notion of Sovereignty

Originally, in the seventeenth century, sovereignty was viewed as the all encompassing right of the State to do whatever it wanted, wherever it wanted. It was clear that this could not work for long as states would be in constant danger of interference from others and so would have to exist in a constant readiness for war. The chances are that the lives of states would, in the words of Hobbes, be "nasty, brutish and short."²⁴ This led then to the limitation of the right so that it became the state's right to do whatever it wished within its own borders.²⁵ This left States free to deal with their resources in any manner they wished: "[s]overeignty has historically included freedom of action with regard to the natural resources found within a nation's boundaries. This control over resources is considered to be a basic constituent of the right to self-determination."²⁶ Now the general position appears to be that the right of action of States, even within their own borders is limited by various conventions, customary international law and by the general principles of international law, for example the principle *sic utere tuo ut alienum non laedus*.²⁷

²⁴ T. Hobbes, *Leviathan* C.B. MacPherson, ed., (Aylesbury, England: Penguin Books) 1985, at 186.

²⁵ "Since the Renaissance, the principle objective of international law has been to confine states to their own borders except where they engage in trade." Stewardship Sovereignty *supra* note 10.

²⁶ Bragdon, *supra* note 23 at 382.

²⁷ Ian Brownlie currently defines it thus, "'sovereignty' is legal shorthand for legal personality of a certain kind, that of statehood" "Principles of Public International Law" Third Edition (Clarendon Press, Oxford 1987) 110. On sovereignty see also Huber J in *Island of Palmas (Netherlands v. United States)* 2RIAA 829 [hereinafter "Islands of Palmas Arbitration"] and Kelsen *supra* note 10 particularly at 248 and 581. (Kelsen throws some doubt on the very existence of the notion of sovereignty thus, "[a]s subjects of international rights the states are subjected to international law, even if international law is considered to be part of national law. Hence, the states as subjects

Such limitation is only natural given the increase in interaction and interdependence amongst states, in particular over the last few decades. One would expect this to lead to the limitation of states' actions in the same way as in the development of societies individual freedoms (or sovereignty) are gradually limited. There is also the fact that a polluting state imposes its political, administrative and economic systems on the victim state, thus impinging on the victim's sovereignty. To protect the victim's sovereignty restrictions have to be placed on the polluting state.²⁸

Problems With Gradual Limitation

The problem with continuing along the lines of gradual limitation of sovereignty is that states will only do the minimum required of them and will try to argue that they have done all that is required of them when in fact they have not.²⁹ This takes me back to the point I started from - that I would like to propose a new system of "land law" for the international legal system, based on the idea of community ownership, under which everyone has an interest in the success of the others, and which I am terming "internationalisation".³⁰

One might argue that I should not be proposing but recording the development of a new

of rights are as little 'sovereign' as the individual is 'sovereign' under national law." 248) See also L. Wildhaber, "Sovereignty and International Law" in R.St.J. MacDonald & D.M. Johnston, eds., *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine And Theory* (Boston: Martinus Nijhoff Publishers) 1986, 425 and Articles 2(7) and 10 of the U.N. Charter Can.T.S. 1945 No.7, 59 Stat. 1031, 145 U.K.F.S. 805 and Article 1(3) of the UNESCO Constitution 4 UNTS 275 and article 3D of the Statute of the International Atomic Agency Can.T.S. 1957 No.20

²⁸ See L.F.E. Goldie, "Concepts of Strict and Absolute Liability and the Ranking of Liability In Terms of Relative Exposure to Risk" (1985) 16 Netherlands Yearbook of International Law 174 at 229.

²⁹ See for example Albania's arguments in the *Corfu Channel Case (United Kingdom v. Albania)* [1949] ICJ Rep 4.

³⁰ I have used the term "internationalisation" in preference to other already commonly used terms such as "globalisation" as I have found that individuals have their own, varied ideas about what these terms mean or should mean.

system of international law as I have already noted³¹ and shall demonstrate in the coming chapters that the law is metamorphosing to something like my desired shape. The problem is that the change has no direction; there is no telling what the final result will be. There is, therefore, a need to ensure that the law embodies the concept of internationalisation. To fully understand why this is one needs to examine the faults in the present system. Before doing that I shall define and discuss the concept being proposed.

The Meaning of Internationalisation

Internationalisation can be explained as follows: say there are 4 states, A, B, C and D. A, B and C each have the right not to have their rights interfered with by D, similarly B, C and D each have the right not to have their rights interfered with by A and so on. Thus each has a similar right not to have their rights interfered with by the others. Not only that, but following from the principle of reciprocity, each state has an interest in ensuring that the others' rights are respected. (So B, C and D all have an interest in ensuring that A's rights are not interfered with by anyone regardless of whether the entity doing the interfering is a part of the group or not.) In this instance each state has the same interest in ensuring that the rights of others are not interfered with, or, to put it another way, each shares a common interest with the others. This could be called "a community interest" - an interest shared by the whole community. All, the threatened state and the other states, have an interest in ensuring that the threatened state's rights are not interfered with.

In practice as soon as one state interferes with the rights of another the community

³¹ At pages 5-6 above.

interest comes into play, allowing the community or a part of it³² to take action to stop the interference. If the interference is stopped then the individual right and the community interest are both protected. Roseann Eshbach, in discussing environmental harm, put it this way: "if a country's industrialisation efforts do harm the environment shared by citizens elsewhere, then the world community has the right to demand behavioral modification, and the 'polluting' state has the duty to abide by the world community's demands."³³ That is the world community has an interest in preventing harm to the territory and citizens of each of its members.

This also leads to another idea: that the community has an interest in the use and protection of each individual state's resources, in that if the use of the resource interferes with another's rights the use may be proscribed or limited as the community directs and if a state interferes with another's resources that interference can also be stopped by the community. In a sense then the resources have become community resources, they can only be used in accordance with the community rules concerning harm to others and are subject to community control where their use breaks those rules. Although an interest does not necessarily lead to a right of ownership the fact that the community can step in to prevent interference with resources, or to prohibit certain uses of resources means it exerts some authority and control over them. Indeed that control is final - the rules prohibiting harm to others have precedence over all other rules and are the ultimate guide as to the uses that may be made of resources. The community is, in effect, the owner of the resources, having the final say in all matters relating to their use if it so desires and the states have thus become more like managers, seeing

³² A part can be as small as an individual state.

³³ A Global Approach, *supra* note 8 at 279.

to the day to day use of the resources rather than owners with complete, unfettered control over the resources in question.

One point that should perhaps be considered at this stage is the nature and composition of the community being proposed. One would suggest that the community include all states and that there be no exceptions. It might be argued that situations may arise which would not be of interest to all states and that, therefore, the community should be tailored to fit the circumstances, but that would mean that it would be unclear who had an interest in each case and could mean that in certain cases the community interest could be ignored. The benefit of applying internationalisation would then be very limited. It would, therefore, be better that the community be as large as possible so that anyone may act when they feel it necessary without their right to do so being challengeable. There is, however, a problem in that the members of the community must feel that they are indeed a part of the community. Thus the community can not be any larger than the some of those who feel that they share common interests. As shall be demonstrated in the chapters below, this is not a great problem as states have already shown that they consider themselves part of one large global community in such instruments as the Stockholm Declaration.

The concept of a community interest is not entirely novel: the Romans regarded some resources as belonging to the world (the world being the community) with a duty upon the state in whose territory they lay to protect them;³⁴ Ludwick Teclaff suggested in 1973 that "[i]t may

³⁴"The particular people or nation in whose territory public things lie may permit all the world to make use of them, but exercise a special jurisdiction to prevent anyone injuring them. In this light even the shore of the sea it was said,...is not the property of the particular people whose territory is adjacent to the shore, but it belongs to them to see that none of the uses of the shore are lost by the act of individuals." T.C.Sanders, "The Institutes of Justinian Translation and Commentary" 4th ed. (London and New York: Longmans, Green & Co.) 1869.

Such things were called *res communes*.

be that [the] awareness of world heritage in respect of certain resources is a precursor of the emergence of a new concept of international trust over all resources which would replace national ownership or sovereignty"³⁵ and Ved Nanda and William Ris Jr. suggested that the "public trust" doctrine,³⁶ which already exists in many states and has become almost a cause célèbre in the United States of America, could be expanded into the international arena.

To a certain extent, the public trust concept already exists in the idea of "the common heritage of mankind".³⁷ The difficulty is that both the public trust and common heritage of mankind concepts apply only to certain resources such as the sea, which are not generally viewed as the property of individual states. Some have argued that there has already been at least one attempt to expand the application of the common heritage of mankind doctrine to national resources in the shape of the proposed convention on international forestry law at the United Nations Convention on Environment and Development,³⁸ but the convention was not adopted and the declaration of principles which replaced it did not contain any references to the common heritage of mankind concept.³⁹ The ability of the two concepts to protect the environment is also somewhat limited as they only affect resources regarded as falling out with

³⁵ L.A. Teclaff, "The Impact of Environmental Concern on the Development of International Law" (1973) 14 *Natural Resources Journal* 357 [hereafter "The Impact of Environmental Concern"] at 385. Unfortunately Teclaff did not expand upon his one sentence suggestion further than to say it was akin to stewardship.

³⁶ V.P. Nanda, and W.K. Ris, "The Public Trust Doctrine: A Viable Approach to International Environmental Protection" (1976) 5 *Ecology Law Quarterly* 291. This doctrine is in fact a successor of the Roman law concept of *res communes*.

³⁷ Discussed more fully in Chapter 4 below.

³⁸ United Nations Conference on Environment and Development, Rio de Janeiro, 1992, reports in United Nations Conference on Environment and Development U.N. Doc. A/CONF.151/26/Rev.1 (Vol I-III). On the proposed forestry convention embodying the "common heritage of mankind" concept see The South and the Earth Summit, *supra*, note 11 at 132-133.

³⁹ On the reasons for these changes see The South and the Earth Summit *supra* note 11.

the jurisdiction of individual states. Thus, they have no effect on how states deal with the resources within their territory. According to the generally accepted principles of international law states are free to consume their resources entirely and to use them in a manner detrimental to the environment if they so wish unless expressly prohibited by a convention or a rule of customary international law.⁴⁰ This means that unless there is an express rule providing for the protection of the environment or resources they are left completely unprotected. Moreover, the concept of the common heritage of mankind is not aimed so much at the preservation of the environment as at the equitable division of the profits of development and use of the resources.⁴¹

This is not to say that it would be impossible to expand the public trust and/or common heritage of mankind concepts to cover all resources, but such an expansion would have the effect of transposing them from their firm foundation in Roman law onto the semi-inflated raft of a floating concept detached from its moorings, uncertain of its precise location and direction, the dimensions of the medium on which it is floating or, even of its own dimensions. It would effectively create a new concept akin to internationalisation, but the concept would be less precise as it would have grown from an existing concept. This could lead to some debate on the limits and efficacy of the expansion.

Practical Effects of Internationalisation

Internationalisation itself is the idea that all resources, no matter where in the world, belong to everyone. This does not mean that each and every use made of them must be

⁴⁰ For example, the rule in the Corfu Channel Case, prohibiting interfering with the interests of others.

⁴¹ See Part XI of the United Nations Convention on the Law of the Sea 1982 U.N. Doc.A/CONF.62/122 October 7,1982, reprinted as amended by U.N. Docs. A/CONF.62/122/Corr.3 November 3, 1982 and A/CONF.62/122/Corr.8 November 26,1982, (1982) 21 I.L.M. 1261 [hereafter "UNCLOS"] on exploitation of the area.

approved by the whole world rather, that each and every abuse of them is actionable by the whole world.⁴² It could also result in uses being subject to certain preset, written rules much as mining of the deep sea bed is today.⁴³ In effect it gives standing to all who wish to challenge (potentially) harmful uses of the environment wherever they occur.

The main objection to internationalisation must be that it limits state sovereignty, something states are always reluctant to relinquish. As has been said

Sovereignty has historically included freedom of action with regard to the natural resources found within a nation's boundaries. This control over resources is considered to be a basic constituent of the right to self-determination. It is also an especially sensitive issue to developing countries, particularly those formerly under colonial rule. Because biological diversity is dependent upon natural resources that are largely concentrated in developing countries, the issue of sovereignty figures prominently in the ongoing intergovernmental negotiations regarding conservation.⁴⁴

This argument does not, however, hold water: the development of international law generally has already led to greater and greater limitations on state sovereignty with states having relinquished sovereignty in respect of some resources,⁴⁵ although often this is only done to allow a greater use of the resource.⁴⁶ Moreover, the idea I am proposing is not so much the limitation of state sovereignty as a change to it - individual sovereignty will be restricted in

⁴² This is also the practical effect of the doctrine of the common heritage of mankind.

⁴³ See UNCLOS Articles 136 - 191. It is possible that an international authority might be established to regulate uses but, its workload would be so enormous and unwieldy that to successfully establish and run it would be extremely unlikely.

⁴⁴ Bragdon, *supra* note 23 at 382.

⁴⁵ See for example the Convention on International Trade in Endangered Species of Fauna and Flora 1973 993 U.N.T.S. 243; U.K.T.S. (1976) 101

⁴⁶ See the treaties discussed in Chapter 3 on the use of international rivers. All were negotiated to allow the use and development of the resources of the rivers and all involve voluntary limitations on sovereignty.

certain areas and the gaps left by that restriction will be filled by joint or shared sovereignty.

Another perceived problem with the concept of internationalisation was outlined by Ludwick Teclaff. It is that, like other general principles, it lacks "sufficient precision to permit [its] application with any degree of confidence in concrete cases; and [becomes] superfluous in any area such as modern fluvial law in which more or less concrete rules are developed."⁴⁷ But, as Teclaff goes on to say, "from the beginning of the nineteenth century, neighbourliness did force states to conclude treaties which, as a rule, limited their free use of transboundary waters in the frontier zone." So too in the last twenty years they have entered into agreements⁴⁸ in the general area of international environmental law embodying and giving substance to general principles. There has been no problem with the principles being too imprecise to be applied, nor have they appeared superfluous.

There are, of course, some possible alternatives to internationalisation such as giving⁴⁹ the environment the right to protect itself.⁵⁰ The basis of this idea is that as natural objects are reliant on the actions of humans to protect them they are vulnerable to the whims of mankind and so are often damaged or destroyed by development. By granting them rights this problem is resolved as they can protect themselves by way of court or other actions.⁵¹ The trouble is

⁴⁷ "The Impact of Environmental Concern" *supra* note 35 at 357.

⁴⁸ Such as UNCLOS and the Vienna Convention on Protection of the Ozone Layer, 1985 C.T.S. 1988 No.23; U.K.T.S. (1990) Cmd. 910.

⁴⁹ The word "giving" is used somewhat loosely here as the proponents of this idea would undoubtedly argue that the objects possess the rights naturally those rights simply are not recognized just now.

⁵⁰ See C.D. Stone, "Should Trees Have Standing? - Towards Legal Rights For Natural Objects" (1972) 45 *Univ. S. Cal. Rev.* 450; "Should Trees Have Standing Revisited: A Pluralist Approach" (1985) 59 *University of Southern California Law Review* 2; *Earth And Other Ethics* (New York: Harper and Row) 1987; S. Lehmann, "Do Wildernesses Have Rights?" (1981) 3 *Environmental Ethics* 129; and G. Varner, "Do Species Have Standing?" (1987) 9 *Environmental Ethics* 57 for a fuller discussion of the concepts discussed here.

⁵¹ Naturally, some sort of guardian would have to be appointed to raise actions on their behalf.

that in attempting to implement this one ends up involved in an interminable, cyclical debate on the nature of the rights to be assigned, the objects to which they are to be assigned and, to a lesser extent, who should have the right to act as guardian. The debate is caused in part by unwillingness on the part of many people to have the rights of objects prevent development and in part by a lack of certainty about what is necessary to protect the environment. If rights were assigned to each and every object it would almost undoubtedly create a backlash against the concept, as irremediable conflicts between humans and natural objects would be certain to arise.⁵² On the other hand, if insufficient rights are granted, or if the definition of the objects to which they are to be assigned is lacking in some respect, then the environment will not be properly protected.

Internationalisation would be quite simple by comparison, it would apply to all resources and the effects would be that they would belong to everyone and no one. It is very much akin to the notion of "common heritage of mankind" allowing use of resources where necessary and not contrary to the interests of others. As the resources belong to all, when a conflict arises the various interests can be balanced against each other to ensure the greatest good to all. Thus, development would not necessarily be halted simply because someone would suffer some harm or because some harm would be done to the environment, but only if the harm outweighed the benefit. This would be decided in the first instance by those concerned by the development. If they could not come to an agreement it would presumably go to arbitration or court as happens now when there are disputes. One might then ask what rules would be applied in deciding which use was the most beneficial, the answer would be rules akin to those contained in Article

⁵² For example, where it was felt necessary to construct a road to enable development to take place but, to build it would involve felling trees or crushing rocks, the road would have to be stopped as it would conflict with the rights of those objects so preventing further development.

V of the Helsinki Rules.⁵³ It could be argued that this would lead to a further problem in that the rules would need to be laid out in a document before they could be applied, but that is not necessarily the case, as a court is bound to take account of all relevant circumstances in any case before it. The relevant parties too are unlikely to negotiate on the use without taking account of all relevant circumstances and the relevant circumstances are likely to be akin to those outlined in Article V.

Alternatively, one could regard resources as ownerless, but to do so would be to ignore reality. If one said that they were ownerless then either they would be unusable as being unpossessable, or users would have to be given some rights, presumably as owners, as soon as they took possession. This would lead to at least two further problems: no one other than the users would have a legal interest in the resources so the grounds for imposing limits on uses could not be extended beyond the present rules prohibiting appreciable and direct harm to

⁵³ Helsinki Rules on the Uses of the Waters of International Rivers as approved by the International Law Association at its Fifty-second Conference at Helsinki 1966. [Hereinafter Helsinki Rules] Article V provides that the factors to be taken into account are:

- (a) The geography of the basin, including in particular the extent of the drainage area in the territory of each basin State;
- (b) the hydrology of the basin, including in particular the contribution of water by each basin State;
- (c) the climate affecting the basin;
- (d) the past utilisation of the waters of the basin, including in particular existing utilisation;
- (e) the economic and social needs of each basin State;
- (f) the population dependent on the waters of the basin in each basin State;
- (g) the comparative costs of alternative means of satisfying the economic and social needs of each basin State;
- (h) the availability of other resources;
- (i) the avoidance of unnecessary waste in the utilisation of waters of the basin;
- (j) the practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among uses; and
- (k) the degree to which the needs of a basin State may be satisfied, without causing substantial injury to a co-basin State.

others, nor could limits be placed on the rights of individuals or states to appropriate and use resources as no one would have the requisite interest and authority to do so. Thus the law would regress to a position similar to the one it was at before the development of the original notion of sovereignty. Ultimately the idea could destroy the international legal system and the environment in a fight between states to grab the most land.

One last alternative is that the environment could be protected by simply drafting more rules governing the use of natural resources. The difficulty with this is that "States have priorities different from one another that lead them to perceive the issues of the endangered planet in very diverse ways. As a consequence, it is virtually impossible to obtain agreement even on an agenda of concerns."⁵⁴ This would, of course, also apply to obtaining agreement to the notion of internationalisation, the difference is that internationalisation is just one issue which does not require any agreement on technical matters⁵⁵ where as the rules required to govern the use of natural resources would be many and varied, demanding prioritising and technical precision and practice has shown that these can cause interminable delays.

The practical application of the concept of internationalisation could, of course be limited by the unwillingness of States to raise actions in relation to things which do not directly affect them, but this problem is faced by all the alternatives and so is not a reason for rejecting any of them. Further, the theoretical possibilities raised by the concept are almost limitless and would be an infinite improvement on the present system under which uses are only examined

⁵⁴ R. Falk, "The Endangered Planet" 40, 1971, quoted in D. Tarlock, "Land use Choice: National Prerogative Versus International Policy" in L.A. Teclaff, and A. Utton, eds., *International Environmental Law* (New York: Praeger Publishers) 1972 215.

⁵⁵ Such agreement is often extremely difficult to obtain, see the debates over what if anything needs to be done to counteract the problems of global warming discussed in Chapter 5 below.

on, at best, a regional scale. That fact, combined with the fact that the accepted rule is that a State can do what it likes with its own resources means that just now the self interest of particular States, or regions, can override the interests of the world as a whole. If, on the other hand, all resources are viewed as international in nature then the benefits of all of them must be shared equally on a global basis. Thus, if a State needs say copper and has a deposit in its own territory, which it wishes to develop, but the development of which might damage either its or another state's environment, then, in deciding whether the project should be allowed to proceed one ought to look at say the feasibility of allowing that State the use of another copper deposit elsewhere⁵⁶, or access to cheaper copper than is generally available on the market. This would allow sensitive areas of the environment to be protected,⁵⁷ but it is only possible where resources are regarded as the common property of all.

Conclusion

As noted above⁵⁸ the accepted view of the law right now is that states can do what they want with their own resources limited only by such obligations as have been placed on them by international law or as they have agreed to. In practice they have entered into agreements to facilitate joint use of, or benefit from a resource only where necessary to facilitate their desired uses, or to avoid claims of harm under international law. Thus, as will be seen in Chapter 3 (which discusses various river regimes) it seems that states have been willing to treat resources

⁵⁶ This could ultimately lead to the abolition of State boundaries.

⁵⁷ On the concept of global resources, Sanyo unveiled a plan in the last year for the provision of solar electricity on a global basis. It envisages giant solar panels, situated at various places around the world and connected to each other. When it is dark in one country electricity would be transported to it from another, via cable.

⁵⁸ See p.11 above.

as shared and to limit their sovereignty only to the extent necessary for them to get the best use possible and only where the resources in question straddle borders. They have not shared resources or limited their sovereignty where they can obtain the best use without having to do so,⁵⁹ nor where the resources fall exclusively within their borders. In practice this means that they develop resources in such a manner and allow developments to take place in such a manner as to cause harm to the environment (for example, allowing clear cut logging which leads to the loss of topsoil, flooding and eventual desertification in some areas)⁶⁰ over use of resources, stripping of resources⁶¹ and harm to the interests of others, whether by damaging the environment or by making it difficult for them to compete in the market place because goods are underpriced to such an extent that they are uneconomic to produce.⁶² This leads to the suggestion that we need a change to the whole system and a fundamental change in the underlying concepts of the system. The accepted rule for states right now seems to be "what is mine is mine unless some rule insists I share a little with someone else" whereas it should be "what is mine is thine."⁶³ The World Commission on Environment and Development put it this way: "All would be better off if each person took into account the effects of his or her acts upon others. But each is unwilling to assume that others will behave in this socially

⁵⁹ See, for example, the Nile river regime, discussed in Chapter 3 below.

⁶⁰ See M.B.Saunders "Valuation and International Regulation of Forest Ecosystems: Prospects For a Global Forest Agreement" (1991) 66 Washington Law Review 871 [hereafter "Valuation and International Regulation"] and Our Common Future, *supra*, note 12, particularly at 7 and 127-'8.

⁶¹ Valuation and International Regulation, *ibid* at 872 -4 and the South and the Earth Summit, *supra*, note 11 at 89 and 91-'6.

⁶² See the example of Indonesia's attempts to gain control of a large portion of the plywood market discussed above at p.9.

⁶³ Our Common Future, *supra*, note 12.

desirable fashion, and hence all continue to pursue narrow self interest."⁶⁴

In fact, as I shall demonstrate in the following chapters, states are moving towards the idea of shared or international resources, all be it very slowly and in a rather piece meal fashion. The problem is that the move is too slow, the application too uneven and the end too uncertain. The course of the development could change if it does not have a structured path to follow, and if we do not recognize the changes that are taking place now for what they are. The aim of this paper is to help in the laying down of the path and to record some of the changes that are taking place.

⁶⁴ *Ibid*, at 47.

Chapter 2 The Case Law

Introduction

In this Chapter I shall look at some of the conflicts which have arisen over the use of resources and at the Corfu Channel Case,¹ as it too is relevant to the discussion. The object is to examine the extent to which courts or tribunals have been willing to limit one state's sovereignty to protect another's interests, the effect of this on state sovereignty over natural resources and the extent to which the participating courts or tribunals have recognised or enforced a transfer of resources from individual sovereignty to "shared" or "international" sovereignty.

Although I noted in Chapter 1 that I would be following the development of the law through the last century, I shall not examine the cases in chronological order, but instead shall try to build a coherent picture of the law by drawing the salient points from each in what appears to be the most logical order. In some instances this will mean going back and forth between the cases.

I should perhaps note that some of the cases involve states within federal jurisdictions. On one level I do not perceive any problem with this as it is generally accepted in international law that

it is reasonable to follow by analogy, in international cases, precedents established ... in dealing with controversies concerning the quasi-sovereign rights of such States, where no contrary rule prevails in international law and no reason for rejecting such precedents can be adduced from the limitations of

¹ *The Corfu Channel Case (United Kingdom v. Albania)* [1949] ICJ Rep 4 [hereinafter "the Corfu Channel Case"]

sovereignty inherent in the Constitution of [those States]²

On another level they do present a problem in that federalism implies shared interests including in resources. Decisions are, therefore, more likely to reflect that and to be made on the basis that resources are shared. In *Georgia v. Tennessee Copper Co.*,³ however, the supreme court held that each state had the right to protect its resources from interference by others, suggesting that resources in a federation are owned individually by the states. Nevertheless, my use of such cases shall be rather cautious.

First Developments

As noted in the last chapter⁴ it was originally thought that sovereignty gave states the absolute right to do anything. This was later limited to anything within their territory. The rule was expressed as follows in the *Islands of Palmas Arbitration* 1928:⁵ "[s]overeignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State."

This chapter begins with the further development of the concept of sovereignty - that being to the stage where sovereignty is the right to do anything within one's territory so long

² *Trail Smelter Arbitration (United States v. Canada)* (1938, 1941) RIAA iii 1905 [hereinafter "the Trail Smelter Arbitration"] at 1964.

³ *Georgia v. Tennessee Copper Co.* 206 U.S. (1906) 1038 [hereinafter "Georgia v. Tennessee Copper Co.".]

⁴ See above, Chapter 1 page 11.

⁵ Huber J. in *Islands of Palmas (Netherlands v. United States)* 2RIAA [herinafter "Islands of Palmas Arbitration"] at 838.

as it does not cause appreciable harm to others. This change was noted by Alvarez J. in his separate opinion in the Corfu Channel Case: "formerly the *misuse of a right* had no place in international law. Anyone could exercise his rights to their fullest extent, even if the effect was prejudicial to others; in such cases there was no duty to make reparation. That is no longer the case.⁶ The misuse of sovereign rights could now lead to liability under international law unlike previously when states could use and misuse their rights with impunity. Alvarez also noted that

We can no longer regard sovereignty as an absolute and individual right of every State, as used to be done under the old law founded on the individualist régime, according to which States were only bound by the rules which they had accepted. To-day, owing to social interdependence and to the predominance of the general interest, the States are bound by many rules which have not been ordered by their will.⁷

This is a natural corollary to the above statement that states can no longer use and misuse their rights with impunity. If they could pick and choose the rules they accepted they could use and misuse their rights as they wished. It also represents a change in the nature of sovereignty: formerly states could choose exactly which rules they wished to accept so exercising their sovereignty freely and completely; now they no longer have that freedom and their sovereignty is limited accordingly. The question then is what has happened to their sovereignty - is there a hole in it where no one any authority or power to act in certain circumstances? The answer is clearly no: the community which imposes the rules on the states now holds and exercises the section of sovereignty removed from the individual states.

Alvarez not only discussed this development in the law, he discussed the more general

⁶ The Corfu Channel Case, *supra*, note 1 at 47.

⁷ *Ibid*, at 43.

development of which it was part, characterising the resulting "new international law" as being "founded on *social interdependence*".⁸ It was, he said "the realization of social justice. It is entirely different from the old law, which was strictly juridical; it approaches nearer to the notion of equity".⁹ This assessment of the development is in keeping with one of the themes of this paper - that the law in moving towards community interests, towards a more equitable sharing of resources and so towards "the realization of social justice." The Corfu Channel Case comes in near the beginning of this stage of the development of the law.

The Corfu Channel Case

The two main issues in the Corfu Channel Case were:

1. Albania's liability in respect of damage caused to British warships by mines laid in an international strait which passes through Albanian territorial waters; and
2. freedom of navigation in international straits both generally and with specific regard to warships.

For present purposes, only the former issue is relevant. The rule as stated in relation to it was that every state is under an "obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."¹⁰ Thus, it is no longer in a position to do absolutely anything it pleases within its territory, but must consider the effects on others and may not carry out or permit any activity which will impinge on the rights of others. This could be

⁸ *Ibid*, at 40.

⁹ *Ibid*.

¹⁰ *Ibid*, at 22.

interpreted as prohibiting knowingly causing or allowing harm to others to occur, but such an interpretation is a little extreme in that not all harm will be "contrary to the rights of other states." For example, a state could follow economic policies which harm another's ability to compete in the market place, but as there is no generally recognised right of "non competitive access" to the market, such activity would not be contrary to the affected state's rights. What the rule actually means is that activities which interfere with the rights of others, for example, the right to political independence, are prohibited. What it means for the purposes of this paper is that no state may knowingly allow or cause harm to the environment of others - all states having a right not to have their environment interfered with by others.¹¹ (Their environment being part of their territory which may not be interfered with by others.)

An important aspect of this obligation is the question of knowledge: a state may not knowingly use or allow its territory to be used for acts contrary to the rights of others. One might wonder if knowledge could be imputed simply because a state exercises control over territory. Judge Alvarez tackled this question in his separate opinion and decided that it could because "every State is considered as having known, or as having a *duty* to have known, of prejudicial acts committed in parts of its territory where local authorities are installed; that is not a presumption, nor is it a hypothesis, it is the consequence of its sovereignty"¹² He said that liability arises from the following facts:

(1) Every State is bound to preserve in its territory such order as is indispensable for the accomplishment of its international obligations: for otherwise its responsibility will be involved.

¹¹ See note 23 Chapter 1 and accompanying text.

¹² The Corfu Channel Case, *supra*, note 1 at 44.

(2) Every State is bound to exercise proper vigilance in its territory. This vigilance does not extend to uninhabited areas; and it is not of the same nature in the terrestrial part of the territory as in the maritime, aerial or other parts.¹³

Judge Krylov in his dissenting opinion added another dimension to this. He began by saying "[o]ne cannot condemn a State on the basis of probabilities. To establish international responsibility, one must have clear and indisputable facts."¹⁴ That is, one can not assume knowledge from the mere fact of territorial sovereignty. Krylov based his opinion on the notion of *culpa*, arguing that one can not hold a state liable merely because an act took place in its territory; rather it has to be proved "that the state acted 'wilfully and maliciously' or in cases of acts of omission (such as failing to prevent an act of terrorism) 'with culpable negligence'".¹⁵ (Footnotes omitted.) A state's actions or inactions, however, could, in certain circumstances where actual knowledge can not be proved, be sufficient to imply knowledge of the harmful event thus implying culpable negligence in failing to stop it. Thus, knowledge may be deemed, but one can not deem knowledge from the mere fact of territorial sovereignty. Something more is required, that something being circumstances sufficient to prove, or lead to the conclusion of *culpa* or culpable negligence.¹⁶ In the main opinion of the court the rule was expressed thus,

it can not be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have

¹³ *Ibid.*

¹⁴ *Ibid.*, at 72.

¹⁵ *Ibid.*

¹⁶ c.f. D.J. Harris, *Cases and Materials on International Law* 3rd ed., (London: Sweet and Maxwell) 1983 Chapter 8 where he put forward the argument that authority can be found either for or against requiring *culpa* for liability to arise.

known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors.

...
 On the other hand, exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of the breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence."¹⁷

That is, if direct proof of knowledge can not be established because the only means of establishing it lie within the exclusive control of the accused state, but knowledge can be implied from the circumstances, then liability will result.

In the Corfu Channel Case knowledge was deemed from the following omissions and commissions: the fact that the Albanian government had coast guard watches stationed near the sight of the minefield and kept a close watch over the area; the fact that the minefield was in an international strait which lay within Albanian waters and over which Albania ought to have exercised some control; the fact that it failed to institute a proper investigation into the laying of the minefield and to notify others of its existence and position; the fact that it did not protest the laying of the minefield even though it protested the presence of the British ships in the area.¹⁸ If no such circumstances exist and knowledge can neither be established in fact nor deemed from the facts available, no liability will arise no matter the harm that may have befallen the victim.

Thus the rule as stated in Corfu Channel is that states are not strictly liable for all

¹⁷ Corfu Channel Case, *supra*, note 1 at 18.

¹⁸ *Ibid*, at 18 to 22.

wrongs resulting from activities within their territories, but they are liable for those they authorised, participated in, had, or should have had knowledge of and could have prevented or at least warned the victim state of to allow the victim to protect itself as best it could.

Development of the Basic Rule

The effects of this rule ought to be compared to the effects of other guiding principles under international law, for example, the rules on the use of international rivers, in particular equitable utilisation, under which states balance the relevant costs and benefits of any given project in deciding whether or not it should be allowed to proceed. This means that a project may be allowed to proceed even though it would cause harm to another state. The question of compensation may have to be considered if it does proceed, but the project would not have to be abandoned. The Corfu Channel Case principle does not allow for any balancing of interest, so if a project would cause any harm to another state it could not proceed because if it did the permitting state would be liable under international law (as the harm is preventable it must be prevented, it would not be sufficient simply to warn other states of the danger.) But if that rule is combined with the following statement from the Lac Lanoux Arbitration¹⁹ a slightly different conclusion is reached:

It is for each State to evaluate in a reasonable manner and in good faith the situations and the rules which will involve it in controversies; its evaluation may be in contradiction with that of another State; in that case, should a dispute arise the Parties normally seek to resolve it by negotiation or, alternatively, by submitting to the authority of a third party; but one of them is never obliged to suspend the exercise of its jurisdiction because of the dispute except when it

¹⁹ Lac Lanoux Arbitration (France v. Spain) (1957) 24 Int.L.R. 101 [hereinafter "the Lac Lanoux Arbitration"] at 132.

assumes an obligation to do so; by exercising its jurisdiction it takes the risk of seeing its international responsibility called into question, if it is established that it did not act within the limits of its rights.

It would appear from this that the rule is: if a state by its actions or inactions causes harm to another, or to the interests of another, it will be liable to that other under international law, but it still has the right to decide whether or not it wishes to run the risk of having to deal with that liability. This is in a sense the precursor of the notions of equitable utilisation and sharing of resources in that it acknowledges the rights of both sides, one not to be harmed and the other to develop resources, acknowledges that these must be balanced, but leaves it to each individual state to undertake the balancing according to its own principles and priorities. Equitable utilisation and the notion of shared resources are more advanced in that they facilitate a more impartial balancing of the conflicting interests by providing guiding principles to direct the balancing.

