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Editorial

Dear Readers,

Our current issue invites you on a *tour d'horizon* through different fields of international law: the protection of the atmosphere, health, the European Union (EU), arms control, the World Trade Organization (WTO) and the law of the sea. This variety of topics affirms what the Study Group of the International Law Commission (ILC) already pointed out in its Fragmentation Report 2006: diversification and fragmentation are inherent to International Law.[1]
While the phenomenon is not a new one,[2] it remains full of new developments and is, thus, subject to changed perceptions.
International lawyers will continue to deal with its tensions: The call for more harmonization and universalism can run the risk of stopping progress in international law and of ignoring local particularities.[3]
At the same time, it cannot be ignored that the difficulties diversification and fragmentation create in case of normative conflicts are able to damage the authority of international law.

1 ILC Study Group, *Fragmentation of International Law: Difficulties Arising From the Diversification an Expansion of International Law*, UN Doc A/CN.4/L.682, 13 April 2006, 246, para.486 [ILC, Fragmentation Report].

2 *Ibid.*, 10, para. 5 indicating that the fragmentation debate is at minimum half a century old.

3 Cf. H. Aust, 'Between Uniformity and Diversity' in H. Aust & G. Nolte (eds), *The Interpretation of International Law by Domestic Courts* (2016), 331, 336 naming further authors; cf. the current discussion on the danger of ignoring the local http://www.ejiltalk.org/remaking-globalization-for-the-local-the-real-search-for-equality-and-diversity-in-international-law/#more-14748;http://verfassungsblog.de/category/themen/voted-out-is-liberal-constitutionalism-becoming-a-minority-position-debates/ (last visited 15 November 2016).

The following articles will analyze not only the role of courts, but also of non-judicial actors and provide you with an insight into some current challenges the respective areas of international law are facing.

Handling the prospect of institutional fragmentation, in their article 'Towards a New International Law of the Atmosphere?', *Peter H. Sand* and *Jonathan B. Wiener* argue for a solution in between and, instead of calling for harmonization, they propose more cooperation and coordination among the several specialized institutions acting in the field of the law of the atmosphere. They take a close look at the initial ILC reports and debates in 2014 and 2015 and shed light on prospects and limitations. In their note the authors provide an overview over the latest work of the ILC.

Robert Frau evaluates in his article 'Law as an Antidote? Assessing the Potential of International Health Law Based on the Ebola-Outbreak 2014' the measures taken by actors such as the World Health Organization (WHO) in the Ebola crisis 2014. He offers suggestions on how to fight and handle outbreaks and spreading of epidemics and pandemics in future.

In 'The EU Commission and the Fragmentation of EU Law: Speaking European in a Foreign Land' *Avidan Kent* examines the EU Commission and its legal arguments in investment arbitration cases analyzing *amicus briefs* available exclusively to the author. He criticizes the EU Commission for fostering the fragmentation of international law by promoting the supremacy of the EU.

Sondre Torp Helmersen in 'The Use of Scholarship by the WTO Appellate Body' examines 110 Appellate Body reports and finally observes a trend of declining use of scholarship when interpreting trade agreements. To resolve upcoming questions, several explanations for these trends are given and examined at the end, such as the Appellate Body's specialization, its members' backgrounds, the external criticism and the increasing certainty of law as possible reasons.

In 'The Evolution of Arms Control Instruments and the potential of the Arms Trade Treaty' - *Tom Coppen* carves out the limited room to maneuver of the *ATT*'s organs - the Convention of the State Parties and the Secretariat. Based on an analysis of preceding arms trade treaties he illustrates how the organs, in spite of their limited authority, can subsequently develop the legal framework of the *ATT* by referring to experiences gathered during preceding arms trade treaties.

Valentin J. Schatz in 'Combating Illegal Fishing in the Exclusive Economic Zone – Flag State Obligations in the Context of the Primary Responsibility of the Coastal State' investigates various legal instrument in order to distinguish the obligations and possibilities coastal States and flag States have with regard to preventing illegal, unreported and unregulated fishing in Exclusive Economic Zones. He - in contrast to *P.Sand* and *J. Wiener* - calls for convergence and suggests that the unclear, but important role of flag States should be clarified by a new, fully binding multilateral treaty.

We hope these thoroughly selected articles provide for yet another worthwhile read to our readership.

At this point, we would also like to express our condolences for the relatives and friends of Prof. Dr. Dr. h.c. mult. Jutta Limbach, who passed away the 10 September 2016 at the age of 82 years. "As President Mrs. Prof. Dr. Limbach represented the Federal Constitutional Court in a manner which set new standards […]. Not only due to her prudential management, but also due to her engaged and public advocacy for the fundaments of the democratic constitutional state, she is one of the most formative judges of the Federal Constitutional Court and enjoys inside and outside the Court the highest esteem."[4]

Her article 'Human Rights in Times of Terror – Is Collective Security the Enemy of Individual Freedom?'[5] published seven years ago in our first issue remains of relevance and continues to be a worthwhile read.

The Editors

4 BVerG, 'Die ehemalige Präsidentin des Bundesverfassungsgerichts Prof. Dr. Dr. h.c. mult. Jutta Limbach ist verstorben', Pressemitteilung Nr. 64/2016 (12 September 2016), available at https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2016/bvg16-064.html (last visited 15 November 2016), translated by the editors.

5 J. Limbach, 'Human Rights in Times of Terror – Is Collective Security the enemy of Individual Freedom?', 1 *Goettingen Journal of International Law* (2009) 1, 17.

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Towards a New International Law of the Atmosphere?

Peter H. Sand* & Jonathan B. Wiener**

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* Lecturer in International Environmental Law, University of Munich.
** Professor of Law & Environmental Policy, Duke University.
This articles evolved from the authors' joint course on 'Law of the Atmosphere' in the context of the *Duke-Geneva Institute in Transnational Law* held at the Faculty of Law, University of Geneva, in June-July 2015. Comments by Ilias Plakokefalos, University of Amsterdam, by Sergei V. Vinogradov, University of Dundee, and by an anonymous reviewer are gratefully acknowledged.

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Preface by the Editors

The atmosphere is our planet's largest single natural resource and is vital to the survival of humankind and any life on earth. Therefore, the degradation of the atmosphere's condition has long been a matter of concern to large segments of the international community, highlighted by the current negotiations in the context of the UN Framework Convention on Climate Change (UNFCCC). In 2013, the United Nation's International Law Commission (ILC) took up this issue as part of its independent mandate for the progressive development of international law and its codification under Article 13(1) of the UN Charter and General Assembly Resolution 174(II). Several conventions regulate atmospheric and related issues, yet there is still no coherent legal framework addressing the protection of the atmosphere. The work by the ILC will be the first attempt to derive rules from the current practice of States addressing the atmosphere's protection. However, the work by the ILC is significantly complicated by the restrained scope of the topic, as the Commission deliberately decided not to deal with, inter alia, questions of liability, the polluter-pays principle, and the principle of precaution.

Abstract

Inclusion of the topic 'protection of the atmosphere' in the current work programme of the UN International Law Commission (ILC) reflects the long overdue recognition of the fact that the scope of contemporary international law for the Earth's atmosphere extends far beyond the traditional discipline of 'air law' as a synonym for airspace and air navigation law. Instead, the atmospheric commons are regulated by a 'regime complex' comprising a multitude of economic uses including global communications, pollutant emissions and diffusion, in different geographical sectors and vertical zones, in the face of different categories of risks, and addressed by a wide range of different transnational institutions. Following several earlier attempts at identifying cross-cutting legal rules and principles in this field (by, *inter alia*, the International Law Association, the UN Environment Programme, and the Institut de Droit International), the ILC has now embarked on a new codification/restatement project led by Special Rapporteur Shinya Murase – albeit hamstrung by a highly restrictive 'understanding' imposed by the Commission in 2013. This article assesses the prospects and limitations of the initial ILC reports and debates in 2014 and 2015, and potential avenues for progress in the years to come.

A. Introduction

At its 65th session in August 2013, the ILC decided to include the topic *protection of the atmosphere* in its current programme of work.[1] Indeed, as the Special Rapporteur appointed by the Commission (Professor Shinya Murase, Tokyo) had emphasized in a preliminary syllabus in 2011,[2] the atmosphere – "the Earth's largest single natural resource"[3] – is not at present subject to a comprehensive legal regime comparable to that of the second-largest resource; namely, the law of the sea. Instead, the global "atmospheric commons"[4] are

1 International Law Commission, *Report of the Commission to the General Assembly on the Work of its 65th Session*, UN Doc A/68/10 (2013), 115, para. 168 [ILC, Report of the Commission to the General Assembly on the Work of its 65th Session].

2 S. Murase, *Protection of the Atmosphere*, UN Doc ILC(LXIII)/WG/LT/INFORMAL, 2 June 2011, para. 1, reproduced as Annex B in ILC, *Report of the Commission to the General Assembly on the Work of its 63rd Session*, UN Doc A/66/10 (2011), 315-329 [Murase, Protection of the Atmosphere (Syllabus), UN Doc A/66/10 (2011)]. See also S. Murase, 'Protection of the Atmosphere and International Law: Rationale for Codification and Progressive Development', 55 *Sophia Law Review* (2012) 1, 1.

3 S. Murase, *First Report on the Protection of the Atmosphere*, UN Doc A/CN.4/667, 14 February 2014, 54, para. 84 [Murase, First Report]. See also *Declaration of the United Nations Conference on the Human Environment*, 16 June 1972, 11 ILM 1416, Principle 2: "The natural resources of the earth *including the air* [...] must be safeguarded for the benefit of present and future generations [...]"; emphasis added); and generally G. Walker, *An Ocean of Air: A Natural History of the Atmosphere* (2007).

4 R. B. Stewart & J. B. Wiener, 'The Comprehensive Approach to Global Climate Policy: Issues of Design and Practicality', 9 *Arizona Journal of International and Comparative Law* (1992) 1, 83, 83 ("the atmosphere is a global commons"); J. Vogler, *The Global Commons: A Regime Analysis* (1995), 124-151; F. Biermann, *Saving the Atmosphere: International Law, Developing Countries and Air Pollution* (1995), 8; M. S. Soroos, *The Endangered Atmosphere: Preserving a Global Commons* (1997), 17-20 & 208-235; M. S. Soroos, 'The Thin Blue Line: Preserving the Atmosphere as a Global Commons', 40 *Environment* (1998) 2, 6 & 32; S. J. Buck, *The Global Commons: An Introduction* (1998), 111-136; J. Harrison & P. Matson, 'The Atmospheric Commons', in J. Burger *et al.*, *Protecting the Commons* (2001), 219-239; J. Vogler, 'Future Directions: The Atmosphere as a Global Commons', 35 *Atmospheric Environment* (2001) 13, 2427; G. Wustlich, *Die Atmosphäre als globales Umweltgut: Rechtsfragen ihrer Bewirtschaftung im Wechselspiel von Völker-, Gemeinschafts- und nationalem Recht* (2003); J. Thornes *et al.*, 'Communicating the Value of Atmospheric Services', 17 *Meteorological Applications* (2010) 2, 243; J. Halfmann, 'Die Atmosphäre als Global Commons: Wissenschaftliche und politische Adressierung', in M. Morisse-Schilbach & J. Halfmann (eds), *Wissen, Wissenschaft und Global Commons: Forschungen zu Wissenschaft und Politik jenseits des Staates am Beispiel von Regulierung und Konstruktion globaler Gemeinschaftsgüter* (2012), 133; and M. Everard *et al.*, 'Air as a Common Good', 33 *Environmental Science and Policy* (2013), 354.

regulated by a 'regime complex',[5] comprising a multitude (some would say a patchwork) of international instruments dealing with

(a) different – and sometimes conflicting – *economic uses* of the atmosphere (*inter alia*, as a medium for aviation and radio-communications, or as a waste receptacle for pollutant substances and energy);
(b) different *geographical sector*s (such as airspace over the high seas, and 'air defence identification zones' in areas beyond national jurisdiction);
(c) different *vertical zones* (troposphere, stratosphere); and
(d) different *categories of risks* (to safety, health, environment, climate, security) addressed by different international agencies and global/regional institutions or programmes.

B. Complex of Transnational Regimes

Traditionally, *international air law* was defined as a synonym of aviation law,[6] focused on the global public order of civil and military flight by air, often to the point of simply excluding other uses of the atmosphere.[7] With the advent of

5 On this concept, see K. J. Alter & S. Meunier, 'The Politics of International Regime Complexity', 7 *Perspectives on Politics* (2009) 1, 13-24; R. O. Keohane & D. G. Victor, 'The Regime Complex for Climate Change', 9 *Perspectives on Politics* (2011) 1, 7. See also I. H. Rowland, 'Atmosphere and Outer Space', in D. Bodansky, J. Brunnée & E. Hey (eds), *The Oxford Handbook of International Environmental Law* (2007), 315, 335; S. Salinas Alcega, 'El régimen jurídico-internacional de protección de la atmósfera', in D. Loperena Rota (ed.), *La calidad del aire y la protección de la atmósfera* (2010), 27; J. L. Dunoff, 'A New Approach to Regime Interaction', in M. A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (2012), 136; and H. van Asselt, *The Fragmentation of Global Climate Governance: Consequences and Management of Regime Interactions* (2014), 3-4.

6 See, e.g., K. Volkmann, *Internationales Luftrecht* (1930), *passim*; F. de Visscher, 'Les conflits de lois en matière de droit aérien', 48 *Recueil des Courses de l'Académie de Droit International* (1934), 279, *passim*; J. Bentzien, 'Das internationale öffentliche Luftrecht als Teil des Völkerrechts', in M. Benkö & W. Kröll (eds), *Luft- und Weltraumrecht im 21. Jahrhundert: Liber Amicorum Karl-Heinz Böckstiegel* (2001), 3, *passim*; J. Naveau, J. M. Godfroid & P. Frühling, *Précis de droit aérien*, 2nd ed. (2006), 2; M. Schladebach, *Luftrecht* (2007), 6-7; M. Milde, *International Air Law and ICAO*, 2nd ed. (2012), 2; L. Tomas, 'Air Law', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. I (2012), 233. See also B. F. Havel & G. S. Sanchez, *The Principles and Practice of International Aviation Law* (2014), 227-228 (highlighting the "divergent paradigms of airspace sovereignty and the global atmosphere").

7 According to O. Riese, *Luftrecht* (1949), 11, the term was "already so firmly established that nobody would even think anymore that it might refer to the legal use of the atmosphere for other purposes, such as nitrogen production, or telecommunications through the

the 'environmental revolution' in the 1970s,[8] however, other worldwide concerns inevitably expanded the regulatory agenda, albeit not without doctrinal resistance by orthodox 'air lawyers'.[9] The paradigm shift from a 'single-use-oriented' to a 'resource-oriented' approach to the law of the atmosphere has since come to the forefront in the debate over the controversial 2011 judgment of the (European)[10] Court of Justice in the case of *Air Transport Association of America and others v. [UK] Secretary of State for Energy and Climate Change*.[11]

ether waves" (translation by the authors). Historically though, the law of wireless radio-communications had indeed been treated as an integral part of air law by a number of authors, including C. Zollmann, *Law of the Air* (1927), esp. 101-132; C. Manion, *Law of the Air: Cases and Materials* (1950); J. G. Verplaetse, *International Law in Vertical Space: Air, Outer Space, Ether* (1960), 10-13; and in the former *Air Law Review* (1930-1941). For a summary of the earlier doctrinal debate in the *Institut de Droit International* since 1906 (on the basis of reports by P. Fauchille & E. Nys), see J. C. Cooper, 'Air Law: A Field for International Thinking', 4 *Transport & Communications Review* (1951) 1, 1, reprinted in I. A. Vlasic (ed.), *Explorations in Aerospace Law: Selected Essays by John Cobb Cooper, 1946-1966* (1968), 2, 10-15 (definition excluding any "other forms of human activity" in airspace).

8 See E. M. Nicholson, *The Environmental Revolution: A Guide for the New Masters of the World* (1970).

9 See P. H. Sand, 'Internationaler Umweltschutz und neue Rechtsfragen der Atmosphärennutzung', 20 *Zeitschrift für Luftrecht und Weltraumrechtsfragen* (1971) 2, 109; and the indignated editorial response by W. Schwenk, 'Zum Begriff des Luftrechts', 20 *Zeitschrift für Luftrecht und Weltraumrechtsfragen* (1971) 4, 260, subsequently qualified in part by the new editor of the journal, K. H. Böckstiegel, in 26 *Zeitschrift für Luft- und Weltraumrecht* (1977) 2, 16566, and by W. Schwenk, 'Grenzfragen zum Luftrecht oder Luftrecht in der Defensive', 27 *Zeitschrift für Luft- und Weltraumrecht* (1978) 4, 247. See also O. Rojahn, 'Internationales öffentliches Luft- und Weltraumrecht', in E. Menzel & K. Ipsen (eds), *Völkerrecht*, 2nd ed. (1979), 419, 428 ("aviation no longer represents the sole legally relevant use of airspace, but must be integrated in a framework of new use interests worthy of protection", translation by the authors); Y. N. Maleyev, *Mezhdunarodnoe vozdushnye pravo: voprosy teorii i praktiki* [International Air Law: Principles of Theory and Practice] (1986), 24 ("diverse inequitable uses of airspace and the atmosphere are among the most serious contemporary global problems", translation by the authors); S. V. Vinogradov, *Mezhdunarodnoe pravo i okhrana atmosfery* [International Law and Protection of the Atmosphere] (1987); H. Kraft, *Internationales Luftreinhalterecht* (1996), 147-148; and D. R. Minnekaeva, *Mezhdunarodno-pravovye aspekty okhrany atmosfernogo vozdukha* [International Legal Aspects of the Protection of Atmospheric Air] (2005).

10 In this article, 'ECJ' is used as the well-known abbreviation even though its new name, after the *Treaty of Lisbon*, is simply the 'Court of Justice'.

11 *Air Transport Association of America and Others v. [UK] Secretary of State for Energy and Climate Change*, Case C-366/10, Judgment of 21 December 2011, ECJ Reports [2011] I 13755. The judgment can also be found in 51 ILM 535. See the U.S. legislative response through the *European Union Emissions Trading Scheme Prohibition Act* (Public Law

In 1971, the International Civil Aviation Organization (ICAO) had begun to lay down global technical standards for aircraft noise emissions under Annex 16 of the 1944 *Chicago Convention*, extended since 1981 to gaseous pollutant emissions from aircraft engines.[12] Ambient air quality criteria and guidelines have been issued since 1977 by the World Health Organization (WHO);[13] in the

112-200), 27 November 2012, 126 Stat. 1477; and the case comments by B. Mayer, 'Case C-366/10', 49 *Common Market Law Review* (2012) 3, 1113; M. W. Gehring, 'Air Transport Association of America v. Energy Secretary: Clarifying Direct Effect and Providing Guidance for Future Instrument Design for a Green Economy in the European Union', 21 *Review of European Community and International Environmental Law* (2012) 2, 149; S. Bogojević, 'Legalising Environmental Leadership: A Comment on the CJEU'S Ruling in C-366/10 on the Inclusion of Aviation in the EU Emissions Trading Scheme', 24 *Journal of Environmental Law* (2012) 2, 345; Brian F. Havel & J. Q. Mulligan, 'The Triumph of Politics: Reflections on the Judgment of the Court of Justice of the European Union Validating the Inclusion of Non-EU Airlines in the Emissions Trading Scheme', 37 *Air and Space Law* (2012) 1, 3; P. Mendes de Leon, 'Enforcement of the EU ETS: The EU's Convulsive Efforts to Export its Environmental Values', 37 *Air and Space Law* (2012) 4/5, 287; S. M. Dejong, 'Hot Air and Hot Heads: An Examination of the Legal Arguments Surrounding the Extension of the European Union's Emissions Trading Scheme to Aviation', 3 *Asian Journal of International Law* (2013) 1, 163. See also V. M. Tunteng *et al.*, 'Legal Analysis on the Inclusion of Civil Aviation in the European Union Emissions Trading Scheme', 24 *Environmental Law and Management* (2012) 3, 119; M. W. Gehring & C. A. R. Robb, 'Addressing the Aviation and Climate Change Options: A Review of Options', *ICTSD Publications No. 7* (2013); V. Schade, *The Inclusion of Aviation in the European Emission Trading Scheme: Analyzing the Scope of Impact on the Aviation Industry* (2013); V. Correia, *L'Union européenne et le droit international de l'aviation civile* (2014); R. Abeyratne, *Aviation and Climate Change: In Search of a Global Market Based Measure* (2014); J. R. Thompson, 'Return to Your Seats and Fasten Your Seatbelts: The European Union Encounters Turbulence in the Application of Its Airline Emissions Trading System', 47 *George Washington International Law Review* (2015) 2, 383; A. Piera Valdés, *Greenhouse Gas Emissions from International Aviation: Legal and Policy Analysis* (2015).

12 *Convention on International Civil Aviation*, 7 December 1944, 15 UNTS 295, Annex 16, Vol. I (Aircraft Noise, 6th ed. 2011) & Vol. II (Aircraft Engine Emissions, 3rd ed. 2008). See P. H. Sand, 'Lessons Learned in Global Environmental Governance', 18 *Boston College Environmental Affairs Law Review* (1991) 2, 213, 244-246; P. Davies & J. Goh, 'Air Transport and the Environment: Regulating Aircraft Noise', 18 *Air and Space Law* (1993) 3, 123; International Civil Aviation Organization (ICAO), *Environmental Report* (2013), 10; and *Resolution 17/2* of the 38th ICAO Assembly, 4 October 2013, ICAO Doc A38-WP/430 (2013), 17-7-17-8, para. 17.3.48.

13 World Health Organisation (WHO), *Air Quality Guidelines: Global Update 2005* (2006); and WHO, *Guidelines for Indoor Air Quality: Selected Pollutants* (2010). For background, see S. Shubber, 'The Role of WHO in Environmental Pollution Control', 2 *Earth Law Journal* (1976) 4, 363; A. M. Abdelhady, *L'action juridique internationale contre la pollution*

same year, the International Labour Organization (ILO) adopted a *Convention Concerning the Protection of Workers Against Occupational Hazards in the Working Environment Due to Air Pollution, Noise and Vibration*.[14] Basic standards for protection against atmospheric nuclear radiation had already been set since 1961 by the International Atomic Energy Agency (IAEA),[15] consolidated in its 1994 *Convention on Nuclear Safety*,[16] complementing the 1963 and 1986 *Conventions on Liability for Nuclear Damage and on Transboundary Notification of Nuclear Accidents*,[17] and supplemented by the independent global monitoring work of the UN Scientific Committee on the Effects of Atomic Radiation (UNSCEAR).[18] Air pollution from ships is regulated since 1997 by the International Maritime Organization (IMO) under Annex VI of the 1973/1978 *MARPOL Convention*,[19] with maritime waste incineration already prohibited under the revised 1972/1996

atmosphérique (1981), 277-413; and H. F. French, 'Clearing the Air: A Global Agenda', *Worldwatch Paper No. 94* (1990), 8-12; and H. G. Post, *The Protection of Ambient Air in International and European Law* (2009).

14 *Convention (No. 148) Concerning the Protection of Workers Against Occupational Hazards in the Working Environment due to Air Pollution, Noise and Vibration*, 20 June 1977, 1141 UNTS 106. See also *Convention (No. 115) Concerning the Protection of Workers Against Ionizing Radiations,* 22 June 1960, 431 UNTS 41; *Convention (No. 136) Concerning Protection Against Hazards of Poisoning Arising From Benzene*, 23 June 1971, 885 UNTS 45; and the comparative analysis by V. A. Leary, 'Working Environment', in P. H. Sand (ed.), *The Effectiveness of International Environmental Agreements: A Survey of Existing Legal Instruments* (1992), 362.

15 International Atomic Energy Agency (IAEA), *Radiation Protection and Safety of Radiation Sources: International Basic Safety Standards* (2014). See P. C. Szasz, 'The IAEA and Nuclear Safety', 1 *Review of European Community and International Environmental Law* (1992) 2, 165.

16 *Convention on Nuclear Safety*, 20 September 1994, 1963 UNTS 293. See M. T. Kamminga, 'The IAEA Convention on Nuclear Safety', 44 *International and Comparative Law Quarterly* (1995) 4, 872.

17 *Vienna Convention on Civil Liability for Nuclear Damage*, 21 May 1963, 1063 UNTS 265, supplemented by the *Joint Protocol to the Application of the Vienna Convention and the Paris Convention*, 21 September 1988, 1672 UNTS 302; the *Convention on Early Notification of a Nuclear Accident*, 26 September 1986, 1439 UNTS 275; and a series of implementing bilateral treaties.

18 Established by GA Res. 913 (X), UN Doc A/RES/913(X), 3 December 1955 (operative part 1), and now operating under United Nations Environment Programme (UNEP) auspices in Vienna. See Scientific Committee on the Effects of Atomic Radiation, *Sources and Effects of Ionizing Radiation* (2010), and GA Res. 69/84, UN Doc A/RES/69/84, 16 December 2014, 3 (operative part 15).

19 Adopted by the 1997 *Protocol to Amend the 1973 International Convention for the Prevention of Pollution From Ships*, 26 September 1997 (not officially published), periodically amended by the IMO Marine Environment Protection Committee (MEPC).

London Dumping Convention.[20] Air pollutant emissions from motor vehicles have been regulated since 1958 by uniform transnational standards initially adopted under a regional agreement of the United Nations Economic Commission for Europe (UNECE),[21] and since 1998 by worldwide technical regulations.[22]

Under the auspices of the United Nations Environment Programme (UNEP), provisions for cooperation between States on weather modification were adopted in 1980,[23] after the *ENMOD Treaty* of 1977 prohibited "hostile" environmental modification.[24] These steps were followed by several global instruments covering atmospheric releases of hazardous chemicals, including ozone-depleting substances (1985/1987),[25] persistent organic pollutants (2001),[26]

20 *Convention on the Prevention of Marine Pollution by Dumping of Waste and Other Matter*, 29 December 1972, 1046 UNTS 120 (as revised by *Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Waste and Other Matter* of 7 November 1996, 36 ILM 7).

21 *Agreement Concerning the Adoption of Uniform Conditions of Approval and Reciprocal Recognition of Approval for Motor Vehicles Equipment and Parts*, 20 March 1958 , 335 UNTS 211 (rev. 1995); with technical regulations Nos 40, 41, 47, 49, 51, 83.

22 *Agreement Concerning the Establishing of Global Technical Regulations for Wheeled Vehicles, Equipment and Parts Which Can Be Fitted and/or Be Used on Wheeled Vehicles*, 25 June 1998, 2119 UNTS 129.

23 UNEP Governing Council, *Decision 8/7/A*, UN Doc A/35/25 (1980), 117-118. See R. J. Davis, 'Atmospheric Water Resources Development and International Law', 31 *Natural Resources Journal* (1991) 1, 11; L. L. Roslycky, 'Weather Modification Operations With Transboundary Effects: The Technology, the Activities and the Rules', 16 *Hague Yearbook of International Law* (2003), 3, 25-26; J. L. J. Reynolds, 'Climate Engineering Field Research: The Favorable Setting of International Law', 5 *Journal of Energy, Climate, and the Environment* (2014) 2, 417, 471-472.

24 *Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques*, 10 December 1976, 1108 UNTS 151. See R. A. Falk, 'Environmental Disruption by Military Means and International Law', in A. H. Westing (ed.), *Environmental Warfare: A Technical, Legal and Policy Appraisal* (1984), 33.

25 *Vienna Convention for the Protection of the Ozone Layer*, 22 March 1985, 1513 UNTS 293; and Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, 1522 UNTS 3 (as amended). See K. M. Sarma et al., 'Ozone Layer: International Protection', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. VII (2012), 1139.

26 *Stockholm Convention on Persistent Organic Pollutants*, 22 May 2001, 2256 UNTS 119, Preamble (referring to atmospheric transport and deposition) and Annex C (ibid., 246-249) on control of combustion/incineration facilities. See P. L. Lallas, 'The Stockholm Convention on Persistent Organic Pollutants', 95 *American Journal of International Law* (2001) 3, 692.

and mercury (2013).[27] Pollutant discharges to the oceans "from or through the air" – addressed by Articles 212 (3) and 222 of the 1982 *United Nations Convention on the Law of the Sea* (UNCLOS)[28] – are the subject of 1985 UNEP *Guidelines for the Protection of the Marine Environment Against Pollution From Land-Based Sources*,[29] a related 1995 global programme of action,[30] and a series of UNEP-sponsored conventions and protocols for twelve marine regions of the world.[31] Meanwhile, the Intergovernmental Panel on Climate Change (IPCC), jointly established by UNEP and the World Meteorological Organization (WMO) in 1988,[32] provides technical input to the Conference of the Parties to the 1992 UN *Framework Convention on Climate Change* (UNFCCC) and its 1997 *Kyoto Protocol* which have sought global agreement on the control of

27 *Minamata Convention on Mercury*, 10 October 2013, Preamble (para. 1), available at https://treaties.un.org/doc/Treaties/2013/10/20131010%2011-16%20AM/CTC-XXVII-17.pdf (last visited 4 August 2015), 1 (on long-range atmospheric transport) and Art. 8 (ibid., 13-17) (emissions to the atmosphere). See H. H. Eriksen & F. X. Perrez, 'The Minamata Convention: A Comprehensive Response to a Global Problem', 23 *Review of European, Comparative and International Environmental Law* (2014) 2, 195.

28 *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3, Arts 212 (3) & 222 [UNCLOS].

29 Cf. UNEP Governing Council, *Decision 13/18/II*, UN Doc A/40/25, 51 & 53. See P. Széll, 'The Montreal Guidelines for the Protection of the Marine Environment against Pollution from Land-Based Sources', 37 *International Digest of Health Legislation* (1986) 2, 391; and Q.-N. Meng, *Land-Based Marine Pollution: International Law Development* (1987).

30 *Global Programme of Action for the Protection of the Marine Environment From Land-Based Activities*, UN Doc UNEP(OCA)/LBA/IG.2/7, 5 December 1995 [UNEP Global Programme]. See T. A. Mensah, 'The International Legal Regime for the Protection and Preservation of the Marine Environment From Land-Based Sources of Pollution', in A. Boyle & D. Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999), 297, esp. 307 *et seq.*; D. L. VanderZwaag & A. Powers, 'The Protection of the Marine Environment from Land-Based Pollution and Activities: Gauging the Tides of Global and Regional Governance', 23 *International Journal of Marine and Coastal Law* (2008) 3, 423.

31 Texts in P. H. Sand, *Marine Environment Law in the United Nations Environment Programme: An Emergent Eco-Regime* (1988). For an update, see Y. Tanaka, 'Regulation of Land-Based Marine Pollution in International Law: A Comparative Analysis Between Global and Regional Frameworks', 66 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2006) 3, 535.

32 Endorsed by GA Res. 43/53, UN Doc A/RES/43/53, 6 December 1988. On the continuing work of the Intergovernmental Panel on Climate Change (IPCC), see IPCC, *Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (AR5) (2014), available at http://ipcc.ch/ (last visited 23 October 2015).

greenhouse gases.[33] At a regional level, the 1979 UNECE *Convention on Long-Range Transboundary Air Pollution* (LRTAP Convention) in Europe and North America, with eight implementing protocols adopted to date (1984-2012),[34] has since been followed by corresponding instruments in Asia and Africa.[35]

33 *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 UNTS 107; and *Kyoto Protocol*, 11 December 1997, 2303 UNTS 162. See C. P. Carlarne, K. R. Gray & R. Tarasofsky (eds), *Oxford Handbook of International Climate Change Law* (2015). The IPCC has depicted the regime complex for climate change at multiple transnational scales in R. Stavins *et al.*, 'International Cooperation: Agreements and Instruments', in IPCC, *Climate Change 2014: Mitigation of Climate Change: Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (O. Edenhofer *et al.* (eds), 2014), 1001, 1012-1013.

34 *Convention on Long-Range Transboundary Air Pollution,* 13 November 1979, 1302 UNTS 217 [LRTAP Convention]. See P. H. Sand, 'Regional Approaches to Transboundary Air Pollution', in J. L. Helm (ed.), *Energy: Production, Consumption, and Consequences* (1990), 246; R. Lidskog & G. Sundqvist (eds), *Governing the Air: The Dynamics of Science, Policy, and Citizen Interaction* (2011); and A. Byrne, 'The 1979 Convention on Long-Range Transboundary Air Pollution: Assessing its Effectiveness as a Multilateral Environmental Regime after 35 Years', 4 *Transnational Environmental Law* (2015) 1, 37. – On bilateral arrangements in North America, see the *U.S.–Mexico Agreements* of 14 August 1983 (22 ILM 1025), 29 January 1987 (26 ILM 33) and 3 October 1989 (29 ILM 29); and the *U.S.–Canada Agreement on Air Quality* of 13 March 1991 (30 ILM 676), with a supplementary protocol and annex on ground-level ozone of 7 December 2000 (text in U.S. Environmental Protection Agency (International Joint Commission), *Air Quality Agreement: 2002 Progress Report* (2002), 47-55). For proposals of a wider trilateral approach to long-range hemispheric air pollution, see A. Szekely, 'Establishing a Region for Ecological Cooperation in North America', 32 *Natural Resources Journal* (1992) 3, 563, 592-595.

35 Including the *Malé Declaration on Control and Prevention of Air Pollution and its Likely Transboundary Effects for South Asia* (22 April 1998), available at http://www.rrcap.ait.asia/male/ (last visited 4 August 2015); of the South Asia Cooperative Environment Programme, the Association of South East Asian States' *Agreement on Transboundary Haze Pollution* (10 June 2002), available at http://haze.asean.org/?wpfb_dl=32 (last visited 4 August 2015); and the 2010 intergovernmental agreement for an Acid Deposition Monitoring Network in East Asia (EANET). See generally W. Takahashi, 'Formation of an East Asian Regime for Acid Rain Control: The Perspective of Comparative Regionalism', 1 *International Review for Environmental Strategies* (2000) 1, 97; N. Silva-Send, *Preventing Regional Air Pollution in Asia: The Potential Role of the European Convention on Long Range Transboundary Air Pollution in Asian Regions* (2007); and S. Jayakumar *et al.* (eds), *Transboundary Pollution: Evolving Issues of International Law and Policy* (2015). Between 2008 and 2011, four sub-regional intergovernmental 'framework policy agreements on air pollution' were adopted under UNEP auspices for Southern Africa, Eastern Africa, Central and Western Africa, and North Africa. See generally L. Nordberg, *Air Pollution: Promoting Regional Cooperation* (2010).

While some scholarly observers view the resulting proliferation and fragmentation of international law-making as an unavoidable and largely harmless side-effect of the growing demand for technical specialization,[36] or even a welcome "beneficial prologue to a pluralistic community",[37] others caution that fragmentation in regulatory institutions and competition among multiple different sub-regimes works systematically to the overall advantage and interests of the most powerful States, whose consent is essential for the functioning of the system.[38] Moreover, fragmentation can lead specialized institutions to adopt narrow decisions that induce adverse side effects ('countervailing risks') in other domains, especially afflicting weaker or disenfranchised community members due to their 'omitted voice'.[39]

There have been a number of attempts at identifying cross-cutting international legal rules and principles, with a view to overcoming excessive fragmentation in this field:

– In 1966, the 7th International Congress of Comparative Law in Uppsala considered reports on 'protection of the atmosphere in international law', which sought to identify common elements in available case law and State practice.[40]

36 M. Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics', 70 *Modern Law Review* (2007) 1, 1, 2; M. Koskenniemi & P. Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 *Leiden Journal of International Law* (2002) 3, 553.

37 M. Koskenniemi, 'What Is International Law For?', in M. D. Evans (ed.), *International Law*, 4th ed. (2014), 29, 47. See also the apologist conclusions of the ILC Study Group on *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.682,13 April 2006, 248-249, para. 492.

38 E. Benvenisti & G. D. Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law', 60 *Stanford Law Review* (2007) 2, 595, 597 & 608; R. B. Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness', 108 *American Journal of International Law* (2014) 2, 211, 230.

39 See J. B. Wiener & J. D. Graham, 'Resolving Risk Tradeoffs', in J. D. Graham & J. B. Wiener (eds), *Risk vs. Risk: Tradeoffs in Protecting Health and the Environment* (1995), 226.

40 See P. de Visscher, 'La protection de l'atmosphère en droit international', in A. Malmström & S. Strömholm (eds), *Rapports généraux au VIIe Congrès International de Droit Comparé* (1968), 338; and A.-C. Kiss, 'La protection de l'atmosphère en droit international', in Centre Français de Droit Comparé (ed.), *Études de droit contemporain* (1966), 369. In contrast to A.-C. Kiss (*op. cit.*, 374), however, P. de Visscher expressed the view that national legislation for the prevention of air pollution did not *eo ipso* apply to transfrontier pollution damage abroad (*op. cit.*, 339 (note 4)). See P. H. Sand, 'The Role of Domestic

– In 1974, the Council of the Organisation for Economic Cooperation and Development (OECD) recommended a set of 'principles concerning transfrontier pollution', later followed by recommendations on equal rights of access in transfrontier pollution disputes.[41]
– In 1978, the UNEP Governing Council adopted its 'shared natural resources (SNR) principles', subsequently endorsed by UN General Assembly *Resolution 34/186* of 18 December 1979.[42] In 1982, the Governing Council called for the preparation of a global code of conduct with respect to transboundary air pollution, drawing upon existing regional and bilateral experience".[43] Yet, that recommendation was never followed up, and the 1992 UN Rio Conference on Environment and Development (UNCED) decided instead, in Chapter 9 of its *Agenda 21*, "[t]o encourage the establishment of new and the implementation of existing *regional* agreements for limiting transboundary air pollution",

Procedures in Transnational Environmental Disputes', in Organisation for Economic Co-operation and Development (OECD) (ed.), *Legal Aspects of Transfrontier Pollution* (1977), 146, 166 (note 1).

41 *Principles Concerning Transfrontier Pollution*, OECD Doc C(74)224 annex (1974), 14 ILM 242 [OECD Principles Concerning Transfrontier Pollution]; OECD Council, *Recommendation C(76)55*, OECD Doc C(76)55(Final) (1976); and OECD Council, Recommendation C(77)28, OECD Doc C(77)28 (1977). The texts are reprinted in OECD (ed.), *supra* note 40, 11, 19 & 29. The 'principles' annexed to the recommendations used the definition of pollution coined by the Joint Group of Experts on the Scientific Aspects of Marine Pollution (GESAMP) established by FAO, IAEA, IMO, UNEP, UNESCO, WHO and UNEP (in UN Doc A/7750 (1969) (copy on file with authors)).

42 The *Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States* (reprinted in 17 ILM 1097) were adopted by UNEP Governing Council Decision 6/14, UN Doc A/33/25 (1978), 154-155. According to the consultant report submitted in preparation of the principles, the natural resources considered susceptible of sharing include "air [...] when it acts as vehicle for the transport of wastes beyond national jurisdiction"; J. Mayda, 'Definition of Internationally Shared Resources', *UNEP Draft Working Paper* (January 1978), 22. See also J. A. Barberis, *Los recursos naturales compartidos entre estados y el derecho internacional* (1979), 113-139.

43 UNEP Governing Council, *Decision 10/21*, UN Doc A/37/25 (1982), 108-109 (operative part 2), adopting the 'Programme for the Development and Periodic Review of Environmental Law' based on the recommendations of an Ad Hoc Meeting of Senior Government Officials Expert in Environmental Law (Montevideo, 6 November 1981), UN Doc. UNEP/GC.10/5/Add.2 (1982), 6 (copy on file with authors); and UN Doc UNEP/GC.10/14 (1982), 100 (copy on file with authors). See also A.-C. Kiss, 'La protection de l'atmosphère: un exemple de la mondialisation des problèmes', 34 *Annuaire Français de Droit International* (1988), 701.

with a focus on developing countries in particular.[44] As a result, UNEP's revised *Montevideo Programme* since 1993 reoriented the organization's work in this field towards replicating the LRTAP model in other regions and sub-regions.[45]

– The International Law Association (ILA), when adopting its 1982 Montreal Rules of International Law Applicable to Transfrontier Pollution, deferred the legal aspects of long-distance air pollution to subsequent work by a different committee.[46] After several preliminary/interim reports between 1984 and 1994, however, the committee was dissolved without conclusions in 1996.
– In 1987, the Cairo session of the Institut de Droit International adopted a resolution on Transboundary Air Pollution.[47]
– In 1989, an International Legal Meeting of Legal and Policy Experts at Ottawa adopted a statement on 'protection of the atmosphere'

44 UN, *Report of the United Nations Conference on Environment and Development* (Rio de Janeiro, 3-14 June 1992), UN Doc A/CONF.151/26/Rev.1, Vol. I (1993), 120-121, para. 9.27 (emphasis added). For background, see the *Report of the Preparatory Committee on its Third Session* (Geneva, 12 August - 4 September 1991), UN Doc A/CONF.151/PC/59 (28 June 1991), 10 (copy on file with authors). The UNEP/WMO follow-up report on *Protection of the Atmosphere*, submitted by the UN Commission on Sustainable Development in preparation of the 2002 Johannesburg Summit, singled out South-East Asia as a priority region. See Commission on Sustainable Development, *Protection of the Atmosphere: Report of the Secretary-General*, UN Doc E/CN.17/2001/PC/12, 2 March 2001, 4, para. 19.

45 See Nordberg, *supra* note 35; and Silva-Send, *supra* note 35. In implementation of section F (a) of the fourth 'Montevideo Programme' adopted by UNEP, *Governing Council Decision 25/11/I*, UN Doc UNEP/GC.25/17, 26 February 2009, 28-29, a seminar organized by UNEP at Osaka/Japan in June 2015 addressed current problems of "law to regulate air pollution and protect the Earth's atmosphere".

46 International Law Association (ILA), *Report of the 60th Conference* (1982), 1-3. See D. Rauschning, 'Report of the Committee on Legal Aspect of the Conservation of the Environment', in ILA, *supra* this note, 159. See also ILA, 'Resolution 2/2014: Declaration on Legal Principles Relating to Climate Change' (11 April 2014), available at http://www.ila-hq.org/en/news/index.cfm/nid/8E6750D9-F999-4396-B3C56C8110A5A523 (last visited 4 August 2015). The resolution was adopted by the 76th Biennial ILA Conference at Washington/DC, drafted in 2008-2014 by the Committee on Legal Principles Relating to Climate Change, chaired by Shinya Murase.

47 Institut de Droit International, *Resolution on Transboundary Air Pollution*, 62 *Annuaire de l'Institut de Droit International* (1987) 2, 296-307.

recommending an international convention or conventions with appropriate protocols on the topic.[48]

– In 2013, the ILC decided to include the topic 'Protection of the Atmosphere' in its current programme of work. But the Commission then quickly adopted a severely restrictive 'understanding', reading:

> "(a) Work on this topic will proceed in a manner so as not to interfere with relevant political negotiations, including on climate change, ozone depletion, and long-range transboundary air pollution. The topic will not deal with, but is also without prejudice to, questions such as: liability of States and their nationals, the polluter-pays-principle, the precautionary principle, common but differentiated responsibilities, and the transfer of funds and technology to developing countries, including intellectual property rights;
> (b) The topic will also not deal with specific substances, such as black carbon, tropospheric ozone, and other dual-impact substances, which are the subject of negotiations among States. The project will not seek to 'fill' the gaps in the treaty regimes;
> (c) Questions relating to outer space, including its delimitation, are not part of the topic;
> (d) The outcome of the work on the topic will be draft guidelines that do not seek to impose on current treaty regimes legal rules or legal principles not already contained therein.
> The Special Rapporteur's reports would be based on this understanding."[49]

C. Analytic Problems of the ILC 'Understanding'

In the face of the restrictions so imposed by his peers, the ILC Special Rapporteur was compelled to substantially modify his approach. Instead of the ambitious original vision of a 'Law of the (Protection of the) Atmosphere'

48 International Legal Meeting of Legal and Policy Experts, *Ottawa Statement*, 22 February 1989, reprinted in 5 *American University Journal of International Law and Policy* (1990) 2, 529-542.

49 ILC, *Report of the Commission to the General Assembly on the Work of its 65th Session*, *supra* note 1, 115, para. 168. See also S. D. Murphy, 'Immunity Ratione Personae of Foreign Government Officials and Other Topics: The Sixty-Fifth Session of the International Law Commission', 108 *American Journal of International Law* (2014) 1, 41, 56.

outlined in the 2011 syllabus[50] – also presented in a thirty-minute video in the UN Legal Office's Audiovisual Library of International Law[51] – his two first reports submitted to the ILC in 2014 and 2015 had to acknowledge and accommodate the 'leash' tightly constraining the scope of his project to the narrow residual range that remains after the 'understanding'.[52]

Not surprisingly, that change of course provoked consternation and instant reactions from academic commentators. In a widely posted blog of Amsterdam University's SHARES project,[53] Ilias Plakokefalos concludes that the Commission effectively watered down the initial proposal, "offering a mandate to the Special Rapporteur that provides for very little room to produce a meaningful result." In essence, he continues, it would have been more plausible for the ILC either not to embark on the project at all or to revert to the original version.[54]

It is of course difficult for outside observers to gauge the rationale behind the Commission's motives for this turn of events, given that much of the internal ILC decision-making process is anything but transparent.[55] On the one hand, there is the notorious reluctance of the Commission to tackle interdisciplinary

50 *Supra* note 2.

51 The video is available at http://legal.un.org/avl/ls/Murase_EL.html (last visited 4 August 2015).

52 Murase, *First Report*, *supra* note 3, 4-5, 7-8 & 15-16, paras 5, 12-14 & 27; and S. Murase, *Second Report on the Protection of the Atmosphere*, UN Doc A/CN.4/681, 2 March 2015, 3, para. 1 (note 2) [Murase, Second Report].

53 I. Plakokefalos, 'International Law Commission and the Topic "Protection of the Atmosphere": Anything New on the Table?' (1 November 2013), available at http://www.sharesproject.nl/international-law-commission-and-the-topic-protection-of-the-atmosphere-anything-new-on-the-table/ (last visited 4 August 2015).

54 *Ibid.* See also the critical appraisal by A. V. Kodolova & A. M. Solntsev, 'Perspektivy kodifikatsii i progressivnogo razvitiya mezhdunarodnogo prava v sfere okhrany atmosfery' [Perspectives of the Codification and Progressive Development of International Law in the Area of Protection of the Atmosphere], 12 *Evrazijskij juridičeskij žurnal/Eurasian Law Journal* (2014) 1, 60.

55 See M. El-Baradei, T. M. Franck & R. Trachtenberg, *The International Law Commission: The Need for a New Direction* (1981), 11 (referring especially to the "private" deliberations of the Planning Group created in 1975). See also the critical comments by S. Rosenne, 'Codification Revisited After 50 Years', 2 *Max Planck Yearbook of United Nations Law* (1998), 1 (on the internal fragmentation of ILC decision-making).

areas,[56] let alone "multi-interdisciplinary" projects (in Shabtai Rosenne's terms[57]: that is, involving other branches of science and human activity), which tend to get dismissed as "too technical" and "more suited for discussion among specialists".[58] Moreover, as one Commission member cautioned, "a one-size-fits-all approach to the topic, which wrongly presupposed that all problems related to the atmosphere were of a similar nature and aimed to develop uniform legal rules to harmonize disparate regimes, was bound to be problematic".[59]

On the other hand, there are the serious political cleavages that manifest themselves most bluntly in the annual governmental comments on ILC reports in the UN General Assembly's Sixth Committee.[60] As the summary records show, the major world powers – in particular, the five permanent Security Council members – simply do not want the ILC to get into the way of any

56 El-Baradei, Franck & Trachtenberg, *supra* note 55, 11: "The Commission's reluctance to tackle topics which, though legal in nature, include, to a greater or lesser extent, issues concerning other disciplines is an ingredient in the decline of the Commission from its central position in the law-making process.". Note, however, with regard to the current topic of protection of the atmosphere, the continuous efforts of the Special Rapporteur to consult with scientists and experts of other institutions (including UNEP, WMO and UN/ECE). See Murase, *Protection of the Atmosphere* (Syllabus), UN Doc A/66/10 (2011), *supra* note 2, 323, para. 28; Murase, *First Report*, *supra* note 3, 5 & 10-11, paras. 7 (note 13) & 19; and Murase, *Second Report*, *supra* note 52, 5, para. 7.

57 Rosenne, *supra* note 55, 20.

58 See also, *inter alia*, the comments (in the GA Sixth Committee discussion of the ILC report in 2011) by France (GA (Sixth Committee), *Summary Record of the 20th Meeting*, UN Doc A/C.6/66/SR.20, 23 November 2011, 9, para. 48), Iran (GA (Sixth Committee), *Summary Record of the 27th Meeting*, UN Doc A/C.6/66/SR.27, 8 December 2011, 8, para. 52), and the Netherlands (GA (Sixth Committee), *Summary Record of the 28th Meeting*, UN Doc A/C.6/66/SR.28, 2 December 2011, 11, para. 64).

59 Statement by S. D. Murphy, in ILC, *Summary Record of the 3211th Meeting*, UN Doc A/CN.4/SR.3211, 20 June 2014, 5. See also J. C. I. Kuylenstierna *et al.*, 'Atmosphere', in UNEP (ed.), *Global Environmental Outlook 5: Environment for the Future We Want* (2012), 31, 57 (citing M. A. Levy, R. O. Keohane & P. M. Haas, 'Improving the Effectiveness of International Environmental Institutions', in P. M. Haas, R. O. Keohane & M. A. Levy, *Institutions for the Earth: Sources of Effective International Environmental Protection* (1993), 397).

60 See El-Baradei, Franck & Trachtenberg, *supra* note 55, 11; and B. G. Ramcharan, *The International Law Commission: Its Approach to the Codification and Progressive Development of International Law* (1977), 115-131. See generally M. Wood, 'The General Assembly and the International Law Commission: What Happens to the Commission's Work and Why?', in I. Buffard *et al.* (eds), *International Law Between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (2008), 373.

ongoing or forthcoming diplomatic negotiations.[61] Hence their recurrent message to the ILC to keep out of their hair, articulated not only in the open Sixth Committee debates but also more subtly through Commission members who traditionally have had current or former foreign-ministry affiliations (it hardly is an exaggeration to observe that the ILC as an institution has from its beginnings been captive to the 'mandarins', the "seasoned lawyer-diplomats"[62] groomed in their respective foreign-office hierarchies).[63]

Other Commission members – from 'lesser' UN member countries – did not hesitate to criticize the rigid 2013 understanding as having "placed the Special Rapporteur in an untenable position", and suggested either to reconsider the understanding, or to agree on a flexible approach to its application.[64] It is indeed hard to imagine – with all due respect to the self-perceived global authority of the ILC – how mere study, conceptual analysis, and model drafting work in the Commission (which according to the Special Rapporteur's provisional schedule are not expected to be completed until 2020 at the earliest)[65] would "interfere with political negotiations on those subjects [air pollution, ozone depletion,

61 See the summary of Sixth Committee comments on the report of the 66th ILC session in 2014 by the Russian, French, UK, U.S. and Chinese delegations, in Murase, *Second Report*, *supra* note 52, 4-5, para. 5 (notes 10 & 11); e.g., the U.S. statement in GA (Sixth Committee), *Summary Record of the 24th Meeting*, UN Doc A/C.6/69/SR.24, 3 December 2014, 13, para. 66, cautioning against the "risk that it would complicate and inhibit ongoing and future negotiations on issues of global concern" (emphasis added). But see also the puzzled query by former ILC Chair L. Caflisch at the Commission's 66th session (28 May 2014), as to how the Commission could possibly anticipate the contents of any future negotiations. See ILC, *Summary Record of the 3212th Meeting*, UN Doc A/CN.4/SR.3212, 30 June 2014, 8 [ILC, Summary Record of the 3212th Meeting].

62 M. Koskenniemi, 'International Legislation Today: Limits and Possibilities', 23 *Wisconsin International Law Journal* (2005) 1, 61, 61.

63 On this sometimes problematic *dédoublement fonctionnel*, see M. Kamto, 'Choix de sujets pouvant être retenus par la Commission aux fins de la codification et du développement progressif et méthodes de travail de la Commission', in UN (ed.), *Making Better International Law: The International Law Commission at 50* (1998) [UN (ed.), Making Better International Law], 256, 270-271.

64 ILC, *Report of the Commission to the General Assembly on the Work of its 66th Session*, UN Doc A/69/10 (2014), 221, para. 87 [ILC, Report of the Commission to the General Assembly on the Work of its 66th Session]. In the view of German ILC member G. Nolte, however, "the understanding left a sufficient margin of manoeuvre to identify general principles of international environmental law and to say that they applied to the protection of the atmosphere". Statement by G. Nolte, in ILC, *Summary Record of the 3213th Meeting*, UN Doc A/CN.4/SR.3213, 16 July 2015, 10.

65 Murase, *Second Report*, *supra* note 52, 47, para. 79.

and climate change]",[66] in which governments might indeed "run the risk that the ILC could make a difference".[67] To be sure, while it is true of course that major preparatory work is currently ongoing for global arrangements to succeed the 1997 *Kyoto Protocol*, there are at this time *no* pending treaty (or treaty amendment) negotiations either on long-range transboundary air pollution or on ozone depletion.[68] Furthermore, the Commission's strict order to the Special Rapporteur *not to deal with* "liability of States and their nationals, the polluter-pays principle, the precautionary principle, and common but differentiated responsibilities [...]" is perplexing – to put it mildly[69] – for an expert body fully qualified to address such general legal questions. Equally unusual is the recommendation of the Drafting Committee in May 2015 to incorporate that categorical interdiction in the text of draft guideline 2 (scope of the guidelines).[70]

The apodictic exclusion of all liability issues is strangely reminiscent of the *travaux préparatoires* of the 1979 *LRTAP Convention*.[71] At that time, upon

66 See the summary of general comments in ILC, *Report of the Commission to the General Assembly on the Work of its 66th Session*, *supra* note 64, 220-221, para. 86.

67 G. Nolte, 'The International Law Commission Facing the Second Decade of the Twenty-First Century', in U. Fastenrath *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (2011), 781, 783.

68 Unless these 'keep out – *chasse gardée*' orders were also intended to apply to all future deliberations of the treaties' governing bodies and their subordinate committees with regard to the continuous adjustment and amendment of technical annexes, which are part of their mandates for regular treaty implementation and review.

69 In the words of Argentine ILC member E. Candioti, the understanding was "a disgrace" to the Commission. Statement by E. Candioti, ILC, *Summary Record of the 3212th Meeting*, *supra* note 61, 7. Tanzanian member C. Peter called it a "sword of Damocles", wondering whether it had been "purposely designed to bog down the work on the topic". Statement by C. Peter, in ILC, *Summary Record of the 3247th Meeting*, UN Doc A/CN.4/SR.3247, 8 June 2015, 12 [ILC, Summary Record of the 3247th Meeting].

70 ILC, *Protection of the Atmosphere: Texts and Titles of Draft Guidelines 1, 2 and 5, and Preambular Paragraphs*, provisionally adopted by the Commission on 2 June 2015, with commentaries adopted at the 3287th and 3288th meetings of the Commission on 5 and 6 August 2015; see para. 2 of draft guideline 2 in Chapter V of the ILC *Report on the Work of its 67th Session* (Rapporteur: M. Vázquez-Bermúdez), UN Doc A/70/10 (2015), 32-33. See also generally P. N. Okowa, 'Responsibility for Environmental Damages', in M. Fitzmaurice, David M. Ong & P. Merkouris (eds), *Research Handbook on International Environmental Law* (2010), 303, 317 (noting the "extreme reticence [...] of States to commit to detailed rules governing issues of responsibility").

71 For background of the negotiations, see E. M. Chossudovsky, *"East-West" Diplomacy for Environment in the United Nations* (1988).

request by the United Kingdom,[72] a special footnote was inserted under Article 8 (f) of the treaty, reading: "The present Convention does not contain a rule on State liability as to damage". Legal interpretations of that disclaimer clause vary,[73] although most of the literature concurs that the sole intent of the footnote was "that any question of international responsibility or liability was to remain unaffected by the LRTAP Convention".[74] The primary concern of governments at the time was to reach urgent agreement on "such preventive principles as prior notification, exchange of information procedures for assessment of environmental impacts and legally binding consultations in cases of significant transboundary pollution", rather than liability for damage, which therefore could be neglected in the negotiations.[75] While that pragmatic approach may have been politically expedient to ensure rapid broad acceptance in the UNECE context of the 1970s,[76] it may be doubted whether it should also serve as a rationale for the drafting of future global guidelines in the ILC context.

72 Over the opposition of the Canadian and Yugoslav delegations, which had unsuccessfully proposed to include provisions on State responsibility in the Convention. See the reports of the 2nd and 4th meetings of the 'Special Group on LRTAP' of the UNECE Senior Advisers on Environmental Problems, UN Docs ENV/AC.9/4 annex II (1978), 3 & ENV/AC.9/8 (1978), 4 (copy on file with authors). See also M. Pallemaerts, 'International Legal Aspects of Long-Range Transboundary Air Pollution', 1 *Hague Yearbook of International Law* (1988), 189, 214-217.

73 The Belgian Government, in a 1982 explanatory memorandum to its Parliament, took the footnote to mean that "there will be no compensation for victim countries" (*le pays victime ne sera toutefois pas indemnisé*). Documents Parlementaires: Chambre des Représentants (1981-1982), No. 315/1, 5. See Pallemaerts, *supra* note 72, 215. Accordingly, some commentators concluded that the Convention also excludes liability claims based on general (customary) international law. See A.-C. Kiss, 'La Convention sur la pollution atmosphérique à longue distance', 5 *Revue juridique de l'environnement* (1981) 1, 30, 35; Statement by R. Quentin-Baxter, in ILC, *Report of the Commission to the General Assembly on the Work of its 34th Session*, UN Doc A/37/10 (1982), Yearbook of the International Law Commission (1982), Vol. II (2), 87, para. 119.

74 See, e.g., J. G. Lammers, 'The European Approach to Acid Rain', in D. B. Magraw (ed.), *International Law and Pollution* (1991), 265, 304. See also Pallemaerts, *supra* note 72, 217; P. H. Sand, 'The Practice of Shared Responsibility for Transboundary Air Pollution', *SHARES Research Paper 69* (2015), available at http://www.sharesproject.nl/wp-content/uploads/2015/07/69.-Sand-Practice-vol..pdf (last visited 4 August 2015), 15 (forthcoming in A. Nollkaemper & I. Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (2016)).

75 See the *Report of the Executive Secretary*, UN Doc E/ECE/936 (1977), 7 (copy on file with authors); Chossudovsky, *supra* note 71, 41.