In relation to resources the above rules mean that they remain the property of the states in whose territory they lie the only proviso being that if in their use a state harms another it is liable for damages. There is no question of sovereignty over the resources being limited, transferred, or converted to joint sovereignty.

It should be remembered that for their time these cases represented a development in the law in that "[f]ormerly the *misuse of a right* had no place in law. Anyone could exercise his rights to their fullest extent, even if the effect was prejudicial to others; in such cases there was no duty to make reparation."²⁰ Now, after Corfu Channel and Lac Lanoux, states' rights are limited by the obligation not to cause harm to others. The effect at this stage, nevertheless,

²⁰ Alvarez J., Corfu Channel Case, *supra*, note 1 at 47.

is that sovereignty is left intact: each state retains sole authority to decide whether or not to allow certain acts within its territory and in so doing runs the risk of liability under international law. Its discretion is not limited to the extent it would be under the equitable utilisation rule discussed below.²¹ For sovereignty to have been limited, discretion would have had to have been curtailed as it was, for example, by the decision in the Trail Smelter Arbitration.²²

Trail Smelter Developments

The Trail Smelter Arbitration concerned airborne pollution from a smelter in Canada which, it was agreed by the parties, caused damage in the U.S.A.. On the question of whether or not it should be allowed to continue doing so the tribunal concluded that it should not because "under the principles of international law ... no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."²³ That is, states do not have the option of deciding that they wish to run the risk of being sued for damages if they proceed with this type of harmful activity, they must stop immediately. The effect is that the complaining state's sovereignty is preserved while the sovereignty of the state carrying out, or permitting the harmful activity is limited. The tribunal's conclusion was derived from the fact that under

²¹ See Chapter 3 below.

²² The Trail Smelter Arbitration *supra* note 2.

²³ *Ibid*, at 1965.

international law "[a] State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction."²⁴ This is the same basic premise as was later restated in the Corfu Channel Case.

One must conclude that at least in the 1940s the rule was that a state may not knowingly cause appreciable harm to another. It is only when one adds the Lac Lanoux Arbitration into the equation that one arrives at the idea of running the risk of having to pay damages if one does proceed with a harmful activity. Thus the development of the law could be said to have followed this route: absolute sovereignty to absolute sovereignty within the state's territory, to sovereignty further restricted in that one must prevent harm to others. Still to come is the development under which the relative harms and benefits are weighed against each other and sovereignty becomes shared or joint.

The Notion of Community Interest

The duty to protect other states from injurious activities as stated in the Corfu Channel Case and the Trail Smelter Arbitration has another implication: it creates a kind of shared, or community right similar to that discussed above in Chapter 1²⁵ in that, following from the principle of reciprocity, each has an interest in ensuring no harm befalls others and has an interest in preventing wrongs by third parties. The importance of this lies in the fact that it means each state has gained some sort of an interest in the resources of others. There is a sense of common proprietorship, in that each has an interest in seeing that uses of the resources do

²⁴ *Ibid* at 1963 quoting Professor Eagleton.

²⁵ See above, Chapter 1 pages 13-17.

not harm others and that no harm befalls the "owner" of them. This is not yet at the stage of shared ownership but is close to the notion of equitable utilisation, in that the community will presumably try to protect the most beneficial or least harmful use.²⁶

Balancing Interests and Injurious Uses

Having established this much one might ask what constitutes an injurious act and whether the definition accords with the notions of shared resources and community interests. To answer the first question the tribunal in the Trail Smelter Arbitration looked to a case between the Swiss Cantons of Soleure and Argovia in which the Swiss Federal Court said that sovereignty "excludes ... not only the usurpation and exercise of sovereign rights [of another State] ... but also an actual encroachment which might prejudice the natural use of the territory and free movement of its inhabitants."²⁷ The same court, however, also noted that the demand "that all endangerment be absolutely abolished apparently goes too far".²⁸ In other words, the act must be an appreciable impingement of another's interests to be unlawfully injurious. This ties with the notion of a shared right discussed above, in that it would be rather inequitable and hardly indicative of sharing to allow an inappreciable harm to outweigh all benefits in deciding whether or not a project should proceed; rather some sort of balancing of interests would have to exist to ensure equitable sharing. That happens where benefits are allowed to outweigh minor harms but are overridden by appreciable harms.

²⁶ Here "use" could also mean "non use" in that where a resource can not be used because to use it would harm the interests of a state the protection of that state's interests is a use, so effectively "non use" is a use.

²⁷ The Trail Smelter Arbitration, *supra*, note 2 at 1963.

²⁸ *Ibid.*

The vague notions of shared rights and balancing of interests appeared again in the case of Wuerttemberg and Prussia v. Baden, or the *Donauversinkung Case*²⁹ where it was said that recent international law had restricted the territorial sovereignty of individual states "in consequence of their forming part of the family of nations."³⁰ This led to "the duty of reciprocal respect and consideration".³¹ That is each state must consider the consequences of their actions on others and each must exercise some restraint in raising objections to the activities of others - the *de minimus* rule applies. In applying the rule to the circumstances of the case this was said to translate into an obligation on those states "through whose territories there flows an international river" to give "due consideration ... to one another".³² In other words, they had to take account of others' interests when deciding which projects to implement on their section of the river. As the court said: "[t]he interests of the States in question must be weighed in an equitable manner against one another. One must consider not only the absolute injury caused to the neighbouring State, but also the relation of the advantage gained by one to the injury caused to the other."³³ This means that the resources in question are removed from the sole sovereignty of the state which until then had complete authority over them and discretion to decide what regime is to apply to them and what factors are to be considered in arriving at the regime is shared in the sense that other states have a say in what

²⁹ *Wuerttemberg and Prussia v. Baden (The Donauversinkung Case)* (1927-'8) 4 Annual Digest of Public International Law Cases 128. [Hereinafter "the Donauversinkung Case".]

³⁰ *Ibid* at 130.

³¹ *Ibid*.

³² *Ibid*, at 131.

³³ *Ibid*.

factors must be considered and in deciding the regime to be applied. More specifically, if those other states demand compensation under some schemes but not others the former are less likely to proceed. This means that individual sovereignty has been limited as individual discretion has been fettered in some areas. It does not mean that there is now a gaping hole in the notion of sovereignty, rather that individual sovereignty has been replaced by some form of "shared sovereignty". I say "some form" because, despite what one may think from what has been said above, it is not an absolute black and white change, it is more of a grey blurring of the concept, with individual sovereignty being maintained in some areas and metamorphosed to "joint" or "shared" in others.

The Trail Smelter Arbitration provides an excellent example of this in practice. The parties requested the tribunal to devise a regime for the smelter, which the tribunal duly did. In so doing it replaced Canada's right to exercise discretion in the regulation of the smelter with joint control and discretion exercised by Canada and the United States together. (It also imposed a heavy penalty on the smelting company in the form of the costs of implementing the new regime.)³⁴ This transfer of control could be said to equate to a transfer of the smelter from Canadian sovereignty to joint U.S. and Canadian sovereignty, as Canada no longer has the power to exercise complete discretion in relation to the smelter and must share the regulation of the smelter with the U.S., but the transfer is only partial in that Canada still maintains the benefits from the smelter and maintains the right or discretion to close the smelter down: sovereignty is only transferred to the extent that so long as the smelter is in operation the U.S. has some control over its running.

³⁴ On this see John E. Read, "The Trail Smelter Dispute" (1963) 1 Can. Y.B. Int'l.L. 213.

Even the transfer that took place is more limited than it might at first appear: Canada had already admitted that it was liable under international law for any damage emanating from the Trail Smelter and, by agreeing to request that the tribunal devise a regime for the smelter, it appears that Canada was asking the tribunal to carry out the weighing of costs and benefits required of it under international law to take account of the harm being done to American interests. This allowed the two states' sovereign rights with respect to the smelter to change. That change was only possible because Canada agreed with the United States that the request be put to the tribunal. Without such a request Canada would have retained sole control of the smelter, its discretion in respect of the smelter would have remained unaffected and so would its sovereignty. In this sense the case can not be said to establish a binding rule of international law, rather the decision was specific to the parties and the circumstances of the case.

The general rule then, would appear to be that while States have to take account of the interests of others in planning the use of their resources (which leads to a transfer of the resources to community proprietorship) they retain their sovereignty in that they still have the final say in whether they risk facing liability under international law for that use.

Further Effects of State Liability

Returning to the practical effects of the rule on state liability, the court in the *Donauversinkung* Case reiterated the point made in the *Corfu Channel Case*³⁵ that it did not simply impose a duty to prevent certain acts, but also, in some instances, to take action to

³⁵ *Supra*, notes 12 and 13 and accompanying text.

prevent a harm occurring.³⁶ This principle, however, was not intended to impose an obligation to act to prevent harm as a result of Acts of God, it only comes into play because "[r]ivers, including those which are non-navigable, are to-day no longer merely the product of natural forces."³⁷ But the court also noted that it was in the interests of those living near by that banks be strengthened and that flow be regulated and that this interest placed an obligation on the respective governments to take action in accordance with the normal practice of states.³⁸ This means that where harm as a result of an Act of God could be minimized or prevented the state concerned must take the necessary action to prevent or minimize the harm otherwise it could be held liable for the damage that occurs.

By providing that each state bears an obligation to take account of the interests of others the court not only suggests severe restrictions on freedom of action and hence sovereignty, but also suggests a sharing of interests and obligations: governments are now in some way responsible to/for the citizens of each other and have an interest in preventing harm to those citizens, which leads to and is tied to an interest in each others resources: a community interest

³⁶ "If a Government fails to undertake, or even prohibits, measure which it must be expected to undertake in accordance with generally recognised rules of law and economic policy - with the intention or with the result that the interests of persons outside its territory are thereby injuriously affected - then such an attitude cannot be regarded as being in accordance with the nature of a community of nations. This ceases to be a mere passive attitude, and becomes an unlawful furthering, through acts of omission, of certain natural events."

The *Donauversinkung Case*, *supra*, note 29 at 132.

³⁷ *Ibid.*

³⁸ "[I]t is in the interest of the inhabitants, both in the upper and lower parts of the rivers, that the banks be strengthened and that the flow of water be subject to regulation, not only on account of possible inundation, but as a matter of normal policy. Thus while a State is under a duty to abstain from altering the flow of the river to the detriment of its neighbours, it must not fail to do what civilized States nowadays do in regard to their rivers."

Ibid.

is forming. Compare this to the decision of the Supreme Court of the United States in *Georgia v. Tennessee Copper Co.*³⁹ where it was said that it was up to each individual state to decide what action should be taken to preserve the interests of their citizens.⁴⁰ These decisions appear to contradict each other, one saying there is some sort of mutual responsibility another that it is up to each individual state to protect the interests of its citizens in the manner it thinks most fitting. In fact, there is no contradiction, rather what we see is part of the metamorphosis from individual to shared sovereignty. It can be explained thus: the duty not to cause appreciable harm to other states results in a sharing of the obligation to prevent harm to the individual citizens of those states,⁴¹ but the right to pursue the interests of those individuals remains with the state of which they are citizens. That aspect of sovereignty has not been changed.

The *Georgia v. Tennessee Copper Co.* case restated the concept that one state may not cause appreciable harm to the territory or interests of another but restated it from a different angle by confirming that each state has the right to demand that its resources not be affected by the acts of another.⁴² It also noted that this right meant that the state was entitled to demand that any harmful activity stop and was not obliged to merely seek compensation for the wrong. "If the state has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be. It is not lightly to be required to give up quasi-sovereign rights for pay; and, apart from the difficulty of valuing such rights in money, if that be its choice it

³⁹ *Georgia v. Tennessee Copper Co.*, *supra*, note 3.

⁴⁰ "Whether Georgia, by insisting upon this claim, is doing more harm than good to her own citizens is for her to determine." *Ibid* at 238.

⁴¹ See the community interest discussed in Chapter 1 pages 13-18 above.

⁴² *Georgia v. Tennessee Copper Co.*, *supra*, note 3 at 238.

may insist that an infraction of them shall be stopped."⁴³ This is in express contradiction to the notion of balancing interests noted above, under which, if it was thought that the benefit to one state would far outweigh the harm to another, a disputed activity would be allowed to continue perhaps with some compensation being paid. According to *Georgia v. Tennessee* if the state to which the harm was being done so wished the harmful activity would have to stop. Indeed the court said the possible harm to those outside of the complaining state must be accepted by them as a consequence of that state demanding her rights.⁴⁴

This decision can only be explained by the fact that it dates from the turn of the century and was prior to the decisions demanding some sort of consideration and balancing of interests. It was made when it was still thought that states had sole authority over their resources and any infraction of that right constituted a wrong which had to be stopped. Such thinking is rather interesting in that it contradicts itself. On the one hand it says that no state may interfere with another's interests, but, on the other hand, it says that acts which interfere with the rights of others must be stopped; that is it interferes with those acts and the rights of the state in which they occur to protect the rights of others. This contradiction necessitated a development of the law and the development which resulted led to the rules on balancing of costs and benefits, rights and obligations presently being discussed.

⁴³ *Ibid* at 237.

⁴⁴ *Ibid* at 239.

The End Result

Finally, perhaps the most important case: the Lac Lanoux Arbitration. Its importance lies in the fact that it effectively imported the concept of equitable utilisation into international law before that term had even been coined, or the existence of the concept recognised.

The case concerned the diversion of certain waters by France for hydroelectric purposes. Normally those waters would flow into the river Carol, through Spain and into the Mediterranean; under the proposed diversion (as originally framed) they would flow into the Ariège and to the Atlantic instead. Spain alleged that the proposal would harm its interests and demanded to be consulted. France complied with the request and after consulting with Spain decided that it could proceed with revised plans under which waters would be substituted for those removed from the Carol before the river reached Spain. Spain then claimed that France had failed to reach a prior agreement with it contrary to the Treaties of Bayonne, particularly that of May 26 1866 and the Additional Act of the same date, and that consequently it should be prohibited from executing the proposed works. It was this claim that led to the arbitration.

In its memorial to the tribunal France acknowledged that amongst others the following principles "derived from the authorities" should "be borne in mind:" territorial sovereignty; the duty not to harm a neighbouring state; and the principle that where no other state's interests are affected there is no duty to seek agreement on the project.⁴⁵ In other words France was emphasising the rule that a resource, even one which is shared, is subject only to the sovereignty of the state in which it is situated, while, acknowledging that states, in exercising their rights with respect thereto are subject to the duty not to cause harm to others. I say

⁴⁵ Lac Lanoux Arbitration, *supra*, note 19 at 111 to 112.

"emphasising" because, of the order in which France laid out the principles: first of all it claimed territorial sovereignty, then it acknowledged the duty not to cause harm to others.

The principle of territorial sovereignty means that resources which straddle state borders are divided by those borders into individual segments rather than being owned jointly by the states concerned. This means that each state can dispose of those resources situated in their territory in any way they wish except to the extent that they must ensure that no harm is done to others. This ties with Article 8 of the Additional Act of 1866 which provides: "All standing and flowing waters, whether they are in the private or public domain, are subject to the sovereignty of the State in which they are located ...

Flowing waters change jurisdiction at the moment when they pass from one country to the other ..." This suggests that while France said its position was "derived from the authorities" it may actually have based its case on the specific rules of the agreement between France and Spain as found in the Treaties of Bayonne and the Additional Act. In fact it seems to have been a combination of the two: in its submissions to the tribunal France said that "[t]he sovereignty of each of the two States on its own territory remains untouched, subject only to the restrictions contained in international instruments between them." In other words the principle as stated in the authorities is unaffected by the agreement between the parties.

The rules which the parties agreed to, while in keeping with the accepted views of their day, now appear to be outdated and out of step with the conventions states are entering into, such as the Convention on Biodiversity and UNCLOS.⁴⁶ To understand the concepts behind the agreed rules one ought to consider them in the light of the argument laid out more fully in

⁴⁶ See Chapter 4 below.

Chapter 4⁴⁷ that the augmentation of the scope of the principle *sic utere tuo ut alienum non laedus* by the introduction of the concept of common heritage of mankind led to the introduction of more detailed and more onerous controls and regulations concerning the use of the resources of individual states, thus eroding individual sovereignty.⁴⁸ That argument and that extension are based on two principles, territorial sovereignty and the duty not to harm neighbouring states. The extension of the latter being due to the shift in emphasis as to which is the more important or dominant principle. France's position and the agreed rules in the Lac Lanoux Arbitration conform with the original dominant principle, which is as one would expect given the date of the arbitration and the fact that the shift in emphasis has taken place mainly over the last twenty years.

One of the interesting points of the case is that having stressed the predominance of the concept of territorial sovereignty, France then acknowledged the duty to inform one's neighbour of any proposed project and to reach agreement where possible. It argued, however, that this only applied when the interests of the neighbour would suffer serious prejudice; otherwise there was no duty to obtain consent.⁴⁹ In so doing, France acknowledged that its actions might impinge upon the rights of others and that where they did those others had a right to some say in the use of the resource, much as the public tends to have a say in planning

⁴⁷ See below pages 137-155.

⁴⁸ See in particular the effects of the United Nations Convention on the Law of the Sea 1982 U.N. Doc.A/CONF.62/122 October 7, 1982, reprinted as amended by U.N. Docs.A/CONF.62/122/COrr.3 November 3, 1982 and A/CONF.62/122/COrr.8 November 26, 1982 (1982) 21 I.L.M. 1261 [hereinafter "UNCLOS"]; the Vienna Convention for the Protection of the Ozone Layer, 22 March 1985, Can.T.S. 1988 No.23, U.K.T.S. 1 (1990) [hereinafter "the Vienna Convention"]; and the Montreal Protocol on Substances That Deplete the Ozone Layer, 16 September 1987, Can.T.S. 1989 No.42 [hereinafter "the Montreal Protocol".]

⁴⁹ Lac Lanoux Arbitration, *supra*, note 19 at 112.

matters which might affect them. This suggests that the resources at issue were subject to some sort of shared ownership, but only where the use had some effect on the rights of others. This clearly detracts from the notion of territorial sovereignty, but is consistent with the arguments put forward above⁵⁰ concerning the gradual internationalisation of resources in that it represents the very earliest stages of the development of internationalisation in which states recognised that the rights of others not to be interfered with meant that they had a right to be consulted on the development of resources where that development might affect them. This then leads to a right to be consulted and so to a form of sharing of control over the resources, the final result being shared sovereignty.

Against this the Spanish memorial argued that one should consider the general law pertaining to the rights of co-riparians and produced evidence that under some treaties and case law and according to the writings of more than 30 publicists prior agreement is the norm and may even be mandatory before a riparian can substantially change the waters of an international river.⁵¹ There was no reference to the change having to interfere with the rights of others before consultation would be mandatory. This suggests that the entire river system is subject to the joint sovereignty of the co-riparians and that, therefore, neither has complete or sole sovereignty over that part of the resource within their territory. This could be construed as internationalisation of the resource but the tribunal considered that it would not be, rather its effect would be to transfer sovereignty from one state to another. The transfer would take place where one state decides its interests will be affected by a given use and prevents that use by

⁵⁰ See Chapter 1, particularly pages 6, 7, 12 and 13.

⁵¹ *Lac Lanoux Arbitration*, *supra*, note 19 at 112.

demanding that prior agreement be reached and then failing to reach an agreement which does not fully comply with that state's needs. As the tribunal said, such a conclusion would amount to giving one state a right of veto over the projects of others.⁵² This would amount to completely transferring sovereignty over the resource from one state to another rather than from individual to shared sovereignty. Its effect, therefore, would be the opposite of that of internationalisation according to which the rights and obligations of each must be balanced to reach the net best result; here the interests of one state could outweigh the interests of all others. The difference between the position under this rule and under the principle of territorial sovereignty lies simply in which state's interests win out.

Further, as the tribunal noted, in its extreme form "the Spanish thesis would imply either the general paralysis of the exercise of State jurisdiction whenever there is a dispute, or the submission of all disputes of whatever nature, to the authority of a third party; international practice does not support either the one or the other of those consequences."⁵³ Were international law to do so it would mean that there would be no such thing as sovereignty as in all cases states could lose their right to exercise their "sovereignty" at the whim of another state. If this happened there would no longer be any form to international relations as there

⁵² *Ibid*, at 127 "To admit that jurisdiction in a certain field can no longer be exercised except on the condition of, or by way of, an agreement between two States, is to place an essential restriction on the sovereignty of a State"
and at 128

in order to appreciate in its essence the necessity for prior agreement, one must envisage the hypothesis in which the interested States can not reach agreement. In such case, it must be admitted that the State which is normally competent has lost its right to act alone as a result of the unconditional and arbitrary opposition of another State. This amounts to admitting a 'right of assent', a 'right of veto' which at the discretion of one State paralyses the execution of territorial jurisdiction by another.

⁵³ *Ibid* at 132.

would be no states capable of enforcing their rights or meeting their obligations each being subject to the control of others. It would, in fact, lead to the dissolution of international law.

In response to Spain's initial arguments that the proposed scheme breached Articles 11, 12, 15 and 16 of the Additional Act because it would destroy the community established by the Act,⁵⁴ France noted that the Treaties of Bayonne and the Additional Act confirmed their sovereign right to undertake works of public utility and did not make the ability of one state to undertake such works subject to the prior consent of the other. France argued that, as the scheme was one of public utility and would not harm Spanish interests or rights, it was not prohibited either under international law or under the treaties, nor was Spain's consent required for it to proceed.⁵⁵ In other words, even if international law generally had accommodated Spain's arguments the specific agreement did not.

Spain then countered that the sovereignty of the contracting parties over international rivers is not absolute, but qualified by agreement of the parties.⁵⁶ In this case such qualification is evinced by the rule of priority in recognizing existing uses⁵⁷ and the rule as to the distribution of excess waters⁵⁸ found in the Additional Act. Thus the parties have to limit their activities in line with the terms of the agreement. Spain also argued that the right of each party to exercise works of public utility was not unlimited but subject to the right of

⁵⁴ *Ibid*, at 112 to 114.

⁵⁵ *Ibid* at 114.

⁵⁶ Lac Lanoux Arbitration, *supra*, note 19 at 115.

⁵⁷ Article 9 of the Additional Act.

⁵⁸ Article 10 of the Additional Act.

common utility because a) the terms of the Additional Act made the community interest paramount and b) the community interest principle has precedence over the principle of public utility.⁵⁹ This assumes that the notion that one must take certain things into account (for example, priority of uses and set rules on the distribution of excess waters) means that the sovereignty of the parties with respect to their international rivers is not absolute but is always subject to the interests of the other party regardless of circumstances and so is limited in certain circumstances. Such an assumption is simply incorrect: to say that one must take account of certain matters in dealing with one's affairs does not imply that one no longer has control over those affairs. It would be rather like saying that an official who, in exercising his or her discretion, must take account of certain matters does not in fact exercise discretion. That is not so: the official still has the final authority to decide the issue all be it that he or she must take certain matters into account in arriving at the decision.

Spain also argued that Article 11, reinforced by Articles 15 and 17, of the Additional Act imposed a duty to obtain the prior consent of the other party to such works.⁶⁰ According to Spain it did this by imposing the duty to notify the other party of works which may affect its interests, giving it the opportunity of protecting its interests. This, Spain said, could only

⁵⁹ Lac Lanoux Arbitration, *supra*, note 19 at 115: "the right of each community to execute works of *public utility* cannot supersede the right of *common utility* which flows from those rules, because the concept of municipal law is subordinate to the latter principle of international law."

⁶⁰ *Ibid*: "... Article 11 of the Act ... creates the obligation of giving notice to 'the competent authorities' ... so that interests which might be involved should not be harmed. And that necessarily requires the reconciliation, by virtue of the agreement of the Parties, of opposing interests."

be done by prior agreement.⁶¹ As the tribunal pointed out, however, that is not necessarily so. The purpose of giving notice might be quite different. It could, for example, be to allow the other party to safeguard their nationals' rights to compensation.⁶² Moreover, had the parties "wished to establish the necessity for a prior agreement, they would not have confined themselves to mentioning in Article 11 only the obligation to give notice",⁶³ they could have specifically referred to an obligation to reach agreement. The tribunal concluded then that "the obligation to give notice does not include the obligation, which is more extensive, to obtain the agreement of the State that has been notified."⁶⁴

It was held, therefore, that the French government was neither in breach of international law, nor of the specific agreement. As none of the guaranteed users would suffer in their enjoyment of the river⁶⁵ (indeed they might benefit because of the new storage provisions) and as the scheme would not alter the course or content of the Carol on Spanish territory there could be no harm to Spanish interests.⁶⁶ The tribunal noted that the case might have been somewhat different had Spain argued that the waters of the Carol would be polluted so as to injure Spanish interests, but no such argument was made. Nor was it argued that the works could not insure that the water returned to the Carol would correspond to the natural flow from

⁶¹ "Article 11 of the Act ... creates the obligation of giving notice to 'the competent authorities' ... so that interests which might be involved should not be harmed. And that necessarily requires the reconciling, by virtue of agreement of the Parties, of opposing interests." *Ibid.*

⁶² *Ibid.*, at 132.

⁶³ *Ibid.*, at 131.

⁶⁴ *Ibid.*, at 132.

⁶⁵ *Ibid.*, at 129.

⁶⁶ *Ibid.*, at 123.

Lac Lanoux. As it was neither argued nor established that the works would present any greater risk of danger than might be found with other similar works elsewhere the tribunal could not find any grounds for preventing the project from proceeding.⁶⁷ Furthermore, as the works and the main effects of the works would take place and be felt in French territory "they would concern waters which Article 8 of the Additional Act submits to French territorial sovereignty ..."⁶⁸ As the tribunal said, "[t]erritorial sovereignty plays the part of a presumption. It must bend before all international obligations, whatever their origin, but only before such obligations." Here that would mean it would have to bend to comply with the obligations agreed to under the treaties. If the works would cause harm to Spanish interests those interests would have to be taken into consideration, otherwise France could proceed with the project as it wished. There being no other obligation either under international law generally or under the Treaties of Bayonne and the Additional Act to gain prior agreement to the schemes, France's claim was allowed to succeed.⁶⁹

One might conclude from the emphasis placed on the notion of territorial sovereignty and the fact that France was allowed to proceed without Spain's consent that this decision represents a retrogression in the law. Such a conclusion would be incorrect. In delivering its decision the court also acknowledged that conflicting interests in the use of international rivers

⁶⁷ *Ibid*, at 123 to 124.

⁶⁸ *Ibid*, at 120.

⁶⁹ *Ibid*, at 119 and 130: "But international practice does not so far permit more than the following conclusion: the rule that States may utilize the hydraulic power of international watercourses only on condition of a *prior* agreement between the interested States can not be established as a custom, even less as a general principle of law." And again, "Customary international law ... does not supply evidence of a kind to orient the interpretation of the Treaty and the Additional Act of 1866 in the direction of favouring the necessity for prior agreement; even less does it permit us to conclude that there exists a general principle of law or a custom to this effect."

must be resolved by agreement and that no state could decide what another's interests were. This means that relevant information must be passed on and genuine negotiations and consultations must be entered into. By following such proceedings states will naturally arrive at the most beneficial and equitable use. It may be that one party will have to forego its original plans, or that, as in the Lac Lanoux Arbitration, the consultations will show that there will be no harm to the other party's interests and so the project can proceed. The outcome will naturally depend on the circumstances, but no matter what it is the fact that the parties have had to consult should mean that their interests are considered, protected and in a sense merged because neither can automatically outweigh the other. Thus we have shared interests and, to a certain rather limited extent, shared sovereignty.

Conclusion

It appears then that the cases have followed a winding path of development. Sometimes they have appeared to regress, but at all times the law has been slowly moving from the rule of absolute territorial sovereignty to shared sovereignty with respect to resources. The earliest cases represent the former rule, under which each could do as it wished with its own territory. This then developed into absolute territorial sovereignty subject to the rule that one must not knowingly cause or allow harm to occur to others as a result of activities within one's territory. If one does allow such harm one becomes liable for damages. The classic example of this stage is, of course, the Corfu Channel Case. This led to the development of a primitive form of community interest - the interest of the community in ensuring that no harm befalls any of its members - and to a primitive balancing of interests. The final embodiment of this stage of the

development is found in the Lac Lanoux Arbitration, which demanded that prior negotiations be carried out where projects are potentially damaging and that agreement be reached where necessary to protect the interests of others. It thus ensured that competing interests would be weighed against each other with the result that the most equitable use should prevail.

The law as found in the cases did not go so far as to completely transfer resources from sole to joint ownership except in the specific case of the Trail Smelter Arbitration where Canada agreed to the transfer before the Arbitration began, effecting the transfer itself rather than allowing the tribunal to do it. Perhaps this failure to transfer resources from the one type of sovereignty to the other is caused by the unwillingness of the courts and tribunals to risk establishing generally applicable rules of this nature. It seems more likely that it is because these cases represent the early stages of the development of the law in the direction of shared sovereignty. It might also be because states appear to be more willing to give up more of their sovereign rights in the specific case than in the general,⁷⁰ which is due to the fact that in specific agreements the application of the principle is clear whereas in general agreements and case law the parties are not so sure of the limits of the application of the principles.

All of the above are possible explanations for the principles found in the case law being less advanced in terms of sharing sovereignty than those found in the treaties discussed below. Of them all I am inclined to follow the chronology argument: the cases represent the early stages of the development of international law. Closely tied to this is the explanation that states are less willing to give up their sovereign rights in general cases than in specific - it is only through time and gradual development of the notions of community interest and shared

⁷⁰ See Chapter 4 below.

sovereignty that states will come to know and accept their effects. As will be seen in Chapter 4, the further along the time scale we go the more willing states become to exchange individual sovereign rights for shared.

Chapter 3 International River Regimes

Introduction

Chapter 2 ended with a primitive community interest having evolved through the case law on the prohibition of causing harm to others. This chapter will follow another route to community interest: the development of community interest to facilitate resource development. States have entered into "community interest" arrangements to enable them to develop a resources that would otherwise be unusable in the sense that unilateral development might harm the interests of others leaving room for a damages suit under international law,¹ or may not be possible because the resources and markets for its "products" lie in different states.² To avoid liability, and following the rules on negotiations outlined in Chapter 2, states enter into agreements governing resource development with their neighbours. This point will be illustrated by looking at the rules and agreements surrounding the non-navigational use of international rivers. At the same time it will be shown that in the narrow confines of agreements on non-navigational use of rivers states have shown themselves willing to enter into community type arrangements and to limit individual sovereignty. The rules contained in two attempts at codification of the rules governing the drafting of agreements on the use of international rivers and the debates surrounding them will then be outlined. Finally, some examples of international river regimes as illustrative of the types of agreements states enter into will be given. It might be thought that this latter part could be dealt with within the discussion of the attempts at codification, but as will be seen, the two attempts at codification have produced two different

¹ See Chapter 2 above on liability under international law for harm to other states.

² See in particular the Columbia River Regime discussed below which was designed to use Canadian resources to satisfy U.S. for hydroelectricity.

dominant rules for guiding drafting. The section of the chapter dealing with actual agreements is intended to establish which is the dominant rule in practice. (The importance of doing this will be outlined below.)

Reasons for choosing the Non-navigational use of International Rivers for Discussion

I chose the non-navigational use of international rivers for discussion for several reasons. Firstly, this area shows the extent to which states are willing to limit their sovereignty when the scope of the limitation is clearly defined and not likely to expand to other areas of their sovereignty in the future. Water is also a very volatile matter given the number of conflicts that have arisen and continue to arise over its use. Linked to this is the fact that water is so important for life as we know it, so all pervasive and yet so scarce. The final reason is that, the non-navigational use of international rivers has been the subject of a couple of attempts at codification, which have resulted in some interesting debates on the nature of the dominant rule.

Starting Points

Before discussing the first point made above, the real subject of this chapter, I should perhaps expand upon the others. The second and third points are amply summarised and bound together in the following quotation:

Water, water, everywhere ... the ancient mariner of Samuel Coleridge's famous poem said, but he was wrong. No less than oil, the main resources of which are inconveniently located in one of the least stable regions of the globe, water is in some parts of the world a resource that is dangerously scarce, and mankind's need for the most basic of resources is leading to conflict.³

³ M. Elliot, "Water Wars" *Geographical Magazine* (May 1991) 28.

These conflicts⁴ are caused by differing demands being made on shared water resources by the various sovereign states. Each state has its own political agenda based on its own economic needs and cultural practices, the availability and accessibility of other resources and demographic needs and demands, and each state is unwilling to compromise on its demands.⁵ This forces state negotiators dealing with a proposed river regime to seek to maximise their state's position over the others in part to ensure that their demands are met and in part to ensure that the agreement is politically acceptable to their people.⁶ The result is tension "between the rational development of river systems and the immediate interests of sovereign

⁴ An extreme example of these is the conflict surrounding the Jordan river system which extends through Syria, Jordan, Israel and the Lebanon. Despite the fact that it is a fairly low volume river: its annual flow is around 2% of the Nile's and 7% of the Euphrates in Syria. (The Euphrates at Hit in Iraq has a flow of around 32,000 mcm, (see J. Kolars, "Hydrogeographic Background to the Utilisation of International Rivers in the Middle East" (1986) 80 *American Journal of International Law* 249 at 254) the Jordan, at its highest point, about 1,850 mcm (E. Anderson, "The Violence of Thirst" *Geographical Magazine* (May 1991) 31) by comparison, the Capilano's highest flow is about 1,700 mcm (B. Pratt-Johnston *Whitewater Trips for Kayakers, Canoeists and Rafters in British Columbia: Greater Vancouver through Whistler, Okanagan and Thomson River Regions* (Vancouver: Adventure Publishing (Betty Pratt-Johnston) Limited) 1986) the state of Jordan gets about 75% of its water from the Jordan river system, Israel about 60% of its. (Anderson at 31) Thus, any increase in the use of the waters of the system by one of the riparians could have a severe impact on the others and of course both Jordan and Israel have planned and actually increased their use.

In the 1950s Israel diverted waters from Lake Tiberius to its coastal strip and ultimately to the Negev Desert. In so doing, it diverted saline springs into the Jordan river rendering it almost completely useless to the state of Jordan. This led Jordan to plan to dam a tributary of the Jordan, the Yarmuk. These plans came to an abrupt halt when Israel invaded the Golan Heights (it now occupies the area where the dam was to be built and many experts blame the 6 Day War on the plan to build the dam (Elliot *ibid* at 29.))

Jordan and Syria now have another plan to build a dam, the Maqarin dam, further upstream on the Yarmuk, but the required international funding is not and will not be forthcoming until all the riparian states, including Israel, agree on the plan.

The importance to Jordan of reaching an agreement and building the dam stems from the fact that it is using 115-120% of its "safe yield" of water, but it is unlikely that Israel will give its consent as it too is using 115-120% of its "safe yield" and is unlikely to relinquish any of its water rights. The result is stalemate and the non use of a useful and badly needed resource.

⁵ D. LeMarquand, "Politics of International River Basin Management" in A.E. Utton, and L.A. Teclaff, eds., *Water In A Developing World The Management of A Critical Resource* (Boulder, Colorado: Westview Press, 1978) 147.

⁶ D.J. Chenevert Jr., "Application of the Draft Articles on the Non-Navigational Uses of International Watercourses to the Water Disputes Involving the Nile River and the Jordan River" (1992) 6 *Emery International Law Review* 495 at 500.

States"⁷ and the only way to overcome that tension is to sacrifice some state interests (and sovereignty) to the common good.⁸ By that I mean individual interests and demands are given up to ensure the greatest good to all. This amounts to the curtailment of individual sovereignty - states can not proceed with unilateral developments of their section of the river if those developments will affect others; instead they must obtain their neighbour's consent to the development. This fact will be demonstrated by looking at various randomly selected regimes⁹ and drawing out the principles upon which they are based and the effects of those principles. It will be seen that although these regimes were not necessarily entered into with the intention of transferring the resources into shared sovereignty that has been their effect. It should also be noted that the scope of each of the regimes is rather narrow, therefore, the parties to them are only giving up a very small part of their sovereignty. This point although not important for this chapter is demonstrative of one of the themes of my thesis - that states have proved more willing to exchange individual for joint sovereignty where the parameters of the exchange are narrowly defined and not capable of expansion.

Returning to the fourth point made above, the attempts at codification suggest that practice should be fairly standardised, unfortunately the two sets produced two different dominant principles upon which regimes ought to be based. As the object of this paper is to draw out some sort of common standard or practice and as one of the dominant principles

⁷ *Ibid.*

⁸ *Ibid.*

⁹ It should be noted that these treaties have been selected only on account of the availability of materials on them. It should also be noted I will only be looking at parts of each of the regimes as a) that is all that is necessary for my purposes and b) to examine the whole of each regime would require an entire chapter on each.

supports a theory of internationalisation and the other does not, this discrepancy ought to be examined before proceeding any further.

Rules Applicable to the Use of International Rivers

The first attempt at codification was by the International Law Association in 1966 and resulted in the Helsinki Rules on the Uses of the Waters of International Rivers 1966,¹⁰ under which the dominant rule guiding drafting of international agreements¹¹ is "equitable utilisation"¹² according to which only the fairest use may proceed. What that is is decided by balancing various factors defined in Article V.¹³ Under the International Law Commission's

¹⁰ Helsinki Rules on the Uses of the Waters of International Rivers as approved by the International Law Association at its Fifty-second Conference at Helsinki 1966 *Report of the Committee on the Uses of International Rivers* (London: International Law Association) 1967 [hereinafter Helsinki Rules.]

¹¹ Hereinafter "the dominant rule".

¹² Article IV of the Helsinki Rules: "Each basin State is entitled, within its territory, to a reasonable and equitable share of the beneficial uses of the waters of an international drainage basin."

¹³The factors are:

- (a) The geography of the basin, including in particular the extent of the drainage area in the territory of each basin State;
- (b) the hydrology of the basin, including in particular the contribution of water by each basin State;
- (c) the climate affecting the basin;
- (d) the past utilisation of the waters of the basin, including in particular existing utilisation;
- (e) the economic and social needs of each basin State;
- (f) the population dependent on the waters of the basin in each basin State;
- (g) the comparative costs of alternative means of satisfying the economic and social needs of each basin State;
- (h) the availability of other resources;
- (i) the avoidance of unnecessary waste in the utilisation of waters of the basin;
- (j) the practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among uses; and
- (k) the degree to which the needs of a basin State may be satisfied, without causing substantial injury to a co-basin State.

Article V (2).

1991 Draft Articles on the Non-Navigational Use of International Watercourses¹⁴ the dominant principle is "no appreciable harm",¹⁵ one of the factors to be considered under the "equitable utilisation" principle.

The potential effect of each of these principles on sovereignty could be quite different: "equitable utilisation" would allow each of the parties involved to barter their rights in order to obtain the maximum benefit from the river and to balance out various factors in deciding what use should be allowed. Its effects are simply to list the factors to be considered in deciding which uses should be allowed. At the same time it facilitates a fairer sharing of the resource by detailing the interests to be taken into account, thus militating against politically and economically stronger states dictating how resources are to be developed. Thus it removes the resource from individual sovereignty and places it under a kind of community ownership - it internationalises it. "No appreciable harm", however, would not allow trading of costs and benefits, instead where appreciable harm was thought likely the proposed project simply could not proceed. This would not "internationalise" resources except that, to the extent that it prohibits development, it preserves them for the benefit of all. This benefit is, however, debatable, as the resources may never be used if agreement can not be reached. The effect may be, therefore, to remove resources from the international sphere and to put them into a kind of cold storage, the opposite of internationalisation, or to remove them from the sovereignty of one state and to give them to another.

¹⁴ International Law Commission's *Draft Articles on the Law of Non-Navigational Uses of International Watercourses, Draft Report of the International Law Commission*, U.N. Doc.A/CN.4/L.463/Add.4(1991) [hereinafter "I.L.C. Draft Articles"].

¹⁵ Article 7 "[w]atercourse States shall utilize an international watercourse in such a way as not to cause appreciable harm to other watercourse States."

So which rule dominates in practice? That can only be answered by looking at actual agreements. In keeping with the chronological nature of my thesis I shall deal with the various regimes in chronological order,¹⁶ beginning with the Nile River Regime.

Selected Agreements on the Non-Navigational Use of International Rivers

Preliminary Matters

Before looking at the treaties I should deal with a perceived problem which potentially limits their applicability. It has been argued that many of the agreements (for example the 1929 Exchange of Notes Between His Majesty's Government in the United Kingdom and the Egyptian Government in Regard to the Use of the Waters of the River Nile for Irrigation Purposes¹⁷ and the 1959 Agreement Between the United Arab Republic and the Republic of Sudan for the Full Utilisation of the Nile Waters)¹⁸ were agreed to purely for political expediency.¹⁹ In relation to the Nile, for example, Sudan did not actually need the share of the waters it would be entitled to under international law,²⁰ so it was willing to agree to the provisions of the two agreements²¹ giving it a smaller portion of the water than was its right. This has led to the agreement being criticised "as dependent on the particular political situation

¹⁶ The dates for deciding the order being the dates of the first agreement, treaty, or declaration in each regime.

¹⁷ Cairo, 7 May 1929. L.N.T.S. vol.XCIII 44. [Hereinafter "the 1929 Agreement".]

¹⁸ Cairo 8 November 1959. (1959) 453 U.N.T.S. 51 [hereinafter "the 1959 Agreement".] Egypt was a part of the United Arab Republic when this agreement was entered into.

¹⁹ See R.K. Batstone, "The Utilisation of the Nile Waters" (1959) 8 International and Comparative Law Quarterly 523 at 533.

²⁰ Even the share it received under the 1959 Agreement has been said to be more than it actually required, see G.M. Badr, "The Nile Waters Question Background and Recent Development" (1959) 15 Egyptian Review of International Law 94 at 116. On the geographical and hydrological circumstances of the Nile River see C.O. Okidi, "Review of Treaties on Consumptive Utilisation of Lake Victoria and Nile Drainage System" (1982) 22 Natural Resources Journal 161 from 162.

²¹ The United Kingdom acted on behalf of the territory which was to become the Sudan in 1929.

then existing"²² (footnotes omitted) which is said to render it invalid as a basis from which to extrapolate the principles of international law:

A State is of course at liberty to accept less than is due to it, should it so decide, for considerations of policy of which it is the only judge. But the exercise of such a liberty in an international treaty or agreement makes it inadvisable to draw legal conclusions from such an instrument or to consider it as a precedent in international law.²³

That, however, is not necessarily true. If a state enters into an agreement of its own free will then it must be taken to have protected its own interests in the light of the applicable rules of international law when doing so. No matter which of the principles, "equitable utilisation" or "no appreciable harm", is said to dominate it must be assumed that the state took account of and applied it in respect of its own rights in the same way that a Canadian citizen is assumed to take account of Canadian law when entering into agreements and contracts. In this case the Sudan must be taken to have decided either that the agreement provided for an equitable use of the waters (Sudan did not require them so it was equitable that Egypt get use of them) and/or, that the regime did not cause it appreciable harm. There is, therefore, no difficulty with using these treaties as a basis from which to determine state practice with regard to the dominant principle under international law. The same can be said about the other treaties examined in this paper: regardless of the political situation surrounding their conclusion, they provide a valuable base from which to examine the extent to which states will limit their sovereignty and treat resources as shared or internationalised and from which to examine the subsidiary issue of the dominant principle under international law.

²² Batstone, *supra* note 19 at 533.

²³ Badr, *supra* note 20 at 162.

The Nile River Regime

In this section I shall examine just two of the treaties establishing the Nile River Regime: the 1929 Agreement and the 1959 Agreement. I have chosen these two as they²⁴ provide the basis for the regime and helped shape the other agreements in it²⁵. More importantly, they²⁶ attempted to deal with the use of the whole of the river whereas the other treaties in the regime dealt with only certain parts of the river.²⁷

On first glance it would appear that these treaties were designed with resource sharing in mind being based on the "equitable utilisation" principle.²⁸ It is submitted, however, that the agreements are in fact designed to benefit Egypt alone and as such embody the "no appreciable harm" doctrine. They protect Egyptian sovereignty while severely restricting Sudan's. It might even be argued that they expand Egyptian sovereignty by giving Egypt the power to undertake works in Sudanese territory without having to obtain consent. The treaties also have the effect of giving to Egypt virtually sole ownership of what was once a shared

²⁴ Particularly the 1929 Agreement.

²⁵ "The 1929 Nile Waters Agreement was, and perhaps remains, the dominant body of legal rules governing the distribution and utilisation of the Nile waters, for although it appeared to be limited to the Egyptian-Sudanese water rights, it also helped to shape the relationship of these States with the other members of the Nile community." B.A. Godana, "Africa's Shared Water Resources: Legal and Institutional Aspects of the Nile, Niger and Senegal River Systems" (Boulder, Colorado: Lynne Reiner Publishers, Inc.) 1985 at 103. See also D.J. Chenevert Jr., "Application of the Draft Articles on the non-Navigational Uses of International watercourses to the Water Disputes Involving the Nile River and the Jordan River" (1992) 6 *Emery International Law Review* 495 at 542.

²⁶ Particularly the 1959 Agreement.

²⁷ For example the Exchange of notes Between the Government of the United Kingdom and the Government of Egypt Regarding the Construction of the Owen Falls Dam (Cairo, 30 and 31 May 1949, 226 U.N.T.S. 274) dealt only with the construction of one particular dam at Owen Falls.

²⁸ L.J. Bouchez, "Rhine Pollution: International Law Aspects" (1981) 9 *International Business Lawyer* 53, cites the Nile Agreements as examples of the embodiment of the "equitable utilisation" principle.

resource: paragraph 4(b) of Note 1 of the 1929 Agreement provides that no works can be constructed by any upstream state without Egypt's consent²⁹ so giving it a veto over all projects; and paragraph 4 (d) allows Egypt to undertake works in the territory of other riparians with only a minimum of consultation with them (consultation only being necessary to ensure that harm is minimized not to gain consent) and without having to pay any sort of compensation.³⁰ The effect is thus the exact opposite of internationalisation. To sketch the nature of the agreements more clearly I shall now examine them separately.

The 1929 Agreement³¹

The misconceptions of the nature of the agreements outlined above arise from the manner in which the agreements were drafted: they appear to acknowledge the equal rights of the parties to the resources. For example, one of the first paragraphs of the 1929 Agreement acknowledges and accepts the need for the Sudan to increase its use of the Nile if it is to develop,³² suggesting that all use is to be equitable in that no party is to be denied its rights purely on the basis that another is already exercising its rights, rather the various rights and

²⁹ Note 1 paragraph 4(b):

Save with the previous agreement of the Egyptian Government, no irrigation or power works or measures are to be constructed or taken on the River Nile and its branches, or the lakes from which it flows, so far as all these are in the Sudan or in countries under British administration, which would, in such a manner as to entail any prejudice to the interests of Egypt, either reduce the quantity of water arriving in Egypt, or modify the date of its arrival, or lower its level.

³⁰ Note 1 paragraph 4 (d):

In case the Egyptian Government decide to construct in the Sudan any works on the river and its branches, or to take any measures with a view to increasing the water supply for the benefit of Egypt, they will agree beforehand with the local authorities on the measures to be taken for safeguarding local interests. The construction, maintenance and administration of the above-mentioned works shall be under the direct control of the Egyptian Government.

³¹ On the background to the 1929 Agreement see Batstone, *supra* note 19 from 526.

³² Paragraph 2 of Note 1:

It is realised that the development of the Sudan requires a quantity of water greater than that which has been so far utilised by the Sudan. As your Excellency is aware, the Egyptian Government has always been anxious to encourage such development, and will therefore continue that policy, and be willing to agree with his Majesty's Government upon such an increase ...

interests are to be weighed against each other to decide which should be allowed to prevail. The same paragraph, however, continues by providing that any increase in use of the waters by the Sudan is not to impinge upon Egypt's "natural and historic rights" to the water nor to prevent Egypt's agricultural expansion.³³ The first part of this provision could be interpreted, if read on its own, as simply protecting existing uses. If so it could be interpreted as being in keeping with the "equitable utilisation" principle,³⁴ but the "equitable utilisation" principle requires that the various factors, including historic uses be balanced, not that one can override the others. Again the latter part, if read on its own could be interpreted as applying the "equitable utilisation" principle, under which one must take account of the existing and future interests of both or, all concerned parties, but again it provides that Egypt's rights are paramount and can not be infringed negating any suggestions of community or shared interest or of "equitable utilisation". Indeed the 1929 Agreement goes further than the "no appreciable harm" principle in that it prohibits all harm, appreciable or not. As Batstone notes the Sudanese interests were to be considered only after Egyptian needs had been satisfied,³⁵ yet Great Britain, on behalf of the Sudan accepted this provision and others such as paragraphs 4 (b) and (d) discussed above.

³³ "...and be willing to agree with his Majesty's Government upon such an increase of this quantity as does not infringe Egypt's natural and historic rights in the waters of the Nile and its requirements of agricultural extension, subject to satisfactory assurances as to the safeguarding of Egyptian interests as detailed in later paragraphs of this note."

³⁴ Batstone suggests, however, that the reference to "natural and historic rights" was not just limited to water actually used at the time of the agreement but, covered rights to unused or surplus waters. He questions the efficacy of such a provision under international law. Batstone, *supra* note 19 at 529

³⁵ "It may be commented that this attitude on the part of Egypt represented a subordination rather than adjustment of interests as Sudanese needs were only to be considered after Egyptian needs had been satisfied." *Ibid* (footnote omitted.)

Clearly, the 1929 Agreement does not provide for sharing resources, nor does it embody the "equitable utilisation" principle, nor it would seem, does it embody the "no appreciable harm" principle. Instead it prohibits all harm to Egyptian interests without Egyptian consent, but allows harm to other parties so long as Egypt takes steps to minimise the harm caused.³⁶ Thus Egyptian sovereignty is protected and perhaps even expanded while the sovereignty of others is limited. The effect is to remove the resources from the other state's sovereignty and give them to Egypt. It has nothing to do with sharing or equitable use.

The 1959 Agreement³⁷

As the 1959 Agreement builds upon the 1929 Agreement one would anticipate that it would reflect the same principles, but the areas covered by it - established rights of use, construction of works, the allotment of net benefits, compensation for damages and the preparation of projects to prevent the loss of water in the Upper Nile Basin³⁸ - suggest that it will apply the "equitable utilisation" principle enabling a greater sharing (or internationalising) of the resources of the river.³⁹ This list is just a minor hiccup, however, as the 1959 Agreement does seem to have been drafted on the same basis as the 1929 Agreement with perhaps a little expansion in its scope as reflected in its entrenching of established rights to the resources. For example, Article I, Article II paragraphs (3), (4) and

³⁶ Even if a harm is minimised it can still be appreciable.

³⁷ This agreement was entered into by the United Arab Republic [hereinafter Egypt], of which Egypt was a part at the time the agreement was entered into and the Republic of the Sudan [hereafter the Sudan], which was by the same time an independent State.

³⁸ United Nations *Legal Problems Relating to the Utilization and Use of International Rivers*, Report of the Secretary General U.N. Doc.A/5409, 15 April 1963, paragraph 109.

³⁹ Where such a broad range is covered one would expect the parties involved to weigh the costs and benefits of each project and type of project against the others when deciding which should proceed and which should not.

(5) and Article V (2) cover the allocation of the Nile waters between the two parties.

Article I sets out the quantities of water used by the two parties in 1959 and declares these to be their established rights.⁴⁰ It could be construed as supporting either the "equitable utilisation" or the "no appreciable harm" principle. It is doubtful that it could be construed as supporting internationalisation - there seems to be no room for sharing of the resource, rather the rule seems to enshrine individual rights. This point can be clarified by examining which of the two principles, "equitable utilisation" or "no appreciable harm" the article supports. It could be "equitable utilisation" in that it is equitable that States be allowed to continue their present uses. On the other hand it could be "no appreciable harm" in that it is only by establishing what the existing rights of the parties are that one can determine whether there has been harm to them. In fact the case for "no appreciable harm" actually appears to be stronger, in that if one were to apply a pure version of the "equitable utilisation" principle then one would have to weigh the benefits of existing uses against the benefits of possible uses and decide which should have precedence. While one might wish to acknowledge the quantities of water being used by the relevant parties when entering into an agreement one would not wish to enshrine them as "established rights" in the agreement. To do so suggests that the rights can not be impinged upon by future uses - exactly the effect of the "no appreciable harm" principle - and prevent reallocation or sharing of resources. It is completely contrary to the notion of

⁴⁰ The 1959 Agreement Article 1:

1. The quantities of water actually used by the United Arab Republic until the date of signing this agreement constitute their established right prior to the benefits accruing to them through the implementation of the control works referred to in this agreement. The established right amounts to 48 milliards of cubic metres per year measured at Aswan.
2. The quantities of water used at present by the Republic of Sudan constitute their established right prior to the benefits accruing to them through the implementation of the aforementioned control works. This established right amounts to 4 milliards of cubic metres per year at Aswan.

internationalisation.

Article II deals with the manner in which the excess flow is to be divided between the two parties to the agreement.⁴¹ Like Article I, it could be construed as supporting either of

⁴¹ The 1959 Agreement Article II:

1. In order to make use of the full natural river supply and stop the flow of any excess to the sea the two Republics agree to the construction by the [United Arab Republic] of the Sudd el Aali Reservoir at Aswan as the first of a series of over-year storage schemes on the Nile.

2. In order to enable the Republic of Sudan to exploit their share, the two Republics agree to the construction by the Sudan Republic of the Rosieres Reservoir on the Blue Nile and any other works deemed necessary by the Sudan for the same purpose.

3. The net benefit from the Sudd el Aali Reservoir shall be calculated on the basis of the mean natural river supply at Aswan in the past years of this century and which amounts to 84 milliards of cubic metres per year. The established rights of the two Republics referred to in Article I as well as the mean value of the over-years storage yearly losses in the Sudd el Aali Reservoir shall be deducted from the above mentioned mean natural river in order to obtain the net yearly benefit to be shared by the two Republics.

4. The net benefit from the Sudd el Aali Reservoir referred to in the previous paragraph shall be allotted between the two Republics at the ratio of 14.5 for Sudan and 7.5 for the United Arab Republic as long as the computed mean natural river supply remains within the limiting value mentioned in the previous paragraph. this means that as long as the computed mean natural river supply is equal to 84 milliards of cubic metres per year and the mean value of the over-year storage losses remains equal to its present estimated value of 10 milliards of cubic metres per year then the net benefit from the Sudd el Aali Reservoir is 22 milliards of cubic metres of which 14.5 milliards shall be allotted to the Republic of Sudan and 7.5 milliards to the United Arab Republic. By adding these benefits to the respective rights the total shares in the net mean natural supply after the working of the complete Sudd el Aali Reservoir shall be 18.5 milliards per year for the Republic of Sudan and 55.5 milliards per year for the United Arab Republic.

If the mean natural river exceeds 84 milliards per year then the resulting increase in the net benefit shall be equally divided between the two Republics.

5. As the net benefit from the Sudd el Aali Reservoir referred to in paragraph (3) article II is calculated by deducting the established rights and the mean natural river supply of the past years of the present century, it is recognised that this net benefit shall be subject to revision by both parties at reasonable intervals to be agreed upon as from the date of the operation of the complete Sudd el Aali Reservoir.

6. The Government of the United Arab Republic agree to the payment of fifteen million Egyptian pounds to the Government of the Republic of Sudan as full compensation for the damages to present Sudanese property resulting from the storage of water in the Sudd el Aali Reservoir to a level of 182.00 metres (Survey). Such payment shall be affected as agreed upon by both parties in the Annex attached thereto.

7. The Government of the Republic of Sudan undertake to take steps to transfer the population round Halfa as well as all other Sudanese inhabitants - whose properties will be affected by the maximum storage of the Sudd el Aali Reservoir - prior to July 1963.

8. It is recognised that after the working of the complete Sudd el Aali Reservoir for over-year storage, the United Arab Republic will not require the use of Gebel Aulia Reservoir for storage. The two contracting parties shall examine all matters related to such renunciation in due time.

the two competing principles. It supports "equitable utilisation" in that paragraph (4) gives a larger portion of the excess of the mean natural flow to the Sudan, so balancing the proportions of water that each is entitled to; paragraph (5) provides that any further excess is to be divided equally; paragraph (6) provides that Egypt is to pay compensation to the Sudan as Egypt is to gain the benefits of the works discussed therein while Sudan will suffer harm as a result of them; and in paragraph (8) Egypt gives up its right to the benefits of another dam in return for the benefits of the Sudd el Aali Reservoir. At the same time it supports the "no appreciable harm" principle in that the provisions for division of the waters of the Nile established under paragraphs (4) and (5) can not be considered to be equitable indeed can only really be construed as an attempt to preserve the present positions of the parties as far into the future as possible.⁴² If paragraph (4) was intended to embody the "equitable utilisation" principle then it would surely have provided a framework for future division of the excess based on need.⁴³ Instead it installs a concrete division, incapable of revision other than by further agreement. Again this suggests the opposite of internationalisation - no consideration is to be given to the community needs and interests let alone to their changing shape.

It seems then that the prime consideration was to ensure that the Agreement did not affect existing rights. Similar arguments can be raised in connection with the division of the excess when the natural flow exceeds the mean annual flow. It appears that the division of the excess was secondary to the need to protect the entrenched rights provided for in Article I.

Again Article V (2) provides that where there is a reduction in the quantity of water

⁴² This is done by taking the existing allocations and adding a certain proportion of the excess waters to them to allow for increases in the amount of water required by each.

⁴³ This would have the effect of internationalising the resource at least to some extent in that it would make the sharing more equitable.

flowing through Aswan as a result of works by other upstream states, which the parties feel compelled to accept, the reduction is to be borne "in equal shares" by the parties.⁴⁴ This too could be interpreted as supporting either of the competing principles. It could mean one for one, or in proportion to the parties' allotments. When read in the context of the complete agreement it would seem that the former interpretation is correct. The agreement sets out quite clearly the manner in which excess flows are to be divided. Where that division is not on a one for one basis that is made clear.⁴⁵ Where the division is to be one for one similar phraseology is used as here: "...the net benefit due to the increase in the mean natural river shall be equally divided between the two Republics".⁴⁶ That being the case Article V (2) can not be said to be supportive of the "equitable utilisation" principle as it takes no account of variations in needs *et cetera* in deciding the allocation of water. Nor can it be based on the concept of internationalisation or community interests under which, as under "equitable utilisation," various interests would be weighed against each other to decide which allocation will be most beneficial or least harmful to the community.

It could also be argued that Article V(2) does not support the "no appreciable harm" principle because a one for one reduction could easily lead to appreciable harm being done to one of the parties if it depended on the water for any reason, but as the regime was generally

⁴⁴ Article V (2):

Since other riparian countries on the Nile besides the Republic of Sudan and the United Arab Republic claim a share in the Nile waters, both Republics agree to study together these claims and adopt a unified view there on. If such studies result in the possibility of allotting an amount of the Nile water to one or the other of these territories, then the value of this amount at Aswan shall be deducted in equal shares from the share of each of the two Republics.

...

⁴⁵ See Article II (4), *supra*, note 41 and accompanying text.

⁴⁶ Article II (4).

aimed at preserving Egypt's interests and as in 1959 the Sudan did not need all the water allocated to it⁴⁷ the idea might have been to prevent appreciable harm to Egypt's interests. The alternative construction is that the provisions entrench the positions of the parties at the time the agreement was entered into. Such entrenchment founds the basis for claims of appreciable harm by giving the parties a foundation for their rights and interests upon which they can base their claims.

Thus the provisions on division of water (that is the main provisions of the 1959 Agreement) appear to entrench the parties' positions, protect individual sovereignty and prevent a greater sharing of the resources and the development of a community interest. In no way does it move towards internationalising the resource, rather it builds upon the 1929 Agreement's transfer of what was a shared resource into Egypt's sole ownership.

Conclusion

All that one can conclude from the above is that the design of the regime had nothing to do with facilitating a greater sharing of resources. Rather it was established to ensure Egypt's existing rights were not affected by further development on Sudan's part. I do not intend to examine the possible reasons for such an agreement, but would suggest that there must have been some political factors at work. Whatever the reasoning this regime has little in common with the idea of internationalisation and would seem to disprove my theory on the development of the community interest (that states are more inclined to agree to community arrangements where the scope is limited) but it should be noted that the foundations for the regime were laid

⁴⁷ Badr, *supra* note 20 at 116 notes that the water allocated to the Sudan under the 1959 Agreement is sufficient to irrigate 7 million feddans (acres) but that the Sudan in 1959 was only known to have 3 million arable feddans requiring irrigation.

in 1929, near the start of my timescale and at a time when permanent sovereignty over resources was paramount and community interest rarely if ever considered. As such it serves as a good starting point for this chapter; as will be shown, the regimes that follow indicate a development in the direction of internationalisation.

The Mekong River Regime

In this section I shall consider the regime applicable to the Mekong river from 1957⁴⁸ to the present. It should be noted at this stage that I have been unable to find the original texts of the various treaties applicable and so have had to rely on what others have written about them.

In 1957 the riparian states of the lower Mekong basin⁴⁹ entered into an agreement to establish a joint committee⁵⁰ to "promote, coordinate, supervise and control the planning and investigation of water resource development projects in the lower Mekong basin".⁵¹ The 1957 Statute together with the Rules of Procedure of the Mekong Committee⁵² laid out the functions and powers of the Committee and formed the basis of the regime until 1978⁵³ when due to Cambodia's unwillingness to cooperate further in the original regime the other three parties,

⁴⁸ Prior to 1957 the regime was primarily concerned with navigation.

⁴⁹ That is Cambodia, Laos, Thailand and the Republic of Viet-Nam.

⁵⁰ The Committee for the Coordination of Investigation of the Lower Mekong Basin [Hereinafter "the Committee"].

⁵¹ Article 4 of the 1957 Statute of the Committee for Coordination of Investigation of the Lower Mekong Basin [hereinafter "the 1957 Statute"].

⁵² Hereinafter "the 1957 Rules".

⁵³ Other agreements and declarations were also made but those listed in this paragraph are the principle ones pertaining to the regime.

Laos, Thailand and Viet-Nam, entered into the Declaration Concerning the Interim Committee for Coordination of Investigations of the Lower Mekong Basin⁵⁴ and Rules of Procedure of the Interim Mekong Committee of 1978⁵⁵ to replace the now defunct original agreements. All of the above agreements are the subject of this next section.

The 1957 Statute and Rules

The regime established by the 1957 Statute and Rules⁵⁶ has been described as demonstrating "a characteristic change from nationalism to internationalism, or perhaps more accurately regionalism",⁵⁷ implying

- 1) greater sharing of the resources,
- 2) limitation of individual sovereignty
- 3) the facilitation of cooperation and coordination in the development and use of the river basin
- 4) that the regime will be based on the principle of "equitable utilisation" and
- 5) that community interest has a rôle in the regime.⁵⁸ The functions of the Committee, however, being somewhat limited, suggest that individual sovereignty may have been left intact.

They are only to

prepare and submit to participating governments plans for carrying out

⁵⁴ Hereinafter "the 1978 Declaration".

⁵⁵ Hereinafter "the 1978 Rules".

⁵⁶ Most of the main characteristics of the regime established under the 1957 Statute and Rules have remained unaltered under the new regime.

⁵⁷ P.K. Menon, "The Legal Regime of the Lower Mekong River Basin" (1971) 49 *Revue belge de droit international des sciences diplomatiques et politiques* 305 [hereinafter "The Legal Regime"] at 330.

⁵⁸ *Ibid* at 321: "[The i]ntegrated basin approach presupposes, coordinated or joint action for development of water resources, considering the basin as one unit from the economic, social and hydrologic points of view."

coordinated research, study and investigation;
 make requests on behalf of the participating governments for special financial
 and technical assistance...;
 draw up and recommend to participating governments criteria for the use of the
 water of the main river for the purpose of water resources development;
 ...⁵⁹

In other words the final say on all plans and projects rests with the individual governments. This might be thought to negate any suggestions of sharing, but by giving the Committee the power to recommend the main uses of the river the parties have tacitly acknowledged that they are part of a community,⁶⁰ that unilateral action by any one of them can harm the others and that, therefore, if all are to receive the maximum benefit from the river basin they must coordinate their actions. These ideas have been reflected in the principles adopted by the Committee in establishing an integrated program of development. "The regime overrules all unilateral works on the river, providing as it does that the basin states would previously consult with each other and agree on any work of development."⁶¹ As Menon notes, this does not necessarily mean that a project will automatically be stopped if an objection is received, particularly if it is in the proposing state's "vital interest".⁶² It simply means that objections must be considered. One could question whether this supports the "equitable utilisation" or the "no appreciable harm" principle. It could be argued that it supports "no appreciable harm" in that if another state alleged that a project would appreciably harm its interests it is unlikely that

⁵⁹ Article 4 of the 1957 Statute.

⁶⁰ "these four basin states have by their actions, recognized the application of the 'community of interest' principle to the Basin." D.K. Malcolm, "Legal Aspects of the Integrated Development of the Lower Mekong Basin" (1971) 2 Law Asia 80 [hereinafter "Legal Aspects"] at 82.

⁶¹ The Legal Regime, *supra* note 57 at 325.

⁶² *Ibid* at 325-326.

the project would proceed. On the other hand, problems would arise if the proposer then claimed that the project was of vital importance to its interests and that if it was not allowed to proceed it would suffer appreciable harm. In such circumstances the two claims would have to be measured against each other and the parties would have to decide which carried most weight - because more harm would be suffered by a particular party, or because the overall harm or benefit to the community would be greater under one of the uses. Presumably this would be done in the light of the factors normally considered in applying the "equitable utilisation" principle.⁶³ Thus, in the final analysis, the parties appear to rely on the "equitable utilisation" principle and to favour the community interest idea.⁶⁴

One provision of the 1957 Statute which could be seen as embodying the "no appreciable harm" principle is that on decision making. Under Article 5 all decisions must be unanimous. As has been said "[t]his means that each nation [is] able to make a careful judgement about the effects of a proposed program of development upon its national interests and [can] seek arrangements which would provide a high degree of assurance that co-basin states do not take advantage of it."⁶⁵ It also allows states to veto projects which they consider would cause them appreciable harm. As such it may provide a mechanism by which the "no appreciable harm" principle can in practice supersede the "equitable utilisation" principle and individual sovereignty can be maintained, perhaps preventing the best use of the resource. From what has

⁶³ On these see *supra* note 13 and accompanying text.

⁶⁴ Query whether this is what would happen under the I.L.C. Draft Articles - in deciding which projects should be allowed to proceed would "no appreciable harm" be applied first, then once it has been satisfied or if it can not be "equitable utilisation" ?

⁶⁵ The Legal Regime *supra* note 57 at 327.

been written on the regime, however, it does not appear that this has happened.⁶⁶ Instead the regime has been described as "the first case in the developing world in which more than two states have come together to take joint and separate action in a coordinated way for the benefit of all the people of the basin."⁶⁷ Nevertheless, this limitation of the community interest idea does exist and the regime we are looking at can be seen to be juggling two competing concepts - community interests and sharing resources versus preservation of sovereignty.

The 1975 Declaration

In 1975 the four states entered into a non-binding declaration⁶⁸ following the principles of "common interest" and "equitable and reasonable sharing in the use of waters".⁶⁹ The declaration also contains guidelines for following these principles: the parties are to consider whether compensation could adjust conflicts, to ensure the avoidance of unnecessary waste in the use of the waters, to assume responsibility to pay appropriate compensation where they negligently cause harm to another, to ensure an adequate flow to downstream states, to consider the requirements of others when carrying out out of basin diversions and to carry out cost/benefit analyses where appropriate.⁷⁰ The parties are also obliged to consider any project which will affect the water resources of the Mekong in the light of its social, hydrological and environmental impacts. All of which ensure that the parties take account of each others interests

⁶⁶ See Mekong Consultations Kuala Lumpur 16 December 1992 *Draft Overview and Analysis of the Mekong Legal and Institutional Framework* . [Hereinafter "Draft Overview".]

⁶⁷ The Legal Regime *supra* note 57 at 322.

⁶⁸ The Joint Declaration of Principle for Utilization of the Waters of the Lower Mekong Basin 1975.

⁶⁹ Draft Overview *supra* note 66 at 6.

⁷⁰ *Ibid* at 7.

and do not simply promote their own individual interests and concerns, and which have also led to the declaration being described as reflecting "the principles on water utilizations as stated in the 1966 Helsinki Rules".⁷¹ That is, they embody the "equitable utilisation" principle and community interest. It thus represents quite a development on the provisions of the 1957 Statute and Rules. One might conclude that there has been a tremendous mind shift in the intervening years, but naturally things are not quite as rosy as they might appear; one must bear in mind that the declaration is just that, a declaration. It is not binding in the way that the 1957 Statute and Rules were. So, while the states might have agreed to a more equitable sharing regime they have not actually given up or transformed their sovereignty in any way. While this does not render the Declaration useless for the present analysis it does illustrate one of my points - that states are slowly moving towards internationalisation and are more inclined to acknowledge and accept it as a principle of international law where they do not actually have to give anything up, that is, where they are just entering into declarations of principles or, for example, when dealing with resources regarded as the common heritage of mankind.

The 1978 Declaration

The 1978 Declaration, as noted above, more or less reflects the provisions of the 1957 Statute the main difference being that Cambodia is not a party to it.⁷² It provides that the purposes of the new interim committee are to be "... to cooperate more closely in order to reap benefits of the development of the water resources of the lower Mekong basin, to meet the needs for reconstruction and economic development of [the] respective countries" and "... to

⁷¹ *Ibid* at 6.