76 The Government of the Netherlands, in its explanatory report to Parliament in 1981, pointed out bluntly that some countries would have refused to sign the Convention "if

Equally unpersuasive is the explicit removal of 'black carbon' – that is, aerosol particles or 'fine particulate matter' ($PM_{2.5}$) such as soot from diesel engines, domestic combustion sources, and agricultural biomass burning – from the mandate of the project,[77] thereby effectively reducing the ILC definition of atmospheric pollution to gaseous emissions. Yet, exposure to ambient $PM_{2.5}$ was responsible for 3.2 million premature deaths in 2010 and is among the top ten leading risk factors for early death.[78] The fact that these emissions also happen to contribute to global warming – as 'short-lived climate pollutants' (SLCPs),[79] hence dual-impact or multiple-risk sources, whose reduction offers co-benefits that are important for health, environment, and the politics of national action – prompted the creation of an innovative transnational partnership of governments and civil society under UNEP auspices (the *Climate and Clean Air Coalition to Reduce Short-Lived Climate Pollutants*, CCAC, launched in 2012). But these interrelated impacts in no way justify the exemption of such pollutants from

it had contained any provisions on liability"; *Tweede Kamer Zitting* [Second Chamber Session] 1980-1981, 16626 No. 5, 2 (translation by the authors). See Pallemaerts, *supra* note 72, 215.

77 Sub-paragraph (b) of the understanding, now incorporated in draft guideline 2 (3); see UN Doc A/70/10 (2015), 33, comment (no. 6) on draft guideline 2.

78 J. S. Apte *et al.*, 'Addressing Global Mortality from Ambient $PM_{2.5}$', 49 *Environmental Science and Technology* (2015) 13, 8057, 8057; S. E. Chambliss *et al.*, 'Estimating Source-Attributable Health Impacts of Ambient Fine Particulate Matter Exposure: Global Premature Mortality from Surface Transportation Emissions in 2005', 9 *Environmental Research Letters* (2014) 10 (10400), 1. See also R. T. Burnett *et al.*, 'An Integrated Risk Function for Estimating the Global Burden of Disease Attributable to Ambient Fine Particulate Matter Exposure', 122 *Environmental Health Perspectives* (2014) 4, 397; and N. A. H. Janssen *et al.*, *Health Effects of Black Carbon* (2012), WHO Regional Office. Climate change is predicted to further increase black carbon concentrations in some areas. See N. Watts *et al.*, 'Health and Climate Change: Policy Responses to Protect Health', 385 *Lancet* (forthcoming 2015), available at http://dx.doi.org/10.1016/S0140-6736(15)60854-6 (last visited 4 August 2015), 12.

79 With atmospheric lifetimes in the order of days or weeks, unlike long-term gaseous pollutants. See generally UNEP & WMO (eds), *Integrated Assessment of Black Carbon and Tropospheric Ozone* (2011); and Institute for Governance & Sustainable Development, *Primer on Short-Lived Climate Pollutants* (2013). See also World Bank & International Cryosphere Climate Initiative, *On Thin Ice: How Cutting Pollution Can Slow Warming and Save Lives* (2013); D. T. Shindell, 'The Social Cost of Atmospheric Release', 130 *Climatic Change* (2015) 2, 313 (estimating the combined damages from both global climate change impacts and air quality impacts, of emissions of black carbon and major greenhouse gases).

international legal analysis.[80] The refusal of the ILC to deal with this major new global health concern in the field of atmospheric pollution will only risk exposing the Commission, at best, to an unflattering public image of benign irrelevance, and at worst to outright ridicule in the scientific world.

Another key sentence of the understanding, which after review by the Drafting Committee also ended up in the 2015 draft guidelines as a preambular paragraph, raises a fundamental issue that touches on the very mandate of the Commission: "*The project will not seek to 'fill' gaps in treaty regimes*".[81] Historically, there has been extensive debate on the mandate of the ILC – based in turn on Article 13 (1) (a) of the *UN Charter* – for "promotion of the progressive development of international law and its codification".[82] And although the Commission itself never clarified the murky distinction between progressive development and codification,[83] it was recognized early on that "in any work of codification, the codifier inevitably has to fill in gaps [...] and amend the law in the light of new developments".[84] Accordingly, the Special Rapporteur – in what he termed a "middle-ground approach" – had emphasized in his two first reports that while the project was "not intended to fill the gaps in treaty regimes,

80 See B. Lode, 'The Climate and Clean Air Coalition to Reduce Short-Lived Climate Pollutants', 17 *ASIL Insights* (2013) 20.

81 Chapter V of the ILC *Report on the Work of its 67th Session*, *supra* note 70, 21-22, and general commentary, *ibid.*, 24. On this sentence, see the skeptical comments by Caflisch (*supra* note 61).

82 *Charter of the United Nations*, 24 October 1945, Art. 13 (1) (a), 1 UNTS XVI. For a recent survey, see D. McRae, 'The Interrelationship of Codification and Progressive Development in the Work of the International Law Commission', 111 *Kokusaihō Gaikō Zasshi/Journal of International Law and Diplomacy* (2013) 4, 75. See also S. D. Murphy, 'Codification, Progressive Development, or Scholarly Analysis? The Art of Packaging the ILC's Work Product', in M. Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (2013), 29.

83 F. Berman, 'The ILC Within the UN's Legal Framework: Its Relationship With the Sixth Committee', 49 *German Yearbook of International Law* (2006), 107, 127.

84 ILC, *Report of the Committee on the Progressive Development of International Law and its Codification on the Methods for Encouraging the Progressive Development of International Law and its Eventual Codification*, UN Doc A/AC.10/51, 17 June 1947, para. 10, as quoted by H. W. Briggs, *The International Law Commission* (1965), 137-138 and by H. Owada, 'The International Law Commission and the Process of Law-Formation', in UN (ed.), *Making Better International Law*, *supra* note 63, 167, 168. The document is reprinted in 41 *American Journal of International Law* (1947) 3 (Supplement), 18-26. See also the UN Secretariat report (known as the 'Lauterpacht Memorandum') *Survey of International Law in Relation to the Work of Codification of the International Law Commission*, UN Doc A/CN.4/1 (1949), 65-66, para. 110, as quoted by R. P. Dhokalia, *The Codification of Public International Law* (1970), 208 ("filling gaps" under article 15 of the ILC Statute).

it would certainly identify such gaps".[85] Yet this 'relatively liberal interpretation' of the understanding continues to meet with irritated objections from more conservative members.[86]

D. Outlook

Following plenary discussions during the first part of the ILC's 67th session in May-June 2015, the Drafting Committee reviewed and provisionally adopted a set of preambular paragraphs and three draft guidelines.[87] In its deliberations on the preamble, the Committee abandoned the concepts of 'common heritage' and 'common concern of humankind', and instead settled for the seemingly innocuous term 'pressing concern of the international community as a whole', explaining the expression "as a factual statement, and not a normative statement".[88]

Political cleavages in the Commission surfaced, once again, with regard to the inclusion of the term 'energy' in draft guideline 1 (use of terms): Whereas

85 Murase, *First Report*, *supra* note 3, 4-5, para. 5 (note 10); and Murase, *Second Report*, *supra* note 52, 3-4, para. 3. See also the Special Rapporteur's summing-up of the debate, in ILC, *Summary Record of the 3214th Meeting*, UN Doc A/CN.4/3214, 14 July 2014, 3.

86 See the summary of comments at the 66th session of the ILC (ILC, *Report of the Commission to the General Assembly on the Work of its 66th Session*, *supra* note 64, 220-227, paras. 85-115) and at the 67th session in May 2015 (ILC, *Summary Record of the 3247th Meeting*, *supra* note 69). Some of the debate sadly illustrates the shrinking range of epistemic-semantic consensus among international lawyers, deplored by J. d'Aspremont, 'Wording in International Law', 25 *Leiden Journal of International Law* (2012) 3, 575.

87 Included, with commentaries, in Chapter V of the ILC *Report on the Work of its 67th Session*, *supra* note 70.

88 See the commentary (no. 4) on the third preambular paragraph, in Chapter V of the ILC *Report on the Work of its 67th Session*, *supra* note 70, 26-27. The expression had previously been used by the Commission as a criterion for determining which topics should be brought onto its programme of work (see ILC, *Report of the Commission to the General Assembly on the Work of its 49th Session*, UN Doc A/52/10, Yearbook of the International Law Commission (1997), Vol. II (2), 71-72, para. 238); and ILC, *Report of the Commission to the General Assembly on the Work of its 49th Session*, Yearbook of the International Law Commission (1998), Vol. II (2), 110, para. 553). According to the Chairman of the Drafting Committee (M. Forteau), "it was agreed among the members of the Committee that no legal consequences arise on their own" from its use in this context; ILC, *Summary Record of the 3260th Meeting*, UN Doc A/CN.4/SR.3260, 8 June 2015, 6 (copy on file with authors). But see the instant rejoinder by Commission member G. Nolte, stating that he had understood instead that while they had agreed to consider this formulation as not establishing a distinct legal obligation "as such", that did not exclude it from being taken into account as an expression of the object and goal of the draft guidelines. *Ibid.,* 7.

the 1979 *LRTAP Convention* had defined air pollution as "the introduction by man, directly or indirectly, of substances *or energy* into the air, resulting in deleterious effects [...]",[89] the 1991 *U.S.–Canada Agreement on Air Quality* had purposely deleted the words 'or energy' from its otherwise identical definition.[90] The difference had become an issue in the wake of the Chernobyl disaster in 1986, over whether or not the *LRTAP Convention* covered radioactive/radionuclide air pollution.[91] In view of strong divergent views among ILC

89 *LRTAP Convention*, Art. 1 (a), *supra* note 34, 219 (emphasis added). The explicit reference to energy goes back to the 1974 OECD *Principles Concerning Transfrontier Pollution* (*supra* note 41), which in turn served as a model for the definition of pollution in *UNCLOS*, Art. 1 (1) (4), *supra* note 28, 399), and in a total of 12 regional seas conventions between 1976 and 2003 (Baltic Sea, Black Sea, Caspian Sea, Gulf of Guinea, Mediterranean Sea, Northeast Atlantic, Northeast Pacific, Persian Gulf, Red Sea, Southeast Pacific, South Pacific, and West Indian Ocean). See A.-C. Kiss & D. Shelton, *International Environmental Law* (1991), 117; P. Birnie, A. Boyle & C. Redgwell, *International Law and the Environment*, 3rd ed. 2009), 390-398.

90 *U.S.–Canada Agreement on Air Quality* Art. 1 (1), *supra* note 34, 678-679. Furthermore, Art. 1 (2) exempts (unlike the LRTAP Convention) "effects of a global nature" from the definition of transboundary air pollution. For background, see M. L. Glode & B. N. Glode, 'Transboundary Pollution: Acid Rain and United States-Canadian Relations', 20 *Boston College Environmental Affairs Law Review* (1993) 1, 1; J. L. Roelofs, 'United States-Canada Air Quality Agreement: A Framework for Addressing Transboundary Air Pollution Problems', 26 *Cornell International Law Journal* (1993) 2, 421.

91 According to the German Government's explanatory memorandum to Parliament (*Denkschrift zu dem Übereinkommen vom 13. November 1979 über weiträumige grenzüberschreitende Luftverunreinigung*, Bundestags-Drucksache 9/1119, 2 December 1981, 14), "radioactive substances are not covered" (translation by the authors). See also A. Rest, 'Tschernobyl und die internationale Haftung', 37 *Versicherungsrecht* (1986) 25, 609, 612-613 (effects of radioactive air pollution "not contemplated at the time", translation by the authors). But see the Austrian Government's statement during the *travaux préparatoires* of the Convention in January 1979 (UN Doc ENV/AC.9/CRP.5/Add.3, 2-3, para. 31 (copy on file with authors) (suggesting that the scope of the Convention "should also include the study of possible negative effects resulting from the peaceful uses of nuclear energy on the environment of a State or States other than the State within which such activities are carried out"). See H. J. Heiss, 'Legal Protection Against Transboundary Radiation Pollution: A Treaty Proposal', 4 *Fordham Environmental Law Review* (2011) 2, 167, 193-194 (note 163). In this sense also D. Rauschning, 'Legal Problems of Continuous and Instantaneous Long-Distance Air Pollution: Interim Report', in ILA, *Report of the Sixty-Second Conference* (1987), 198, 219; and P. J. Sands, *Chernobyl: Law and Communication: Transboundary Nuclear Air Pollution – The Legal Materials* (1988), 163 (definition "clearly wide enough to bring radioactive fallout within the scope of the Convention"). See Murase, *First Report*, *supra* note 3, 50-51, para. 76. It is worth noting in this context that Chapter V of the 1995 *UNEP Global Programme* (*supra* note 30, 41-44, paras. 107-113), which operates under the similar *UNCLOS* definition of pollution (supra

members,[92] the Drafting Committee therefore decided to delete the term 'energy' and only refer to 'substances', subject to future explanation in the commentaries; ultimately, the commentary on draft guideline 1 now affirms that "it is the understanding of the Commission that, for the purposes of the draft guidelines, the word 'substances' includes 'energy'. 'Energy' is understood to include heat, light, noise and radioactivity introduced and released into the atmosphere through human activities".[93]

The Special Rapporteur's next (third) report in 2016 is scheduled to deal with the *sic utere tuo* principle; sustainable development (utilization of the atmosphere and environmental impact assessment); equity; special circumstances and vulnerability.[94] Subsequent reports in turn are to address the issues of prevention, due diligence, and precaution (2017); the interrelationship with other relevant fields of law (law of the sea, international trade law, and international human rights law, 2018); compliance, implementation and dispute settlement (2019). While it remains to be seen how much of the torso will undergo further amputations in light of the Commission's ominous 'understanding', the project now appears to be inexorably – if haltingly – on its way towards characterizing at least the broad contours of an international law of atmospheric resources.[95]

note 89), also covers emissions of radioactive substances. See VanderZwaag & Powers, *supra* note 30, 428.

92 During debates at the 66th and 67th sessions, some Commission members proposed deletion of the reference to radioactive/radionuclide emissions. See Murase, *Second Report*, *supra* note 52, 9-10, para. 13; and ILC, *Summary Record of the 3247th Meeting*, *supra* note 69.

93 *Summary Record of the Commission's 3288th meeting on 6 August 2015*, UN Doc A/CN.4/SR.3288 (22 September 2015), 4 (copy on file with the authors); and Chapter V of the ILC *Report on the Work of its 67th Session*, *supra* note 70, 30 (commentary no. 9 on draft guideline 1, sub-para. b).

94 See Murase, *Second Report*, *supra* note 52, 47, para. 78; and Chapter V of the ILC *Report on the Work of its 67th Session*, *supra* note 70, para. 47.

95 In his *First Report* (*supra* note 3, 15-16, para. 27), the Special Rapporteur modestly suggested that "it may be a little too ambitious to talk about the 'Law of the Atmosphere' just yet", while noting the mounting momentum for a comprehensive consideration of the topic. See, e.g., J. Bruce, 'Law of the Air: A Conceptual Outline', 18 *Environmental Policy and Law* (1988) 1-2, 5; B. P. Herber, 'The Economic Case for an International Law of the Atmosphere', 9 *Environment and Planning: Government and Policy* (1991) 4, 417; A. Najam, 'Future Directions: The Case for a "Law of the Atmosphere"', 34 *Atmospheric Environment* (2000) 23, 4047; Thornes *et al.*, *supra* note 4, 249; and F. Murray, 'The Changing Winds of Atmospheric Environment Policy', 29 *Environmental Science and Policy* (2013), 115.

The systemic risks of fragmentation noted in Section B. above counsel in favor of taking a broad holistic view, at least for the purpose of critical analysis. That need not lead directly to a monolithic merger of all of the disparate pieces of the fragmented regime complex into a single centralized Law of the Atmosphere and a single international institution charged with implementing this law. There are gains from specialization in skills and knowledge. Further, merging and centralizing institutions can pose new problems, such as bogging down information flow and decision making, magnifying the costs of errors, forgoing the learning arising from variation, and vesting too much power in centralized authority.

Thus, an optimal approach to a complex multifaceted problem like the atmosphere may be neither piecemeal fragmentation nor unified centralization, but rather a holistic analysis of system performance, coupled with the design of mechanisms for communicating and coordinating among the multiple specialized institutional actors, so as to correct the countervailing risks of omitted voice and disregard.[96] Such mechanisms might include, for example:

1. giving notice of each body's deliberations and actions to other relevant bodies, so that diverse voices can be heard on pending decisions and can be aware of potential impacts on their domains;
2. holding periodic joint meetings of key bodies, so that they can deliberate together on matters of shared interest;
3. assembling a comprehensive system of monitoring and data collection to assess the status and trends of atmospheric resources;[97] and
4. creating an atmosphere policy oversight or coordination body, authorized to assess the field broadly, and to review impact assessments prepared by the various specialized bodies, so that interactions, gaps, countervailing risks, co-benefits, and cumulative effects can be assessed and managed in concert, tradeoffs among regime components can be resolved, synergies can be pursued, priorities for future action can be charted, and learning can be shared across domains.[98]

In this perspective, *de lege aëris ferenda*, even with (or in spite of) the 'understanding', the ILC's project on protection of the atmosphere may still be

96 Stewart, *supra* note 38, 269; Wiener & Graham, *supra* note 39, 267.

97 J. B. Wiener, 'Toward an Effective System of Monitoring, Reporting and Verification', in S. Barrett, C. Carraro & J. de Melo (eds.), *Towards a Workable and Effective Climate Regime* (2015), 183.

98 J. B. Wiener & D. L. Ribeiro, 'Impact Assessment: Diffusion and Integration', in F. Bignami & D. Zaring (eds), *Comparative Law and Regulation* (2015), 159; The *UNFCCC* already calls for policy impact assessments in Article 4(1)(f).

able to develop a "realistic utopia"[99] – that is, a holistic analytic perspective, and an appraisal of the merits of various potentially constructive legal mechanisms to redress the dysfunctions of fragmentation.

[99] Cf. F. Francioni, 'Realism, Utopia, and the Future of International Environmental Law', in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (2012), 442, 443.

E. Additional Note by the Authors (August 2016)

At its 68th session (Geneva, 2 May-10 June and 4 July-12 August 2016), the ILC considered the Special Rapporteur's Third Report on the Protection of the Atmosphere[100] and on the basis of the report of the Drafting Committee provisionally adopted draft guidelines 3-7 and a preamble paragraph,[101] together with commentaries thereto. In its report to the UN General Assembly[102], the Commission reiterated its request to States for comments and further information.

The Special Rapporteur (Prof. Shinya Murase) indicated that in 2017 the Commission could deal with the question of the interrelationship of the law of the atmosphere with other fields of international law (such as the law of the sea, international trade and investment law and international human rights law), and in 2018 with the issues of implementation, compliance and dispute settlement relevant to the protection of the atmosphere, with the intention of completing the first reading of the topic that year.

The text of the draft guidelines, together with the preamble, as provisionally adopted so far is reproduced below.

Preamble[103]

...

Acknowledging that the atmosphere is essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems,

Bearing in mind that the transport and dispersion of polluting and degrading substances occur within the atmosphere,

Recognizing therefore that the protection of the atmosphere from atmospheric pollution and atmospheric degradation is a pressing concern of the international community as a whole,

100 *Third report on the protection of the atmosphere*, UN Doc. A/CN.4/692, 25 February 2016.

101 *Titles and texts of draft guidelines 3, 4, 5, 6 and 7 together with a preambular paragraph*, UN Doc. A/CN.4/L.875, 10 June 2016.

102 *Official Records - 71st Session*, Chapter VIII, UN Doc. Suppl. No. 10, A/71/10, 18 August 2016.

103 Some other paragraphs may be added and the order of paragraphs may be coordinated at a later stage.

Aware of the special situation and needs of developing countries,

Recalling that these draft guidelines are not to interfere with relevant political negotiations, including those on climate change, ozone depletion, and long-range transboundary air pollution, and that they also neither seek to "fill" gaps in treaty regimes nor impose on current treaty regimes legal rules or legal principles not already contained therein,

...

Guideline 1: Use of terms

For the purposes of the present draft guidelines,

(a) "Atmosphere" means the envelope of gases surrounding the Earth;

(b) "Atmospheric pollution" means the introduction or release by humans, directly or indirectly, into the atmosphere of substances contributing to deleterious effects extending beyond the State of origin of such a nature as to endanger human life and health and the Earth's natural environment;

(c) "Atmospheric degradation" means the alteration by humans, directly or indirectly, of atmospheric conditions having significant deleterious effects of such a nature as to endanger human life and health and the Earth's natural environment.

Guideline 2: Scope of the guidelines[104]

1. The present draft guidelines [contain guiding principles relating to] [deal with] the protection of the atmosphere from atmospheric pollution and atmospheric degradation.

2. The present draft guidelines do not deal with, but are without prejudice to, questions concerning the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, the liability of States and their nationals, and the transfer of funds and technology to developing countries, including intellectual property rights.

3. The present draft guidelines do not deal with specific substances, such as black carbon, tropospheric ozone and other dual-impact substances, which are the subject of negotiations among States.

4. Nothing in the present draft guidelines affects the status of airspace under international law nor questions related to outer space, including its delimitation.

[104] The alternative formulations in brackets will be subject to further consideration.

Guideline 3: Obligation to protect the atmosphere
States have the obligation to protect the atmosphere by exercising due diligence in taking appropriate measures, in accordance with applicable rules of international law, to prevent, reduce or control atmospheric pollution and atmospheric degradation.

Guideline 4: Environmental impact assessment
States have the obligation to ensure that an environmental impact assessment is undertaken of proposed activities under their jurisdiction or control which are likely to cause significant adverse impact on the atmosphere in terms of atmospheric pollution or atmospheric degradation.

Guideline 5: Sustainable utilization of the atmosphere
1. Given that the atmosphere is a natural resource with a limited assimilation capacity, its utilization should be undertaken in a sustainable manner.
2. Sustainable utilization of the atmosphere includes the need to reconcile economic development with protection of the atmosphere.

Guideline 6: Equitable and reasonable utilization of the atmosphere
The atmosphere should be utilized in an equitable and reasonable manner, taking into account the interests of present and future generations.

Guideline 7: Intentional large-scale modification of the atmosphere
Activities aimed at intentional large-scale modification of the atmosphere should be conducted with prudence and caution, subject to any applicable rules of international law.

Guideline 8: International cooperation
1. States have the obligation to cooperate, as appropriate, with each other and with relevant international organizations for the protection of the atmosphere from atmospheric pollution and atmospheric degradation.
2. States should cooperate in further enhancing scientific knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation. Cooperation could include exchange of information and joint monitoring.

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The EU Commission and the Fragmentation of International Law: Speaking European in a Foreign Land

Avidan Kent*

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* PhD (Cantab), Lecturer at the University of East Anglia. The author would like to thank Dr Jamie Trinidad (Cambridge) and Dr Nikos Skoutaris (East Anglia) for their helpful comments. Usual disclaimer applies.

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Abstract

The debate on the fragmentation of International Law has been relatively dormant in recent years. However, recent events demonstrate not only that this debate should be re-awoken, but also that some key elements of this debate must be reconsidered. Notably, while the fragmentation of International Law has often been discussed from the perspective of courts and judges, this article examines the view and the impact of a different institutional actor – the Commission of the European Union. This contribution analyzes a series of *amicus* briefs that were submitted in a number of investment treaties-based cases. These briefs, which were recently disclosed to the author, reflect a certain *radicalization* of the European Court of Justice's view concerning the place and the role of the EU's legal system within the international legal order. This article discusses the problematic implications that the Commission's approach may have on the international legal order, as well as possible future pathways.

A. It's the Fragmentation… All Over Again…

The phenomenon referred to as the *fragmentation of International Law* describes the structure of International Law. It portrays a universe of isolated, self-contained legal regimes (e.g. trade law, human rights law, environmental law, etc.) that have developed over the years with minimal, or no coordination. This isolation and lack of coordination are, at least potentially, problematic, as they imply the possibility of certain conflicts, *inter alia* between the instructions established by these regimes. The International Law Commission (ILC) described this possibility as a case in which "[two or more] relevant treaties seem to point to different directions in their application by a party". [1]

The debate about the fragmentation of International Law has dominated much of the academic sphere during the last decade. Numerous academic articles, symposiums and PhD dissertations were dedicated to the questions that underline this debate, notably the following three: (1) Does fragmentation really exist?; (2) Should fragmentation be considered a problem?; and (3) In case the first two questions are to be answered affirmatively, what should be done

[1] *Report of the Study Group of the International Law Commission to the Fifty-Eighth Session, Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682, 13 April 2006, 81, para. 22 [ILC Report].

about it? These questions have been discussed and debated extensively (and some would say exhaustedly) by academics, who have provided a variety of opinions.[2]

As described by T. Broude, in recent years the debate over the fragmentation of International Law "has virtually gone silent".[3] Broude explains the demise of the debate in the following words:

> "[F]ragmentation as a phenomenon – its causes, its effects, its significance – is now hardly the subject of heated arguments and lofty theoretical debates, and perhaps most importantly, is no longer considered to constitute an existential threat to international law as a system. Fragmentation has to great extent been normalized, accepted, as it were, as both politically inevitable and legally manageable."[4]

In other words, the debate has died out because the fear of fragmentation had been over-exaggerated, and by and large can be lived with. This conclusion of the debate signifies a *victory* for the position championed at the time by former International Court of Justice (ICJ) Judge Bruno Simma. Simma, as early as 2003, declined to view fragmentation as a *threat* to the unification of International Law. Rather, he preferred to view it in a more positive light, as an expression of the diversification and the expansion of International Law.[5]

Simma also added that indeed, despite the proliferation of international courts, fragmentation did not result in contradictory jurisprudence.[6] This state of affairs is attributed according to Simma, as well as other notable commentators such as former Judge Gilbert Guillaume,[7] to some sort of a highly delicate, unofficial and somewhat psychological mechanism: International adjudicators,

2 See e.g., ILC Report, *supra* note 1; R. Michaels & J. Pauwelyn, 'Conflict of Norms or Conflict of Laws? Different Techniques in the Fragmentation of International Law', 22 *Duke Law Working Papers* (2012) 3, 349; T. Broude & Y. Shany, *Multi-Source Equivalent Norms in International Law* (2010).

3 T. Broude, 'Keep Calm and Carry on: Martti Koskenniemi and the Fragmentation of International Law', 27 *Temple International & Comparative Law Journal* (2013) 2, 279, 279.

4 *Ibid.*, 280.

5 B. Simma, 'Fragmentation in a Positive Light', 25 *Michigan Journal of International Law* (2004) 1, 845, 847 [Simma, Fragmentation in a Positive Light].

6 B. Simma, 'Universality of International Law from the perspective of a practitioner', 20 *The European Journal of International Law* (2009) 2, 265, 278 [Simma, Universality].

7 Speech by ICJ President G. Guillaume to the Sixth Committee of the UN General Assembly, 'The Proliferation of International Judicial Bodies: The Outlook for the

it is argued, are mindful of the threats of fragmentation; they are "anxious to avoid" conflicts,[8] and display the "utmost caution in avoiding to contradict each other."[9] The unity of International Law, according to former ICJ Judges Simma and Guillaume, remains firm due to individual Judges' understanding of the situation, and their willingness to stand up for this unity, even "at the price of dodging issues that would very much have deserved to be tackled."[10]

Although the mechanism described by Simma and Guillaume seems extremely fragile, one must admit that it has held, at least well enough so as to put the fragmentation debate to sleep. The lack of *smoking gun* evidence of the threats often attributed to fragmentation seems to show that indeed, as Broude puts it, fragmentation is "manageable".[11]

This article is intended to re-open the currently dormant discussion about the fragmentation of International Law. The author believes that there are two reasons for doing this. First, the events described below demonstrate that the delicate mechanism illustrated by Simma can be easily crashed, and that, unlike Simma's evaluation, some international institutions are not keen at all to uphold the unity of International Law. It could be therefore that other methods and techniques besides the legal tools often discussed in this context[12] should be considered.

Secondly, these events also reveal that besides courts, other institutions' role and impact on fragmentation could well be meaningful in this context. The role of institutions in this field is especially interesting in light of the ILC's decision to ignore this issue in its iconic report on the fragmentation of International Law. The ILC took the position that "[t]he issue of institutional competencies is best dealt with by the institutions themselves."[13] Also Simma, while addressing institutional aspects related to courts, did not dedicate much attention to other institutional actors such as international organizations, apart from stating that "when they interpret and apply international law, [they] need to bear in mind that they are acting within an overarching framework of international law,

International Legal Order' (2000), available at http://www.icjcij.org/court/index.php?pr=85&pt=3&p1=1&p2=3&p3=1 (last visited 26 June 2016).

8 Guillaume, *supra* note 7.

9 Simma, 'Fragmentation in a Positive Light', *supra* note 5, 847.

10 *Ibid.*, 846.

11 Broude, *supra* note 3, 280.

12 Notably the *VCLT*'s "tool-box" rules, as described in ILC Report, *supra* note 1, 249, para. 492.

13 *Ibid.*, 13, para. 13.

residual as it may be."[14] The events described below, however, demonstrate that certain institutional actors may be very important in this respect. The role of such institutions, their views on the structure of International Law and their impact on fragmentation should therefore be examined.

B. The European Union's Institutions and Fragmentation

Many of the events that are generating a renewed interest in the fragmentation debate are related to the European Union (EU), its law and its institutions' approach towards International Law. The EU is a relatively unique creature in International Law, being a branch of International Law, an international organization, and also a party to numerous treaties.[15] While a discussion of the legal conflicts between EU Law and other types of International Law is interesting and deserves academic attention,[16] this contribution will focus on the EU institutions' approach towards the fragmentation issue, their view concerning the place of EU Law within the international legal order, and their role in both enhancing and overcoming fragmentation.

While the focus of this article will be placed on the EU Commission's view and actions, it is important first of all to present the approach taken by the EU's judicial arm – the European Court of Justice (ECJ) – with respect to the fragmentation of International Law. The ECJ's attitude towards other competing sources of authority seems to guide the Commission in its activity, notably in its attempts to impose complete EU legal hegemony, even outside of the EU's legal sphere.

14 Simma, 'Universality', *supra* note 6, 271.

15 On the relationship between international law and EU law, see K. Ziegler, 'The Relationship Between EU Law and International Law', in D. Patterson & A. Soderston (eds), *A Companion to EU and International Law* (2016), 42, [Ziegler, Relationship]; ILC Report, *supra* note 1, 113, para. 219.

16 Much has been written about the legal conflicts between EU law and other types of international law, see e.g., V. Kosta *et al.* (eds), 'The EU Accession to the ECHR' (2014); A. Dimopoulos, 'The validity and applicability of International Investment Agreements Between EU Member States Under EU and International Law' 48 *Common Market Law Review* (2011) 1, 63.

I. The European Court of Justice and the Fragmentation of International Law

In the eyes of the ECJ, the EU treaties more closely resemble constitutional documents[17] than international treaties. This approach finds its origins in the iconic *Van Gend en Loos* judgement, in which the ECJ described the *Treaty Establishing the European Economic Community*[18] as "more than an agreement which merely creates mutual obligations between the Contracting States".[19] The ECJ's constitutional approach, as well as its relevance to the fragmentation of International Law, was demonstrated most notably in its *Kadi* decision.[20] In the *Kadi* case, the ECJ faced a classic *fragmentation* situation in which certain EU Law obligations conflicted with those of the *Charter of the United Nations (UN Charter)*. The ECJ solved this conflict by *de facto* prioritizing EU Law over the *UN Charter*. Ziegler commented that the *Kadi* decision goes as far as "sever[ing] the Community from its origins in international law."[21] De Búrca added in this respect:

> "In particular, the judgement represents a significant departure from the conventional presentation and widespread understanding of the EU as an actor maintaining a distinctive commitment to international law and institutions."[22]

17 See in ILC Report, *supra* note 1, 113, para. 218; see also, *Parti écologiste "Les Verts" v. European Parliament*, Case No. 294/83, Judgment of 23 April 1986, [1986] ECR 01339, 1365.

18 *Treaty Establishing the European Economic Community,* 25 March 1957, 298 UNTS 11.

19 *Van Gend en Loos*, Case No. 26/62, Judgment of 5 February 1963, [1963] ECR 1, 12.

20 G. de Búrca, 'The European Court of Justice and the International Legal Order After Kadi', 51 *Harvard International Law Journal* (2010) 1,1; Ziegler, 'Relationship', *supra* note 15, 9; K. Ziegler, 'Strengthening the Rule of Law but Fragmenting International Law: The *Kadi* Decision of the ECJ from the perspective of human rights' 9 *Human Rights Law Review* (2009) 2, 288 [Ziegler, Strengthening the rule of law]; *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Joined Cases Nos 402 & 415/05, Judgment of 3 September 2008, [2008] ECR I-6351 [Kadi].

21 Ziegler, 'Strengthening the rule of law', *ibid.*, 303.

22 de Búrca, *supra* note 20, 2.

And that:

> "[T]he ECJ has chosen to use the much-anticipated Kadi ruling as the occasion to proclaim the primacy of its internal constitutional values over the norms of international law."[23]

The approach displayed in the *Kadi* decision was recently reinforced by the ECJ in its opinion concerning the EU's accession to the *European Convention on Human Rights*[24] (*ECHR*). In December 2014, the ECJ decided to reject the EU's Accession Treaty to the *ECHR* based on potential incompatibilities between the *ECHR* and EU Law.[25] The ECJ mentions, *inter alia,* that the autonomy of EU Law "in relation to international law requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU".[26] The ECJ added that "in particular", the possibility that the ECJ's findings will be questioned by the European Court of Human Rights (ECtHR) is unacceptable.[27]

Following this decision the ECJ was described by authors as creating a "fortress EU",[28] and as:

> "[S]tan[ding] guard at the gates of the EU legal order, Cerberus-like, one head fending off national constitutional courts, the other keeping the WTO and UN at bay, and now, a third glowering at the European Court of Human Rights."[29]

The strong constitutionalist approach demonstrated by the ECJ casts doubts on Simma and Guillaume's belief in the role of international adjudicators as the guardians of the unified legal order. It also demonstrates how fragile

23 de Búrca, *supra* note 20, 49.

24 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 3 September 1953, 213 UNTS 221.

25 *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Compatibility of the Draft Agreement With the EU and FEU Treaties*, Opinion 2/13, 18 December 2014, C-2/13, [ECJ Opinion 2/13].

26 *Ibid.*, para. 170.

27 *Ibid.*, para. 186.

28 A. Lazowsky & R. Wessel, 'When Caveats Turn Into Locks: Opinion 2/13 on Accession of the European Union to the ECHR' 16 *German Law Journal* (2015) 1, 179, 187.

29 T. Isiksel, 'European Exceptionalism and the EU's accession to the ECHR' (2015) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2590178 (last visited 27 June 2016).

in reality this mechanism is, when it seems that some courts simply do not regard the unity of International Law as important. This is especially true if it is remembered that the judges themselves may be a part of the problem, particularly in the more *specialized* systems of International Law, where professional communities can be regarded as somewhat segregated from the *general International Law* community.[30]

While it is often the ECJ that is mentioned in the discussion on the relationship between EU Law and International Law, other EU institutions should not be ignored. In a recent set of events, the EU Commission (Commission) demonstrated its own role as a possible agent of fragmentation. Notably, the Commission attempted to impose the ECJ's own constitutional, and somewhat isolationist approach towards the traditional rules of Public International Law, as well as towards other branches of International Law.

While the ECJ applied this approach within its own *home court*, the Commission took one step further: It directly demanded that non-EU tribunals also accept this Euro-supremacist approach, and topped its demand with an implied threat concerning the consequences of ignoring it. Furthermore, while the ECJ bases its decisions on its own applicable law, the Commission insisted on basing the claims it presented in international, *non-EU* fora, almost exclusively on *EU Law*. This article argues that the Commission's action, in these cases, not only widens the already existing fragmentation, but also batters the delicate, somewhat diplomatic mechanism described by Judges Simma and Guillaume that guards the unity of International Law.

The story, however, does not end here. With no early indication or warning, in April 2015 the Commission submitted four additional briefs in which it (almost) completely abandoned its previous EU-supremacist approach, and possibly even departed from the ECJ's own traditional line. These briefs were based almost exclusively on International Law, considering the EU legal order as an *equal* among other regimes, rather than as a supreme source of authority. The

[30] Many have written about the fundamental differences existing between the communities surrounding each field of international law, whether differences in culture, ethos or expert knowledge, see e.g., O. Perez, 'Multiple Regimes, Issue Linkages, and International Cooperation: Exploring the Role of the WTO', 26 *University of Pennsylvania Journal of International Economic Law* (2005) 4, 735; J. Ellis, 'Sustainable Development and Fragmentation in International Society', in D. French (ed.), *Global Justice and Sustainable Development* (2010), 57; see also Haas' research on epistemic communities P. M. Haas, 'Introduction: Epistemic communities and international policy coordination', 46 *International Organization* (1992) 1, 1.

Commission's approach(es), as reflected in its *amicus* submissions, are presented below.

II. The EU Commission's Approach(es) to International Law

The following section reviews the EU Commission's *amicus* submissions in a number of investment treaties-based cases. This review is based on the limited access that the author was granted by the Commission to the latter's *amicus* briefs that were submitted in a line of investment disputes, as well as on a review of these briefs by investment tribunals.

The following section begins with the review and analysis of the *EURAM* and *U.S. Steel* cases, which are the only pre-2015 cases in which the Commission's own briefs were available to the author. The author will then review the *Micula* case, partly because of the arguments made by the Commission in this case, but also due to the events that took place after the arbitration award was issued. The *Eureko* and *Electrabel* cases also warrant an examination here because of the informative discussions presented by the tribunals in these cases, and the somewhat unique position expressed by the Commission in the *Electrabel* case. Finally, the author will review the Commission's most recent submissions, filed in the four *Czech cases*.[31] These submissions, which were recently released to the author by the Commission, are important as they represent an apparent 180° turn in the Commission's approach concerning the role of the EU legal order, within International Law.

Beyond these cases the Commission has intervened, or asked to intervene, as *amicus* in other cases as well.[32] Due to scope and space limitations, and because of the fact that the Commission's arguments by and large presented in the cases have been discussed in this article, the author will not elaborate on these cases.

31 *Voltaic Network GmbH v. Czech Republic*, PCA Case No. 2014-20, registered 8 May 2013, pending [Voltaic]; *I.C.W. Europe Investments Limited v. Czech Republic,* PCA Case No. 2014-22, registered 8 May 2013, pending [I.C.W.]; *Photovoltaic Knopf Betriebs-GmbH v. Czech Republic*, PCA, registered 8 May 2013, pending [Photovoltaic]; *WA Investments-Europa Nova Limited v. Czech Republic*, PCA Case No. 2014-19, registered 8 May 2013, pending [WA Investments] [the Czech Cases].

32 See e.g., *EDF International v. Hungary*, UNCITRAL, PCA, Award of 4 December 2014 available at http://www.iareporter.com/articles/investigation-in-recent-briefs-european-commission-casts-doubt-on-application-of-energy-charter-treaty-to-any-intra-eu-dispute/ (last visited 1 August 2016); *Eastern Sugar v. The Czech Republic*, SCC Case No. 088/2004, Partial Award of 27 March 2007.

1. The Commission's Position in *EURAM v. Slovakia*

The *European American Investment Bank (EURAM) v. Slovakia* arbitration commenced in 2009, based on a bilateral investment treaty (BIT) between Austria and the Czech and Slovak Federal Republic, which became binding on Slovakia by accession *(Austria-Slovakia BIT)*.[33] The claimant, a private health insurance provider, claimed that a new Slovakian law, which prohibited the distribution of dividends, and required the re-investment of all profits for the provision of public health care, resulted in the breach of several sections of the *Austria-Slovakia BIT*.[34]

Slovakia argued that because of its accession into the EU, and due to the fact that EU Law covers similar subject matter, the *Austria-Slovakia BIT* cannot be applied and the arbitral panel should decline jurisdiction.[35] Slovakia relied in its arguments on, among other sources, Public International Law, notably the *Vienna Convention on the Law of Treaties* (*VCLT*).

Noticing the potential clash between the different legal regimes, including the potential impact on the EU's treaties' objectives, the *EURAM* Tribunal decided to contact the Commission and invite it to submit its observations. In its brief letter of reply (dated October 2011), the Commission opened by stating that as the parties to this dispute are a EU Member State and an EU investor, both "are therefore required to *respect the primacy of European Union law* as well as the *autonomy of its judicial system*"[36] (emphasis added). In other words, the Commission's starting point is not one of a competition between different branches of International Law, but rather one that assumes immediate hegemony in any case of normative conflicts between the EU regime and any other.

[33] *Agreement Between the Republic of Austria and the Czech and Slovak Republic Concerning the Promotion and Protection of Investments*, 21 October 1992, available at http://www.investorstatelawguide.com/documents/documents/BIT-0103%20-%20Austria-Slovakia%20(Czechoslovakia)%20(1990)%20[english%20translation]%20UNTS.pdf (10 August 2016).
Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, 1 October 1992, available at http://www.italaw.com/sites/default/files/laws/italaw6195%284%29.pdf (last visited 10 August 2016).

[34] *European American Investment Bank AG v. The Slovak Republic*, Award on Jurisdiction, PCA Case No. 2010-17, 22 October 2012, para. 46 [EURAM, Award on Jurisdiction].

[35] *Ibid*., para. 48.

[36] European Commission, 'Letter Submitted by the European Commission to the Tribunal Concerning *European American Investment Bank AG (Austria) v. Slovakia*, PCA Case No-2010-17', 13 October 2011, Ref. Ares(2011)1091296 [EU Commission's Observations].

The Commission continued by stressing that, as EU Laws "form part of the public order of all its Member States", the activity of non-EU tribunals ruling on issues that are also regulated by EU Law (i.e. where competing jurisdiction exists) is "in breach of this public order". Therefore where non-EU tribunals issue decisions that do not conform to EU Law, these arbitral awards will not be recognized or enforced within the EU.[37] The Commission adds that the discussed subject matter is indeed covered by EU Law, and ends its submission with a demand that, based on the above, the investment tribunal should decline jurisdiction in this case.[38]

Unlike Slovakia, the Commission did not refer in its submissions to any of the traditional techniques available under Public International Law concerning the relationship between international regimes, including those enshrined in the *VCLT* (e.g. Articles 30 and 31 of the *VCLT*).

The *EURAM* Tribunal, in stark contradiction to the Commission's approach, relies in its analysis primarily (and in great length and detail)[39] on International Law. The Tribunal opens by discussing the relevance of the *VCLT*, and by specifically stating what some may consider as a given – that EU Law is indeed a part of International Law.[40] As such, the Tribunal continues, the relationship between the BIT and EU Law should be evaluated by the tools provided by Public International Law, notably the *VCLT*.[41] The Tribunal continues by evaluating the conflict between the two regimes by using Article 59 *VCLT* (the *lex posterior* rule), which, according to the Tribunal need not be applied under the circumstances, as the two regimes in question, despite the Commission's position, do not have the same subject matter, and therefore should not be regarded as conflicting.[42]

Concerning the argument according to which the EU's Human Rights Law includes obligations that are, in essence, overlapping with those available in the BIT, the Tribunal (relying *inter alia* on the ITLOS *Bluefin Tuna* decision)[43] states that "the two treaties are far from being so incompatible that they cannot be applied at the same time."[44] The Tribunal adds:

37 'EU Commission's Observations', *supra* note 36, 2.
38 *Ibid.*, 3, 5.
39 The Tribunal dedicates more than 60 pages to its public international law-based analysis.
40 *EURAM*, Award on Jurisdiction, *supra* note 34, paras 69-72.
41 *Ibid.*, paras 73-76.
42 *Ibid.*, para. 178.
43 *Ibid.*, para. 231.
44 *Ibid.*, para. 226.

> "If indeed, the investors are protected in a similar way by two different regimes, why should only one of these regimes be applicable? In such a factual situation, the Tribunal considers that far from being necessarily incompatible, the parallel rules under the BIT and the ECT, can be cumulatively applied."[45]

The Tribunal then continues to address other issues based on Public International Law rules, including the notification requirement imposed by Article 65 *VCLT*,[46] as well as Article 30 *VCLT*,[47] and reaches the conclusion that the two regimes in this case, could be interpreted in "harmony",[48] and that the one does not lead to the inapplicability of the other.[49]

2. The Commission's Position in *U.S. Steel v. Slovakia*

The *U.S. Steel Global Holdings v. The Slovak Republic* arbitration started in 2013, based on a BIT between the Netherlands and the Czech and Slovak Federal Republic, which became binding on Slovakia by accession (*Netherlands-Slovakia BIT*).[50] In May 2014 the Commission submitted an *amicus curiae* brief.[51] Although this case was eventually discontinued, this particular *amicus curiae* brief is one of the only two pre-2015 *amicus* briefs that are currently available to the author (in addition to the above discussed *EURAM* brief).[52] Unlike the 4 page *EURAM* brief discussed above, the Commission's *amicus* submission in the *U.S. Steel* case is a long in-depth analysis, which provides for the first time an opportunity to properly assess the Commission's legal position, as well as its attitude towards International Law as implied from the language, arguments, references and sources on which the Commission relied.

45 *EURAM*, Award on Jurisdiction, *supra* note 34, para. 228.
46 *Ibid.*, para. 235.
47 *Ibid.*, para. 239.
48 *Ibid.*, para. 236.
49 *Ibid.*, para. 279.
50 *U.S. Steel Global Holdings I B.V. v. The Slovak Republic*, PCA Case No. 2013-6 (currently being edited) [U.S. Steel].
51 European Commission, *amicus curiae* brief, *U.S. Steel Global Holding I B.V. (The Netherlands) v. The Slovak Republic*, 15 May 2014, unpublished (with the author), [EU Commission's *amicus curiae* brief, US Steel].
52 Although the EU Commission's brief is not available online, the Commission was willing to share this brief with the author. Unfortunately, requests for any other briefs submitted by the Commission were denied.

The focus of this case was the removal of exemptions previously enjoyed by certain energy producers, with respect to certain fees. This measure, it was claimed, resulted in the breach of several provisions of the *Netherlands-Slovakia BIT*. The Commission intervened, this time on its own initiative, and claimed that according to EU Law, Slovakia was under an obligation to accept the contested measures and annul the exemptions. As in the above described *EURAM* case, a genuine normative conflict arises here; while an investment treaty (allegedly) instructs Slovakia to maintain its rules, the EU regime instructs it to annul them.

As in the *EURAM* case, the Commission demanded that the investment tribunal decline jurisdiction. Also as in the *EURAM* case, the Commission based its contentions mainly on EU Law, despite the fact that it could have relied on arguments from the world of Public International Law. Even in the rare occasions in which the *VCLT* was consulted by the Commission (only two references in a 25 page-long document that is dedicated to the relationship between treaties), the Commission chose to focus on the *VCLT*'s most *confrontational* and excluding aspects. E.g., the Commission mentions Slovakia's *Treaty on Accession* (2004), according to which Slovakia accepted the authority of existing EU Law. The EU Commission used this accession treaty in order to demonstrate the termination (and thus the exclusion) of the *Netherlands-Slovakia BIT*, based on Article 30 *VCLT*.

An alternative, more *accommodating* and less f*ragmented* possibility, would have been the use of Articles 31 (3) (a), (b) and (c) of the *VCLT*, that require the Tribunal to interpret the *Netherlands-Slovakia BIT* in its context; to also take into account subsequent agreements between the parties regarding the application of the BIT; the parties' subsequent practices, and "[a]ny relevant rules of international law applicable in the relations between the parties."[53] Any of these provisions might have served the Commission's purpose, which was guarding the integrity of its own Competition Law regime. Using these provisions, however, also meant an acknowledgment of the validity of the competing regime in this case, and recognizing it as a competing equivalent source of authority. Such an acknowledgement, as discussed below, was made only in later cases (see discussion below about the *Czech cases*).

The clearest expression of the Commission's rejection of any external legal authority can be found in paragraph 40 of the Commission's brief. The

[53] See *Vienna Convention on the Law of Treaties*, 23 May 1969, Article 31 (3) (a), (b), (c), 1155 UNTS 331 [*VCLT*]; EU Commission's *amicus curiae* brief, *US Steel*, *supra* note 50, 16, para. 49.

Commission admits in this paragraph that its position has been rejected several times before by investment tribunals. Very undiplomatically, however, the Commission suggests that such previous decisions, in fact, do not mater, as long as the ECJ ("which has ultimate jurisdiction on matters of interpretation of Union law") has not given its own ruling on this issue.[54]

Lastly, the Commission adds a threat, one that in the below described *Micula* case has proved to be genuine. The Commission informs the Tribunal that if it decides against the Commission's position and awards compensation to the investor – based on Investment Law – the Commission will regard such an award as the granting of new State Aid to the investor, and thus a possible violation of EU Law. The meaning of this announcement is that the execution of the award and the payment of compensation will be allowed "only if the Commission was to approve it".[55]

The Commission's position in this respect is not based on any clear instruction provided by the EU Treaties concerning the relationship between EU Law and other international tribunals, but rather on the ruling of the ECJ in the *Lucchini* case, as well as on Articles 101, 107 and 108 TFEU.[56] This comparison is interesting as the *Lucchini* case, as well as the mentioned TFEU provisions, state that due to the primacy of EU Law, *national* European courts should avoid issuing any decisions that might conflict with the EU's laws on State Aid.[57] The application of these rules on the decisions of *international* tribunals, including the stretching of the supremacy principle in this context, are the Commission's own legal interpretation.

The Commission's legal interpretation is interesting for two reasons. First, it implies that the Commission considers competing international tribunals as equivalent to the EU member States' national courts, a view that demonstrates the Commission's notion of EU-supremacy also with respect to other international legal regimes. Secondly, based on these very legal provisions, here the Commission could also have chosen a different path: one that is based on Article 31 *VCLT*, by asking the Tribunal to view the mentioned EU legal provisions as a part of the investment treaty's *context*, as a subsequent agreement/s, and as relevant rules of International Law applicable between the parties. The Commission's choice to

54 EU Commission's *amicus curiae* brief, *US Steel*, *ibid*., para. 40.

55 *Ibid*., para. 20.

56 *Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA*, Case No. 119/05, Judgment of 18 July 2007 [2007], ECR I-6199.

57 EU Commission's *amicus curiae* brief, *US Steel*, *supra* note 50, 21, para. 69.

avoid basing its arguments on the *VCLT* is telling, in the author's view, and will be discussed below in part III of this paper.

While the Tribunal's reply to the Commission's brief would have been, undoubtedly, informative and interesting, this case was eventually discontinued. The view of investment tribunals, however, can be learned from other cases discussed in this paper.

3. The Commission's Position in *Micula v. Romania*

The proceedings in *Micula v. Romania* commenced in 2005, based on the *Romania-Sweden BIT*.[58] In its final award (issued in 2013) the *Micula* Tribunal devoted only one paragraph to the purpose of summarizing the Commission's *amicus* submission.[59] On the face of it, this brief summary suggests a somewhat different narrative – one that is based on International Law. It mentions that the Commission requested that the interpretation given to the *Romania-Sweden BIT* will "take into account" the treaty's "context and origin".[60] This argument implies the possibility that, unlike the above reviewed briefs, the Commission may have relied this time on Article 31 *VCLT*. The Tribunal further points out that the Commission relied on Article 30 (3) *VCLT* (the *lex posterior* rule), and asked the Tribunal to prioritize the EU's State Aid rules, where these conflicted with the *Sweden-Romania BIT*.

It should be noted however, that the issues reviewed by the Tribunal in this case are those that the Tribunal chose to address, and not necessarily those that were emphasized by the Commission in its confidential submission. Indeed in other cases where the Commission's submissions were available to the author (e.g. in the *EURAM* case) the Tribunal chose to discuss International Law-based claims, while the Commission's own claims were in fact focussed on EU Law. Furthermore, as reviewed below, in other parts of the *Micula* award the Tribunal also refers to other arguments made by the Commission, which reflect the previously described Euro-supremacist approach.

The *Micula* Tribunal evaluated the role of EU Law in the interpretation of the BIT, according to the traditional rules of International Law. It stated

58 *Agreement Between the Government of the Kingdom of Sweden and the Government of Romania on the Promotion and Reciprocal Protection of Investments*, 1 April 2003, available at http://www.italaw.com/sites/default/files/laws/italaw6225.pdf (last visited 10 August 2016).

59 *Ioan Micula et al. v. Romania*, Award of the Arbitral Tribunal, 11 December 2013, ICSID Case No. ARB/05/20, para. 93 [Micula, Award].

60 *Ibid.*

that as Romania's accession treaty[61] (signed in 2005) did not address the BIT (entered into force in 2003), the Tribunal cannot assume that by acceding to the EU, any of the State parties wished to modify the BIT.[62] The Tribunal then examined, based on Article 31 (2) *VCLT*, the BIT's preamble and the original association agreement between the EU and Romania, in order to understand the treaty's context, and found that the State parties did not intend to defeat their obligations under the BIT.[63]

Despite the Commission's (apparent) reliance on International Law, the Commission's supremacist approach, so it seems, was not abandoned. Similarly to the above described cases, the Commission in *Micula* stated that any award against Romania will not be enforceable within the EU, "by virtue of the supremacy of EC law".[64] Moreover, whilst acknowledging that Article 54 *ICSID Convention*[65] requires the automatic enforcement of ICSID-based investment awards by national courts, the Commission claimed that in such a case EU Law requires that the enforcement proceedings be stayed, so as to allow the ECJ to decide on the status of Article 54 *ICSID Convention* under the EU regime. The Commission adds in this respect that as the EU itself is not a party to the *ICSID Convention* (although except Poland all of its Member States are), it is not therefore bound by Article 54 of this Convention.[66]

The Commission's argument concerning Article 54 *ICSID Convention* demonstrates the Commission's view that EU Law should prevail not only in the case of a conflict with *intra*-EU investment treaties, but also in the case of a conflict with the *ICSID Convention*.[67] This point is interesting, as unlike the

61 *Treaty Between Member States of the European Union and the Republic of Bulgaria and Romania, Concerning the Accession of the Republic of Bulgaria and Romania to the European Union*, 21 June 2005, 48 Official Journal of the European Union L 157, 11.

62 *Micula*, Award, *supra* note 59, paras 318-321.

63 *Ibid.*, paras 322-326.

64 *Ibid.*, paras 330, 334.

65 *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 14 October 1966, 575 UNTS 159.

66 *Ibid.*, para. 336.

67 This argument is problematic for several reasons, notably because of the fact that, with the exception of Poland, all EU member States are members of the *ICSID Convention*. Furthermore, the Commission expressed its interest to "explore the possibility" of acceding to the *ICSID Convention*, but acknowledges that technical obstacles (only States can accede to this Convention) currently stop it from joining, see European Commission, *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Towards* a *Comprehensive European International Investment Policy*, 7 July 2010, COM (2010) 343 final, 5, 10.

BITs discussed in the cases reviewed in this article, the Commission does not dispute the validity of the *ICSID Convention*; rather, it assumes that a perfectly valid Convention should not be observed by its Member States, due to potential clashes with EU Law.

After clarifying its position concerning the (lack of) enforceability of a future award against Romania, so as to sweeten the pill, the Commission added that it believed that a direct conflict between EU Law and the BIT and the *ICSID Convention* would be avoided, if the Commission's above described *VCLT*-based arguments were to be accepted.[68] In other words, the Commission provided the Tribunal with an opportunity to solve this matter in accordance with the traditional rules of International Law, followed by a warning that, if it adopts the wrong solution, the EU institutions would have to re-address the matter, this time under EU Law alone.

The *Micula* Tribunal chose to ignore the Commission's threats, stating that "it is not desirable to embark on predictions as to the possible conduct of various persons and authorities after the Award has been rendered."[69] It did, however, feel the need to simply quote Articles 53 and 54 of the *ICSID Convention* in full, with no further explanations, as if to gently remind the parties (and especially the Commission) of their international obligations.[70]

4. The Post-*Micula* Events

The *Micula* case is of interest regarding the debate on the fragmentation of International Law, not only because of the above discussion, but also (and perhaps mostly) because of the events that took place after the final award was issued.

Despite the Commission's threats, the *Micula* Tribunal decided on 11 December 2013 to award compensation to the claimants. Immediately after issuing the award, the Commission started to act in order to frustrate its execution of this award. On 30 January 2014, the Commission announced to Romania that the implementation of the award would be considered as State Aid under EU Law.[71] As Romania replied that it had already started to implement the award, the Commission issued a suspension injunction, ordering Romania to stop any further implementation of the award until a final decision was made

68 *Micula*, Award, *supra* note 59, para. 336.

69 *Ibid.*, para. 340.

70 *Ibid.*

71 Commission Decision (EU) 2015/1470 of 30 March 2015, 58 Official Journal of the European Union L 232, 43, para. 2 [Letter from the Commission].

concerning the compatibility of the State Aid with EU Law.[72] In a letter issued in October 2014, the Commission announced to Romania that it indeed seemed that the State Aid was incompatible with EU Law, and accordingly an official investigation was to be launched.[73]

This letter presents some of the above described Euro-centric legal arguments, notably that any conflict between EU Law and other international regimes (the BIT and the *ICSID Convention*) is to be decided in accordance with EU Law alone,[74] entirely avoiding any mentioning of the rules of International Law, or even the term *International Law*.

These events demonstrate that the Commission's threats are not empty: The Commission intends to actively enforce the supremacy of EU Law by sanctioning any State that chooses to follow the rules of Public International Law, as understood by investment tribunals. As mentioned, such enforcement proceedings are being done in full isolation from, and with no regard to, International Law.

5. The Commission's Position in *Eureko v. Slovakia*

In *Eureko v. Slovakia,*[75] the Commission presented similar claims to those described above. It claimed *inter alia* that EU Law and the relevant investment treaty are incompatible, and that the only court in which this matter can be resolved is the ECJ.[76] The Commission further dismissed the traditional rules of International Law; for example, it claimed that the customary rule of *pacta sunt servanda* does not apply to *inter*-EU BITs, due to the EU's principle of supremacy.[77] The Commission also implicitly rejected the general rules of treaty interpretation, as set in Article 31 *VCLT*, by claiming that:

> "[C]onflicts between BIT provisions and EU law cannot be resolved by interpreting and applying the relevant EU law provisions in the light of the BIT. Only the inverse approach is possible, namely interpretation of the BIT norms in the light of EU law." [78]

72 *Ibid.*, para. 6.
73 *Ibid.*, para. 71.
74 *Ibid.*, paras 51-55.
75 *Eureko E.V. v. The Slovak Republic,* Award of the Tribunal on Jurisdiction, Arbitrability and Suspension, 26 October 2006, PCA Case No. 2008-13 [*Eureko*, Award on Jurisdiction].
76 *Ibid.*, paras 177-178.
77 *Ibid.*, para. 180.
78 The *Eureko* Tribunal quotes from the Commission's submission, in *ibid*.