⁷² *Ibid* at 9.

proceed with new water resources development activities..." The first purpose clearly reflects the "equitable utilisation" principle: it demands cooperation on the part of the parties, they can not simply proceed with development on a unilateral basis, it also promotes development as the predominant objective. If "no appreciable harm" were the guiding principle, then the provisions would have portrayed the obligation not to cause harm to others as the dominant provision with development coming second to it. In essence these functions are the same as those of the original committee. One major difference is that under Article 4 of the 1978 Rules the interim committee is authorised to approve plans for development; the original committee was only authorised to prepare them and pass them to the governments for approval.⁷³ This may be a small development, but it is an important one, for it removes a little more of the parties' individual sovereign powers from them and gives them to the committee. As the committee represents the community the effect is to limit individual sovereignty and to fill the gap left with a type of community sovereignty. To an extent then the resources are "internationalised". This small development is reinforced by the inclusion in the 1978 Declaration of the duty to respect mutual (community) interests.⁷⁴ That is, the parties can no longer choose to promote their own interests above all else, but must consider community interests first.

Thus the 1978 Declaration and Rules provide quite a development on the 1957 Rules and Statutes, having moved from a combined community interest, preservation of individual sovereignty situation to a regime based solely on community interest. One of the interesting things to note is the use of stepping stones in the development: the parties began by combining

⁷³ Article 4 1978 Rules, the interim committee may: "prepare and approve plans for carrying out coordinated research, studies and investigations; ..."

⁷⁴ Clause 5.

the two competing principles then they issued the Declaration of Principles in which the community interest principle was predominant, but which were not binding, then finally they agreed to be bound by a system based on community interest. Such a gradual development suggests that the end result was only possible because of the initial steps, that the initial regime helped foster good relations and facilitated the negotiation of a more detailed regime. The time scale is also interesting: we have moved from 1957, the year the Lac Lanoux Arbitration was decided (emphasising territorial sovereignty and noting that it was limited only where harm to others would result) to 1978, in the post Stockholm Declaration/environmental era when states had already begun to acknowledge community interests generally.

The next regime I will discuss limits itself to specific purposes to a greater extent than any of the others. This might lead one to argue that it ought not to be discussed here, particularly as it is a striking example of the type of treaty which prompted the following statement: "[i]t is of course debatable whether treaties can be important evidence of general custom since in essence they reflect law for the particular parties."⁷⁵ But what is custom if not an amalgam of practices pertaining to particular parties and circumstances? No matter how specific the provisions of a treaty it must embody certain principles. These principles, if used in a sufficient number of treaties,⁷⁶ become customary international law.

The Columbia River Regime

The Columbia River regime represents a further development in the community interest concept - the resource being utilised to a greater degree than would have been possible without

⁷⁵ Godana, *supra*, note 25 at 13.

⁷⁶ I do not intend to define "sufficient" here. That is a problem for another paper.

the agreement, and both parties to the agreement receiving more benefit from the resource than they otherwise would have - but the agreement is very narrow and specific in scope.⁷⁷ There is no room for its expansion without further negotiation because it is tailored to the specific circumstances surrounding use of this resource, indeed to specific uses of the resource. This point is illustrated by Article XIII (1) which deals with future diversions of water and provides

Except as provided in this Article neither the United States of America nor Canada shall, without the consent of the other evidenced by an exchange of notes, divert for any use ... any water from its natural channel in a way that alters the flow of any water as it crosses the Canada-United States of America boundary within the Columbia River basin.

In other words all uses involving diversion of the waters of the Columbia river other than those covered by the agreement must be discussed with and consented to by the other party. (Given the fact that the parties had already researched into the uses of the waters and the situation of the river I would estimate that all probable uses would involve diversion and this is why the parties only included diverting uses in Article XIII.) The positive effects of this are that it enables the regime to be very detailed in its provisions (actual figures and time limits are included in the founding treaty)⁷⁸ it also allows a considerable restriction of state sovereignty

⁷⁷ It is concerned with storage to prevent flood damage and to enable greater hydroelectric power production in the United States, Columbia River Treaty Preamble:

Being desirous of achieving the development of [the water resources of the Columbia river] in a manner that will make the largest contribution to the economic progress of both countries and to the welfare of their peoples of which those resources are capable, and
Recognising that the greatest benefit to each country can be secured by cooperative measures for hydroelectric power generation and flood control, which will make possible other benefits as well

...

⁷⁸ Treaty Between The United States of America and Canada Relating to Cooperative Development of the Water Resources of The Columbia River Basin, Washington, January 17 1961 Can.T.S. 1964 No.2; U.S.T. Vol.15 No.2 1555 (1964). Hereafter "Columbia River Treaty". The Columbia River Treaty was supplemented by a protocol in 1964 the terms of which simply clarify some of the treaty provisions: Annex to Exchange of Notes Dated January 22, 1964 Between the Governments of Canada and the United States Regarding the Columbia River Treaty Can.T.S. 1964 No.2; U.S.T. Vol.15 No.2 1579 (1964).

in relation to the matters covered by the convention and could be said to lead to a greater sharing of the resource in question - the power generating potential of the Columbia river.

This suggests that the parties based their regime on the principle of equitable utilisation, maximizing the benefits to all (by transferring resources to where they are most needed in return for a consideration) and minimizing the harm. Some have argued, however, that this is not what happened; they say that the regime maximizes the benefits and minimizes the harm to the United States without giving anything to Canada other than compensation for the use of its land, land which it might otherwise have been able to develop (perhaps more profitably) for its own use. General McNaughton has described the treaty provisions as being "essentially for the protection of the U.S. interests downstream, because, while the operation of the Canadian storage provisions can cause serious and indeed disastrous damages to the United States downstream, there is little that the downstream country can do to cause damage upstream."⁷⁹ Implying that the treaty is designed purely to protect U.S. interests, embodies the "no appreciable harm" principle and basically transfers resources from Canada to the U.S. all be it for consideration.⁸⁰ The problem with this argument is that although it is correct to say that Canada will not benefit directly from the storage facilities to be developed, it will benefit from the financial payments and payments in kind agreed to in the treaty. Both of these represent income it might not otherwise have been able to generate from these resources.⁸¹ One ought to bear in mind that the Columbia River Treaty was negotiated after studies of the river basin

⁷⁹ General A.G.L. McNaughton, "The Proposed Columbia River Treaty" (1962-'3) 18 *International Journal* 148 at 164.

⁸⁰ McNaughton would, I think, have been inclined to argue that the consideration was too small.

⁸¹ It is not entirely certain that other development of the area would or will take place.

had been undertaken. The parties must be assumed, therefore, to have agreed that the uses embodied in the treaty are the most beneficial to all.

One might ask then what principle or principles form the base or basis of the Columbia River Treaty and what effect they have on Canadian and U.S. sovereignty and ownership of the resources? The Preamble states that the parties aim to develop the resources of the basin "in a manner that will make the largest contribution to the economic progress of both countries and to the welfare of their people"⁸² suggesting equitable utilisation and shared ownership of the resource. The treaty then goes on to state that Canada is to provide a certain amount of storage⁸³ which the United States is to make the most efficient use possible of and for which the United States is to pay Canada compensation. Payment is to be calculated on the assumption that the United States is making the best use possible of the increase in flow.⁸⁴

⁸² *Supra*, footnote number 77.

⁸³ Columbia River Treaty Article II:

(1) Canada shall provide in the Columbia River basin in Canada 15,500,000 acre-feet of storage usable for improving the flow of the Columbia River.

(2) In order to provide this storage, which in the Treaty is referred to as the Canadian storage, Canada shall construct dams:

(a) on the Columbia River near Mica Creek, British Columbia, with approximately 7,000,000 acre-feet of storage;

(b) near the outlet of Arrow Lakes, British Columbia, approximately 7,100,000 acre-feet of storage; and

(c) on one or more tributaries of the Kootenay River in British Columbia downstream from the Canada-United States of America boundary with storage equivalent in effect to approximately 1,400,000 acre-feet of storage near Duncan Lake, British Columbia.

(3) Canada shall commence construction of the dams as soon as possible after the ratification date.

⁸⁴ Columbia River Treaty Article III:

(1) The United States of America shall maintain and operate the hydroelectric facilities included in the base system and any additional hydroelectric facilities constructed on the main stem of the Columbia River in the United States of America in a manner that makes the most effective use of the improvement in stream flow resulting from operation of the Canadian storage for hydroelectric power generation in the United States of America power system.

(2) The obligation in paragraph (1) is discharged by reflecting in the determination of

Canada is also to provide additional storage for flood control, when requested to do so by the United States.⁸⁵ Again the United States is to pay Canada compensation for this benefit.⁸⁶ This all looks quite equitable: Canada is allowing the United States to make use of Canadian resources not actually required by it, with the United States paying Canada for that use. This is effectively a transfer of resources (and to some extent sovereignty)⁸⁷ for consideration. Canada is not giving away its resources, it is gaining some benefit from an otherwise useless resource. Thus both states benefit and the resource is in a sense shared.

In conclusion it would appear that this treaty is based wholly on the principle of equitable utilisation. This is much as one would expect given the treaty's limited scope and aims, the amount of information available to the parties when they entered into it and their stage of development. Part of the reason for it being possible is that the two states have a

downstream power benefits to which Canada is entitled the assumption that the facilities referred to in paragraph (1) were maintained and operated in accordance therewith.

⁸⁵ Columbia River Treaty Article IV (2):

For the purpose of flood control until the expiration of sixty years from the ratification date, Canada shall

(a) ...

(b) operate any additional storage in the Columbia River basin in Canada, when called upon by an entity designated by the United States of America for that purpose, within the limits of existing facilities and as the entity requires to meet flood control needs for the duration of the flood period for which the call is made.

⁸⁶ Columbia River Treaty Article VI (3):

For the flood control provided by Canada under Article IV (2) (b) the United States of America shall pay Canada in United States funds in respect only of each of the first four flood periods for which a call is made 1,875,000 dollars and shall deliver to Canada in respect of each and every call made, electric power equal to the hydroelectric power lost by Canada as a result of operating the storage to meet the flood control needed for which the call was made, delivery to be made when the loss of hydroelectric power occurs.

⁸⁷ See article IV under which the United States can demand storage from Canada,

history of cooperation and friendship,⁸⁸ part that they were more developed than say the Plata river basin states were when that regime was established at the time the Columbia River Treaty was negotiated and part that they were aware which type of development was most important for them.⁸⁹ The regime is also fairly narrow in scope and specific in details.

One of the interesting points about the regime is that it restricts Canadian and U.S. actions with respect to the use of the Columbia river quite rigidly, and at the same time it facilitates a greater sharing of the resource by the two states than is seen in any of the other regimes discussed here. Perhaps the main reason for this sharing being possible is the narrowness of its scope which means the states do not feel that their sovereignty is terribly threatened as they do not have to give up much.

Moreover, although the treaty could be regarded as restricting Canadian sovereignty to a greater extent than U.S. sovereignty, suggesting "favouritism" and a derogation from the community spirit the effect is actually the enhancement of the overall welfare of the

⁸⁸ Columbia River Treaty Preamble: "Recognizing that their peoples have, for many generations, lived together and cooperated with one another in many aspects of their national enterprises for the greater wealth and happiness of their respective nations..."

⁸⁹ One of the problems generally encountered in establishing international river regimes is obtaining sufficient information to decide which development projects would be most beneficial to all. This makes cooperation particularly necessary for an accurate assessment of the resources of the basin which, in turn, demands close cooperation in the collection, analysis and standardisation of data in a coordinated manner. Only this can provide valuable data for use as a basis for international agreement on the question of how the resources of the basin should be utilised between the countries concerned ... because there can not be any effective application of legal principles to the uses of the waters of an international watercourse unless there is an accurate and detailed knowledge regarding those waters.

Godana *supra* note 25 at 5. Godana notes that this problem is generally more acute for developing countries which have fewer resources available for the collection of data. In the instant case such problems are not so marked as the parties had a fairly well established knowledge of the resources of the river basin when they entered into negotiations for the treaty, having previously asked the International Joint Commission to carry out a study of the problem. (On this see R. W. Johnson, "The Canada-United States Controversy Over The Columbia River", (1966) 41 Washington Law Review 676 particularly at 711-735.)

"community"⁹⁰ and, at least in the short term, the enhancement of the "profits"⁹¹ each is able to reap from the use of the resource. This may be what has led it to be described as

a half-way house between independent development and basin development. Under the treaty, the parties develop the resources separately, but Canada allows the United States to use Canadian soil for the storage of water for the production of hydroelectric power and the control of floods. Canada in return receives compensation in the form of electricity and dollars.⁹²

It may be that the effect comes close to giving the U.S. sovereignty over Canadian resources in return for consideration, but I would be more inclined to see it as a sharing, a gaining of mutual benefit from an otherwise unusable resource with sovereignty over the resource being shared in that each has the power to withdraw from the regime and each has agreed on who is to operate and control what. It is not a case of one state imposing its will on another and then paying some compensation for that as could be said to have happened in the Trail Smelter Arbitration where Canada forced pollution on the U.S. and then paid compensation for it.

⁹⁰ That is the U.S. and Canada.

⁹¹ That is beneficial use of the resource.

⁹² A.E. Utton, "The Columbia River Treaty and Protocol" (1966) 1 Land and Water Law Review 181 at 198.

The Rhine River Regime

As with the Nile a number of treaties have been entered into in the last century with respect to the utilisation of the Rhine river.⁹³ In this section I shall consider three of the most recent relating to the pollution⁹⁴ of the Rhine: The 1963 Agreement Concerning the International Commission for the Protection of the Rhine Against Pollution,⁹⁵ the 1976 Convention on the Protection of the Rhine Against Pollution by Chlorides⁹⁶ and the 1976 Convention on the Protection of the Rhine Against Chemical Pollution.⁹⁷

The conventions attempt to reach a compromise between polluting uses upstream and consumptive uses downstream and as such do not deal with actual physical division of the

⁹³ See A. Schwabach, "The Sandoz Spill: The Failure of International Law to Protect the Rhine From Pollution", (1989) 16 Ecology Law Quarterly 443 at 459.

⁹⁴ Pollution is not a new problem for the Rhine, as Samuel Taylor Coleridge wrote in 1834:

In Köhln, a town of monks and bones,
 And pavements fang'd with murderous stones
 And rags, and hags, and hideous wenches,
 I counted two and seventy stenches,
 All well defined, and several stinks!
 Ye Nymphs that reign ower sewers and sinks,
 The river Rhine, it is well known,
 Doth wash your city of Cologne;
 But tell me Nymphs, what power divine
 Shall henceforth wash the river Rhine?

Quoted in Schwabach, *supra*, note 93.

⁹⁵ 1963 Agreement Concerning the International Commission for the Protection of the Rhine Against Pollution, Berne, April 29, 1963 994 U.N.T.S. [hereafter "the Berne Convention".] I shall not examine this convention in detail but, shall just touch upon it. It is included in this section purely because it was the precursor to the two 1976 conventions, without which it is unlikely that they would have been entered into.

⁹⁶ Bonn, December 3, 1976. Hereinafter "the Chlorides Convention". Unofficial translation contained in (1977) 16 I.L.M. 265.

⁹⁷ Bonn, December 3, 1976. Hereinafter "the Chemical Convention". Unofficial translation contained in (1977) 16 I.L.M. 242.

waters.⁹⁸

The most dramatic example of these conflicting uses of the Rhine is probably that between its use as a sewer for the chemical industry and the use of its water as raw material for the production of drinking water. Although the flow of the Rhine amounts to only 0.2 percent of all rivers in the western world, approximately 20 percent of all chemical companies in the western world are located in its drainage area. Many of these companies discharge their waste water directly into the Rhine. Downstream from most of these discharges, 8.1 million people in Germany and the Netherlands depend on the same waters of the Rhine for their drinking water.⁹⁹

The Berne Convention

The Berne Convention has been described as purely institutional, placing no obligations on the parties.¹⁰⁰ It institutionalised the International Rhine Commission and stated its terms of reference,¹⁰¹ but did not give the Commission any real powers either of enforcement, or

⁹⁸ The various uses of the Rhine are listed in Article 1(2) of the Chemical Convention:

The measures referred to in paragraph 1 above shall be adopted taking into account, within reason, that the waters of the Rhine are used for the following purposes:

- a. Production of drinking water for human consumption,
- b. Consumption by domestic and wild animals,
- c. Conservation and development of natural species, both fauna and flora, and conservation of the self-purification property of water,
- d. Fishing,
- e. Recreation, taking into account health and aesthetic requirements,
- f. Direct or indirect supply of fresh water for agricultural lands,
- g. Production of water for industrial use and the need to preserve an acceptable quality of sea water.

⁹⁹ M.T. Kamminga, "Who Can Clean up the Rhine: The European Community or the International Rhine Commission?" in Zacklin *et al*, eds "The Legal Regime of International Rivers and Lakes", (Boston: Martinus Nijhof Publishers) 1981 at 371. (Footnotes omitted.) On the conflicts between uses see also at 372:

The annual damage to crops in the Netherlands from chlorides alone may amount to tens of millions of dollars. The additional costs of making polluted Rhine water suitable for human consumption are probably several times as high. But most of the damage is of course impossible to calculate. What is the price of the disappearance of salmon, a once abundant species, from the Rhine? What price should be paid for the fact that seals in certain parts of the North-Sea are now threatened with extinction because the Rhine is contaminated with PCBs ...?

¹⁰⁰ A. Kiss, "The Protection of the Rhine Against Pollution", (1985) 25 *Natural Resources Journal* 613 at 621.

¹⁰¹ *Ibid* and Kamminga, *supra* note 99 at 373.

even to draw up regulations concerning pollution of the river. Instead the Commission was instructed to research the problems and to recommend guidelines to the parties to the Berne Convention and given only a limited budget with which to do so. That being the scope of the Convention it will not be discussed further.

The Chemical Convention

The preamble to the Chemical Convention provides: "Aware of the dangers likely to result from certain uses of the waters of the Rhine, Desiring to improve the quality of the waters of the Rhine in view of those uses, Considering that the Rhine serves other purposes, particularly navigation and as a receptor for liquid wastes".¹⁰² This suggests that the parties wished to establish a system to balance out all of these factors and uses and so to establish a regime to balance out their various interests. If so the result should be a regime reflecting the community interest and limiting individual sovereignty. The Chemical Convention then goes on to enumerate general aims on the elimination of and reduction in pollution by certain chemicals to be defined in two separate lists.¹⁰³ It does not, however, contain any details on the manner in which the aims are to be achieved. As such it merely establishes a framework for further action and has no real effect on state sovereignty over the water. Had it been more specific with regard to the method(s) of achieving the aims the Chemical Convention's effects

¹⁰² See also Article 1(2), *supra*, note 98.

¹⁰³ Chemical Convention Article 1(1):

In order to improve the quality of the Rhine waters, the Contracting Parties will take, in accordance with the following provisions, appropriate measures to:

- a. Eliminate pollution from the surface waters of the Rhine basin by dangerous substances included in the families and groups of substances shown in Annex I They propose to achieve gradually the elimination of discharges of those substances, taking into account the results of studies made by experts concerning each one, as well as the technical means available.
- b. Reduce the pollution of the Rhine waters by dangerous substances included in the families and groups of substances shown in Annex II....

on sovereignty would have been quite marked. Detailing the measures to be taken and the quantities *et cetera* of chemicals allowed in the water would severely curtail state discretion and hence individual sovereignty. As it is the convention does none of this, nor does it provide any support for either the "equitable utilisation" or the "no appreciable harm" principle.

In contrast the list of uses to be considered when implementing the Chemical Convention contained in Article 1(2)¹⁰⁴ could be construed as supporting existing uses, as preserving individual sovereignty¹⁰⁵ and as supporting the "no appreciable harm" principle in that it entrenches existing uses and suggests that they are not to be interfered with no matter what the benefits to the community as a whole. It could, however, also be construed as supporting "equitable utilisation" and the community interest in that as these are the existing uses the parties ought to consider the effects on them of implementation of the various measures along with the benefits of implementation when deciding whether or not to proceed. Simply to go ahead and implement the measures outlined could prove more harmful to the community as a whole if, for example, it prevents a vitally important use of the rivers waters. Thus the benefits of existing uses must be considered too. When read in conjunction with the preliminary paragraph of Article 1(2) the latter interpretation appears more fitting: "[t]he measures referred to in paragraph 1 above shall be adopted taking into account, within reason, that the waters of the Rhine are used for the following purposes...."¹⁰⁶ Thus, although these things have to be considered, they do not necessarily have to be the dominant factor. They can be overruled to

¹⁰⁴ *Supra* note 98.

¹⁰⁵ That is the "no appreciable harm" principle.

¹⁰⁶ Emphasis added.

facilitate a more equitable use of the resource.

The remainder of the Convention lays out guidelines and general measures to be taken by the parties in implementing the convention. It provides, for example, the manner in which limits for discharges are to be set but not the actual levels¹⁰⁷ and that these levels are to be enforced but, not how they are to be enforced.¹⁰⁸ Thus it lays out a framework for implementing a more equitable sharing of the resource and for ensuring the paramountcy of the community interest over individual state interests, but it does not go so far as to put these principles into practice. It is another "stepping stone" type of agreement like the Mekong regime's 1975 Declaration, paving the way for greater cooperation and sharing.

The Chlorides Convention

The Chlorides Convention, in contrast to the Chemical Convention, does contain specific measures and details, notably those on the chloride injection system to be established in France. This suggests the furtherance of community interests and the restriction of individual sovereignty in the areas covered by the convention and the embodiment of the "equitable

¹⁰⁷ Article 5 (1)

The International Commission shall propose the concentration limits referred to in Article 3 (2) and, if necessary, their application for discharges into drains. Those concentration-limits shall be set in accordance with the procedures referred to in Article 14. ...

(Article 3 simply provides that these limits are to be complied with, Article 14 that amendments may be made to the Annexes.)

¹⁰⁸ Article 3

1. Any discharge into the surface waters of the Rhine basin that may contain one of the Annex I substances shall be subject to prior authorization from the competent authority of the Government concerned.

2. for the discharge of those substances into the surface waters of the Rhine basin and, when necessary for purposes of implementing this Convention, for the discharge of those substances into the sewers, the authorization shall set emission standards that may not exceed the concentration limits set in accordance with Article 5.

3. ...

4. The authorization may be granted only for a limited period of time. It may be renewed taking into account possible changes in the concentration-limits referred to in Article 5.

utilisation" principle: France is to install and run the system to reduce contamination of the Rhine by chlorides produced as a byproduct of potassium mining in the Alsace region.¹⁰⁹ The costs of the system are to be borne by all the parties in accordance with the shares laid out in Article 7(2).¹¹⁰ The idea is to allow France to continue its mining works and at the same time to protect the downstream countries,¹¹¹ particularly the Netherlands, from the harmful effects of chloride pollution. The effects, particularly re sovereignty and sharing the resource are like those of the Columbia River Treaty. The areas covered by the convention are virtually removed from individual sovereignty and given over to shared, all other areas remain unaffected.

The provisions on division of the costs are reminiscent of the compensation provisions in the Columbia River Treaty too: compensation is to be paid to France for having to install works from which it will gain no benefit. It also ensures that the Netherlands does not have to bear the full costs of the harm that is being done to it¹¹² and reflects the Columbia River Treaty providing compensation for the use by one state of the other state's resources. Thus it allows what was once a resource used by only one state to be a resource used by several in return for payment. There is a difference in the two regimes in that in this case the provisions

¹⁰⁹ On the mining and chloride production see Kiss, *supra* note 100 at 629-'30.

¹¹⁰ Article 7(2)

The Contracting Parties mentioned below will contribute to the total cost of 132 million French francs by means of a lump sum payment, prorated as follows:

Federal Republic of Germany	30%
Kingdom of the Netherlands	34%
Swiss Confederation	6%

The remaining 30% to be paid by France.

¹¹¹ The Netherlands has traditionally used the Rhine waters to flush salt out of lands reclaimed from the sea. The increased salinity of the rhine waters made such use impossible, see Kiss, *supra* note 100 at 629.

¹¹² See Kamminga, *supra* note 99 on the costs to the Netherlands from damage to crops.

go somewhat further to account for the harm being done to the Netherlands. In so doing they seemingly follow the "equitable utilisation" principle¹¹³ and enable a greater sharing of the resource, but "[i]t is an ironic observation that, although an up-river state agreed to contribute to the cost of the operation, it is the victim state that pays the largest contribution."¹¹⁴ This can hardly be described as equitable, that the victim should bear the costs of something it has no control over while the perpetrator pays little for interfering with the victims rights. It is also "clearly incompatible with the principle that the polluter pays".¹¹⁵ (It has been said that the contribution by the Netherlands was only made "in order to bring the other states to an agreement to reduce the salinity.")¹¹⁶ But the regime is still indicative of "equitable utilisation" in that having balanced all the costs and benefits the states found that this was the most equitable outcome. It is also indicative of an attempt to pursue the community interest in that this was the solution giving most benefit to the community as a whole. Perhaps individual states could have benefited more by other arrangements, but this was agreed to be the most beneficial for the greatest number. The regime, as it demands certain action of the parties and thus limits their freedom to act, certainly could not be described as protecting individual sovereignty, nor does it reflect the principle of "no appreciable harm". Under the "no appreciable harm" principle the French potassium mining would be prohibited. At best it could

¹¹³ Germany and Switzerland are both included as partly contributing to the problem: "[p]articipation in the expenses by Switzerland and certainly Germany was fair as both states contributed also to the salinity of the Rhine." J.G. Lammers, "New International Legal Developments Concerning the Pollution of the Rhine", (1980) 27 *Netherlands International Law Review* 171 [hereinafter "New International Developments".] Germany also gained some benefit from the installation of the system.

¹¹⁴ Kiss, *supra* note 100 at 632.

¹¹⁵ New International Developments, *supra* note 113 at 173.

¹¹⁶ *Ibid* continuing the above quote at 173.

continue if France installed a system such as the injection system, but the Netherlands would not be obliged to contribute anything towards the costs of the system as it is under the present regime.

In conclusion the Chloride Convention seems to reflect the community interest principle to a greater extent than was found under the Chemical Convention.

What then is the effect of the regime as a whole? It seems to reflect the "equitable utilisation" principle and the idea of community interest. For example, in 1986 a fire at a warehouse in Switzerland caused chemicals to spill into the Rhine¹¹⁷ causing considerable short term damage downstream.¹¹⁸ It was clear that Switzerland had breached its obligations under the Chemical Convention in agreeing to the siting of the warehouse¹¹⁹ yet the downstream States did not claim any damages from Switzerland. Schwabach ascribes this to the following factors:

- political opposition¹²⁰
- dirty hands on the part of the downstream States¹²¹
- the willingness of the Sandoz Company to compensate those injured¹²²

That is, so long as they received some measure of compensation, the downstream parties were

¹¹⁷ For details of the fire see Schwabach, *supra* note 93 at 444-453.

¹¹⁸ In many areas domestic drinking water had to be trucked in and animals had to be moved from grazing near the Rhine.

¹¹⁹ See Schwabach, *supra*, note 93 at 468.

¹²⁰ From industry.

¹²¹ They too cause pollution.

¹²² Schwabach, *supra*, note 93 at 469.

willing to bear some loss as a result of the accident in return for being able to continue their own polluting industries. The result - a use which according to the factors outlined in the Helsinki Rules is equitable is allowed to continue and the community as a whole benefits.

Overall the regime is like the Columbia River Treaty, in that it allows the community interest to override the individual interests of sovereign states but its scope is clearly restricted to a very narrow field. Moreover, part of the system is merely a framework for further action. While this does represent a regression from the position under the Columbia river regime, it should be recalled that there are more parties involved under this regime, and the more parties there are the harder it is to reach agreement. It should also be noted that the scope of the Chemical Convention is potentially greater than the scope of the Columbia River regime, therefore, it represents more of a threat to individual sovereignty.

The Plata Basin Regime

The last regime I will discuss covers the Plata Basin which extends through Argentina, Bolivia, Brazil, Paraguay and Uruguay.¹²³ These five states have had turbulent relations for the last five hundred years,¹²⁴ but have also recognised the potentially enormous benefits of development of the basin for quite some time.¹²⁵ One can only assume that they were aware

¹²³ It should be noted that I have been unable to locate the texts of all the documents discussed here and so have had to rely in large part on the work of others.

¹²⁴ See J.O. Trevin & J.C. Day, "Risk Perception in International River Basin Management the Plata Basin Example" (1990) 30 *Natural Resources Journal* 87 [hereinafter "Risk Perception".]

¹²⁵ *Ibid.* The waters of the basin are used primarily for the following purposes, listed in approximate order of importance:

1. Hydroelectric production,
2. Navigation,
3. Domestic, municipal and industrial consumption,
4. Irrigation,
5. Sewage disposal.

of the need for cooperation if development was to take place, but were prevented from doing anything prior to the late 1960s by their traditional animosity.¹²⁶ One would anticipate that this would result in either a very basic framework type regime paving the way for further cooperation, or in a regime which basically entrenches the parties positions, protecting individual sovereignty. Whether or not either of these scenarios is correct will be established by examining the founding documents of the regime. These are the 1967 Joint Declaration of Buenos Airies;¹²⁷ the 1968 Act of Santa Cruz;¹²⁸ and the 1969 Treaty of the River Plate Basin.¹²⁹

The 1967 Declaration

The 1967 Declaration formed the basis upon which negotiations to establish the regime were based. It stated its aims as being

to combine efforts for the harmonic and balanced development of the region; to carry out the joint and integral study of the Basin, aiming at the performance of a multilateral, bilateral and national works program; to assert the objective of integral basin development to which end hydroelectric studies tending to the power integration of the Basin shall be carried out; to create the CIC to centralize the information and direct it to the interested governments and coordinate joint action; and to create by each government national agencies for the Basin which, through CIC, shall exchange information relating to the above mentioned joint and integral study.¹³⁰

¹²⁶ There were some bilateral agreements on the use and development of portions of the basin and on navigation, but they did not cover to the whole basin.

¹²⁷ Buenos Airies, 24-27 February 1967. [Hereinafter "the 1967 Declaration".]

¹²⁸ Santa Cruz, 20 May 1968. [Hereinafter "the 1968 Act".]

¹²⁹ Brasilia, 23 April 1969, 875 U.N.T.S. 11. [Hereinafter "the 1969 Treaty".]

¹³⁰ Quoted in G.J. Cano, "Argentina, Brazil, and the Plata River Basin: A Summary Review of Their Legal Relationship" in A.E. Utton & L. Teclaff, eds., *Water In A Developing World The Management of A Critical Resource* (Boulder, Colorado: Westview Press, Inc.) 1978 127.

This looks like the 1967 Declaration was to be a stepping stone to further agreement. As such it outlined the principles to be applied and its terms suggest that the regime is to be based on the "equitable utilisation" principle, that it is intended to treat the resources as shared and that the effects on individual sovereignty will be quite marked - see, for example, the use of the phrases "harmonic and balanced development" and "integral basin development", both suggesting "equitable utilisation" and shared resources. This looks like the beginning of the framework suggested above whether or not it is can only be established by looking at the other treaties in the regime.

The 1968 Act

The 1968 Act builds upon the foundations laid by the 1967 Declaration by providing for initial studies to be carried out and adopting a priority listing for them¹³¹ geared towards maximum exploitation and infrastructural progress. Such aims are obviously designed to benefit the community as a whole and not individual states. They are also obviously based more on the "equitable utilisation" principle than on "no appreciable harm". Were the regime based on the latter it would give opt out provisions or entrench existing rights to protect state sovereignty and individual interests.

Clearly the regime is also designed to have a marked effect on individual sovereignty - states are no longer able to act unilaterally nor to prevent projects which interfere with their sovereignty. It should be noted, however, that this is simply a system for researching into the

¹³¹ The order of priority established was as follows:

- "a) those which secure the maximum exploitation of the water resource;
- b) infrastructural projects aiming at the coordination and integration of such infrastructure;
- c) those which prevent alterations which may affect in a duly verified way the maximum exploitation of rivers."

Ibid, at 139.

problems and deciding which projects should be allowed to proceed. It does not provide for actual projects to be initiated. So while it builds upon the 1967 Declaration it still provides more than a skeletal framework for further action.

The 1969 Treaty

The 1969 Treaty was signed in order to "reinforce the River Plate Basin system"¹³² as such it reiterates much of what has been said before. Indeed the preamble echoes the wording and priorities of the 1967 Declaration when it says: "PERSUADED that joint action will permit the harmonious and equitable development, as well as the best utilisation, of the great natural resources of the region". It also notes that joint action will insure the preservation of the resources "for future generations through a rational utilization of [them]". By promoting "rational utilisation" it suggests that it aims to promote a community interest and joint ownership of the resources. No doubt individual sovereignty and unilateral development could lead to rational use, but it would not be guaranteed to the extent that it is under a community interest based regime. The fact that it has been emphasised suggests that the parties want to make a concerted effort to ensure that that is the outcome.

Article I then sets out the objectives of the parties in entering into the treaty emphasising the "harmonious development" of the river basin.¹³³ It also lists projects which are to be

¹³² Preamble to the 1969 Treaty.

¹³³ 1969 Treaty Article I:

The Contracting Parties agree to combine their efforts for the purpose of promoting the harmonious development and physical integration of the River Plate Basin, and of its areas of influence which are immediate and identifiable.

Sole Paragraph. To this end, they shall promote, within the scope of the Basin, the identification of areas of common interest and the undertaking of surveys, programs and works, as well as the drafting of operating agreements and legal instruments they deem necessary, and which shall tend toward:

given priority in the basin's development,¹³⁴ favouring those which will benefit the community interest¹³⁵ and those which are reasonable and equitable.¹³⁶ At all times Article I refers to cooperation and coordination between parties, prohibiting parties from taking unilateral action, and transferring part of that sovereignty to the community as a distinct entity, but it should be noted that Article I simply contains the parties' agreement to promote these ends. It does not prescribe how they are to reach them. It is, once again, providing only the framework for further agreement. Article II provides a little more structure. It provides for the annual meeting of Foreign Ministers at which they are to draft basic directives, review results and adopt any measures felt necessary.¹³⁷ Of course it is always possible that nothing will be

-
- a) Advancement and assistance in navigation matters;
 - b) Reasonable utilization of water resources, particularly through regulation of water courses and their multiple and equitable uses;
 - c) Conservation and development of animal and vegetable life;
 - d) Perfection of highway, rail, air, electrical and telecommunication interconnections;
 - e) Regional complementation through the promotion and installation of industries of interest to the Basin development;
 - f) Economic complementation in frontier areas;
 - g) Reciprocal cooperation in matters of education, health and combatting of disease;
 - h) Promotion of other projects of common interest, particularly those related to inventory, assessment and utilisation of the areas natural resources; and
 - i) Total familiarity with the River Plate Basin.

¹³⁴ *Ibid.*

¹³⁵ Article 1 para (h).

¹³⁶ Article I paragraph (b).