After stating its departure point, which is that International Law does not matter in light of EU Law's supremacy, the Commission turned to what seems to be a rather redundant discussion on International Law. Concerning the termination of the BIT, the Commission admitted that the parties did not take any "decisive steps" for doing so, and that in light of the *VCLT* this treaty has not, in fact, been terminated.[79] The Commission added however, that despite this, due to the supremacy of EU Law, any BIT provision that is incompatible with EU Law should be regarded as void.[80] The Commission refers to Article 30 (3) *VCLT* in order to claim that the latter treaty (EU Law) should prevail in a case of incompatibility between the regimes.[81]

Unlike the Commission's approach, the *Eureko* Tribunal decided to approach this issue from the perspective of International Law,[82] and provided a lengthy analysis of the relationships between EU Law and the BIT based on the provisions of the *VCLT*.[83] The Tribunal's analysis is somewhat *integrationist* in nature, as both EU Law and the ECJ's jurisprudence are considered. The Tribunal's analysis opens with the question of whether the BIT had been terminated based on Articles 59 and 65 *VCLT*.[84] Interestingly, in this review the Tribunal acknowledges and considers decisions made by the ECJ, but decides that as the facts in the current case are somewhat different, the ECJ's ruling cannot be applied.[85] The Tribunal continued to evaluate the role of Article 30 (3) *VCLT*, where the legality of the arbitral process is evaluated in light of EU Law, and several decisions made by the ECJ.[86] It can be seen therefore that the Tribunal, unlike the Commission, is not shy of engaging with other fields of International Law and considers these as relevant.

79 *Eureko*, Award on Jurisdiction, *supra* note 75, para. 187.
80 *Ibid.*, paras 187-188.
81 *Ibid.*, paras 188-193.
82 The Tribunal states: "Whatever legal consequences may result from the application of EU law, those consequences must be applied by this Tribunal within the framework of the rules of international law and not in disregard of those rules." *Ibid.*, para. 229.
83 *Ibid.*, paras 231-277.
84 *Ibid.*, para. 231.
85 *Ibid.*, paras 248-249.
86 *Ibid.*, paras 273-277.

6. The Commission's Position in *Electrabel v. Hungary*

As in the above discussed cases, in *Electrabel v. Hungary*[87] (*Electrabel* case) the Commission also demanded that the Tribunal decline jurisdiction. However, unlike the above described cases which concerned *intra*-EU BITs, this case was based exclusively on the *Energy Charter Treaty*[88] (ECT).[89]

The Commission's submission in this case is somewhat older than in the other cases discussed in this paper (*amicus* submission was filed in 2008),[90] and so its approach, at least as appears from the Tribunal's discussion (the *amicus* brief itself was not released to the author), was somewhat different from the other discussed pre-2015 cases. The Commission founded its arguments on a far less confrontational tone: The Commission reviewed the institutional links between the EU and ECT regimes, and acknowledged the fact that the ECT is binding on the EU's institutions and Member States (a position that was later reversed in the four *Czech cases*).[91] Furthermore, the Commission seemed much more inclined to rely on the traditional rules of International Law, and even presented legal arguments based on the non-confrontational, *harmonzing* parts of the *VCLT*, namely Article 31 of this Convention.

It is difficult to explain the Commission's unique position in this case, especially when evaluated in light of other briefs that were submitted by the Commission before and after this case. As the submission itself was not disclosed to the author, one may only speculate regarding the reasons. It is possible for example that, as in other cases, the Tribunal chose to concentrate on International Law in its decision while the Commission's EU Law-based claims were mostly ignored (see for example the *EURAM* case). In any event, this submission represented a very unique exception to the Commission's pre-2015 approach. This case however, is nevertheless important as it somewhat predicted what seem to be an ideological U-turn that was taken seven years later by the Commission in its most recent submissions in the *Czech cases*, described below.

87 A review of the Commission's brief was presented by the Tribunal in this case, see *Electrabel SA v. Republic of Hungary*, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ICSID Case No. ARB/07/19 [*Electrabel*], paras 27-34.

88 *The Energy Charter Treaty*, 17 December 1994, 2080 UNTS 95.

89 *Ibid.*, paras 4.11-4.12.

90 *Ibid.*, para. 1.18.

91 *Ibid.*, paras 4.98-4.100.

7. The Commission Position in the *Czech Cases*

In April 2015 the Commission submitted four *amicus* briefs in four different investment arbitrations held between German investors and the Czech Republic (the *Czech cases*).[92] These cases were all based on the same treaties, namely the ECT and the BIT between Germany and the Czech Republic, and concerned the same disputed State measure, namely changes made by the Czech Republic to its support scheme for the production of renewable energy. As all four submissions are in essence similar (mostly *copy-pasted*), the author will address them as one.[93]

On the face of it, these submissions represented a striking change in approach; there is hardly any trace left from the EU constitutional/supremacist approach displayed in previous submissions. Instead, the Commission's arguments are almost exclusively based on International Law. Its legal point of departure is that EU Law should be evaluated against other international regimes, just as any one treaty is to be evaluated against others when conflicts arise.

The Commission's briefs open with an extensive analysis of the relationship between the different treaties, based on the *lex posterior* rule, as reflected in both Articles 59 and 30 of the *VCLT*.[94] The Commission claims in this respect, that EU Law should trump not due to its inherent superiority, but rather to the fulfilment of the *VCLT*'s rules concerning the termination of treaties and with respect to the relations between successive treaties.

The Commission further argues that the ECT does not apply to the legal relations between the different EU Member States. Here as well the Commission's arguments are not based on EU Law, but rather on the States' intentions, or alternatively, on Article 30 *VCLT*.[95] The Commission continued to demonstrate this claim by providing a lengthy review of the "Context, preparatory work

92 Listed *Czech Cases* in *supra* note 31.

93 European Commission, written *amicus curiae* submission, *Voltaic Network GmbH v. Czech Republic*, 14 April 2015, unpublished (with the author) [Voltaic *amicus* submission]; European Commission, written *amicus curiae* submission, *I.C.W. Europe Investments Limited v. Czech Republic*, 8 April 2015, unpublished (with the author) [I.C.W. *amicus* submission]; European Commission, *Photovoltaic Knopf Betriebs-GmbH v. Czech Republic*, unpublished (with the author) [Photovoltaic *amicus* submission]; European Commission, written *amicus curiae* submission, W*A Investments-Europa Nova Limited v. Czech Republic*, 8 April 2015, unpublished (with the author) [WA Investment *amicus* submission].

94 *Ibid.*, paras 28, 32, 33.

95 *Ibid.*, para. 50.

and circumstances of the conclusion of the ECT".[96] This review, it is stated, is relevant for the application of Articles 31 and 32 *VCLT*,[97] which requires a *harmonious* approach to be taken to treaty interpretation.

Lastly, unlike its stance in previous cases, the Commission avoided issuing statements that implied an EU-supremacist approach. For example, unlike in previous cases, there are no explicit demands "to respect the primacy of European Union law",[98] and no arguments are based on the "virtue of the supremacy of EC law".[99]

At first glance, EU Law is no longer regarded as a supreme source of authority. Rather, it is seen by the Commission as one among many, whereby questions of hierarchy are resolved by a source that is external to the EU legal order (i.e. the *VCLT*). This implies two ideological changes to the Commission's previous approach. The first concerns the authoritative equality of EU Law *vis-à-vis* other international sources of authority. The EU legal order is no longer addressed as a supreme legal order, which automatically trumps any competing source of authority. Rather, it is regarded as equal among many; one that will prevail over other sources only where recognized rules of International Law will allow. Secondly and somewhat related to the first point, the Commission's new approach also represents an acknowledgement of the supremacy of the traditional rules of Public International Law. The Commission no longer tries to subject the relations between the EU and the BITs to EU rules, but rather agrees that such matters are subjected to a higher source of authority, that of the traditional rules of Public International Law, as reflected by the *VCLT*.

In short, at least on the face of it, it seems that the Commission has finally decided to play the game of International Law. The author however, believes that this approach is still far from reflecting a genuine shift in approach. In part 5, at the very end of the International Law-oriented briefs, the Commission repeats is usual threat – that any award that will rule compensation against the State could be frustrated by the Commission.[100] The Tribunals' view on these claims

96 Voltaic *amicus* submission, *supra* note 93, para. 54; I.C.W. *amicus* submission, *supra* note 93, para. 54; Photovoltaic *amicus* submission, *supra* note 93, para. 54; WA Investment *amicus* submission, *supra* note 93, para. 54.

97 *Ibid.*, Fn. 34, para. 77.

98 'EU Commission's observations', *supra* note 36.

99 *Micula,* Award, *supra* note 59, paras 330 and 334.

100 Voltaic *amicus* submission, *supra* note 93, paras 118-128; I.C.W. *amicus* submission, *supra* note 93, paras 118-128; Photovoltaic *amicus* submission, *supra* note 93, paras 118-128; WA Investment *amicus* submission, *supra* note 93, paras 118-128.

would have been interesting to assess. The Tribunals however, refused to accept these *amicus* submissions.[101]

C. Discussion

The cases described above demonstrate that while the debate on the fragmentation of International Law has more or less disappeared, the fragmentation itself, including its most severe adverse effects, still takes place. These cases also underline the fact that international courts are not the only meaningful actors in this debate, and that other institutional actors are very relevant as well. Notably, the Commission reveals itself in these cases as an important agent of fragmentation, increasing the gaps between the different branches of International Law, as well as actively detaching EU Law, and EU Member States, from the general rules of International Law. The following section discusses some of the issues that emerge from the material reviewed above.

I. The Commission's Pre-2015 Approach: A Radicalization of the ECJ's Approach?

As discussed above, the isolationist approach of the ECJ with respect to International Law is not new. The author, however, believes that the ECJ's constitutional approach, as presented in *Kadi,* has been *radicalized* by the Commission, and that this radicalization imposes a threat to the unity of International Law and to the delicate mechanisms that currently hold it together.

1. The Commission's Decision to *Speak European*

There is no doubt that the Commission continued the ECJ's own Euro-centric line with respect to the relationship between EU Law and International Law. But can the Commission's line, as specifically reflected in its pre-2015 submissions, be seen as a more extreme version of the ECJ's? In the author's view, it would appear that it can. While the ECJ certainly places International Law under EU Law, it did not always ignore its existence and validity. Indeed, in the past the ECJ has applied parts of Customary International Law in its

[101] The Tribunals' decisions were not made public. All parties (including the Commission) refused to allow access to these decisions.

decisions,[102] and has confirmed that the EU institutions are bound by it.[103] Even in its notorious *Kadi* decision, the ECJ insisted that it was not the UN Security Council's Resolution that it was challenging, but only its local implementation.[104] The ECJ further stated in this decision:

> "In this respect it is first to be borne in mind that the European Community must respect international law in the exercise of its powers [FN omitted], the Court having in addition stated, in the same paragraph of the first of those judgments, that a measure adopted by virtue of those powers must be interpreted, and its scope limited, in the light of the relevant rules of international law."[105]

The approach displayed by the Commission's pre-2015 submissions seems not only to prioritize EU Law over other branches of International Law (as the ECJ did), but also to mostly ignore the existence of International Law. Notably, when addressing the relationship between the different regimes, the Commission repeatedly based its arguments on EU Law, by and large ignoring the *VCLT*. The Commission's approach seems to reflect the view of Advocate General Maduro, as stated in his opinion in *Kadi*:

> "The relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community."[106]

The Commission's insistence on applying the rule expressed in Maduro's above quotation concerning the relationship between different regimes is in stark contradiction to the *VCLT*. While Madoro's interpretation implies the

[102] See e.g., a review of the cases in which the ECJ applied customary international law in Ziegler, 'Relationship', *supra* note 15, 7.

[103] *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change*, Case No. C366/10, Judgement of 21 December 2011, para. 101 [*Air Transport Association*].

[104] *Kadi*, *supra* note 20, para. 298.

[105] *Ibid.*, para. 291.

[106] Opinion of Advocate General Poiares Maduro, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, Joined Cases Nos C-402/05 P & C-415/05 P, Judgment of 16 January 2008, para. 24 [Opinion of AG Maduro].

assumption that Member States must all address their international obligations in light of EU Law, the *VCLT* requires an independent, *de novo* inquiry into the context, purpose, and notably also to the intentions of the concluding parties, in each and every case in which treaties interact.

2. The Commission's *Exportation* of the ECJ's Approach

Secondly, the Commission's above described steps seem to expand the application of the ECJ's constitutional approach and apply it also to non-EU *fora*, in what seems to be an attempt to enforce its hegemony also outside of the EU legal sphere. In *Kadi,* as stated in opinion of some, the ECJ acted like a "domestic court",[107] considering the questions before it as mostly an internal issue,[108] and therefore to be resolved in accordance with EU Law. The same legal logic however cannot be found in the Commission's course of action; the Commission's involvement in the investment cases took place outside of the EU's home-court. The Commission operated in Investment Law proceedings, which were based on International Law and adjudicated by International Law experts. While it is expected that legal arguments presented in EU courts will be based on EU Law, the Commission seems to forget, or perhaps simply chooses to ignore the fact that it was operating in a foreign environment, where a different sets of norms, as well as a different legal logic, prevail.

3. Expanding the *Sense of Urgency* Threshold

Another indication of the Commission's radicalization of the ECJ's approach can be found in the threshold set by the Commission in its decision to contradict a competing source of authority. Simma submits that "as a rule, international judges or arbitrators have to experience an extreme sense of urgency before they would decide to straight-up contradict their colleagues in another international jurisdiction."[109] Applying the *extreme sense of urgency* threshold seems useful from the perspective of preventing fragmentation, as it guarantees high levels of respect for other branches of International Law and the prevention of conflicts in most cases. Furthermore, this test also allows some flexibility as it does not entirely stop courts from contradicting other authorities in International Law in order to safeguard those interests that are of fundamental importance.

107 Ziegler, 'Relationship', *supra* note 15, 10.
108 *Kadi*, *supra* note 20, para. 317.
109 Simma, 'Fragmentation in a Positive Light', *supra* note 5, 846.

In *Kadi*, the ECJ dealt with the protection of fundamental human rights, which possess a somewhat constitutional status within the EU legal order.[110] It can certainly be said that the necessity to protect human rights gives rise to an *extreme sense of urgency* and therefore may justify the contradiction of a competing source of authority, even one as important as the UN Security Council. On the other hand, it is difficult to argue that a similar *extreme sense of urgency* is what motivated the Commission in its own course of action. In the above described investment cases, the competing authority (the BITs) threatened to contradict mere competition laws. Important as these laws undoubtedly are, the existence of such an *extreme sense of urgency* in this context is doubtful at best.

Moreover, even if one is to attach an *extreme sense of urgency* to the protection of the EU competition regime, one must remember that these investment arbitration awards did not challenge the validity of this regime as a whole, but at most required only a one-off exception with respect to specific economic actors. The fact that only a one-off exception is needed in this respect certainly reduces the *sense of urgency* to contradict other sources of authority.

4. Respect, Deference and the Unity of International Law

One more indication of the radicalization of the ECJ's approach by the Commission in the above discussed cases relates to non-legal elements such as respect and deference, which, as explained below, play an important role in upholding the unity of International Law. As stated by Wessel, the ECJ displayed in *Kadi* a certain respect to the competing international authority (the *UN Charter* in this case) by avoiding a direct challenge to its validity[111] through creating a clear partition between the source of the competing norm (i.e. the UN Security Council Resolution, which the ECJ had no power to review)[112] and its implementation (which is the EU's measure that was the reviewed act in this case). The Commission on the other hand, challenged *head-on* the validity of the source's competing norms, as well as the competing tribunals' jurisdictions.

Admittedly, the partition created by the ECJ in *Kadi* was without any practical consequences, as it is likely that *any* implementation of the UN Security Council Resolution would have been ruled as incompatible with EU Law. The ECJ's approach, however, presented a certain respect and recognition

110 *Kadi*, *supra* note 20, para. 283.

111 R. Wessel, 'Reconsidering the Relationship Between International and EU Law: Towards a Content-based Approach?', in E. Cannizzaro, P. Palchetti & R. Wessel (eds), *International Law as Law of the European Union* (2011), 6, referring to *Kadi*, *supra* note 20, para. 298.

112 *Kadi*, *supra* note 20, para. 287.

of International Law, as well as of the legal regimes that are external to the EU. This sense of respect corresponds with the unofficial, delicate and almost diplomatic mechanism that was described by Judges Simma and Guillaume, which attributes the coherence and the unity of International Law to international judges' informal decision to display "utmost caution in avoiding to contradict each other."[113] This mechanism, as mentioned above, is dependent not on any official rule, but rather on judges' willingness to support the unity of International Law, even, as stated by Simma, "at the price of dodging issues that would very much have deserved to be tackled."[114]

One, therefore, may wonder what the implications of the Commission's approach are, and how it could impact this delicate mechanism. Former Judge Guillaume stated in this respect that "[t]his work of co-ordination is very much dependent on the attitude of the judges, and on their ability to determine their own competence while keeping in mind their position within the international framework."[115] Will such an explicit lack of respect change judges' *attitude* and reduce their willingness in the future to cooperate? Will judges resume applying a holistic and systemic legal approach while operating under one regime, where it is clear to them that their *competition* has no intention of doing the same?

The answers to these questions are not yet clear at the time of writing. It is possible however that some implications are already noticeable. For example, in the more recent *Czech cases* the tribunals refused to accept the Commission's request to submit an *amicus* brief.[116] As the Commission refused to disclose these decisions, the author has no knowledge of their content. One however, may speculate that the Commission's own isolationist pre-2015 approach had some (possibly informal) influence on the Tribunals' lack of willingness to engage with it. If this speculation is correct,[117] this could mean that it is likely that fragmentation will increase in the future.

113 Simma, 'Fragmentation in a Positive Light', *supra* note 5, 846.

114 *Ibid.*

115 Guillaume, *supra* note 7.

116 See listed *Czech Cases* in *supra* note 31.

117 It should be mentioned, however, that even if the above described decisions will be published in the future, the correctness of this speculation will be difficult to assess. This is due to the fact that it is very unlikely that adjudicators will openly discuss such a non-legal element as the displayed lack of respect as a reason for their refusal to allow these interventions.

II. The *Czech Cases*: A Damascene Conversion?

As discussed above, in April 2015 the Commission submitted four *amicus* briefs, which were based on a completely different approach. Notably, although the Commission kept arguing that EU Law should prevail, and generally attempted to promote the same outcome it had tried in previous cases, this time it chose to advocate its cause based on the traditional rules of Public International Law. For the first time,[118] it seems that the Commission is wholeheartedly accepting the role of Public International Law with respect to the relations between different treaties, as well as the place of the EU regime as one among many, and as operating under, or within Public International Law.

For all the reasons described above, the author believes the Commission's apparent sudden change of heart could be seen as a positive development. Notably, it is far more respectful towards other international sources of authority. Moreover, it brings back at least some sense of order and security into the informal, delicate mechanism described above, based on which the unity of the international legal system is maintained, and on which states rely while acting in the world of international relations.

At least on the face of it, it could also be argued that the Commission's new position departs from that of the ECJ. The ECJ, as reviewed above, views the EU Treaties as constitutional documents rather than international treaties, and have treated these on several occasions as superior to other international sources of authority. By treating the EU legal regime as equal to other international regimes, and by subjected it to Public International Law, the Commission's approach seems to depart from the ECJ's somewhat isolationist approach, and, to a certain extent, pulls the EU legal order back into the world of International Law.

On the other hand, despite the change in rhetoric, the Commission did not back away from its refusal to allow the enforcement of the awards, should these be considered as *State Aid*.[119] In other words, regardless to the *VCLT* rules on conflicts between treaties, at the end of the day the Commission will choose to unilaterally frustrate the objectives of any competing treaty in order to ensure the superiority of EU Law. In making its decision on *State Aid*, the Commission will not consider the *VCLT* rules, nor the fact that such *State Aid* was in fact justified under International Law. In the author's view, this issue significantly

118 With the exception of the above discussed *Electrable*, *supra* note 87.

119 Voltaic *amicus* submission, *supra* note 93, paras 118-128; I.C.W. *amicus* submission, *supra* note 93, paras 118-128; Photovoltaic *amicus* submission, *supra* note 93, paras 118-128; WA Investment *amicus* submission, *supra* note 93, paras 118-128.

waters down the importance of the *Czech cases* and the Commission's apparent change of heart.

The Commission, so it appears, had no intentions of backing away from its original goal. Why then did the Commission change its rhetoric so suddenly? One may only speculate. A reasonable explanation, however, would be that the Commission's legal agents simply attempted to win. After failing to convince investment tribunals on so many occasions, every sensible lawyer would start questioning their strategic choices. As all pre-2015 decisions clearly demonstrate that investment arbitrators will address, and consider, mostly *VCLT*-based claims, it is likely that the message finally went through, and that the Commission's legal agents decided to play the cards which were most likely to succeed. But as already stated, the change in rhetoric in this case does not necessarily mean a change of approach.

III. The Role of Non-Court Actors in the Debate

The implications of the Commission's pre-2015 approach and its explicit lack of respect may go even further than judges' mere unwillingness to apply a harmonized approach to International Law. Former Judge Guillaume mentions a certain negative competition between the different tribunals:

> "Every judicial body tends – whether or not consciously – to assess its value by reference to the frequency with which it is seised. Certain courts could, as a result, be led to tailor their decisions so as to encourage a growth in their caseload, to the detriment of a more objective approach to justice. Such a development would be profoundly damaging to international justice."[120]

Some questions arise following Guillaume's warning, and in light of the Commission's activity in this field. Will other international tribunals begin to send their *proxies*, for example their secretariats, to intervene in other tribunals' proceedings in order to demand their jurisdiction? The ECJ is not the only Tribunal to claim exclusive jurisdiction over certain types of disputes. For example, the World Trade Organization's (WTO) dispute settlement mechanism claims exclusive jurisdiction over disputes that concern WTO Law violations.[121]

120 Guillaume, *supra* note 7.

121 See *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 15 April 1994, Article 23, 1869 UNTS 401.

The possibility of overlapping jurisdictions has been discussed in the context of WTO Law, especially with respect to regional and bilateral trade agreements,[122] but also in relation to other international regimes such as multilateral environmental agreements.[123] Should we expect the rather influential secretariat of the WTO[124] to intervene in the future where such overlapping cases arise, in order to demand that cases be re-directed towards the WTO?

Whether this concern seems somewhat exaggerated or not, there is no escaping the fact that the role of the Commission, in the context of the debate on the fragmentation, is meaningful. Notably, it demonstrates that the fragmentation can be enhanced not only by courts, but also by other institutional actors who are keen enough to protect their own territory without paying heed to larger systemic implications. Other institutional actors, even if not as powerful as the Commission, can also intervene in the proceedings of international courts as the Commission has done. For example, Article 34 (2) of the *Statute of the International Court of Justice*[125] specifically grants a special legal status to international organizations, making these bodies the sole entity that is currently authorized to submit *amicus curiae* briefs to the International Court of Justice. Other Tribunals are also receiving *amicus* briefs from international organizations. For example, the World Health Organization has recently requested to submit an *amicus* brief in a certain investment dispute.[126]

The role of non-judicial institutional actors in the context of fragmentation has been discussed in the past by the author.[127] Notably, the author has

122 See e.g., K. Kwak & G. Marceau, 'Overlaps and Conflicts of Jurisdiction Between WTO and RTAs', *Conference on Regional Trade Agreements World Trade Organization - Executive Summary* (2002), available at https://www.wto.org/english/tratop_e/region_e/sem_april02_e/marceau.pdf (last visited 14 July 2016); C. Henckels, 'Overcoming Jurisdictional Isolationism at the WTO-FTA Nexus: A Potential Approach for the WTO', 19 *European Journal of International Law* (2008) 3, 571.

123 G. Marceau, 'Conflicts of norms and conflicts of jurisdiction: The relationship between the WTO agreement and MEAs and other treaties' 35 *Journal of World Trade* (2001) 6, 1081, 1122-1124.

124 See e.g., S. Jinnah, 'Overlap management in the World Trade Organization: Secretariat influence on trade-environment politics' 10 *Global Environmental Politics* (2010) 2, 54.

125 *Statute of the International Court of Justice*, 24 October 1945, 1 UNTS XVI.

126 C. Trevino & L. E. Peterson, 'World Health Organization is given green-light by arbitrators to intervene in Philip Morris v. Uruguay arbitration' (2015), available at http://www.iareporter.com/articles/world-health-organization-is-given-green-light-by-arbitrators-to-intervene-in-philip-morris-v-uruguay-arbitration/ (last visited 1 August 2016).

127 A. Kent, 'Implementing the principle of policy integration: Institutional interplay and the role of international organizations' 14 *International Environmental Agreements: Politics,*

examined the potential positive role that institutional actors can play in overcoming fragmentation, including by the exchange of expert knowledge and the informing of decision-making processes. The above discussed cases, however, and particularly the post-*Micula* events, demonstrate well that the role of institutional actors may also be negative, one of enforced fragmentation and the silencing of a judicial dialog.

The role of non-judicial institutional actors in this respect raises another important question; one that relates to the delicate mechanism described by Simma and Guillaume and discussed above, and its applicability to other actors besides judges. It could be argued that this mechanism is based on a certain collegial relationship between judges and their understanding of the International Law as a whole. Therefore, it is possible that actors who are not so clearly affiliated with this social and professional milieu may not be inclined to respect this mechanism.

IV. The Way Forward

1. A Grim Point of Departure

The final part of this article essentially asks: *What now can be done*? The grim starting point (at least from the perspective of those who are concerned by the unity of the international legal order), is that any substantive shift in approach is somewhat unlikely. When evaluating the above described situation, it seems probable that some elements that are related more to sociology than to law are in play. The tendency to see one's own group as somewhat more central than others' was mentioned in the context of the fragmentation by authors such as David Kennedy, who commented on this issue:

> "When we public international lawyers look out the window, we see a world of nation states and worry about war. We remember the great wars of the twentieth century. We were traumatized by the holocaust, fear totalitarianism and are averse to ideology. […] Trade lawyers, by contrast, look out the window and see a world of buyers and sellers struggling to deal. Their trauma was the great depression."[128]

Law and Economics (2014) 3, 203.

128 D. Kennedy, 'One, Two, Three Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream' 31 *New York University Review of Law and Social Change* (2007) 3, 641, 650.

Koskenniemi adds in this regard:

> "To be doing 'trade law' or 'human rights law' or 'environmental law' or 'European law' – as the representatives of those projects repeatedly tell us – is not just to operate some technical rules but to participate in a culture, to share preferences and inclinations shared with colleagues and institutions who identify themselves with that 'box'".[129]

These descriptions seem to correspond well with the EU's own professional legal community. A review of the current ECJ judges' profiles[130] reveals that, with very few exceptions, these judges' professional environment and background can be defined as highly EU-oriented. The same could probably be said about the Commission's *Eurocrats*, most of whom have developed professionally within the EU system. This *social* fragmentation may explain the EU legal community's entrenchment within its own *constitutional* approach. In light of this background it would seem that the expectation of a complete change of approach from the EU institutions may be somewhat exaggerated.

Furthermore, due to its own job description, the Commission may not be willing to change its ways. The Commission is often defined as the "guardian of the treaties", whose role is to "promote the general interest of the Union" and "oversee the application of Union law".[131] It is not surprising therefore that the Commission chose to address EU Law in isolation from elements such as Public International Law, and shows very little interest in considering the unity of International Law.

Despite this difficult point of departure, the EU Commission seems to have modified its approach and, at least to a certain extent, to break away from the EU-isolationist approach demonstrated both by the Commission and the ECJ. On the face of it, this move is encouraging from the perspective of those who are interested in keeping the unity of the international legal system. But as stated above, the Commission's ideological U-turn was somewhat watered

129 M. Koskenniemi, 'International law: Between Fragmentation and Constitutionalism', 27 November 2006, available at http://www.helsinki.fi/eci/Publications/Koskenniemi/MCanberra-06c.pdf (last visited 14 July 2016), 4.

130 See http://curia.europa.eu/jcms/jcms/Jo2_7026/ (last visited 14 July 2016).

131 *Consolidated Version of the Treaty on European Union*, 13 December 2007, Art 17 (1), 2008/ C 115/01.

down by its insistence with respect to the (lack of) enforcement of investment tribunals' awards within the EU.

In short, when asking: *What now can be done?* the first part of the answer should be: 'Let us not expect much'. But nevertheless, the author believes that one possible route seems feasible, notably because in part, it is already being applied.

2. An Increasing Role for the ECJ and the *Sense of Urgency* Threshold

The above discussion presents a certain challenge for those who are concerned with the unification of International Law. It describes the activity of *non-judicial bodies*, which may have *no grasp of, or interest in*, upholding the unity of International Law. This situation simply cannot sit comfortably with the informal mechanism described by Guillaume and Simma, which is based on *judges,* and their *willingness* to uphold the unity of International Law. What then, should, or could be done about it?

As stated above, the informal mechanism described by Guillaume and Simma is based on judges, and their willingness to uphold the unity of international law. Maybe it is time to remind ECJ judges of their role in this respect. Despite the ECJ's own constitutional approach, the author believes that this institution could take several steps, even if declaratory in nature, to mitigate some of the impression made by the Commission, as well as to provide some guidance.

The author does not expect the ECJ to completely abandon its own constitutional approach. Rather, it is claimed that the ECJ should consider the explicit adoption of the *sense of urgency* threshold, sending the message that where the integrity of the EU regime is not being threatened, the ECJ, and the Commission, should attempt to accommodate the decisions of non-EU tribunals as much as possible.

As stated above, the author believes that this is by no means a radical step, as the ECJ is, implicitly, already following the *sense of urgency* test. The use of this test seems useful as it allows the necessity to balance two elements that seem, at times, to be in competition; the need to respect the authority of competing international sources of authority on the one hand, and the need to protect those fundamental elements in one's regime, on the other.

The need to balance these two elements seems to be currently missing from the Commission's perception of its job description as the *guardian of the treaties*. The explicit adoption of the *sense of urgency* also by the Commission

will therefore enable it to guard the EU treaties, but to do so in context, and in understanding of the wider international environment.

3. Hold Actions Until Political Negotiations Are Done

Another, albeit less legal, solution for this situation is simply to hold any action until the EU Member States come out with a clear answer. The fragmentation of International Law is first and foremost the result of uncoordinated law-making. Turning the wheels back to the law-making point of negotiations therefore, may resolve these specific conflicts.

The above discussion presents a picture of normative conflicts between different regimes. Although there is a certain legal uncertainty as to which regimes should prevail, the Commission seems very decisive in its views and actions, and as to the desired result. There is no doubt that the Commission represents the EU's interests; but the EU, one must remember, is a collective of States, and is made of a collective of rules that were agreed upon by these States. It is not clear at all that the Commission's position on this matter represents the will of its Member States, and the level of their consent to be bound by this legal regime. For example, the *Eureko* Tribunal invited the Netherlands' government to express its opinion regarding the validity of the *Netherlands-Slovakia BIT* in light of the Commission's arguments. In a reply letter, the Netherlands' Ministry of Economic Affairs stated that the relevant EU Law should not be seen as terminating the BIT, and that the EU must respect International Law, "in particular with respect to the termination and suspension of international treaties."[132] The Netherlands' view was indeed enforced by an informal confirmation granted by Slovakia, the respondent in this case, that indeed the BIT between these States is still valid.[133]

Both States also agreed that this issue should be resolved by the States themselves, through a process of political negotiations.[134] The Commission published on its website that "Regarding this issue, the Commission is in close contact with the Member States and has repeatedly reiterated that the incompatibility of *intra*-EU BITs with EU law means that they have to be brought to an end."[135]

132 *Eureko*, Award on Jurisdiction, *supra* note 75, para. 157.

133 *Ibid.*, para. 159.

134 *Ibid.*, paras 162, 163, 166, 167.

135 European Commission, 'Bilateral Investment Treaties between EU Member States (intra-EU BITs)', available at http://ec.europa.eu/finance/capital/analysis/monitoring_activities_and_analysis/index_en.htm (last visited at 23 October 2016).

In light of the above, the Commission's decision to intervene in these disputes and to take legal action against certain Member States seems questionable. The Commission is aware of the fact that this issue is currently under discussion, and it is certainly unclear that the Commission's view will prevail eventually. Why then, take such drastic action? Why not wait for the *sovereign,* the Member States in this case, to express their opinion?

Holding back from any further action at this stage seems both politically and legally appropriate. One must remember that the use of complex treaty interpretation rules, or normative conflict resolution rules, is necessary only where the ordinary meaning of the treaty is not clear. The fact that negotiations are taking place, and a practical, politically accepted solution may be agreed upon by the Member States, seems not only politically preferable, but also legally correct as it will save treaty interpreters the need to read (unknown) meaning into current legal lacunas. At the same time, it is important to remember that such a concrete solution will apply only to the currently discussed legal conflicts, and will not be useful in order to resolve the wider problem discussed in this paper, which is the isolationist, supremacist legal approach presented by the Commission.

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Law as an Antidote? Assessing the Potential of International Health Law Based on the Ebola-Outbreak 2014

Robert Frau*

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* Dr. Robert Frau is Senior Research Associate at the Chair for Public Law, especially International Public Law, European Law and Foreign Constitutional Law, European-University Viadrina, Frankfurt (Oder), frau@europa-uni.de. The author would like to thank the two anonymous reviewers for their comments on an earlier draft.

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> "And, indeed, as he listened to the cries of joy rising from the town, Rieux remembered that such joy is always imperilled. He knew what those jubilant crowds did not know but could have learned from books: that the plague bacillus never dies or disappears for good; that it can lie dormant for years and years in furniture and linen-chests; that it bides its time in bedrooms, cellars, trunks, and bookshelves; and that perhaps the day would come when, for the bane and enlightening of men, it roused up its rats again and sent them forth to die in a happy city."
>
> *A.Camus, The Plague*

Abstract

The Ebola-Outbreak of 2014 has put international health law in the limelight. This contribution assesses the measures taken by the international community with regard to the outbreak of 2014 with a special focus on the World Health Organization and the UN Security Council. International law provides different actors with means to cooperate in order to fight the outbreak. The list of actors does not include the UN Security Council, which has addressed the outbreak in one resolution under chapter VII without taking any effective legal remedies. In addition, the relevant human right to health has not been addressed by actors, creating leeway in further emergencies.

A. Introduction

The worldwide spread of severe diseases seems more common today than in the past. The most recent epidemics and pandemics[1] include the 2002/2003 outbreak of the severe acute respiratory syndrome (SARS), the 2009 H1N1-swine-origin influenza virus or *swine flu* pandemic, cholera since 2010 in Haiti, the Chikungunya-fever in the Americas (2013) and most recently the Middle East respiratory syndrome coronavirus (MERS) in the Republic of Korea (2015) or the outbreak of the Zika-virus in Latin America and the Caribbean suspected

[1] An outbreak is considered an epidemic in cases where cases are clearly in excess of normal expectancy within a community or region while a pandemic is an epidemic that "has spread over several countries or continents", UN High-level Panel on the Global Response to Health Crises, *Protecting Humanity from Future Health Crises*, 25 January 2016, 74, 77 [High-level Panel].

to be connected to an observed increase in neurological disorders and neonatal malformations (2016).[2] Even the plague resurfaces regularly, most recently at the end of 2014 in Madagascar.[3] In 2014, the Ebola-virus broke out in western Africa. First, it was contained in a small village in Guinea where a two-year-old toddler was infected and died after four days.[4] After his family and inhabitants of surrounding villages were infected, the disease quickly spread to other countries. It turned out to be by far the biggest Ebola-outbreak in history. In January 2016, when the WHO declared the outbreak to be over,[5] more than 28,600 people were infected and 11,316 lives were lost. Ultimately, when the Director General terminated the public health emergency of international concern, 11,323 people died and 28,646 cases were counted.[6]

The Ebola-Outbreak of 2014 has put international health law in the limelight. As a rather *niche* field of law, legal aspects of health are often overlooked or even ignored.[7] In the case of health emergencies, such as the 2014 Ebola-outbreak, factors other than legal ones matter more and are considered to

2 On 1 February 2016 the WHO determined the Zika-outbreak a public health emergency of international concern, cf. *WHO statement on the first meeting of the International Health Regulations (2005) (IHR 2005) Emergency Committee on Zika virus and observed increase in neurological disorders and neonatal malformations*, 1 February 2016, available at http://www.who.int/mediacentre/news/statements/2016/1st-emergency-committee-zika/en/ (last visited 1 August 2016).

3 WHO, 'Plague – Madagascar', 21 November 2014, available at http://www.who.int/csr/don/21-november-2014-plague/en/ (last visited 1 August 2016).

4 H. Yan & E. Smith, 'Ebola: Who is patient zero? Disease traced back to 2-year-old in Guinea', *Cable News Network* (21 January 2014), available at http://edition.cnn.com/2014/10/28/health/ebola-patient-zero/index.html (last visited 1 August 2016); *High-level Panel*, *supra* note 1, 21, para. 9.

5 WHO, 'Latest Ebola outbreak over in Liberia; West Africa is at zero, but new flare-ups are likely to occur', 14 January 2016, available at http://www.who.int/mediacentre/news/releases/2016/ebola-zero-liberia/en/ (last visited 1 August 2016).

6 WHO, Data up to 27 March 2016, available at http://apps.who.int/ebola/ebola-situation-reports (last visited 1 August 2016). For a historic overview cf. L. Gostin & E. Friedman, 'A Retrospective and Prospective Analysis of the West African Ebola Virus Disease Epidemic: Robust National Health Systems at the Foundation and an Empowered WHO at the Apex', 385 *The Lancet* (2015) 9980, 1902 *et seq.*[Gostin & Friedmann, Retrospective and Prospective Analysis]; O. Aginam, 'Mission (Im) possible? The WHO as a 'Norm Entrepreneur' in Global Health Governance', in M. Freeman, S. Hawkes & B. Bennett (eds), Law and Global Health (2014), 559, 562 *et seq.*

7 B. Meier & L. Mori, 'The Highest Attainable Standard: Advancing a Collective Human Right to Public Health', 37 *Columbia Human Rights Law Review* (2005) 3, 101, 103; Aginam, *supra* note 6, 559. This holds especially true for German scholarship of international law.

be more urgent. When States are eager to cooperate and stop a further spread of a disease, there seems to be no need for international law. Medical, social and other aspects are more pressing. Also, traditional challenges to health usually require continuous and permanent efforts – maternal and childhood health, issues arising from disabilities or HIV/AIDS as well as poverty are all long-term-challenges and need to be addressed accordingly. Even then, the applicable legal framework is not easy to identify. One has to take into account, among others, human rights, environmental and intellectual property law as well as domestic law: in the end a concoction of various legal orders. Nevertheless, law is not irrelevant. While it will not cure a single disease or sickness, it may provide a framework in which experts counter sicknesses and diseases and law may facilitate the solution. It may also provide factors that help to lead a healthy life.

In stark contrast to aforementioned traditional challenges, viruses like the Ebola virus disease, or short Ebola, need to be addressed expeditiously. Fighting an outbreak is, first and foremost, a question of time.[8] The Ebola-crisis 2014 has demonstrated the need for swift global[9] action. Despite its severity, the number of victims, the region affected by the outbreak, and not the least the media's fear-mongering coverage regarding Ebola being a threat to Europe,[10] the international response has not been speedy and comprehensive.[11] In 2014,

8 Statement by the Special Representative of the Secretary General and Head of the United Nations Mission for Emergency Ebola Response A. Banbury, *Record of the 7279th meeting of the Security Council*, UN Doc. S/PV.7279, 14 October 2014, 3.

9 Globalization as an additional challenge has been described extensively by Meier & Mori, *supra* note 7, 105; *High-level Panel*, *supra* note 1, 25, para. 40.

10 This holds true even for respectable news sources, cf. K. Elger *et. al.*, 'Gateway to Hell: The Threat of Ebola grows Worse', *Spiegel Online International* (8 September 2014), available at http://www.spiegel.de/international/world/how-the-ebola-outbreak-in-africa-could-become-a-threat-to-europe-a-990445.html (last visited 1 August 2016); T. Walker, 'Is Europe taking the Ebola Threat seriously?', *Deutsche Welle* (7 October 2014), available at http://www.dw.de/is-europe-taking-the-ebola-threat-seriously/a-17980662 (last visited 1 August 2016); 'WHO warns of Ebola health care risks', *British Broadcasting Corporation* (8 October 2014), available at http://www.bbc.com/news/world-europe-29531671 (last visited 1 August 2016); cf. also *High-level Panel*, *supra* note 1, 23, para. 23.

11 Cf. Médecins Sans Frontières, 'Ebola: Pushed to the Limit and Beyond. A Year Into the Largest Ever Ebola Outbreak', 23 March 2015, available at http://www.msf.org/sites/msf.org/files/msf1yearebolareport_en_230315.pdf (last visited 1 August 2016); Meier & Mori, *supra* note 7, 105 *et seq.*; cf. also internal WHO documents 'Bungling Ebola Documents', *The Associated Press*, available at http://interactives.ap.org/specials/interactives/_documents/who-ebola/ (last visited 2 August 2016) dealing with the WHO's flawed attempts to combat the outbreak [Bungling Ebola Documents]; Criticism was also raised within *Record of the 7502nd meeting of the Security Council*, UN Doc. S/PV.7502,

the international community attempted to address the recent outbreak by a vast array of measures.

These measures will be addressed in the following. The underlying assumption is that the recent outbreak has shaped some aspects of international health law, which now provides for better measures against similar outbreaks. The article will first identify the different notions of *health* and the applicable legal framework before the specific measures in regard to the Ebola-outbreak 2014 are analyzed. The concluding remarks will summarize the findings and assess the potential of international health law based on the Ebola-outbreak 2014. As stated in the introductory quote, even if a specific outbreak of a disease was halted successfully, chances are that other diseases or another outbreak will occur. Thus, it is crucial to adapt international health law with regard to future threats.

B. Identifying the Legal Framework

I. What is *Health*?

The legal framework surrounding aspects of health depends on, naturally, the understanding of *health*.[12]

The preamble to the *Constitution of the World Health Organization* (WHO) defines *health* as "a state of complete physical, mental and social wellbeing and not merely the absence of disease or infirmity."[13] Thus, *health* refers to the condition of an individual.[14] *Public health*, in contrast, is neither defined in the *WHO-Constitution*, nor in the current program of work[15] nor

13 August 2015 [7502nd Meeting] and in *High-level Panel*, *supra* note 1, 6. The motifs for delaying response were already laid out by S. Davies & J. Youde, 'The IHR (2005), Disease Surveillance, and the Individual in Global Health Politics', 17 *The International Journal of Human Rights* (2013) 1, 133, 134; A. Silver, 'Obstacles to Complying with the World Health Organization's 2005 International Health Regulations', 26 *Wisconsin International Law Journal* (2008) 1, 229, 235 *et seq*.

12 Cf. also C. Foster & J. Herring, 'What is Health?', in Freeman, Hawkes & Bennett, *supra* note 6, 23.

13 *Constitution of the World Health Organization*, 22 July 1946, 14 UNTS 185, [WHO-Constitution]; Cf. *Declaration of Alma Ata*, 12 September 1978, Article 1, available at http://www.who.int/publications/almaata_declaration_en.pdf (last visited 1 August 2016).

14 Cf. J. Wolff, *The Human Right to Health* (2012), 27.

15 L.O. Gostin & E.A. Friedman, 'Ebola: a Crisis in Global Health Leadership', 384 *The Lancet* (2014) 9951, 1323 [Gostin & Friedmann, Ebola: a Crisis].

the most recent *International Health Regulations (2005)* [IHR (2005)]. One can find a definition on the WHO's website, stating that "public health refers to all organized measures (whether public or private) to prevent disease, promote health, and prolong life among the population as a whole". The WHO aims at creating conditions in which people can be healthy. The organization focuses on entire populations, not on individual patients or diseases. One may define public health as referring to all organized measures (whether public or private) to prevent disease, promote health, and prolong life among the population as a whole.[16] This is supported by the fact that the *International Covenant on Civil and Political Rights*[17] (*ICCPR*) and the *European Convention of Human Rights*[18] (*ECHR*) recognize public health as a limitation of specific human rights (Articles 12 (3), 18 (3), 19 (3)(b), 21 and 22 (2) *ICCPR*, Articles 2 (2), 8 (2), 9 (2), 10 (2), 11 (2) *ECHR*). Thus, public health is a matter of public interest.

Inherent in that terminology is an international dimension, given that

> "forces that affect public health can and do come from outside State boundaries and that responding to public health issues now requires attention to cross-border health risks, including access to dangerous products and environmental change."[19]

Primarily, measures of *public health* are population based and focused on preventive measures.[20]

II. The World Health Organization

Admittedly, the definition of health is very broad – after all, the term *well-being* is so vague that it constitutes an unreasonable standard for human rights law, as will be shown below.[21] Nevertheless, the definition sets the objective for the WHO. According to Article 1 *WHO-Constitution*, the WHO shall attain the highest possible level of health for all peoples. In order to achieve this

16 WHO, *Health Promotion Glossary* (1998), 3.

17 *International Covenant on Civil and Political Rights*, 999 UNTS 171, 16 December 1966 [ICCPR].

18 *European Convention on Human Rights*, 213 UNTS 221, 11 April 1950.

19 WHO*, Health Promotion Glossary* (1998), 3.

20 WHO, *Twelfth General Programme of Work. Not Merely the Absense of Disease* (2014).

21 B. Toebes, 'Introduction: Health and Human Rights in Europe', in B. Toebes *et al*. (eds), *Health and Human Rights in Europe* (2012), 5.

goal, Article 2 WHO-Constitution outlines the functions of the organization. According to its own understanding the

> "WHO is the directing and coordinating authority for health within the United Nations system. It is responsible for providing leadership on global health matters, shaping the health research agenda, setting norms and standards, articulating evidence-based policy options, providing technical support to countries and monitoring and assessing health trends."[22]

1. The WHO's Powers Under International Law

While the mandate of the WHO seems to be all encompassing,[23] its powers under international law are limited.

Under Article 19 of its Constitution, the Health Assembly of the WHO may adopt conventions or agreements with respect to any matter within the WHO's competencies.[24] Such conventions or agreements enter into force for each member State the moment the State accepted the treaty in accordance with its constitutional law. Subsequently, a State has to take action relative to the acceptance of that treaty (Article 20 *WHO-Constitution*). The first treaty adopted under this provision is the *Framework Convention on Tobacco Control*.[25]

Also, the Health Assembly has the authority to make recommendations with respect to any matter within its competencies (Article 23 *WHO-Constitution*). Finally, State parties are under an obligation to report on a regular basis to the WHO (Articles 61-65 *WHO-Constitution*).

More important than these conventional measures is, however, the authority of the WHO to issue legally binding regulations. In this sense, the *WHO-Constitution* offers some unique features.[26]

22 WHO, 'About WHO', available at http://www.who.int/about/en/ (last visited 1 August 2016).

23 For a possible limitation cf. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, 66, 74, paras 19 *et seq*.

24 Cf. also L. O. Gostin, *Global Health Law* (2014), 110.

25 *WHO Framework Convention on Tobacco Control*, 2302 UNTS 166, 21 May 2003. For a comprehensive overview cf. G. B. Cockerham & W. C. Cockerham, 'International Law and Global Health', in Freeman, Hawkes & Bennett, *supra* note 6, 492, 495 *et seq*.

26 Gostin, *supra* note 24, 111.

2. The WHO's International Health Regulations (2005)

Article 21 *WHO-Constitution* grants the organization the power to adopt regulations concerning specific aspects, including sanitary and quarantine requirements and other procedures designed to prevent the international spread of diseases; nomenclatures with respect to diseases, causes of death and public health practices; standards with respect to diagnostic procedures for international use; advertising and labelling of biological, pharmaceutical and similar products moving in international commerce and similar.

A convention or agreement adopted under this provision enters into force for all members after due notice has been given of its adoption (Article 22 *WHO-Constitution*). As consequence, regulations adopted under Article 21 *WHO-Constitution* are binding for member States.[27] This is the legal ground for the *International Health Regulations* (IHR).

The power granted by this provision came to life at a very early stage. In 1951, the WHO adopted the *International Sanitary Regulations* (ISR).[28] In 1969, the need for an update led to the adoption of the *International Health Regulations*,[29] which "represent a revised and consolidated version"[30] of the *ISR* (1951). The *IHR* (1969) were amended in 1973[31] and 1981[32]. After these changes, the scope of the *IHR* (1969) was limited to cholera, yellow fever and the plague. Despite the Health Assembly being aware of the fact that

> "there is a continuous evolution in the public health threat posed by infectious diseases related to the agents themselves, the facilitation of their transmission in changing physical and social environments and to diagnostic and treatment capacities"[33]

27 J. P. Ruger, 'Toward a Theory of a Right to Health: Capability and Incompletely Theorized Agreements', 18 *Yale Journal of Law & the Humanities* (2006) 2, 273, 312.

28 *International Sanitary Regulations*, 25 May 1951, 175 UNTS 215, [ISR (1951)].

29 *International Health Regulations*, 25 July 1969, 764 UNTS 3, [IHR (1969)].

30 WHO, *International Health Regulations* (1969), 3rd. ed. (1983), 5.

31 WHO, *Additional Regulations of 23 May 1973 Amending the International Health Regulations (1969), in Particular with Respect to Articles 1, 21, 63-71 and 92*, Health Assembly Res. WHA26.55, 23 May 1973.

32 WHO, Health Assembly Doc. WHA34/1981/REC/I., 22 May 1981, 10; cf. WHO, *Official Records of the World Health Organization No. 217* (1974), 21, 71, 81.

33 WHO, Health Assembly, Res. WHA48.7, 12 May 1995, Preamble para. 5.

already in 1995 as well as the (re)emergence of old and new threats, States lacked political will to update the *IHR* (1969).[34] This changed after the outbreak of Severe Acute Respiratory Syndrome (SARS) in 2003, which affected more than 8,000 people and killed 774 persons in 27 countries.[35] This pandemic ultimately led to the new *International Health Regulations* (2005)[36], which entered into force in 2007.

3. Public Health Emergencies of International Concern

Purpose of the *IHR (2005)* is to "prevent, protect against, control and provide" a response to any "public health emergency of international concern" (Article 2 *IHR (2005)*). The *IHR (2005)* are guided by the thought to "avoid unnecessary interference with international traffic and trade" – States fear negative economic implications without any scientific justification for such measures.[37] In stark contrast to the *IHR (1969)*, there is no focus on specific diseases.[38] A *public health emergency of international concern* is to be understood as

> "an extraordinary event which is determined, as provided in these Regulations: (i) to constitute a public health risk to other States through the international spread of disease and (ii) to potentially require a coordinated international response" (Article 1 *IHR (2005)*).

A *public health risk* means

> "a likelihood of an event that may affect adversely the health of human populations, with an emphasis on one which may spread internationally or may present a serious and direct danger" (Article 1 *IHR (2005)*).

34 M. Frenzel, *Sekundärrechtsetzungsakte internationaler Organisationen: völkerrechtliche Konzeption und verfassungsrechtliche Voraussetzungen* (2011), 136; R. Katz & A. Muldoon, 'Negotiating the Revised International Health Regulations (IHR)', in E. Rosskam & I. Kickbusch (eds), *Negotiating and Navigating Global Health* (2012), 77, 80.

35 WHO, Summary of Probable SARS Cases With Onset of Illness from 1 November 2002 to 31 July 2003, 21 April 2004, available at http://www.who.int/entity/csr/sars/country/table2004_04_21/en/index.html (last visited 1 August 2016).

36 *International Health Regulations*, 23 May 2005, 2509 UNTS 79, [IHR (2005)].

37 B. Condon & T. Sinha, 'The Effectiveness of Pandemic Preparations: Legal Lessons from the 2009 Influenza Epidemic', 22 *Florida Journal of International Law* (2010) 1, 1, 2.

38 Gostin, *supra* note 24, 184.

The *IHR (2005)* focus on containing threats in their place of origin – in contrast to the *IHR (1969)* – which were focused on preventing the spread of the mentioned diseases across international borders through controlling ports and borders.

According to Articles 6, 7 *IHR (2005)*, States must notify the WHO of any unexpected or unusual event that may constitute a *public health emergency of international concern*. It is then up to the Director General of the WHO to determine whether or not such a *public health emergency of international concern* is occurring (Article 12 *IHR (2005)*). Subsequently, an elaborate mechanisms comes into play by which the WHO and State parties in the affected area attempt to counter the threat. It is important to note that an Emergency Committee may be established with regard to a specific *public health emergency of international concern* to propose measures to be taken which, in turn, may be endorsed by the Director General subsequently be issued as temporary recommendations (Article 15 *IHR (2005)*).

A case could be made for a binding character of temporary recommendations: The language of Article 15 *WHO-Constitution* sounds rather as if the recommendations under Article 15 *IHR (2005)* are binding. For one, Article 15 *IHR (2005)* is rather explicit about the procedure to adopt recommendations and their modification. Also, recommendations may be terminated and automatically expire after three months if there is no extension. Such sophisticated provisions are not necessary for mere suggestions. Finally, interpreting these provisions in light of object and purpose of the instrument,[39] a binding character would be beneficiary to combat a *public health emergency of international concern*.

Making this case, however, is futile. The most obvious reason is found in Article 1 *IHR (2005)* where temporary recommendations are defined as "non-binding advice". In support, *recommendations* are usually not binding under any circumstances. Being recommendations, the content of such regulations is rather vague and better compared to suggestions than to permissions or prohibitions. For example, recommendations under Article 40 *Charter of the United Nations* (UN-Charter) are very different from measures under Articles 41 and 42 *UN-Charter*. Those recommendations are "without prejudice to the rights, claims, or position of the parties concerned" and ultimately, the Security Council may "call upon the parties concerned to comply with such provisional measures"

[39] Even though the *IHR (2005)* are not an international treaty as defined in *Vienna Convention on the Law of Treaties*, 23 May 1969, Article 2 (1) (a), 1155 UNTS 331, 3, for the purpose of this article the rules on treaty interpretation are applied here.

(Article 40 *UN-Charter*). Also, recommendations under Article 36 (3) *UN-Charter* are non-binding by nature.[40] In contrast to the obligation to report on the implementation of *IHR (2005)* by State parties (Article 54 (2) *IHR (2005)*) or the obligation to report incidents that may constitute a *public health emergency of international concern* (Article 7 *IHR (2005)*), such clear language is missing in regard to recommendations. Also, the Director General has no legislative power under the *WHO-Constitution*.[41] Other recommendations, which are made by the Health Assembly under Article 23 *WHO-Constitution*, are not binding.[42] To ensure compliance with such recommendations, States are obliged to report on an annual basis to the WHO (Article 62 *WHO-Constitution*).

A closer look at the recent practice of the Director General supports this conclusion. For example, in the Ebola-outbreak she recommended, first, measures usually regulated by domestic law and not international law, for example that the heads of State should declare national emergencies; affected States should activate their national disaster/emergency management mechanisms; and, second, soft measures, for example that heads of State should personally address the nations to provide information on the situation or health ministers and other health leaders should assume a prominent leadership role in coordinating and implementing emergency Ebola response measures.[43]

Ultimately, recommendations issued by the Director General under the regime of *public health emergency of international concern* provided for in the *IHR (2005)* are not of a binding nature.[44] This does not lead to the conclusion that those recommendations are without effect. On the contrary, due to the authority of the WHO, its aggregated expertise and the risk faced by States

40 Cf. Separate Opinion by Judges J. Basdevant, M.Alvarez, B. Winiarski, M. Zoricic, C. De Visscher, A.H. Badawi K. Pasha, B. Krylov, *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Preliminary Objection, ICJ Reports 1948, 31, 32.

41 R. Katz & J. Fischer, 'The Revised International Health Regulations: A Framework for Global Pandemic Response', 3 *Global Health Governance* (2010) 2, 1, 2 [Revised IHR].

42 M. Vierheilig, *Die Rechtliche Einordnung der von der Weltgesundheitsorganisation Beschlossenen Regulations* (1984), 38.

43 WHO, 'Statement on the 1st meeting of the IHR Emergency Committee on the 2014 Ebola outbreak in West Africa', 8 August 2014, available at http://www.who.int/mediacentre/news/statements/2014/ebola-20140808/en/. [Statement on the 1st meeting] (last visited 1 August 2016). The content of the recommendation may be due to the fact that among the Emergency Committee members, none has a legal background.

44 Cf., Vierheilig, *supra* note 42, 34.

for defiance ensure compliance with emergency recommendations[45] – or at least *should* ensure compliance. In this sense, the WHO is supposed to work through its expertise. Hence, the mechanism regarding *public health emergencies of international concern* is an essential tool to address global threats that utilizes international law without creating new obligations on the actors involved.

A further possibility is to bring temporary recommendations to take full effect, which may be done by utilizing Article 43 *IHR (2005)*. This provision stipulates a very sophisticated process for additional health measures by States. In general, State parties are not precluded from implementing additional health measures (Article 43 (1) *IHR (2005)*). However, the *IHR (2005)* are clear (and repetitive) on one thing: those additional measures may not be more restrictive on international traffic and not more intrusive on persons than reasonably available alternatives, which achieve the appropriate level of health protection. If a State wants to adopt additional measures, it shall provide the WHO with information. The WHO, in turn, assesses these measures and may request the State to reconsider its plans (Article 43 (4) *IHR (2005)*). In other words, additional measures must be justified by a State party. If a State plans to adopt measures contrary to temporary recommendations already in place, those measures would contravene the condition set at the end of Article 43 (1). If the WHO, for example, recommends to not restrict trade and travel, restrictions by States are more restrictive on international traffic and are more intrusive on persons. Thus, they fail to meet the threshold. Nevertheless, under international law, those national measures remain in force – the *IHR (2005)* cannot void any national measure. Still, the State is under the treaty obligation to report such measures (Article 43 (3), (5), (6) *IHR (2005)*). Thus, this requirement may nudge the State to adhere to the temporary recommendation and at least nudge them to refrain from contravening the provisions. To be perfectly clear: This is in no way a legal enforcement mechanism should work – although it may work for policy reasons.

Yet another possibility would be to interpret a State's obligation to progressively realize the human right to health in line with the temporary recommendations. In order to assess this possibility, a closer look at the human right dimension is indispensable.

45 G. Burci & J. Quirin, 'Ebola, WHO, and the United Nations: Convergence of Global Public Health and International Peace and Security', 18 *American Society of International Law Insights* (2014) 25, available at http://www.asil.org/insights/volume/18/issue/25/ebola-who-and-united-nations-convergence-global-public-health-and (last visited 4 October 2016).