¹³⁷ Article II:

The Ministers for Foreign Affairs of the countries of the River Plate Basin shall meet once a year, on a date to be suggested by the Inter-Governmental Coordinating Committee, in order to lay down basic joint policy guidelines for the attainment of the objectives established in this Treaty; to assess and evaluate the results obtained; to hold consultations on the activities of their respective Governments relating to the multinational integrated development of the Basin; to guide the work of the Intergovernmental Co-ordinating Committee and, in general, to adopt such provisions as are necessary to ensure the implementation of this Treaty through the specific measures called for herein.

agreed to, but by laying down how often the Foreign Ministers are to meet and by detailing the matters to be dealt with the regime is made more structured and the chances of individual interests being pursued at all costs becomes less likely. Unfortunately Article II also provides that any decisions made by this body must be unanimous.¹³⁸ While this ensures that none of the parties can be out voted by the others and may lead to more cooperation instead of coercion, the down side is that it also allows one State to veto any project it considers harmful to its interests,¹³⁹ no matter how beneficial it may be to the community as a whole. (The same voting rules apply to decisions of the Inter-Governmental Coordinating Committee under Article 11 of the Statute establishing it.)¹⁴⁰ Thus while promoting the community interest over individual interests the treaty also allows individual sovereignty to be protected. Again providing a kind of stepping stone although this time the regime could go either way depending on how that one document is interpreted. Another positive sign is to be found in the fact that the parties have not simply left matters at the Ministers making decisions, they have also provided a body to implement the decisions. Article III provides that the Inter-Governmental Coordinating Committee is to compliment the work of the meeting of Foreign Ministers and

...

¹³⁸ Article II paragraph 3.: "Any decision adopted at meetings convened in conformity with this Article, shall always require the unanimous vote of the five nations."

¹³⁹ As noted, *supra* pages 65 and 66 such provisions are closer to the "no appreciable harm" principle than to the "equitable utilisation" principle but, go further than the "no appreciable harm" principle in protecting a State's interests.

¹⁴⁰ Statute of the Inter-Governmental Coordinating Committee 1968, Santa Cruz, 20 May 1968.

to ensure that their decisions are carried out.¹⁴¹ This should ensure that the parties do not later renege on their promises due to pressures at home, that is they can not argue economic necessity as a reason for backing out of agreed projects. Article V, however, provides a balance to this, it provides: "[c]oncerted action among the Contracting Parties must be undertaken without prejudice to those projects and enterprises they have decided to execute within their respective territories, with due respect to international law, and in accord with acceptable practices between nations who are neighbours and friends." This allows community projects to be subordinated to individual projects and community interests to individual interests. Trevin and Day put this another way, they assert that "[t]his article introduced a nonbinding provision into the treaty... [which] basically means that non-compliance by a party would not be adequate grounds for claiming reparation or judicial remedies."¹⁴² That is while the parties have agreed to promote the community interest they have provided themselves with a let out if needed. Trevin and Day then go onto say,

It is quite a different matter, however, to assert that the parties are free to act as if the treaty does not exist, or to deny the value of an agreement as a means of achieving cooperation. ... [T]he agreement enables each signatory nation to establish what is expected that it and others will do, and provides the normative foundations which support these expectations.¹⁴³ (Footnotes omitted.)

Conclusion

¹⁴¹ Article III:

For the purposes of the present Treaty, the Inter-Governmental Coordinating Committee is recognised to be the permanent River Basin organ, entrusted with promoting, coordinating and following the progress of the multinational activities undertaken toward the objective of the integrated development of the River Plate Basin; with obtaining technical and financial assistance with support of the international organizations it deems desirable; and with the execution of the decisions adopted by the Foreign Ministers. ...

¹⁴² Risk Perception, *supra* note 123 at 99-100.

¹⁴³ *Ibid.*

It would appear then that the regime as a whole is merely a stepping stone to further agreement, providing the roots from which a greater community interest can grow. One interesting thing about the regime is that despite the fact that it was, like the other regimes, created in a piece meal fashion, it does not show the sort of development in cooperation and community interest found in, for example, the Mekong regime. This may be in part due to the time scale involved, the Plata Basin regime was developed in three years, the Mekong in twenty-three. It may also reflect the fact that the parties were only beginning to cooperate in determining the projects needed whereas when, for example, the Columbia River regime was being negotiated scientific investigation and analysis of the area's requirements had already been carried out. Or it may be a reflection of the traditional hostilities between the parties, perhaps these have not completely died. Regardless of these factors the regime is still very important in that it shows the willingness of states which were traditionally enemies to agree to cooperate to enable development to take place.

Conclusion and Summary

The results of the above analysis would seem to be that the early agreements, for example, those on the Nile, reflect the idea of the immutability of state sovereignty, entrenching existing rights. From there the states moved to treaties echoing the first awakenings of a community interest. In some this was demonstrated by the fact that the regime established was just a framework, an agreement to agree, for example, the Berne Convention. In others, such as the Plata basin regime, it was reflected in let out provisions. Even here there are differences in the level of cooperation agreed to: for example the states party to the Berne Convention instructed a commission to research the problems to be tackled and to recommend guidelines

for action.¹⁴⁴ The parties to the Plata Basin regime only agreed to investigate the problems, they did not actually set up a mechanism for investigating them.¹⁴⁵ The difference probably lies in the fact that the states party to the Berne convention already had a long history of cooperation, but those party to the Plata basin regime had only a history of animosity. Thus, the former already shared a basic feeling of community while the latter were simply beginning the process of developing a community spirit.

The treaties in this section were generally entered into in the 1950s and '60s. In the 1970s we saw more agreement on details. For example, the Chlorides Convention on the Rhine, which followed the Berne Convention, provides for the establishment of a chloride injection system, detailing the manner in which it is to be run and the share of the costs each party has to bear.¹⁴⁶ There was also more willingness to cooperate to fulfil the community interest. This can again be seen in the Chlorides Convention and can also be seen in the developments in the Mekong regime from 1957 to 1978, for example, in 1978 the parties to the Mekong regime agreed to delegate the authority to approve plans for development to a committee, under the 1957 statute the committee could only suggest plans. Actual approval of them was left to the individual governments.¹⁴⁷

These developments may have been due in part to more information being available to the parties on the harm that unilateral development could do and on the benefits of community

¹⁴⁴ See above page 89-90.

¹⁴⁵ See above page 97 and 98.

¹⁴⁶ See above page 93.

¹⁴⁷ See pages 75 to 81.

development (it was the availability of such information that enabled the Columbia River regime to be so detailed) it may simply be that with the passage of time states saw the benefits of cooperation more clearly. Whatever the reasoning it is clear that what we have at the end of this chapter is a development on the position at the end of Chapter 2 where all that the community interest demanded was that states consult and negotiate to ensure that their projects did not harm others. Individual sovereignty over resources remained virtually untouched at that stage as each retained the authority to decide which projects should or should not proceed. Here sovereignty has to some extent been transferred to the community as a whole, generally by delegating the power to make decisions to a joint committee or commission, and individual freedom of action has been curtailed in that the states party to the various regimes have agreed that all development will be in accordance with the rules of the regime and will only be such as is agreed to by the other parties. We are no longer dealing simply with compulsory negotiations and prevention of harm to others; sovereignty itself is now shared, all be it the scope of that sharing is limited to the specific matters detailed under each regime and all be it some of the regimes, for example, the Plata basin regime, provide loop holes for states not yet completely willing to give up even a small part of their sovereignty. (The Plata basin regime's provisions on decision making by the parties' Foreign Ministers ostensibly ensure that projects can not be stalled simply by inaction, but, as they provide that all decisions must be unanimous, they leave room for parties to prevent the adoption of projects *et cetera*.)¹⁴⁸

This community interest is reflected in the dominant rule guiding the treaties: equitable utilisation. All of the regimes except for the Nile regime are based on the idea of balancing the

¹⁴⁸ See above pages 100 and 101.

costs and benefits of competing uses to decide which is the least harmful only the Nile allows a party's existing interests to dominate the regime and it must be remembered that the Nile regime was first established in 1929, even before most of the case law discussed in Chapter 2 had arisen. This is a development on the case law in that although the case law placed an obligation on the parties to negotiate it did not give guidelines for the negotiations, now the principle of equitable utilisation appears to underlie all negotiations on use and development.

Part of the reason for the above developments may be that as all the relevant parties were involved in negotiating the regimes and are involved in their administration they had and have the opportunity to ensure that neither the regimes themselves nor projects permitted under them would, or will harm their interests: some of the regimes¹⁴⁹ also give the parties a right to veto any projects they think will harm their interests. Moreover, the regimes only deal with a very small part of each state's sovereignty and are not capable of expansion without further negotiation. This is quite a different position from that found in the case law where the rules decided in one case could end up being applied to completely different circumstances with very different results and to that found where states are dealing with "more general" resources such as the ozone. (This latter type of agreement will be discussed in the next chapter.) The effect is that it enables states to give up more of their individual sovereignty in return for a share of the community interest because they have less to fear from that exchange and can gauge the benefits more easily. Most importantly from the point of view of states the parameters of the exchange are clearly defined and incapable of change without further negotiation.

Lastly one should note that without these agreements it is unlikely that the resources

¹⁴⁹ For example the Mekong.

would be developed to their full potential¹⁵⁰ as no one state would have the requisite combination of resources, technology and demand for the product to make development both possible and profitable. Compare that to the case law which could if anything be regarded as preventing development as all the rules contained in it are negative, for example providing that developments which may harm others are not to proceed.¹⁵¹ It does not seem terribly surprising that the states concerned have been more willing to restrict their individual sovereignty in the treaties discussed in this chapter than they are obliged to under the principles found in the case law, as they are limiting it to get some benefit they could not otherwise get. Thus the idea of gaining some benefit seems to have acted as a catalyst for agreement as all could see the benefits of joint development.¹⁵² It also seems to have facilitated the development of the various community interests discussed above.

¹⁵⁰ See, for example, the Columbia River Regime which was entered into purely to allow one party to use a resource it needed, but which lay in the other's territory. A resource, moreover, which might not otherwise have been developed.

¹⁵¹ See, for example, the discussion on Georgia v. Tennessee in Chapter 2 pages 43 and 44.

¹⁵² See, in particular pages 96 and 97 above where the attitudes of the Plata basin states are discussed.

Chapter 4 International Instruments Dealing With Environmental Law

Introduction

Chapters 2 and 3 traced the gradual emergence of the concept of the community interest in international law. In Chapter 2 its emergence led only to the duty to prevent harm to others and to consult and negotiate with those likely to be affected to prevent or minimise any harm that might occur. In Chapter 3 the development of the concept to the stage where states recognized the necessity of employing it to ensure the full potential for development of certain resources was outlined. The area in which it applied was, however, still very limited, covering only certain narrowly defined resources and uses and being incapable of further expansion without further negotiations. In this chapter we shall see a further growth in both the scope and content of the concept. This growth, however, has led to a kind of splitting of the concept. In Chapter 3 the rules stemming from the community interest concept were accepted and applied quite uniformly by all states no matter what their geographical location, or level of economic development. In this chapter it will be shown that some states are not as willing as others to accept the limitations to their individual sovereignty that come with the community interest (One could probably have anticipated such a splitting given that we are now dealing with a much broader area where the circumstances to which the rules will be applied and the outcome of application are less certain and/or predictable.) This has led to some interesting phrasing in some instruments and some self-contradiction, some of which shall be discussed below.¹ As

¹ It should be noted that the various instruments discussed in this chapter have been chosen almost completely at random. The only ones I made a conscious decision to include were the Stockholm Declaration of the United Nations Conference on the Human Environment, 1972 U.N. Doc.A/CONF.48/14 (1972) [hereinafter "the Stockholm Declaration"] and the Rio Declaration on the Environment and Development (1992) 31 I.L.M. 874 [hereinafter "the Rio Declaration"]. The rest were picked randomly in the hope that they would provide a good cross section of the types of instruments being entered into.

will be apparent from the discussion, willingness to accept the community interest concept over individual sovereignty tends to be tied to the developmental stage each state has reached: the more developed a state is the more willing it is likely to be to accept community interests over individual. Thus the developed countries² tend to be more willing to accept limitation of individual sovereignty to further community interests³ than the developing countries are.⁴ The end result is that the developed countries seem to be the ones leading the way in environmental matters. Naturally this characterisation of states is not absolute and has at times been reversed, with the South advocating greater limits on state sovereignty and the North pressing for freedom of action.⁵ This chapter will show the extent to which the priorities of the parties have influenced the law in this area. More importantly, it will show the extent to which the parties are now willing to limit their sovereignty to protect the environment.

I shall be dealing with international instruments concerning environmental law in the

² Hereinafter referred to as the North.

³ This is probably not due so much to the altruistic wishes of the governments concerned but to the demands of their people who, since the late 1960s early 1970s, have become more and more concerned with the harms being done to the environment as a result of heavy industrialisation.

⁴ Hereinafter referred to as the South. This is because

"Sovereignty has historically included freedom of action with regard to the natural resources found within a nation's boundaries. This control over resources is considered to be a basic constituent of the right to self-determination. It is also an especially sensitive issue to developing countries, particularly those formerly under colonial rule. Because biological diversity is dependent upon natural resources that are largely concentrated in developing countries, the issue of sovereignty figures prominently in the ongoing intergovernmental negotiations regarding conservation."

S.H. Bragdon, "National Sovereignty and Global Environmental Responsibility: Can the Tension be Reconciled for the Conservation of Biological Diversity?" (1992) 33 Harvard International Law Journal 381 at 382.

⁵ See for example, the negotiations concerning UNCLOS's deep sea bed mining provisions, discussed below.

period from 1972 to 1992,⁶ the last period in my time scale and a period described as the environmental era. My aim is to show that internationalisation has spread even though some states have argued against it; that states are more likely to agree to inclusion in declarations than in binding conventions and in conventions dealing with resources regarded as the common heritage of mankind than in those dealing with resources generally perceived as owned by individual states and that more stringent requirements for the protection of the environment are being agreed to now than were agreed to before.⁷ As will be apparent the developments that have taken place do not go as far as my proposed scheme of internationalisation, but they do go further than the developments of the last two chapters.

One point of interest that distinguishes this chapter from Chapters 2 and 3 is that although some of the treaties discussed, for example the Vienna Convention⁸ deal with matters generally perceived as the preserve of individual state sovereignty, the problems leading to the development of the conventions are caused by a great many, if not all states. There is, therefore, less pressure on any individual state to take action and by the same token the benefits of taking individual action are lessened. This is because each bears less responsibility for the harm and because each has proportionately less to gain from taking action. For example, if a state unilaterally enacts legislation to protect the environment which also has the effect of

⁶ The one convention from out with this period is the 1933 Convention Relative to the Preservation of Fauna and Flora in their Natural State, L.N.T.S. 172 No.3995 at 241. Hereafter "the 1933 Convention".

⁷ See for example the 1971 Convention on Wetlands of International Importance Especially as Waterfowl Habitat 996 U.N.T.S. 245 [hereinafter "the Wetlands Convention"] and the 1989 Montreal Protocol, Can.T.S. 1989 No.42 [hereinafter "the Montreal Protocol".]

⁸ Vienna Convention for the Protection of the Ozone Layer, 22 March 1985, Can.T.S. 1988 No.23, U.K.T.S. 1 (1990) [hereinafter "the Vienna Convention".]

making a particular production system more expensive in that country than in others, it lowers the competitive ability of that particular domestic industry in the global market place and acts as a disincentive for such legislation.

The effects of this diluting of interests could be positive or negative, while it could mean that states are less likely to take action it could also mean that they are more likely to agree to community interest based schemes limiting their sovereignty,⁹ with the result that they treat resources traditionally regarded as national resources as shared. A prime example of this is the Vienna Convention discussed below.

To facilitate the drawing out of the points noted above I shall divide the various instruments into declaratory and non declaratory instruments and then further subdivide the latter group into those dealing with resources owned separably by states and those dealing with common resources. Within these divisions I shall deal with the treaties in chronological order.

Declaratory Instruments

The Stockholm Declaration¹⁰

The signing of the Stockholm Declaration heralded the dawn of the environmental era. It laid the foundations of the law and set the initial parameters to guide the drafters of future instruments making it perhaps the most important instrument in international environmental law. The declaration's best known provision is Principle 21 which provides that:

⁹ See, for example, the Vienna Convention, *supra*, note 8.

¹⁰ When considering this document one should bear in mind that it is only a Declaration and as such it is not binding in international law and does not have the force of law. It could, however, be seen as placing some sort of moral obligation on the States that signed it to follow the principles laid out in it. See Bragdon, *supra*, note 4 at 385 as to the non-binding nature of Declarations.

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, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

It thus links the concept of territorial sovereignty and the principles of state responsibility and community interest which could lead to it being described as a Janus type principle.¹¹ The first half embodying the concept of unfettered state sovereignty in relation to natural resources; the second half providing the fetters and restating the principles contained in the Trail Smelter and Corfu Channel cases that states should not use, or allow their territory to be used in such a way as to cause harm to other states.¹² It is perhaps as well that principle 21 is the most well known of the Stockholm Declaration's provisions as it epitomises the mood of the whole instrument, encapsulating as it does the conflict between absolute territorial sovereignty and state responsibility. For example Principle 9 promotes development as a means of protecting the environment,¹³ while Principles 3 and 5 place limits on the rights of states to develop by limiting their rights to exploit their resources. They provide that resources should not be exhausted, that where resources are renewable they must be used in such a way as to ensure

¹¹ See N.A. Robinson, "A Legal Perspective on Sustainable Development" in J.O. Saunders *The Legal Challenge of Sustainable Development* (Calgary: Canadian Institute of Resource Law) 1990 15

¹² See Chapter 2 above.

¹³ Principle 9:

Environmental deficiencies generated by the conditions of underdevelopment and natural disasters pose grave problems and can best be remedied by accelerated development through the transfer of substantial quantities of financial and technological assistance as a supplement to the domestic effort of the developing countries and such timely assistance as may be required.

that they are not diminished and, where possible, should be improved upon.¹⁴ Principle 2 also provides that the earth's natural resources should be safeguarded for the benefit of present and future generations.¹⁵

Principles 2, 3 and 5 not only augur against development but also limit individual sovereignty by prescribing the manner in which states are to deal with their resources. The limits placed on individual sovereignty by the Stockholm Declaration are not, however, terribly onerous. Principle 6, for example, provides that the release of toxic substances into the environment must be stopped but it does not set any time limits for doing so.¹⁶ This allows states to say that they will comply eventually, but that compliance is not possible or expedient at this point in time as they do not have the requisite technology, or the state of their economy does not allow them to take the necessary steps. Similarly Principle 21 neglects to detail the actions to be taken by states to prevent environmental damage leaving room for states to claim to be doing all they can when in fact more could be done.

Again, Principle 5,¹⁷ while providing that "non renewable resources of the earth must

¹⁴ Principle 3: "The capacity of the earth to produce vital renewable resources must be maintained and, wherever practicable, restored or improved."

Principle 5: "The non-renewable resources of the earth must be employed in such a way as to guard against the danger of their future exhaustion and to ensure that benefits from such employment are shared by all mankind."

¹⁵ Principle 2: "The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate."

¹⁶ Principle 6:

The discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon ecosystems. The just struggle of the problems of all countries against pollution should be supported.

¹⁷ *Supra*, note 15.

be employed in such a way as to guard against the danger of their future exhaustion and to ensure that" their benefits are shared by all it does not contain any details on how this should be done. Without details it is very difficult to actually oblige states to take action. They are always left with the opportunity to argue that it is not possible for them to do anything at this point in time and are likely to be dissuaded from taking unilateral action to meet their obligations because of possible negative impacts on their industry. This is of course added to by the fact that the declaration is no more than morally binding on the parties.

One might wonder why the declaration contains so many loop holes. The reason is that when it was originally mooted for consideration it was viewed by the South as another attempt by the North to impose its will upon it,¹⁸ even though it could not have any binding effect. Environmental protection was also thought by the South to be rather unimportant, the real issue as far as it was concerned being economic development. Thus for the North to persuade the South to become involved it had to agree to include such provisions as the first half of Principle 21,¹⁹ Principles 1,²⁰ 8²¹ and 9.²² Despite the inclusion of these principles some of the

¹⁸ See A.K. Biswas "Environmental Law: A Perspective From Developing Countries" in the *1984 Hague Academy of International Law Workshop* 389 at 390.

¹⁹ This part of the provision reiterates the provisions of the United Nations Resolution on Permanent Sovereignty Over Natural Resources of 1962 (U.N.G.A. Res.1803 (XVII),17 U.N.GOAR.Supp. (No.17) 15, U.N. Doc.A/5217 (1963)) which noted that "the creation and strengthening of the inalienable sovereignty of States over their natural resources reinforces their economic independence" and that independence was particularly important.

²⁰ Principle 1:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating *apartheid*, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.

²¹ Principle 8 "Economic and social development is essential for ensuring a favourable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life."

nations of the South were still somewhat concerned that the Stockholm Declaration limited individual sovereignty. This concern led to a second Resolution on Permanent Sovereignty Over Natural Resources being adopted in December of 1973,²³ "strongly [reaffirming] the inalienable rights of States to permanent sovereignty over all natural resources, on land within their international boundaries as well as those in the sea-bed and the subsoil thereof within their national jurisdiction and in the superjacent waters."

This resolution might appear to represent a major regression in international environmental law, but as a resolution of the General Assembly of the United Nations it does not have any binding effect. Its importance and effect are further limited by the fact that at the same time as it was being voted for conventions were being negotiated placing further limitations on state sovereignty in the interests of environmental protection.²⁴ Moreover, the resolution could not over rule the case law²⁵ and existing conventions²⁶ which already limited sovereignty. Nor did or could the resolution prevent States going on to negotiate other treaties limiting their sovereignty and enforcing the community interest. In effect, the resolution is part of a continual seesawing between the notion of individual sovereignty and the concepts of community interest and shared sovereignty.²⁷

²² *Supra*, note 14.

²³ U.N.G.A. Res.3171 (XXVIII); 28 U.N. GAOR.Supp. (No.30) 52, U.N. Doc. A/9400 (1973)

²⁴ For example, the 1973 Convention to Regulate International Trade in Endangered Species of Flora and Fauna U.K.T.S 101 (1976) 993 U.N.T.S. 243.

²⁵ See Chapter 2 above.

²⁶ For example, the Wetlands Convention *supra* note 7.

²⁷ On this see-sawing see Bragdon *supra* note 4 at 385 and 386.

Returning to the Stockholm Declaration, it can be seen as bridging the gap between the notions of complete sovereignty and community interest and shared sovereignty, paving the way for further agreements. In providing that resources should be protected for the benefit of present and future generations²⁸ it suggests a willingness on the part of states to accept some limitation of their sovereignty in the interests of the community as a whole and to accept that the use of their resources can affect others and in tackling and prescribing the principles to be applied in resource development it implies that there is shared sovereignty over them. It thus moves a little way towards the notion of internationalisation of resources, but its progress in this direction was brought up short by the need to restate the sanctity of state sovereignty to get the South to join in making the Declaration.

More Recent Declarations

The South's concern to preserve state sovereignty has not left us. It can be seen in the Amazon Declaration of 1989²⁹ paragraph 4.: "[w]e reaffirm the sovereign right of each country to manage freely its natural resources...." and in the Declaration of Brasilia 1989 para 2.³⁰ Both of these documents, however, go on to place some restrictions on the sovereignty of states: paragraph 4. of the Amazon Declaration further provides that each state has to exercise its sovereign right to manage natural resources "bearing in mind the need for

²⁸ Principles 2, 3 and 5, *supra* notes 15 and 16.

²⁹ Reprinted in M.R.Molitor, ed., *International Environmental Law Primary Materials* (Deventer, Boston: Kluwer Law and Taxation) 1991 88. [Hereinafter "the Amazon Declaration".]

³⁰ Declaration of Brasilia 1989 reprinted in Molitor at 92. [Hereinafter "the Declaration of Brasilia"] paragraph 2.:
"The Ministers endorse the principle that each State has the sovereign right to administer freely its natural resources."

promoting the economic and social development of its people and the adequate conservation of the environment"(emphasis added.) One should note the similarity to Principles 9 and 11 of the Stockholm Declaration and that this shows a concern for community interests over riding individual sovereignty.) Paragraph 2. of the Declaration of Brasilia also notes that each state's right to manage its resources does not "exclude the need for international cooperation at the subregional, regional and world levels; rather it reinforces it." While neither of these provisions represents a direct curtailment of sovereignty they do place at least a moral obligation on the parties to the Declaration to cooperate in the interests of the community as a whole. Thus, they limit individual freedom of action, or sovereignty and replace the restricted parts with shared sovereignty, or control by the community.

Paragraph 5 of the Amazon Declaration adds to this by recognizing the need to study bilateral and regional measures to protect the environment. This suggests that states no longer regard resources situated within their territory as their sole "property," but view them as shared by the whole community. Perhaps more importantly from an environmental point of view the Amazon Declaration demonstrates that the developing countries have now recognised the link between preservation of the environment and development: in paragraph 6 for example the parties:

stress that the protection and conservation of the environment in the region, one of the essential objectives of the Treaty for Amazonian Co-operation to which each of our nations is firmly committed, cannot be achieved without improvement of the distressing social and economic conditions that oppress our peoples and that are aggravated by an increasingly adverse international context. (Emphasis added.)

There is a similar linkage of the environment and development in the Declaration of Brasilia:

Improving economic and social conditions is the key to preventing the

defacement of the environment in our countries. In Latin America and the Caribbean, as in other parts of the Third World, underdevelopment and the deterioration of the environment are factors in a vicious circle that condemns millions of people to a quality of life beneath the norms of human dignity.³¹ (Emphasis added.)

This linkage is necessary if one is to ensure that the environment is safeguarded. Without it one can not ensure that development is sustainable because states and individuals are inclined to continue to view resources, the environment and development as distinct issues governed by separate rules. While they might express a willingness to protect the environment their practices and rules governing resource use and development might continue to be unsustainable. For present purposes the importance of this lies with the fact that it demonstrates a willingness on the part of the South to acknowledge the importance of environmental protection. It suggests that the South is no longer solely interested in preserving state sovereignty and pressing forward with development and that it will be willing to limit state sovereignty. One might wonder what effect this would have on more recent global agreements. Does it enable, for example, the Rio Declaration to be a great development on the Stockholm Declaration?

The Rio Declaration

One of the first principles suggests that the Rio Declaration is not a great improvement on the Stockholm Declaration - Principle 2 virtually restates Principle 21 of the Stockholm Declaration:

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 and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not

³¹ Declaration of Brasilia 1989 paragraph 3.

cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

With the exception of the insertion of the words "and development" between "environmental" and "policies" there is no difference between the two principles. So one might argue that in twenty years there has been no change, but before dismissing the Rio declaration one ought to consider Principle 7:

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

This reflects the concerns of the South with regard to responsibility for environmental damage and acknowledges the North's responsibility with regard to the promotion of sustainable development.³² It also provides an updated version of Principle 24 of the Stockholm Declaration which provides for co-operation so long as that co-operation does not impinge upon sovereignty.³³ The new version improves upon this by not containing any exclusions. Moreover, the use of the word "shall" in the phrase "States shall cooperate" places an

³² As the industrialised North caused and causes most harm to the global environment it is thought to bear most of the responsibility for righting its wrongs and promoting sustainable development. See generally Dr R.K.L. Panjabi in "The South and the Earth Summit: The Development/Environment Dichotomy" (1992) 11 Dickinson Journal of International Law 77 [hereinafter "The South and the Earth Summit".] and also the statement by H.E. Mr. Soeharto President of Republic of Indonesia, Report of the United Nations Conference on Environment and Development Vol.III A/CONF.151/26 Rev.1 (Vol.III) [hereinafter "UNCED III"] 127 at 130.

³³ Principle 24 of the Stockholm Declaration:

International matters concerning the protection and improvement of the environment should be handled in a co-operative spirit by all countries, big and small, on an equal footing. Co-operation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States.

obligation upon the signatories to fetter their discretion with regard to environmental matters, limiting individual sovereignty and effectively giving control over these policies to the community through shared sovereignty. It also implies that states are starting to view resources as common property in that it talks about state responsibility re the global environment and about the "international pursuit of sustainable development", implying that the environment is not separable into national components and extra jurisdictional areas but, is one entity in which all have an interest and over which all have joint control.³⁴ This is built upon by principle 11 which obliges states to enact "effective environmental legislation":

States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.

By placing an obligation of this type upon themselves states are restricting their individual sovereignty and transferring a portion of their legislative powers to the community. Freedom to legislate being one of the main components of sovereignty, this is quite an important development. Principle 11, of course, does not detail the legislation to be drafted, it leaves state discretion in regards to this in tact and so leaves itself open to the criticisms levelled earlier against the Stockholm Declaration: that it does not oblige states to actually take any action and so is rather weak.³⁵ It does, however, prescribe that parties must consider the effect of their legislation on others, obliging them to consider more than their own individual interests. In a

³⁴ This paves the way for a coordinated approach to be taken to protecting the environment. (As opposed to the standard method of protecting the environment under which States draw up guidelines to protect small segments of the environment, each segment being dealt with separately and each set of self-contained rules relating only to those segments they are aimed at and not tying in with other areas.)

³⁵ See above pages 111 and 112.

sense it can be seen as reflecting the principles drawn out in the case law discussed in Chapter 2 - that the community interest demands that states consider the effects of their actions or inactions on others. It does not, however, go as far as the case law went in obliging states to negotiate with each other to prevent any harm occurring.

Principle 15 limits state sovereignty further by describing the manner in which states are to protect the environment:

In order to protect the environment, the precautionary approach shall be widely applied by States to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

It thus gives a framework for action and a structure against which the efficacy of state action can be measured. It also represents quite an important development from the provisions of the Stockholm Declaration. Its effect then is more like that of the Chemical Convention in the Rhine Regime discussed in Chapter 3³⁶ than to that of the Stockholm Declaration.

Similar developments can also be seen in, for example, Principles 14 and 17. Principle 14 provides that states should endeavour to prevent the relocation and transfer of harmful activities and substances to other States³⁷ and Principle 17 encourages states to carry out environmental impact assessments where appropriate.³⁸ Both of these are fairly concrete obligations, noncompliance with which is fairly transparent. Again they provide a framework

³⁶ 1976 Convention on the Protection of the Rhine Against Pollution by Chlorides, unofficial translation contained in (1977) 16 I.L.M. 265.

³⁷ "States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health."

³⁸ "Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority."

for action, an outline of what is to be done, but like the provisions of the Chemical Convention they provide no details on how the ends are to be met and so do not actually oblige anyone to do anything.

The Rio Declaration also demonstrates a more holistic approach to the environment and development than the Stockholm Declaration, for example, Principle 4, provides that environmental protection is to be considered as part of the development process: "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it." The Stockholm Declaration's provision in relation to this refers only to nature conservation being taken into account in planning matters³⁹ and to the environment *per se* being considered only in relation to urban planning.⁴⁰ The major drawbacks of the Stockholm Declaration's provisions is that nature conservation is something that is generally carried out on a more piece meal basis, with specific provisions being enacted for specific (limited) areas and that the declaration tries to divide conservation of the environment up depending into different types of circumstances and different areas. Principle 4 on the other hand recognizes the oneness of the environment and the need to try to apply uniform measures to its protection.

Over all then the Rio Declaration contains a far greater acceptance of the need to limit individual sovereignty in the interests of the common good and seems closer to the notions of

³⁹ Principle 4 of the Stockholm Declaration:

"Man has a special responsibility to safeguard and wisely manage the heritage of wildlife and its habitat, which are now gravely imperilled by a combination of adverse factors. Nature conservation, including wildlife, must therefore receive importance in planning for economic development."

⁴⁰ Principle 15.

community interest, shared sovereignty and internationalisation than the Stockholm Declaration did or was. It does, however, only provide a framework for further action and does not bind states to take any specific action within any set time limits. Moreover, it is, like the Stockholm Declaration and all other declarations, non-binding. One would have thought that this would mean that the parties would have been more inclined to agree to provisions limiting their sovereignty than they would be in a binding convention, but against this is the fact that the scope of the Rio Declaration is very broad. The scope of binding conventions tends to be much narrower and as seen in Chapter 2, states are much more willing to agree to limit their sovereignty in narrowly defined areas than in broad ones. Which of these factors has weighed more heavily in the drafting of international conventions will become clear in the next section.

International Conventions

Conventions Dealing With Resources Owned Separably By States

a) The Convention Relative to the Preservation of Fauna and Flora in Their Natural State 1933⁴¹

The earliest environmental treaties were concerned mainly with the establishment of safe havens for wildlife and flora. They were generally drafted on the premise that all that was required was that individual states protect distinct areas within their territory to the best of their ability. So, for example, the 1933 Convention gives its aims as being "Desiring to institute a special regime for the preservation of flora and fauna"⁴² and notes that this

⁴¹ The 1933 Convention, *supra*, note 6.

⁴² Preamble to the 1933 Convention.

can best be achieved (i) by the constitution of national parks, strict natural reserves, and other reserves within which the hunting, killing or capturing of fauna, and the collection or destruction of flora shall be limited or prohibited, (ii) by the institution of regulations concerning the hunting, killing and capturing of fauna outside such areas, (iii) by the regulation of the traffic in trophies, and (iv) by the prohibition of certain methods of and weapons for the hunting, killing and capturing of fauna.⁴³

suggesting an international regime of individual reserves, each designed specifically to meet the needs of the local area and with no global plan in mind.⁴⁴ It then goes on to provide:

The Contracting Governments will explore forthwith the possibility of establishing in their territories national parks and strict natural reserves as defined in the preceding Article. In all cases where the establishment of such parks or reserves is possible, the necessary work shall be commenced within two years from the date of entry into force of the present convention.⁴⁵

This might seem to be quite a stringent requirement, placing a mandatory obligation on the parties to take action. Unfortunately all they are required to do is examine the feasibility of establishing parks and reserves and, where that "is possible", to begin work on them within two years. Two small words in the provision give the parties a great deal of leeway in deciding whether or not to establish parks or reserves. What is "possible" could be restricted by all manner of considerations: geographic, economic, social, technical, political. Thus the provisions suggest a framework convention, laying out the type of action to be taken, but not the actual manner in which the convention's policies are to be met. Compare it to for example, the Chlorides Convention in the Rhine regime which details how pollution from French mines

⁴³ Ibid.

⁴⁴ A global plan would be necessary if one was to ensure that all species of fauna and flora were to be protected as it might be necessary to have various reserves working together on projects to maintain viable populations of certain species.

⁴⁵ Article 3(1).

is to be mitigated.⁴⁶

Article 3 goes some way to plugging the gaps in the system by providing that if no parks or reserves are to be established immediately sites should be selected for development at the earliest opportunity.⁴⁷ It is, however, only a slight improvement as no time scale is provided, so parties can stall on establishing a reserve indefinitely. After all who can define "the earliest opportunity"? This defect is compounded by the fact that Article 3 (2) provides that only the authorities of the relevant territory have the right to decide whether or not circumstances permit the establishment of a park or reserve. No one else has any right to intervene. Thus individual sovereignty is preserved and the ideas of shared sovereignty over the "resources" or community interest in them would appear to be non starters.