III. The Human Right Dimension

1. The Human Right

Next to the aim of *health* in international law and the institutional aspects, there is a human rights dimension to *health*. After all, being healthy does not solely or primarily depend on State's behaviour, but on one's physical and mental preconditions.[46] When drafting the human right to health, States were aware of the broad definition of *health* as well as the impossibility to safeguard a perfect health for everyone.[47] Despite the scope of the human right being limited, its importance can hardly be overstated. As the General Comment on Article 12 *ICESCR* states, "health is a fundamental human right indispensable for the exercise of other human rights."[48]

To reconcile the above mentioned practical difficulties, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)[49] stipulates a somewhat lesser goal when it guarantees a human right to the "enjoyment of the highest attainable standard of physical and mental health" (Article 12 (1) *ICESCR*). In the same vein, the *WHO-Constitution* specifies that the "enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being." Other human rights instruments include the same content for the human right to health. Notwithstanding these provisions as well as the right to health being included in several other human rights instruments, including the non-binding *UN Declaration of Human Rights*[50] and binding regional instruments,[51] in this case particularly the *African Charter on Human and Peoples' Rights*[52] (or *Banjul-Charter*), as well as instruments focusing on

46 Wolff, *supra* note 14, 27.

47 Gostin, *supra* note 24, 251.

48 Human Rights Committee, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12)*, UN Doc. E/C.12/2000/4, 11 August 2000, 1, para. 1 [Right to Highest Standard].

49 *International Covenant on Economic, Social and Cultural Rights*, 993 UNTS 3, 16 December 1966 [ICESCR].

50 *Universal Declaration of Human Rights*, GA Res, 217 A (III), Article 25 (1), 10 December 1948.

51 *Charter of Fundamental Rights of the European Union*, 50 Official Journal of the European Union C 303, Article 35, 14 December 2007, 389; *Arab Charter on Human Rights*, translated English version for example in 24 *Boston University International Law Journal* (2006) 2, 147, Article 39, 23 May 2004.

52 *African Charter on Human and Peoples' Rights*, 1520 UNTS 217, Article 16, 27 June 1981.

specific groups or topics,[53] the meaning of the right to health remains difficult to establish.[54]

Article 12 (2) *ICESCR* insinuates several steps that State parties shall take to achieve the full realization of the right enshrined in Article 12 (1). Among those steps are the "prevention, treatment and control of epidemic, endemic, occupational and other diseases" and the "creation of conditions which would assure to all medical service and medical attention in the event of sickness." However, under Article 2 (1) *ICESCR* it has to be taken into account that a State is obliged to undertake steps to "progressively [achieve] the full realization of the rights recognized" by the *ICESCR*. Hence, Article 12 (2) *ICESCR* complements[55] the individual human right to health with obligations of State parties.[56]

The Committee's General Comment No. 14 separates the freedoms to control one's health and body and to be free from interference by non-consensual treatment from the entitlements such as the right to a health care system, which provides the opportunity to enjoy the highest attainable standard of health.[57]

A major factor in the highest attainable standard of health is the State's available resources.[58] Here, major elements to be taken into consideration are availability, accessibility, and acceptability of quality of a health care system.[59] In this sense, Article 2 (1) *ICESCR* limits the human right to health to a relatively weak and abstract obligation of progressive realization.[60] States may thus differ in their approach to the full realization due to specific domestic factors.[61]

To shape the substantial obligations, some specific areas of concern have been identified. Among those are women's and mothers health, children and

53 *Convention on the Elimination of All Forms of Racial Discrimination*, Article 5 (e) (iv), 660 UNTS 195, 21 December 1965; *Convention on the Elimination of All Forms of Discrimination against Women*, 1249 UNTS 13, Article 12, 18 December 1979; *Convention on the Rights of the Child*, 1577 UNTS 3, Article 24, 20 November 1989; *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3, Article 25, 30 March 2006; *United Nations Principles of Older Persons*, GA Res. 46/91, 16 December 1991, Principle 1. A comprehensive overview over the different applicable treaties and provisions is available at http://www.ohchr.org/EN/Issues/Health/Pages/InternationalStandards.aspx (last visited 1 August 2016).

54 Katz & Fischer, 'Revised IHR', *supra* note 41, 13; Ruger, *supra* note 25, 273.

55 Meier & Mori, *supra* note 7, 113.

56 Cf. J. Tobin, *The Right to Health in International Law* (2012), 75, 225 *et seq*.

57 *Right to Highest Standard*, *supra* note 48, para. 8.

58 *Ibid*., para. 9.

59 *Ibid*., para. 12.

60 Criticial Meier & Mori, *supra* note 7, 115.

61 *Ibid*.

adolescents, older persons, persons living with disabilities, workers, migrants, and indigenous people. Mainly, binding treaties as well as non-binding guidelines exist to improve the health situation of these groups. Missing are substantial obligations regarding emergency situations. As will be seen later on, the Ebola-outbreak of 2014 had hardly an impact on the development of such substantial obligations.

Some of the rights enshrined in the *ICCPR* cover health aspects as well.[62] The health aspects of Article 6 (right to life), Article 7 (prohibition of torture), and Article 9 (liberty and security) are evident, even though they are focused on other aspect and are not framed as to include a right to being healthy. The European Court of Human Rights shares this view.[63]

2. No Derogation in Times of Emergency

In contrast to the *ICCPR*, the *ICESCR* does not contain a provision comparable to Article 4 *ICCPR*, allowing State parties to derogate from their treaty obligations in *time of public emergency* and under further preconditions. Nonetheless, it does not mean that the rights of the *ICESCR* are granted unlimited. Article 4 *ICESCR* allows for limitations to the rights enshrined in the covenant by law if this is compatible with nature of these rights and solely for the purpose of promoting the general welfare in a democratic society. This provision, however, applies at all times and not solely in times of emergency. In the end, the *ICESCR* is equally applicable in calmer times as well as in times of emergency. *Mutatis mutandis*, the finding by the Human Rights Committee that the *ICCPR* is "generally sufficient during such situations and no derogation from the provisions in question would be justified by the exigencies of the situation"[64] holds true to the *ICESCR* as well.[65] In addition, State parties are obliged to progressively realize the rights under the Covenant (Article 2 (1) *ICESCR*). As stated previously, in this sense Article 2 (1) *ICESCR limits* the human right to health.

If the *ICESCR* contained a provision like Article 4 *ICCPR* and provided a derogation clause, the Ebola-outbreak might have constituted such a situation, especially given the fact that the WHO declared a *public health emergency of*

62 Gostin, *supra* note 24, 252 *et seq*.

63 *Pentiacova v. Moldova*, ECtHR Application No. 14462/03, Judgment of 4 January 2005.

64 Human Rights Committee, *General Comment No. 29: States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 5.

65 B. Saul, D. Kinley & J. Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (2014), 979.

international concern. This scenario, however, does not fit under *lex lata*. Given the fact that no such provision exists, the outbreak did not shape international human rights law with regard to a derogation-clause or to emergency provisions. Moreover, in times of health emergencies, a derogation from Article 12 *ICESCR* would not make any sense. In times like these, it is the primary goal to uphold the highest attainable standard of health and defeat the disease.[66]

3. Possible Limitation in Times of Emergency

Nevertheless, in the case at hand there have been instances where a restriction of the rights under the *ICESCR* made sense. Such a restriction is possible under Article 4 *ICESCR* if such a limitation is provided by law and only in so far as a limitation may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

In the case of Sierra Leone, for example, the State closed down hospitals.[67] This was not only due to the fact that not adequate staff was present to help – sometimes because they were sick themselves. In some cases, hospitals contributed to spread the disease.[68] In fact, some of the Ebola cases that have occurred in countries far away from West Africa were helpers from abroad who returned home sick.[69] In such a situation in would be counterproductive to oblige a State party to keep hospitals open. Such an obligation may lead to a further spread of the disease and ultimately to self-defeat.

In this sense, the Ebola-outbreak refined Article 4 *ICESCR* as it illustrated that pursuing a short-term goal such as keeping hospitals open may have in turn (and after just a few days) a devastating effect on the rights enshrined in the Covenant.

66 Cf. *ibid*.

67 D. Koroma, 'Government Hospitals Close Down – Executive Director Health Alert', *Awareness Time* (27 August 2014), available at http://news.sl/drwebsite/publish/article_200526067.shtml (last visited 4 October 2016).

68 M. Fox, 'Are Hospitals Part of the Ebola Problem? Charity Wants New Strategy', *National Broadcasting Company News* (15 September 2014), available at http://www.nbcnews.com/storyline/ebola-virus-outbreak/are-hospitals-part-ebola-problem-charity-wants-new-strategy-n202486 (last visited 1. August 2016).

69 Cf. Saul, Kinley & Mowbray, *supra* note 65.

IV. The Obligations of States

1. Obligations to Respect, Protect and Fulfil

State parties to the *ICESCR* are under an obligation to ensure the human right to the highest attainable standard of health. The General Comment No.14 has interpreted Article 12 *ICESCR* to include obligations to respect, protect and fulfil.[70] In particular, a State is under the obligation to refrain from interfering directly or indirectly with this right, to protect individuals from interference by other actors and to adopt appropriate measures towards the full realization of the human right to health.[71] Of outmost importance is international assistance and cooperation, as already laid out in Article 2 (1) *ICESCR* and Article 2 (a) *WHO-Constitution* as well as section IX of the *Alma Ata Declaration on Primary Health Care*, which was adopted at the International Conference on Primary Health Care in 1978,[72] expressing the need for urgent action to protect and promote the health of all people.

In addition to bilateral cooperation and multilateral cooperation through the WHO, the UN General Assembly is also tasked with promoting international cooperation in the field of health (Article 13 (1) (b) *UN Charter*). In doing so, each State is expected to contribute to the maximum of its capacities.[73] How international cooperation can be achieved is, of course, a matter for each specific case.

2. States' Obligations *Ratione Loci*

The *ICESCR* does not provide an explicit threshold of application, unlike the *ICCPR*, where Article 2 (1) *ICCPR* obliges State parties to undertake to "respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant." A comparable provision is found in Article 2 (1) *ICESCR* where States agree to undertake

> "steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of [their] available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant

70 *Right to Highest Standard*, *supra* note 48, para. 33.
71 *Ibid*.
72 Cf. Gostin, *supra* note 24, 97 *et seq*.
73 *Right to Highest Standard*, *supra* note 48, para. 40.

by all appropriate means, including particularly the adoption of legislative measures."

Any reference to the applicability *ratione loci* is missing.

One can make the case and argue for applicability only in a State party's territory. After all, it is difficult enough to provide health care within a State alone. If the *right to health* is correctly the somehow weaker human right to the enjoyment of the highest attainable standard of physical and mental health (Article 12 (1) *ICESCR*), it could follow that it has no international dimension. Moreover, if a State cannot provide perfect health to everyone on its territory (due to individual preconditions), how can a State than achieve this goal abroad? Providing health care is a domestic matter and States are under no obligation to provide healthcare abroad.

This view has its merits. However, interpreting the human right to the mere supply of hospitals, doctors, medicine and the like falls short of treat law. After all, Article 2 (1) *ICESCR* includes an undertaking of international assistance and cooperation. International assistance and cooperation has naturally an international dimension. By being under the treaty obligation to render assistance, States may not hamper efforts by other States to achieve health.

In addition, the human rights approach may counter a problem that became evident yet again in the Ebola-case 2014: States ignore the temporary recommendations issued by the WHO's Director General. If one takes into account, first, that travel and trade restrictions are detrimental to the fight against Ebola, second that the Director General recommended repeatedly to lift travel and trade restrictions, and third, that such measures are taken by a State on its territory, Article 12 (1), (2) *ICESCR* is affected by such measures. In short, the obligation to progressively realize the rights enshrined in the *ICESCR* in cooperation with other States as well as the obligation to assist other States in their endeavour to provide the human right to health is violated by restrictions taken despite a temporary recommendation to the opposite.[74] Even if States

[74] An international dimension of Article 12 (2) ICESCR is also identified by *Right to Highest Standard*, *supra* note 48, para. 38 *et seq*.; cf. Human Rights Committee, *General Comment No. 3: The Nature of States Parties' Obligations (Article 2 para. 1)*, UN Doc. E/1991/23, 14 December 1990, para. 13. Critical to the General Comment Saul, Kinley & Mowbray, *supra* note 65, 139 *et seq*. Others identify this international dimension also, cf. Wolff, *supra* note 14, 32; Tobin, *supra* note 56, 325 *et seq*.

are not under an obligation to render assistance without being asked for it,[75] impeding assistance is not in the ambit of the *ICESCR*.[76]

To summarize, the obligation to render assistance to other States amounts an obligation not to interfere with measures taken by other States or the international community.

V. The Legal Framework of International Health

In brief, the international law framework for public health is characterized by a broad understanding of the term *health*. Its core meaning covers the absence of disease or infirmity and a broader understanding may entail a State of complete physical, mental, and social wellbeing.

International organizations take the broader approach, with the WHO leading the way. This organization's *IHR (2005)* provide a framework to address *public health emergencies of international concern* on a global scale, however, not granting the WHO any legal powers. There is a practical need to cooperate internationally and to assist weaker States. However, international law does not provide for specific forms of cooperation in regard to international health. Thus, cooperation is regulated by general international law.

In addition to institutionalized efforts, States are under an obligation to achieve the highest attainable level of health. This corresponds to the human right to health, benefiting individuals.

Largely, international law relies on States and their domestic law to counter health issues and emergencies. It further attempts to regulate international health by way of recommendations by the WHO and this forum to cooperate. The human right to health obliges States to take steps in order to bring this right to life.

C. The Measures Taken by the International Community During the Ebola-Outbreak 2014

I. The Ebola-Outbreak 2014

The aforementioned framework was challenged during the Ebola-outbreak 2014 in West Africa. In December 2013 first cases were reported in Guinea

75 Saul, Kinley & Mowbray, *supra* note 65, 139.

76 Cf. Tobin, *supra* note 56, 331 *et seq*. Cf. also *Right to Highest Standard*, *supra* note 46, paras 39, 41.

before the WHO was officially notified on 23 March 2014.[77] Still in March 2014, Ebola spread to Liberia[78] and in May to Sierra Leone.[79] In the following months, Ebola spread to the West African States of Mali and Senegal as well as to Nigeria and as far as USA and Spain. By mid-September, nearly 5,000 cases were reported and more than 2,500 people had died.[80] Two months later, on 14 November, the numbers mounted to over 14,000 cases and more than 5,100 deaths.[81] Just one week later, there were 1,000 more cases and nearly 300 more people had died.[82] By mid-August 2015, nearly 28,000 people have been infected and 11,299 persons lost their lives.[83] Seven months later, at the end of the outbreak, 11,323 people died and 28,646 cases were counted.[84]

II. The IHR Emergency Committee Regarding Ebola

1. The IHR Emergency Committee's Recommendations

In the beginning of August 2014, when 1,711 cases including 932 deaths had been reported[85] the WHO's Director General declared the situation a *public*

77 WHO, 'Ebola virus disease in Guinea', 23 March 2014, available at http://www.afro.who.int/en/clusters-a-programmes/dpc/epidemic-a-pandemic-alert-and-response/outbreak-news/4063-ebola-virus-disease-in-guinea.html (last visited 4 October 2016); Fox, *supra* note 68.

78 WHO, 'Ebola virus disease, Liberia (Situation as of 30 March 2014)', 30 March 2014, available at http://www.afro.who.int/en/clusters-a-programmes/dpc/epidemic-a-pandemic-alert-and-response/outbreak-news/4072-ebola-virus-disease-liberia.html (last visited 1 August 2016).

79 WHO, 'Ebola virus disease, West Africa (Update of 26 May 2014)', 26 May 2014, available at http://www.afro.who.int/en/clusters-a-programmes/dpc/epidemic-a-pandemic-alert-and-response/outbreak-news/4143-ebola-virus-disease-west-africa-26-may-2014.html (last visited 1 August 2016).

80 The Secretary-General, *Identical Letters Dated 17 September 2014 from the Secretary-General Addressed to the President of the General Assembly and the President of the Security Council*, UN Docs A/69/389-S/214/679, 18 September 2014 [Identical Letters].

81 WHO, 'Ebola Response Roadmap–Situation Report Update', 14 November 2014, available at http://apps.who.int/iris/bitstream/10665/143216/1/roadmapsitrep_14Nov2014_eng.pdf?ua=1 (last visited 1 August 2016).

82 WHO, 'Ebola Response Roadmap–Situation Report Update', 21 November 2014, available at http://apps.who.int/iris/bitstream/10665/144117/1/roadmapsitrep_21Nov2014_eng.pdf?ua=1 (last visited 1 August 2016).

83 Cf. Yan & Smith, *supra* note 4; *High-level Panel*, *supra* note 1, 21, para 9.

84 Data up to 27 March 2016 taken from the WHO's website, available at http://apps.who.int/ebola/ebola-situation-reports (last visited 4 October 2016).

85 [Statement on the 1st meeting], *supra* note 43.

health emergency of international concern according to Articles 12(4)(c), 48(1)(a), 49(5) *IHR (2005)*.[86] This came after the advice of the IHR Emergency Committee regarding Ebola that the situation constituted an extraordinary event, given the fact that this outbreak constitutes the largest Ebola-outbreak ever recorded. In its assessment, the Emergency Committee regarding Ebola identified major challenges for the affected countries: As their health systems were fragile and inexperienced in dealing with Ebola outbreaks, and given a high mobility of populations as well as the speed at which the disease was spreading, the fight against the outbreak required a joint effort. Among the measures that could be taken the Emergency Committee recommended to States with Ebola transmission that their competent national authorities declare a national emergency and ensure that all necessary measures to stop the outbreak may be taken; the activation of national disaster/emergency management mechanisms; health ministers and other leaders to assume leadership roles in coordination and implementing response measures; provide sufficient medical commodities; conduct exit screenings and prohibit travel by persons confirmed to suffer from Ebola; monitor probable and suspected cases closely; and that funerals and burials are conducted by trained personnel. To States with a potential or confirmed case and to States with land borders with affected States, the Emergency Committee regarding Ebola recommended to closely monitor clusters of unexplained fever of deaths and treating any suspected or confirmed case as an emergency. There is no recommendation, even for non-affected States with land borders to affected States, to close their borders to those affected States. In the same vein, all States should not ban travel or trade from and to affected States, but be prepared to detect, investigate and manage Ebola cases. In addition, all States, affected or not, should provide the public with accurate and relevant information on the outbreak and the transmission of as well as measures against Ebola.[87] The Director General followed the Emergency Committee's findings and issued these recommendations as temporary recommendations under Article 15 *IHR (2005)*.

In its second meeting in September 2014, the Emergency Committee regarding Ebola regretted flight cancelations and other travel restrictions to and from affected countries, which result in detrimental economic consequences, hinder relief and support and ultimately result in an increased risk of international spread of Ebola. In addition, health-care workers should be provided with adequate means to counter Ebola as well as to protect themselves from the

86 *Ibid*.
87 *Ibid*.

disease. As consequence of the Emergency Committee's findings, the Director General extended the temporary recommendations already in place.[88]

Owing to the increase in cases, the Emergency Committee regarding Ebola met in advance of the expiration date of the temporary recommendations. In its third meeting, the Emergency Committee regarding Ebola identified as lessons learned the importance of leadership, community engagement, bringing in more partners, paying staff on time and accountability. Primary emphasis must continue to be the stop of the disease in the three most affected countries Liberia, Sierra Leone and Guinea. Here, the Emergency Committee regarding Ebola recommended exit screenings. Nevertheless, the Emergency Committee regarding Ebola reiterated that there should not be a general ban on travel or trade, which is likely to cause hardship, increase uncontrolled migration and isolate or stigmatize affected countries and their populations. Entry screenings, however, were viewed critically by the Emergency Committee regarding Ebola. With regard to international meetings and mass gatherings, a risk-based approach on a case-by-case basis should be followed. Again, the Director General extended the temporary recommendations already in place.[89]

In contrast to the situation in October the number of cases decreased at the time of the Emergency Committee's fourth meeting in January 2015. Nonetheless, the Emergency Committee regarding Ebola still determined the situation to be a *public health emergency of international concern*. It was concerned with the fact that more than 40 States established travel restrictions that went beyond what the WHO had recommended earlier. In substance, the earlier recommendations were repeated. For the first time countries sharing borders with Guinea, Liberia and Sierra Leone were advised to conduct border surveillance as well as to cooperate internationally. Other States were reminded of Article 2 *IHR (2005)*, which emphasizes the need to avoid unnecessary interference with international travel and trade. The travel restrictions put in place by States were harmful to local populations, increase stigma and isolation, disrupt livelihoods

88 WHO, 'Statement on the 2nd meeting of the IHR Emergency Committee on the 2014 Ebola outbreak in West Africa', 22 September 2014, available at http://www.who.int/mediacentre/news/statements/2014/ebola-2nd-ihr-meeting/en/ (last visited 1 August 2016).

89 WHO, 'Statement on the 3rd meeting of the IHR Emergency Committee on the 2014 Ebola outbreak in West Africa', 23 October 2014, available at http://www.who.int/mediacentre/news/statements/2014/ebola-3rd-ihr-meeting/en/ (last visited 1 August 2016).

and economies as well as impede recruitment of health-care workers. Again, the Director General extended the temporary recommendations already in place.[90]

When the fifth meeting of the Emergency Committee took place in April 2015, the situation improved further. Fewer cases were reported and the overall risk of spread appeared to had been further reduced, especially in the three most affected countries.[91] Still, the Emergency Committee regarding Ebola felt compelled to warn against complacency. It remained essential to reach a *global zero* with not a single new case worldwide for a time span of 42 days. In this line of reasoning, the Emergency Committee maintained that the Ebola-outbreak constituted a *public health emergency of international concern* and recommended that all temporary recommendations should be extended. In addition, the Emergency Committee repeated its call to conduct exit screenings in the three most affected countries, reinforce border surveillance and avoid unnecessary interference with international travel and transport. As before, the Director General extended the temporary recommendations already in place.

The Emergency Committee regarding Ebola maintained at its sixth meeting in July 2015 that the outbreak still constituted a *public health emergency of international concern* even though case numbers were still in decline.[92] However, the fight entered phase 3, which is focused on understanding every chain of transmission in order to counter Ebola more effectively. Next to the repeated calls for common border management and continuation of travel and transport to and from the region, the committee raised several new issues. It demanded better interagency collaboration, deplored a lack of understanding due to language problems, and, most importantly, singled out Guinea-Bissau, a country that was not affected by the Ebola-outbreak. Due to violent protests in this nation, allegedly targeting Ebola-preparedness efforts,[93] the Emergency Committee feared that Ebola would spread to Guinea-Bissau. Again, the

90 WHO, 'Statement on the 4th meeting of the IHR Emergency Committee on the 2014 Ebola outbreak in West Africa', 21 January 2015, available at http://www.who.int/mediacentre/news/statements/2015/ebola-4th-ihr-meeting/en/ (last visited 1 August 2016).

91 WHO, 'Statement on the 5th meeting of the IHR Emergency Committee on the 2014 Ebola outbreak in West Africa', 10 April 2015, available at http://www.who.int/mediacentre/news/statements/2015/ihr-ec-ebola/en/ (last visited 1 August 2016).

92 WHO, 'Statement on the 6th meeting of the IHR Emergency Committee on the 2014 Ebola outbreak in West Africa', 7 July 2015, available at http://www.who.int/mediacentre/news/statements/2015/ihr-ebola-7-july-2015/en/ (last visited 1 August 2016).

93 M. Brice, 'Ebola threat to Guinea Bissau rises as border zone heats up', *Reuters* (1 June 2015), available at http://www.reuters.com/article/2015/06/01/us-health-ebola-guinea-idUSKBN0OH3LE20150601 (last visited 1 August 2016).

Director General restated the determination of the outbreak as *public health emergency of international concern* as well as the existing and newly proposed recommendations.

After the outbreak settled down, the Emergency Committee regarding Ebola met again in October 2015. Numbers in the three most affected countries had declined significantly, with no new case of Ebola in Liberia since 3 September 2015, but still within the 42-days time frame before the country could be declared Ebola-free.[94] Despite the progress, several States had travel restrictions to the region. The Emergency Committee regarding Ebola upheld its recommendation that the situation constituted a *public health emergency of international concern* and its prior measures. For the first time, the Emergency Committee explicitly stated the individuals infected with Ebola should not travel. The Director General affirmed the Committee's recommendations and stated that the 7th recommendations were to supersede any prior temporary recommendation.

At the end of 2015 more progress was made in interrupting the original Ebola-chains transmission. Under these circumstances, the 8th meeting of the Emergency Committee regarding Ebola took place.[95] However, newer chains of the virus were still occurring. Even though these outbreaks could have been controlled rather rapidly, the situation still constituted extraordinary events requiring cooperation by all States with the affected countries. The Committee remained deeply concerned about continuing travel and transport restrictions by several States. As it had recommended earlier, the Committee asked the heads of States to continue to address their nations. Additionally, States should take precautionary measures such as exit screenings. Trade and travel restrictions are counterproductive and should be abolished. Given the success in containing the virus the Committee seemed uncertain as to whether or not the situation remained a *public health emergency of international concern*. Between the lines it becomes obvious that it would have preferred to declare an "'intermediate' level of alert".[96] Within the WHO, a review process is taking place and is looking at

94 WHO, 'Statement on the 7th meeting of the IHR Emergency Committee on the 2014 Ebola outbreak in West Africa', 5 October 2015, available at http://www.who.int/mediacentre/news/statements/2015/ihr-ebola-7th-meeting/en/ (last visited 1 August 2016).

95 WHO, 'Statement on the 8th meeting of the IHR Emergency Committee on the 2014 Ebola outbreak in West Africa', 18 December 2015, available at http://www.who.int/mediacentre/news/statements/2015/ihr-ebola-8th-meeting/en/ (last visited 1 August 2016).

96 *Ibid*.

potential changes. Still, the Director General declared a *public health emergency of international concern* and affirmed the Committee's recommendations.

Finally, the 9th meeting of the Emergency Committee regarding Ebola in March 2016 advised the Director General to declare the *public health emergency of international concern* to be over and to terminate the temporary recommendations.[97] This was due to the fact that the original chains of the virus had been interrupted successfully. While newer chains still erupted, the countries affected were able to confine and counter these outbreaks quickly. The Committee called upon the international community to continue to support outbreak response activities in countries in need of such support. The Director General determined that the *public health emergency of international concern* was indeed over and she consequently terminated the temporary recommendations.[98]

To repeat, while the recommendations by the Emergency Committee regarding Ebola and the Director General cover a vast array of aspects, the measures adopted nevertheless remain recommendations to States, without any legal effect.

2. Evaluation of the WHO's Response

The WHO itself initiated a review process over its response. In a first step, it established the Ebola Interim Assessment Panel. It was tasked to assess the roles and responsibilities of the WHO during the Ebola crisis. After a preliminary report published in May 2015,[99] the final report was issued in July 2015.[100] In a second step, a Review Committee on the Role of the *IHR (2005)* in the Ebola Outbreak and Response was set up, that delivered its report in May 2016.[101]

97 WHO, 'Statement on the 9th meeting of the IHR Emergency Committee on the 2014 Ebola outbreak in West Africa', 29 March 2016, available at http://www.who.int/mediacentre/news/statements/2016/end-of-ebola-pheic/en/ (last visited 1 August 2016).

98 WHO, 'WHO Director-General briefs media on outcome of Ebola Emergency Committee', 29 March 2016, available at http://www.who.int/mediacentre/news/statements/2016/ihr-emergency-committee-ebola/en/ (last visited 1 August 2016).

99 WHO, Report by the Secretariat, *Ebola Interim Assessment Panel*, A68/25, 8 May 2015.

100 WHO, Report of the Ebola Interim Assessment Panel, 7 July 2015, available at http://www.who.int/csr/resources/publications/ebola/report-by-panel.pdf?ua=1 (last visited 1 August 2016) [July 2015 Report].

101 WHO, Report of the Review Committee on the Role of the IHR (2005) in the Ebola Outbreak and Response, *Implementation of the International Health Regulations (2005)*, A69/21, 13 May 2016 [Review Committee on the Role of the IHR. Ebola Outbreak and Response].

At the outset, the Ebola Interim Assessment Panel was of the opinion that significant changes throughout the WHO were needed to re-establish the WHO's authority:[102] The panel found that the WHO lacked both the capacity as well as the "organizational culture to deliver a full emergency public health response."[103] This went so far as to discuss a proposal to either establish a new health emergency organization or confer the lead in such cases to another UN agency.[104] As both would certainly have meant the end of the WHO as such, the panel urged the WHO to invest in its emergency operational capacity. In doing so, improvements were needed in governance, and leadership, financing, organizational culture, and procedures, as well as the work force, and regional, and international collaboration. In addition, research and development should be focused. The panel recalled that member States of the WHO were responsible for raising the funds of the WHO. Without increased funding, all attempts of reform and improvement would be futile.[105]

The Ebola Interim Assessment Panel also found shortcomings within the *IHR (2005)*, which were deemed not strong enough by the panel. First, the declaration of a *public health emergency of international concern* was in this case not satisfactory. The panel highlighted that to declare a situation a *public health emergency of international concern*, the Director-General and her staff need to be independent and courageous.[106] However, this was absent during the first months of the crisis.[107]

Second, neither the Director-General nor the member States took the *IHR (2005)* seriously enough.[108] For example, member States have failed to fulfil their obligations under the *IHR (2005)* to develop a preparedness strategy that could be independently evaluated.[109] As under the current *IHR (2005)*, States will be penalized by other countries if they report outbreaks quickly and transparently. Even though the *IHR (2005)* oblige States to act responsibly in case of an outbreak, the closing of borders and travel and trade restrictions

102 July 2015 Report, *supra* note 100, 5 in this vein also eq.
103 *Ibid*., para. 26.
104 *Ibid*., para. 27.
105 WHO Ebola Response Team, 'Ebola Virus Disease in West Africa – The First 9 Months of the Epidemic and Forward Projections', 371 *New England Journal of Medicine* (2014) 22, 1481, 1482.
106 July 2015 Report, *supra* note 100, para. 8.
107 Cf., *ibid*., para. 20 *et seq*.
108 *Ibid*., para. 10.
109 *Ibid*., para. 11 *et seq*.

hurt the countries affected by the crisis without benefiting anyone.[110] Here, the weakness of the *IHR (2005)* became very visible: Without any means to enforce its recommendations, States will most likely continue to defy temporary measures in situations of a *public health emergency of international concern*.[111] The panel proposed possible sanctions "for inappropriate and unjustified actions."[112] It also introduced the idea of calling on the Security Council in such cases.[113]

To summarize, the panel found shortcomings in leadership, organization, and the behaviour of member States. The *IHR (2005)* are, in the view of the panel, to soft and without an enforcement mechanism.

The Secretariat did not let this severe condemnation stand and responded with an official paper.[114] With regard to the *IHR (2005)* the secretariat announced a review process, albeit without going into detail on what changes could be imagined. It envisaged, however, an intermediate stage before declaring a *public health emergency of international concern*.[115] With regard to possible disincentives or even sanctions for ignoring either the *IHR (2005)* or the temporary recommendations, the secretariat kept rather quiet. It referred to the review process of the *IHR (2005)*, which may focus on these issues.[116] Still, it is unfortunate that the secretariat did not take a stand on such a crucial issue. For example, it could have envisaged a role of the Security Council, as recommended by the Ebola Interim Assessment Panel and the African Union (AU).[117] In essence, it promised to work more efficiently and signalized institutional reforms to be prepared by several advisory bodies.

The Ebola Interim Assessment Panel has raised several important factors. From a legal perspective, the effectiveness of both the *IHR (2005)* and the temporary recommendations issued in a concrete *public health emergency of international concern* needs to be increased. This could was made possible first trough making the recommendations legally binding and second by introducing sanction-mechanisms. Given that there is no such mechanism currently in

110 *Ibid*., para. 16.
111 Gostin & Friedman, 'Retrospective and Prospective Analysis', *supra* note 6, 1904.
112 July 2015 Report, *supra* note 100, para. 19.
113 *Ibid*.
114 WHO, *Secretariat response to the Report of the Ebola Interim Assessment Panel*, August 2015, available at http://www.who.int/csr/resources/publications/ebola/who-response-to-ebola-report.pdf (last visited 1 August 2016).
115 *Ibid*., para. 10.
116 *Ibid*., para. 8.
117 WHO, *July 2015 Report*, *supra* note 100, para. 19; Statement of the representative of the AU, *7502nd meeting*, *supra* note 11, 8.

place, even a soft one would be an improvement. Here, the Security Council could play a pivotal role. However, given that already the recommendations of 2011 to adapt the *IHR (2005)* in response to the swine flu pandemic of 2009 were ignored by the WHO and it's member States, it is not very likely that those regulations will be updated soon.

In a second step and in line with the Ebola Interim Assessment Panel's recommendation, the WHO started reviewing its *IHR (2005)*. It had established a Review Committee on the Role of the *IHR (2005)* in the Ebola Outbreak and Response, which met in August 2015 for the first time. In its report[118] the Review Committee set the agenda for their next meetings and identified areas of main concern. Basically, they are the same as already acknowledged by the Ebola Interim Assessment Panel and the WHO Secretariat.

In its final report issued in May 2016, the Review Committee on the Role of the *IHR (2005)* in the Ebola Outbreak and Response identified similar problems as the Ebola Interim Assessment Panel. Starting with a lack of knowledge or understanding of the *IHR (2005)*, the Review Committee acknowledged a need for further implementation and not amendment of the regulations.[119] It recommended to "incentivize compliance"[120] by supporting countries more, which adhere to the *IHR (2005)*. Namely, funding could be prioritized to support activities in compliant countries. In addition, secrecy hampers overall compliance, in the view of the committee. Thus, it advised to increase transparency and publicity about compliance with *IHR (2005)* and temporary recommendations issued during a *public health emergency of international concern*.[121]

III. The United Nations Mission for Ebola Emergency Response (UNMEER)

The reaction by the United Nations was rather innovative. The Secretary General as well as the Security Council took unprecedented steps to counter the threat posed by Ebola.

118 WHO, *Report of the First Meeting of the Review Committee on the Role of the International Health Regulations (2005) in the Ebola Outbreak and Response*, 25 August 2015, available at http://www.who.int/ihr/review-committee-2016/IHRReviewCommittee_FirstMeetingReport.pdf (last visited 1 August 2016).

119 WHO, *Review Committee on the Role of the IHR. Ebola Outbreak and Response*, *supra* note 101, paras 4 *et seq*., 154 *et seq*.

120 *Ibid*., para. 78.

121 *Ibid*., 66.

The Secretary General reacted to a letter by the Presidents of the three most affected countries.[122] In this letter, the three heads of State painted an alarming picture of the situation in the region. While the countries enjoy a phase of "relative peace, security and stability",[123] the Ebola-outbreak "has dealt a devastating blow" to their respective efforts to stabilize their countries.[124] In line with the recommendations by the Emergency Committee regarding Ebola, the Presidents stressed that their countries face "virtual economic sanctions and trade embargoes" aggravating the effects of the outbreak and leaving their countries feeling "ostracized, sanctioned and abandoned."[125] They asked the international community for help and suggested a coordinated international response to end the outbreak with the WHO providing strategic guidance, a coordinated international response to support the affected societies and economies by maintaining trade and transportation links, and an international education campaign.

In response to this letter, the Secretary General wrote a letter to the Presidents of the Security Council and the General Assembly, outlining his measures to address the Ebola-outbreak.[126] Given the fact that the outbreak has not only health implications, but also "has become multidimensional, with significant political, social, economic, humanitarian, logistical and security dimensions"[127], the Secretary General announced a comprehensive approach, including WHO, World Bank, and International Monetary Fund as well as other UN agencies. Most importantly, he established the United Nations Mission for Ebola Emergency Response (UNMEER), which should

> "harness the capabilities and competencies of all the relevant United Nations actors under a unified operational structure to reinforce unity of purpose, effective ground-level leadership and operational direction, in order to ensure a rapid, effective, efficient and coherent response to the crisis"

122 'Joint Letter Dated 29 August 2014', Annex to *Letter dated 15 September 2014 from the Secretary-General addressed to the President of the Security Council*, UN Doc. S/2014/669, 15 September 2014 [Joint Letter].

123 *Ibid*.

124 *Ibid*.

125 *Ibid*.

126 Identical letters, *supra* note 80.

127 *Ibid*., 1.

while being "mindful of the potential peace and security implications, cognizant of the fact that all three affected countries are presently within the ambit of the Peacebuilding Commission." UNMEER should be guided by six principles, namely to reinforce government leadership; deliver rapid impact on the ground; closely coordinate and collaborate with actors outside the United Nations; tailor responses to particular needs in the different countries; reaffirm WHO lead on all health issues; identify benchmarks for transition post-emergency and ensure that actions strengthen systems. The missions strategic objective, catalysing a rapid and massive mobilization of international human, material, logistic and financial resources under a single overarching framework, would be achieved by focusing on twelve mission-critical actions, in particular identification and tracing of people with Ebola virus disease; care for the infected and infection control; safe and dignified burial; medical care for responders; food security and nutrition; access to basic health services; cash incentives for health workers; economic protection and recovery; supplies of material and equipment; transportation and fuel; social mobilization; and messaging.

The UN General Assembly had welcomed the intention of the Secretary General and requested him to take necessary steps to implement his plan.[128] The Security Council has referenced UNMEER on several occasions,[129] but has failed to include any reference to it in its most important Res. 2177 (2014), which was adopted after the Secretary General had announced his plans to the members of the Security Council.[130]

1. The Legal Base for UNMEER

Being the first-ever UN emergency health mission, the legal base for UNMEER needs to be established. The search for an explicit article in the *UN-Charter* remains unsuccessful. The search is then complicated by the fact that the Security Council explicitly *requested* the Secretary General

128 UN General Assembly, *Measures to contain and combat the recent Ebola outbreak in West Africa*, UN Doc. A/RES/69/1, 23 September 2014, paras 1, 2.

129 *Record of the 7279th meeting of the Security Council*, UN Doc. S/PV.7279, 14 October 2014; Statement by the President of the Security Council, UN Doc. S/PRST/2014/24, 21 November 2014, [SC President Statement].

130 *Record of the 7268th meeting of the Security Council*, UN Doc. S/PV.7268, 18 September 2014, 3, 7 [7268th meeting].

> "to help to ensure that all relevant United Nations System entities, including the WHO and UNHAS, in accordance with their respective mandates, accelerate their response to the Ebola outbreak"

(without mentioning UNMEER but basically embracing the mission) and *requested* him to "develop a strategic communication platform using existing United Nations System resources and facilities in the affected countries" to combat misinformation about Ebola and its transmission. Overall, these statements hint at the Security Council as the origin of UNMEER, entailing its legal powers under the *UN-Charter*. On the other hand, the General Assembly *welcomed* the Secretary General's establishment of UNMEER and at the same time *requested* him to take measures required to execute his intention and report on the progress. This could be read as if the Security Council *entrusted* the Secretary General with other functions as mentioned in Article 98 *UN-Charter*.

In the end, nonetheless, the initiative to establish UNMEER was taken by the Secretary General as the chief administrative officer of the UN. He took an administrative decision to gather resources and maintain a combined health mission. It was not a political proposal to the General Assembly or the Security Council, which they needed to agree to. For UNMEER, no new competencies were created nor was it in any other way required by law to involve another actor. Moreover, UNMEER is to be seen in relation to the appointment of a United Nations System Senior Coordinator for Ebola Virus Disease as well as, after activating the UN's emergency response mechanism for the first time, a Deputy Ebola Coordinator and Emergency Crisis Manager. These two men fulfil, as their job title suggests, coordinating functions. Thus, they are not aiding the Secretary General in his political functions under Article 99 *UN-Charter*, but under Article 98 *UN-Charter*. In this sense, UNMEER is an umbrella for several specialized UN-institutions to efficiently and effectively counter the Ebola-outbreak.

2. The Powers of UNMEER

Given this evaluation, it is evident that the Secretary General could not create any new powers for UNMEER. As described above, UNMEER's purpose is limited to an umbrella and operational structure. Still, UNMEER could have enjoyed more powers – if only the Security Council had used its chapter VII powers to equip UNMEER with such powers. As will be shown in the next section, the Security Council did not opt for this possibility and failed to effectively shape and enforce international health law.

3. UNMEER's Aftermath

UNMEER terminated at the end of July 2015 after – in the view of the UN – it achieved its core objectives.[131] The oversight over UN response to Ebola shifted to the WHO. Within the Security Council, an August 2015 debate addressed the UN's response to Ebola. Nigeria proposed this meeting and prepared issued to be considered at the meeting.[132] In this meeting, however, nothing new was stated. As usual within Security Council debates, the members congratulated themselves on their actions. Even though some members voiced concerns about the international communities' response,[133] neither harsh criticism nor specific demands were voiced. The measures taken by the WHO were not openly addressed by the Council, unlike the scathing criticism voiced by Médecins Sans Frontières.[134] Rather, the WHO's willingness to reform was applauded by members of the Security Council.

UNMEER was much more explicitly condemned by the WHO's Ebola Interim Assessment Panel. While UNMEER was more or less successful outside of Western Africa, it failed to help in the affected countries.[135] The panel went so far as to propose not to use such a mission in future scenarios.[136]

Remarkably, the members of the Security Council were in total disagreement about priorities with regard to the specific past response and possible future preparation. While the US identified getting to zero cases as top priority,[137] the Chinese representative called for alleviation of poverty and development,[138] and the Spanish representative called for better research.[139] Also, the lessons learned were vastly different: The AU, for example, learned the importance of speedy response and collaboration between (public and private)

131 UN, 'Secretary-General Announces Closure of Ebola Emergency Response Mission as Core Objective Achieved, Oversight to Be Led By World Health Organization' (31 July 2015), available at http://www.un.org/press/en/2015/sgsm16982.doc.html (last visited 27 July 2016); Statement of the UN Secretary General Special Envoy on Ebola D. Nabarro, *7502nd meeting*, *supra* note 11, 4.

132 Letter dated 5 August 2015 from the Permanent Representative of Nigeria to the United Nations addressed to the Secretary-General, UN Doc. S/2015/600, 5 August 2015.

133 Cf. the Statements by the Representatives of States, *7502nd meeting*, *supra* note 11, USA Powell, 12; Angola Gaspar Martins, 15 *et seq*.; United Kingdom Wilson, 19; New Zealand Van Bohemen, 25.

134 Cf. Meier & Mori, *supra* note 7, 105; *High-level Panel*, *supra* note 1, 25, paras 11, 40..

135 Cf. also A, Kamradt-Scott *et al*., *Saving Lives* (2015), 9 *et seq*.

136 July 2015 Report, *supra* note 100, para. 78.

137 Statement by the Representative of the USA Power, *7502nd meeting*, *supra* note 11, 11.

138 Statement by Representative of the People's Republic of China Liu Jieyi, *ibid*., 17.

139 Statement by the Representative of Spain Gasso Matoses, *ibid*., 20.

partners, flexibility in health care missions, need for sophisticated technology, State's preparedness for health emergencies, cost efficiency, bridging the gap between the UN and the WHO, and African solidarity as underlying factor.[140] The WHO Director-General restated that the lack of public health capacities and corresponding infrastructures were the major challenge in the fight against the disease.[141] The WHO attempts to reform itself, including the establishment of a global health emergency work force, which can engage quickly.[142] It seems as if the members of the Security Council have not learned any lessons by the Ebola-outbreak – they do not even have the same perception of this particular Ebola-outbreak in Western Africa.

As if he saw this coming, the UN Secretary General took further steps to address future world-wide health crises. Already in April 2015, he appointed a High-Level Panel on Global Response to Health Crises. It was explicitly asked to take account the lessons learned by the Ebola-outbreak 2014 and make recommendations "to strengthen national and international systems to prevent and manage further health crises".[143]

4. The UN High-Level Panel on Global Response to Health Crises

The panel delivered a final report in January 2016.[144] Boldly stating that the Ebola-outbreak 2014 has been a "preventable tragedy"[145], the panel started with the forecast that "future pandemic threats will emerge and have potentially devastating consequences."[146] Thus, it is pivotal for the international community to be prepared.

A major part of the panel's report is devoted to the WHO and its failures during the crisis. Given the focus on the WHO, the Panel issued recommendations similar to the WHO's review bodies. First and foremost, the panel reiterated how important it is for States to comply with the *IHR (2005)* and temporary recommendations issued in an emergency.[147] The best way to

140 Statement by the Representative of the AU António, *ibid*., 6 *et seq*.
141 Statement by the WHO Director-General Dr. M. Chan, *ibid*., 2.
142 *Ibid*., 3; another proposal is made by Aginam, *supra* note 6, 559.
143 UN, 'Secretary-General Appoints High-Level Panel on Global Response to Health Crises' (2 April 2015), available at http://www.un.org/press/en/2015/sga1558.doc.htm (last visited 4 October 2016).
144 *High-level Panel*, *supra* note 1.
145 *Ibid*., para. 34.
146 *Ibid*., 7.
147 *Ibid.,* Recommendations 1, 6, 23.

achieve this is to implement a periodic review of the member States efforts, which produces publically available reports. This is comparable to the WHO's Review Committee on the Role of the *IHR (2005)* call for more transparency and publicity.[148] Like this body, the High-level panel considers the existing *IHR (2005)* to be good enough and not in need of any amendment or modification.[149] A major contributor for better compliance would be an increase in funding, by member States and international organizations.[150] It also proposed to create a WHO Centre for Emergency Preparedness and Response[151] with the task to survey unusual health events as well to act as an open data-platform. It could establish *significant operational capabilities* to enhance the WHO's response to an epidemic or pandemic.

But the panel did not solely focus on the WHO, it identified a lack of coherence and coordination in the entire UN-system.[152] In short, there should be an automatism to react to health crises so that a waste of time and resources will be averted. Part of that effort could be the establishment of a High-level Council on Global Public Health Crises, which would monitor issues related to possible public health crises.[153] Within the WHO this recommendation met opposition: According to the WHO's Review Committee on the Role of the *IHR (2005)* such a council would diminish the WHO's mandate and leadership in health crises.[154] Given the mandate of the WHO, the view of the Review Committee is correct and the UN system should trust the WHO with the fight against epidemics. If the UN is not prepared to do so, the better approach is to improve the WHO's governance or its funding before creating a duplicate within the UN-system. However, the Review Committee is to be applauded for its recommendation to create a standing advisory committee, which may issue an intermediate level of alert.[155] Such an intermediate level of alert is currently missing.

148 Review Committee on the Role of the IHR. Ebola Outbreak and Response, *supra* note 101, 66.
149 *High-level Panel, supra* note 1, paras 70 *et seq*.
150 *Ibid*., Recommendations 17-22.
151 *Ibid*., paras 146 *et seq*.
152 *Ibid*., para. 155.
153 *Ibid*., Recommendation 26.
154 *Ibid*., para. 163.
155 *Ibid*., Recommendation 6, 64.

In the end, the panel recommends a summit on global public health in 2018.[156] Whether or not the political moment will be lost by then (as the panel fears[157]) and the summit will take place remains to be seen.

IV. The Security Council as Facilitator of International Public Health Law

1. Security Council Res. 2177 (2015)

Astonishingly, the Security Council addressed the Ebola-outbreak in one resolution[158] under chapter VII as well as in a presidential statement of November 2014[159]. To begin with, in Res. 2177 (2015), the Security Council highlighted the severance of the Ebola-outbreak. Taking note of the different actors, in example, the countries affected, neighbouring States, UN-organs and organizations, NGOs as well as first-line responders, the Security Council called upon them to collectively address the threat posed by the epidemic. In the operative part of said resolution, the Council commended the actors for their contributions but *encouraged*, *called* and *urged* these actors to do even more. Noteworthy is not the fact that the Council was not satisfied with the efforts to date, but that the Council did not *decide* on a common strategy, nor did it *demand* specific measures or *requested* concrete actions. It could have done so in regard to travel and trade restrictions, border management or access of health care workers to affected countries or regions – issues that are addressed by the WHO as well as by the Council, but only as recommendations.[160] Also, the recommendations by the WHO were not transformed into legal binding obligations by virtue of Security Council actions under chapter VII *UN-Charter*. The Council could have easily demanded from member States that they keep open their borders to affected countries, cooperate with them with regard to border management (exit and entry screenings that is) or address domestic actors to continue travel and transport to and from West Africa.[161] In essence, the Council refrained from addressing the epidemic by legal means and issued mere recommendations.

156 *Ibid*., Recommendation 27.
157 *Ibid*., para. 233.
158 SC Res. 2177, UN Doc. S/RES/2177 (2014), 18 September 2014.
159 SC President Statement, *supra* note 129.
160 Cf. SC Res. 2177, *supra* note 158 Preamble paras 9 and 17.
161 Similar Gostin & Friedman, *Retrospective and Prospective Analysis*, *supra* note 6, 1906.

2. Ebola as a *Threat to the Peace*

Nevertheless, the operative part of Res. 2177 (2015) is – from a legal perspective – rather unexciting after an audacious move by the Council. Namely, the Council determined "that the unprecedented extent of the Ebola outbreak in Africa constitutes a threat to international peace and security", thus opening its powers under chapter VII. This is an innovative approach. Given, there is a discussion about the scope of the notion *threat to international peace and security* under Article 39 *UN-Charter*. Yet in practice, "a threat to the peace is whatever the Security Council says is a threat to the peace."[162] Nevertheless, one should not accept any determination simply because it was made by the Security Council. As is well known, scholarship is divided on the interpretation of *peace* in Article 39 *UN-Charter*. Some[163] argue for a wide understanding of *peace*, which includes aspects of positive peace, for example, also "broader conditions of social development".[164] Others take a more cautious approach, understanding the term to cover only negative peace, in other words the absence of armed violence between States.[165]

Here, an interesting parallel to the term *health* can be drawn. As shown earlier, *health* can be understood as "a state of complete physical, mental and social wellbeing and not merely the absence of disease or infirmity"[166] while the human right to health is limited to the human right to the "enjoyment of the highest attainable standard of physical and mental health" (Article 12 (1) *ICESCR*). In a philosophical sense, the appropriate ambition in the face of any evil is not only the abolition of said evil, but the achievement of the opposite.[167] Consequently, the powers of the WHO are extended to the achievement of *positive health* while the powers of the Security Council to achieve *positive peace* are still debated.

With the Security Council understanding the Ebola-outbreak as a *threat to international peace and security*, one could assume that the Council now opts

162 Akehurst & Malanczuk, *A modern introduction to international law* (1987), 219.

163 Cf. Gostin & Friedman, 'Retrospective and Prospective Analysis', *supra* note 6, 1903 *et seq*.

164 P. Malanczuk, *Akehurst's Modern Introduction to International Law* (1987), 219.

165 Cf. only C. Tomuschat, 'Obligations arising for States without or against their will', 241 *Recueil des Cours de l'Academie de droit international de la Haye* (1993) 4, 195, 334 *et seq*.

166 *Constitution of the World Health Organisation*, 14 UNTS 185 22 July 1946 [WHO-Constitution]; Cf. also *Declaration of Alma-Ata*, *supra* note 13, Article 1.

167 The author specifically thanks one of the two anonymous reviewers for this thought.

for a wider interpretation of that notion as before. Is there any merit to this claim?

First of all, the Security Council never before understood Article 39 *UN-Charter* as to include health aspects. While the Council prudently hinted that HIV/AIDS "may pose a risk to stability and security",[168] the Council did not dare to make that recommendation in the decades that followed this suggestion.[169] In addition, the human right to health is not closely related to negative peace, it is a part of positive peace. Also, the Council highlights the vast challenges, which are posed by the Ebola-outbreak, beginning with care for infected persons, safe burials of victims, misinformation about the virus and its transmission, food insecurity, a functioning domestic health care system, and other. Contrary to its usual practice, the Council did not address the question of refugees explicitly as constituting a threat. This could be understood as a move away from the fear of refugees as a destabilizing factor. In addition, 130 States co-sponsored the draft-resolution, making it the most supported chapter VII resolution ever. This seems to demonstrate a unanimous understanding between member States of the UNO as authorized interpreters of Article 39 *UN-Charter* to include positive peace aspects in this notion.

Interpreting Res. 2177 (2015) in this way, however, ignores the wording of the resolution. First of all, the Council clearly states that the *unprecedented extent* of the outbreak constitutes the threat and not the mere existence of an epidemic or a pandemic. Granted, the claim that something is unique may be made quite easily and is not decisive. Second, and most importantly, the Council relates the Ebola-outbreak to international peace and security in a rather traditional way. Res. 2177 (2015) emphasizes such aspects throughout the preamble paragraphs. The Council not only reiterates the international dimension of the disease, affecting several countries in the region, but links the disease directly to international security issues: The Security Council recognizes

> "that the peacebuilding and development gains of the most affected countries concerned could be reversed in light of the Ebola outbreak and underlining that the outbreak is undermining the stability of the most affected countries concerned and, unless contained,

168 SC Res. 1308, UN Doc. S/RES/1308 (2000), 17 July 2000.

169 SC Res. 1983, UN Doc. S/RES/1983 (2011), 7 June 2011, which repeats the phrasing of SC Res. 1308, *supra* note 168.

> may lead to further instances of civil unrest, social tensions and a deterioration of the political and security climate."[170]

The meeting record is affluent with references to the instable situation in the most affected countries and the region.[171] Voices that based Res. 2177 (2015) on the health crisis alone are minor.[172] For example, the representative of Brazil emphasized "the need to treat the outbreak first and foremost as a health emergency and a social and development challenge rather than a threat to peace and security."[173]

In this sense, Res. 2177 (2015) does not interpret Article 39 UN-Charter in an innovative way, it keeps in line with the conservative understanding of the notion *threat to international peace and security*. Ultimately, it is not Ebola that led the Security Council to act, but the anticipated instability of the region due to Ebola. In this sense, the Security Council remains an actor in the field of security, but not in health governance.[174]

3. Subsequent Practice of the Security Council

The Security Council kept the situation in West Africa on its agenda. In November 2014, the President of the Security Council issued a statement

170 SC Res. 2177, *supra* note 158, Preamble para. 4.

171 Cf. for example Statements by the Representatives of the member States, *7268th Meeting*, *supra* note 130: Argentina Perceval, 20; Australia Quinlan, 16; Chad Mangaral, 19; Chile Barros Melet, 22; China Wang Min, 16; France Delattre, 10; Jordan Kawar, 21; Lithuania Murmokaitè, 14; Luxembourg Loucas, 18; Republic of Korea Oh Joon, 13; Rwanda Nduhungirehe, 12 and United Kingdom Lyall Grant, 17; as well as Statement by the Representatives of participating States under Rule 37 of the *Security Council's provisional Rules of Procedure*, UN Doc. S/96/Rev.7, *ibid*.: Brazil Patriota, 29; Canada Rishchynski, 32; Colombia Ruiz, 45; Estonia Kolga 41; Germany Thoms, 44; Guinea Fall, 24; Guyana Talbot, 47; Italy Lambertini, 39; Japan Yoshikawa, 33; Morocco Hilale, 29; Netherlands Van Oosterom, 35; Norway Stener, 42; Sierra Leone Kamara, 26; Spain Gonzáles de Lineares Palou, 38; Switzerland Zehnder, 30; Turkey Çevik, 32 and Statement by Representatives of international organizations as the AU António, 37, *ibid*. As a side note, the traditional aspects were already highlighted in Joint Letter, *supra* note 122.

172 Statement by the Representative of the United States, *7268th meeting*, *supra* note 130, 7.

173 Statement by the Representative of the Brazil Partiota, *ibid*., 28.

174 Cf. R. Frau, 'Combining the WHO's International Health Regulations (2005) with the UN Security Council's Powers: Does it make sense for Health Governance?', to be published in 2016.

concerning the Ebola-outbreak.[175] The President reiterated the Council's concerns for the wider circumstances and thanked several actors for the efforts. For the first time, the Council addressed UNMEER explicitly, but overlooked the WHO while still recalling the *IHR (2005)*, which, in the words of the Council, "aim to improve the capacity of all countries to detect, assess, notify and respond to all public health threats." Overall, the statement does not add much to Res. 2177 (2015). The President echoes the concerns of the Council as a whole and restates the recommendations made in aforementioned resolution.

Obviously, in its agenda on peace consolidation in West Africa the Security Council kept the Ebola-outbreak in mind.[176] The Council's member applauded UNMEER and other UN efforts to counter Ebola.[177] More specifically, with regard to the United Nations Mission in Liberia (UNMIL), the Council was mindful of the outbreak and its implications on the mission.[178] In December 2014 the Council extended UNMIL's mandate "to coordinate with UNMEER, as appropriate".[179] This is a rather vague mandate. Given the fact that Res. 2190 (2014) was adopted under chapter VII the Council made that decision with legally binding effect. The powers of UNMIL as of now include the authority to cooperate with UNMEER.

V. Further Actors

1. World Bank Group

Within the World Bank Group two institutions joined the international effort. The International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA) acted within their respective mandates.

First, the IBDD is explicitly tasked to

175 SC President Statement, *supra* note 129.

176 Cf. only *Report of the 7357th meeting of the Security Council*, UN Doc. S/PV.7357, 8 January 2015, 3.

177 *Report of the 7279th meeting of the Security Council*, UN Doc. S/PV.7279, 14. October 2014; *Report of the 7480th meeting of the Security Council*, UN Doc. S/PV.7480, 7 July 2015.

178 SC Res. 2176, UN Doc. S/RES/2176 (2014), 15 September 2014, Preamble para. 2; SC Res. 2188, UN Doc. S/RES/2188 (2014), 9 December 2014, Preamble paras 5, 6; SC Res. 2190, UN Doc. S/RES/2190 (2014), 15 December 2014, Preamble para. 5; SC Res. 2215, UN Doc. S/RES/2215 (2015), 2 April 2015, Preamble paras 2, 3.

179 *Ibid.*

> "assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrupted by war, the reconversion of productive facilities to peacetime needs and the encouragement of the development of productive facilities and resources in less developed countries" (Article 1 *Articles of the Agreement of the International Bank for Reconstruction and Development*[180]).

In order to accomplish that goal, the IBRD may make or facilitate loans. This has been done in the case of the three most affected countries.[181]

Second, the IDA's purpose is to

> "promote economic development, increase productivity and thus raise standards of living in the less-developed areas of the world included within the Association's membership (…), thereby furthering the developmental objectives of the IBRD and supplementing its activities" (Article 1 *Articles of Agreement of the International Development Association*, 1960[182]).

The IDA provides financing for development projects (Article 5 (1) *IDA-articles*) and like the IBRD, the IDA has provided funds for the three most affected countries.[183]

Both IBRD and IDA are independent international organizations. However, they are both specialized agencies of the UN under Article 57 *UN-Charter*. As such, the legal base for their cooperation lies in Article 57 *UN-Charter*, Article 5 (8) *IBRD-articles*, Article 6 (7) *IDA-articles* and the respective relationship agreement between the UN and IBRD and IDA.[184]

180 *Articles of Agreement of the International Bank for Reconstruction and Development*, 27 December 1945, 2 UNTS 134 [IBRD-articles].

181 The World Bank, 'World Bank Group Ebola Response Fact Sheet', available at http://www.worldbank.org/en/topic/health/brief/world-bank-group-ebola-fact-sheet (last visited 1 August 2016) [WBG Ebola Fact Sheet].

182 *Articles of Agreement of the International Development Association*, 24 September 1960, 439 UNTS 249 [IDA-articles].

183 'WBG Ebola Fact Sheet', *supra* note 181.

184 GA Res. 124 (II), UN Doc. A/RES/124(II), 15 November 1947; GA Res. 1594 (XV), 27 March 1961.

In foresight, the World Bank Group plans to establish a Pandemic Emergency Facility (PEF)[185] to cooperate with other actors in comparable future scenarios. The respective articles of agreement provide for such a program. While joined programs against disasters are nothing new in the World Bank Group (for example, the IDA Crisis Response Window and the catastrophe deferred drawdown option), the establishment of PEF is due to the Ebola-outbreak. PEF is supposed to "channel funds swiftly to governments, multilateral agencies, NGOs and others to finance efforts to contain dangerous epidemic outbreaks before they turn into pandemics." PEF is, however, not created to cover pandemic preparedness or reconstruction efforts. The establishment of PEF has been endorsed by the 2015 G7 summit in Germany.[186]

In the end, the Ebola-outbreak 2014 has not created new powers under international law for any organization within the World Bank Group. Nevertheless, existing mechanisms and capacities have been used to finance the fight against Ebola. In addition, the creation of PEF, while not being an innovative tool, adds a mechanism to counter similar threats in the future. In this sense, the Ebola-outbreak 2014 helped to reshape international law, in particular with regard to international organizations.

2. AU, ECOWAS and the African Development Bank

Of course, regional actors were part of the international response. Before all others, the AU addressed the Ebola-outbreak. The AU Peace and Security Council emphasized the wider circumstances of the Ebola-outbreak a month before the UN Security Council took action.[187] It called on member States and other States to renew their efforts to fight the outbreak. In order to do so, the Peace and Security Council authorized the immediate deployment of a military and civilian humanitarian mission, the AU Support Mission for the fight against the Ebola Outbreak in West Africa or in short ASEOWA. This mission, comprising medical doctors, nurses and other medical and paramedical personnel, is the regional umbrella for States that provide healthcare personnel, financial and material resources to the countries most affected by the Ebola epidemic. The military component to the mission is safeguarding the effectiveness

185 The World Bank, 'Pandemic Emergency Facility: Frequently Asked Questions', available at http://www.worldbank.org/en/topic/pandemics/brief/pandemic-emergency-facility-frequently-asked-questions (last visited 1 August 2016).

186 G7 Germany, Leaders Declaration (7-8 June 2015), 12 *et seq*.

187 AU Peace and Security Council, *Communiqué*, PSC/PR/COMM.(CDL), 19 August 2014.

and protection of the mission. The Council embraced the concerns of the UN Security Council and called for a lift of travel and trade bans and the like during the months that followed.[188] However, the Council did not take innovative decisions.

The AU Executive Council, which coordinates and takes decisions on policies in areas of common interest to member States, foreshadowed parts of Res. 2177 (2015) when it called on AU member States to "urgently lift all travel bans and restrictions to the principle of free movement".[189] The AU Council referred to the recommendations by the WHO and even noted the "responsibility of member States to protect their citizens and public health consistent with IHR (2005)".[190] Given the fact that the AU Executive Council may not legislate, its decision did not alter the nature of the non-binding recommendations by the WHO.

ECOWAS, the Economic Community of West African States, is tasked to promote cooperation and integration leading up to an economic union in West Africa in order to facilitate development.[191] To counter the Ebola-epidemic, its member States have pledged to deploy military medical personnel.[192]

Moreover, the African Development Bank has supported the WHO and other actors in the fight. It too provided funds to the three most affected countries, like the agencies of the World Bank Group.[193]

188 AU Peace and Security Council, *Communiqué*, PSC/PR/COMM.(CDLXIV), 29 October 2014; AU Peace and Security Council, *Communiqué*, PSC/PR/COMM.(DXX), 29 June 2015.

189 AU Executive Council, *Decision on the Ebola Virus Disease (EVD) Outbreak*, Ext/EX.CL/Dec.1(XVI), 8 September 2014, para. 10 ii).

190 *Ibid*., para. 2.

191 *Revised Treaty of the Economic Community of West African States*, 24 July 1993, Article 3, 2373 UNTS 233, 238-239 [ECOWAS].

192 ECOWAS, 'ECOWAS member States pledge military medical personnel to bolster ebola fight', available at http://www.ecowas.int/ecowas-member-States-pledge-military-medical-personnel-to-booster-ebola-fight/ (last visited 1 August 2016).

193 African Development Bank, Ebola, available at http://www.afdb.org/en/topics-and-sectors/topics/ebola/ (last visited 1 August 1016); African Development Bank, Ebola Project Brief, 15 April 2015, available at http://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/Ebola_project_brief.pdf (last visited 1 August 2016).

D. Re-shaping the Framework During the Ebola-Outbreak 2014: A Summary of the Response

I. *Help as one* – A Unified Effort by the International Community?

Taking a look at UNMEER and the combined efforts of numerous actors, one is tempted to describe the international community's measures with regard to the Ebola-outbreak as unified answer to a common threat. Several institutions, among them universal organizations like the agencies of the World Bank Group as well as regional organizations such as the AU joined their powers and capacities to counter a common challenge under the leadership of the UN. As such, it was an interdisciplinary response, taking into account a vast array of factors and addressing them by the proper agencies.

It would be naive, however, to draw that conclusion. Even from the most important perspective – helping infected persons – the international response was rather slow, disorganized and at times even incompetent.[194] From within the WHO, voices criticized the organizations internal communication in the particular case as well as the appointments in the African office in general.[195] If the example of UNMEER will add some value to the UN, or if it will be just another brick in the UN's bureaucracy remains to be seen.

From a legal perspective this claim also does not sustain. True, the organizations and agencies acted within their respective mandates. As such, they provided personnel, medical expertise and equipment, funding and other support. They called on the private sector to contribute to the effort in general and on airlines and shipping companies in particular. The Security Council addressed the epidemic in a rather innovative way, in example by means of chapter VII *UN-Charter*.

Nonetheless, the *legal* response could have been more intense. More specifically, the Security Council missed an opportunity to act swiftly and effectively and re-shape international health law or at least facilitate its development. Once the Council had determined that the unprecedented extent of the Ebola outbreak in Africa constituted a *threat to international peace and security*,[196] it could have issued binding decisions under Article 41 and 42 *UN-Charter* and not mere recommendations under Article 40 *UN-Charter*. The need

194 Cf. the critical references cited in Meier & Mori, *supra* note 7, 105 and *High-level Panel*, *supra* note 1, 25, para. 40.

195 Cf. 'Bungling Ebola Documents', *supra* note 11.

196 SC Res. 2177, *supra* note 158, Preamble *para*. 5.

for effective action was evident, at least by the repeated calls of the Emergency Committee regarding Ebola to address border management, exit and entry screening as well as a lift to trade and travel bans. Given the fact that the majority among the UN member States was willing to deal with the crisis under chapter VII *UN-Charter*, including all permanent and elected members of the Security Council, binding measures seemed to be a viable option.

The Council could have used its far-reaching powers under Article 41, 42 *UN-Charter* in the following ways: For example, it could have authorized the deployment of troops in order to provide much needed staff for safe burials of victims or border management, in example, to conduct exit or entry screenings. Furthermore, it could have elevated the WHO's temporary recommendations as proposed by the Emergency Committee regarding Ebola to legally binding obligations, where applicable. Surprisingly, the *IHR (2005)* do not reference the Security Council in any way and neither did the Security Council establish any relations to the WHO.[197] Also, it could have decided that borders to the three most affected countries had to stay open in order to halt the isolation of these countries and communities and subsequent protests and violence, which challenged the three States. After all, all the factors that the members of the Security Council feared contributed to the likelihood of new civil wars in the region.[198]

Given the consent of the three most affected countries,[199] a binding resolution under chapter VII *UN-Charter* was probably not required to provide help in the aforementioned sense. But if the consent was so evident, there was also no need to make a determination under Article 39 *UN-Charter*. It seems as if the Council dared to open the door to chapter VII without actually entering it – a half-hearted resolution.

To be clear, the Security Council remained also on safe grounds when it based its determination under Article 39 *UN-Charter* not on the epidemic alone but on exacerbating factors in the region, such as political instability and mistrust against the respective governments, specifically on the security apparatus. In this sense, the general interpretation of Article 39 *UN-Charter* was not fundamentally altered.

Still, the experience with Ebola has already sparked a debate about future changes to the *IHR (2005)*, most prominently by an interdisciplinary research

197 Statement of the Representative of the AU António, *7502nd meeting*, *supra* note 11, 8.
198 Cf. *High-level Panel*, *supra* note 1, Recommendations 1, 6, 23.
199 Joint Letter, *supra* note 122.

group.[200] Just as after previous incidents,[201] the lack of compliance with the *IHR (2005)* and the lack of an effective enforcement mechanism is still an unresolved issue. Unfortunately, all efforts of reform are too late for the recent outbreak of the Zika-virus in Latin America and the Caribbean.[202]

II. Ignoring the Human Right to Health

Most appalling is the ignorance of the human right to health. As has been shown above, different actors have taken measures to combat the epidemic. They referred to diverse reasons for their actions, among them political and economic reasons as well as more altruistic aspects such as food shortages and stigmatization of nationals from the three most affected countries.[203] However, none of the above-mentioned actors referred to the human rights dimension as stated in Article 12 *ICESCR*. Neither the Security Council as such, which chose a rather traditional approach, nor the vast majority out of nearly 50 State representatives, who spoke during the discussion after the adoption of the resolution referred to a human right. Only one representative hinted at a human rights dimension[204] while all other participants were silent on that matter. Compared to classic examples of *threats to the peace*, as referenced by States,[205] human rights aspects seem to be of only marginal relevance. Likewise, also the General Assembly does not cite the human right to health in its key resolution 69/1.

If even UN-organs ignore the human rights dimension, it does not surprise that other institutions did not address this right as well. Consequently, neither the WHO's Director General nor the Emergency Committee regarding Ebola mentioned the human right to health. Keeping in mind the preamble of the *WHO-Constitution*, the Director General could have referred to this dimension as well. At least for the Emergency Committee, this lies outside of

200 S. Moon *et al*., 'Will Ebola change the game? Ten essential reforms before the next pandemic. The report of the Harvard-LSHTM Independent Panel on the Global Response to Ebola', 386 *The Lancet* (2015) 10009, 2204.

201 Condon & Sinha, *supra* note 35, 6; Silver, *supra* note 11, 234; C. Murray, 'Implementing the New International Health Regulations: The Role of the WTO's Sanitary and Phytosanitary Agreement', 40 *Georgetown Journal of International Law* (2009) 625, 627 *et seq*; Gostin, *supra* note 24, 359 *et seq*.

202 Cf. *High-level Panel*, *supra* note 1.

203 Cf. Statements in *7318th meeting of the Security Council*, UN Doc. S/PV.7318, 21 November 2014.

204 Statement by the Representative of Morocco Hilale, *7268th meeting*, *supra* note 130, 30.

205 Cf. *High-level Panel*, *supra* note 1, Recommendations 1, 6, 23.

their powers under *IHR (2005)*. Neither the World Bank Group nor the African Development Bank is mandated to address human rights issues. Yet the AU could have done so.

Overall, neither the individual human right to health nor a possible human right to public health has been advanced. States and international organizations have failed to address global health challenges by means of international law.[206] Even more disturbing, when WHO and UN evaluated their respective responses in the aftermath of the crisis,[207] no word was lost on the human rights dimension. With no time pressure and the possibility to take a step back and look at past actions, it would have been easy to take into account human rights.

Overall, the Ebola-outbreak did not help in reshaping the human right to health. For future cases, the human right to health in emergency situations, its applicability *ratione loci* and the central point of international cooperation[208] has not been shaped. With regard to Ebola, a chance was lost to further advance the right to health by itself and international health law by utilizing the human rights dimension.[209]

E. Conclusion: Raised Awareness and a New Approach to Threat to the Peace, but no News for the Human Right to Health

As Rieux forecasted in fiction, worldwide epidemics and pandemics of fatal diseases will occur in future real life scenarios.[210] Scenarios like the Ebola-outbreak 2014, affecting many communities, may in the future destabilize single countries or entire regions. International law will not stop a disease from spreading. However, a legal framework surrounds all efforts to counter a pandemic; the international community has many tools at hand. Some of them have been utilized in the Ebola-outbreak. Nevertheless, while there has been a more or less common international response from various actors, some tools

206 Already critical to the overall approach to the human right to health Meier & Mori, *supra* note 7, 121 *et seq*.

207 Cf., *High-level Panel*, *supra* note 1; WHO Director General, *WHO response in severe, large-scale emergencies*, A69/26, 6 May 2016.

208 Tobin, *supra* note 56, 368.

209 The human right as a catalyst is brought forward by Gostin, *supra* note 24, 243, 256 *et seq*.; The present author continues this approach, cf. Frau, *supra* note 174.

210 Statement of the UN Secretary General Special Envoy on Ebola Dr. D. Nabarro, *7502nd meeting*, *supra* note 11, 5; *High-level Panel*, *supra* note 1, 7.

were left aside. Most importantly, the Security Council remained behind its abilities. Institution wise, the fight opened collaborations and identified the need for a global and interdisciplinary strategy, taking into account diverse factors. Whether or not lessons were learned will be seen during the next pandemic. While the institutions more or less worked effectively together, another aspect of international law was ignored by all actors: Unfortunately, the human right to health was not a decisive factor during the crisis. Here, the international community failed to address a major issue of pandemics. In the end, the Ebola-outbreak helped to re-shape some parts of international health law. The human rights dimension, however, remains vague in the case of pandemics. For future scenarios, this is regrettable.

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The Use of Scholarship by the WTO Appellate Body

Sondre Torp Helmersen*

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* PhD Research Fellow, Department of Public and International Law, Faculty of law, University of Oslo. E-mail: s.t.helmersen@cantab.net. I thank Lorand Bartels, Geir Ulfstein, and Erlend Leonhardsen for comments on various versions of the text.

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Abstract

This article examines the use of scholarship by the WTO Appellate Body. While it is not possible to say definitively how the Appellate Body views the legal status of scholarship in WTO dispute settlement, its use of scholarship will in practice determine its status. The article identifies three overall trends: the Appellate Body's use of scholarship has declined, the Appellate Body uses scholarship mostly for matters of general international law (as opposed to WTO law), and the Appellate body has generally been careful in its use of scholarship. Possible explanations for these trends may include an increase in available precedents, the Appellate Body's specialized role, criticism of the Appellate Body, and its members' backgrounds.

A. Introduction

I. Topic and Outline

This article examines how the World Trade Organization (WTO) Appellate Body uses scholarship. The term is defined in chapter A.III below. The topic has been the subject of a short chapter in an edited volume[1] and brief chapters in general textbooks,[2] but no comprehensive study of it exists.

Scholarship seems to play an important practical role in international law generally.[3] This study focuses on whether, and how, this is true for the Appellate Body.

Studying the Appellate Body's use of scholarship is interesting for several reasons. Studying one aspect of the legal reasoning of a highly successful[4] international tribunal is interesting on an abstract level. Practically, how

1 E. de Brabandere, 'La doctrine en tant que source de droit et l'OMC', in Tomkiewicz, Garcia & Pavot (eds), *Les sources et les normes dans le droit de l'OMC* (2012), 209.

2 P. Van Den Bossche & W. Zdouc, *The Law and Policy of the World Trade Organization: Text Cases and Materials*, 3rd ed. (2012), 59; M. Matsushita, T. J. Schoenbaum & P. C. Mavroidis, *The World Trade Organization: Law, Practice, and Policy,* 2nd ed. (2006), 86.

3 E.g. M. Wood, 'Teachings of the Most Highly Qualified Publicists (Art. 38 (1) *ICJ Statute*)', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law Vol. IX* (2012), 783, 783, para. 3 calls it 'fundamental'.

4 E.g. P.-T. Stoll, 'World Trade Organization, Dispute Settlement', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International LawVol. X* (2012), 968, 968, para. 1; A. C. M. de Mestral, 'Dispute Settlement Under the WTO and RTAs: An Uneasy Relationship', 16 *Journal of International Economic Law* (2013) 4, 777, 778; B. Wilson, 'Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date', 10 *Journal of International Economic Law* (2007) 2, 397, 399.

the Appellate Body uses scholarship is useful to anyone who studies and/or argues over WTO law. The study could also say something about the status of scholarship in international law more generally, and be a basis for comparison of other international courts and tribunals.

The use of scholarship (in international law generally and by the Appellate Body specifically) can also be studied from other perspectives. For example, the use, or non-use, of scholarship can raise issues of intellectual property. An author whose work is used by a court without acknowledgement in the resulting judicial decision could claim to be victim of plagiarism. More indirectly, a judge who goes to great length to dig up references and refers to them in a judicial decision may feel similarly if a different judge uses those references without mentioning the judicial decision. Revealing such practices would require comparisons of the contents of judicial decisions with the contents of relevant scholarship and of other judicial decisions. Determining the legality of such practices is a matter of intellectual property law. These questions will not be pursued further in the present article.

This introduction is chapter A, and explains the article's topic and outline (chapter A.I), explains my methodology (chapter A.II) and the definition of *scholarship* that was used in the study (chapter A.III). Chapter B discusses the potential legal status of scholarship in WTO dispute settlement. The results of my study are presented in chapter E. These results are that the Appellate Body's use of scholarship has been declining (chapter C.I), that the Appellate Body mostly uses scholarship for questions of general international law, as opposed to WTO law (chapter C.II), and that the Appellate Body uses scholarship in a way that avoids controversy (chapter C.III). Chapter D tries to explain why the Appellate Body uses scholarship in the ways that it does. The conclusion in chapter E includes some final thoughts on the study's limitations and significance.

II. Methodology

I have read through all 110 Appellate Body reports that were available as of April 2014, starting with US – *Gasoline*[5] (1996) and ending with *Canada – Renewable Energy*[6] (2013). I used the English language versions of the official PDF

5 Report of the Appellate Body, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996.

6 Reports of the Appellate Body, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* and *Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R, WT/DS426/AB/R, 6 February 2013.

document available from the WTO's website.[7] I counted references to scholarship manually, noting them down in a separate document for later analysis.[8] The results are presented in nine tables, which are referred to throughout the article and attached at the end of it.

The analysis is part quantitative and part qualitative. For the quantitative studies, I used the following approach. If a work of scholarship is referred to multiple times in one paragraph, this is counted as a single reference. If it is referred to in multiple footnotes to a single paragraph, this is also counted as a single reference. If a work is referred to in both the text of and footnotes to a single paragraph, this is counted as a single reference. For the purposes of distinguishing between references in the text and footnotes (the subject of table 4), a paragraph that has references both in the text and in footnotes is counted as a reference in the text (since references in the text are the exception in Appellate Body reports).

That different Appellate Body reports have different lengths has not been adjusted for. Each report, regardless of length, presumably raised at least one appealable legal issue where scholarship could have been referred to.

The study is limited to the Appellate Body, meaning (among other things) that it does not include WTO panels. One reason for this is that the Appellate Body is a permanent organ, and thus presumably has a more deliberate, consistent, and far-sighted approach than the temporary panels.[9] Another reason is that panels are expected to and do follow the practice of the Appellate Body.[10]

7 WTO, *Appellate Body Reports* (2014), available at https//www.wto.org/english/tratop_e/dispu_e/ab_reports_e.htm (last visited 19 September 2016).

8 This approach is similar to M. Peil, 'Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice', 1 *Cambridge Journal of International and Comparative Law* (2012) 3, 136, 147-148; O. K. Fauchald, 'The Legal Reasoning of *ICSID* Tribunals – An Empirical Analysis', 19 *European Journal of International Law* (2008) 2, 301, 302; the approach also resembles a *citations analysis* (which is an examination of how many times a specific source is referred to by subsequent sources) as explained by e.g. R. Posner, 'An Economic Analysis of the Use of Citations in the Law' 2 *American Law and Economics Review* (2000) 2, 381, 382.

9 I. Van Damme, *Treaty Interpretation by the WTO Appellate Body* (2009), lxv; R. H. Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints', 98 *American Journal of International Law* (2004) 2, 247, 257.

10 Van Damme, *supra* note 9, lxv.

III. A Definition of Scholarship

1. Introduction

This article studies the use of *scholarship*. This term has no legal definition in international law. I intend my term *scholarship* to be synonymous with what is also referred to as *doctrine* and *scholarly writings*, as well 'teachings of […] publicists' in the International Court of Justice Statute[11] Article 38(1)(d).

The definition I adopt in this article is provisional (not indented as final) and instrumental (not an end in itself). In the present chapter I try to give final answers to the questions of classification that are raised by the Appellate Body' practice, but mainly because and to the extent that this is necessary in order to conduct a precise analysis.

The core of my definition of scholarship is books and articles, purporting to answer legal questions, being used when ascertaining the content of international law. The rest of this chapter discusses what such a definition may include (chapter A.III.2), and what it may exclude (chapter A.III.3), before concluding (chapter A.III.4).

2. What it May Include

My definition of *scholarship* will include texts written by bodies that are not controlled by States. The International Law Commission (ILC) is an important example (see table 6).[12] The ILC is a subsidiary organ of the United Nations (UN) General Assembly (UNGA),[13] which is composed of States. The members of the ILC are individuals. They are elected by States, but serve in

11 *Statute of the International Court of Justice*, 26 June 1945, 1 UNTS 993.

12 Wood, *supra* note 3, 11; A. Pellet, 'Article 38', in Zimmermann *et. al.* (eds), *The Statute of the International Court of Justice: A Commentary*, 2nd ed. (2012), 731, 870; I.A. Shearer, *Starke's International Law*, 11th ed. (1994), 44-45; P. Daillier, M. Forteau & A. Pellet, *Droit international public* (2009), 434-436; C. Parry, *The Sources and Evidences of International Law* (1965), 114; M. E. Villiger, *Customary International Law and Treaties* (1985), 79; B.G. Ramcharan, *The International Law Commission: Its Approach to the Codification and Progressive Development of International Law* (1977), 24.; M. N. Shaw, *International Law*, 6th ed. (2008), 112-113 and 119-121; G. Von glahn and L. Taulbee, *Law Among Nations: An Introduction to Public International Law*, 10th ed. (2012), 65, 70 write about the ILC in separate chapters from scholarship; I. Sinclair, *The International Law Commission*, 2nd Ed. (1987), 121 seems ambivalent as to whether ILC texts are scholarship.

13 ILC, *Introduction* (2014), http://legal.un.org/ilc/ilcintro.shtml (last visited 19 September 2016).

their individual capacity.[14] Thus its texts do not emanate from the States that its members represent.[15] ILC texts are sometimes 'taken note of' by the UNGA,[16] which at least means that the UNGA is aware of a text's existence, and may also indicate some form of tacit endorsement. In such cases the UNGA resolution will not be scholarship, but the original ILC text will still have emanated from the ILC and retains its status as scholarship.[17] An ILC text will also retain its status as scholarship even when it leads to the development of a treaty.[18] A State's comments on an ILC text are not scholarship, however.[19] The Appellate Body has referred to a text from the United Nations Commission on International Trade Law (UNCITRAL),[20] which is composed of States,[21] and thus does not produce scholarship.[22]

The definition includes scholarship commenting on historical law, if this is ultimately used to elucidate present law.[23] Also included is scholarship that

14 *Ibid.*

15 Villiger, *supra* note 12, 79.

16 E.g. GA Res. 56/83, UN Doc A/RES/56/83, 12 December 2001, para. 3 taking note of the *ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts,* Yearbook of the International Law Commission (2001), Vol. II, Part Two, 26.

17 *Survey of International Law in Relation to the Work of Codification of the International Law Commission: Preparatory work within the purview of Art. 18(1) of the International Law Commission–Memorandum submitted by the Secretary-General*, UN Doc A/CN.4/1/Rev.1, 10 February 1949, 16.

18 Peil, *supra* note 8, 150; ILC texts preparatory to the *VCLT* were referred to in Report of the Appellate Body, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, 4 April 2012, WT/DS406/AB/R, 92, Fn. 473; Reports of the Appellate Body, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States and European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador*, 26 November 2008, WT/DS27/AB/RW/US, WT/DS27/AB/RW2/ECU, 130, Fn. 468.

19 See e.g., in *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, 15 February 2002, 82, Fn. 257.

20 *Canada – Renewable Energy*, *supra* note 6, 97, Fn. 495.

21 UNCITRAL, *FAQ – Origin, Mandate and Composition of UNCITRAL* (2015), available at https://www.uncitral.org/uncitral/en/about/origin_faq.html (last visited 19 September 2016).

22 According to Wood, *supra* note 3, 13 such intra-governmental committees "may lie somewhere between" State practice and scholarship.

23 See e.g., Report of the Appellate Body, *United States – Section 211 Omnibus Appropriations Act of 1998*, 2 January 2002, WT/DS176/AB/R, 2 January 2002, 54, Fn. 122.

comments on the object and purpose of a rule, as long as this is used to ascertain the content of the rule.[24]

Similarly, scholarship that argues *lex ferenda* rather than *lex lata* will also be included in the definition if the scholarship is used to find the content of international law.[25]

The Appellate Body sometimes mentions that someone else has referred to scholarship, as opposed to referring to scholarship itself. It may mention references made a by a panel, by a party to the case, or by the Appellate Body itself[26]. For example, in *EC – Bananas*, the Appellate Body noted that "[t]he Complaining Parties refer to" an ILC text.[27] This can be called *indirect* references to scholarship, as opposed to regular *direct* references. Indirect references have some significance, but presumably give less importance to scholarship than references that the Appellate Body makes on its own initiative.

Scholarship about domestic (or *national* or *municipal*) legal systems has also been referred to by the Appellate Body. Such scholarship is included in my definition when it is used to ascertain the content of international law.[28] Domestic scholarship and domestic law may alternatively be used as a fact, in order to determine whether a member fulfils its WTO obligations.[29] Facts are not covered by the definition of scholarship, as explained in the paragraph below.

3. What it May Exclude

In the context of adjudication, law can be distinguished from facts. Many texts that are used by adjudicators supply only facts, and do not say what the law is. The Appellate Body has referred to external documents as the basis of facts

[24] See e.g., Report of the Appellate Body, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, 19 December 1997, 16, para. 41, Fn. 28.

[25] See e.g., Report of the Appellate Body, *United States – Final Anti-dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, 30 April 2008, 67, Fn. 313.

[26] See e.g., Report of the Appellate Body, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, 3 December 2007, 88, Fn. 426.

[27] Report of the Appellate Body, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, 9 September 1997, 37, Fn. 43.

[28] See e.g., Report of the Appellate Body, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, 25 April 1997, 14, Fn. 16.

[29] See e.g., it did in Report of the Appellate Body, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, 17 June 2011, 56, Fn. 218; *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, 24 February 2000, 9, para. 24; *US – Section 211 Appropriations Act*, *supra* note 23, 10, Fn. 37.

on many occasions. These are however, not scholarship.[30] Texts that supply what may be called evidence of law, such as treaty collections, reports of arbitrations without further analysis, and historical data on State practice and *opinio juris*, are not included in my definition of scholarship. This is distinct from the law regulating a tribunal's treatment of facts.[31]

Dictionaries are also excluded from my definition of scholarship.[32] They can say how words are customarily used, including words used in treaties. However dictionaries do not comment on the law as such. This is what distinguishes dictionaries from legal scholarship. My definition of scholarship will also exclude legal dictionaries, for the same reason.

Counsel pleadings are often cited in Appellate Body reports. They are, however, given on behalf of States. They will therefore not be seen as scholarship here.[33]

4. Conclusion

Under my definition of scholarship, the Appellate Body has cited scholarship a total of 159 times, in 29 of its 110 reports. This means that 26% of reports refer to scholarship, and the total average is 1.4 references per report. Since more than half of all contain zero references, the median number of references per report is zero. These numbers are summarised in tables 1 and 2.

B. The Legal Status of Scholarship in WTO Dispute Settlement

I. A Question Regulated by Law?

Law may be said to consist of legal rules that are derived from sources of law. What constitutes valid sources of law in a given legal system is itself usually governed by law. In international law the law governing the sources of law is mainly found in customary international law.

30 Peil, *supra* note 8, 149-150.

31 See e.g., Report of the Appellate Body, *Canada – Measures Affecting the Export of Civilian Aircraft*, 20 August 1999, WT/DS70/AB/R, 20 August 1999, 19, Fn. 55, 20, Fn. 58, Fn. 59, 57, Fn. 128.

32 Brabandere, *supra* note 1, 5-6, 8 distinguishes (legal) dictionaries from scholarship, but adds that the former may nonetheless be considered scholarship; Peil, *supra* note 8, 150-151 includes some dictionaries in his study.

33 Peil, *supra* note 8, 149.

This customary international law may extend to regulate the use of scholarship. If the use of scholarship is governed by such customary international law, there will be norms of customary international law saying whether, when, and how international lawyers may use scholarship when ascertaining the content of international law. These norms may oblige lawyers to use scholarship in certain ways, they may moreover prohibit certain other uses of scholarship, and they may leave yet other aspects of the use of scholarship to the individual lawyer's discretion. An alternative to the existence of such norms is that there is no regulation of the use of scholarship in international law. If there is no such regulation, lawyers will be free to (or not to) refer to scholarship when ascertaining the content of international law. They would still only be free in a legal sense, because there may still exist social and other guidelines outside international law on how international lawyers can or must use scholarship.

One indication that the use of scholarship is indeed governed by international law is that scholarship is mentioned in the *ICJ Statute* Article 38(1)(d), which qualifies scholarship as "subsidiary means for the determination of rules of [international] law" by the ICJ.[34] Many writers assume that the *ICJ Statute* Article 38(1) reflects customary international law.[35] If so, that Article 38(1)(d) mentions scholarship implies that the use of scholarship in international law is regulated by law. However answering the question conclusively would require a broader examination than what the present article attempts, covering more than just the practice of the Appellate Body. It would also be complicated by difficulty of precisely ascertaining the content of customary international law, and by the debates over the correct method for doing so.[36] Whether the use

[34] Matsushita, Schoenbaum & Mavroidis, *supra* note 2, 58-86; Fauchald, *supra* note 8, 301-302 use the term "interpretative elements".

[35] E.g. H. Charlesworth, 'Law-making and Sources', in J. Crawford & M. Koskenniemi (eds), *The Cambridge Companion to International Law* (2012), 187, 188-189; Shaw, *supra* note 12, 70; R. Jennings & A. Watts (eds), *Oppenheim's International Law – Volume 1: Peace, Introduction and Part 1* (1992), 24; V. D. Degan, *Sources of International Law* (1997), 5; M. Koskenniemi, 'Introduction', in M. Koskenniemi (ed.), *Sources of International Law* (2000), xi; R. Jennings, 'What Is International Law and How Do We Tell It When We See It?', in Koskenniemi, *ibid*., 27, 60 [Jennings, What is International Law]; O. Spiermann, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (2005), 58; R. McCorquodale, M. Dixon & S. Williams, *Cases and Materials on International Law*, 5th ed. (2011), 18.

[36] Issues include what counts as evidence of State practice, who must partake in practice and how long it must last, and the nature of *opinio juris*; also discussed e.g. by the ILC in *Second Report on Identification of Customary International Law*, UN Doc. A/CN.4/672, 22 May 2014, 18-62.

of scholarship is governed by international law will therefore not be discussed further in this article. In any event the question is ultimately not relevant to the status of scholarship in WTO dispute settlement, as outlined in chapter B.IV below.

II. The Applicability of the Law in WTO Dispute Settlement

International law is generally seen as a single legal system,[37] which the WTO treaties are part of.[38] Thus there is no separate set of *sources of WTO law*. There are only sources of international law, among which are the WTO treaties.[39]

[37] *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Yearbook of the International Law Commission (2006), Vol. II, Part Two, 157, para. 1; J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (2003), 9 [Pauwelyn, Conflict of Norms]; D. Palmeter, 'The WTO as a Legal System', 24 *Fordham International Law Journal* (2000) 444, 478 is undecided on whether the WTO as such should be considered a legal system; M. Payandeh, 'The Concept of International Law in the Jurisprudence of H.L.A. Hart', 21 *European Journal of International Law* (2011) 967, 995 concludes that international law should be called a legal system despite; H. L. A. Hart, *The Concept of Law*, 3rd ed. (2012), 232-327 apparently holding otherwise.

[38] G. Abi-Saab, 'The WTO dispute settlement and general international law', in R. Yerxa & B. Wilson (eds), *Key Issues in WTO Dispute Settlement: The First Ten Years* (2005) 7, 10; The WTO can be and has been called a "self-contained regime", see e.g. B. Simma & D. Pulkowski, 'Leges specalies and Self-Contained Regimes', in J. Crawford, A. Pellet & S. Olleson, *The Law of International Responsibility* (2010), 139, 155-158; However, the most common meaning of this term seems to be rather narrow, in that it denotes a treaty that derogates from the rules of general international law that regulate State responsibility see Simma & Pulkowski, *ibid.*, 142; Report of the Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.682, 13 April 2006, paras 124, 128 [ILC Study Group Report]; Slightly different definitions are found e.g. in D. Regan, 'International Adjudication: A Response to Paulus–Courts, Custom, Treaties, Regimes and The WTO', in S. Besson & J. Tasioulas (eds), *The Philosophy of International Law* (2010), 225, 232; J. Crawford, 'Chance, Order, Change: The Course of International Law', 365 *Recueil des cours* (2014) 1, 1, 212.

[39] Pauwelyn, *Conflict of Norms*, *supra* note 37, 25-26; D. Palmeter & P. C. Mavroidis 'The WTO Legal System: Sources of Law', 92 *American Journal of International Law* (1998) 3, 398; Van Den Bossche & Zdouc, *supra* note 2, 60; J. H. Jackson, *The World Trading System* (1997), 25; D. M. McRae, 'The WTO in International Law: Tradition Continued or New Frontier?', 3 *Journal of International Economic Law* (2000), 1, 27, 28-30; J. Pauwelyn, 'Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach', 94 *American Journal of International Law* (2000) 2, 335, 336.

However, not all international law is necessarily applicable by WTO tribunals. Many tribunals have clauses in their constitutive document that regulate what law they may apply. WTO tribunals, however, do not have a general *applicable law clause* similar to, for example, the *ICJ Statute* Article 38(1), the *ICSID Convention*[40] Article 42(1), and the *UNCLOS*[41] Article 293(1).[42] The *Dispute Settlement Understanding* (DSU)[43] Articles 1.1, 3.2, and 19.2 make it clear that the WTO tribunals are to apply the WTO 'covered agreements', and not 'add to or diminish' their rights and obligations. Beyond this, however, the regulation of applicable law in WTO dispute settlement is unwritten.

The applicability of rules that, with the existence of a conflict rule such as the *VCLT*[44] Article 30 or the *UN Charter*[45] Article 103, could override WTO rules is debated: some hold that these are applicable,[46] others that they are not.[47] Rules that would not override WTO rules are generally seen as applicable unless

40 *Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 159.*

41 *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3.

42 Van Damme, *supra* note 9, 13.

43 *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 15 April 1994, 1869 UNTS 401.

44 *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331.

45 *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

46 Pauwelyn, *Conflict of Norms*, *supra* note 37, 491; J. Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?', 95 *American Journal of International Law* (2001) 3, 535, 560-565 [Pauwelyn, The Role of Public International Law in the WTO]; E. Vranes, 'Jurisdiction and Applicable Law in WTO Proceedings', 48 *German Yearbook of International Law* (2005) 265, 288-289.

47 J. P. Trachtman , 'Book Review: "Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law" By J. Pauwelyn', 99 *American Journal of International Law* (2005) 4, 855, 858; J. P. Trachtman, 'The Domain of WTO Dispute Resolution', 40 *Harvard International Law Journal* (1999) 2, 333, 347-348; G. Marceau, 'A Call for Coherence in International Law: Praises for the Prohibition Against 'Clinical Isolation' in 'WTO Dispute Settlement', 33 *Journal of World Trade* (1999) 5, 87, 113; G. Marceau 'WTO Dispute Settlement and Human Rights', 13 *European Journal of International Law* (2002), 4, 753, 778 [Marceau, Human Rights]; Report of the Appellate Body, *Mexico – Soft Drinks*, 56 , 78 may support this view; P. C. Mavroidis, 'No Outsourcing of Law? WTO Law as Practiced by WTO Courts', 102 *American Journal of International Law* (2008) 3, 421, 439 finds it telling that no WTO tribunal has applied such rules as defences; G. Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and other Treaties', 35 *Journal of World Trade* (2001), 6, 1081, 1107-1108 would allow WTO tribunals to declare that a WTO rule is superseded by another rule, but no more.

they are derogated from by WTO rules.[48] Thus, if general international law includes norms regulating scholarship (see chapter B.I above), their applicability in the WTO dispute settlement will depend on whether the WTO has its own, *lex specialis*, regulation of scholarship.

As will be elaborated in chapter B.IV below, determining this is difficult. Such a determination will not be attempted in this article, but the uncertainty will not undermine the conclusions reached about the status of scholarship in WTO dispute settlement.

III. The Potential Role of Scholarship

Scholarship is, like judicial decisions, generally seen as not containing rights or obligations in themselves.[49] It is rather seen as an aide in determining the contents of *principal* (as opposed to subsidiary) means for the ascertainment of international law, such as treaties and customary international law.[50] Scholarship and (especially) judicial decision can nonetheless have a notable influence on the outcome of a case,[51] although this will not necessarily be reflected in the text of

48 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), Advisory Opinion, ICJ Reports 1971, 16, 47 para. 96; *Case Concerning the Factory at Chorzów*, PCIJ Series A, No. 9 (1927), Merits, 29; For the WTO, Van Damme, *supra* note 9, 16-19; ILC Study Group Report, *supra* note 38, 169; Pauwelyn, *Conflict of Norms*, *supra* note 37, 560-561.

49 E.g. Peil, *supra* note 8, 137-138; G. J. H. Van Hoof, *Rethinking the Sources of International Law* (1983), 169, 176; Koskenniemi, *supra* note 35, xi11; P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th ed. (1997), 36; G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, 3rd ed. (1957), 26-28; G. Schwarzenberger, 'The Inductive Approach to International Law', 60 *Harvard Law Review* (1947) 4, 539, 551 [Schwarzenberger, The Inductive Approach]; G. Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law', in *F. M. van Asbeck et. al.* (eds), *Symbolae Verzijl* (1958) 153, 157; G. Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law', 92 *Recueil des Cours* (1957) 1, 97. Most international law textbooks discuss scholarship in a chapter on "The Sources of International Law" (or something similar).

50 Peil, *supra* note 8, 139-142; Malanczuk, *supra* note 49, 51-52; H. Thirlway, 'The Sources of International Law', in M. D. Evans (ed.), *International Law*, 3rd ed. (2010), 95, 110; M. Dixon, *Textbook on International Law*, 7th ed. (2013), 49; Daillier, Forteau & Pellet, *supra* note 12, 853-854; M. O. Hudson, *The Permanent Court of International Justice* 1920-1942 (1943), 612; M. Lachs, 'Teachings and Teaching on International Law', 151 *Hague Recueil* (1976) 3, 161, 169; S. Rosenne, *Practice and Methods of International Law* (1984), 119; S. Rosenne, *The Law and Practice of the International Court, 1920-2005: Vol. III*, 4th ed. (2006), 1551.

51 Jennings, *What Is International Law*, *supra* note 35, 178.

a decision.[52] This article examines the Appellate Body's use of scholarship, and uses it to infer conclusions about the extent and nature of such influence by scholarship in WTO dispute settlement.

This influence on the Appellate Body's conclusions about the content of international law can have a variety of bases. It is possible, at least in theory, to distinguish between two categories: legal and non-legal influence. Scholarship has legal influence when its use is seen as regulated by law and it is seen as having a legally mandated *weight* in the outcome of legal questions. Non-legal influence is any other kind of influence that scholarship has, in practice, on how a legal question is considered and answered. Without a clear view of whether the use of scholarship by the WTO Appellate Body is regulated by law, and the nature and content of this law, it is difficult to distinguish between these forms of influence when examining the Appellate Body's practice. However, as outlined in chapter B.IV below, my examination of the Appellate Body's use of scholarship will nonetheless yield conclusions about the status of scholarship in WTO dispute settlement.

IV. The Appellate Body Has the Final Word

The Appellate Body does not specify whether its use of scholarship is based on any legal regulation, and if so whether this legal regulation is general or specific to the WTO. When the Appellate Body uses scholarship, it may intend one of at least four things:

1. It uses general customary law on the use of scholarship.
2. It uses *lex specialis* customary law on the use of scholarship (the Appellate Body cannot create such a *lex specialis* rule, but can act as if one exists).
3. It assumes that WTO agreements (implicitly) give it the competence to create its own law on the use of scholarship.
4. It assumes that no law regulates its use of scholarship.

The Appellate Body's decisions are treated as *de facto* precedents by future WTO tribunals, even though there is no *de jure* rule of precedent (neither for Appellate Body, panel, nor Dispute Settlement Body decisions).[53]

[52] H. Thirlway, *The Sources of International Law* (2014), 127.

[53] R. Bhala, 'The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)', 14 *American University International Law Review* (1999) 4, 845, 936-941; R.

In addition to being treated as precedents, Appellate Body decisions are in practice not subject to review. The Dispute Settlement Body can by consensus decide not to adopt Appellate Body decisions (DSU Article 17.14), but this has never happened.

This means that, for practical purposes, regardless of which (if any) of the four possible intentions mentioned above the Appellate Body has adopted, it will have the final word on the status of scholarship in WTO dispute settlement. This means that the present study of the Appellate Body's use of scholarship should be sufficient to determine the status of scholarship in WTO dispute settlement, regardless of underlying uncertainties in the general international law and the Appellate Body's approach to it.

C. Results

I. The Use of Scholarship Has Declined

1. Introduction

One general trend in the Appellate Body's use of scholarship seems to be that the importance of scholarship to the Appellate Body has been decreasing.[54] This is shown in several ways:

- The number of references to scholarship per year has generally decreased over time (chapter C.I.2).
- The Appellate Body members that were inclined to cite scholarship were mostly appointed in its early days, and are no longer members (chapter C.I.3).
- The relative share of indirect references (see chapter A.III.2) has generally increased over time (chapter C.I.4).

Bhala, 'The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)', 9 *Journal of Transnational Law and Policy* (1999) 1, 1; M. Crowley & R. Howse, 'US – Stainless Steel (Mexico)', 9 *World Trade Review* (2010) 1, 117, 126; Possible reasons for development of *de facto* doctrines of precedent in international tribunals are discussed by H. G. Cohen, 'Theorizing Precedent in International Law', in A. Bianchi, D. Peat & M. Windsor (eds), *Interpretation in International Law* (2015), 268.

[54] Matsushita, Schoenbaum & Mavroidis, *supra* note 2, 86 draw the opposite conclusion: "references [to scholarship], in the early WTO years were rare. The quantity of references has increased over the years […]".

2. Fewer Cases with References

This study examines 110 Appellate Body reports, of which 29 (26%) cite scholarship. The first report was given in 1996, and new ones have been given every year since. The Appellate Body's references to scholarship are unequally distributed over its history.

As can be seen it table 1, in the four years from 1996 to 1999, at least 38% of Appellate Body reports cited scholarship. In the 14 years since, only two years (2004 and 2009) have reached at least this number. The overall trend is that gradually fewer cases have cited scholarship.

When looking at the number of references to scholarship (as opposed to the number of reports referring to scholarship), the trend is less clear (see table 2). The five cases with the highest number of references are US – *Anti – Dumping and Countervailing Duties (China)*[55] (31 references), EC – *Chicken Cuts*[56] (27 references), US – *Shrimp*[57] and *EC – Hormones*[58] (15 references each), and *Japan – Alcoholic Beverages II*[59] (11 references). While three of these are from the first three years of the Appellate Body's operation, the two highest on the list are newer, from 2005 and 2010 respectively.

The high number of references in *EC – Chicken Cuts*[60] and *US – Anti-Dumping and Countervailing Duties (China)*[61] naturally affects the average number of citations per report by year (table 2). The four years from 1996 to 1999 saw between 5.8 and 1.9 references to scholarship per report on average. The only later years with numbers above 1.9 are 2005 and 2010, with averages of 2.9 and 10.33 references respectively.

A general trend thus seems to be that the four first years of the Appellate Body's operation saw a more consistently high number of references to scholarship, while later years have consistently lower numbers except for two *outlier* cases.

55 Report of the Appellate Body, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, 11 March 2011, WT/DS379/AB/R.

56 Report of the Appellate Body, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, 12 September 2005, WT/DS269/AB/R, WT/DS286/AB/R.

57 Report of the Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, 12 October 1998, WT/DS58/AB/R.

58 Reports of the Appellate Body, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, 16 January 1998, WT/DS26/AB/R, WT/DS48/AB/R.

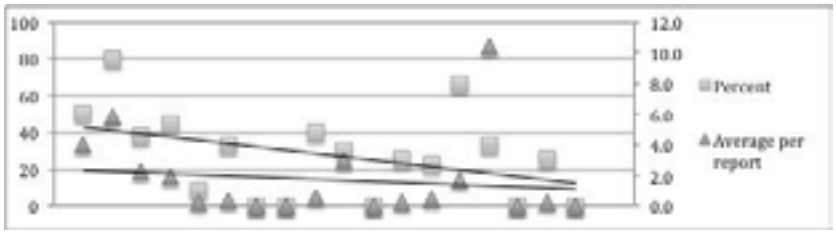
59 Reports of the Appellate Body, *Japan – Taxes on Alcoholic Beverages*, 4 October 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R.

60 *EC – Chicken Cuts*, *supra* note 56.

61 *US – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, *supra* note 55.

The overall conclusion is that, even though the number of references varies greatly from year to year, and the pattern is far from clear, references to scholarship seem to have become rarer over time

This can be illustrated with the following graph (with trend lines):



3. Changing Membership

An analysis of references by individual Appellate Body members shows a similar trend. Each Appellate Body member has referred to scholarship in between 0 and 70% of the reports they have contributed to. The average number of references per report a member has contributed to vary from 0 to 4.3 between different members. This is illustrated Table 5.

The Appellate Body has 24 current and former members.[62] 23 of them have contributed to at least one Appellate Body report. Those 23 were appointed in 1995 (7 members), 2000 (3 members), 2001 (3 members), 2003 (1 member), 2006 (1 member), 2007 (2 members), 2008 (2 members), 2009 (2 members), and 2011 (2 members).

Among current and former Appellate Body members, four have referred to scholarship in more than 40% of their reports, while 11 have referred to scholarship in 20% or less of their reports. Of the four members with more than 40%, three were among the seven appointed in 1995. Of the 11 members with 20% or less, none were among those seven. Thirteen Appellate Body members have an average of more than one reference to scholarship per report, while the remaining ten have less than one. Of the former thirteen, ten were appointed in 2001 or earlier, and the group includes all seven original members. Thus the ten members with less than one reference on average were all appointed in 2000 or later.

62 WTO, 'Appellate Body Members' (2015), available at https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm (last visited 19 September 2016).

The members can be divided into three chronological groups: Those appointed in 1995 (7 members), those appointed in 2001-2003 (7 members), and those appointed in 2006-2012 (9 members). As shown in table 5, the share of reports with references to scholarship dropped from 37% for the first group to 19% and 21% respectively for the last two. The average number of references per report was 2 for the first group, 0.8 for the second, and 1.7 for the third.

These findings reinforce the overall impression that the importance of scholarship in Appellate Body reports has been declining.

4. More Indirect References

Of the Appellate Body's 159 references to scholarship, 58, or 36%, have been *indirect*. This is illustrated in table 3. As explained in chapter A.III.2 above, indirect references mean that the Appellate Body merely refers to the fact that someone else has referred to scholarship, rather than referring to scholarship itself. The relative share of indirect citations compared to direct citations has increased over time.

Of the 12 years after 2001, all but two (2008 and 2012) have a majority of indirect references. By contrast, in the six years prior to 2002, no year had a majority of indirect references, and four years had no indirect references. This means that indirect references have been far more prevalent in the later parts of the Appellate Body's existence.

As indirect references are presumably less significant than direct ones (see *supra* chapter A.III.2), the increasing share of indirect references to scholarship reinforces the impression of scholarship's declining importance to the Appellate Body.

II. Scholarship is Used Mostly for General International Law

1. Generally

The Appellate Body can, and sometimes must, use various general rules of international law, as opposed to WTO-specific law (see *supra* chapter B.II). One trend in the Appellate Body's use of scholarship is that it mostly uses scholarship to determine this general international law.[63] As table 7 shows, 87% of the Appellate Body's references to scholarship have been used to answer questions of general international law, as opposed to 13% for WTO law. Moreover, the

[63] Brabandere, *supra* note 1, 6-8; Van Den Bossche & Zdouc, *supra* note 2, 317; Fauchald, *supra* note 8, 281.

scholarship references connected to WTO law mostly came early in the Appellate Body's existence. Fourteen of the 21 references to WTO were made in the four years prior to 2000, compared to only seven in the following 14 years.

The rest of this chapter describes the specific areas of general international law that the Appellate Body has used scholarship to elucidate.

2. Interpretation and Other Treaty Law

Many of the Appellate Body's references to scholarship concern treaty interpretation. Under the DSU Article 3.2, WTO agreements are to be interpreted using 'customary international law of treaty interpretation'. The Appellate Body has largely used this law,[64] and used scholarship when ascertaining it.[65] Numerically, 71 of the Appellate Body's 159 references to scholarship have concerned treaty interpretation (see table 7). This is a substantial plurality of 44.7%, nearly half of all references.

The Appellate Body has used scholarship to establish the following:

- The *VCLT* Article 31(1)[66] and Article 32[67] as customary law.
- The relationship between Article 31 and 32.[68]
- The scope of Article 31(1)[69] and Article 32[70].
- The primary role of party intention.[71]
- That an interpretation must not render a term meaningless.[72]

64 Van Damme, *supra* note 9, 379-383 notes that it has put particular emphasis on context and effectiveness.

65 Brabandere, *supra* note 1, 8-10; Fauchald, *supra* note 8, 352 finds the same for *ICSID* tribunals between 1998 and 2006.

66 *US – Gasoline*, *supra* note 5, 17, Fn. 34.

67 *Japan – Alcoholic Beverages II*, *supra* note 59, 9, Fn. 17.

68 Reports of the Appellate Body, *European Communities – Customs Classification of Certain Computer Equipment*, 5 June 1998, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, 31, Fn. 64, 32, Fn. 65.

69 *EC – Chicken Cuts*, *supra* note 56, 100, Fn. 448.

70 *EC – Chicken Cuts*, *supra* note 56, 27, Fn. 147, 116, Fn. 557, Fn. 558.

71 *EC – Chicken Cuts*, *supra* note 56, 69, Fn. 343; The ICJ made the same point in *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment*, ICJ Reports 2009, 213, 31, para. 58.

72 *US – Gasoline*, *supra* note 5, 23, Fn. 45.

- To elaborate the role of object and purpose (see Article 31(1)),[73] including the object and purpose of a treaty as a whole.[74]
- That an interpretation should consider the treaty as a whole.[75]
- The concept of effectiveness.[76]
- The role[77] and meaning[78] of 'subsequent practice' (see Article 31(3)(b)).
- The role[79] and meaning[80] of 'subsequent agreements' (see Article 31(3) (a)).
- The meaning of 'relevant rules of international law' (see Article 31(3) (c)).[81]
- The concept of in "*dubio mitiu*".[82]
- The concept of evolutive interpretation.[83]
- The *principle of acquiescence*.[84]

The Appellate Body has also used scholarship a further two times to establish other customary rules of treaty law.[85]

3. State Responsibility

The responsibility of States for internationally wrongful acts is another part of general international law that the Appellate Body has applied. The Appellate

73 *Japan – Alcoholic Beverages II*, *supra* note 59, 10, Fn. 20.
74 *US – Shrimp*, *supra* note 57, 42, Fn. 83.
75 Report of the Appellate Body, *Japan – Measures Affecting Agricultural Products*, 22 February 1999, WT/DS76/AB/R, 26, Fn. 44.
76 *Japan – Alcoholic Beverages II*, *supra* note 59, 11, Fn. 21; *US – Shrimp*, *supra* note 57, 50, Fn. 116.
77 *Japan – Agricultural Products II*, *supra* note 75, 19-20, Fn. 24-26.
78 *EC – Chicken Cuts*, *supra* note 56, 100, Fn. 485, Fn. 489.
79 *US – Clove Cigarettes*, *supra* note 18, 92, Fn. 473.
80 *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador and European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, *supra* note 18, 130, Fn. 468.
81 *US – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, *supra* note 55, 119, Fn. 218.
82 *EC – Hormones*, *supra* note 58, 64, Fn. 154.
83 *US – Shrimp*, *supra* note 57, 48, Fn. 109.
84 *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, 7 April 2005, WT/DS285/AB/R, 62, Fn. 255.
85 *EC – Bananas*, *supra* note 27, 9, Fn. 43; Report of the Appellate Body, *Canada – Patent Term*, WT/DS170/AB/R, 18 September 2000, 22, Fn. 50 both about the *VCLT* Article 28.

Body has frequently referred to scholarship in this regard: 25% of the Appellate Body's references to scholarship have involved questions of responsibility. Most of the references have been to the ILC's *Responsibility of States for Internationally Wrong Acts*[86]. The Appellate Body can use texts such as this in at least three different ways:

- They can be used as interpretive factors when interpreting WTO agreements.
- Alternatively, they can be used more indirectly, to establish customary international law, which is then used to interpret WTO agreements.
- Finally, they can be used to establish customary international law that is applied directly in a dispute.

As will be shown below, the Appellate Body has so far only used them in the first and second way. The third approach should also be permissible to the extent it does not conflict with any existing WTO law. If at least some of the topics covered by a text are not regulated by WTO-specific law, the third approach should be permissible as well.[87]

The largest subgroup of references to scholarship in the field of responsibility concerns the determination of the legal status of the ILC's *Responsibility of States for Internationally Wrong Acts*. So far, this has been the subject of 22 references (13.8% of the total). All 22 references stem from *US – Anti-Dumping and Countervailing Duties (China)*,[88] where various parties discussed whether the articles reflected customary law, although the Appellate Body did not find it necessary to decide the question.[89]

Attribution of acts to WTO members is the subject of 12 references (7.5% of the total). The Appellate Body has used international law textbooks to establish the general customary international law rule that a State is responsible for the acts of its organs.[90] It has used the ILC's *Responsibility of States for*

86 GA Res. 56/83, *supra* note 16.

87 Van Damme, *supra* note 9, Fn. 16-19; ILC Study Group Report, *supra* note 38, 90, para.169; Pauwelyn, 'The Role of the WTO in Public International Law', *supra* note 46, 560-561.

88 *US – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, *supra* note 55, 16-18, paras 36-39, 41, Fn. 140-146, 67, Fn. 148, 125, Fn. 236, 128, Fn. 248, 130, Fn. 257, 132, Fn. 268, 146, Fn. 306, 147, Fn. 312-313, Fn. 315-316.

89 *US – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, *supra* note 55, 119 -123, paras 309-317.

90 *US – Shrimp*, *supra* note 57, 71, Fn. 177.

Internationally Wrong Acts Article 4-8 to interpret the term public body in Article 1.1(a)(1) of the Agreement on Subsidies and Countervailing Measures[91],[92] and has briefly referred to parties' citations of the ILC's Responsibility of States for Internationally Wrongful Acts Article 4[93] and Article 8[94].

Four references (2.5% of the total) have concerned what constitutes a breach of a WTO obligation. The references were all indirect, with parties citing the ILC's *Responsibility of States for Internationally Wrongful Acts* Article 2[95] and 13-15[96] to support their arguments.

A further two cases (1.3% of the total) have referred to the proportionality requirement for countermeasures found in the ILC's *Responsibility of States for Internationally Wrongful Acts* Article 51, which the Appellate Body took to reflect customary international law, which was it in turn used to interpret the *Agreement on Textiles and Clothing*[97] Article 6.4[98] and the *Agreement on Safeguards*[99] Article 5.1[100].

4. Burden of Proof and Other Questions of Evidence

The Appellate Body has also referred to scholarship when examining questions of evidence, especially those involving the burden of proof. This has been the subject of 12 references to scholarship (8% of the total). All but one

91 *Agreement on Subsidies and Countervailing Measures*, 15 April 1994, 1869 UNTS 14.

92 *US – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, *supra* note 55, 10, para. 22, 16, 18, para. 35, para. 40, 146, Fn. 305, Fn. 309, 147, Fn. 311, Fn. 314, Fn. 316.

93 Report of the Appellate Body, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, 18 August 2009, 77, Fn. 466.

94 *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, 27 June 2005, 23, Fn. 104, para. 69.

95 *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW, 14 May 2009, 38, Fn. 136.

96 *US – Zeroing (EC) (Article 21.5 – EC)*, *supra* note 95, Ibid, 59, Fn. 199, para. 130; *US – Zeroing (Japan) (Article 21.5 – Japan)*, *supra* note 93, 29, para. 58, 44, Fn. 150, 113, Fn. 364.

97 *Agreement on Textiles and Clothing*, 15. April 1994, 1868 UNTS 14.

98 Report of the Appellate Body, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan – AB-2001-3*, WT/DS192/AB/R, 8 October 2001, 70, Fn. 90.

99 *Agreement on Safeguards*, 15 April 1994, 1869 UNTS 154.

100 *US – Line Pipe*, *supra* note 19, 82, para. 259, Fn. 255.

involved the general rule that the claimant has the burden of proof.[101] The last reference was used to establish that it was permissible to draw inferences from a party's refusal to submit evidence.[102]

Evidence is the only field where the Appellate Body has referred to domestic scholarship to ascertain international law (as described in chapter A.III.2). It has referred to domestic scholarship eight times.[103]

5. Other General International Law

The Appellate Body has also used scholarship when tackling certain other general international law matters, with a total of 13 references (8% of the total).

International environmental law was the subject of eight references. In *EC – Hormones*[104], the Appellate Body referred to scholarship when discussing the precautionary principle, but did not conclude whether it was customary law, or whether it would have overridden the *WTO Agreement on the Application of Sanitary and Phytosanitay Measures* (*SPS Agreement*)[105] Article 5.1 and 5.2 if it were.[106] In *US – Shrimp*, an international law book was used to elaborate the general international law concept of sustainable development, as referred to in the Preamble of the WTO Agreement[107].[108]

The other five references concerned the treatment of domestic law in international law,[109] the principle of good faith or *abus de droit*,[110] and consistency as an argument in favour of *stare decisis*.[111]

101 *Canada – Aircraft*, *supra* note 31, 19, Fn. 55, 20, 58-59; *US – Wool Shirts and Blouses*, *supra* note 28, 14, Fn. 15-16.

102 *Canada – Aircraft*, *ibid.*, 57, Fn. 128.

103 All references were in *US – Wool Shirts and Blouses*, *supra* note 28, 14, Fn. 16.

104 *EC – Hormones*, *supra* note 58.

105 *The WTO Agreement on the Application of Sanitary and Phytosanitary Measures*, 14 April 1994, 1867 UNTS 493.