Similarly, Article 4 obliges the parties to "give consideration" to controlling settlements on parks and reserves, establishing intermediate zones around parks and reserves and to choosing areas for parks and reserves that are sufficient to cover the entire areas covered by migratory fauna.⁴⁸ This might seem to bestow quite a lot of power on the convention to

⁴⁶ See Chapter 3 pages 92-96 above.

⁴⁷ Article 3(2): "If in any territory the establishment of a national park or strict natural reserve is found to be impractical at present, suitable areas shall be selected as early as possible in the development of the territory concerned, and the areas so selected shall be transformed into national parks or strict natural reserves so soon as, in the opinion of the authorities of the territory, circumstances will permit."

⁴⁸ Article 4: "The Contracting Governments will give consideration in respect of each of their territories to the following administrative arrangements:

1. The control of all white or native settlements in national parks with a view to ensuring that as little disturbance as possible is occasioned to the natural fauna and flora.
2. The establishment round the borders of national parks and strict natural reserves of intermediate zones within which the hunting, killing and capturing of animals may take place under the control of the authorities of the park or reserve; but in which no person who becomes an owner, tenant, or occupier after a date to be determined by the authority of the territory concerned shall have any claim in respect of depredations caused by animals.
3. The choice in respect of all national parks of areas sufficient in extent to cover, so far as possible, the migrations of the fauna preserved therein."

regulate the activities of the parties and to restrict their sovereignty, but it should be noted that the Article only requires consideration, it does not require actual action. Once again the question is who can measure consideration or establish whether or not it has been given?⁴⁹ Once more individual sovereignty is not actually sacrificed, all that has happened is that states have been given some guidance on its implementation.

Again Article 8 provides for the special protection of certain specific species: those listed in Class A of the Annex must "be protected as completely as possible".⁵⁰ Thus it does not actually impose any standards on the parties, instead it leaves the parties room to argue that even the most limited protection (or even no protection at all) complies as it is all that is possible given the relevant circumstances.⁵¹ Further, the article goes on to provide two very specific and rather large loopholes. Paragraph 2 provides:

No hunting or other rights already possessed by native chiefs or tribes or any other persons or bodies, by treaty, concession, or specific agreement, or by administrative permission in those areas in which such rights have already been definitely recognised by the authorities of the territory are to be considered as being in any way prejudiced by the provisions of the preceding paragraph.

And paragraph 5:

⁴⁹ These questions open up several areas for discussion including judicial review, administrative discretion and sovereignty within the state all of which are out with the scope of this paper.

⁵⁰ Article 8:

1. The protection of the species mentioned in the Annex to the present convention is declared to be of special urgency and importance. Animals belonging to the species mentioned in Class A shall, in each of the territories of the Contracting Governments, be protected as completely as possible, and the hunting, killing or capturing of them shall only take place by special permission of the highest authority on the territory, which shall be given only under special circumstances, solely in order to further important scientific purposes, or when essential for the administration of the territory...

⁵¹ The relevant circumstances could cover at least the following: financial, social, economical, political or, geographical.

Nothing in the present Article shall (i) prejudice any right which may exist under the local law of any territory to kill any animals without a licence in defence of life or property, or (ii) affect the right of the authorities of the territory to permit the hunting, killing, or capturing of any species (a) in time of famine, (b) for the protection of human life, public health, or domestic stock, (c) for any requirement relating to public order.

Two very wide exceptions. So, although the provision might, at first glance, look as though it places quite major obligations on the parties it actually leaves their sovereignty virtually intact by providing escape holes through which the parties can elide their responsibilities.

The biggest loophole in the 1933 Convention is Article 11 which allows parties to opt out of any of the obligations contained in Articles 3 to 10 (the main provisions of the Convention.)⁵² Thus states can become parties to the 1933 Convention and at the same time exempt themselves from all obligations under it, rendering their participation meaningless. Such a scenario is unlikely, but there is a good chance that states would exempt themselves from the provisions most necessary to preserve resources in their territory as they would be the most onerous on them.

In effect then, the parties to the 1933 Convention are required to do no more than they wish to. Their right to exercise discretion when acting in this area is not restricted in any way and so their sovereignty is protected in its entirety and their resources remain their resources. So, while the convention's potential effect if all the parties comply fully with its terms is quite marked - it would transfer the resources from individual into joint sovereignty - in practice it could be next to nothing if the parties opted out of all their obligations or declared that

⁵² Article 11: "It is understood that upon signature, ratification, or accession any Contracting Government may make such express reservations in regard to Articles 3-10 of the present Convention as may be considered essential."

circumstances did not permit their compliance.

b)The Convention on Wetlands of International Importance Especially as Waterfowl Habitat 1971⁵³

The next convention to be considered is the Wetlands Convention signed in 1971, the beginning of the environmental era. It could perhaps be regarded as representing quite a breakthrough for internationalisation, the ideas of community interest and the concept of shared sovereignty as it specifically provides that waterfowl should be regarded as an international resource: "Recognising that waterfowl in their seasonal migrations may transcend frontiers and so should be regarded as an international resource". The parties also recognised "the interdependence of Man and his environment"⁵⁴ thereby acknowledging that the world can not be divide into segments - the environmental segment, the human segment - this also suggests that they may be willing to accept that division of the environment and resources by state boundaries is artificial too and can not be maintained. They have thus opened the way to a more holistic approach and perhaps also to a more equitable sharing of resources. (It should of course be noted that the resources being discussed in this convention are not generally regarded as terribly valuable and so there is a greater chance that the parties would be willing to share them equitably.) One might compare this to the Stockholm Declaration which does not contain any provisions linking the ecosystems of the world, but was drafted at around the same

⁵³ *Supra*, note 7.

⁵⁴ Preamble to the Wetlands Convention.

time.⁵⁵ This discrepancy can be explained by the fact that this Convention deals with one specific resource which can be seen to "transcend frontiers" whereas the Stockholm Declaration covers all resources, no matter their location or nature.

The above are not the only ways in which the convention represents a development in international law. All the instruments described above, even the Rio Declaration, do no more than provide frameworks for further action, this convention demands action now and prescribes exactly what is to be done. For example, Article 2 (which is perhaps the equivalent of Article 3 of the 1933 Convention) mandates the designation of wetlands for inclusion in a "List of Wetlands of International Importance" and gives precise details as to how the Wetlands are to be chosen⁵⁶ and described⁵⁷ and provides that each party must designate at least one wetland to be included in the list.⁵⁸ The mandatory language is tempered, however, by the inclusion of the word "suitable": "Each Contracting Party shall designate suitable wetlands within its territory for inclusion in a List of Wetlands of International Importance..."⁵⁹ This leaves some

⁵⁵ See above pages 109-114.

⁵⁶ Article 2 (2): "Wetlands should be selected for the List on account of their international significance in terms of ecology, botany, zoology, liminology or hydrology. In the first instance wetlands of international importance to water-fowl at any season should be included."

⁵⁷ Article 2 (1):

Each Contracting Party shall designate suitable wetlands within its territory for inclusion in a List of Wetlands of International Importance, hereinafter referred to as "the List", which is maintained by the bureaus established under Article 8. The boundaries of each wetland shall be precisely described and also delimited on a map and they may incorporate riparian and coastal zones adjacent to the wetlands, and islands or bodies of marine water deeper than six metres at low tide lying within the wetlands, especially where these have importance as water-fowl habitats.

⁵⁸ Article 2 (4): "Each Contracting Party shall designate at least one wetland to be included in the List when signing this Convention or when depositing its instrument of ratification or accession, as provided in Article 9."

⁵⁹ Article 2(1) of the Wetlands Convention.

discretion in the hands of the signatories and may allow them to renege on their obligations simply to preserve their sovereignty.⁶⁰ Further, paragraph 3 of Article 2 specifically provides that the inclusion of an area in the List of Wetlands of International Importance shall "not prejudice the exclusive sovereign rights of the Contracting Party in whose territory the wetland is situated." This is a rather interesting provision as it could be taken as contradicting everything else in the convention: all the other provisions seem bent on transferring sovereignty over the wetlands from individual to shared sovereignty, decisions are to be based on criteria agreed to by all of the parties jointly and individual parties no longer have the power to decide on their own agenda, yet a first reading of this provision suggests that they do. On a second look, however, one notices the use of the word "exclusive" - shall "not prejudice the exclusive sovereign rights." In other words the convention shall not affect those sovereign rights left in the hands of the individual parties, those rights that have been transferred to the community as a whole remain as shared rights, and are not affected by this provision.

Perhaps more importantly the Wetlands Convention includes measures to ensure that the parties do not simply designate an area as a Wetland of International Importance and then do nothing to preserve it. It obliges the parties to establish nature reserves on wetlands and "to provide adequately for their wardening".⁶¹ The fact that the Wetlands Convention does not provide precise criteria for the establishment of nature reserves and their wardening that does not necessarily detract from its efficacy: each reserve will have different requirements for its

⁶⁰ But see footnote number 63 and accompanying text.

⁶¹ The Wetlands Convention Article 4 (1):

"Each Contracting Party shall promote the conservation of wetlands and waterfowl by establishing nature reserves on wetlands, whether they are included in the List or not, and provide adequately for their wardening."

establishment and wardening. If the convention did prescribe standards they would probably prove to be more than was necessary in some cases and too little in others. The problem with this is that where the standards proved to be more than was necessary it could lead to a backlash against them and where they proved to be too little they could lead to the convention's denunciation for failing to adequately protect the environment. The only real defect in this provision is that it does not contain any time limits and so the parties can not be obliged⁶² to take action within a set time⁶³ detracting from the efficacy of the convention and reducing it to little more than a plan of action. It does not quite reduce it to the level of a framework convention, it is still more detailed than that, but the lack of time limits in this provision make it less effective at imposing obligations on the parties.

Another important provision is Article 4 which attempts to prevent parties renegeing on their obligations at a later date, it provides that if a party has to "delete or restrict the boundaries of a Wetland included in the list" it should compensate for that as far as possible by establishing another reserve.⁶⁴ Again showing that the parties have not merely drafted a vague plan for future action, but have attempted to draft a proper regime and to block all possible loopholes.

⁶² Query whether they ever could be. This is of course one of the problems of international law can states ever be obliged to take action? It is a vast question and one which do not intend to tackle here, but shall leave to others instead.

⁶³ Presumably if a party did not take steps to set up nature reserves within a reasonable time (which would be determined by comparing how long it took other parties to establish reserves) the other parties to the convention could bring at least moral pressure to bear on the offending party.

⁶⁴ Article 4 (2): "Where a Contracting Party in its urgent national interest, deletes or restricts the boundaries of a wetland included in the List, it should as far as possible compensate for any loss of wetland resources, and in particular it should create additional nature reserves for waterfowl and for their protection, either in the same area or elsewhere, of an adequate portion of the same habitat."

Lastly, the convention obliges the parties to consult with each other on implementation⁶⁵ and to convene Conferences when necessary to discuss implementation, additions and changes to the list and other information⁶⁶ making non compliance harder by keeping peer pressure up.

Overall the Wetlands Convention is more stringent than the 1933 Convention, less like a framework for action. It restricts individual sovereignty more, gives more power to the parties as one body, effectively provides for shared sovereignty over the wetlands and waterfowl and provides better protection for the environment. As such it represents quite a development in the law. It also achieves more than the declarations discussed above as it lays precise obligations on the parties and makes it hard to elide them by providing for consultation and providing that if an area has to be withdrawn from the International List it must be replaced, thus preventing tacit withdrawal and restricting individual sovereignty. It should be

⁶⁵ Article 5:

The Contracting Parties shall consult with each other about implementing obligations arising from this Convention especially in the case of more than one Contracting Party or where a water system is shared by Contracting Parties. They shall at the same time endeavour to co-ordinate and support present and future policies and regulations concerning the conservation of wetlands and their flora and fauna.

⁶⁶ Article 6:

1. The Contracting Parties shall, as necessity arises, convene Conferences on the Conservation of Wetlands and Waterfowl.
2. These Conferences shall have an advisory character and shall be competent inter alia:
 - (a) to discuss the implementation of this Convention;
 - (b) to discuss additions to and changes in the List;
 - (c) to consider information regarding changes in the ecological character of wetlands included in the List provided in accordance with Paragraph 2 of Article 3;
 - (d) to make general or specific recommendations to the Contracting Parties regarding the conservation, management and wise use of wetlands and their flora and fauna;
 - (e) to request relevant international bodies to prepare reports and statistics on matters which are essentially international in character affecting wetlands;
3. The Contracting Parties shall ensure that those responsible at all levels for wetlands management shall be informed of, and take into consideration, recommendations of such Conferences concerning the conservation, management and wise use of wetlands and their flora and fauna.

borne in mind, however, that it does still leave some discretion in the parties' hands⁶⁷ and so does not limit individual sovereignty completely, nor does it provide for the complete internationalisation of the resources as the parties still have quite a bit of freedom of action. The most important defect is that the treaty does not contain any enforcement mechanisms. (It would be open to the parties to go to an international court or arbitration to have the treaty enforced but, such action is unlikely when the convention does not actually provide for it.)

c) Convention on Biological Diversity

The last convention in this section is the 1992 Convention on Biological Diversity,⁶⁸ which brings us up to date once more. The convention begins with a fairly radical provision.

Article 1 provides:

The objectives of this convention, to be pursued in accordance with its relevant provisions, are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to the technologies, and by appropriate funding.

This suggests that the resources discussed are regarded as shared and that the interests of the community of states are to be pursued, in that all are to benefit from the resources on an equitable basis, implying that individual interests in making a profit and developing resources unilaterally to serve individual ends have been over ridden. Yet the preamble to the convention also provides that "States have sovereign rights over their own biological resources". And

⁶⁷ See Article 2.

⁶⁸ 1992 Convention on Biological Diversity, (1992) 31 I.L.M. 818

Article 3 provides that

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, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

It would appear from this that the parties did not intend to base the regime on the concept of internationalisation after all, leading one to question the purpose of Article 1. Article 15 paragraphs (1) and (2) seem to provide the answer:

1. Recognising the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.
2. Each Contracting Party shall endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses by other Contracting Parties and not to impose restrictions that run counter to the objectives of this Convention.

It would seem that although states are to have control over the day to day exploitation of their resources the governing policies are to be those contained in the Convention on Biological Diversity. These provide that resources are not to be used in such a way as to prevent others gaining access to them rather, the parties are to regulate access to ensure that it is equitable and that all benefit. In a sense the parties have become more guardians than owners.

These provisions seem to have been negotiated as a compromise between the desire of the industries of the North to get access to resources in the territory of Southern states (particularly to plants for pharmaceutical purposes) and the South's desire to regulate that access to ensure that their resources are not simply appropriated by foreign companies, but that

they get some benefit from them.⁶⁹

The convention on Biological Diversity contains one major improvement on the 1933 convention in that Article 8 provides for the *in situ* preservation of resources⁷⁰ and dictates the steps to be taken to ensure that it is effective. The 1933 Convention while providing for reserves and parks to be established did not promote actual *in situ* conservation allowing parties

⁶⁹ See also Article 19 which provides that parties are to take measures to promote access by the developing countries to the benefits of biotechnologies based on their resources. See statement by H.E. Mr. Ali Hassan Mwinyi President of the United Republic of Tanzania UNCED III 185 at 189.

⁷⁰ Each contracting Party shall, as far as possible and as appropriate:

- (a) Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity;
- (b) Develop, where necessary, guidelines for the selection, establishment and management of protected areas or areas where special measures need to be taken to conserve biological diversity;
- (c) Regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use;
- (d) Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings;
- (e) Promote environmentally sound and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas;
- (f) Rehabilitate and restore degraded ecosystems and promote the recovery of threatened species, *inter alia*, through the development and implementation of plans or other management strategies;
- (g) Establish or maintain means to regulate, manage or control the risks associated with the use and release of living modified organisms resulting from biotechnology which are likely to have adverse environmental impacts that should affect the conservation and sustainable use of biological diversity, taking also into account the risks to human health;
- (h) Prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species;
- (i) Endeavour to provide the conditions needed for compatibility between present uses and the conservation of biological diversity and the sustainable use of its components;
- (j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.
- (k) Develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations;
- (l) Where a significant adverse effect on biological diversity has been determined pursuant to Article 7, regulate or manage the relevant processes and categories of activities; and
- (m) Cooperate in providing financial and other support for *in-situ* conservation outlined in subparagraphs (a) to (l) above, particularly to developing countries.

(Emphasis added.)

to establish parks and reserves in areas convenient to humans and to move species to those areas. The 1933 Convention neglected to even mention ecosystems or indigenous knowledge let alone provide that parties should promote their protection.⁷¹ On the negative side the Convention on Biological Diversity only requires parties to act "in accordance with [their] particular conditions and capabilities".⁷² This means that the provisions do not actually bind the parties even though they appear quite precise. The parties can refuse to take any action on the grounds that it is not possible given their particular conditions and capabilities. This represents a reversion to the type of terminology used in the 1933 and the Wetlands Conventions, merely suggesting directions to be taken where "possible and appropriate". For the provisions to have any bite they would require to lay down criteria and time limits in the same manner as the Montreal Protocol does.⁷³ Again Article 6 promotes sustainable development:

Each Contracting Party shall in accordance with its particular conditions and capabilities:

- (a) Develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which shall reflect, *inter alia*, the measures set out in this Convention relevant to the Contracting Party concerned; and
- (b) Integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies

but does not say how sustainable development is to be introduced, nor does it set time limits,

⁷¹ It should be noted that Article 8 also promotes sustainable development, the rehabilitation of degraded ecosystems and the preservation of indigenous knowledge and the eradication of alien species that threaten ecosystems. All important developments.

⁷² Article 6, Article 8 phrases it slightly differently, providing that it is just to be "as far as possible and as appropriate", which amounts to the same thing as what is possible will only be possible "in accordance with [the] particular conditions and capabilities" of each individual state.

⁷³ See below pages 148-153.

nor even say whether it must be applied to all relevant resources, or may be applied just to those the parties choose. It too, despite using mandatory language, leaves a great deal of freedom of action with the parties.⁷⁴

The Convention's lack of teeth turn it once again into a framework convention similar to the instruments discussed above and Vienna Convention (discussed below) and indeed Article 23 (4) (c) of the Convention on Biodiversity provides that the annual conference of the parties established by it will "[c]onsider and adopt, as required, protocols in accordance with Article 28" which provides

1. The Contracting Parties shall cooperate in the formulation and adoption of protocols to this convention,
2. Protocols shall be adopted at a meeting of the Conference of the Parties,
3. The text of any proposed protocol shall be communicated to the Contracting Parties by the Secretariat at least six months before such a meeting.

It clearly was not intended that the Convention on Biological Diversity lay out strict rules of procedure, but that it should provide the basis for further, more detailed agreement.

⁷⁴ The remainder of the provisions are drafted in a similar manner and provide for such things as exchange of information, public education and awareness, impact assessment and technical and scientific cooperation. In the interests of time and space they shall not be discussed here.

Conventions Dealing With The Common Heritage of Mankind Concept

a)The United Nations Convention on the Law of the Sea 1982⁷⁵

As this convention, unlike those discussed above, deals with resources not commonly regarded as the property of individual states⁷⁶ one would anticipate that the parties would have given different principles priority and perhaps that they will have agreed that their rights can be quite severely curtailed, principally because what rights they have are very limited anyway. To establish whether or not this is the case I shall look at both the provisions relating to the mining of the deep seabed and the pollution control provisions (those provisions generally considered to be "environmental" in nature).⁷⁷

⁷⁵ U.N. Document A/CONF.62/122 October 7, 1982. Reprinted as amended by U.N. Documents A/CONF.62/122/Corr.3 November 3, 1982 and A/CONF.62/122/Corr.8 November 26, 1982 (1982) 21 I.L.M. 1261 [hereinafter "UNCLOS".]

It could be argued that this is not strictly an environmental convention in that it is concerned as much if not more with the use of the sea and seabed as with its conservation, but as I am using the term "environmental" to cover both what is generally regarded as environmental law and what is more properly termed "natural resource law" its inclusion here is logical and justified. Moreover, the impact of UNCLOS on environmental law (as narrowly construed) is quite significant as shall be shown.

⁷⁶ One should note, however, that UNCLOS, in providing for the protection of common resources, impinges upon states' rights with respect to resources generally regarded as falling within individual jurisdictions and individual state control because their use and development is controlled to prevent harm to the common resources.

⁷⁷ I am including an examination of the provisions on mining of the deep seabed as this allows discussion of the concept of "the common heritage of mankind" and of the different attitudes of the South and the North to the use of international resources.

The Deep Sea Bed

The regime established by UNCLOS provides that the deep seabed and its resources are "the common heritage of mankind".⁷⁸ The practical effect of this is that no state can claim sovereignty over the deep seabed or its resources, nor can any state or individual claim any right over any minerals recovered from the deep seabed without complying with the provisions of UNCLOS: provisions established by the community as a whole which vest the resources in mankind as a whole⁷⁹ and which provide that the resources are to be administered by a body delegated the authority to do so by all the parties to the convention. The system's elements and principles have been listed thus:

the notion of trust and trustees; indivisibility of the heritage; the regulation of the use of that heritage by the international community; the most appropriate equitable application of benefits obtained from the exploration, use and exploitation of this area to the developing countries; freedom of access and use by all States; and the principle of peaceful use.⁸⁰

⁷⁸ UNCLOS Article 136: "The Area and its resources are the common heritage of mankind." For a comparison of the concepts of "common heritage" and *res communis* see C.A. Fleischer in International Union for Conservation of Nature and Natural Resources, *Trends in Environmental Law and Policy* (Chicago: Gland) 1980 [hereinafter "Trends in Environmental Law".] particularly at 325 to 327.

⁷⁹ Article 137:

"1. No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognised.

2. All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act. These resources are not subject to alienation. The minerals recovered from the Area, however, may only be alienated in accordance with this Part and the rules, regulations and procedures of the Authority.

3. No State or natural or juridical person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with this Part. Otherwise, no such claim, acquisition or exercise of such rights shall be recognised."

⁸⁰ C.A. Fleischer in Trends in Environmental Law at 321 quoting from the 1969 Report of the Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor Beyond the Limits of National Jurisdiction, G.A. Official Records, 24th Session, Supplement No.22 (A/7622) 14.

This places a blanket prohibition on expansion of State jurisdiction over the seabed preventing the expansion of state sovereignty and limiting existing rights. Traditionally the only restraint on the rights of states to expand their jurisdiction was where another state already exercised jurisdiction over a given area. Thus declarations such as the Truman Proclamation of 1945 gained credence despite having no actual basis in international law.⁸¹

The negotiations and final text of Part XI of UNCLOS bear witness to the positions taken by the South and the North over the seabed. The South wanted an Authority which would have complete control over the seabed and the ability and power to carry out all exploration and exploitation of it, whilst the North wished for a regime that would allow individual States to undertake the exploration and exploitation, all be it subject to the supervision of an Authority.⁸² Thus the South was looking to have individual freedoms limited in the interests of a more equitable distribution of the resources of the seabed⁸³ while the North, being in possession of the technology necessary to carry out exploration and exploitation, was looking

⁸¹ In this declaration President Truman laid a claim, on behalf of the United States of America, to some of the resources of the seabed and ocean floor. The claim was based on coastal States having a national jurisdiction over the resources of the continental shelf although no such principle had been recognised in the past. The Proclamation went on to become the basis for a large number of claims by countries from the South to 200 mile exclusive economic zones. See J.L. Briery *The Law of Nations: An Introduction to the International Law of Peace* 6th ed. (Oxford: Clarendon Press) 1963

⁸² "On the one side are the developing countries which (rather idealistically) would like to entrust to such Authority all activities of exploration, extraction and marketing of mineral resources. On the other side, the States with advanced economies insist upon a much more bland, but more realistic, regime which, while under the undisputed supervision of the international Authority, would let single countries (and the public and private companies under their control) be the protagonists of exploration activities."

B. Conforti "Does Freedom of The Seas Still Exist?" (1975) 1 *The Italian Year Book of International Law* 3 at 13 (footnote omitted.) [Hereinafter "Freedom of the Seas".]

⁸³ "Implicit in the Third World's philosophy is the progressive reduction of the economic disparity between the developed and developing sections of the world."

H.S. Amerasinghe "The Third World and the Seabed" Cap. 16 in Elisabeth Mann Borgese, *Pacem in Maribus* (New York: Dodd, Mead) 1972 237 at 244.

for as few restrictions on freedom of action as possible to enable it to reap the benefits of exploitation. The position of the South in this regard was somewhat interesting when considered in light of the number of southern states that, following upon the Truman Proclamation, claimed a 200 mile exclusive economic zone, increasing their jurisdiction and decreasing the area left as "the common heritage of mankind".⁸⁴ Regardless it based its position on the premise that "the harmful effects which future production might cause or initiate in the economies of the producing developing countries should be minimized"⁸⁵ and reflected the developing countries' desires for a new international economic order.⁸⁶ This led the Group of 77 to propose a draft text for UNCLOS providing that: "[t]he Area and its resources being the common heritage of mankind, the title to the Area and its resources and all other rights in the resources are vested in the Authority on behalf of mankind as a whole. These resources are not subject to alienation."⁸⁷ At the same time the North put forward a draft which allowed prospecting in any area not already being exploited.⁸⁸ The North's draft did place a restriction

⁸⁴ On this see *1983 Proceedings of the American Society of International Law*, at 153-155 remarks by A.M. Aguilar and Freedom of the Seas *supra* note 85 at 9-12. As to the importance of the economic zones to developing countries see the statement by the Chairman of the Joint Committee of the Congress of Micronesia submitted on behalf of the Congress by the United States of America to the Third United Nations Conference on the Law of the Sea, Second Session: Caracas, 20 June-29 August 1974 U.N. Doc. A/CONF.62/L.6.

⁸⁵ Chile *Working Paper on the Economic Implications for the Developing Countries of the Exploration of the Sea-bed Beyond the Limits of National Jurisdiction* U.N. Doc.A/CONF.62/C.1/L.11.

⁸⁶ On the New International Economic Order see T.S. Rama Rao "The New International Economic Order and the North South Dialogue" in S.K. Agrawala, T.S. Rama Rao & J.N.Saxena, eds., *New Horizons of International Law and Developing Countries* (Agincourt, Ontario: N.M.Tripathi Private Ltd.) 1983.

⁸⁷ U.N. Doc.A/CONF.62/C.1/L.7 Article 1.

⁸⁸ U.N. Doc. A/CONF.62/C.1/L.8 Article II (1):

"Prospecting shall be open in the International Sea-bed Area, other than in areas in respect of which contracts have been awarded in accordance with Article III..."

on the number of evaluation and exploitation contracts an entity could have under the regime,⁸⁹ but did not place any limits on the number of contracts nationals of a given state could have. This means it would be theoretically possible for all of the contracts to be awarded to the nationals of one state, detracting somewhat from the notion of "common heritage of mankind". Moreover, the entire seabed was left up for grabs.⁹⁰

Ultimately the compromise position outlined above⁹¹ was reached, with the result that UNCLOS provides that

[a]ctivities in the Area shall... be carried out for the benefit of mankind as a whole, irrespective of the geographical location of the States, whether coastal or land-locked, and taking into particular consideration the interests and needs of developing States and of the peoples who have not attained full independence or other self-governing status recognized by the United Nations...⁹²

This appears to be somewhat closer to the position taken by the South than to that of the North. It also confirms the resources as international in nature and restricts individual sovereignty in so far as before UNCLOS was agreed to all states could, in theory, appropriate the resources of the sea bed without any consideration for others except that their activities could not interfere with the freedom of the high seas. Now they may only acquire the resources in accordance with UNCLOS's provisions and with the consent of the Authority and their rights of acquisition are limited to what is fair and reasonable. This has led UNCLOS to be described as according only

⁸⁹ Article 4:

"An applicant may not hold more than six contracts at any one time in respect of each category of resources."

⁹⁰ Interestingly the North's proposed draft made provision for the transfer of technology to the South by way of training of individuals, U.N.Doc. A/CONF.62/C.1/L.8 Article XI: "The applicant shall indicate in his application the steps to be taken in order to ensure the participation in the activities envisaged of nationals of countries without sea-bed exploration and exploitation capability, with a view to ensuring the training of such nationals."

⁹¹ See footnotes numbers 83 and 84 and accompanying text.

⁹² UNCLOS Article 140 (1).

functional rights to States.⁹³

The willingness of states to accept the provisions may be based upon the fact that they have never really exercised sovereignty over this area and so do not feel that they are giving anything up. The notion of freedom of the seas⁹⁴ is, however, an extension of the notion of sovereignty in that it allows states to exercise their discretion in relation to their activities on the seas limited only by their duty not to interfere with the exercise of the right by others and, as noted above,⁹⁵ the regime under UNCLOS limits that freedom thus limiting sovereignty.

Returning to the notions of community interest, shared sovereignty and internationalisation, one potential problem facing the regime was that only a few states actually possessed the technology to harvest the resources of the Area when the convention was agreed upon. This meant that those states could conceivably harvest all the resources (so gaining the lions share of the benefits from them.) before any other states would be able to develop the

⁹³ "The exploitation of the seabed by an international Authority or by a single concessionary country, on the one hand, and the other uses of the sea by *all* countries, on the other hand, must necessarily become the object of functional rights. In this case also the first and general principle will not be the freedom of the seas but, rather, a principle according to which the States may apply in the international area only for those activities strictly indispensable for a rational use of ocean spaces - not freedom for fishing, therefor, but the right to fish if this is within the limits required by economic necessity; not freedom of navigation, but the right to navigate over routes which, without being antieconomic, do not interfere with the exploitation of mineral resources; not freedom to lay submarine cables and pipelines but the right to use the sea bed for this purpose because of indispensable necessity for communications and transportation; and so on." Freedom of the Seas, *supra*, note 85 at 14. Thus sovereignty is limited in that the freedom of states to act is restricted to merely a right to act where absolutely necessary.

⁹⁴ On this see B.J. Theutenberg "The International Environmental Law Some Basic Viewpoints" in *The Future of the International Law of the Environment* 1984 Hague Academy of International Law Workshop, 233 particularly at 234.

⁹⁵ Footnotes numbers 81 and 82 and accompanying text.

necessary technology,⁹⁶ preventing a true sharing of the resources. A couple of articles were included to overcome this problem: Article 144 provides that the Authority is to encourage technology transfer to the developing countries⁹⁷ (and to the Enterprise)⁹⁸ and Article 148 provides that the developing states are to be encouraged to participate in the activities of the Area.⁹⁹ By promoting access to the resources by all, these provisions enable a real sharing of the resources and promote the community interest for, without equal access by all the resources would effectively be the property of those with the ability to gain and take advantage of access. In other words, the notion of freedom of the high seas would have been left virtually intact. Article 150¹⁰⁰ reinforces this by providing that activities in the Area shall, amongst other

⁹⁶ This is of particular importance to developing states many of whom produce the same minerals as are found on the deep sea bed.

⁹⁷ Article 144 (1) the Authority shall take measures in accordance with this Convention:
 (a) to acquire technology and scientific knowledge relating to activities in the Area; and
 (b) to promote and encourage the transfer to developing States of such technology and scientific knowledge so that all States Parties benefit therefrom.
 (2) To this end the Authority and States Parties shall co-operate in promoting the transfer of technology and scientific knowledge relating to activities in the Area so that the Enterprise and all States Parties may benefit therefrom. In particular they shall initiate and promote :
 (a) programmes for the transfer of technology to the Enterprise and to developing States with regard to activities in the Area, including *inter alia*, facilitating the access of the Enterprise and of developing States to the relevant technology, under fair and reasonable terms and conditions;
 (b) measures directed towards the advancement of the technology of the Enterprise and the domestic technology of developing States, particularly by providing opportunities to personnel from the Enterprise and from developing States for training in marine science and technology and for their full participation in the Area.

⁹⁸ The body set up by UNCLOS to undertake some of the harvesting of the resources.

⁹⁹ Article 148: The effective participation of developing States in activities in the Area shall be promoted as specifically provided for in this Part, having due regard to their special interests and needs, and in particular to the special needs of the land-locked and geographically disadvantaged among them to overcome obstacles arising from their location, including remoteness from the Area and difficulty of access to and from it.

¹⁰⁰ Article 150: Activities in the Area shall, as specifically provided for in this Part, be carried out in such a manner as to foster healthy development of the world economy and balanced growth of international trade, and to promote international co-operation for the over-all development of all countries, especially developing states, and with a view to ensuring:

things promote: "the expansion of opportunities for participation in such activities";¹⁰¹ participation by all in the development of the resources of the Area;¹⁰² the protection of developing countries from adverse effects on their economies as a result of the reduction in price of minerals;¹⁰³ and the development of the common heritage for the benefit of mankind as a whole¹⁰⁴ again facilitating sharing of resources.

The provisions promoting steps to prevent harm to the economies of developing states as a result of the harvesting of the resources of the Area¹⁰⁵ are also interesting in that they

-
- (a) the development of the resources of the Area;
 - (b) orderly, safe and rational management of the resources of the Area, including the efficient conduct of activities in the Area and, in accordance with sound principles of conservation, the avoidance of unnecessary waste;
 - (c) the expansion of opportunities for participation in such activities consistent in particular with Articles 144 and 148;
 - (d) participation in revenues by the Authority and the transfer of technology to the Enterprise and developing States as provided for in this Convention;
 - (e) increased availability of the minerals derived from the Area as needed in conjunction with minerals derived from other sources, to ensure supplies to consumers of such minerals;
 - (f) the promotion of just and stable prices remunerative to producers and fair to consumers for minerals derived both from the Area and from other sources, and the promotion of long-term equilibrium between supply and demand;
 - (g) the enhancement of opportunities for all States Parties, irrespective of their social and economic systems or geographical location, to participate in the development of the resources of the Area and the prevention of monopolization of activities in the Area;
 - (h) the protection of developing countries from adverse effects on their economies or on their export earnings resulting from a reduction in the price of an affected mineral, or in the volume of exports of that mineral, to the extent that such reduction is caused by activities in the Area, as provided in Article 151;
 - (i) the development of the common heritage for the benefit of mankind as a whole; and
 - (j) conditions of access to markets for the import of minerals produced from the resources of the Area and for imports of commodities produced from such minerals shall not be more favourable than the most favourable applied to imports from other sources.

¹⁰¹ Article 150 (c).

¹⁰² Article 150 (g).

¹⁰³ Article 150 (h).

¹⁰⁴ Article 150 (i).

¹⁰⁵ Article 150 (f) and (h).

help insure an equitable sharing of the benefits of harvesting, or rather, they go some way towards preventing those with the best technology dominating the markets, under cutting less developed producers and reaping the benefits. Again, this promotes internationalisation by seeking to provide the greatest good to all rather than to individuals.