106 *EC – Hormones*, *supra* note 58, 45, Fn. 92; Palmeter & Mavroidis, *supra* note 39, 65.

107 *Agreement establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 154.

108 *US – Shrimp*, *supra* note 57, 48, Fn. 107.

109 *India – Patents (US)*, *supra* note 24, 23, Fn. 52.

110 *US – Shrimp*, *supra* note 57, 62, Fn. 156; *Brazil – Retreaded Tyres*, *supra* note 26, 97, Fn. 426.

111 *US – Stainless Steel (Mexico)*, *supra* note 25, 67, Fn. 313.

III. Careful Use of Scholarship

1. Introduction

Another overall trend in the Appellate Body's use of scholarship is an apparent tendency to be careful. The following elements of this are discussed in this chapter:

- The Appellate Body uses a timid approach when referring to scholarship (chapter C.III.2).
- The Appellate Body has referred to an uncontroversial selection of scholarship (chapter C.III.3).
- The Appellate Body has used scholarship mostly for conventional tasks (chapter C.III.4).
- Rather than using scholarship as support for going beyond institutional constraints, the Appellate Body has used scholarship as a basis for deferring to such constraints (chapter C.III.5).

2. Timid Approach

The Appellate Body seems to use a rather timid approach when referring to scholarship.[112]

Chapter C.I.4 noted how 36% of the Appellate Body's references to scholarship have been indirect, and that the number seems to have increased over time. Indirect references can be said to be less bold than direct references.

Moreover, 122 (77%) of the Appellate Body's references to scholarship are found in footnotes. Only 37 references have been in the text of a report, and 30 of those are from a single report (*US – Anti-Dumping and Countervailing Duties (China)*) References in footnotes are often supporting arguments, used (merely) to support the primary arguments made in the main text. Thus, even when references to scholarship are direct (as opposed to indirect), scholarship mostly does not seem to have been part of the Appellate Body *discussions* of relevant law, only support for its *conclusions*.

The Appellate Body also mostly refers to scholarship without referring to scholarship that opposes its conclusions, and without mentioning nuances or contrasting arguments within a given work. The Appellate Body generally

[112] Fauchald, *supra* note 8, 352 notes the opposite with regard to *ICSID* tribunals between 1998 and 2006, which more often than not used scholarship as "an essential interpretive argument".

does not discuss or even highlight the scholarship's views or conclusion, its main approach is merely to attach a plain footnote with scholarship references at the end of its own conclusions. (An exception from this is its discussion of the precautionary principle in *EC – Hormones*.[113])

3. Well-known Authors with Government Links

A further indication of the Appellate Body's careful attitude to scholarship is shown by the kinds of scholarship it refers to.

Many of the works that the Appellate Body refers to are old, well-known, and relatively uncontroversial general international law textbooks. Its most cited non-ILC work is Ian Sinclair's *Vienna Convention on the Law of Treaties*[114], which has been cited 14 times.[115] Then comes the following:

- The 1992 edition of Oppenheim's International Law[116] with ten citations.[117]
- Mustafa Kamil Yasseen's L'interprétation des traités d'après la Convention de Vienne sur le Droit des Traités[118] with nine citations.
- Ian Brownlie's Principles of Public International Law[119] with five citations.[120]
- Eduardo Jiménez de Aréchaga's International Law in the Past Third of a Century[121] with four citations.
- Dominique Carreau's Droit International[122] with four citations.

113 *EC – Hormones*, *supra* note 58, 45, para. 123, Fn. 92.

114 Sinclair, *supra* note 12.

115 *Japan – Alcoholic Beverages II*, *supra* note 59, 10, Fn. 20, 11-12, Fn. 24-26; *EC – Computer Equipment*, *supra* note 68, Fn. 65; *US – Shrimp*, *supra* note 57, 42, Fn. 83, 48, Fn. 109; *Japan – Agricultural Products II*, *supra* note 75, 26, Fn. 44; *EC – Chicken Cuts*, *supra* note 56, 7, Fn. 36, 27, Fn. 147, 29, Fn. 157, 36, Fn. 192, 100, Fn. 448, 113, Fn. 542, 114, Fn. 557-558, 119, Fn. 572.

116 Jennings & Watts, *supra* note 35.

117 This work ranks sixth for citations by the ICJ according to Peil, *supra* note 8, 158.

118 M. K. Yasseen, 'L'interprétation des traités d'après la convention de Vienne sur le droit des traités', 151 *Recueil des Cours de l'Académie de Droit International* (1976) 3, 3.

119 I. Brownlie, *Principles of Public International Law*, 4th ed. (1990), 5th ed. (1998) and 6th ed. (2003).

120 These works rank ninth for citations by the ICJ according to Peil, *supra* note 8, 159.

121 E. J.de Aréchaga's 'International Law in the Past Third of a Century', 159 *Recueil de Cours* (1978) 1, 1.

122 D. Carreau, *Droit International*, 3rd ed. (1991), 4th ed. (1994).

- Anthony Aust's Modern Treaty Law and Practice[123] with three citations.
- Two works by John H. Jackson,[124] with three citations between them.
- Mojtaba Kazazi's Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals[125] with three citations.

In addition, nine authors have been cited twice, and 31 authors have been cited once.

Moreover, many of the authors that have been cited the most by the Appellate Body have connections with governments. There are ten authors who have been cited more than twice. Three of them (Watts, Sinclair, and Aust) have had long careers at the United Kingdom's Foreign and Commonwealth Office. Four (Brownlie, Aréchaga, Sinclair, and Yasseen) have been members of the International Law Commission. Some, especially Brownlie, Watts, Jennings, and Kazazi have been counsel for various governments in cases before the International Court of Justice (ICJ) and elsewhere.

A large and increasing number of references to ILC texts is also noticeable in the Appellate Body's use of scholarship.[126] As shown in table 6, 47 (30%) of the Appellate Body's references to scholarship are to ILC text, and 41 of these have come in the nine years since 2005 (as opposed to six in the nine years before 2005). As noted in chapter A.III.2, the ILC is part of the UN and consists of experts nominated by States. While ILC texts should be considered scholarship, their drafting is more influenced by States than is the writing of the average academic text. Thus ILC texts can also be said to have connections with governments.

123 A. Aust, *Modern Treaty Law and Practice* (2000).

124 J. H. Jackson, *World Trade and the Law of GATT* (1969); J.H. Jackson & S.P Croley, 'WTO Dispute Panel Deference to National Government Decisions, The Misplaced Analogy to the U.S. Chevron Standard-of-Review Doctrine', in E.-U.Petersmann (ed.), *International Trade Law and the GATT/WTO Dispute Settlement System* (1997), 185.

125 M. Kazazi, *Burden of Proof and Related Issues* (1996).

126 Pellet, *supra* note 12, 870 and Peil, *supra* note 8, 152 note a similar trend in the ICJ; Fauchald, *supra* note 8, 352 finds the opposite in *ICSID* tribunal decisions between 1998 and 2006.

4. Conventional Uses

It is possible to classify the Appellate Body's references to scholarship according how the scholarship was used.[127] As is shown in table 8, in most instances Appellate Body has used scholarship to justify either its assumption that a given rule of customary international law exists or its choice of a given interpretation of a treaty. In total, 113 references (71%) have been for the establishment of customary international law, while 18 (11%) have been for the interpretation of treaties. A further nine references to scholarship (6%) have been justifications for assuming that a given *general principle* is part of international law (as per the *ICJ Statute* Article 38(1)(c)).

This use of scholarship to directly ascertain the content of current law is a core function of scholarship in international law, as noted in chapter A.III.1. However, that chapter also noted that there are other ways of using scholarship. Using scholarship to synthesise judicial decisions has been the subject of 12 references (8%).[128] Other ways of using scholarship count for a further seven references (4%). Two of these were used to establish customary international law that was then used to interpret a treaty.[129] Two were to general background scholarship about the topic in question.[130] One reference concerned historical law,[131] one the purpose of a treaty,[132] and one *lex ferenda*.[133]

Thus most of the Appellate Body's references to scholarship have been of a conventional sort, to show the existence of a customary rule or to interpret a treaty.

Moreover, most (26 out of 28) of the references that do not fit in these conventional categories came in its early years, before 2002. This is in line with the conclusion in chapter C.I above that the significance of scholarship in WTO dispute settlement has decreased over time.

127 Peil, *supra* note 8, 153-157 has a similar classification.

128 *US – Wool Shirts and Blouses*, *supra* note 28, 14, Fn. 15, Fn. 16; *Canada – Aircraft*, *supra* note 31, Fn. 55, Fn. 58-59, Fn. 128.

129 *US – Cotton Yarn*, *supra* note 98, Fn. 90; *US – Line Pipe*, *supra* note 19, Fn. 259.

130 *India – Patents (US)*, *supra* note 24, 8, Fn. 26.

131 *US – Section 211 Appropriations Act*, *supra* note 23, Fn. 122.

132 *India – Patents (US)*, *supra* note 24, 9, Fn. 28.

133 *US – Stainless Steel (Mexico)*, *supra* note 25, 67, Fn. 313.

5. Scholarship as an Aid in Deferring to Politics

While courts and tribunals are bound to follow and apply law,[134] they may on occasion attempt to break free from their institutional constraints by taking a flexible or progressive approach to the legal questions before them. Tribunals may use scholarship to support its reasoning in such cases. The Appellate Body has not used scholarship for such purposes; it seems rather to have done the opposite.

In *EC – Hormones*, the Appellate Body referred to scholarship to support the view that it should adopt a standard of review for the *SPS Agreement* that "reflect[s] the balance established […] between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members", as "neither a panel nor the Appellate Body is authorized" to do otherwise.[135] It thus used scholarship as a basis for *deferring* to its political and institutional constraints rather than as a basis for *subverting* them.

The same case also featured the question of whether the precautionary principle was customary international law and whether the principle could override the *SPS Agreement*.[136] The Appellate Body used scholarship to show that the debate over the principle's status was unresolved.[137] The Appellate body found that it would be "unnecessary, and probably imprudent" for it to take a stance on this "important, but abstract" question.[138] The Appellate Body thus used scholarship to show that it had good reason to avoid a politically charged legal question, which is another example of the Appellate Body using scholarship as a basis for not challenging the politics of the WTO.

134 R. Jennings, 'Reflections on the Subsidiary Means for the Determination of Rules of Law', in Jennings (ed.), *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz* (2004), 319, 329-330 [Jennings, Reflections].

135 *EC – Hormones*, *supra* note 58, 42, para. 115, Fn. 80.

136 *EC – Hormones*, *supra* note 58, 44- 47, paras 120-125.

137 *EC – Hormones*, *supra* note 58, 45, Fn. 92.

138 *EC – Hormones*, *supra* note 58, 45, para. 123.

D. Explaining the Results

I. Introduction

This chapter will suggest some underlying explanations for the results presented in chapter E.

The ICJ generally does not refer to scholarship in its majority opinions.[139] Various possible explanations for this have been presented by commentators, including that variations between works and between authors, abstractness, author rivalries, geographical limitations, the difficulty of choosing works, collegiate drafting of decisions, and political contexts.[140] Suggested reasons for *ICSID* tribunals' more frequent use of scholarship are that there are few writers, that writers participate as arbitrators and counsel, and that many arbitrators are legal academics.[141]

All of these possible explanations also apply to the Appellate Body, albeit to varying degrees. However, their applicability to the Appellate Body has been relatively constant, in that the realities they describe have not changed much over time. Thus, while they could be useful in a comparison of the practice of the Appellate Body with that of another tribunal, they are not suited to explaining developments over time in the Appellate Body's practice. Other explanations are therefore needed.

II. Less Uncertain Law

In a legal system that has some form of precedent, judicial decisions will (at least to some extent) decide legal questions that were unresolved before the decision. As the catalogue of decided cases expands, the number of unresolved legal questions may generally be presumed to decline.[142] There is always the

139 Peil, *supra* note 8, 151.

140 See variously Pellet, *supra* note 12, 869; J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (2012), 42-43; M. Mendelson, 'The ICJ and the Sources of International Law', in V. Lowe and M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice* (1996), 63, 83; Wood, *supra* note 3, 10; Rosenne, *Practice*, *supra* note 50, 119-120; Schwarzenberger, *The Inductive Approach*, *supra* note 49, 559-560; Parry, *supra* note 12, 108; Peil, *supra* note 8, 146; Charlesworth, *supra* note 35, 197.

141 Fauchald, *supra* note 8, 352-353.

142 Pellet, *supra* note 12, 869; Jennings & Watts, *supra* note 35, 42; Parry, *supra* note 12, 104; Jennings, *What is International Law*, *supra* note 35, 46; L. Oppenheim, 'The Science of International Law: Its Task and Method', 2 *American Journal International Law* (1908) 2, 313, 315; Schwarzenberger, *The Inductive Approach*, *supra* note 49, 560; The Privy

possibility that a given case raises more questions than it resolves, and the production of new law may outpace the output of judicial decisions. Absent this, however, the general trend should be a decline in the number of unresolved legal questions.

When precedent has decided a legal question, it is no longer necessary to try to solve it using scholarship. Thus in a case legal system with precedent, an expanding number of precedents may reduce the need to refer to scholarship.

The WTO's system of *de facto* precedent (see chapter B.IV) may therefore be one explanation why a decline in the role of scholarship is observable in the Appellate Body's practice.

III. Specialization

The central purpose of the WTO system is to facilitate international trade,[143] and WTO law is usually categorised as *(international) trade law*. The Appellate Body is part of this system. There are at least two reasons why a *specialist* tribunal such as the Appellate Body may be less comfortable with deciding questions of general international law than would a more *generalist* tribunal: expertise and legitimacy.

Regarding expertise, the Appellate Body's members must be competent in trade law, and are usually less well versed in general international law than, for example, the more generalist international lawyers who are typically appointed

Council, *The Kronprinsessan Margaret*a [1921] I. A. C. 486, 495 and H. Lauterpacht, *The Development of International Law by the International Court* (1958), 25 note the same consequence in international law from increasingly available records of State practice; Jennings, *Reflections*, *supra* note 134, 325, Thirlway; *supra* note 52, 127 and Van Hoof, *supra* note 49, 177 note that the contents of scholarship may also become part of subsequent law; Peil, *supra* note 8, 144-145 notes that this explanation is unsatisfactory with regard to the ICJ, since the *ICJ Statute* (*supra* note 11) Article 38(1)(d) does not privilege judicial decisions over scholarship, and because the absence of scholarship in ICJ decisions has not been a gradual development; Fauchald, *supra* note 8, 352 writing about *ICSID* tribunals between 1998 and 2006 suggests but apparently rejects the (opposite) possibility that more settled law leads to more references to scholarship.

143 See e.g. *Agreement Establishing the World Trade Organization*, 15 April 1994, preamble para. 1, 1867 UNTS 154: "expanding the production of and trade in goods and services".

to the ICJ.[144] The former may thus feel a greater need to back up their conclusions with references to scholarship.[145]

Legitimacy in this context refers to how a tribunal is perceived by observers.[146] The Appellate Body's main task may be seen as deciding trade law cases, and not meddling in the development of general international law.[147] Showing that its application of general international law is based on sound principles, by backing them up with uncontroversial references to scholarship, may thus ward off potential criticism.

The Appellate Body's specialised nature may therefore explain why the Appellate Body mostly uses scholarship to decide general international law questions (see chapter C.II). It may also have affected its choice of an uncontroversial approach to scholarship (see chapter C.III) when dealing with such questions.

IV. Criticism

International and national judges as well as Appellate Body Members may be seen as actors in a political system. They may be assumed to react to incentives within the system they operate in.[148]

144 Marceau, *Human Rights*, *supra* note 47, 765-766; J. Pauwelyn, 'How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law – Questions of Jurisdiction and Merits', 37 *Journal of World Trade* (2003) 6, 997, 1030 notes, however, that general international law experts have been appointed to the Appellate Body; P. Van den Bossche, 'From Afterthought to Centrepiece: The WTO Appellate Body and Its Rise to Prominence in the World Trading System', in G. Sacerdoti, A. Yanovich & J. Bohanes (eds), *The WTO at Ten: The Contribution of the Dispute Settlement System* (2006), 289, 301 notes that only one of the original Appellate Body members were "renowned international trade law experts".

145 Crawford, *supra* note 140, 43 and makes the same point for domestic courts.

146 A. Buchanan, 'The Legitimacy of International Law', in Besson & Tasioulas, *supra* note 38, 79 sees this as the "sociological" aspect of legitimacy, as opposed to the "normative", which concerns philosophical justification (rather than perceived justification).

147 A. Paulus, 'International Adjudication', in Besson & Tasioulas, *supra* note 38, 207, 214-215; D. Leebron, 'Linkages', 96 *American Journal of International Law* (2002) 5, 25-26.

148 For works that assume, discuss and/or purport to show this see R. Posner, 'What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)', 3 *Supreme Court Economic Review* (1994) 1, 1; L. Epstein, W. M. Landers & R. Posner, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* (2005); E. Posner & F. P. de Figueiredo, 'Is the International Court of Justice Biased?', 34 *Journal of Legal Studies* (2005) 2, 599; C. Sunstein et. al., *Are Judges Political?: An Empirical Analysis of the Federal Judiciary* (2006); E. Voeten, 'The Impartiality of International Judges: Evidence from the European Court of Human Rights', 102 *American Political Science Review* (2008) 4, 417.

The role of the Appellate Body in the WTO has become increasingly controversial.[149] It has been accused of and criticised for *judicial activism* (i.e. deciding cases on the basis of policy rather than law) from various quarters,[150] even though many writers have found such accusations to be ungrounded.[151] Such criticism may have provided an incentive for it to moderate its decision-making, including using scholarship in an uncontroversial manner. It may also have inspired member States to elect Appellate Body members that are seen as likely to take such a moderate approach.

One particular area of criticism is the Appellate Body's approach to *amicus curiae* briefs. Many if not most WTO member States are of the view that panels and the Appellate Body should not be permitted to accept such briefs,[152] while WTO tribunals consider themselves free to do so. This disagreement caused a "major diplomatic row".[153] The Appellate Body and panels have accepted only a few *amicus curiae* briefs, and have never acknowledged any to have been useful.[154] The Appellate Body has nonetheless said that it will accept *amicus curiae* if they

149 C.-D. Ehlermann, 'Tensions Between the Dispute Settlement Process and the Diplomatic and Treaty-Making Activities of the WTO', 1 *World Trade Review* (2002) 3, 301, 301-304.

150 J. Greenwald, 'WTO Dispute Settlement: An exercise in Trade Law Legislation?', 6 *Journal of International Economic Law* (2003) 1, 113 and C. E. Barfield, 'Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization', 2 *Chicago Journal of International Law* (2001) 2, 403 criticise it; J. Ragosta, N. Joneja & M. Zeldovich, 'WTO Dispute Settlement: The System Is Flawed and Must Be Fixed', 37 *The International Lawyer* (2003) 3, 697, 749-750 and Steinberg, *supra* note 9, 247-248 note criticism.

151 L. Bartels, 'The Separation of Powers in the WTO: How to Avoid Judicial Activism', 53 *International and Comparative Law Quarterly* (2004) 4, 861, 861-862; W. J. Davey, 'Has the WTO Dispute Settlement System Exceeded Its Authority? A Consideration of Deference Shown by the System to Member Government Decisions and Its Use of Issue-Avoidance Techniques', 4 *Journal of International Economic Law* (2001) 1, 79, 79-96; R. Howse, 'The Most Dangerous Branch? WTO Appellate Body Jurisprudence on the Nature and Limits of the Judicial Power', in T. Cottier & P. C. Mavroidis (eds), *The Role of the Judge in International Trade Regulation: Experience and Lessons for the WTO* (2003), 12, 35.

152 WTO, 'Participation in dispute settlement proceedings' (2015), available at https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c9s3p1_e.htm (last visited 19 September 2016) [WTO, Participation]; WTO General Council, *Minutes of Meeting on 22 November 2000*, WT/GC/M/60, 23 January 2001; Dispute Settlement Body, *Minutes of Meeting on 6 November 1998*, WT/DSB/M/50, 14 December 1998.

153 Ehlerman, *supra* note 149, 303.

154 WTO, 'Participation', *supra* 152; J. Durling & D. Hardin, 'Amicus Curiae Participation in WTO Dispute Settlement: Reflections on the Past Decade', in R. Yerxa and B. Wilson (eds), *Key Issues in WTO Dispute Settlement: The First Ten Years* (2005) 221, 224-225.

are included in a party's submission, if the party takes responsibility for the brief's content.[155] One interpretation of this is that the Appellate Body allows the views of outsiders only if filtered through member States. A parallel with regards to scholarship may be the Appellate Body's references to the ILC and authors with government links (see chapter C.III.3). The point is not that the writers in question are not objective, only that referring to them may be seen as more acceptable by member States. The timing of the *amicus curiae* controversy is also notable. It occurred in 1999-2000,[156] and has been said to mark a "watershed in the history of the WTO".[157] This is also when several aspects of the Appellate Body's use of scholarship changed. As shown in chapter C.I, the use of scholarship has generally declined since 2000. Indirect references became more frequent (chapter C.I.4) around the same time. Most references to ILC texts have come after 2000 (chapter C.III.3). As shown in the chapter C.I.3, the Appellate Body members appointed immediately after the debacle (i.e. between 2001 and 2003) have fewer references to scholarship in their reports than both those appointed earlier and those appointed later. Unconventional references to scholarship virtually disappeared after 2001 (chapter C.III.4).

V. Member Background

It is also possible to examine variances between members based on their background. Table 9 presents data across three variables:

- The wealth of the member's home country (with OECD membership as a proxy).
- The member's professional background (distinguishing between former academics and former diplomats).
- The legal system of the country where the member studied law (common law, civil law, or a combination of both).

There are no significant differences between members based on home country wealth or legal education. Some discrepancy is evident between members who were diplomats before joining the Appellate Body and those who were academics. One might imagine that academics would be more open to citing their former colleagues than would diplomats, who could be assumed

155 *US – Shrimp*, *supra* note 57, 31, paras 89, 91; Durling & Hardin, *supra* note 154, 226.
156 WTO, 'Participation', *supra* note 152; Durling & Hardin, *supra* note 154, 223-224, 226.
157 Bartels, *supra* note 151, 861.

to show more loyalty to the interests their home country and its partners than to the writings of independent academics. The numbers tell the opposite story, however: Former diplomats have referred to scholarship in 32% of reports, academics in only 20%. The diplomats have an average of 1.6 references per report, against the academics' 1.

E. Conclusion

This study has shown that under its definition of scholarship, the Appellate Body has used scholarship gradually less, mostly to answer questions of general international law, and with an uncontroversial approach. Possible explanations for these trends include an increasing body of precedent in the WTO, the Appellate Body's Specialization, external criticism, and, to a lesser extent, Appellate Body members' backgrounds.

The study has inherent methodological limitations, in at least two respects.

The first is *internal*: The study does not reveal what Appellate Body members actually think about scholarship. It does not show what scholarship Appellate Body members have read and been influenced by, nor what scholarship counsel have (and have not) cited in Appellate Body proceedings.

The other respect is *external*, in the sense that the study does not say anything conclusive about the status of scholarship in international law generally, or about how the Appellate Body relates to this.

In both respects, however, the study still has some significance.

First, it shows how the Appellate Body has actually used scholarship, through three broad trends. Thus anyone making a legal argument directed at the Appellate Body should not expect too much to be gained from citing scholarship. They will probably be comparatively better off with citing scholarship concerning general international law, and *safe* scholarship such as ILC reports and classic textbooks.

In the *external* respect, the Appellate Body's reports can be counted as *judicial decisions*, which are *subsidiary means* for the ascertainment of international law. Thus a study of the status of scholarship in international law generally may incorporate the Appellate Body's use of scholarship.

Table 1: Reports per year

Year	With scholarship	Total	With scholarship, %
1996	2	4	50
1997	4	5	80
1998	3	8	38
1999	4	9	44
2000	1	12	8
2001	3	9	33
2002	0	7	0
2003	0	6	0
2004	2	5	40
2005	3	10	30
2006	0	5	0
2007	1	4	25
2008	2	9	22
2009	2	3	67
2010	1	3	33
2011	0	6	0
2012	1	4	25
2013	0	1	0
Total	29	110	26

Table 2: References per year

Year	References	Average per report
1996	16	4.0
1997	29	5.8
1998	18	2.3
1999	17	1.9
2000	2	0.2
2001	3	0.3
2002	0	0.0
2003	0	0.0
2004	3	0.6
2005	29	2.9
2006	0	0.0
2007	1	0.3
2008	4	0.4
2009	5	1.7
2010	31	10.3
2011	0	0.0
2012	1	0.3
2013	0	0.0
Total	159	1.4

Table 3: Direct and indirect

Year	Direct	Indirect	Indirect, %
1996	16	0	0
1997	28	1	3
1998	18	0	0
1999	11	6	35
2000	2	0	0
2001	3	0	0
2004	1	2	67
2005	10	19	66
2007	0	1	100
2008	4	0	0
2009	0	5	100
2010	7	24	77
2012	1	0	0
Total	101	58	36

Table 4: Text and footnotes

Year	Text	Footnotes	Text, %
1996	0	16	0
1997	0	29	0
1998	0	18	0
1999	2	15	12
2000	0	2	0
2001	1	2	33
2004	0	3	0
2005	1	28	3
2007	0	1	0
2008	0	4	0
2009	3	2	60
2010	30	1	97
2012	0	1	0
Total	37	122	77

Table 5: References per member

Member	Tenure	Reports	Reports with references	References	Reports with references, %	Avg. references per report
Beeby	1995-2000	10	7	29	70	2.9
El-Naggar	1995-2000	12	5	23	42	1.9
Matsushita	1995-2000	13	5	36	38	2.8
Ehlermann	1995-2001	21	5	27	24	1.3
Feliciano	1995-2001	21	6	49	29	2.3
Lacarte-Muró	1995-2001	22	7	34	32	1.5
Bacchus	1995-2003	27	12	52	44	1.9
Taniguchi	2000-2007	22	3	3	14	0.1
Ganesan	2000-2008	24	4	33	17	1.4
Abi-Saab	2000-2008	27	7	8	26	0.3
Lockhart	2001-2006	11	2	2	18	0.2
Baptista	2001-2009	20	4	31	20	1.6
Sacerdoti	2001-2009	23	5	36	22	1.6
Janow	2003-2007	10	1	1	10	0.1
Unterhalter	2006-2013	13	1	1	8	0.1
Bautista	2007-2011	9	4	39	44	4.3
Hillman	2007-2011	10	1	2	10	0.2
Oshima	2008-2012	8	3	4	38	0.5
Zhang	2008-2016	7	1	3	14	0.4
Bossche	2009-2017	8	2	32	25	4.0
Ramírez-Hernández	2009-2017	8	2	32	25	4.0
Bhatia	2011-2015	3	0	0	0	0.0
Graham	2011-2015	1	0	0	0	0.0
Chang	2012-2016	0	0	0	n/a	n/a
	All 1995	126	47	250	37	2.0
	All 2000-2003	137	26	114	19	0.8
	All 2006-2011	67	14	113	21	1.7

Table 6: ILC works

Year	ILC works	% of total
1996	3	19
1997	1	3
1998	0	0
1999	0	0
2000	0	0
2001	2	67
2004	0	0
2005	4	14
2007	0	0
2008	1	25
2009	5	100
2010	30	97
2012	1	100
Total	47	30

Table 7: Questions answered

Topic		Total		Total, %	
Gen. int'l law	Treaty law	73	138	46	87
	Responsibility	40		25	
	Evidence	12		8	
	Other	13		8	
WTO law	GATT	11	21	7	13
	Other	10		6	

Table 8: Ways used

Year	Customary law	Interpret treaty	General principles	Judicial decisions	Other
1996	16				
1997	9	2	6	9	3
1998	14	2	2		
1999	6	8		3	
2000	1	1			
2001					3
2004		3			
2005	29				
2007			1		
2008	1	2			1
2009	5				
2010	31				
2012	1				
Total	113	18	9	12	7
Total %	71	11	6	8	4

Table 9: Members' backgrounds

	Country	Background	Education	Avg. per report	Reports with scholarship, %
Bhatia	India	Diplomat	India/UK	0	0
Bossche	Belgium	Academic	EU/US	4	25
Chang	Korea	Academic	Korea/US	n/a	n/a
Graham	US	Lawyer	US	0	0
Ramirez-Hernandez	Mexico	Lawyer	Mexico/US	4	25
Unterhalter	South Africa	Academic	South Africa/UK	0.1	8
Zhang	China	Academic	China/US	0.4	14
Abi-Saab	Egypt	Academic	Egypt/US/UK/EU	0.3	26
Bacchus	US	Diplomat	US	1.9	44
Baptista	Brazil	Int'l bureaucrat	Brazil/US/EU	1.6	20
Bautista	Philippines	Diplomat	Philippines/US	4.3	44
Beeby	New Zealand	Diplomat	New Zealand/UK	2.9	70
Ehlermann	Germany	Diplomat	EU	1.3	24
El-Naggar	Egypt	Int'l bureaucrat	Egypt/UK	1.9	42
Feliciano	Philippines	Judge	Philippines/US	2.3	29
Ganesan	India	Diplomat	India	1.4	17
Hillman	US	Diplomat	US	0.2	10
Janow	US	Academic	US	0.1	10
Lockhart	Australia	Int'l bureaucrat	Australia	0.2	18
Matsushita	Japan	Academic	Japan/US	2.8	38
Lacarte-Muró	Uruguay	Diplomat	?	1.5	32
Oshima	Japan	Diplomat	Japan	0.5	38
Sacerdoti	Italy	Academic	Italy/US	1.6	22
Taniguchi	Japan	Academic	Japan/US	0.1	14
	OECD			1.5	28
	Non-OECD			1.4	25
		Diplomats		1.6	32
		Academics		1.0	20
			Common law	1.4	28
			Civil law	1.1	28
			Mixed	1.5	24

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The Evolution of Arms Control Instruments and the Potential of the Arms Trade Treaty

Tom Coppen*

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* Dr. Tom Coppen completed his Ph.D. degree at Utrecht University in 2016. His research focuses on how international arms control law and international politics combine to form a global regime attempting to maintain peace and security by preventing nuclear proliferation. A strong practical element in his work was provided by his experience as Special Advisor to delegations of the Netherlands at several international non-proliferation conferences. Tom Coppen has authored and co-authored various separate articles and chapters in books, journals and magazines. In 2014, he was awarded a Fulbright Scholarship, which allowed him to conduct part of his research at the Center for Nonproliferation Studies in Washington DC and Monterey, California.

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Abstract

Although the *Arms Trade Treaty* (*ATT*) has the potential to create an effective international legal framework for controlling the international arms trade, much depends on the subsequent development of its legal framework. This article therefore analyzes how the *ATT*, as a multilateral arms control treaty, can develop its own legal framework in accordance with international law and what role the organs established by it can play in that process. It will be shown that in its current form the *ATT* has significant shortcomings that may prevent it from achieving this goal, but there certainly is room for the lawful development of its norms, which will depend on amassing political will and the establishment of practice.

A. Introduction

This article analyzes the potential of the *Arms Trade Treaty* (*ATT*) to establish a strong international regime for the control of conventional weapons transfers in accordance with the applicable rules of international law.[1] The possession of conventional armaments is generally not in contravention of the rules of international law.[2] Conventional weapons and strategic items are inherently *dual-use*, which means that they can be obtained and used for legitimate purposes such as national self-defense, contributing to UN missions, policing, or private purposes such as hunting, as well as for committing violations of national and international laws. Surpluses of conventional weaponry have a tendency to prolong or stimulate conflict; war or civil unrest can, in fact, stimulate arms sales. The availability of arms is a necessary precondition for the commission of crimes, war crimes, human rights violations, or acts of terrorism.[3] The global arms trade mirrors this dual nature, consisting of legitimate transactions between

1 UNTC, *Arms Trade Treaty*, 2 April 2013, available at https://treaties.un.org/doc/Treaties/2013/04/20130410%2012-01%20PM/Ch_XXVI_08.pdf (last visited 4 Oktober 2016).

2 As opposed to Weapons of Mass Destruction (WMD), which are generally banned by treaty. Exceptions are weapons covered by instruments such as the Certain Conventional Weapons (CCW), mine-ban and cluster conventions.

3 See e.g., United Nations Office for Disarmament Affairs, *United Nations Coordinating Action on Small Arms: The Impact of Poorly Regulated Arms Transfers on the Work of the United Nations*, UNODA Occasional Papers No.23, March 2013; R. Stohl & S. Grillot, *The International Arms Trade, War and Conflict in the Modern World Series* (2009); Z. Yihdego, *The Arms Trade and International Law* (2007).

States and/or non-State actors alongside illegal, black market trade; in between these two, a large grey area exists.[4]

The *ATT* essentially tries to increase control over the global arms trade in order to contain the illicit side thereof. Its preamble reflects the dual-use nature of conventional weapons by underlining the

> "[…] need to prevent and eradicate the illicit trade in conventional arms and to prevent their diversion to the illicit market, or for unauthorized end use and end users, including in the commission of terrorist acts […]"

while at the same time mentioning "legitimate trade", "lawful ownership", and the "use of certain conventional arms for recreational, cultural, historical, and sporting activities". Attempts to control the trade in conventional weapons are not new – the *ATT* builds on existing instruments such as the UN Register of Conventional Arms (UNROCA), the UN Program of Action on Small Arms, and various UN resolutions and reports.[5] The treaty was negotiated at two special conferences in 2012 and 2013; after Iran, the Democratic People's Republic of Korea and Syria blocked consensus on the final text, it was submitted to and endorsed by the UN General Assembly.[6] The *ATT* was opened for signature shortly thereafter, and entered into force in December 2014 upon its fiftieth ratification.[7]

4 A. Feinstein, *The Shadow World: Inside the Global Arms Trade* (2011); Z. Yihdego, 'The UN Arms Trade Treaty Negotiations: A Battle Between Codifying Frail and Robust Legal Principles', *Arms Control Law – A Blog* (7 July 2012), available at http://armscontrollaw.com/2012/07/07/the-un-arms-trade-treaty-negotiations-a-battle-between-codifying-frail-and-robust-legal-principles/ (last visited 27 April 2016).

5 *General and complete disarmament – Transparency in armaments*, UN Doc A/RES/46/36 L, 6 December 1991; *Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*, UN Doc A/CONF.192/15, 2001; *Towards an Arms trade treaty*, UN Doc A/RES/61/89, 18 December 2006; *Report of the Secretary General: The illicit trade in small arms and light weapons in all its aspects*, UN Doc A/68/171, 22 July 2013.

6 UNGA Resolution, *The Arms Trade Treaty*, UN Doc A/RES/67/234 B, 11 June 2013; see for comments of the *ATT* negotiations M. Bromley, N. Cooper & P. Holtom, 'The UN Arms Trade Treaty: Arms Export Controls, the Human Security Agenda and the Lessons of History', 88 *International Affairs* (2012) 5, 1029; M. Brandes, '"All's Well That Ends Well" or "Much Ado About Nothing"?: A Commentary on the Arms Trade Treaty', 5 *Goettingen Journal of International Law* (2013) 2, 399.

7 UNTC, *Arms Trade Treaty – entry into force*, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-8&chapter=26&clang=_en (last

According to its text the *ATT* aims to establish standards for regulating the trade in conventional arms, as well as to prevent illicit trade in and diversion of such weapons.[8] Article 2(1) *ATT* lists the types of arms the treaty applies to: tanks, armored vehicles, artillery systems, aircraft, helicopters, warships, missiles, missile launchers, and small arms and light weapons (SALW). In addition, Articles 3 and 4 *ATT* expand the scope of the treaty to include munitions and ammunition for these weapons, as well as parts and components thereof, when these are exported in a form that provides the capability to assemble them. Member States are obliged to establish a national control system to regulate the export of such items. In addition, they must regulate the import, transit, transshipment and brokering of the armaments listed in Article 2(1).[9] The *ATT* prohibits transfers of weapons, ammunition or components in contravention of UN Security Council resolutions or any other binding international obligations; States are furthermore banned from authorizing transfers if they have knowledge that the items in question will be used in the commission of

> "[…] genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes […]".[10]

If none of these situations apply, member States are still obliged to assess the possible consequences of any export of convention weapons, ammunition or components in terms of its impact on peace and security, or it's potential to facilitate violations of humanitarian law, human rights law, acts of terrorism, or acts related to transnational organized crime.[11] *ATT* member States are furthermore obliged to take measures to prevent the diversion of arms, to keep records of transfers; they are encouraged to share these reports, as well as to cooperate to further the prevention of illicit trade in convention weapons. These latter provisions, however, only apply to arms covered in Article 2(1) *ATT*, not to ammunitions or components.

The *ATT* has established a Secretariat in order to "assist State Parties in the effective implementation" of the treaty.[12] It shall be responsible to the

visited 4 October 2016).

8 Article 1 *ATT*.

9 Articles 8-10 *ATT*.

10 Article 6(3) *ATT*.

11 Article 7 *ATT*.

12 Article 18 *ATT*.

member States and undertake, "within a minimized structure", the following responsibilities:

- Receiving, making available and distributing reports required by the *ATT*;
- Maintaining the list of national points of contact and making it available to member States; and
- Facilitating the matching of requests for, and offers of, assistance and promoting international cooperation on request.[13]

In addition, the Secretariat has convened a Conference of States Parties (CSP), which is tasked to:

- Review the implementation of the *ATT*, including developments in the field of conventional arms;
- Consider and adopt recommendations regarding the implementation and operation of the *ATT*, in particular the promotion of its universality;
- Consider amendments to the *ATT*;
- Consider issues arising from its interpretation;
- Consider and decide the tasks and budget of the Secretariat; and
- Consider the establishment of any subsidiary bodies as may be necessary to improve the functioning of this Treaty; and
- Perform any other function consistent with the *ATT*.[14]

The CSP has focused mainly on procedural and institutional issues, establishing the seat of the Secretariat, discussing reporting issues, and adopting its rules of procedure. It shall henceforth convene at its own discretion; its next meeting is in 2016.[15] The *ATT* emphasizes that the Secretariat shall perform the duties the CSP decides upon as well as facilitate its work.[16]

The *ATT* is expected to contribute to the establishment of the highest possible international standard for the regulation of the international arms trade.[17] It has a role in raising attention and awareness; an increase in oversight

13 Article 18(3) *ATT*.
14 Article 17 *ATT*.
15 *Ibid*.; see also Arms Trade Treaty First Conference of State Parties, *Draft Final Report*, ATT/CSP1/2015/…, 27 August 2015, para. 40.
16 Article 18 *ATT*.
17 Article 1 *ATT*; Yihdego, *supra* note 4; Bromley, Cooper & Holtom, *supra* note 6; J. Morely, 'Arms Survey Highlights ATT Challenge', *Arms Control Association* (2 July

over the arms trade through the *ATT*'s provisions increasing transparency may further help control it by "creating an environment of accountability" for weapons transfers.[18] International standards may furthermore be improved by making them more objective. Some have pointed, in this context, at the connection that the *ATT* establishes between the arms trade and human rights law, international criminal law or international humanitarian principles.[19] States may be able to use such norms, featured in the provisions of the *ATT*, to increase political and diplomatic pressure on those States they consider to be acting in contravention of the principles of the treaty.[20] On the other hand, the *ATT* is regarded by many as an incomplete treaty: its scope is limited at certain points, and its provisions are unclear or undefined on many points, including qualifications or large margins of appreciation for States that may be used as loopholes to circumvent scrutiny of arms transfers. Much depends on the powers of the CSPs and the Secretariat to review and supervise the *ATT*. While some have indicated the importance of an institutional framework for the development of an effective conventional arms trade regime arguing that the "[…] establishment of dedicated bureaucracy with powers to monitor, interpret and implement an *ATT* will be key to an effective agreement […]" or commending the *ATT* for providing a dispute settlement mechanism and creating a multilateral forum to discuss arms trade issues, others have pointed out the limits of the mandate of the Secretariat as *very minimal*, stressing that it will not be a *new UN bureaucracy*.[21] Neither the Secretariat nor the CSP have international legal personality.

2014), available at https://www.armscontrol.org/act/2014_0708/Newsbriefs/Arms-Survey-Highlights-ATT-Challenge (last visited 29 April 2016); *Political Declaration Delivered by Mexico on behalf of 98 States – Adoption of the ATT by the General Assembly*, 2 April 2013 [ATT Adoption/Declaration by Mexico], available at https://mision2.sre.gob.mx/onu/images/disc_att_2abril13.pdf (last visited 20 June 2016).

18 Comments by R. Stohl during the Arms Control Association Briefing for Reporters, in 'Transcript – The Arms Trade Treaty: Just the Facts' (2013), available at http://www.armscontrol.org/events/The-Arms-Trade-Treaty-Just-the-Facts#transcript (last visited 29 April 2016) [Transcript].

19 See e.g., Bromley, Cooper & Holtom, *supra* note 6, 1035; comments made by A. Akwei during the *Arms Trade Treaty: Just the Facts* briefing, in 'Transcript', *supra* note 18.

20 'Comments made by T. Countryman during the *Arms Trade Treaty: Just the Facts* briefing', in 'Transcript', *supra* note 18.

21 C. Carneiro, 'From the United Nations Arms Register to an Arms Trade Treaty – What Role for Delegation and Flexibility?', 14 *ILSA Journal of International and Comparative Law* (2007) 2, 477, 494; 'comments by R. Stohl and D.G. Kimball during the *Arms Trade Treaty: Just the Facts* briefing', in 'Transcript', *supra* note 18; P. Holtom & M. Bromley, 'Implementing an Arms Trade Treaty: Mapping Assistance to Strengthen Arms Transfer Controls', *SIPRI Insights on Peace and Security* (2012) 2, 1 [Holtom & Bromley,

Thus, although the *ATT* has the potential to create an effective international legal framework for controlling the international arms trade, much depends on the subsequent development of its legal framework. This article therefore analyzes how the *ATT*, as a multilateral arms control treaty, can develop its own legal framework in accordance with international law and what role the organs established by it can play in that process. To this end, the following section analyzes the characteristics and dynamics of the law of arms control, evaluating how such influences have shaped the *ATT*. Section three discusses the potential role of the *ATT* CSP in developing the treaty by way of its progressive interpretation in light of international treaty law and the experience of the review mechanisms of the *Nuclear Non-Proliferation Treaty* (*NPT*) and the *Biological Weapons Convention* (*BWC*) in this area. Section four assesses the potential role, in this context, of the future *ATT* Secretariat and its supervisory mandate.

B. The *ATT* as an Arms Control Instrument

The *ATT* is part of the international law of arms control, an area of public international law with its own characteristics and features.[22] It is a special legal regime of

> "rules on a limited problem together with the rules for the creation, interpretation, application, modification, or termination – in a word, administration – of those rules",

Implementing an Arms Trade treaty]; comments by States parties to the *ATT* CSP Preparatory Committee in Berlin at 27-28 November 2014, as reflected by the report by G. Irsten, *CSP preparatory committee: Berlin*, available at http://www.reachingcriticalwill.org/disarmament-fora/att/csp-prep/berlin (last visited 29 April 2016).

22 Different terms are used by different authors to refer to parts of this field of law; see in general, E.P.J. Myjer & G. Den Dekker, 'Wapenbeheersingsrecht', in N. Horbach, R. Lefeber and O. Ribbelink (eds), *Handboek Internationaal Recht* (2007); E.P.J. Myjer (ed.), *Issues of Arms Control Law and the Chemical Weapons Convention* (2001) [Myjer, Issues of Arms Control]; G. Den Dekker, *The Law of Arms Control, International Supervision and Enforcement*, (2001)[Law of Arms Control]; D.H. Joyner (ed.), *Arms Control Law* (2012); J. Dahlitz (ed.), *Future Legal Restraints on Arms Proliferation*(Vol.III) (1996); J. Kolasa, *Disarmament and Arms Control Agreements: A Study on Procedural and Institutional Law* (1996); J. Dahlitz & D. Dicke (eds), *The International Law of Arms Control and Disarmament – Vol I Arms Control and Disarmament Law* (1991).

including rules for determining the consequences of a breach of substantive rules.[23] In other words, the implementation and development of the *ATT* will be affected by specific arms-control related dynamics.[24]

The history of arms control law indicates that the goals of arms control instruments traditionally relate to minimizing human suffering in conflicts and enhancing peace and security.[25] Or, in the words of the US Arms Control and Disarmament Agency, it is an effort "to reduce the likelihood of war and to limit the effects if it occurs".[26] The preamble and Article 1 of the *ATT* confirm the presence of both a humanitarian and a security-related purpose of the treaty. Under *principles*, it refers to the right of self-defense of States under Article 51 of the *UN Charter*, the peaceful settlement of disputes, the prohibition on the threat or use of force, as well as to the *Geneva Conventions of 1949* and human rights; Article 1 *ATT* establishes that the purpose of the treaty is to contribute to international and regional peace, security and stability, to reduce human suffering, and to build confidence between States.

Observers have emphasized the humanitarian or human rights dimension of the *ATT*, arguing that the treaty centralizes human rights or that human security constitutes its foundation.[27] Indeed, these occupy a significant

23 *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission*, UN Doc A/CN.4/L.682, 13 April 2006, 81; there is an ongoing discussion on whether rules on creation, interpretation, application, etc. should also be considered as secondary rules of a regime, see e.g. D.H. Joyner & M. Roscini (eds), *Non-Proliferation Law as a Special Regime* (2012); B. Simma and D. Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law', 17 *European Journal of International Law* (2006) 3, 483.

24 This does not mean that general rules of public international law – in the context of this article mainly consisting of treaty interpretation rules in the *Vienna Convention on the Law of Treaties* (*VCLT*) – do not apply, see therefore e.g. A. Lindroos & M. Mehling, 'Dispelling the Chimera of 'Self-Contained Regimes' International Law and the WTO', 16 *European Journal of International Law* (2013) 5, 857, 875.

25 See W.H. Boothby, *Weapons and the Law of Armed Conflict* (2009); see also for a short history of arms control, J. Goldblat, *Arms Control: A Guide to Negotiations and Agreements* (1994); G. Lysén, *The International Regulation of Armaments: The Law of Disarmament* (1990).

26 Arms Control and Disarmament Agency, *Arms Control and National Security* (1968), 3.

27 PAX, 'Mensenrechten staan centraal in historisch Wapenhandelverdrag', *PAX* (2 April 2013), available at http://www.paxvoorvrede.nl/actueel/nieuwsberichten/mensenrechten-staan-centraal-in-historisch-wapenhandelverdrag (last visited 29 April 2016); comments by A. Akwei during the *Arms Trade Treaty: Just the Fact*s briefing, in 'Transcript', *supra* note 18; Bromley, Cooper & Holtom, supra note 6.

position in the *ATT*, especially when comparing it to arms control instruments such as the *Treaty on Conventional Armed Forces in Europe Treaty* (*CFE*)[28] or other bilateral Cold War arrangements. While the latter heavily rely on concepts of international security and (military) stability, Articles 6 and 7 *ATT* explicitly make arms transfers subject to considerations related to international criminal law, human rights law and humanitarian law. On the other hand, it has been pointed out that nearly every provision in the *ATT* is "part and parcel of peace and security".[29] A lead US negotiator on the *ATT* has emphasized the peace-and-security related elements of the treaty, referring to preventing transfers of *undesirable actors* – which were primarily taken to be more *classical* security-related threats such as States, criminal organizations, and terrorists.[30] The text of the *ATT* itself also appears to position aspects related to peace and security at a slightly more prominent place than those related to humanitarian or human rights considerations. The preamble is an example of this. So are also Articles 6 and 7, which reserve their strongest provisions for the prohibition to violate UN SC-based embargoes or other, existing international agreements – as opposed to the undefined qualification that States must have *knowledge* of the fact that an arms transfer will lead to violations of human rights or humanitarian law.[31] Thus, the *ATT* has multiple purposes, which is not uncommon for arms control instruments. They should not be regarded as completely independent goals. Rather, one is subservient to the other. As one commentary concludes, instead of a bottom-up, NGO-dominated instrument based on human security, the *ATT* is the result of an agenda produced from below but accommodated within its security environment.[32] The negotiations eventually saw a pushback against the influence of human security and a reassertion of the primacy of security and State sovereignty.[33]

The connection between law and national, regional, and international security is extremely strong in the field of arms control law. The reason for this is that States, under international law, are not under any obligations to limit the level or types of armaments they possess unless they are bound by a rule of arms

28 OSCE, *Treaty on Conventional Armed Forces in Europe*, 19 November 1990, available at http://www.osce.org/library/14087?download=true (last visited 13 July 2016).

29 Yihdego, *supra* note 4.

30 Comments made by T. Countryman during the *Arms Trade Treaty: Just the Facts* briefing, 'Transcript', *supra* note 18.

31 Article 6(3) *ATT*.

32 Bromley, Cooper & Holtom, *supra* note 6.

33 *Ibid*.

control law.[34] Such obligations, in turn, affect States' capacities to use force as a means of self-defense, individually or collectively or when asked to do so by the UN Security Council under Chapter VII of the *UN Charter* to prevent or address threats to peace and security, breaches thereof, or acts of aggression. This means that the law of arms control directly affects States' capability to defend their territorial sovereignty, to protect their wider interests, or to withstand other threats or forms of indirect coercion thereon.[35] As a result of this impact on national and international security arms control warrants predictability, stability and reciprocity; instruments are normally a confirmation of the political *status quo*, arranged between dominant States to codify a *de facto* political or military situation that is in their best interest.[36] Once a treaty has been concluded, the adherent States benefit from the predictability and stability that is created by the legal certainty of written norms. This need for legal certainty has also led to a strong tendency by States that are party to multilateral treaties to preserve that treaty-regime and, if possible, attempt to achieve universal membership.[37] On the other hand, States will attempt to preserve some political and legal flexibility under arms control instruments as they are generally unwilling to be constrained by too rigid treaty rules to take measures, if necessary, to protect vital interests. Political, military, technological or economic developments will normally outpace the development of international law, necessitating the need for flexibility in the context of arms control law.[38] Thus, arms control instruments necessarily combines elements of flexibility with legal certainty in order to be most effective.

34 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, 14, 135, para. 269; see also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, 239, para. 21.

35 On deterrence and concepts of security, see T.V. Paul, R.J. Harknett & J.J. Wirtz (eds), *The Absolute Weapon Revisited. Nuclear Arms and the Emerging International Order*, 4th ed. (2001); L. Freedman, *The Evolution of Nuclear Strategy*, 3rd edition (2003); E.P.J. Myjer, *Militaire Veiligheid door Afschrikking* (1980).

36 K. Ipsen, 'Explicit Methods of Arms Control Treaty Evolution', in Dahlitz & Dicke (eds), *supra* note 22, 75.

37 According to officials and observers, universalization and inclusivity were important topics at the CSP Preparatory Committee in Berlin at 27-28 November 2014; the desire of the *NPT* member States, for example, to achieve universal adherence to the treaty is reflected in its *Review Conference 2010 Final Document*, Review section, UN Doc NPT/CONF.2010/50 (Vol.I), 4 June 2010, 17-18.

38 See e.g. T. Coppen, 'The Role and Rationale of the Nuclear Non-Proliferation Treaty in the Twenty-First Century', 7 *Romanian Journal on Society and Politics* (2012) 2, 95.

The element of legal certainty is reflected in the *ATT* in several ways, starting with its unlimited duration.[39] Second, the *ATT*'s object and purpose contribute to stability and transparency by regulating the arms trade through the creation of international standards.[40] Articles 6 and 7 provide more details on these standards, which are legally binding for every member State. This means that there is, in theory, no possibility for a *race to the bottom* amongst participating States in terms of making arms transfers conditional upon humanitarian, human rights or other considerations without violating the terms of the *ATT*. To stimulate implementation and increase transparency, thus reinforcing the standards of Articles 6 and 7, the *ATT* obliges member States to establish national control systems, make available their national control lists, and designate national points of contact for the exchange of information.[41] It furthermore contains articles on record-keeping, reporting and international cooperation; the Secretariat is tasked with stimulating transparency and cooperation between States.[42] Cooperation should not only lead to transparency but also to further harmonization of trade controls, thus contributing to enhancing legal certainty in multiple ways. The *ATT* has, moreover, emphasized achieving consensus both throughout the process of its negotiation and in its provisions on the CSP.[43] The rules of procedures for CSPs emphasize the importance of consensus, obliging States to "make every effort to achieve consensus on matters of substance".[44] If this is not possible, there is an obligatory suspension of proceedings for 24 hours, only if after such a grace period consensus remains unattainable, the CSP can take decisions by two-thirds majority.[45] The importance of consensus ensures a large share of control of individual member States over these processes, thereby

39 Article 24(1) *ATT*.

40 Article 1 *ATT*.

41 Article 5 *ATT*.

42 See Articles 12, 13, 15, 16, 18 *ATT*.

43 Comments by P. Holtom & M. Bromly, 'Commentary – Looking back to ensure future progress: developing and improving multilateral instruments to control arms transfers and prevent illicit trafficking' (19 June 2014), *Stockholm International Peace Research Institute* (SIPRI), available at http://www.sipri.org/media/newsletter/essay/june-12 (last visited 15 December 2014); Brandes, *supra* note 6, 409.

44 Rule 33, *Rules of Procedure of the Conference of States Parties of the Arms Trade Treaty Facilitator's Report*, ATT/CSP1/2015/WP.1, 24 August 2015.

45 *Ibid*., the rules resemble, in terms of decision-making, those of the *NPT* Review Conferences with voting as a last resort if consensus cannot be reached, see Irsten, *supra* note 21. In practice, however, the *NPT* Review Conferences never saw such a vote; if no consensus could be reached, no outcome document was adopted.

increasing legal certainty, which in turn will help to maximize the number of future member States.

This process also illustrates the challenge of combining legal certainty with flexibility. This paradox is based on the fact that in order to convince as many States as possible to join and implement the treaty, compromises had to be made that limited the specificity or scope of some of the provisions of the *ATT*, or that involved foregoing legally binding provisions on a number of issues. Thus, in order to ensure the successful conclusion of the negotiations as well as the support by relevant States, the proponents of the *ATT* had to compromise on certain points that limit the impact of the treaty. Writing on the role of flexibility and delegation in the context of the *ATT* negotiations, Cristiane Carneiro has referred to three aspects of legalization: Obligation (the degree to which commitments are legally binding), precision (the degree to which the content of commitments clearly identifies the conduct required of member States), and delegation (the degree to which the interpretation and supervision is transferred to a third party).[46]

Regarding *delegation*, the previous paragraph already indicated that the emphasis on consensus in the context of the CSP gives States greater control over the future direction and implementation of the treaty. In this way, it safeguards State sovereignty over *ATT*-related decisions and limits the flexibility of the treaty regime. This conclusion is reinforced by the limited mandate of the Secretariat. The *ATT* text clearly restricts the Secretariat to an administrative and facilitating role, minimizes its structure, and emphasizes its subservience to member States and the CSP, avoiding all allusions to any form of decision-making power for the Secretariat.[47] It is the member States, through the CSP, which are designated by the *ATT* to define the role of the Secretariat. They have already begun doing so at the first CSP, specifying the tasks of the Secretariat under its mandate of Article 18(3) *ATT*.[48] Compared to arms control organizations such as the International Atomic Energy Agency (IAEA) or the Organization for the Prohibition of Chemical Weapons (OPCW), the role of the *ATT* Secretariat is greatly restrained.[49]

46 Carneiro, *supra* note 21, 482.

47 Cf. Article 18(3) *ATT*, which refers to the Secretariat's 'minimized structure'; see also *supra* note 21.

48 *Directive of the States Parties to the Secretariat of the Arms Trade Treaty*, ATT/CSP1/2015/WP.2/Rev.2, 25 August 2016.

49 This is due to the difference in mandate of these organs, see in general, H.G. Schermers & N.M. Blokker, *International Institutional Law*, 5th ed. (2011); on the OPCW;W. Krutzsch, E.P.J. Myjer & R. Trapp (eds), *The Chemical Weapons Convention: A*

In terms of *obligation*, it is notable that the wording of a number of *ATT* provisions reflects the fact that they are non-binding. These provisions are mainly related to the implementation and oversight of the *ATT*. They deal, for example, with reporting, transparency measures, or international cooperation.[50] This reinforces the idea that the drafters of the *ATT* were very averse to the concept of any form of international oversight with regards to the implementation of the treaty, falling in line with the limitation of the Secretariat's mandate. The scope of the *ATT*, moreover, was restricted during negotiations. One example is the deletion of the words 'at a minimum' from Article 2(1) *ATT*, suggesting that the scope of the treaty is exhaustive.[51] Although ammunitions and components are included in the treaty, section 1 illustrated how several provisions do not apply to these categories. All in all, it has been concluded that the scope of the *ATT* is a compromise between those supporting a more comprehensive regulation of the arms trade and those motivated by commercial or security-related interests.[52] Article 24(2) on withdrawal furthermore increases flexibility by giving States the option of leaving the *ATT* regime in case it ceases to serve their national interests.[53]

Third, the provisions of the *ATT* lack in *precision*. In particular, this concerns a lack of definition of key terms in the treaty pertaining to substantive obligations therein as well as to reporting obligations.[54] Examples on the latter category can be found in Article 13, which obliges States to report to the Secretariat on new measures to be taken when "appropriate", but fails to mention when that is. Moreover, reports on exports and imports may exclude "commercially sensitive or national security information", creating a loophole in

Commentary (2014); on the practice of the IAEA Secretariat, see e.g., D. Fischer, *History of the International Atomic Energy Agency: The First Forty Years* (1997); M. Hibbs, 'Ten Lessons from September's IAEA Diplomacy', *Carnegie Endowment for International Peace* (7 October 2010), available at http://carnegieendowment.org/2010/10/07/ten-lessons-from-september-s-iaea-diplomacy/5qa (last visited 29 April 2016); M. Hibbs, 'Amano influence and the IAEA fall meetings', *Carnegie Endowment for International Peace* (9 September 2011), available at http://carnegieendowment.org/2011/09/09/amano-s-influence-and-iaea-fall-meetings/52gz (last visited 29 April 2016).

50 Cf. the use of words such as 'may', 'are encouraged to', and 'voluntary' in Articles 12(2) and (3), 13(2), 15(2)-(4), (6) and (7), and 16.

51 Brandes, *supra* note 6, 407.

52 *Ibid*., 409.

53 On withdrawal and flexibility, see G. Den Dekker & T. Coppen, 'Termination and Suspension of, and Withdrawal from, WMD Arms Control Agreements in Light of the General Law of Treaties', 17 *Journal of Conflict and Security Law* (2012) 1, 25.

54 See also Brandes, *supra* note 6.

the reporting obligation by leaving it to the discretion of States themselves to determine what information qualifies as such.[55] The obligations in Articles 6 and 7 contain similar loopholes. Transfers must be prevented if the exporter knows the arms may be used for certain purposes, yet there is no definition of what constitutes *knowledge* in this context. Reference may be made to international criminal law in this case, but it is more difficult to define knowledge when it comes to entities such as States. In the context of humanitarian law, it has been pointed out that explicit references to non-international conflicts have been deleted, and that a reference to customary international law in this regard may have increased the uniformity of the application of the *ATT*.[56] Article 7, on the control procedures, likewise contains many ambiguous and undefined terms such as "negative uses" of arms, "serious" human rights violations, and "overriding risks". Article 13 fails to clarify what "diversion" means. Although the inclusion of human rights principles has been hailed as a step towards objectifying the standards for the arms trade, these too can quickly turn into subjective rather than objective factors, especially when political considerations play a role, thus further increasing the flexibility of States to determine their export policies notwithstanding the provisions of the *ATT*.[57] Such flexibility offers States the possibility to use the resulting legal grey area to approve sensitive exports for commercial or strategic reasons if necessary.

In short, particular arms control dynamics underlying the negotiation of the *ATT* have led to what are regularly perceived as shortcomings of the treaty. Although States benefit from the stability and predictability that could result from more harmonized standards for arms trade, sovereignty-related concerns have led to undefined and multi-interpretable terms in the treaty, to limitations on scope, to non-binding provisions on reporting, as well as to a limitation of the mandate for the CSP and Secretariat. The role of States is

55 *Ibid*.

56 *Ibid*.

57 Council of the European Union, *Council Common Position of 8 December 2008 defining common rules governing control of exports of military technology and equipment*, EU 2008/944/CFSP, 8 December 2008, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008E0944&from=EN (last visited 13 July 2016) e.g. includes criteria such as "Respect for human rights in the country of final destination as well as respect by that country of international humanitarian law" or "the internal situation in the country of final destination, as a function of the existence of tensions or armed conflicts", without defining these further or referring to specific standards or human rights documents. The assessment of the internal situation or that country's human rights is left to the exporting States' authorities, giving them large margins of discretion in deciding on export licenses.

maximized by limiting the power of the *ATT*'s oversight mechanisms to develop the legal framework of the *ATT* as well as by increasing the flexibility for States individually by enlarging the margin of appreciation left to national authorities for the implementation of treaty provisions.

C. The Conference of States Parties and the Interpretation of the *ATT*

Having thus explored the current substantive and institutional limits of the legal framework established by the *ATT* along with the particular dynamics of the law of arms control that underlie these limitations, the question to be addressed is what capabilities, under international law, the organs of the *ATT* will have to develop the legal framework of the *ATT* despite their limited mandates. Starting with the CSP, the simple answer is that Articles 17 and 20 envision a significant role for the CSP in the consideration and adoption of formal amendments to the *ATT*. Although this may appear to give the CSP an important role in the development of the *ATT*, the reality is that this function will not affect the role of the CSP much, since it is extremely unlikely that the *ATT* will be formally amended in the foreseeable future.[58] Article 17, however, also attributes certain other functions to the CSP, which are mostly related to the review, implementation, and interpretation of the *ATT*, as well as to the establishment of the Secretariat and the direction of the work thereof.[59] Specific examples of substantive issues that have been named as possible topics for deliberation by the CSP are the development of standardized reporting forms, matrixes for reviewing reports, changes to the scope of the *ATT*, or the discussion of including benefits to *ATT* membership such as a preferential trade status.[60]

58 The procedure for amendment is complicated and burdensome; amendments require the support of ¾ of votes, and will only be in force for States that formally accept it. In this, it resembles the procedure of other arms control instruments. As a consequence, no major arms control treaty has ever been formally amended. The Statute of the IAEA, as an international organization, has been amended twice, but only in relation to procedural issues.

59 Article 17 *ATT*; see also Holtom & Bromley, 'Implementing an Arms Trade Treaty', *supra* note 21.

60 Based on discussions with officials and observers involved with the preparations for the first CSP as mentioned before, the first CSP mainly focused on procedural and institutional issues, although reporting templates were on the agenda as well, see also Brandes, *supra* note 6; Carneiro, *supra* note 21; P. Holtom & M. Bromley, 'Next Steps for the Arms Trade Treaty: Securing Early Entry Into Force', *Arms Control Association* (3

This mandate may make it possible for the CSP, based on general rules of treaty interpretation in the *Vienna Convention on the Law of Treaties* (*VCLT*), to develop the legal framework of the *ATT* without resorting to its formal amendment procedure.[61] Articles 31 and 32 *VCLT* combine three main approaches to treaty interpretation: The textual, subjective, and the teleological approach. As the first two emphasize, respectively, the text on itself and the text as the reflection of the meaning of the drafters of a treaty, they are more static than the teleological approach, which advocates interpreting the terms of a treaty primarily in light of its *object and purpose*.[62] As this may involve "[…] teleological interpretations of the text which go beyond, or even diverge from, the original intentions of the parties as expressed in the text"[63], it is a more dynamic, flexible approach that leaves room for the development of the law. A teleological interpretation can be used to fill gaps, make corrections, expand or supplement a text, as long as this is "[…] consistent with, or in furtherance of, the objects, principles and purposes in question."[64] This may include looking at the possible evolution of the meaning given to the terms of the treaty, especially if these are abstract or undefined – as many of the *ATT*'s terms are.[65]

The teleological approach to treaty interpretation is reflected in the *VCLT* in Article 31(1), which states that treaties must be interpreted in good faith, in accordance with the 'ordinary meaning' of its text in its context and the 'light of its object and purpose'. Article 31(3) *VCLT* embodies a clearly dynamic element of treaty interpretation by establishing that, together with the context of the treaty text (which consists of interpretative statements and agreements in connection with the conclusion of a treaty between its members), the interpretation of a treaty should take into account any subsequent agreement regarding the application of the treaty between its members, as well as any

June 2013), available at https://www.armscontrol.org/act/2013_06/Next-Steps-for-the-Arms-Trade-Treaty_Securing-Early-Entry-Into-Force (last visited 3 May 2016).

61 *Vienna Convention on the Law of Treaties*, 23 May 1969, Articles 31 and 32, 1155 UNTS 331 [*VCLT*].

62 See e.g., F.G. Jacobs, 'Varieties of Approach to Treaty Interpretation: with Special Reference to the Draft Convention on the Law of Treaties Before the Vienna Diplomatic Conference', 18 *International Comparative Law Quarterly* (1969) 2, 318; M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2008), 422.

63 *Third report on the law of treaties*, Yearbook of the International Law Commission (1964), Vol. II, 53-54, para. 4.

64 G.G. Fitzmaurice, *The Law and Procedure of the International Court of Justice* (1986), 8.

65 R.M. Dworkin, *Taking Rights Seriously* (1977), 165-169; U. Lindefalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (2007), 77-78.

subsequent practice in the application of the treaty "[…] which establishes the agreement of the parties regarding its interpretation." It has been pointed out that it is

> "[…] arguable that the main significance of subsequent practice in the [*VCLT*] is not in clarifying the original intentions of the parties, but in enabling effect to be given to their subsequent intentions, at least within the framework of the original text."[66]

Thus, subsequent agreement or practices can be used to establish an object and purpose that may differ from the original ones, as long as this does not lead to an interpretation of the treaty's terms that runs contrary to its text. The ILC noted that adopting an interpretation contrary to the text of a treaty would amount to a revision of that treaty, not its interpretation.[67] There is no hierarchy between the elements of Article 31 – they form a singular, integral approach.[68] On the other hand, the commentary to the *VCLT* makes clear that the *travaux préparatoires* of a treaty constitute only a *supplementary* means of interpretation.[69]

It is fair to ask why a teleological, dynamic approach primarily based on Article 31(3) *VCLT* should take precedence over the other approaches when interpreting the *ATT* over an extended period of time. The answer is that this is related to the type of treaty that the *ATT* is. The previous section explained how the particular nature of its inception and its subject-matter, the conflicting interests of flexibility and legal certainty, have led to the inclusion in the *ATT* of numerous undefined or *open terms*. Ninety-eight States supported a political declaration at the adoption of the *ATT* in which they stated that the treaty enables its members "[…] to make it stronger, and through its implementation, to adapt it to future developments."[70] Thus, the *ATT* is widely viewed as a work

66 Jacobs, *supra* note 62, 329-330.

67 *ILC Draft Articles on the Law of Treaties*, Yearbook of the International Law Commission (1966), Vol. II, 219 [ILC Draft Articles on the Law of Treaties]. More recently, this principle has been referred to as 'modification'. The debate on whether the medication of a treaty text through subsequent agreement and practice can be lawful has to date not been settled. The ILC concluded in its 2014 session that the "possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized", see *Report of the International Law Commission on the Work of Its Sixty-Sixth Session*, UN Doc. A/69/10, 2014, 169 [ILC Report (2014)].

68 *Ibid*., 219-220; see also Villiger, *supra* note 62.

69 See Article 32 *VCLT*; *ILC Draft Articles on the Law of Treaties*, *supra* note 67, 223.

70 *ATT Adoption/Declaration by Mexico*, *supra* note 17. This position is also supported by the majority of NGOs involved in the creation and implementation of the *ATT*.

in progress. Moreover, it can be classified as a *law-making* rather than a *contract* treaty. Whereas the latter contain specific obligations for each member, or group of members, in a *quid pro quo*, law-making treaties create general norms for the future conduct of the parties, containing obligations that are basically the same for all parties.[71] It is generally accepted that the teleological method of interpretation is best suited for law-making treaties or – to put it differently- in "[…] the field of general multilateral conventions, particularly those of the social, humanitarian, and law-making type."[72] The *ATT* is a multilateral arms control instrument setting norms for the behavior of all its member States. Article 1 states its object as the establishment of the *highest possible* standards for arms transfers. This goal can be only achieved through the adaptation of its provisions and its development into a more precise and elaborated legal framework, in line with the fact that such flexibility helps to guarantee the continued relevance of the *ATT* in response to military, political or technological changes. Its interpretation therefore warrants emphasizing the role of its object and purpose and the evolution of its terms as evidenced by subsequent agreement and practice.

Future CSPs may play an important role therein. International law has not defined 'subsequent agreement and practice' very clearly. Moreover, the distinction between subsequent agreement and practice is not always very clear.[73] To establish whether the discussions and documents of *ATT* CSPs may constitute subsequent agreement and practice in the sense of the *VCLT* it is necessary to turn to the case-law of the ICJ and examine the comments by the ILC in order to discern certain parameters. First, this illustrates that there are no clear conditions as to the *form* subsequent agreement and practice

71 J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (2012), 31; D. H. Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (2009), 9 considers the contract treaties to have as their chief characteristic "[…] a set of rules which are applied universally across the full spectrum of states parties"; see also, in general, A.D. McNair, 'The Functions and Differing Legal Character of Treaties', 11 *British Yearbook of International Law* (1930), 100; N. White, 'Interpretation of non-proliferation treaties', in Joyner & Roscini, *supra* note 23, 87.

72 Fitzmaurice, *supra* note 64, 2; see also H. Abromeit & T. Hitzel-Cassagnes, 'Constitutional Change and Contractual Revision: Principles and Procedures', 5 *European Law Journal* (1999), 1, 23, 29-30; M. Bos, 'Theory and practice of treaty interpretation', 27 *Netherlands International Law Review* (1980) 2, 135, 159-160.

73 *ILC Report (2014)*, *supra* note 67, 173.

must have.[74] It may include, for example, silent acquiescence.[75] The ILC pointed out that inaction, too, can under specific circumstances constitute subsequent practice.[76] Silence, moreover, may constitute acceptance of a practice, although it is necessary that all parties are aware of and accept the existence of a common understanding regarding the interpretation of a treaty.[77]

What is clear is that bodies such as the CSP, which are established by the treaty itself, may play a role in its subsequent interpretation even if they do not possess international legal personality. Draft conclusion 10 of the 2014 ILC Report states that the legal effect of decisions by CSPs "depends primarily on the treaty and any applicable rules of procedure".[78] They may, in effect, amount either to subsequent agreement or practice, depending on the modalities of the decision.[79] In 1952, the ICJ looked at documentation of a committee established by the 1906 *General Act of Algeciras* for the interpretation of the terms of the latter.[80] More recently, however, the Court rejected an interpretation of the *Whaling Convention* based on resolutions issued by the International Whaling

74 *ILC Report (2014)*, *supra* note 67, 169 concluding that subsequent agreement and practice can take a "variety" of forms, as long as they constitute a determination that the parties have taken a position regarding the interpretation of a treaty.

75 The ICJ, at least, has left this possibility open, see e.g. in *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, Judgment, ICJ Reports 1994, 6 when interpreting a 1955 treaty between Libya and France to settle a border dispute, the ICJ pointed out that no subsequent agreement had called the frontier deriving from the 1955 treaty into question, moreover, in a later treaty the same frontier was mentioned "with no suggestion of there being any uncertainty about it" *Territorial Disputes*, *ibid*., 34, para.66; in *Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgment, ICJ Reports 1999, 1045, 1076, paras 52, 53, 66 the ICJ did not challenge the assertion by one of the parties that international law does not require any particular formality for the conclusion of an international agreement, and that the only criterion is the intention of the parties to conclude a binding agreement, it merely found that the agreement in question did not indicate agreement on the boundaries of the disputed territory and did therefore not constitute a 'subsequent agreement' as meant in Article 31.3 *VCLT*; see also I. Buga, *The Modification of Treaties by Subsequent Practice: The Implications of Practice Going Beyond the Limits of Treaty Interpretation*, Ph.D dissertation, Utrecht University (2015), 54 stating that it must be clear that the acquiescing party is aware of the practice.

76 *ILC Report (2014)*, *supra* note 67, 169-170.

77 *Ibid*.

78 *Ibid*., 170.

79 *Ibid*.

80 *Case concerning rights of nationals of the United States of America in Morocco (France v. United States of America)*, Judgment, ICJ Reports 1952, 176, 211.

Commission (IWC).[81] The IWC was established by the Convention, and given powers to, *inter alia*, engage in studies and investigations, collect and analyze relevant data, disseminate and publish information, amend the scope of the Convention, or make recommendations to member States; to do so, it appoints its own Secretary, staff and can set up sub-committees.[82] The reason that its resolutions were not admitted as subsequent agreement or practice by the ICJ, however, had nothing to do with the composition or role of the IWC but was based on the fact that the resolutions in question were not adopted by consensus – Japan, for example, party to the proceedings, had opposed them.[83] What matters most therefore appears to have less to do with the form of the subsequent agreement or practice but all the more with the intention behind it: Do States agree that it should be a basis for interpretation?[84]

It certainly appears that future *ATT* CSPs have the potential to meet this standard. The text of the treaty states that the CSP is to review the implementation of the *ATT*, consider recommendations, amendments, and – notably – 'issues arising from its interpretation'.[85] The CSP furthermore has complete control over the size, mandate and activities of the *ATT* Secretariat.[86] It is very likely that the exact meaning of treaty terms such as "overriding risks", "grave" or "serious" breaches of international law, and "knowledge" will be discussed at CSPs, along with the creation of reporting tools and determining the role and influence of civil society in reviewing and implementing the *ATT*. Based on the judgment of the ICJ in the *Whaling-case*, however, it does seem likely that in order to have interpretative value, CSP decisions will have to be taken by consensus.

81 *Whaling in the Antarctic (Australia v. Japan, New Zealand intervening)*, Judgment, ICJ Reports 2014, 226 [*Whaling Case*].

82 *International Convention for the Regulation of Whaling*, 2 December 1946, Articles III, IV, V, VI, 161 UNTS 72, 76-83.

83 *Whaling Case*, *supra* note 81, para. 83; see also J. Arato, 'Subsequent Practice in the Whaling Case, and What the ICJ Implies about Treaty Interpretation in International Organizations', *EJIL: Talk! – Blog of the European Journal of International Law* (31 March 2014), available at http://www.ejiltalk.org/subsequent-practice-in-the-whaling-case-and-what-the-icj-implies-about-treaty-interpretation-in-international-organizations/ (last visited 29 April 2016).

84 See *ILC Report (2014)*, *supra* note 67, 170; *Kasikili/Sedudu Island Case*, *supra* note 75, in which the ICJ did not challenge the assertion by one of the parties that international law does not require any particular formality for the conclusion of an international agreement, and that the only criterion is the intention of the parties to conclude a binding agreement; R.K. Gardiner, *Treaty Interpretation* (2008), 17.

85 Article 17(4)(d) *ATT*.

86 Article 17(4)(e) *ATT*.

Other arms control instruments provide insights on how review mechanisms can contribute to the development of treaty regimes in combination with State practice. The *NPT*, which entered into force in 1970, mainly contains short, undefined provisions. Article VIII *NPT* called for a Review Conference in 1975; this provision has formed the basis for a review mechanism consisting of five-yearly Review Conferences, which are since 1995 preceded by Preparatory Committees.[87] The documents of these meetings have reflected, in a number of cases, subsequent agreement and practice of *NPT* member States that provides a legal basis for the dynamic interpretation of the treaty. The text of the core non-proliferation provisions of the *NPT* in Articles I and II, for example, left a number of possible loopholes for proliferation in the sense that they did not cover all possible scenarios of nuclear proliferation, such as proliferation via non-State actors, giving assistance to a nuclear weapons effort by a nuclear-weapon State to another nuclear-weapon State, or to a non-*NPT* State; or by an non-nuclear-weapon State to any other State.[88] A review of the *NPT* Review Conferences, however, indicates that Articles I and II *NPT* have been consequently interpreted by its member States in a way that closes off these loopholes. The 2010 Review Conference clearly states the obligation of *all NPT* members to ensure that their exports do not directly or indirectly assist nuclear weapons programs, and that they are in conformity with the *NPT*'s objectives and purposes as stipulated in Articles I, II and III of the treaty, not distinguishing in this context between *NPT* and non-*NPT* recipient States.[89] Similarly, the text of Article IV (1) *NPT*

87 *Final Document of the 1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons*, UN Doc NPT/CONF.1995/32 (Part I), 12 May 1995, Annex, Decision I, [NPT Conference 1995].

88 Cf. M. Shaker, *The Nuclear Non-Proliferation Treaty: Origin and Implementation, 1959-1979* (1980); M. Willrich, *Non-Proliferation Treaty: Framework for Nuclear Arms Contro*l (1969); E. Young, *A Farewell to Arms Control?* (1972).

89 F*inal Document of the 2010 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons*, UN Doc NPT/CONF.2010/50 (Vol. I), issued 28 May 2010, reissued 18 June 2010, 26 [NPT Conference 2010]; similar obligations were articulated by the Review Conferences of 1975, 1985, 1995, and 2000, see therefore *Final Document of the Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons*, NPT/CONF/35/I, Annex I, 30 May 1975, 3-4; *Final Document of the 1985 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons*, NPT/CONF.III/64/I, Annex I, 25 September 1985, 3; NPT Conference 1995, *supra* note 87, 11; *Final Document of the 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons*, NPT/CONF.2000/28 (Part I), 19 May 2000, 6 [NPT Conference 2000]; at the same time, extensive practice has been built up with the creation of the NSG and a near-universal system of domestic trade controls,

requires States to exercise their right to use nuclear energy for peaceful purposes in accordance with Articles I and II. Subsequent Review Conferences have clarified that they must also comply with safeguards obligations in Article III *NPT*.[90]

The *BWC* went through a number of developments as well, despite the fact that its drafters gave little consideration to the possibility of the treaty being at the basis of an evolving regime.[91] It did, however, call for a CSP to be organized within five years to review the operation of the *BWC*, taking into account "any new scientific and technological developments relevant to the Convention".[92] Gradually, the focus of the CSPs changed from simply reviewing the treaty to adapting it based on subsequent agreement and practice.[93] Article V *BWC*, for example, originally established a bilateral (consultations) and a multilateral (resort to the UN) mechanism for the resolution of conflicts arising out of the application of the *BWC*. Over time, however, a multilateral consultative mechanism was set up that did not necessarily involve the UN but involved expert meetings instead.[94] This, of course, implied a reinterpretation of the text of the *BWC*. The *BWC* Review Conference additionally added various confidence-building mechanisms to the treaty regime, often building on existing practices. Such developments did not necessarily happen at a very high pace, but gradually took place in a timespan covering multiple CSPs.[95]

Thus, while it is unlikely that the CSP will manage to adopt formal amendments to the *ATT*, it has much potential to contribute to the development of the legal regime on arms transfers through the progressive interpretation of the terms of the *ATT*. This conclusion is not only supported by legal theory – both the *NPT* and the *BWC* provide ample evidence of how review mechanisms can be the basis of the evolution of treaty-based arms control regimes. This does not mean, of course, that every declaration or document of a CSP meeting amounts to subsequent agreement. Developments of the *NPT* and *BWC* took

cf. T. Coppen, *The Law of Arms Control and the International Non-Proliferation Regime: Preventing the Spread of Nuclear Weapons*, (2016 [forthcoming]), Chapter 4.

90 NPT Conference 1995, *supra* note 87, Annex, para. 11; see also NPT Conference 2000, *ibid*., paras 8, 10; NPT Conference 2010, *ibid*., para. 31; see in general, Coppen, *supra* note 38.

91 N. A. Sims, *The Evolution of Biological Disarmament* (2001), 17.

92 *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction* (*BWC*), 10 April 1972, Article XII, 1015 UNTS 163, 168.

93 Sims, *supra* note 91, 17.

94 *Ibid*., 31-43.

95 *Ibid*., 82-119.

years or decades. Discussions at CSP meetings must reflect the intention of *ATT* member States to interpret the treaty.

Furthermore, this intention should be supported by State practice. The Appellate Body of the World Trade Organization has concluded that a practice had to be "concordant, common and consistent"[96] to amount to subsequent practice in the sense of the *VCLT*.[97] The ICJ has applied Article 31 even more flexibly. The ILC has followed the latter approach, focusing on the specifity and clarity of the practice, as well as on whether and how it is repeated.[98] It concludes that while the formula of the WTO Appellate Body "may be useful for determining the weight of subsequent practice in a particular case" it is not sufficiently well-established to articulate a minimum threshold.[99] Instead, the value of the practice may vary, leaving room for one-off instances of State practice to fall under Article 31 *VCLT* as well.[100] For analytical purposes, this article will follow the higher standard, in example that of the WTO.[101] In the case of the *ATT*, it is most likely that such practices will be stimulated, encouraged and documented by the Secretariat.

D. The Creative Function of the *ATT* Secretariat

As mentioned, the *ATT* does not attribute to its Secretariat any explicit law-making or interpretive mandate. Moreover, the Secretariat has no international legal personality and lacks the power to enforce compliance with the *ATT* by, for example, recommending or adopting punitive measures against States.[102]

96 M. K. Yasseen, 'L'interprétation des traités d'après la Convention de Vienne sur le Droit des Traités' (1976-III) 151 *Recueil des Cours* (1976) 3, 1, 4; Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (1984), 137.

97 Reports of the Appellate Body, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996, 11-13.

98 *ILC Report (2014)*, *supra* note 67, 169 stating that the "element of time and the character of the repetition also serves to indicate the "grounding" of a particular position of the parties regarding the interpretation of a treaty"; repetition should, in this context, be more than a technical or unmindful repetition of a practice.

99 *Ibid*., 195.

100 *Ibid*., 195-196.

101 The reason for this is not only that meeting this threshold would mean meeting that of the ICJ/ILC as well; it is also a reflection of the importance of legal certainty in this particular field of international law, described in section B.

102 Cf. e.g. Article 18 *ATT* with the powers of the IAEA in *Statute of the International Atomic Energy Agency*, 29 July 1957, Articles XII and XIX, 276 UNTS 3 or the organs of the OPCW in *Convention on the Prohibition of the Development, Production, Stockpiling and*

This does not mean, however, that it cannot contribute to the development of the treaty in other ways, for instance by carrying out certain supervisory tasks.

The necessity of an adequate system for the supervision of arms control arrangements has been discussed extensively.[103] Although non-compliance may be hard to detect in the case of the *ATT*, States will nevertheless demand some certainty that other States are indeed adhering to the rules of the treaty. The process of doing so can be referred to as *supervision*.[104] Supervision entails more than simply enforcing compliance with treaties. It also includes those parts of the process that help establish whether States have breached certain norms. Thus, we can distinguish different stages or phases of the supervisory process: information gathering, review, assessment and compliance management.[105] The first of these, *information gathering*, is rather self-explanatory, consisting of "[…] efforts to detect, identify, and measure developments and activities of interest."[106] Information gathering may be done on a continuous, general basis or with a specific aim. Prevalent methods are national technical means such as satellite imagery or espionage, information exchanges, reporting requirements, inspections or cameras. During the *review* stage, the data yielded by information gathering activities is analyzed according to, mainly, technical and legal standards. The review stage is based on concepts such as objectivity,

Use of Chemical Weapons and their Destruction, 29 April 1997, Article XII, 1974 UNTS 45.

103 Cf. Den Dekker, *Law of Arms Control*, *supra* note 22; S. Sur (ed.), *Verification of Current Disarmament and Arms Limitation Agreements: Ways, Means and Practices* (1991); E.P.J. Myjer, 'The Law of Arms Control and International Supervision', 3 *Leiden Journal of International Law* (1990) 3, 99; E.P.J. Myjer & J. Herbach, 'Violation of Non-proliferation Treaties and Related Verification Treaties', in Joyner & Roscini, *supra* note 23, 119.

104 See Den Dekker, *Law of Arms Control*, *supra* note 22; G. Den Dekker, 'The Effectiveness of International Supervision in Arms Control Law', 9 *Journal of Conflict and Security Law* (2004) 3, 315 [Supervision of Arms Control Law]; others have referred to this process as 'verification' cf. e.g., *Fifth Report of the Committee on Arms Control and Disarmament Law – National and International Verification Measures*, International Law Association London Conference, 20 January 2000, available at www.ila-hq.org/download.cfm/docid/1250C212-4417-4682-A2BCDAF39C36AEF2 (last visited 13 June 2016); J. Mackby, 'Nonproliferation Verification and the Nuclear Test Ban Treaty', 34 *Fordham International Law Journal* (2011) 4, 697; L. Tabassi, 'The Chemical Weapons Convention', in G. Ulfstein (ed.), *Making Treaties Work: Human Rights, Environment and Arms Control* (2007), 273; L. Rockwood, 'The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and IAEA Safeguards Agreements', in Ulfstein *ibid*., 301.

105 See in general, Den Dekker, *Law of Arms Control*, *supra* note 22; Den Dekker, 'Supervision or Arms Control Law', *supra* note 104.

106 Den Dekker, *Law of Arms Control*, *supra* note 22, 102.

negotiation and consultation. It is in certain cases followed by *assessment*, which entails a more formal political-legal qualification of the reviewed data. In this stage, States come to a conclusion whether evidence of certain State behavior constitutes non-compliance with its treaty obligations. A fourth part of the supervisory process is that of *compliance management*. It is a continuous process between States – or between States and international supervisory bodies such as the *ATT* Secretariat. Compliance management includes what is often referred to as *enforcement* of compliance or *correction* of State behavior. These elements have a strong punitive side to them, as they aim to "[…] persuade States to adapt their behavior and again render it consistent with what is required by the treaty provisions."[107] Enforcement measures can first of all be of a unilateral character based on the concept of self-help under international law.[108] Such measures may include, for example, countermeasures, retorsions, but also political or even military pressure.[109] Many arms control treaties contain, in addition, a number of measures that can be adopted against a non-compliant State by a multilateral supervisory body, such as the suspension of certain rights or benefits a State enjoys under the treaty in question, or even a referral of the situation to the UN Security Council, which may subsequently adopt collective measures.[110] Non-compliance resolution or other forms of diplomatic pressure are, moreover, a form of punitive measure on themselves as they can lead to a loss of status for the State involved.

In the context of the *ATT*, it is clear that any political pressure regarding the implementation of its terms should come, for the foreseeable future, from individual member States or from civil society. The Secretariat simply lacks the mandate to make a political assessment of State compliance with the *ATT* or to take coercive measures against non-compliant States. Scholars have recognized, however, that enforcement is not always the most effective way of ensuring compliance with a treaty: It can create adversary relations between parties to a treaty that ought to be cooperating to achieve a common goal.[111] Thus, a

107 *Ibid*., 110.

108 Schermers & Blokker, *supra* note 49, para. 1445.

109 See e.g., B. Kaussler, *Iran's Nuclear Diplomacy: Power Politics and Conflict Resolution* (2014).

110 NPT Conference 2010, *supra* note 89.

111 C.P. Hindawi, 'The Controversial Impact of WMD Coercive Arms Control on International Peace and Security: Lessons from the Iraqi and Iranian Cases', 16 *Journal of Conflict and Security Law* (2011) 3, 417, 441; see also A. Chayes & A.H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995)[New Sovereignty]; A.H. Chayes & A. Chayes, 'From Law Enforcement to Dispute Settlement:

new, more managerial, approach was identified. This cooperative approach is based on elements of transparency, dispute settlement, capacity building and persuasion. The first two speak for themselves: transparency is necessary for confidence-building between States, fostering cooperative relations, and dispute settlement (whether through formal or informal means) is necessary as a result of the ambiguity of both arms control instruments as well as the behavior of States thereunder.[112] Capacity building entails assistance given to States with the aim of increasing that State's capabilities of implementing treaty provisions; persuasion is based on offering States positive incentives in exchange for adhering to an arms control regime.[113]

Thus, even though the Secretariat lacks the capacities and/or mandates for assessment and enforcement of compliance with the *ATT*, this does not mean that it is not a supervisory organ, as supervision entails much more than assessment and enforcement. As such, it can contribute to the development of the *ATT* treaty regime. Supervision, it has been pointed out, has a distinct creative function in the sense that it involves the elaboration, clarification and creation of new rules as both political and legal standards are being developed to measure State behavior against.[114] Compliance management, too, incorporates a creative element: through negotiation and consultations, through the spreading of practices and knowledge, norms can be adapted to changing circumstances in a non-adversarial context.[115] A clear example of this would be the creation of legal standards through the resort by States to the *ATT*'s formal dispute settlement mechanism in Article 19, but the practice of the future *ATT* Secretariat may also contribute to the development of the law.

This starts with its information-gathering and transparency-related functions. The *ATT* establishes that the Secretariat shall receive, make available and distribute the reports required by the treaty.[116] States are, under the provisions of the *ATT*, required to report on their national control lists, national points of contact, implementation measures as well as imports and exports covered by the treaty. Additionally, they are encouraged to make such reports publicly available

A New Approach to Arms Control Verification', 14 *International Security* (1990) 4, 147; M. ElBaradei, *The Age of Deception* (2011), 111-113.

112 Chayes & Chayes, *New Sovereignty*, *supra* note 111, 201.

113 *Ibid*.

114 E.P.J. Myjer, 'The Organization for the Prohibition of Chemical Weapons: Moving Closer Towards an International Arms Control Organization? A Quantum Leap in the Institutional Law of Arms Control', in Myjer, *Issues of Arms Control*, *supra* note 22, 61.

115 Chayes & Chayes, *New Sovereignty*, *supra* note 111.

116 Article 18(3) *ATT*.

and report on measures they have taken to prevent the diversion of armaments covered by the *ATT*.[117] The role of transparency under the *ATT* is reminiscent of UNROCA and of the Committee for the implementation of UN Security Council resolution 1540 (1540 Committee). Both of these mechanisms relied on voluntary reporting by States. The UN Program of Action against SALW trade proposes, furthermore, that States publish relevant national laws and data. Participation in the UNROCA and the Programme of Action has not been optimal, which has been blamed on the influence of security-related, political and economic factors, State capacities, cultures of secrecy, reporting fatigue or simple opposition against the initiative at hand.[118] The 1540 Committee has partly addressed these problems by establishing a more sophisticated supervisory mechanism that comprises strong elements of cooperation, knowledge transfer and capacity building. The *ATT* mechanism, in turn, can build on the combined experience of the 1540 Committee, UNROCA, and the Programme of Action. The *ATT* provides several ways to assist States with their reporting requirements, as the 1540 Committee does. The latter's experience has already proven that better dissemination of information will help spread best practices and harmonize standards in practice. Furthermore, Committee experts are often in a better position to comprehend decentralized national export control systems than State officials that work for one department only, and so increase national awareness and set up national inter-agency bodies.[119] The *ATT* is ambivalent on the question whether State reports will be made publicly available, but if this happened civil society could apply further pressure on States to raise their standards.[120]

Additionally, the experience of the 1540 Committee demonstrates that information-sharing is a task that incorporates an element of review. First, national authorities themselves will have to review their actions in the context of the treaty in order to comply with the reporting requirements. Second, the 1540 Committee has created a matrix to streamline the reporting process: States answer questions and the Committee evaluates how national measures address the questions posed in the matrix. Follow-ups with the State in question are possible. This practice has further contributed to the development and integration

117 Articles 5, 11 and 13 *ATT*.

118 P. Holtom, 'Nothing to Report: The Lost Promise of the UN Register of Convention Arms', 31 *Contemporary Security Policy* (2010) 1, 61, 67.

119 Comments by senior official, Washington DC, 15 January 2014 given during an interview with the author.

120 Comments by an expert of a Dutch arms control NGO, October 2014 given during an interview with the author.

of international standards on dual-use export controls. There is no reason why the *ATT* Secretariat could not play a similar role. Through such matrixes, for example, it could stimulate the practice of extending the reporting requirements to ammunition and components, or streamline national control lists and thereby harmonize practices in terms of the scope of the treaty.[121]

The *ATT* Secretariat, moreover, has a lot of potential in terms of capacity building, as the *ATT* emphasizes the importance of the Secretariat in relation to facilitating offers and request for assistance in the implementation of the treaty.[122] There are, furthermore, a number of other provisions in the treaty on to international cooperation and assistance. These are related to assistance with criminal investigations, prosecutions and judicial proceedings, anti-corruption initiatives, the exchange of expertise and lessons learned in relation to the implementation of the *ATT*, as well as the setting up of a voluntary trust fund to assist member States with implementing the treaty.[123] Although the text of the *ATT* does not envision a role for the Secretariat in these spheres, the CSP may, under Article 17, consider the tasks of the Secretariat – given that its role already is that of a clearing-house for assistance requests and offers, as well as that of a distributor of information, it is not a stretch to imagine that the Secretariat's role in international assistance and cooperation will be increased by *ATT* member States. The 1540 Committee was given stewardship of a multilateral fund for increasing cooperation as well. Furthermore, the CSP of the *BWC* decided to establish a similar sponsorship program to support and increase the participation of developing member States in meetings, tasking the Implementation Support Unit of the treaty with its administration.[124]

Through supervising the implementation of the *ATT*, the Secretariat therefore possesses significant potential to contribute to the establishment of standard practices under the treaty. It does not require to have international legal personality, or to be part of an existing UN structure, for this. Based on its current tasks and mandate it will already be able to play a significant role and disseminating information, best practices, assist in facilitating cooperation and capacity-building, as well as streamline reporting and interpretation of the treaty, thus furthering its harmonized implementation. Moreover, the *ATT*

121 Cf. Holtom & Bromley, 'Implementing an Arms Trade Treaty', *supra* note 21.

122 Article 18 (3)(c) *ATT*.

123 Articles 15, 16 *ATT*.

124 *Seventh Review Conference of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction – Final Document*, UN Doc. BWC/CONF.VII/7, 13 January 2012, paras 21, 23.

membership may elect to expand its mandate and structure over the years, further increasing its impact on international practice.

E. Conclusion

The *ATT* is a significant step towards effective international regulation of the arms trade and, with that, towards the increased accountability for arms transfers. At the same time, however, it is clear that the *ATT* in its current form has significant shortcomings that may prevent it from achieving this goal. Security-related concerns have led States to ensure that the treaty provisions do not encroach, to a too great extent, upon their sovereign decision-making powers related to strategic imports and exports. These efforts have most notably led to the introduction of certain *open* qualifications in the *ATT* that may be used to circumvent its obligations, to a limitation of the scope of the provisions of the treaty, and to a limited mandate for its Secretariat. Thus, if the *ATT* is to form a legal basis for the harmonization of export policy standards and to contribute to greater accountability through improved transparency of the arms trade, it must develop its scope and norms into a more comprehensive international legal framework.

This article pointed out that in this sense the *ATT* conforms to the dynamics that influence the creation and development of most arms control instruments. It then illustrated how both legal theory and experiences with the development of other arms control instruments indicate that there is sufficient latitude for the *ATT* to develop its framework under applicable rules of general international law in order to realize its potential. Both the CSP and the Secretariat can play an important role in the *ATT*'s evolution without transgressing the boundaries set by the treaty to their mandates. The concept of the dynamic interpretation of treaties, based on the *VCLT*, is a key part of this process. Treaties such as the *ATT*, with its open terminology and qualified obligations, can evolve through the establishment of authoritative subsequent agreement and practice in relation to the meaning of its provisions. This article illustrated how such subsequent agreement and practice may originate from the *ATT* CSP and Secretariat. The treaty itself lays the foundation for this process by attributing functions to these bodies in terms of review (CSP) and supervision (Secretariat). Much like the Review Conference mechanisms of the *NPT* and the *BWC*, consensus discussions, conclusions, decisions or recommendations of the CSP may be the basis of a progressive interpretation of the *ATT* in case they are supported by concordant, common and consistent practice of its member States. It is the Secretariat that will have a major role in this particular context: although

it has few real powers, its function as a clearing-house for information, match-maker and facilitator will put it in a position to contribute to the development and harmonization of international practice in the implementation of the terms of the *ATT*. Together with CSP documents that, over time, indicate a shifting *opinio juris* of States regarding the interpretation of corresponding treaty provisions, this constitutes subsequent agreement and practice under the *VCLT*.

Thus, while neither the actions of the CSP (unless explicitly stated in the *ATT*) nor those of the Secretariat will have any direct binding legal consequences they may, subject to the rules of the *VCLT*, establish an authoritative interpretation of the *ATT*'s terms, which do bind the member States of the treaty. In this way the treaty regime may evolve in order to effectively carry out the task it was intended to. This mechanism for the development of a legal regime is – as already suggested by the examples of the *NPT* and *BWC* – common and well-suited to arms control instruments. It satisfies the demand for flexibility in that the treaty needs to develop in order to adapt to changing circumstances and so remain effective without having to resort to burdensome amendment procedures. Moreover, it allows for the initial insertion of more open terms in the text of the treaty, as well as for an initial limitation of its scope, in order to acquire the greatest number of signatories as possible. Subsequently, following existing practice and consensus (or, at the very least, acquiescence), the treaty can evolve, maintaining and expanding its membership. This process serves legal certainty because it translates existing practices into legal rules, thereby providing clear standards and increasing predictability for States adhering to the treaty. At the same time, because it is based on existing practices (although these may be stimulated by the organs of the *ATT*, in turn) the progressive development of the treaty will have a significant bottom-up, State-driven aspect to it, which should satisfy arms-control related State concerns about their sovereignty. The requirement of consensus, recently stressed by the ICJ, ensures that this way of treaty development will not bind States against their will.

It can therefore be concluded that while *ATT* may yet be inadequate to fulfill the promise of an effectively regulated and controlled international arms trade, there certainly is room for the lawful development of its norms, which will depend on amassing political will and the establishment of practice. Experience with implementing the *ATT* will contribute to both; so will diplomatic efforts, a well-staffed, able and efficient Secretariat, as well as the continuous involvement of civil society. The *ATT* provides the foundation for a more comprehensive legal framework on the arms trade, international law provides the means to develop it; now it is up to those involved to realize this aim.

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Combating Illegal Fishing in the Exclusive Economic Zone – Flag State Obligations in the Context of the Primary Responsibility of the Coastal State

Valentin J. Schatz*

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* The author is a Doctoral Candidate and Research Associate at the Chair for Public Law, in particular Public International Law and European Law (Professor Dr. Alexander Proelß) of the University of Trier, Germany. At the time of completion of this article, the author was a student assistant at the Chair of Constitutional and Administrative Law, Public International Law, European and International Economic Law (Professor Dr. Hans-Georg Dederer) of the University of Passau, Germany.

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Abstract

Illegal fishing in the Exclusive Economic Zones [EEZs] of developing coastal States is an urgent problem for the marine environment, global food security, and local economies. While past academic debate has predominantly focused on obligations of flag States to tackle so called IUU-fishing in the High Seas, the recent request for an advisory opinion submitted by the Sub-Regional Fisheries Commission to the International Tribunal for the Law of the Sea (ITLOS, *Case No. 21*) has drawn attention to the fisheries regime of the EEZ. This article argues that the primary responsibility for fisheries management in the EEZ rests on the coastal State and that, so far, flag States have no obligation under customary international law to exercise their jurisdiction and control over vessels flying their flag which fish in the EEZ of other States. The article first gives an account of coastal State regulatory and enforcement jurisdiction. It outlines recent developments of the law by drawing on the jurisprudence of the ITLOS, particularly the recent *M/V "Virginia G" Case*. Further, the article undertakes to identify potential flag State obligations to combat illegal fishing in the EEZ. To that end, it provides an in-depth analysis of relevant binding and non-binding legal instruments such as the 1982 *UN Convention on the Law of the Sea*, other multilateral treaties, bilateral fisheries treaties, and relevant soft-law instruments of the Food and Agriculture Organization of the United Nations. The article also discusses the relevance of principles of international environmental law. Next, the article analyzes the nature and scope of potential flag State obligations, qualifying them as obligations of due diligence. Finally, the article concludes that, *de lege lata*, no persuasive evidence of established flag State obligations exists. The author suggests that the situation should be remedied by a new, fully binding legal instrument.

A. Introduction

The state of global fish stocks is alarming. According to the annual report of the Food and Agriculture Organization of the United Nations [FAO], global catches peaked at 86.4 million tonnes in 1996 and have generally been decreasing since.[1] While the size of the global fishing fleet has remained stable at 4.72

[1] FAO, The State of World Fisheries and Aquaculture (2014), available at http://www.fao.org/3/a-i3720e.pdf (last visited 10 March 2015), 37 [FAO, State of World Fisheries].

million vessels,[2] only 79.7 million tonnes of fish were caught in 2012.[3] At the same time, only 9.9% of fish stocks still showed potential for an increase of catches in 2011.[4] About 61.3% of commercially exploited marine fish stocks were fully fished and 28.8% were found to be overfished.[5] These statistics prove the 1995 Kyoto Declaration right, which estimated that from 2010 fish stocks would not be able to satisfy the growing demand for fish products.[6] One of the main causes for the worldwide decline in fish stocks is the so-called "illegal, unreported and unregulated fishing" [IUU-fishing].[7] According to recent studies, IUU-fishing generates between USD 4 and 9 billion in revenues annually.[8] While the international community's main focus was on IUU-fishing in the High Seas during the past two decades, the bulk of global IUU-fishing (or simply "illegal fishing" for the present purposes[9]) actually took place in the EEZs of coastal

2 *Ibid.*, 32-33. The Asian fleet alone accounts for as much as 3.23 million vessels.

3 FAO, *Fishery and Aquaculture Statistics*, Yearbook 2012 (published in 2014), available at http://www.fao.org/3/a-i3740t.pdf (last visited 10 March 2015), 7.

4 FAO, *State of World Fisheries*, *supra* note 1, 37.

5 *Ibid.*, 347.

6 International Conference on the Sustainable Contribution of Fisheries to Food Security, *Kyoto Declaration and Plan of Action on the Sustainable Contribution of Fisheries to Food* (1995), available at http://www.un.org/esa/documents/ecosoc/cn17/1996/ecn171996-29.htm (last visited 19 January 2015), Article 3.

7 The term was first defined in para. 3 of the FAO's *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (2001) [IPOA-IUU], available at ftp://ftp.fao.org/docrep/fao/012/y1224e/y1224e00.pdf (last visited 30 March 2015).

8 High Seas Task Force, *Closing the Net: Stopping Illegal Fishing on the High Seas* (2006), available at http://www.oecd.org/sd-roundtable/papersandpublications/39375276.pdf (last visited 30 March 2015), 3.

9 Whether the term "IUU-fishing" has led to more clarity in the context of EEZ fisheries can be doubted. Foreign fishing in the EEZ is "illegal" (para. 3.1 IPOA-IUU) when conducted "without the permission of [the coastal State], or in contravention of its laws and regulations". Consequently, "unreported" (para. 3.2 IPOA-IUU) fishing activities, which "have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations" are simply a form of "illegal" fishing. Relevant ITLOS cases are *The "Hoshinmaru" Case (Japan v. Russian Federation),* ITLOS, *Case No. 14, Prompt Release*, Judgment, 6 August 2007; *The "Tomimaru" Case (Japan v. Russian Federation)*, ITLOS, *Case No. 15, Prompt Release*, Judgment, 6 August 2007. The relevance of „unregulated" (paras 3.3.1, 3.3.2 IPOA-IUU) fishing is limited to situations in the High Seas, as fishing in the EEZ will hardly ever be entirely "unregulated" due to the fishing laws and regulations of the coastal State. In conclusion, two of three components of the term IUU-fishing are redundant in the EEZ. It suffices to refer to them as "illegal fishing", especially as the definition is expressly not binding (para. 4 IPOA-IUU). See D. M. Sodik, 'Non-Legally Binding International Fisheries Instruments and Measures to Combat Illegal, Unreported and Unregulated Fishing', 15 *Australian International Law Journal* (2008) 1, 129, 134.

States.[10] Due to their extensive EEZs, which are rich in fisheries,[11] and their lack of resources for purposes of monitoring and enforcement,[12] West African States are particularly vulnerable to illegal fishing.[13] On 27 March 2013, the Sub-Regional Fisheries Commission [SRFC],[14] a Regional Fisheries Organization [RFMO] of West African States, submitted a request for an advisory opinion to the International Tribunal for the Law of the Sea [ITLOS] in Hamburg. The first of the four questions submitted by the SRFC reads: "What are the obligations of the flag State in cases where illegal, unreported and unregulated [IUU] fishing activities are conducted within the Exclusive Economic Zones of third party States?"[15] With its request, the SRFC seems to have followed recent calls for an advisory opinion to clarify flag State responsibilities.[16]

10 About USD 1.25 billion of the USD 4 to 9 billion in revenues from illegal fishing originate from the High Seas and the remaining part (USD 2,75 to 7,75 billion) from the EEZs of coastal States.

11 About 90% of global fish stocks are located in the EEZs of coastal States. See J. Gulland, 'Developing Countries and the New Law of the Sea', 22 *Oceanus Magazine* (1979) 1, 36. The area above the continental shelves down to the 200m isobath is estimated to cover about 87% of commercially exploited fish stocks. See R. Dupuy, *L' océan partagé - analyse d'une négociation (Troisième Conférence des Nations Unies sur le Droit de la mer)*, 1st ed. (1979), 87.

12 Two main drivers of IUU-fishing are the low demonstration effect due to insufficient monitoring, control and surveillance, and the low deterrence effect due to inadequate enforcement and sanctions. See C. Schmidt, 'Economic Drivers of Illegal, Unreported and Unregulated (IUU) Fishing', 20 *International Journal of Marine and Coastal Law.* (2005), 479, 485-487. Even developed coastal States such as the United States are struggling to eradicate illegal fishing in their EEZs. C. H. Allen, 'Doctrine of Hot Pursuit: A Functional Interpretation Adaptable to Emerging Maritime Law Enforcement Technologies and Practices', 20 *Ocean Development and International Law* (1989), 309, 311.

13 West African States incur losses of an estimated USD 1 billion due to illegal fishing annually. As a result, conservation measures of coastal States are undermined and fish stocks collapse, negatively affecting the livelihood of local fishing communities and the profitability of the local fishing industry. See High Seas Task Force, *supra* note 8,16.

14 The seven member States are: Republic of Cabo Verde, Republic of the Gambia, Republic of Guinea, Republic of Guinea-Bissau, Islamic Republic of Mauritania, Republic of Senegal, Republic of Sierra Leone. See http://www.spcsrp.org/ (French only, last visited 30 March 2015).

15 Request for Advisory Opinion, ITLOS, *Case No. 21* (27 March 2013). All documents relating to the written proceedings and the verbatim records of the oral hearings in ITLOS, *Case No. 21* are available at http://www.itlos.org/index.php?id=252 (last visited 30 March 2015).

16 T. M. Ndiaye, 'Illegal, Unreported and Unregulated Fishing: Responses in General and in West Africa', 10 *Chinese Journal of International Law* (2011) 2, 373, 395-396; For calls for a "model case", see also Department of Fisheries and Oceans of Canada, *Expert Workshop on Flag State Responsibilities: Assessing Performance and Taking Action* (2008),

This article aims to contribute to that clarification,[17] and includes both an analysis of the written and oral submissions of States, international organizations and NGOs during the proceedings and is restricted to illegal fishing in the EEZ.[18] It will first analyze the regulatory and enforcement jurisdiction of the coastal State to draw a sufficiently clear picture of coastal State responsibilities underlying the regime of the EEZ (section B.). In order to identify and define potential flag State obligations to combat illegal fishing, it will then analyze the relevant provisions of the 1982 *United Nations Convention on the Law of the Sea* [UNCLOS][19] and other multilateral conventions, soft-law instruments, as well as bilateral treaty practice and principles of international environmental law (section C.). This analysis will be followed by a conclusion (section D.).

B. Regulatory and Enforcement Jurisdiction of the Coastal State in its EEZ

Considering how the zonal system of *UNCLOS* adopts the perspective of the coastal State, potential flag State obligations in the EEZ cannot be analyzed without first taking a look at coastal States' jurisdiction and competences. It is now generally accepted that most of the EEZ regime of Part V of *UNCLOS* represents customary international law.[20] The EEZ is a maritime zone *sui generis*,[21] which combines fundamental freedoms of the High Seas (in particular

available at http://www.dfo-mpo.gc.ca/international/documents/flag-state-eng.htm (last visited 30 March 2015), 11.

17 Note also G. Handl, 'Flag State Responsibility for Illegal, Unreported and Unregulated Fishing in Foreign EEZs', 44 *Environmental Policy and Law* (2014) 1-2, 158.

18 The legal implications of fishing activities in the Territorial Sea, Archipelagic Waters and Internal Waters of coastal States will not be analyzed. Sedentary species, which are defined by Article 77 (4) *UNCLOS* as "organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil" are covered by the regime of the Continental Shelf and not that of the EEZ. See Article 68 *UNCLOS*. See also D. Harris, *Cases and Materials on International Law*, 7th ed. (2010), 396, para. 4.

19 *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3 [UNCLOS].

20 *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, Judgment, ICJ Reports 1985, 13, 33; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, Judgment, ICJ Reports 1984, 246, 294; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, ICJ Reports 1993, 38, 59.

21 D. Nelson, 'Exclusive Economic Zone', in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law*, Vol III (2008), 1035, 1038, para. 14. Views that the EEZ remains part of the High Seas are difficult to uphold in light of the wording of

the freedom of navigation, Article 58 (1) *UNCLOS*) with certain sovereign rights of coastal States, thereby creating considerable tension between the two.[22] As stated by Article 56 (1) (a) *UNCLOS* the coastal State has, *inter alia*, sovereign rights for the purpose of exploring, and exploiting, conserving, and managing the living natural resources in its EEZ. Those sovereign rights must be distinguished from the coastal State's full sovereignty over the Territorial Sea, as they are limited *ratione materiae* to the resources of the EEZ.[23] Thus, the EEZ succeeds earlier concepts of preferential fishing rights in an area beyond the Territorial Sea.[24] In order to exercise its sovereign rights, the coastal State may regulate EEZ fisheries in accordance with Articles 61, 62 *UNCLOS* and enforce its fisheries laws pursuant to Article 73 *UNCLOS*.

I. Regulatory Jurisdiction of the Coastal State

The coastal State determines the allowable catch pursuant to Article 61 (1) *UNCLOS* and must take proper conservation and management measures in order to ensure that the maintenance of the living resources in the EEZ is not endangered by over-exploitation pursuant to Article 61 (2) *UNCLOS*. As stated by Article 62 *UNCLOS* the coastal State must at the same time promote the objective of optimum utilization of the living resources. It has an obligation to give other States access to any possible surplus of the allowable catch that it cannot harvest itself.[25] Nationals of other States must comply with the fishing laws and regulations of the coastal State in its EEZ pursuant to Articles 56 (1) (a), 62 (4) *UNCLOS*,[26] which involve, *inter alia*, licensing schemes, catch quotas, reporting duties, monitoring, landing of catches, and

Article 55 *UNCLOS* ("The exclusive economic zone is [...] subject to [a] specific legal regime".) and Article 86 *UNCLOS* ("The provisions [on the High Seas] apply to all parts of the sea that are not included in the exclusive economic zone".). For a more nuanced approach, see A. Proelss, 'The Law on the Exclusive Economic Zone in Perspective: Legal Status and Resolution of User Conflicts Revisited', 26 *Ocean Yearbook* (2012), 87, 88 ff.

22 A. J. Hoffmann, 'Freedom of Navigation', in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law*, Vol VII (2011), 568, 571-572, para. 19.

23 Y. Tanaka, *The International Law of the Sea*, 1st ed. (2012), 127.

24 See *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, Judgment, ICJ Reports 1974, 3, paras 55-60; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Judgment, ICJ Reports 1974, 175, paras 47-52.

25 For details, see *infra*, section C.III.

26 It should be noted that Article 62 (4) *UNCLOS* is not a separate basis for jurisdiction, but merely concretizes Article 56 (1) (a) *UNCLOS*.

enforcement procedures.[27] Technological progress and an increasingly global economy have changed modern fishing practices. Many activities which are today a common feature of international fisheries, are not expressly mentioned in Article 62 (4) *UNCLOS*. Large industrial fishing vessels can now stay at sea for long periods of time as they are accompanied by factory and refrigerator vessels on which they transship their catches, by tankers which supply them with oil and gas as fuel (so-called "bunkering"), and by other support vessels which deliver supplies and workers.[28] For the purposes of this article, those recent practices can roughly be pooled into two main categories: (1) handling of catches such as transshipment, processing, refrigerating and transport of caught fish, (2) support of fishing vessels such as bunkering and supply with provisions and personnel. Those activities are arguably not essential elements of (and do not exclusively apply to) fishing, but are nonetheless characteristic of contemporary fishing practices. The question of whether they can be regulated by the coastal State is of utmost importance for combating illegal fishing in the EEZ. Where the coastal State has no jurisdiction, any legislative or enforcement measures will constitute an infringement of the flag State's freedom of navigation in the EEZ pursuant to Article 58 (1) *UNCLOS*.[29]

With respect to category (1), the arbitral tribunal in the *Case concerning filleting within the Gulf of St. Lawrence*, adopting a narrow interpretation of Article 56 (1) (a) *UNCLOS*, held that the coastal State's sovereign rights to manage the living resources of the EEZ do not extend to the processing of fish caught in the EEZ.[30] It considered that Article 62 (4) *UNCLOS* did not cover activities substantially different from those listed.[31] In the *"Juno Trader" Case*, the ITLOS was confronted with the issues of transshipment and transport of catch in the EEZ, but did not expressly address coastal State competences.[32] It did, however, take into account Guinea-Bissau's transshipment legislation

27 The list in Article 62 (4) *UNCLOS* is not exhaustive, see M. H. Nordquist *et al.* (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Volume II, Article 1 to 85, Annexes I and II, Final Act, Annex II (1993), para. 62.16 (j) [Nordquist, Virginia Commentary Vol. II].

28 See Ndiaye, *supra* note 16, 376.

29 See *The M/V "Virginia G" Case (Panama v. Guinea-Bissau)*, ITLOS, *Case No. 19*, Merits, Judgment, 14 April 2014, para. 222. The ITLOS also notes that Article 58 *UNCLOS* must generally be read in conjunction with Article 56 *UNCLOS*.

30 *Case concerning filleting within the Gulf of St. Lawrence between Canada and France*, 19 Reports of International Arbitral Awards (1986), 225, para. 50.

31 *Ibid*., para. 52.

32 *The "Juno Trader" Case (Saint Vincent and the Grenadines v. Guinea-Bissau)*, ITLOS, *Case No. 13*, Judgment, 18 December 2004, paras 86-91.

for the purposes of calculating the "[...] reasonable bond [...]" pursuant to Article 73 (2) *UNCLOS*,[33] which can be read as an implicit acknowledgment of its conformity with *UNCLOS*.[34] Thus, the ITLOS disagreed with the arbitral tribunal in the *Gulf of St. Lawrence Case*.[35] However, it is often difficult to distinguish fishing activities and transport of catch in the EEZ from mere transport of catch of different origin through an EEZ.[36] The ITLOS touched upon this issue in the *"Monte Confurco" Case* and implicitly acknowledged the coastal State's competence to oblige transiting fishing vessels to notify their entry into the EEZ.[37] Arguably, the coastal State may also adopt legislation providing for inspection of transiting fishing and transport vessels.[38] However, as mere transit as such is protected by the freedom of navigation, the coastal State may not interfere by, for example, denying certain fishing or transport vessels entry into its EEZ.[39] As for category (2), the question of the coastal State's competence to regulate support activities came up in the *M/V "SAIGA" Case*, where Guinea had arrested a vessel for a breach of customs laws which regulated bunkering in Guinea's EEZ.[40] While the ITLOS did not expressly state whether bunkering falls into the scope of coastal State jurisdiction,[41] dissenting opinions of the minority show that the judgment can be read as implicitly deciding in favor of broad coastal State jurisdiction.[42]

33 *Ibid*., paras 90, 95.

34 See also Ndiaye, *supra* note 16, 393.

35 The decision in the *Gulf of St. Lawrence Case* was also subject to heavy criticism by scholars as the interpretation of Articles 56 (1) (a), 62 (4) *UNCLOS* was perceived as unnecessarily narrow. See Ndiaye, *supra* note 16, 388, with further references.

36 *Ibid*., 393.

37 *The "Monte Confurco" Case (Seychelles v. France)*, ITLOS, *Case No. 6, Prompt Release*, Judgment, 18 December 2000, paras. 81-83. For a similar case, see *The "Grand Prince" Case (Belize v. France)*, ITLOS, *Case No. 8, Prompt Release*, Judgment, 20 April 2000. See also Nordquist, *Virginia Commentary Vol. II*, *supra* note 27, para. 58.10 (c).

38 M. Barrett, 'Illegal Fishing in Zones Subject to National Jurisdiction', 5 *James Cook University Law Review* (1998), 1, 22.

39 Ndiaye, *supra* note 16, 393.

40 *The M/V "SAIGA" Case (Saint Vincent and the Grenadines v. Guinea)*, ITLOS, *Case No. 1, Prompt Release*, Judgment, 4 December 1997.

41 *Ibid*., para 59.