Turning now to UNCLOS's provisions on pollution: these are in one sense an extension of its provisions in relation to the deep seabed, in another they revert to the preservation of individual sovereignty and terms similar to those of the Stockholm Declaration. For example, Article 193 provides that "States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment". Compare this to Article 21 of the Stockholm Declaration:

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, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Article 193 looks like a summarised version of Article 21 (with some emphasis, of course, on the marine environment as opposed to the environment generally.) Before completely writing off Article 193 as a regression in terms from the concept of common heritage back to individual rights one ought to consider Article 192 which provides "States have the obligation to protect and preserve the marine environment." Emphasising the obligation to protect and preserve the environment over and above the rights of states to their resources. As Article 192 comes first and as it is described as a general obligation, one can only assume that UNCLOS's remaining provisions on pollution must be subject to it. Therefore, the right to exploit resources must be subject to the duty to preserve and protect the environment. The importance of this obligation

is reflected in the number of articles mandating that the parties adopt laws and rules to prevent pollution and take action against pollution.¹⁰⁶ There are none confirming the right to exploit resources. This clearly takes us further than Article 21 of the Stockholm Declaration which gave no real precedence to any one principle.

Conclusion

Overall UNCLOS links individual freedoms and sovereignty and promotes common interests and the concept of shared sovereignty over resources. Its introduction of the notion of common heritage and the reflection of that concept throughout the convention represents a considerable development on the provisions of the conventions and declarations discussed above. The provisions on mining of the deep sea bed too are quite a development in that they provide a detailed regime to govern exploitation and not just a framework. The pollution provisions, however, those that actually affect individual sovereignty, are not so detailed and do just provide another framework for action. So in some departments there is development, while in others nothing has really changed.

The next question to ask then is "has there been any improvement in more recent conventions?" I shall look at the Vienna Convention¹⁰⁷ and the Montreal Protocol¹⁰⁸ in an attempt to answer that question.

¹⁰⁶ See articles 194, 199, 207, 208 and 212.

¹⁰⁷ *Supra* note 8.

¹⁰⁸ *Supra* note 7.

b)(i) The Vienna Convention

The Vienna Convention preamble refers back to Principle 21 of the Stockholm Convention,¹⁰⁹ suggesting that it at least does not contain any improvements and indicating that states may continue to pursue their own policies on development and use of resources so long as they do not cause harm to others. There does not seem to be any room for the notions of common heritage or shared sovereignty despite the fact that the aim of the convention is to protect the ozone, a resource generally regarded as "owned" in common because it is extra territorial. It does, however, also contain the following statement: "Determined to protect human health and the environment against adverse effects resulting from modifications of the ozone layer". The significance of this statement is that it opens the door to the possibility of the Convention imposing obligations and standards on the parties in respect of the use of their resources, so limiting their sovereignty and tacitly moving those resources from individual to shared sovereignty. For example, Article 2 (1) provides that "[t]he Parties shall take appropriate measures in accordance with the provisions of this Convention and of those protocols in force to which they are a party to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer." Thus individual discretion is limited by the collective will and by policies agreed to by all the parties. Article 2 goes on to include provisions on a par with Articles 194 and 207 of UNCLOS, providing for research to be carried out and legislation to be adopted, again

¹⁰⁹ Preamble to the Vienna Convention:

"... Recalling the pertinent provisions of the Declaration of the United Nations Conference on the Human Environment, and in particular principle 21..."

limiting individual discretion and imposing policies decided upon by the community as a whole¹¹⁰

One potential problem with Article 2 (2) is that it provides that the measures need only be in accordance with the individual State's means,¹¹¹ which gives parties the opportunity to argue that their circumstances do not allow them to take any action. On the other hand, there is no point in putting a greater obligation on a party than it can bear. It does mean though, that the Vienna Convention tends to reflect the general position taken by the South that it is neither willing, nor able to accept detailed restrictions. It also turns the convention into a framework convention simply paving the way for more detailed provisions.¹¹² The convention does try to encourage the parties to adopt more stringent regulations if they wish. Article 2 (3) provides:

The provisions of this convention shall in no way affect the right of Parties to adopt, in accordance with international law, domestic measures additional to those referred to in paragraphs 1 and 2 above, nor shall they affect additional measures already taken by a Party, provided that those measures are not incompatible with their obligations under this Convention.

¹¹⁰ Article 2 (2):

To this end the Parties shall, in accordance with the means at their disposal and their capabilities:

(a) Co-operate by means of systematic observation, research and information exchange in order to better understand and assess the effects of human activities on the ozone layer and the effects on human health and the environment from modification of the ozone layer;

(b) Adopt appropriate legislative or administrative measures and co-operate in harmonizing appropriate policies to control, limit, reduce or prevent human activities under their jurisdiction or control should it be found that these activities have or are likely to have adverse effects resulting from modification or likely modification of the ozone layer;

(c) Co-operate in the formulation of agreed measures, procedures and standards for the implementation of this Convention, with a view to the adoption of protocols and annexes;

(d) Co-operate with competent international bodies to implement effectively this Convention and protocols to which they are party.

¹¹¹ Vienna Convention Article 2 (2): "To this end the Parties shall, in accordance with the means at their disposal and their capabilities: ... (emphasis added.)

¹¹² The rest of the convention contains more provisions for cooperation in research and observation (Article 3) and in the legal, scientific and technical fields (Article 4); establishes the secretariat (Article 7) and conference of the parties (Article 6); provides for adoption and amendment of protocols, annexes and the convention (Articles 8, 9 and 10); provides for dispute resolution (Article 11), for signature, ratification, accession and entry into force (Articles 12, 13, 14 and 17.)

This is a positive sign, but it still does not demand any specific action, nor set particular standards. Another positive sign is that the convention does not permit any reservations¹¹³ although it does permit withdrawals.¹¹⁴

Even though the convention has little punch the fact that it has been entered into shows a development in the willingness of States to enter into treaties limiting their freedom and obliging them to follow a certain course of action. As was noted when the Vienna Convention was being drafted "Two decades ago the notion that governments would regulate substances in household spray cans out of concern for the stratospheric ozone layer might have struck many as science fiction; now nations are developing a world treaty to prevent ozone depletion."¹¹⁵ Moreover, by imposing all the obligations it does on the parties the convention continues the trend towards shared sovereignty over resources,¹¹⁶ removing them from the control of individual parties. One must add a word of caution here, however, as this is only a tacit removal. States could argue that their sovereign powers remain intact and unaffected by the convention and that the resources affected by its implementation are still theirs to do with as they please. This fact is emphasised by Article 19's withdrawal provisions¹¹⁷ allowing parties to revert to their original positions, policies and habits with impunity.

¹¹³ Article 18 "No reservation may be made to this Convention."

¹¹⁴ Article 19 "At any time after four years from the date on which this Convention has entered into force for a Party, that Party may withdraw from the Convention by giving written notification to the Depositary."

¹¹⁵ Global Environment Ten Years After Stockholm Cap one in Erik P.Eckholm *Down to Earth* (New York: Norton) 1982.

¹¹⁶ Here I am referring not to the ozone but to the resources the use of which damages the ozone.

¹¹⁷ *Supra*, note 114.

b)(ii) The Montreal Protocol

As one would anticipate the Protocol was negotiated to provide the detail lacking in the Vienna Convention. The main provisions are contained in Article 2 which lays out the steps to be taken by the parties to reduce certain substances and provides time limits by which the parties must reduce the production and use of certain chemicals listed in an annex.¹¹⁸ The

¹¹⁸ Montreal Protocol Article 2:

"1. Each Party shall ensure that for the twelve-month period commencing on the first day of the seventh month following the date of entry into force of this Protocol, and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances in Group I of Annex A does not exceed its calculated level of consumption in 1986. By the end of the same period each Party producing one or more of these substances shall ensure that its calculated level of production of the substances does not exceed its calculated level of production in 1986, except that such level may have increased by no more than ten per cent based on the 1986 level. Such increase shall be permitted only so as to satisfy the basic domestic needs of the Parties operating under Article 5 and for the purposes of industrial rationalization between Parties.

2. Each Party shall ensure that for the twelve-month period commencing on the first day of the thirty-seventh month following the date of entry into force of this Protocol, and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances in Group II of Annex A does not exceed its calculated level of consumption in 1986. By the end of the same period each Party producing one or more of these substances shall ensure that its calculated level of production of the substances does not exceed its calculated level of production in 1986, except that such level may have increased by no more than ten per cent based on the 1986 level. Such increase shall be permitted only so as to satisfy the basic domestic needs of the Parties operating under Article 5 and for the purposes of industrial rationalization between Parties. The mechanisms for implementing these measures shall be decided by the Parties at their first meeting following the first scientific review.

3. Each Party shall ensure that for the period 1 July 1993 to 30 June 1994 and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances in Group I of Annex A does not exceed, annually eighty per cent of its calculated level of production in 1986. Each Party producing one or more of these substances shall, for the same periods, ensure that its calculated level of production of the substances does not exceed eighty per cent of its calculated production in 1986. However, in order to satisfy the basic domestic needs of the Parties operating under Article 5 and for the purposes of industrial rationalization between Parties, its calculated level may exceed that limit by up to ten per cent of its calculated level of production in 1986.

4. Each Party shall ensure that for the period 1 July 1998 to 30 June 1999 and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances in Group I of Annex A does not exceed, annually fifty per cent of its calculated level of production in 1986. Each Party producing one or more of these substances shall, for the same periods, ensure that its calculated level of production of the substances does not exceed fifty per cent of its calculated production in 1986. However, in order to satisfy the basic domestic needs of the Parties operating under Article 5 and for the purposes of industrial rationalization between Parties, its calculated level may exceed that limit by up to fifteen per cent of its calculated level of production in 1986...."

convention also outlines how control levels are to be calculated¹¹⁹ and how their success is to be assessed; it also provides that they are to be reviewed at set intervals.¹²⁰ Thus the convention ensures that the measures it lays down do not become out dated and meaningless.

The effect of these provisions is to severely impinge upon state sovereignty, abolishing all freedom of action and freedom to legislate in respect of the chemicals covered by Groups I and II of the Protocol's Annex so removing them from individual state control/sovereignty.

The one problem with this approach is that

international uniform obligations are both inefficient and unjust. Uniform regulations are likely to impose costs far in excess of those necessary to achieve the relevant goals. Such regulations also confer disproportionate benefits on nations that have gained from their existing contributions to current problems, and they impose disproportionate burdens on those that have the least to loose

¹¹⁹ Article 3:

For the purposes of Articles 2 and 5, each Party shall, for each Group of substances in Annex A, determine its calculated levels of:

(a) production by:

(i) multiplying its annual production of each controlled substance by the ozone depleting potential specified in respect of it in Annex A; and

(ii) adding together, for each such Group, the resulting figures;

(b) imports and exports, respectively, by following, mutatis mutandis, the procedure set out in subparagraph (a); and

(c) consumption by adding together its calculated levels of production and imports and subtracting its calculated level of exports as determined in accordance with subparagraphs (a) and (b). However, beginning on 1 January 1993, any export of controlled substances to non-Parties shall not be subtracted in calculating the consumption level of the exporting Party.

¹²⁰ Article 6:

Beginning in 1990, and at least every four years thereafter, the Parties shall assess the control measures provided for in Article 2 on the basis of available scientific, environmental and economic information. At least once a year before such assessment, the Parties shall convene appropriate panels of experts qualified in the fields mentioned and determine the composition and terms of reference of any such panels. Within one year of being convened, the panels will report their conclusions, through the secretariat, to the Parties.

from increased environmental degradation.¹²¹

To try to get around this and to persuade the countries of the South to become parties to the convention, Article 2 contains an exception for those states which had a relatively low production level of the controlled chemicals in 1986.¹²² It also refers to Article 5 - allowing certain states to increase production in the name of industrial rationalisation or basic domestic needs. Moreover, Article 5 itself includes a special exemption for developing countries: they need not comply with any of the provisions for ten years after the time that the Protocol becomes effective for them.¹²³ Article 5 also provides that "Any such Party shall be entitled to use either the average of its annual calculated level of consumption for the period 1995 to 1997 inclusive or a calculated level of consumption of 0.3 kilograms per capita, whichever is the lower, as the basis for its compliance..." The effect is to allow certain states to maintain their sovereignty over their resources while removing them from other, wealthier states and making those resources subject to shared sovereignty.

¹²¹ Trading Debt supra note 41 at 94. The authors go on to say: "It should be unsurprising that poor countries have been especially reluctant to enter into agreements that seem to intrude on their sovereignty while imposing costs that dwarf the potential benefits." (Footnotes omitted.)

¹²² Article 2 (5):

" Any Party whose calculated level of production in 1986 of the controlled substances in Group A of Annex A was less than twenty-five kilotonnes may, for the purposes of industrial rationalization, transfer to or receive from any other Party, production in excess of the limits set out in paragraphs 1, 3 and 4 provided that the total combined calculated levels of production of the Parties concerned does not exceed the production limits set out in the Article.... "

¹²³ Montreal Protocol Article 5 (1):

Any Party that is a developing country and whose annual calculated level of consumption of the controlled substances is less than 0.3 kilograms per capita on the date of entry into force of the Protocol for it, or any time thereafter, within ten years of the date of entry into force of the Protocol shall, in order to meet its basic domestic needs, be entitled to delay its compliance with the control measures set out in paragraphs 1 to 4 of Article 2 by ten years after that specified in those paragraphs....

(Emphasis added.)

This is in a sense a retrogression from UNCLOS's provisions. The reason for it is that the resources covered by UNCLOS had never been owned by or regarded as owned by any given state, whereas the resources being affected by the Vienna Convention and Montreal Protocol¹²⁴ were, or are regarded as owned by the parties individually. Therefore, if the parties allow their resources to be changed from individually "owned" to shared they lose something that belonged to them exclusively; in UNCLOS all they stood to lose was a potential right.

It should be remembered, however, that the exceptions described above only apply to some states and only so long as they meet certain requirements: once a certain level of production or consumption is met the exceptions no longer apply and individual state control is curtailed. In a sense they provide that those who can afford to bear the loss should. This notion complements the idea that the benefit of the common heritage of mankind should be shared equitably by all - the loss should be shared equitably too.

As has been noted these provisions were included to persuade the South to join, China and India in particular refused to become parties to the convention unless such exceptions were included,¹²⁵ along with provisions for technology transfer.¹²⁶ The importance of having the South as a party lies in the fact that

it is necessary for each State to avoid to the maximum extent possible and to reduce to the minimum extent possible the adverse environmental effects beyond

¹²⁴ Those that harm the ozone.

¹²⁵ China's reluctance to become a party is best understood in the light of its policy to provide a refrigerator for each household, the cheapest sort of refrigerators available being those using chlorofluorocarbons in their insulation.

¹²⁶ Article 5 (2) provides for environmentally safe technology transfer.

its jurisdiction of the utilization of a shared natural resource so as to protect the environment, *in particular*, when such utilization might:

- (a) cause damage to the environment which could have repercussions on the utilization of the resource by another sharing State;
- (b) threaten the conservation of a shared renewable resource;
- (c) endanger the health of the population of another State¹²⁷

By recognising this the original negotiators seem to have recognised the need to remove individually "owned" resources from the control of individual states in order to protect the ozone. They thus, (perhaps unwittingly) gave the nod to the concept of internationalisation.

The Montreal Protocol contains some other interesting limitations on state sovereignty, for example, Article 4 restricts their freedom to trade in controlled substances with non-parties,¹²⁸ thus plugging one possible loop hole and giving the convention more teeth. This

¹²⁷ Principle 3(3) of the UNEP *Draft Principles of Conduct in the Field of Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States* quoted in W. Riphagen, "The International Concern For The Environment as Expressed in the Concepts of the 'Common Heritage of Mankind' and of 'Shared Resources'" in *Trends in Environmental Law and Policy*, *supra*, note 81 343 at 344. The ozone is clearly a shared resource.

¹²⁸ Article 4:

- (1) Within one year of entry into force of this Protocol, each Party shall ban the import of controlled substances from any State not party to this Protocol.
- (2) Beginning on 1 January 1993, no Party operating under paragraph 1 of Article 5 may export any controlled substance to any State not party to this Protocol.
- (3) Within three years of the date of entry into force of this Protocol, the Parties shall, following the procedures in Article 10 of the Convention, elaborate in an annex a list of products containing controlled substances. Parties that have not objected to the annex in accordance with those procedures shall ban, within one year of the annex having become effective, the import of those products from any State not party to this Protocol.
- (4) Within five years of the entry into force of the Protocol, the Parties shall determine the feasibility of banning or restricting, from States not party to this Protocol, the import of products produced with, but not containing, controlled substances. If determined feasible, the Parties shall, following the procedures in Article 10 of the Convention, elaborate in an annex a list of such procedures. Parties that have not objected to it in accordance with those procedures shall ban or restrict, within one year of the annex becoming effective, the import of those products from any State not party to this Protocol.
- (5) Each Party shall discourage the export, to any State not party to this Protocol, of technology for producing and for utilizing controlled substances.
- (6) Each Party shall refrain from providing new subsidies, aid, credits, guarantees or insurance programmes for the export to States not party to this Protocol of products, equipment, plants or technology that would facilitate the production of controlled substances.

and other provisions such as Article 13's financial provisions¹²⁹ indicate that the parties are quite serious in their commitment to protecting the ozone layer and represent an immense improvement on conventions such as the 1933 Convention and the Wetlands Convention. Add this to the effects of the Vienna Convention and Montreal Protocol provisions on individual sovereignty (removing resources from individual sovereignty and placing them under shared) and we have quite a development in international law.

Conclusion

A number of points arise from the above examination of international instruments. There has been an obvious improvement in the willingness of states to agree to limit their sovereignty. The earliest instruments, such as the 1933 Convention, did not actually prescribe a set course of action for the parties to follow, they merely contained agreements to ambiguous policies which the parties were free to interpret as they wished, at their leisure. Now the parties are actually binding themselves to take certain well defined steps within set time limits. There has also been a move from conventions relating only to one narrowly defined resource to

(7) Paragraphs 5 and 6 shall not apply to products, equipment, plants or technology that improve the containment, recovery, recycling or destruction of controlled substances, promote the development of alternative substances, or otherwise contribute to the reduction of emissions of controlled substances.

(8) Notwithstanding the provisions of this Article, imports referred to in paragraphs 1, 3 and 4 may be permitted from any State not party to this Protocol if that State is determined, by a meeting of the Parties, to be in full compliance with Article 2 and this Article, and has submitted data to that effect as specified in Article 7.

¹²⁹ Article 13:

(1) The funds required for the operation of this Protocol, including those for the functioning of the secretariat related to this Protocol, shall be charged exclusively against contributions from the Parties.

(2) The Parties, at their first meeting, shall adopt by consensus financial rules for the operation of this Protocol.

conventions covering several resources, even where their intended effect is just to protect one resource.¹³⁰ In addition states have begun to accept the removal of resources from individual sovereignty and the creation of shared sovereignty over them.¹³¹ The parties have also begun to try to ensure that the use of resources benefits the community as a whole rather than just the individual state in whose territory they lie or which has the technology to exploit them. This development began in UNCLOS's provisions on mining of the deep sea bed according to which "activities in the Area shall ... be carried out for the benefit of mankind as a whole"¹³² and which promote mining by the developing countries and try to prevent harm to their economies as a result of the mining¹³³ and continued on through the provisions of the Convention on Biological Diversity.¹³⁴ It is also clear that the parties will agree to what appear to be more

¹³⁰ See, for example, the Vienna Convention and Montreal Protocol, *supra*, notes 7 and 8, both are intended to protect the ozone, but their effect is to limit state action in relation to several resources.

¹³¹ See the Convention on Biological Diversity.

¹³² UNCLOS Article 140 (1)

¹³³ Article 150.

¹³⁴ See for example Articles 15 and 19 of the Convention on Biological Diversity: Article 15

1. Recognising the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.
2. Each Contracting Party shall endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses by other Contracting Parties and not to impose restrictions that run counter to the objectives of this Convention.
3. For the purpose of this Convention, the genetic resources being provided by a contracting Party, as referred to in this Article and Articles 16 and 19, are only those that are provided by Contracting Parties that are countries of origin of such resources or by the Parties that have acquired the genetic resources in accordance with this Convention.
4. Access, where granted, shall be on mutually agreed terms and subject to the provisions of this Article.
5. Access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party.
6. Each Contracting Party shall endeavour to develop and carry out scientific research based on genetic resources provided by other contracting Parties with the full participation of, and where possible in, such Contracting Parties.

onerous conditions when those conditions are contained in non-binding declarations than when they are entering into binding conventions.¹³⁵ Lastly, it has become clear through provisions such as Article 5 (1) of the Montreal Protocol¹³⁶ that the developed states are more willing to limit their individual sovereignty in the interests of the community as a whole than the developing countries are.

Overall the position can be summarised as a gradual shift from declarations of principles imposing no real obligations on the parties to them, to declarations proper placing moral obligations on the parties to act. These moral obligations were enhanced by the development of the concept of "the common heritage of mankind" in UNCLOS which is close to the ideas

equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the Contracting Party providing such resources. Such sharing shall be upon mutually agreed terms.

Article 19

1. Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, to provide for the effective participation in biotechnological research activities by those Contracting Parties, especially developing countries, which provide the genetic resources for such research, and where feasible in such Contracting Parties.
2. Each Contracting Party shall take all practicable measures to promote and advance priority access on a fair and equitable basis by Contracting Parties, especially developing countries, to the results and benefits arising from biotechnologies based upon genetic resources provided by those Contracting Parties. Such access shall be on mutually agreed terms.
3. The Parties shall consider the need for and modalities of a protocol setting out appropriate procedures, including, in particular, advance informed agreement, in the field of the safe transfer, handling and use of any living organism resulting from biotechnology that may have adverse effect [sic] on the conservation and sustainable use of biological diversity.
4. Each contracting Party shall, directly or by requiring any natural or legal person under its jurisdiction providing the organisms referred to in paragraph 3 above, provide any available information about the use and safety regulations required by that Contracting Party in handling such organisms, as well as any available information on the potential adverse impact of the specific organisms concerned to the Contracting Party into which those organisms are to be introduced.

¹³⁵ See, for example, the difference between the Stockholm Declaration and the Wetlands Convention.

¹³⁶ *Supra* note 125.

of community interest and internationalisation outlined in Chapter 1¹³⁷ and which gradually led to the imposition of stricter and more detailed controls and regulations, eroding state sovereignty with regard to resources traditionally regarded as belonging exclusively to those states.

The Rio Declaration's retreat to the standards of 1972 reflect the continued unwillingness of states to bind themselves to action on the grand scale - although they will agree to limit their sovereignty in specific fields they will not agree to limiting their sovereignty generally. (Even conventions like the Convention on Biological Diversity are limited in scope as they only relate to certain perspicuously defined circumstances and resources.)

The changes we have seen may be due in part to "the growth in the number of States," which has led to "revolutionary changes in the structure of societies and their progressive development[. This] growing interdependence, indicates that we are seen to have reached a stage of saturation: Thus we begin to see a trend towards the sharing of rights over parts of nature."¹³⁸ Whatever the cause the instruments discussed in this chapter suggest that states are coming to accept that the use of all resources, no matter where situated, will have an effect on others and that, therefore, their use must be regulated. They have begun to enter into agreements to do just that and in so doing have begun to remove resources from sole "ownership" and transfer them to joint or community "ownership". This may just be a beginning, but it should be noted that states no longer limit their action solely to avoid harm to others as they would under the rules discussed in Chapter 2, nor are they only entering into

¹³⁷ See above pages 13 to 23.

¹³⁸ State and Nature, Cap. VII in Manfred Lachs *The Development And General Trends Of International Law In Our Time* (The Hague: Martinus Nijhoff) 1984

agreements with their immediate neighbours over one specific resource as they did in the treaties discussed in Chapter 3. States are now entering into treaties with multiple parties that cover more than one resource in one place and which have potentially far greater effect on their sovereignty. They are also beginning to agree to limit their sovereignty and to give control over to the community as a whole, that is to give sovereignty to the community.

There is at least one perceivable problem with this interpretation in that it could be argued that entering into an agreement does not really limit the individual state's sovereignty as they are always free to renege on their promises at a later date. Against this is the fact that, no matter what states might do at a later date, the fact is that current practice finds them entering into agreements limiting individual sovereignty and creating a kind of community sovereignty over resources. Moreover, this practice could be said to constitute evidence of the emergence a customary rule of international law obliging states to continue this practice.¹³⁹

¹³⁹ I do not think that one can at this stage say that such a rule exists, but should the practice continue there is no doubt that such a rule will emerge.

On the emergence of customary rules of international law see Ian Brownlie, *Principles of Public International Law* Third Edition (Oxford: Clarendon Press) 1987 at 4 to 7.

Chapter 5 Conclusion

Having completed our journey through environmental law in the last century it is now time to return to the basic thesis and to compare the findings of Chapters 2, 3 and 4 to it to establish the extent to which the concepts discussed in Chapter 1 have been reflected in the law, the shortcomings of the law and the ways in which the law could and/or should develop. To facilitate this I shall first of all give individual summaries of the first four chapters, then give an overall summary of Chapters 2, 3 and 4, compare these to each other and to the thesis and then give my conclusions.

Individual Summaries

The Thesis: The basic argument is for a global community in which resources are "owned" in common with states having something like a *usufruct* over those within their territory. The idea is that the resources are used in such a manner as to give the greatest benefit the community possible and are not simply used to benefit the individual state. The uses resources are put to should also cause as little harm to other states as possible. In practice the community as a whole would most likely agree on the basic rules to guide the use and development of resources.

If the goal of "community ownership" is to be achieved states need to acknowledge that they have mutual interests and concerns which can only be addressed by the community as a whole, as individual states frequently neither have the power nor the will to deal with these matters unilaterally. States also need to recognise that individual interests such as in the development of certain resources are often best served by cooperation with other states where for example no one state possesses the requisite combination of technology and resources or

resources and demand to make development possible or profitable. This again means acknowledging that they share certain interests with others.

There is a second part to the thesis and that is that states have already begun to acknowledge that they share certain common interests and concerns and have begun to try to deal with them on a community basis. Admittedly the constitution of the community seems to change with each problem faced, but the fact remains that states are beginning to act as members of a group or groups, limiting their own individual freedom of action. The problem is that this development is rather slow and unstructured. It could, therefore be reversed at any time, with states promoting their own self interest above all else.

The Case Law: The case law, coming as early in the development of the law as it did, tends to reflect the idea that the sanctity of individual sovereignty is the basis of all international legal principles. This is apparent from the fact that the only rules it imposed on states in the exercise of their sovereignty were those necessary to ensure that no harm befell others. They provided that one must not cause or allow harm to others to occur as a result of activities in one's territory and to this end, one must carry out prior negotiations with one's neighbours if one is proposing to carry out a project which might affect their interests. It should be noted, however, that even this represents a development in the law which used to allow states to do whatever they wished within their own territory. The rules on preventing harm to others and the rules prescribing that negotiations must take place suggest the beginnings of a community interest in that it is not in the interests of the community that any state be allowed to harm another for no reason other than its own gain.

The Law Pertaining to the Non-Navigational Use of International Rivers: This area in some senses shows the most development of the law in that the states involved have demonstrated far more willingness to accept the idea that they share certain interests with other states. The development does not represent an absolute acceptance of the community interest concept, however, as the interests covered are defined by and limited to a single shared resource and the agreements that deal with them are incapable of expanding to cover other resources (and usually even other issues relating to the resources covered by the agreements) without further negotiation. The acceptance of common interests that exists enables or leads the states concerned to agree to give up some of their individual sovereign rights in return for a share in joint sovereignty over the resources.¹

Instruments Dealing With International Environmental Law: These instruments gave a mixed bag of results - some demonstrated a clear willingness on the part of states to accept a community interest, others did not. Those that did tended to be either non-binding declarations, such as the Rio Declaration, or to deal with resources not generally regarded as belonging to any one state, but which are perhaps capable of appropriation, such as the marine resources covered by UNCLOS. Those instruments that dealt with resources falling within the territory of individual states tended not to go so far in their acceptance of the community interest theory.² More recent conventions dealing with resources that fall within the territory of individual states (and hence traditionally within their individual sovereignty) are, however, now

¹ See, for example, the 1976 Convention on the Protection of the Rhine Against Pollution by Chlorides' [hereinafter "the Chlorides Convention"] detailed plan of the injection system which clearly limits individual sovereignty and gives the states joint control over the regime and resources.

² See, for example, The Convention on Wetlands of International Importance Especially as Waterfowl Habitat, 12 July 1971, 996 U.N.T.S. 245 [hereinafter "the Wetlands Convention".]

dealing with these resources as though subject to the joint sovereignty of the community of states. For example, the Convention on Biological Diversity notes that states retain their sovereignty over their resources,³ but then gives policy guidelines for their use and development.⁴ This suggests that the resources are actually subject to the joint control of the parties to the convention and that, therefore, each state's individual sovereignty has been limited in that they must follow policies agreed to by all the parties to the convention.

General Summary

The above summaries indicate a gradual development of the law to reflect the slow emergence of the ideas of community interest and shared/joint sovereignty amongst states. The development began with the case law recognizing the need to prevent harm to others resulting from a state's activities. This developed into a requirement to consult with others to ensure that no harm would befall them. The development continued through treaties dealing with the use of specific resources. In these the parties recognised that they shared common interests in seeing the development of those resources. At the same time states began entering into treaties to deal with the development and/or preservation of extraterritorial resources. Finally states began to enter into treaties to deal with resources commonly regarded as falling under the exclusive sovereignty of individual states, the use of which had hitherto been unaffected by international law.

The development has been somewhat limited, in that it has tended to take place only under certain circumstances. Those circumstances are: where resources were already perceived

³ The Convention on Biological Diversity, 5 June 1992, 31 I.L.M. 818 [hereinafter "the Convention on Biological Diversity"] Article 3.

⁴ *Ibid* Articles 5, 6, 8, 9, 10, 12, 15, 16, 17 and 19.

as shared;⁵ where the resources were regarded as being extraterritorial;⁶ where the parties were merely declaring principles upon which future action should be based and not actually binding themselves to take any specific action;⁷ and where the parties perceived themselves to be under some common threat.⁸

An interesting trend seen in both the international river regimes and some of the later conventions discussed in Chapter 4⁹ is that states have entered into initial agreements acknowledging common interests and laying the ground work for further, more detailed agreements and have then drafted more detailed rules limiting their individual sovereignty.

The problem just now is that states tend to regard individual sovereignty as the basis of all law - the root from which all other legal principles spring - and as sacrosanct and unchallengeable. This prevents them taking a community based approach to problems or at least makes it difficult for them to do so as each tries to protect its position in negotiations and is unwilling to compromise. This needs to change. States must recognise that they have mutual interests and concerns and that it is these interests that must form the basis of the law if development is not to be completely stymied by conflicting interests.

⁵ As found, for example, with international rivers.

⁶ For example, the deep sea bed.

⁷ As, for example, under the Rio Declaration on Environment and Development (UNCED Doc. A/CONF.151/5/Rev.1, June 13, 1992) [hereinafter "the Rio Declaration".]

⁸ As, for example, the threat to the ozone layer that led to the Vienna Convention for the Protection of the Ozone Layer, 22 March 1985, Can.T.S. 1988 No.23, U.K.T.S. 1 (1990) [hereinafter "the Vienna Convention"] and the Montreal Protocol on Substances That Deplete the Ozone Layer, 16 September 1987, Can.T.S. 1989 No.42. [hereinafter "the Montreal Protocol".]

⁹ See particularly the Mekong Regime and the Vienna Convention and the Montreal Protocol.

Comparison of Aims and Findings

As noted above, the basic aim of this paper is to argue for the creation of a "community ownership" system, which requires states to acknowledge that they share certain mutual interests, the furtherance of which requires that they limit their individual sovereignty.¹⁰ It would appear, from the findings of Chapter 2 to 4, that these requirements are being met to a certain extent in that states are beginning to recognise common interests. The difference is that whereas the argument laid out in Chapter 1 is that all sovereignty needs to be shared and there is no room for individual sovereignty over resources the common interests recognized in each of the treaties discussed in Chapters 3 and 4 tend to be limited to specific resources and specific states. There are some notable exceptions to this namely UNCLOS, the Vienna Convention and Montreal Protocol and the Convention on Biological Diversity. They are all open to all states and all impact on the use and development of numerous resources,¹¹ but even these treaties have only limited purposes and scope. Each is limited to one particular problem or area - the Vienna Convention and Montreal Protocol are intended only to tackle the depletion of the ozone layer, it is not intended even to deal with other pollution problems. Similarly the Convention on Biological Diversity aims only at preserving biological diversity.

The findings of Chapters 2 to 4 also demonstrate that states tend to be more willing to

¹⁰ These are to ensure that no harm befalls any part of the community and to ensure that all have an equal opportunity to develop. Failure to ensure this will lead to some states becoming a burden on other members of the community, preventing those members concentrating on the sustainable development of their own resources and tackling other problems facing the community. See J.Walsh "Will the Jobs Ever Come Back" *Time* 7 February 1994, 37 where Walsh discusses the effects of unemployment on state economies and communities. Although this article refers to the effects on individuals and not states the effects of mass unemployment on individuals and communities described in it reflect the effects on states and the global community of the inability of certain states to develop particularly where no assistance is given to them.

¹¹ UNCLOS, for example, deals with all marine resources and also impacts on the development of some land based resources through its provisions on marine pollution from land based sources.

recognise common interests where it is indisputable that they share the resource, such as in the regimes applying to international rivers. One might compare, for example, the Chlorides Convention in the Rhine regime to the Montreal Protocol, both provide quite detailed regimes for combating pollution, but the former actually outlines the steps to be taken by the individual parties and provides the *per centages* of the costs to be borne by each state. The latter simply sets targets for pollution control and a time scale for meeting those targets, it does not detail the steps to be taken by each individual party. This difference may stem in part from the fact that it is obvious that the development of such resources as international rivers will impact, possibly negatively on the other states through which they flow, in part from the fact that there are fewer states involved, making it easier for them to agree on common interests and in part from the fact that the regimes are very narrowly defined and incapable of expansion, again making it easier for the parties to accept them. It is also clear that where states are not dealing with such obviously shared resources they are more likely to agree to take action where faced with a common and commonly acknowledged threat. For example, the states which produce the most greenhouse gases (the developed states) tend not to feel as threatened by global warming as certain small island states, which contribute little to the problem, but stand to lose a lot if sea levels rise as a result of the warming.¹² The developed states are, therefore, less

¹² See statement by H.E. Mr. Bailey Olter, President of the Federal States of Micronesia and Chairman of the South Pacific Forum in the Report of the United Nations Conference on Environment and Development U.N. Doc. A/CONF.151/26/Rev.1 (Vol III) [hereafter "UNCED Vol.III"] at 55:

Climate change and sealevel rise caused by global warming are the most serious environmental threats to the islands in the Pacific region. Our cultural, economic and even our physical survival are directly at risk. Yet we have not created the problem which threatens to destroy us, nor even materially contributed to it. Moreover the solution to the problem is not within our capabilities, but lies instead with those who purchased their own development with polluted currency that the rest of us dare not use.