42 *Ibid*., Dissenting Opinion of President Mensah, paras. 19-23; Dissenting Opinion of Vice-President Wolfrum and Judge Yamamoto, paras. 21-25. In the decision on the merits, the ITLOS did not elaborate further on the issue, but held that bunkering may at least not be regulated through customs laws. See *The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, ITLOS, *Case No. 2*, Merits, Judgment, 1 July 1999, para. 127, 138. Indeed, customs laws are restricted to the Territorial Sea and artificial islands, installations and structures (Article 60 (2) *UNCLOS*). As far as the Contiguous Zone is concerned, Article 33 (1) *UNCLOS* provides that the coastal State

The recent judgment of the ITLOS in the *M/V "Virginia G" Case*[43] provides clarification of the majority of the issues mentioned above. The *M/V "Virginia G",* an oil tanker flying the flag of Panama, was supplying fuel to commercial fishing vessels in the EEZ of Guinea-Bissau.[44] On 21 August 2009 the *M/V "Virginia G"* was arrested by the authorities of Guinea-Bissau[45] for violation of fisheries laws by carrying out "fishing related activities in the form of 'unauthorized sale of fuel to ships fishing in [Guinea-Bissau's] EEZ'"[46]. Panama disputed the legality of Guinea-Bissau's measures and submitted the case to the ITLOS. One core question was whether Article 56 (1) (a) UNCLOS provided Guinea-Bissau with jurisdiction to regulate the bunkering of foreign fishing vessels in its EEZ.[47] Surprisingly,[48] the ITLOS *unanimously* found that the bunkering of fishing vessels falls indeed into the scope of Article 56 (1) (a) *UNCLOS*.[49] The ITLOS reaffirmed that the list in Article 62 (4) *UNCLOS* is not exhaustive, but required a "direct connection" of any regulated activity to fishing.[50] The bunkering of fishing vessels fulfills that criterion as it enables them to continue their fishing activities at sea without interruption.[51] This finding, however, only applies to bunkering of vessels "engaged in fishing" and not bunkering in general.[52] This leaves open whether there is a sufficiently close connection of bunkering of other associated vessels with fishing. In support of its conclusion, the ITLOS made reference to definitions of "fisheries related activities" in multiple international agreements,[53] including the 2009 FAO Agreement on Port State Measures [PSMA],[54] which provides in Article 1 (d):

may apply customs laws only for purposes of prevention or enforcement of violations in the Territorial Sea or Internal Waters. See Tanaka, *supra* note 23, 122.

43 ITLOS, *The M/V "Virginia G" Case*, *supra* note 29.

44 *Ibid*., paras 55, 61-62.

45 *Ibid*., paras 61-62.

46 *Ibid*., para. 64.

47 *Ibid*., para. 161.

48 The voting on the same issue in the *M/V "SAIGA" Case* was as close as 12/9. See ITLOS, *The M/V "SAIGA" Case*, *supra* note 40, para. 86.

49 ITLOS, *The M/V "Virginia G" Case*, *supra* note 29, para. 452.

50 *Ibid*., para. 215.

51 *Ibid*.

52 *Ibid*., para. 223. The judgment did not address the question of whether the coastal State has jurisdiction to regulate bunkering in general. *Ibid*., para. 224. One declaration, however, concludes that the coastal State has such regulatory jurisdiction, referring to Articles 56 (1) (b) (iii), 211 (5), 220 *UNCLOS*. *Ibid.,* Joint Declaration of Judges Kelly and Attard, 1.

53 ITLOS, *The M/V "Virginia G" Case*, *supra* note 29, para. 216.

54 *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (22 November 2009), available at http://www.fao.org/fishery/psm/

> "'[F]ishing related activities' means any operation in support of, or in preparation for, fishing, including the landing, packaging, processing, transshipping or transporting of fish that have not been previously landed at a port, as well as the provisioning of personnel, fuel, gear and other supplies at sea."

It seems that the ITLOS considers all activities mentioned in that definition to fall into the scope of Articles 56 (1) (a), 62 (4) *UNCLOS*,[55] and rightly so. As the provisioning of personnel, gear and other supplies is just as related to fishing activities as bunkering, all category (2) activities are surely included. Category (1) activities such as the "[...] landing, packaging, processing, transshipping or transporting of fish that have not been previously landed at a port [...]" are even more closely related to fishing than support activities. Therefore, it is only logical to apply the reasoning of the judgment *a fortiori* to such activities and to consider the award in the *Gulf of St. Lawrence Case*[56] overruled. However, the transport and on-board processing of catch that has previously been landed at port will generally be considered as mere transit and are, therefore, protected by the flag State's freedom of navigation, with the limitations described above (for example the notification of entry into the EEZ, inspection of catches and secure stowing of fishing gear during transit[57]).

II. Enforcement Jurisdiction of the Coastal State

In order to deter illegal fishing in its EEZ, the coastal State must be able to effectively enforce its fisheries laws. Today, effective enforcement is even more important to further legislative action. The lack of coastal State enforcement capacity is at the core of the call for flag State obligations. The basic enforcement measures available to the coastal State to ensure compliance with its fisheries laws and regulations in accordance with Articles 56 (1) (a), 73 (1) *UNCLOS*[58] include

agreement/en (last visited 25 October 2016).

55 As the PSMA had not entered into force at the time of the judgment, the ITLOS certainly did not consider it to be binding as such, but rather as a definition that best reflects State practice regarding Arts. 56 (1) (a), 62 (4) *UNCLOS*.

56 See *supra* note 26.

57 T. Aqorau, 'Illegal Fishing and Fisheries Law Enforcement in Small Island Developing States: The Pacific Islands Experience', 15 *International Journal of Marine and Coastal Law* (2000) 1, 37, 46.

58 Similar to Article 62 (4) *UNCLOS*, Article 73 *UNCLOS* is a concretization of Article 56 (1) (a) *UNCLOS*.

boarding, inspection, arrest and judicial proceedings.[59] In order to arrest foreign vessels suspected of fishing law violations, the coastal State can also carry out hot pursuit from the EEZ into the High Seas pursuant to Article 111 (2) *UNCLOS*.[60] Article 73 (2) *UNCLOS* provides, however, that arrested vessels and crews must be promptly released upon posting of a reasonable bond or other security.[61] The ITLOS' approach to the reasonableness of the bond has proven to be a significant hurdle for effective and deterring enforcement measures. It considers that the bond must be of a financial nature, thereby excluding non-financial securities, for example "good-behavior bonds" such as conditions to carry a Vessel Monitoring System [VMS].[62] Further concerns are the limitation on the amount that can reasonably be claimed as bond and the vague criteria the ITLOS uses to determine the amount, which lead to legal uncertainty.[63]

As for sanctions under coastal State law, such as the recurring issue of confiscation (or forfeiture) of violating vessels and cargo, the *M/V "Virginia G" Case* provides some further insights.[64] The ITLOS interpreted Article 73 (1) *UNCLOS* in light of coastal State practice and held that it permits, in principle, confiscation laws and enforcement measures as long as they are "necessary to ensure compliance with the laws and regulations" of the coastal State.[65] As far as the legal basis

59 The coastal State has a broad discretion with regard to enforcement measures. See Ndiaye, *supra* note 16, 380. Accordingly, the list of measures is not exhaustive. See M. Dahmani, *The Fisheries Regime of the Exclusive Economic Zone* (1987), 82.

60 Today, the strict procedural requirements have become a hurdle to the effective use of modern technology for the purposes of hot pursuit. For details, see Allen, *supra* note 12, 311. The author suggests a functional interpretation of the procedural requirements that allows the use of modern technology. But note that the ITLOS rejected this approach with regard to the "signal to stop" requirement. See ITLOS, *The M/V "SAIGA" (No. 2) Case*, *supra* note 42, para. 148.

61 See generally J. Gao, 'Reasonableness of the Bond under Article 292 of the LOS Convention: Practice of the ITLOS', 7 *Chinese Journal of International Law* (2008) 1, 115, 115-142. To ensure compliance with Article 73 (2) *UNCLOS*, Article 292 *UNCLOS* contains a special prompt release procedure which has so far served as basis for nine out of twenty contentious cases before the ITLOS.

62 *The "Volga" Case (Russian Federation v. Australia)*, ITLOS, *Case No. 11, Prompt Release*, Judgment, 23 December 2002, para. 77; this narrow interpretation has attracted criticism by scholars. See for example S. Karim, 'Conflicts over Protection of Marine Living Resources: The 'Volga Case' Revisited', 3 *Goettingen Journal of International Law* (2011) 1, 101, 110-113.

63 For an overview over the criteria, see D. H. Anderson, 'Prompt Release of Vessels and Crews', in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law*, Vol. VIII (2008), 499, 504-505, paras. 21-33.

64 The issue was already touched upon in ITLOS, *The "Tomimaru" Case, supra* note 9, paras 75-76.

65 ITLOS, *The M/V "Virginia G" Case*, *supra* note 29, paras 256-257.

for confiscation is concerned, it must both afford the coastal State's authorities with flexibility in the sanctioning of violations and offer sufficient possibilities to challenge the confiscation before national courts.[66] The ITLOS also indicates that automatic forfeitures are illegal, because they are not "necessary".[67] In order for enforcement measures pursuant to Article 73 *UNCLOS in general* (including confiscation) to be necessary, they must satisfy a principle of reasonableness that demands due regard "[...] to be paid to the particular circumstances of the case and the gravity of the violation."[68] This is in conformity with the ITLOS' additional finding that Article 225 *UNCLOS*, which is found in Part XII of *UNCLOS* on the protection and preservation of the marine environment, equally applies to enforcement measures pursuant to Article 73 *UNCLOS*.[69] Thus, fisheries enforcement measures may not "endanger the safety of navigation or otherwise create any hazard to a vessel, or bring a vessel to an unsafe port or anchorage, or expose the marine environment to an unreasonable risk". The establishment of such a broad and imprecise principle that allows the ITLOS to interfere with individual enforcement measures leaves coastal States with great legal uncertainty. Finally, as stated by Article 73 (3) *UNCLOS*, penalties for violations of fisheries legislation may, in the absence of a specific agreement between the coastal State and the flag State, not include imprisonment or any other form of corporal punishment.[70] Article 73 (4) *UNCLOS* also obliges the coastal State to promptly notify the flag State in case of any arrest or detention and possible penalties imposed.[71]

66 *Ibid*., 256-257.

67 *Ibid*., 256-257. It follows that enforcement laws like the automatic forfeiture procedure (without court order) introduced by Australia in 1999 would probably be considered illegal. See R. Baird, 'Australia's Response to Illegal Foreign Fishing: A Case of winning the Battle but losing the Law?', 23 *International Journal of Marine and Coastal Law* (2008) 1, 95, 95-124.

68 ITLOS, *The M/V "Virginia G" Case*, *supra* note 29, para. 270.

69 *Ibid*., para. 343.

70 As the coastal State does not enjoy substantial criminal jurisdiction in the EEZ, this restriction leads to legal problems whenever illegal fishermen use force to evade arrest by the coastal State's authorities. See e.g. S. K. Kim, 'Illegal Chinese Fishing in the Yellow Sea: A Korean Officer's Perspective', 5 *Journal of East Asia and International Law* (2012) 2, 455, 469-471.

71 These provisions reflect the aim of *UNCLOS* to establish a balance between the interests of coastal States and flag States. See ITLOS, *The "Monte Confurco" Case*, *supra* note 37, paras 70-72. However, this balance has deteriorated. Today's commercial fishing fleets are controlled by private investors, whose identity is often concealed by a complex corporate web and many flag States are neither willing nor able to effectively exercise their control over them. See ITLOS, *The "Volga" Case, supra* note 62, Dissenting Opinion of Judge *ad hoc* Shearer, para. 19.

In conclusion, the EEZ regime of *UNCLOS* displays a clear primary responsibility of the coastal State for the management and conservation of the living resources. To this end, the coastal State has extensive legislative and enforcement jurisdiction. The recent jurisprudence of the ITLOS has further strengthened the regulatory competences of the coastal State, but has also set problematic limits with regard to enforcement measures. None of those developments suggest a normative shift away from coastal State responsibility. We shall keep this *status quo* in mind when analyzing the role of the flag State in this system in the next chapter.

C. Flag State Obligations to Combat Illegal Fishing in the EEZ of Other States

One of the most fundamental principles of the international law of the sea, now laid down in Article 91 (1) *UNCLOS*, is the right of all States to grant their nationality to ships.[72] Flag States can define requirements for the granting of their nationality in their domestic law.[73] They enjoy parallel jurisdiction over their vessels in the EEZ pursuant to Articles 58 (2), 92 (1) *UNCLOS*.[74] In theory, flag States can therefore adopt, apply, and enforce strict laws governing activities of fishing vessels flying their flag in the EEZ of other States. Whether they have an obligation to do so first of all depends on whether they have concluded any agreements containing relevant duties. As many flag States (so-called "Flags of Non-Compliance")[75] avoid such treaty obligations, fishing vessels flying their

[72] This right was already well established in the early 20th century, as witnessed by Articles 4-5 of the *Convention on the High Seas*, 29 April 1958, 450 UNTS 11 [HSC].

[73] ITLOS, *The M/V "SAIGA" (No. 2) Case*, *supra* note 42, para. 63; See also C. Goodman, 'Flag State Responsibility in International Fisheries Law - Effective Fact, Creative Fiction, or further work required?', 23 *Australian & New Zealand Maritime Law Journal* (2009) 2, 157, 161.

[74] Article 92 (1) *UNCLOS* provides for exclusive flag State jurisdiction in the High Seas. Article 58 (2) *UNCLOS* transfers this jurisdiction into the EEZ, where it is no longer exclusive with respect to activities which fall under coastal State jurisdiction. M. H. Nordquist *et al.* (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. III, Articles 86-132 & Documentary Annexes (1995), para. 92.6 (c) [Nordquist, Virginia Commentary Vol. III].

[75] In the fisheries context, the term "Flag of Non-Compliance" is preferable as some of the most notorious distant water fleets fly the flag of States which would not qualify as "Flags of Convenience" within the traditional meaning, as they do not maintain open registries. See D. König, 'Flags of Convenience', in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law*, Volume IV (2008), 118, 122-123, para. 13.

flags do not have to fear strict regulation, monitoring and sanctions.[76] This underscores the potential importance of customary international law obligations of flag States, which the ITLOS may apply when interpreting *UNCLOS* in accordance with Article 293 (1) *UNCLOS*.[77] In order to identify and discuss potential obligations of customary international law, this section will provide an overview of the relevant provisions of *UNCLOS*, the most important other multilateral treaties and soft-law instruments, as well as bilateral treaty practice and relevant principles of international environmental law. Interestingly, nearly all statements touching upon the substance of the SRFC's questions submitted by States,[78] international organizations,[79] and NGOs[80] during the proceedings of ITLOS, *Case No. 21* conclude that flag States have an obligation to exercise effective jurisdiction and control over fishing activities of vessels flying their flag in the EEZ of other States.

I. United Nations Convention on the Law of the Sea 1982

Pursuant to Articles 58 (2), 94 (1) *UNCLOS*, the flag State has a general duty to effectively exercise its jurisdiction and control in administrative,

76 *Ibid*.; see also J. K. Ferrell, 'Controlling Flags of Convenience: One Measure to Stop Overfishing of Collapsing Fish Stocks', 35 *Environmental Law* (2005) 2, 323, 333-337.

77 See J. L. Jesus, 'Statement given to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs', New York (25 October 2010), available at http://www.itlos.org/fileadmin/itlos/documents/statements_of_president/jesus/legal_advisors_251010_eng.pdf (last visited 24 March 2015), 8.

78 Written submissions, ITLOS, *Case No. 21*: First Written Statement of New Zealand (27 November 2013), paras 26-31; Second Written Statement of New Zealand (13 March 2014), paras 3-8; Written Statement of the Federal Republic of Somalia (27 November 2013), paras II(1)-(11); Written Statement of the Federated States of Micronesia (29 November 2013), paras 37 & 46; Written Statement of the Kingdom of the Netherlands (14 March 2013), paras 2.1-2.8; Written Statement of Japan (29 November 2013), paras 30-34 & 37-38; Written Statement of the Republic of Chile (29 November 2013), 7-13; Written Statement of the European Commission on behalf of the European Union (29 November 2013), paras 30-48; Written Statement of the Democratic Socialist Republic of Sri Lanka (18 December 2013), paras 10-17.

79 Written submissions, ITLOS, *Case No. 21*: Written Statement of the International Union for Conservation of Nature and Natural Resources [IUCN] (25 November 2013), paras 26-38; Written Statement of the Caribbean Regional Fisheries Mechanism [CRFM] (27 November 2013), paras 83-167; Written Statement of the Central American Fisheries and Aquaculture Organization (16 December 2013), para. 1; Written Statement of the Sub-Regional Fisheries Commission [SRFC] (November 2013), 12.

80 *Amicus Curiae* brief from WWF International (29 November 2013), paras. 20-32, available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/written_statements_round2/21_II_WWF_amicus_brief.pdf (last visited 24. March 2015).

technical and social matters over ships flying its flag in the EEZ.[81] This is an expression of the "genuine link" between flag State and vessel as required by Article 91 (1) *UNCLOS*.[82] The duties laid down in Article 94 *UNCLOS* aim to ensure safety at sea.[83] There is no mention of duties regarding fishing activities.[84] It should be noted in particular that the wording "generally accepted international regulations, procedures and practices" in Article 94 (5) *UNCLOS* refers to rules of navigation introduced under the auspices of the International Maritime Organization [IMO],[85] and not fisheries agreements.[86] Thus, Article 94 *UNCLOS* does not contain any flag State obligations related to fishing. Nonetheless the obligation laid down in Article 94 (1) *UNCLOS* is the prototype of a flag State obligation, as most of the other flag State duties can only be discharged by the exercise of effective jurisdiction and control over the relevant vessels.[87] Flag States must, for example, adopt and enforce laws and regulations for the prevention, reduction and control of pollution of the

81 See also Article 5 (1) HSC. The duties of the flag State are stated in great detail in Article 94 (2) - (7) *UNCLOS*.

82 The ITLOS has held that the purpose of the "genuine link" concept is to ensure that flag States properly discharge their duties. Nonetheless, States which discover evidence indicating the absence of proper jurisdiction and control by a flag State over a vessel have to recognize the right of the ship to fly the flag of the flag State. See ITLOS, *The M/V "SAIGA" (No. 2) Case*, *supra* note 42, paras 82-83; *The M/V "Virginia G" Case*, *supra* note 29, paras 109-113. This interpretation renders the concept largely meaningless. For an in-depth discussion of the term, see A. D'Andrea, 'The "Genuine Link" Concept in Responsible Fisheries: Legal Aspects and Recent Development', 61 *FAO Legal Papers Online* (2006), available at http://www.fao.org/fileadmin/user_upload/legal/docs/lpo61.pdf (last visited at 24 March 2015).

83 In so far they are complementing the exclusive flag State jurisdiction in the High Seas laid down in Article 92 (1) *UNCLOS*, which aims to protect the freedom of navigation. See *ILC Commentary to the Articles Concerning the Law of the Sea*, Yearbook of the International Law Commission (1956), Vol. II, 254, Commentary on Article 29, para. 3; Commentary on Article 30, para. 1.

84 See A. Van Houtte, 'Flag State Responsibility and the Contribution of Recent International Instruments in Preventing, Deterring and Eliminating IUU Fishing', in FAO, *Report of the Expert Consultation on Fishing Vessels Operating under Open Registries and their Impact on Illegal, Unreported and Unregulated Fishing* (2003), FAO Fisheries Report No. 722 (2004), available at ftp://ftp.fao.org/docrep/fao/006/y5244e/y5244e00.pdf (last visited 23 March 2015), 47, 51.

85 See e.g. the *International Convention for the Safety of Life at Sea*, 01 November 1974, 1184 UNTS 278 [SOLAS].

86 See T. Zwinge, 'Duties of Flag States to Implement and Enforce International Standards and Regulations - And Measures to Counter their Failure to Do So', 10 *Journal of International Business & Law* (2011) 2, 297, 302-305; see also Goodman, *supra* note 73, 161.

87 Nordquist, *Virginia Commentary Vol. III*, *supra* note 74, para. 94.8 (a).

marine environment from vessels flying their flag pursuant to Articles 211 (2), 217 *UNCLOS*.

Several statements submitted in ITLOS, *Case No. 21* claim that an obligation of flag States to ensure that vessels flying their flag comply with the coastal State's fishing laws and regulations in the EEZ can be read into Article 58 (3) *UNCLOS*.[88] However, Article 58 (3) *UNCLOS* applies only to situations in which flag States are "exercising their rights and performing their duties under [UNCLOS] in the [EEZ]". Those rights and duties are clearly defined in the first two paragraphs of Article 58 *UNCLOS*, which provide for the application of Articles 87-115 *UNCLOS* in the EEZ.[89] Those provisions do not deal with fishing.[90] At the same time, the provisions governing fisheries in the EEZ have their own separate place in Articles 61-73 *UNCLOS*.[91] Thus, Article 58 (3) *UNCLOS* is not a suitable basis for flag State obligations concerning fishing activities.

Also Article 62 (4) *UNCLOS*[92] is frequently cited as a possible basis for such an obligation.[93] While *UNCLOS* does not provide a definition of the term "national", it certainly refers to private vessels flying the flag of the relevant

88 See *e.g.* Statement of Chile, *supra* note 78, 13; Statement of Sri Lanka, *supra* note 78, paras 14-15; First Statement of New Zealand, *supra* note 78, para. 28; Statement of Japan, *supra* note 78, para. 31; Statement of Micronesia, *supra* note 78, para. 29; Statement of Somalia, *supra* note 78, 6; Statement of the WWF, *supra* note 80, paras 23-32; Statement of the SRFC, *supra* note 79, 12; Article 58 (3) *UNCLOS* states: "In exercising their rights and performing their duties under this Convention in the [EEZ], States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State [...]".

89 Tanaka, *supra* note 23, 131. Any other interpretation would depart from the ordinary meaning of the wording in its context and in the light of its object and purpose. See Article 31 (1) of the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 [VCLT]. See also M. Fitzmaurice, 'The Practical Working of the Law of Treaties', in M. D. Evans (ed), *International Law*, 3rd ed. (2010), 172, 183-184.

90 The freedom of fishing in the High Seas (Article 87 (1) (e) *UNCLOS*) was not included in Article 58 (1) *UNCLOS*, and the High Seas fishing provisions of Articles 116-120 *UNCLOS* were left out of Art. 58 (2) *UNCLOS*.

91 See also Nordquist, *Virginia Commentary Vol. II*, *supra* note 27, para. 58.10 (a).

92 In relevant part, Article 62 (4) *UNCLOS* states: "Nationals of other States fishing in the [EEZ] shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State".

93 See *e.g.* Statement of Chile, *supra* note 78, 8; Statement of the WWF, *supra* note 80, paras 22-32. One statement even goes so far to claim that States have a duty to exercise their effective jurisdiction and control over persons of their nationality. See further *Amicus Curiae* brief on behalf of WWF International (14 March 2014), available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/written_statements_round2/21_II_WWF_amicus_brief.pdf (last visited 24 March 2015), paras. 25-29.

State.[94] However, flag State obligations in *UNCLOS*, like Articles 58 (3), 217 *UNCLOS* are generally phrased in a way that directly addresses the flag State, and not the nationals on whom it has to exercise effective control over.[95] The first sentence of Article 62 (4) *UNCLOS* therefore only addresses nationals of other States, not the flag State itself as their supervisor.[96]

For these reasons, most scholars consider that, *de lege lata*, no flag State obligations to combat illegal fishing in the EEZs of other States can be read into any provisions of *UNCLOS*.[97] This conclusion is consistent with the system of coastal State responsibility in the EEZ explained in section B. above. The lack of ability of developing coastal States to appropriately discharge their responsibility was apparently not foreseen by the drafters of *UNCLOS*. This deficiency cannot convincingly be remedied by means of interpretation.

II. Other Multilateral Treaties and Soft-Law

There have been various attempts to fill the gaps in the fisheries regime of *UNCLOS* with the conclusion of new multilateral treaties. It is beyond the scope of this article to provide more than a broad overview of the existing instruments

94 See Article 91 (1) *UNCLOS*, which is entitled "Nationality of ships". An older definition of "nationals" which expressly includes "fishing boats or craft" can be found in Article 14 of the *Convention on Fishing and Conservation of the Living Resources of the High Seas,* 29 April 1958, 559 UNTS 285.

95 But note the flawed interpretation of the CJEU in *European Parliament and European Commission v. Council of the European Union*, Joined Cases No. C-103/12 and No. C-165/12, Judgment of the Grand Chamber of 26 November 2014, 58 *Official Journal of the European Union* (2015) C 026/2, paras 62-65.

96 Y. Takei, 'Assessing Flag State Performance in Legal Terms: Clarifications of the Margin of Discretion', 28 *The International Journal of Marine and Coastal Law* (2013) 1, 97, 108. This, however, does not mean that Article 62 (4) *UNCLOS* confers an obligation (that is an independent legal position) on private individuals. See – insofar correctly – CJEU, *European Parliament and European Commission v. Council of the European Union*, *supra* note 95, para. 32. The provision merely concretizes the coastal State's jurisdiction to regulate its EEZ fisheries.

97 *Ibid.*; Handl, *supra* note 17, 159; implicitly also Ndiaye, *supra* note 16, 378-382; R. Wolfrum, 'The potential of the International Tribunal for the Law of the Sea in the management and conservation of marine living resources', Presentation given by the President of the International Tribunal for the Law of the Sea to the Meeting of the Friends of the Tribunal at the Permanent Mission of Germany to the United Nations, New York (21 June 2007), available at http://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/friends_tribunal_210607_eng.pdf (last visited 26 March 2015), 4; for reservations of a more general nature, see also Goodman, *supra* note 73, 169; Zwinge, *supra* note 86, 322; for an opinion in favour of an obligation under *UNCLOS*, see Barret, *supra* note 38, 24-25.

and their relevance for fishing in the EEZ. The 1993 *FAO Compliance Agreement*[98] is the starting point of the legislative process to introduce flag State obligations and forms the basis for several other treaties and soft-law instruments.[99] It does, however, only apply to the High Seas[100] and has gained little support.[101] The 1995 *UN Straddling Fishstocks Agreement*[102] was the most successful multilateral agreement since *UNCLOS*.[103] It contains comprehensive flag State obligations to combat IUU-fishing, particularly through cooperation with RFMOs.[104] With the notable exception of Article 18 (3) (b) (iv) UNFSA, which obliges the flag State to ensure that vessels flying its flag do not conduct unauthorized fishing within areas under the national jurisdiction of other States, those duties apply to the High Seas.[105] Under Article 19 UNFSA, which also applies to Article 18 (3) (b) (iv) UNFSA, the flag State has a duty to take effective enforcement measures. Another treaty, the PSMA, adopts an entirely new approach by requiring port States to use their strategic importance to combat illegal fishing.[106]

98 FAO, *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas,* 24 November 1993, 2221 UNTS 91 [Compliance Agreement].

99 See in particular Article III Compliance Agreement, which obliges the flag State to exercise its jurisdiction and control over vessels flying its flag and provides a detailed list of individual duties.

100 See Article II (1) Compliance Agreement.

101 Even 20 years after its conclusion, the Compliance Agreement only had 39 State parties. This level of participation is insufficient to deal with the problem, in particular because important fishing nations such as the People's Republic of China, the Kingdom of Thailand, and the Republic of India did not ratify the Compliance Agreement. See G. Hosch, 'Analysis of the Implementation and Impact of the FAO Code of Conduct for Responsible Fisheries since 1995', *FAO Fisheries and Aquaculture Circular No. 1038* (2009), 1, 28.

102 *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, 4 December 1995, 2167 UNTS 3 [UNFSA].

103 After the ratification of the Republic of the Philippines on 24 September 2014, the UNFSA now has 82 State parties. However, it did not reach the same level of participation as *UNCLOS*, particularly with respect to big fishing nations. See J. Friedrich, 'Legal Challenges of Nonbinding Instruments: The Case of the FAO Code of Conduct for Responsible Fisheries', 9 *German Law Journal* (2008) 11, 1539, 1547 footnote 27.

104 Pursuant to Articles 18, 19 *UNFSA* the flag State has to exercise its jurisdiction and control over vessels flying its flag in the High Seas to ensure compliance with the rules of the competent RFMOs.

105 See Article 3 (1) UNFSA.

106 This approach is not completely new, as Article 23 UNFSA already provided for certain port state obligations. See T. L. McDorman, 'A Note on the May 2009 FAO Draft Agreement on Port State Measures to Prevent, Deter and Eliminate IUU Fishing', 27 *Chinese (Taiwan) Yearbook of International Law & Affairs* (2009), 131, 134.

Notably, Article 20 PSMA also contains obligations of flag States to cooperate with port States.[107] The PSMA entered into force only on 5 July 2016, thirty days after the date of deposit with the Director-General of FAO of the twenty-fifth instrument of ratification. As this overview shows, the existing multilateral conventions generally apply to the High Seas and most of them lack ratifications. Thus, their normative relevance for the EEZ is limited.[108]

For nearly 20 years the FAO has attempted to remedy the lack of participation in binding treaties by adopting soft-law instruments.[109] Those soft-law instruments include the 1995 FAO Code of Conduct for Responsible Fisheries [CCRF],[110] the 2001 IPOA-IUU,[111] and, most recently, the 2014 FAO Voluntary Guidelines for Flag State Performance [Voluntary Guidelines].[112] For the purposes of this article, it suffices to acknowledge that these instruments consistently call on flag States to exercise their jurisdiction and control over fishing vessels flying their flag in the EEZ (not just the High Seas)[113] to ensure compliance with the laws and regulations of coastal States. The fact that the majority of those instruments has been created by, or in the framework of, the FAO, casts some doubt on their normative value.[114] It speaks for itself that new soft-law instruments, which were agreed upon with broad support, often call on States to ratify the binding treaty instruments[115] – with little success.[116] Although many States are willing to support non-binding instruments calling for binding rules, they are unwilling to ratify the relevant binding treaties. Furthermore, the

107 These obligations do also apply to the EEZs of States which are not parties to the PSMA. See Articles 3 (3), 1 (e) PSMA.

108 A. Boyle, 'Soft-Law in International Law Making', in Evans (ed), *supra* note 89, 122, 137; Handl, *supra* note 17, 159.

109 Friedrich, *supra* note 103. Soft-law is not binding under public international law, but it can codify pre-existing law and can be proof of *opinio iuris* and State practice. See Boyle, *supra* note 109, 134-137.

110 FAO, *Code of Conduct for Responsible Fisheries* (31 October 1995), available at http://www.fao.org/docrep/005/v9878e/v9878e00.htm (last visited 27 March 2015). See in particular Article 6.11, 8.2 CCRF.

111 See *supra* note 7. See in particular paras 34-50 IPOA-IUU.

112 FAO, *Voluntary Guidelines for Flag State Performance* (08 February 2013, endorsed by FAO Committee on Fisheries on 11 June 2014), available at ftp://ftp.fao.org/FI/DOCUMENT/tc-fsp/2013/VolGuidelines_adopted.pdf (last visited 27 March 2015). See in particular paras 2, 6, 8 & 39-43 of the Voluntary Guidelines. For further details, see Handl, *supra* note 17, 161.

113 See Article 1.2 CCRF; para. 3.1 IPOA-IUU; para. 3 of the Voluntary Guidelines.

114 See also Van Houtte, *supra* note 84, 59.

115 See e.g. Article 8.2.6 CCRF; para. 11 IPOA-IUU; GA Res. 67/79, UN Doc A/RES/67/79, 11 December 2012, 12.

116 The low number of ratifications of the *Compliance Agreement* illustrates this dilemma.

level of implementation by States is generally insufficient.[117] Thus, for purposes of establishing *opinio iuris*, the FAO instruments seem to be little more than a diplomatic fig leaf for non-complying States.[118]

III. Bilateral Fisheries Treaties

The lack of binding rules for flag States has, at least in part, been substituted by coastal States on a bilateral level. As already mentioned above, the coastal State has an obligation pursuant to Article 62 (2) *UNCLOS* to grant other States access to any potential surplus of allowable catch that it cannot harvest itself, which is usually done by means of bilateral fisheries treaties (BFTs, or EEZ access agreements).[119] However, as the coastal State has great discretion in determining the allowable catch, it can effectively circumvent this obligation.[120] Furthermore, Article 62 (3) *UNCLOS* empowers coastal States to carefully weigh their own interests against those of flag States. Thus, the selection of suitable partners for BFTs is in the discretion of the coastal State.[121] In the absence of a BFT or other agreements, fishing vessels may not engage in any fishing activities in the EEZ unless they have acquired a permit outside of a treaty framework. This favorable negotiating position allows coastal States to tie EEZ access to treaty clauses which oblige flag States to ensure compliance of their fishing vessels with the coastal State's fisheries laws and regulations.[122] Such "vessel compliance clauses" [VCCs][123] have been a prominent feature in BFTs for the past three decades.[124]

117 See e.g. Friedrich, *supra* note 103, 1561.

118 Nonetheless some authors seem to attach great weight to soft-law instruments in the fisheries context. See e.g. Handl, *supra* note 17, 162.

119 These are the agreements mentioned in Article 62 (2) *UNCLOS*. See Dahmani, *supra* note 59, 77-78. As the concept of the EEZ evolved before *UNCLOS* was finally agreed, the practice of concluding BFTs already began in the late 1970s and early 1980s between developing coastal States and developed fishing nations. See Van Houtte, *supra* note 84, 49.

120 Y. Tanaka, 'The Changing Approaches to Conservation of Marine Living Resources in International Law', 71 *Heidelberg Journal of International Law* (ZaöRV) (2011) 2, 291, 298-299; R. R. Churchill & A. V. Lowe, *The Law of the Sea*, 3rd ed. (1999), 289.

121 Ndiaye, *supra* note 16, 379; Dahmani, *supra* note 59, 77-78; See also Nordquist, *Virginia Commentary Vol. II*, *supra* note 27, paras 62.16 (d)-62.16 (h).

122 B. Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (1989), 87-88. However, it should also be noted that developing coastal States often depend on payments received by flag States and fishing corporations in return for EEZ access, which substantially weakens their negotiation position.

123 Term used in the Statement of the IUCN, *supra* note 79, para. 28.

124 It was not uncommon to include such clauses into BFTs even before *UNCLOS* entered into force in 1994. See Dahmani, *supra* note 59, 78-81. The FAO recommended the inclusion of VCCs as early as 1984. See *Report of the FAO World Conference on Fisheries*

The member States of the SRFC are also engaged in this practice.[125] VCCs take very different forms, and both their wording and content varies substantially. While an in-depth analysis of varieties of VCCs would be highly desirable, it is beyond the scope of this article. A modern, fully reciprocal example of a VCC can be found in Article 8 (1) of the 2009 EU-Russia BFT:[126]

> "Each Party shall, in accordance with its own laws, regulations and administrative rules, take the necessary steps to ensure the observance by their fishing vessels of rules and regulations established in law by the other Party for the exploitation of fishery resources in the Exclusive Economic Zone of that other Party in the Baltic Sea."

Coastal States have also developed a variety of instruments to foster the inclusion of VCCs into BFTs. On a regional level, some multilateral fisheries management treaties require States parties to include VCCs into their BFTs. An example of such a "VCC-harmonization-clause" is Article 2 (c) (iv) of the *Nauru Agreement*,[127] which was concluded within the framework of the Pacific Islands Forum Fisheries Agency [FFA].[128] Considering that the FFA has 17 Pacific Island member States, such regional treaties have the potential to significantly increase the abundance and acceptance of VCCs. In order to prevent the conclusion of BFTs without the additional safeguard of a VCC, coastal States have also started to incorporate domestic legislation, which

Management and Development (1984), 18. The first known VCC which expressly refered to "Flag State Responsibility" was laid down in Article 4 of the *Treaty on Fisheries between Governments of certain Pacific Island States and the Government of the United States of America* (02 April 1984), 26 ILM 1053. See Van Houtte, *supra* note 84, 49.

125 Ndiaye, *supra* note 16, 400-401.

126 *Agreement between the European Community and the Government of the Russian Federation on cooperation in fisheries and the conservation of the living marine resources in the Baltic Sea* (28 May 2009), available at http://faolex.fao.org/docs/pdf/bi-87793.pdf (last visited 29 March 2015).

127 *Nauru Agreement Concerning Cooperation in the Management of Fisheries of Common Interest* (11 February 1982), available at http://faolex.fao.org/docs/pdf/mul5181.pdf (last visited 01 April 2015). Another prominent example is Article IV (5) of the *Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region*, 09 July 1992, available at http://www.ffa.int/niue_treaty (last visited 29 March 2015). It requires State parties to "ensure that foreign fishing agreements with flag States require the flag State to take responsibility for the compliance by its flag vessels with the terms of any agreement and applicable laws". See Van Houtte, *supra* note 84, 49.

128 The FFA was founded in 1979 to promote sustainable EEZ management in the region. See http://www.ffa.int/ (last visited 29 March 2015).

prohibits their governments to sign or ratify BFTs without such a clause.[129] Of course, such national legislation will generally remain ineffective on the public international law level.[130] It is, however, proof of growing State practice on behalf of the coastal States. Another special example is the Common Fisheries Policy of the European Union, which today involves the conclusion of EU-BFTs only with VCCs.[131]

Research by the IUCN shows that more than 80 of the nearly 150 coastal States worldwide are now engaged in this practice.[132] Thus, most BFTs now contain a VCC. The majority of those which lack a VCC predate *UNCLOS* and their numbers are in steady decline. From the perspective of coastal States, there is therefore widespread and consistent practice. There also seems to be little opposition from flag States. To conclude that this practice is clear evidence of customary international law may, however, be too generous.[133] First, there still seems to be a fairly widespread practice of issuing private licenses outside of, or parallel to, BFT regimes.[134] Flag States will hardly be willing to accept responsibility under such circumstances. Second, every BFT is an individual bargain, which may take a significant amount of time and effort to negotiate. Such agreements are based on access to fisheries (granted by the coastal State) on the one hand and some form of consideration (promised by the flag State)

129 See for example para. 38 (4) (a) of the 2007 *Gambian Fisheries Act*, available at http://faolex.fao.org/docs/pdf/gam77403.pdf (last visited 29 March 2015). For a non-exhaustive list with 17 examples, see Statement of the IUCN, *supra* note 79, 68-69, Annex A.

130 See Article 27 (1) VCLT. See also *Certain German Interests in Polish Upper Silesia*, PCIJ Series A, No. 7 (1926), 19. Interesting questions may however arise with respect to the exception of Articles 46, 27 (3) VCLT. If the national legislation was properly published, a violation by conclusion of a BFT would probably be manifest within the meaning of Article 46 (2) VCLT. However, it seems doubtful whether such prohibitions could be classified as fundamental constitutional norms determining the competence to conclude treaties as required by Article 46 (1) VCLT. For a detailed discussion of the two requirements, see for example M. Bothe, 'Article 46: Provisions of internal law regarding competence to conclude treaties', in O. Corten & P. Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary*, Vol. II (2011), 1090, 1094-1097.

131 See Statement of the EU, *supra* note 78, para. 44. See also Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (29 September 2008).

132 For a non-exhaustive list with 91 examples of BFTs with VCC, see Statement of the IUCN, *supra* note 79, 66-75, Annex B. Although not all of these agreements are still in force and some have yet to enter into force, they are evidence of significant State practice.

133 But see Aqorau, *supra* note 57, 50; another author reaches this conclusion by way of an overall assessment of BFT practice, multilateral treaties, and soft-law instruments. See Handl, *supra* note 17, 162. A similar line of argument can be found in the Statement of the IUCN, *supra* note 79, paras 26-29.

134 R. Churchill & D. Owen, *The EC Common Fisheries Policy* (2010), 351-359.

on the other. Often, the consideration consists of substantial amounts of money and acceptance of a set of additional rules that apply to the EEZ fisheries regime, including VCCs. Agreements between two coastal States with substantial fishing fleets may contain fully reciprocal obligations.[135] Depending on the circumstances, BFTs therefore contain varying arrangements and conditions. A BFT (at least if it does not contain fully reciprocal obligations) is therefore essentially a contractual treaty (*traité-contrat*), and not a legislative treaty (*traité-loi*). But even if one considers BFTs to be lawmaking treaties (and VCCs to possess "fundamentally norm-creating character"[136]), they only cover situations in which the coastal State *has granted* EEZ access. The flag State accepts the obligation arising out of a VCC *on the condition* that its vessels may fish in the EEZ. Therefore, it cannot be inferred from the practice of concluding BFTs that, in absence of a BFT, flag States in general also accept *a fortiori* (that is without consideration) an obligation analogous to a VCC covering situations in which the coastal State *has not granted* EEZ access.[137] Any customary international law derived from BFTs would have to reflect this separation, leaving another (albeit smaller) lacuna in the EEZ regime.

IV. Obligations Derived From International Environmental Law

It is well established that States have an obligation to ensure that activities within their jurisdiction do not harm the environment within the jurisdiction of other States, or within areas beyond national jurisdiction.[138] This obligation was

135 For a fully reciprocal BFT, see e.g. the 2009 EU-Russia BFT, *supra* note 127.

136 *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark and The Netherlands)*, Judgment, ICJ Reports 1969, 3, 41-42 para. 72.

137 There is also too little practice of flag States effectively exercising (enforcement) jurisdiction over vessels flying their flag in the EEZ of other States in absence of a BFT. Even where VCCs are in place, flag State enforcement is not guaranteed. See generally E. R. Fidell *et al.*, 'Flag state measures to ensure compliance with coastal state fisheries regulations: the United States, Japanese and Spanish experience', 6 *Fisheries Law Advisory Programme - EEZ, Circular* (1986); see also G. Moore, 'Enforcement Without Force: New Techniques in Compliance Control for Foreign Fishing Operations Based on Regional Co-operation', 24 *Ocean Development and International Law* (1993) 2, 197, 201.

138 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, 241-242, para. 29; *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, ICJ Reports 1997, 7, 41, para. 53; *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment, ICJ Reports 1949, 4, 22; see also *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Provisional Measures, Order of 13 December 2013, available at http://www.icj-cij.org/docket/files/152/17838.pdf (last visited 29 March 2015), 398, 403, para. 19 & 408, para. 37; P. Sands *et al.* (eds), *Principles of International Environmental Law*, 3rd ed. (2003), 196.

first described by the arbitral tribunal in the *Trail Smelter Case*[139], and can be based on the principles of sovereign equality of States,[140] and of mutual respect.[141] It has also been laid down in Principle 21 of the 1972 *Stockholm Declaration*[142] and repeated in various other important soft-law instruments.[143] Furthermore, it has been included in a number of binding agreements,[144] and in Article 3 of the *2001 Articles on Prevention of Transboundary Harm from Hazardous Activities*.[145] The obligation encompasses a "negative" prohibition of transboundary harm (the no harm principle), and a "positive" obligation to take steps to prevent transboundary harm (the preventive principle).[146] The preventive principle has, for example, been included in Article 194 (1) *UNCLOS* with respect to marine pollution,[147] and indirectly in Article 193 *UNCLOS* with respect to the marine environment.[148] Several statements submitted in ITLOS, *Case No. 21* claim that the preventive principle applies to fishing in the EEZ,[149] citing former ITLOS president Wolfrum.[150]

139 *Trail Smelter Arbitration (United States v. Canada)*, Arbitral Award of the Arbitral Tribunal, 16 April & 11 March 1941, 3 Reports of International Arbitral Awards (1941), 1907, 1965.

140 Today, this fundamental principle of international law is codified in Article 2 (1) of the *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

141 Wolfrum, *supra* note 97, 4.

142 *Declaration of the United Nations Conference on the Human Environment* (1972), UN Doc. A/CONF.48/14/Rev.1.

143 See for example Principle 21 (d) of the *World Charter for Nature*, GA RES/37/7, UN Doc A/RES/37/7, 28 October 1982; Principle 2 of the *Rio Declaration on Environment and Development* (1992), UN Doc. A/CONF.151/26; para. 8 of the *Johannesburg Declaration on Sustainable Development*, UN Doc. A/CONF.199/20, 4 September 2002.

144 See for example Article 3 of the *Convention on Biological Diversity,* 5 June 1992, 1760 UNTS 79.

145 *ILC Articles on Prevention of Transboundary Harm from Hazardous Activities* (2001), available at http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_7_2001.pdf (last visited 28 March 2015).

146 G. Handl, in D. Bodansky *et al.* (eds), *The Oxford Handbook of International Environmental Law*, 1st ed. (2007), 531, 538-544.

147 *ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries*, Yearbook of the International Law Commission (2001), Vol. II (2), 144-170, Commentary on Article 3, para. 8, footnote 880, 154 [Draft Articles on Prevention of Harm].

148 Sands, *supra* note 139, 198-199.

149 See Statement of the IUCN, *supra* note 79, paras 30-31; Statement of the CRFM, *supra* note 79, paras 155-157; Statement of the WWF, *supra* note 80, paras. 35-38.

150 Wolfrum, *supra* note 97, 4.

While the living resources of the EEZ are undoubtedly part of the marine environment,[151] it is less clear whether foreign fishing in the EEZ is an activity of a transboundary nature as envisaged by the preventive principle. The *ratio legis* of the preventive principle is that, under public international law, States cannot lawfully exercise jurisdiction in the territory of other States to prevent transboundary harm originating therein, and therefore a rule guaranteeing protection is needed. This *ratio* equally applies to other situations in which one State has exclusive jurisdiction over the source of harm, such as flag State jurisdiction on the High Seas. In the EEZ, however, the coastal State is not only *able* to exercise its prescriptive and enforcement jurisdiction over foreign fishing vessels – it has the *primary responsibility* to do so. It is true that, as Handl points out, the flag State *can* exercise its parallel prescriptive and enforcement jurisdiction over fishing vessels flying its flag in the EEZ of other States as long as those actions are compatible with the coastal State's rights under Articles 56 (1) (a), 73 *UNCLOS*.[152] This situation, however, has no influence on the extent of the coastal State's jurisdiction and responsibility. Thus, illegal fishing in the EEZ is not a situation analogous to those in which the International Court of Justice [ICJ] or the ITLOS have held the preventive principle to apply. As a result, an application of the preventive principle is not warranted.

V. Nature and Scope of Potential Flag State Obligations

If, however, the ITLOS should decide in favor of the existence of relevant customary law, it becomes necessary to analyze the nature of such obligations. First, the ITLOS could support a customary obligation based on treaty practice and soft-law (as discussed in section C.II. above) obligating flag States to ensure that vessels flying their flag comply with the applicable laws of the coastal State. This, of course, equally applies to the content of VCC obligations. Such obligations are similar to, and perhaps based on, the flag State's general duty of control pursuant to Article 94 (1) *UNCLOS*, which aims at supervisory conduct of the flag State.[153] A potential customary rule based on the application of the preventive principle (as discussed in section IV. above) would contain similar duties.[154] Both obligations would be "obligations 'of conduct'", requiring the

[151] *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, ITLOS, *Case No. 3 & 4*, Provisional Measures, Order of 27 August 1999, para. 70.

[152] Handl, *supra* note 17, 159 (particularly endnote 27).

[153] Takei, *supra* note 96, 124-126.

[154] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion of the Seabed Disputes Chamber)*,

adoption of legislative and administrative measures. Contrary to "obligations 'of result'", they would not determine a breach on the basis of an outcome, but on the basis of a State's failure to act diligently.[155] As a result, not every single harmful act causing damage would lead to a breach.[156] Such obligations, which require States to exercise due diligence with respect to the prescribed conduct, are commonly referred to as due diligence obligations.[157] They are usually incorporated into treaties as "obligations 'to ensure'"[158] in order to fill the gap left by the general rule of non-attribution of conduct of non-State actors to the State which has jurisdiction over them.[159] A direct attribution of private acts, on the other hand, would be an exception to the general rules of public international law on State responsibility.[160]

The determination of the threshold that must be met in order to comply with such obligations is often an intricate issue. So far, due diligence obligations of flag States are considered to be objective and to require the same efforts of industrial and developing nations.[161] As due diligence is an imprecise and relative term, the threshold for diligent conduct depends on the nature of the supervised activity, and is higher for riskier activities.[162] For the obligations described above, "risk"[163] means not only risk of environmental damage, but also risk of violations of coastal State legislation aimed at conservation. As stated by the ICJ in the *Pulp Mills Case*, the exercise of due diligence "[…] entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement […]".[164] The rules applicable to private fishing vessels adopted under the domestic law of the flag State must therefore also be made enforceable and subject to sufficiently severe sanctions.[165]

ITLOS, *Case No. 17*, Advisory Opinion, 1 February 2011, para. 184 [ITLOS, Case No. 17, Advisory Opinion].

155 *Ibid.*, para. 110.

156 *Ibid.*, para. 112.

157 *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, 14, 67 para. 187 [ICJ, Pulp Mills Case].

158 Examples from *UNCLOS* are Articles 94 (3), 115 & 139 (1). See also ITLOS, *Case No 17*, Advisory Opinion, *supra* note 155, para. 112.

159 *Ibid*.

160 See generally O. de Frouville, 'Private Individuals', in J. Crawford *et al.* (eds), *The Law of International Responsibility* (2010), 257, 261-263.

161 Handl, *supra* note 17, 162-163; See also Takei, *supra* note 96, 128-129.

162 ITLOS, *Case No. 17*, Advisory Opinion, *supra* note 155, para. 117.

163 See ILC, *Draft Articles on Prevention of Harm*, *supra* note 148, Article 1 and paras 13-14 of its commentary.

164 ICJ, *Pulp Mills Case*, *supra* note 158, 79, para. 197.

165 *ITLOS Case No. 17*, Advisory Opinion, *supra* note 155, para. 239.

Depending on factors such as coastal State regulatory and enforcement efforts and abilities, both the risk of damage to the marine environment and the risk of breaches of coastal State legislation can be very high. However, insufficient exercise of coastal State responsibility, particularly a failure to take sufficiently effective conservation and management measures to ensure that the maintenance of the living resources in the EEZ is not endangered by over-exploitation in accordance with Article 61 (2) *UNCLOS*, should in general be without effect on the flag State's threshold for due diligence.[166] Otherwise, there would be an undue shift in responsibility towards the flag State in cases of improperly regulated fisheries: The flag State would effectively be obliged to review the often insufficiently transparent coastal State efforts and legislation despite legal uncertainty and coastal State discretion.[167] The flag State would then have to create own *extraterritorial* legislation (and take corresponding enforcement measures) either aimed at replacing ineffective coastal State legislation and enforcement with respect to its own nationals or at least aimed at prohibiting them to fish even where the coastal State has issued a license. Even in the face of environmental concerns such an approach would seem incompatible with the coastal State's rights under *UNCLOS*, except in cases of a grave and evident breach by the coastal State.[168]

With regard to the requirements of a breach, not every single violation suffices. Instead, a pattern of repeated violations of coastal State laws will generally be required to warrant the rebuttable *presumption* that the flag State is not exercising due diligence.[169] A systematic failure to exercise legislative and enforcement duties, as is commonly the case for FoCs, which leads to violations of national fisheries laws by private vessels would constitute a breach. Unfortunately, as Allen points out, the ITLOS' lax approach to assessing whether Panama complied with its general obligation to exercise effective jurisdiction and control under Art. 94 (1) *UNCLOS* in the *M/V "Virginia G" Case* provides no reason for optimism.[170]

166 Statement of the WWF, *supra* note 80, paras 23-32.

167 For a discussion of the shortcomings of Article 61 (2) *UNCLOS*, see Tanaka, *supra* note 121, 297-300.

168 For a different opinion, see Statement of the WWF, *supra* note 80, paras 39-51.

169 Takei, *supra* note 96, 131.

170 C. H. Allen, 'Law Of The Sea Tribunal Implies A Principle Of Reasonableness In *UNCLOS* Article 73' (2014), available at http://opiniojuris.org/2014/04/17/guest-post-law-sea-tribunal-implies-principle-reasonableness-unclos-article-73/ (last visited 27 March 2015); ITLOS, *The M/V "Virginia G" Case*, *supra* note 29, paras 113-118 .

D. Conclusion

Even though a number of States have questioned the ITLOS' jurisdiction to render a full bench advisory opinion,[171] it is likely that the ITLOS will find that it has jurisdiction and renders the advisory opinion requested by the SRFC.[172] Setting aside the political ramifications of a finding of jurisdiction, the advisory opinion will be an excellent opportunity to clarify the role of the flag State with respect to illegal fishing in the EEZ. The ITLOS will be confronted with a lacuna of a fundamental nature that is deeply rooted in the EEZ regime established by *UNCLOS*. To effectively combat illegal fishing in the EEZ, the primary responsibility of the coastal State must be complemented with strong flag State obligations. So far, it has proven difficult to close normative gaps in *UNCLOS* on a multilateral level by the adoption of comprehensive and legally binding rules. This is only in part remedied on a bilateral level by the inclusion of VCCs in BFTs. However, neither this bilateral treaty practice, nor a potential application of the preventive principle seem to point to the development of a customary international law obligation of all flag States to exercise their jurisdiction and control over fishing vessels flying their flag in the EEZ of other States.[173] If, however, the ITLOS should find that such a customary rule exists, it would qualify as a due diligence obligation, requiring flag States to adopt effective legislative and enforcement measures to prevent violations by its fishing vessels. No matter how the ITLOS ultimately decides the issue, a sustainable long-term solution for the problem cannot lie in a vague customary obligation, but must be developed in the context of a new and comprehensive multilateral

171 While only a relatively small number of States has made comments on the substantive issues raised by SRFC's questions, four of five permanent members of the Security Council of the United Nations [UNSC] have contested the jurisdiction of the ITLOS to render full bench advisory opinions. See Written submissions, ITLOS, *Case No. 21*: Written Statement of the French Republic (29 November 2013), 2-3; Written Statement of the United Kingdom (28 November 2013), paras 4-58; Written Statement of the People's Republic of China (26 November 2013), paras 5-94; Written Statement of the United States of America (27 November 2013), paras 7-39; The Russian Federation has not submitted a Statement.

172 Which is likely given the position taken by several judges in academic writings. See for example T. M. Ndiaye, 'The Advisory Function of the International Tribunal for the Law of the Sea', 9 *Chinese Journal of International Law* (2010) 3, 565, 580-587; 'Commentary on Article 138 Rules', in P. Gautier & P. Chandrasekhara Rao (eds), *The Rules of the International Tribunal for the Law of the Sea: A Commentary* (2006), 393-394.

173 It seems that this concern is, at least implicitly, shared by Goodman, *supra* note 73, 169; Zwinge, *supra* note 86, 322; Takei, *supra* note 96, 108.

treaty. ITLOS, *Case No. 21* provides an invaluable chance to trigger further debate and negotiations.

E. Addendum

This article was originally pre-published in the spring of 2015. Meanwhile, on 2 April 2015, the ITLOS rendered its advisory opinion in *Case No. 21*.[174] In addition, an arbitral tribunal constituted under Annex VII of *UNCLOS* to hear a dispute between the Philippines and China (the *South China Sea Arbitration*) has applied the abstract findings of the ITLOS in its award on the merits of 12 July 2016.[175] Due to the restricted nature of this addendum, it will be limited to a brief outline the most important findings of the ITLOS. For an exhaustive analysis and critical discussion of the advisory opinion and its implementation by the award in the *South China Sea Arbitration*, I have to point to my forthcoming article in *Ocean Development and International Law*.[176]

On the question of flag State obligations, the ITLOS held that Articles 58 (3), 62 (4), 94 (2), 94 (6) and 192 apply.[177] In that regard, the ITLOS classified Articles 94, 192 *UNCLOS* as *general obligations* and Articles 58 (3), 62 (4) *UNCLOS* (which apply only in the EEZ) as *specific obligations*.[178] The advisory opinion is inconsistent as to whether the ITLOS based this obligation on a separate or conjunctive reading of the relevant provisions, but several findings support the former. According to the ITLOS, flag States were also, in cases of alleged violations of fisheries legislation, obliged to investigate and, if appropriate, take any action necessary to remedy the situation and to inform the reporting State of that action pursuant to Article 94 (6) *UNCLOS*.[179] As, unfortunately, the ITLOS did not offer arguments for its interpretation, it remains rather enigmatic how it arrived at these conclusions. The ITLOS did not address the question of whether customary international law provides for a similar (or identical) obligation of flag States, but Judge Paik made this point, albeit restricted to a basic obligation.[180] On the point of the nature and scope

174 *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, ITLOS, *Case No. 21*, Advisory Opinion, 2 April 2015 [ITLOS, Case No. 21, Advisory Opinion].

175 *The South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China)*, Arbitral Tribunal constituted under Annex VII of the 1982 United Nations Convention on the Law of the Sea, Award on the Merits, 12 July 2016, paras 717 ff. [The South China Sea Arbitration, Award on the Merits].

176 V. Schatz, 'Fishing for Interpretation - The ITLOS Advisory Opinion on Flag State Responsibility for Illegal Fishing in the EEZ', 47 *Ocean Development & International Law* (2016) 4, 327-345.

177 ITLOS, *Case No. 21*, Advisory Opinion, *supra* note 175, paras 115-124.

178 *Ibid.*, paras 109-111.

179 *Ibid.*, paras 118-119.

180 *Ibid.*, Separate Opinion of Judge Paik, paras 19 ff.

of the obligation, the advisory opinion is largely in line with the arguments presented above (C.V.). The ITLOS classified the relevant flag State obligation(s) as obligations of *conduct* rather than obligations of *result*[181] and, in broad terms, outlined the threshold of due diligence to be fulfilled by flag States[182]. The ITLOS considered that flag States were under the following due diligence obligations:

- An obligation to take the necessary measures, including those of enforcement, to ensure compliance by vessels flying its flag with the fishing laws and regulations of the coastal State in its EEZ, and to prohibit any fishing activities in the absence of an authorization by the coastal State (Article 58 (3) *UNCLOS* and Article 62 (4) *UNCLOS* each).[183]

- An "obligation to take the necessary measures to ensure that vessels flying its flag comply with the protection and preservation measures" enacted by coastal States (Articles 192, 193 *UNCLOS*).[184]

- An obligation of the flag State to "exercise effectively its jurisdiction and control in administrative matters over fishing vessels flying its flag, by ensuring, in particular, that such vessels are properly marked" (Article 94 *UNCLOS*).[185]

On the question of the responsibility and liability of flag States in cases of illegal fishing, the ITLOS considered the general international law principles of State responsibility applicable.[186] Finally, the ITLOS considered the frequency of illegal fishing activities by vessels flying the flag of a certain State irrelevant for the question of whether a breach has occurred.[187] While this last point is certainly correct, the frequency of violations may still be relevant in the context of evidence and the burden of proof, as pointed out above (C.V.). It may be concluded that, while the advisory opinion has engaged in a very problematic and progressive interpretation of the relevant provisions of *UNCLOS* with respect to the question of flag State obligations, it has not supported its findings with the necessary arguments. It is submitted that Article 58 (3) *UNCLOS* is

181 ITLOS, *Case No. 21*, Advisory Opinion, *supra* note 175, paras 125 ff.
182 *Ibid.*, paras. 131 ff.
183 *Ibid.*, para. 136.
184 *Ibid.*, para. 137.
185 *Ibid.*, para. 138.
186 *Ibid.*, paras 141 ff.
187 *Ibid.*, para. 150.

the only legal basis on which such an obligation can arguably be based (if one is willing to adopt a very broad interpretation). For details, I refer to my article.[188]

[188] Schatz, *supra* note 177.