See also the statements by H.E. Mr. L Erokine Sandiford P.M. of Barbados and H.E. Mr. Geoffrey Arama Henry

likely to take action as they have less to gain and more to lose in that they will have to change certain of their practices which will not only cost more initially, but may continue to be economically more expensive in the long term.¹³ Compare this to the treaties designed to protect the ozone layer, an area in which there was a reasonable degree of consensus as to the dangers of inaction and which was promoted in large part by the developed countries with the developing countries less willing to become parties to it.¹⁴ In this case it was the developing countries that felt they had less to gain and more to lose by becoming parties to the convention.

It seems then that under the present system states need something to prod them to recognise common interests, either a threat to them, or the prevention of development. In other words if states think that they can continue to act as they wish with impunity they will; it is only if they think that they will suffer some unfavourable consequences that they will agree to curb their individual sovereignty or freedom of action. The exception which proves the rule being UNCLOS's provisions on deep sea bed mining, which curb individual freedom to mine the deep sea bed despite the fact that the resources are not obviously shared by the parties, nor is there any need for individual states to cooperate in order to develop them,¹⁵ nor is there any real threat to or from the resources. On the other hand, it could be argued that the provisions were only agreed to because the parties believed that they had a greater chance of sharing in the profits of the mining activities by regulating production and rights to production than if they

P.M. of the Cook Islands in UNCED Vol.III at 91 and 133.

¹³ I use the word "economically" as the new practices ought to prove to be environmentally cheaper.

¹⁴ One should recall that special provisions allowing developing country parties to delay compliance for some time were included in order to persuade them to join. See above Chapter 4, pages 150-152.

¹⁵ Except that the less developed states might not be able to develop the requisite technology to mine the resources.

did not.¹⁶

The problem with only acting where there is a common threat or where common interests clearly exist, is that certain matters are either not dealt with or are inadequately dealt with because they do not generate sufficient interest. Such problems would not arise under the proposed system as all activities would have to conform to community based policies agreed upon by the parties. There would be no room for the individual policies of states to over rule the community interest; all policies would be subject to the community interest principle. One might argue that the proposed system would fail in areas where policies had not yet been formulated, but that is not necessarily so. All policies would be derived from the principle of the furtherance of community interests so where no policies had actually been agreed upon the correctness of a certain course of action could be deduced by weighing its costs and benefits to the community as a whole to establish the net benefit. In other words, something akin to the principle of "equitable utilisation" would be applied to determine the appropriateness of projects not already governed by a detailed regime.¹⁷ Chapter 3 gives some indication of the effectiveness of that principle in practice: the parties to the treaties discussed in it tended to agree to try to balance their individual interests to ensure that the resources in question were put to the most beneficial use possible where they did not actually have a precise use for the

¹⁶ It is interesting that the one state with the technology to actually carry out mining in the deep sea bed in 1982, the U.S.A., has not actually become a party to the convention.

¹⁷ The question of whether general guide lines similar to those contained in Article V of the Helsinki Rules on the Uses of The Waters of International Rivers as approved by the International Law Association at its Fifty-second Conference, Helsinki 1966 (London) 1967 [hereinafter "the Helsinki Rules"] ought to be drafted to decide such matters is rather moot in that it could be argued that such guide lines are implied by the principle of community interest. On the other hand, it might be beneficial to have some general guide lines to settle disputes.

river in mind.¹⁸ It is also clear from Chapter 3 that where there is no obvious community spirit, such as was the case when the Plata Basin regime was first established, there is less progress towards joint development of the resources. Chapter 4 demonstrates that there is also less likelihood of states entering into agreements to protect the environment as a whole where they do not have a perception of sharing common interest. Compare, for example, the Montreal Protocol¹⁹ to the Framework Convention on Climate Change.²⁰ The former provides detailed rules on how the problem of ozone depletion is to be tackled, the latter a framework for action, outlining policies the parties should follow, but not giving details as to how they should deal with the problem of global warming. The difference in approaches is due to the fact that there is some sort of consensus between states as to the threat posed by and as to the very fact of ozone depletion, there is little consensus as to the effects of climate change, or even whether there is or will be any real climate change in the foreseeable future.²¹

A further benefit of a community based system over an individual sovereignty based system is that it facilitates developments which could not otherwise take place because no single state possesses the requisite combination of resources and technology to make it possible.²²

¹⁸ See, for example, the Mekong regime.

¹⁹ *Supra*, note 8.

²⁰ The Framework Convention on Climate Change reproduced in Report of the Intergovernmental Negotiating Committee For a Framework Convention on Climate Change On the Work of the Second Part of the Fifth Session, U.N. Doc.A/AC.237/18 (Part II) Add.1 15 May 1992.

²¹ See statement by H.E. Mr. Geoffrey Arama Henry, P.M. of the Cook Islands, *supra* note 12 at 134, where he discussed the scientific uncertainty surrounding the issue and notes that this only adds to the concern of small island states which can not afford to wait for absolute proof of sea level rise.

²² Possible scenarios are that the resources are shared by two or more states, no one state possesses all the necessary technology, or no one state possesses both the resources and the necessary technology.

Where a community with common interests is felt to exist states are more likely to cooperate to provide the necessary combination of resources and technology to allow the development to proceed than where each is simply concerned with pursuing its own interests and in improving its position relative to other states. Consider, for example, the Rhine river regime, the parties to which felt themselves to be part of a community, with a common history and common interests particularly as far as the Rhine was concerned. This perception of common interests facilitated the construction of a detailed regime to guide the use of the river basin which it was thought would benefit the community as a whole, even though it would perhaps cause some loss to certain states, such as France.²³ By comparison, when the Nile regime was established the parties had little if any perception of sharing common interests and so the main thrust of the regime is to preserve existing interests and to ensure that the individual interests of the parties are not threatened in the future.

Conclusion

Although the law is developing to reflect a community interest, it has not yet done so to the extent one might desire. This is due to the fact that although most states seem to regard themselves as members of several small communities founded on specific interests or problems, they do not generally view themselves as members of one single community. It is also due to the fact that states are still inclined to regard individual sovereignty as sacrosanct and to be unwilling to give up any of their sovereign rights,²⁴ with the result that where there is clearly

²³ France would lose out under the regime in that it would have to bear a proportion of the costs of implementing the Chlorides injection scheme, but would gain nothing from it.

²⁴ This can be seen in, for example, the Article 2 of the Rio Declaration which provides that states retaining permanent sovereignty over their resources. See above page 116 of Chapter 4.

no perception of a community interest existing rights tend to be entrenched and development to be blocked. For example, the Nile River Regime was not drafted with the idea of promoting the community interest. It was established to protect Egypt's existing rights and uses and to promote future uses by her.²⁵ Moreover, even those regimes or treaties negotiated with the idea of pursuing a community based system tend not to fair as well if the parties do not regard themselves as part of a community before they enter into the agreement. Compare, for example, the efficacy of the Plata Basin regime and the Rhine regime. The former, although representing a step towards the creation of a community spirit by states traditionally hostile to each other, was in effect only a framework for further action; it was an agreement to agree. The regime merely laid the foundations for a community interest based system, it did not actually give the system any structure. The Rhine regime, on the other hand, was agreed to by states with a long history of cooperation in numerous areas and, although it does not on the face of it appear so concerned with the concept of community interest, it obviously benefits the Rhine riparian community as a whole. The Chlorides Convention, for example, enables France to continue its mining activities and at the same time ensures that downstream states will not be prevented from using the water by France's activities.

One ought to note the predominance of international river regimes in the examples of regimes demonstrating community interest. This is simply because the examples discussed above have indicated that the parties to international river regimes are much more likely to share a perception of a community interest than is the case in the general sphere of international law. This is, no doubt, because the states are neighbours and are, therefore, forced to cooperate

²⁵ See above, Chapter 3 at pages 65 to 74.

with each other more frequently than they would be if they were situated on opposite sides of the globe. The parties are also more likely to share common interests, problems and perspectives as their geographies, histories, demographics and economies are likely to correspond more closely to each others than to those of states more distantly located. The other factor of importance is that states tend to enter into international river regimes for specific purposes²⁶ and with the express intention of facilitating cooperation and development. The instruments discussed in Chapter 4 were, by comparison, intended to enable and ensure protection of the environment. They were not intended to facilitate cooperation and development so much as to ensure compliance and conservation of resources. This makes them less attractive to states: conservation tends to mean that development is prevented which makes the parties feel that they are losing something rather than gaining something by becoming parties to the convention.

If one turns all this on its head, one sees that an existing perception of community interest is necessary if one is to draft a meaningful regime to govern the use or preservation of a resource. Both international river regimes and international environmental law generally indicate that if the parties do not already perceive themselves to share certain interests, they must draft a basic framework for agreement in which they outline the issues to be tackled, the interests they share and any conflicting interests that may exist before they can draft a detailed regime on the development or protection of the environment.²⁷

Given that more is achieved where states perceive that they have common interests, such

²⁶ See, in particular the Columbia River regime, above Chapter 3 pages 82 to 87.

²⁷ See, for example, the Mekong regime, Chapter 3 pages 74 to 81 and the Vienna Convention and Montreal Protocol, *supra*, note 8.

beliefs should be fostered by the law to the greatest extent possible. That is, the notion of community interest should be adopted as a basic principle of international law guiding relations between states. Its promulgation should help states to understand the benefits of and to agree to the limitation of individual sovereignty and to the creation of joint sovereignty. Both of these objectives would be achieved by states agreeing to the imposition of detailed regimes upon themselves.

While the law does appear to be moving in this direction, the problem is that it is moving too slowly and its final destination is not clear. States are proceeding in a rather *ad hoc* manner with no definite goals. The issues tackled are those which happen to be at the top of the political agenda at any given time. These tend to be the issues that are seen either to be particularly important because of the threat they bear, or to be particularly beneficial to the parties. Examples are the depletion of the ozone layer which it is generally agreed threatens everyone and which led to drafting of the Vienna Convention and Montreal Protocol and the development of international river basins which give economic benefits to the states party to them.

There is a further problem in that there is no knowing how long states will continue to cooperate as what cooperation there is takes place on an *ad hoc* basis. Nor is there any way of knowing whether they will later withdraw from their commitments and/or from the community. The only way to combat this uncertainty is to ensure that there is a general acceptance that states are part of a community with shared interests including in matters traditionally regarded as falling within the exclusive sovereignty of individual states. That means all states must accept that they share an interest in the manner in which others deal with their resources, economic

matters, development and so on. States need to agree that all activities must conform to the idea of furthering the community interest above all else. If they do it will eventually enable them to accept an all pervasive shared sovereignty and the imposition of regulations which effectively render them guardians over or usufructuaries²⁸ of their resources. This would mean that they would be able to use the resources, but only in accordance with the policies laid down by the community as a whole and only in the manner thought to benefit the community the most or to harm it the least. Where no regulations had been agreed upon projects would be assessed for their overall benefit to the community in accordance with guidelines like those contained in Article 5 of the Helsinki Rules.²⁹

One should note, however, that before states can agree to share sovereignty they need to enter into a basic framework for agreement setting out the parameters for the community, in the same way as the states party to, for example, the Mekong Regime entered into a framework agreement before going on to give the regime any real form.

In sum, the argument I am putting forward is twofold: as the world is "shrinking" in the sense that states are becoming more and more dependent on each other and that their actions are having an ever greater impact on others, international law must be developed so that it is based on the concept of community interest under which all actions must benefit the community as a whole. If the law is to continue without developing the community interest concept as its basis, states will almost undoubtedly continue pursuing their own ends above all other interests

²⁸ A usufructuary is someone who has the use of property for their life, rent free, and without limit as to their use except that they may not dispose of the property in any way, the original owner having already directed that ownership be transferred to someone else on the usufructuary's death.

²⁹ *Supra*, note 13 of Chapter 3.

and the destruction of the environment and stripping of resources that presently happens will continue. We shall continue to see such activities as states felling their forests and selling the wood at unprofitable prices simply to gain control of a market. The effect of such activities is and will continue to be that the forests are completely logged, even to the stage that they become unable to replenish themselves, and the states concerned gain nothing from the exercise, indeed they may end up costing them money.³⁰ The effect worldwide is and will continue to be that resources are lost forever and that those states that have a sound economic base have to subsidise those that are unable to form one.

The second part to the argument being put forward here is that states are already beginning to base their activities on the community interest concept. The problem is that the agreements do not go far enough, they are limited to certain resources, parties and circumstances while other areas are completely neglected. This leads to a further problem in that one has no way of knowing what shape future agreements will take, whether they will continue to be based on the idea of sharing sovereignty or whether they will revert to enshrining individual sovereignty as sacrosanct. These problems could be avoided if the law was developed so that the community interest concept formed its basis as it would give direction to all future agreements and would provide guidance in those areas not covered by an agreement.

³⁰ See, for example, the discussion of the attempt by Indonesia to gain control of the plywood market in Chapter 1.

Bibliography

International Declarations

Amazon Declaration of 1989 reprinted in M.R.Molitor, ed., *International Environmental Law Primary Materials* (Deventer, Boston: Kluwer Law and Taxation) 1991 88.

Decalaration of Brasilia 1989 reprinted in M.R.Molitor, ed., *International Environmental Law Primary Materials* (Deventer, Boston: Kluwer Law and Taxation) 1991 92.

Declaration on the Human Environment, formulated at Stockholm (1972) 21 U.N. Doc. A/Conf.48/14,reprinted in (1972),11 I.L.M. 1416

Rio Declaration on Environment and Development (UNCED Doc. A/CONF.151/5/Rev.1,June 13, 1992.

International Conventions

Convention on Biological Diversity, 5 June 1992, 31 International Legal Materials 818

Convention Relative to the Preservation of Fauna and Flora in Their Natural State, 8 November 1933, League of Nations Treaty Series, Vol.172 No.3995 241

Convention to Regulate International Trade in Endangered Species of Flora and Fauna, 3 March 1973, United Kingdom Treaty Series 101 (1976) 993 United Nations Treaty Series 243

The Convention on Wetlands of International Importance Especially as Waterfowl Habitat, 12 July 1971, 996 United Nations Treaty Series 245

Framework Convention on Climate Change, in Intergovernmental Negotiating Committee for a Framework Convention on Climate Change 5th Session 2nd Part New York, 30 April to 9 May 1992, A/AC.237/18 (Part II) Add.1

The United Nations Charter Canadian Treaty Series 1945 No.7

The United Nations Convention on the Law of the Sea, 10 December 1982, U.N. Doc. A/CONF.62/122 October 7 1982, reprinted as amended by U.N. Documents A/CONF.62/122/Corr.3 November 3, 1982 and A/CONF.62/122/Corr.8 November 26, 1982 (1982) 21 International Legal Materials 1261.

The UNESCO Constitution 4 United Nations Treaty Series 275

Vienna Convention for the Protection of the Ozone Layer, 22 March 1985, Canadian Treaty Series 1988 No.23, United Kingdom Treaty Series 1 (1990)

Montreal Protocol on Substances That Deplete the Ozone Layer, 16 September 1987, Canadian Treaty Series 1989 No.42.

Canada- United States:

1909 Boundary Eaters Treaty between Canada and the United States of America 1909 Canadian Treaty Series 548

Treaty Between The United States of America and Canada Relating to Cooperative Development of the Water Resources of The Columbia River Basin, January 17 1961, Canadian Treaty Series 1964 No.2; United States Treaties and Other International Agreements Vol.15 No.2 1555 (1964)

Annex to Exchange of Notes Dated January 22, 1964 Between the Governments of Canada and the United States Regarding the Columbia River Treaty, Canadian Treaty Series 1964 No.2; United States Treaties and Other International Agreements Vol.15 No.2 1579 (1964)

The Mekong:

1957 "Rules of Procedure of the Mekong Committee" United Nations Legislative Series ST/LEG/SER.B/12 Treaty No.81

1957 "Statute of the Committee for Coordination of Investigation of the Lower Mekong Basin" United Nations Legislative Series ST/LEG/SER.B/12 Treaty No.81

The Nile:

1929 Exchange of Notes Between His Majesty's Government in the United Kingdom and the Egyptian Government in Regard to the Use of the Waters of the River Nile for Irrigation Purposes Cairo, 7 May 1929. League of Nations Treaty Series, vol.XCIII 44.

1949 Exchange of Notes Between the Government of the United Kingdom and the Government of Egypt Regarding the Construction of the Owen Falls Dam Cairo, 30 and 31 May 1949

1959 Agreement Between the United Arab Republic and the Republic of Sudan for the Full Utilisation of the Nile Waters, 8 November 1959, 453 United Nations Treaty Series 51.

The Plata River:

1969 Treaty for the Plata Basin Brasilia, 23 April 1969, 875 United Nations Treaty Series 11 and (1969) 8 International Legal Materials 905.

The Rhine:

1963 Agreement Concerning the International Commission for the Protection of the Rhine Against Pollution, 29 April 1963, 994 United Nations Treaty Series 0

1976 Convention on the Protection of the Rhine Against Pollution by Chlorides, 3 December 1976 unofficial translation in (1979) 16 International Legal Materials 265

1976 Convention on the Protection of the Rhine Against Chemical Pollution, 3 December 1976 unofficial translation in (1979) 16 International Legal Materials 242

International Resolutions

United Nations Resolution on Permanent Sovereignty Over Natural Resources of 1962 U.N.G.A. Res.1803 (XVII), 17 U.N.GOAR.Supp. (No.17) 15, U.N. Doc.A/5217 (1963)

U.N.G.A. Res.3171 (XXVIII); 28 U.N. GAOR.Supp. (No.30) 52, U.N. Doc. A/9400 (1973)

Other International Documents

Draft Articles on the Law of the Non-Navigational Uses of International Watercourses, Draft Report of the International Law Commission, U.N. GOAR, 43rd Sess., at 1, U.N. Doc.A/CN.4/L.463/Add.4 (1991).

Helsinki Rules on the Uses of the Waters of International Rivers as approved by the International Law Association at its Fifty-second Conference at Helsinki 1966, *Report of the Committee on the Uses of International Rivers* (London: International Law Association) 1967

Mekong Consultations Kuala Lumpur 16 December 1992 *Draft Overview and Analysis of the Mekong Legal and Institutional Framework*

Statute of the International Atomic Agency 26 October 1956 Canadian Treaty Series 1957 No.20

United Nations *Legal Problems Relating to the Utilization and Use of International Rivers*, Report of the Secretary General U.N. Doc.A/5409, 15 April 1963

The Charter of Social and Economic Rights and Duties of States G.A.Res 3281 (XXIX), 29 U.N. GAOR Supp.(No,31) at 50, U.N. Doc.A/9631 (1974),

U.N. Doc.A/CONF.62/C.1/L.7

U.N. Doc.A/CONF.62/C.1/L.8

Case Law

Corfu Channel Case (United Kingdom v. Albania) [1949] ICJ Rep 4.

Georgia v. Tennessee Copper Co. 206 U.S. 1906 1038

Island of Palmas (Netherlands v. United States) 2 UNRIAA 829

Lac Lanoux Arbitration (France v. Spain) Int.L.R., 24 (1957) 101

The Trail Smelter Arbitration (Canada V. United States) (1938, 1941) RIAA iii 1905

Wuerttemberg and Prussia v. Baden 4 Annual Digest of Public International Law Cases (1927-'8) 128

Secondary Sources

S.K. Agrawala, T.S. Rama Rao & J.N. Saxena, eds., *New Horizons of International Law and Developing Countries* International Law Association (Indian Branch) (Agincourt, Ontario: The Carswell Company Ltd.) 1983

H.S. Amerasinghe, "The Third World and the Seabed" in Elisabeth Mann Borgese, *Pacem in Marbus*, (New York: Dodd, Mead) 1972

American Society of International Law 1983 "Proceedings of the 77th Annual Meeting of the American Society of International Law"

E. Anderson, "The Violence of Thirst" *Geographical Magazine* (May 1991) 31

G.M. Badr, "The Nile Waters Question Background and Recent Development" (1959) 15 *Egyptian Review of International Law* 94

T.C. Bacon, "The Role of The United Nations Environment Program (UNEP) in the Development of International Law" (1974) 12 *Canadian Year Book of International Law* 255.

R.K. Batstone, "The Utilisation of the Nile Waters" (1959) 8 *International and Comparative Law Quarterly* 823

L.J. Bochez, "Rhine Pollution: International Law Aspects" (1981) 9 *International Business Lawyer* 53

C.B. Bourne, "The International Law Commission's Draft Articles on the Law of International Watercourses: Principles and Planned Measures" (1992) 3 *Colorado Journal of International Environmental Law and Policy* 65

S. H. Bragdon, "National Sovereignty and Global Environmental Responsibility: Can the Tension Be Reconciled for the Conservation of Biological Diversity?" (1992) 33 *Harvard International Law Journal* 381

J.L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* 6th ed. Sir Humphrey Waldock ed. (Oxford: Clarendon Press) 1963

I. Brownlie, *Principles of Public International Law* Third Edition (Oxford: Clarendon Press) 1987

L.K. Caldwell, *International Environmental Policy Emergence and Dimensions* (Durham, North Carolina: Duke University Press) 1984

G.J. Cano, "Argentina, Brazil, and the Plata River Basin: A Summary Review of Their Legal Relationship" in Utton, A.E. and L.Teclaff, eds., *Water In A Developing World The Management of A Critical Resource* (Boulder, Colorado: Westview Press, Inc.) 1978

D.J. Chenevert Jr., "Application of the Draft Articles on the non-Navigational Uses of International Watercourses to the Water Disputes Involving the Nile River and the Jordan River" (1992) 6 *Emery International Law Review* 495 .

Chile "Working Paper on the Economic Implications for the Developing Countries of the Exploration of the Sea-bed Beyond the Limits of National Jurisdiction" U.N. Doc.A/CONF.62/C.1/L.11.

J.E. Cohen "International Law and the Water Politics of the Euphrates" (1991) 24 *New York Journal of International Law and Politics* 502

B. Conforti "Does Freedom of The Seas Still Exist?" (1975) 1 *The Italian Year Book of International Law* 3

R.J. Dupuy, ed., *The Future of the International Law of the Environment Hague Academy of International Law 1984* (Boston: Martinus Nijhoff Publishers) 1985

E.P. Eckholm "Global Environment Ten Years After Stockholm" Cap one in *Down to Earth* (New York: Norton) 1982.

G. Elian *The Principle of Sovereignty Over Natural Resources* (Germantown, Maryland: Sijthoff and Noordhoff) 1979

- M. Elliot, "Water Wars" *Geographical Magazine* (May 1991) 28
- R. Eshbach "A Global Approach to the Protection of the Environment: Balancing State Sovereignty and Global Interest" (1990) 4 *Temple International and Comparative Law Journal*, 271
- External Affairs and International Trade Canada, *The International Environment: A Reference Book (A Selection of Current Declarations and Agreements)* 1990
- Finnish Branch of the International Law Association, *The Work of the International Law Association on the Law of International Resources* (Helsinki) 1988
- C.A. Fleischer, *Trends in Environmental Law and Policy* International Union for Conservation of Nature and Natural Resources, (Chicago: Gland) 1980
- R.L. Freidheim, *Negotiating the New Ocean Regime* (Columbia South Carolina: University of South Carolina Press) 1993
- B.A. Godana, *Africa's Shared Water Resources: Legal and Institutional Aspects of the Nile, Niger and Senegal River Systems* (Boulder Colorado: Lynne Reiner Publishers, Inc.) 1985
- L.F.E. Goldie, "Concepts of Strict and Absolute Liability and the Ranking of Liability In Terms of Relative Exposure to Risk" (1985) 16 *Netherlands Yearbook of International Law* 174
- W. Griffin, "The Use of Waters of International Drainage Basins Under Customary International Law" (1959) 53 *American Journal of International Law* 50
- H. Grotius, *The Rights of War and Peace* translated with notes by A.C. Campbell, M.A., (Washington: M.Walter Dunne Publisher) 1901
- P.M. Haas, *Saving the Mediteranean 'The Politics of International Environmental Cooperation'* (New York: Columbia University Press) 1990
- G. Handle, "The Principle of Equitable Use As Applied To International Natural Resources: Its Role In Resolving Potential International Disputes Over Transfrontier Pollution" (1978-'9) 14 *revue belge de droit internationale* 40
- X. Hanquin, "Relativity in International Water Law" (1992) 3 *Colorado Journal of International Environmental Law and Policy* 45
- D.J. Harris *Cases and Materials on International Law* 3rd ed., (London: Sweet and Maxwell) 1983

- R.D. Hayton and A.E. Utton, "Transboundary Groundwaters: The Belagio Draft Treaty" (1989) 29 *Natural Resource Journal* 663.
- R.D. Hayton, "The Choice Between International Watercourses and International Watercourse Systems" (1992) 3 *Colorado Journal of International Environmental Law and Policy* 31
- I.L. Head *On a Hinge of History The Mutual Vulnerability of South and North* (Toronto: University of Toronto Press) 1991
- T. Hobbes, *Leviathan* C.B. MacPherson, ed., (Aylesbury, England: Penguin Books) 1985
- E. Hughes, A. Lucas & W. Tilleman, eds., *Environmental Law and Policy* (Toronto: Emond Montgomery) 1992
- D.M. Johnston, "Functionalism in the Theory of International Law" (1988) 26 *Canadian Year Book of International Law* 3
- R.W. Johnson, "The Canada-United States Controversy Over The Columbia River" (1966) 41 *Washington Law Review* 676
- M.T. Kamminga, "Who Can Clean up the Rhine: The European Community or the International Rhine Commission?" in Zacklin *et al*, eds., *The Legal Regime of International Rivers and Lakes* (Boston: Martinus Nijhof Publishers) 1981
- H. Kelsen *Principles of International Law* 2nd ed. W.Trucker, ed., (U.S.: Holt, Rinehart and Winston Inc.) 1966
- C. Kerrigan, ed., *An Anthology of Scottish Women Poets* (Edinburgh: Edinburgh University Press) 1991
- A. Kiss, "The Protection of the Rhine Against Pollution" (1985) 25 *Natural Resources Journal* 613
- J. Kolars, "Hydrogeographic Background to the Utilisation of International Rivers in the Middle East" (1986) 80 *American Journal of International Law* 249
- M. Lachs *The Development And General Trends Of International Law In Our Time* (The Hague: Martinus Nijhoff) 1984
- J.G. Lammers, "International Cooperation for the Protection of the Waters of the Rhine Basin against Pollution" (1974) 5 *Netherlands Yearbook of International Law* 59
- J.G. Lammers, "New International Legal Developments Concerning the Pollution of the Rhine" (1980) 27 *Netherlands International Law Review* 171

- R. Lansing, "Notes on World Sovereignty" (1921) 15 *American Journal of International Law* 13
- S. Lehman, "Do Wildernesses Have Rights?" (1981) 3 *Environmental Ethics* 129
- D. LeMarquand, "Politics of International River Basin Management" in A.E. Utton, and L. Teclaff, eds., *Water In A Developing World: The Management of A Critical Resource* (Boulder, Colorado: Westview Press) 1978
- D.B. Magraw, ed., *International Law and Pollution* (Philadelphia: University of Pennsylvania Press) 1991
- D.B. Magraw, "The Legal Treatment of Developing Countries: Differential, Contextual and Absolute Norms" (1990) 1 *Colorado Journal of International Environmental Law and Policy* 69
- D.K. Malcolm, "Legal Aspects of the Integrated Development of the Lower Mekong Basin" (1971) 2 *Law Asia* 80
- M.S. McDougal & W.M. Reisman *International Law in Contemporary Perspective the Public Order of the World Community Cases and Materials* (Minnesota, New York: The Foundation Press Inc.) 1981
- General A.G.L. McNaughton, "The Proposed Columbia River Treaty" (1962-'3) 18 *International Journal* 148
- P.K. Menon, "The Legal Regime of the Lower Mekong River Basin" (1971) 49 *Revue de droit international des sciences diplomatiques et politiques* 303
- P.K. Menon, "Institutional Mechanisms for the Development of International Water Resources" (1972) 8 *Revue belge de droit international* 81
- P.K. Menon, "The Mekong River and International Development of Natural Resources" (1971) 5 *International Lawyer* 53
- M.R. Molitor ed. *International Environmental Law Primary Materials*, (Boston: Kluwer Law and Taxation) 1991
- T. Naff, "Remarks" in "Hydrogeographic Background to the Utilisation of International Rivers in the Middle East" (1986) 80 *American Society of International Law Proceedings* 249
- V.P. Nanda & W.K. Ris, "The Public Trust Doctrine: A Viable Approach to International Environmental Protection" (1976) 5 *Ecology Law Quarterly* 291.

- J. Ntambiweki *The Developing Countries in the Evolution of an International Environmental Law* (1991) 14 Hastings International and Comparative Law Review 905
- C. O'Keefe, "Transboundary Pollution and the Strict Liability Issue" (1990) 18 Denver Journal of International Law and Policy 145
- C.O. Okidi, "Review of Treaties on Consumptive Utilisation of Waters of Lake Victoria and Nile Drainage System" (1982) 22 Natural Resources Journal 161
- Dr R.K.L. Panjabi in "The South and the Earth Summit: The Development/Environment Dichotomy" (1992) 11 Dickinson Journal of International Law 77
- B. Pratt-Johnston *Whitewater Trips for Kayakers, Canoeists and Rafters in British Columbia: Greater Vancouver Through Whistler, Okanagan and Thomson River Regions* (Vancouver: Adventure Publishing (Betty Pratt-Johnston) Limited) 1986
- M.S. Rajan, *Sovereignty Over Natural Resources* (Atlantic Highlands, N.J.: Humanities Press) 1978
- T.S. Rama Rao, "The New International Economic Order and the North-South Dialogue" in S.K. Agrawala, T.S. Rama Rao & J.N. Saxena, eds., *New Horizons of International Law and Developing Countries* International Law Association (Indian Branch) (India: N.M.Tripathi Private Limited) 1983.
- J.E. Read, "The Trail Smelter Dispute" (1963) 1 Canadian Yearbook of International Law 213
- W. Riphagen, "The International Concern For The Environment as Expressed in the Concepts of the "Common Heritage of Mankind" and of "Shared Resources"" in *Trends in Environmental Policy and Law* International Union for Conservation of Nature and Natural Resources, (Gland) 1980
- N.A. Robinson, "A Legal Perspective on Sustainable Development" in J.O. Saunders *The Legal Challenge of Sustainable Development* (Calgary: Canadian Institute of Resource Law) 1990 15
- T.C. Sanders, *The Institutes of Justinian Translation and Commentary* 4th Ed. (London and New York: Longmans, Green & Co.) 1869
- M.B. Saunders "Valuation and International Regulation of Forest Ecosystems: Prospects For a Global Forest Agreement" (1991) 66 Washington Law Review 871
- O. Schachter *Sharing the World's Resources* (New York: Columbia University Press) 1977
- A. Schwabach, "The Sandoz Spill: The Failure of International Law to Protect the Rhine From Pollution" (1989) 16 Ecology Law Quarterly 443

F.E. Snyder & S. Sathurathai, eds., *Third World Attitudes Toward International Law* (Boston: Martinus Nijhoff Publishers) 1987

Statement by the Chairman of the Joint Committee of the Congress of Micronesia submitted on behalf of the Congress by the United States of America to the Third United Nations Conference on the Law of the Sea, Second Session: Caracas, 20 June-29 August 1974 U.N. Doc. A/CONF.62/L.6.

C.D. Stone, "Should Trees Have Standing? - Towards Legal Rights For Natural Objects" (1972) 45 *University of Southern California Law Review* 450

C.D. Stone, "Should Trees Have Standing Revisited: A Pluralist Approach" (1985) 59 *University of Southern California Law Review* 2

C.D. Stone, *Earth And Other Ethics* (New York: Harper and Row) 1987

A.

D. Tarlock "Stewardship Sovereignty: The Next Step in Former Prime Minister Palmer's Logic" (1992) 42 *Washington University Journal of Urban and Contemporary Law* 21

L.A. Teclaff, "Fiat or Custom: The Checkered Development of International Water Law" (1991) 31 *Natural Resources Journal* 45

L.A. Teclaff, "The Impact of Environmental Concern on the Development of International Law" (1973) 14 *Natural Resources Journal* 357

L.A. Teclaff & E. Teclaff, "Transboundary Toxic Pollution and the Drainage Basin Concept" (1985) 25 *Natural Resources Journal* 45

L.A. Teclaff & A. Utton, eds., *International Environmental Law* (New York: Praeger Publishers) 1972

B.J. Theutenberg, "The International Environmental Law - Some Basic Viewpoints" in *The Future of the International Law of the Environment*, 1984 Hague Academy of International Law Workshop 233

J.A.C. Thomas M.A., *The Institutes of Justinian: Text, Translation and Commentary* (Wynberg, South Africa: Juta & Company Limited) 1975

J.O. Trevin & J.C. Day, "Risk Perception in International River Basin Management the Plata Basin Example" (1990) 30 *Natural Resources Journal* 87

A.E. Utton & L.A. Teclaff, *Transboundary Toxic Pollution and the Drainage Basin Concept* (Boulder, Colorado: West View Press) 1978

A.E. Utton, and L. Teclaff, eds., *Water In A Developing World: The Management of A Critical Resource* (Boulder, Colorado: Westview Press) 1978

A.E. Utton, "The Columbia River Treaty and Protocol" (1966) 1 *Land And Water Law Review* 181

G. Varner, "Do Species Have Standing?" (1987) 9 *Environmental Ethics* 57

W.D. Verwey "Adapting International Law to the Development of the Third World" in F.E. Snyder & S. Sathurathai, eds., *Third World Attitudes Toward International Law* (Boston: Martinus Nijhoff Publishers) 1987 801

J. Walsh, "Will the Jobs Ever Come Back" *Time* 7 February 1994, 37

E.B. Weiss "The Panetary Trust: Conservation and Intergenerational Equity" (1984) 11 *Ecology Law Quarterly* 495

J.L. Wescoat, "Beyond the River Basin: the Changing Geography of International Water Problems and the International Watercourse Law" (1992) 3 *Colorado Journal of International Environmental Law and Policy* 301.

L. Wildhaber, "Sovereignty and International Law" in R.St.J. MacDonald & D.M. Johnston, eds., *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine And Theory* (Boston: Martinus Nijhoff Publishers) 1986, 425

The World Bank *World Development Report 1991 The Challenge of Development* (New York: Oxford University Press) 1991

World Commission on Environment and Development, *Our Common Future* (New York: Oxford University Press) 1987

P.K. Wouters, "Theory and Practice in the Allocation of the Non-navigational Uses of International Watercourses: Canada and the United States" (Geneva: Memoire de diplome) 1992 [unpublished]

R. Zacklin & L. Caflisch, *The Legal Regime of International Rivers and Lakes* (Boston: Martinus Nijhoff Publishers) 1981