Environmental Policy and Law 50 (2020) 489–508
DOI 10.3233/EPL-209005
IOS Press

International Environmental Law-Making

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Abstract. The article seeks to make a modest effort in making sense of the international environmental law-making process. It comprises the subtle normative process currently at work, including 'global conferencing' technique resorted to by the UN General Assembly, how it draws upon the basic legal underpinnings of international law, the unique treaty-making enterprise at work, and what this enormous legal churning process portends for the protection of the global environment at this critical time of perplexity in the Anthropocene epoch. It calls for taking serious cognizance of mass destruction of plant and animal species, heavy pollution of fresh water resources, choking of the oceans with plastic and other litter, and alteration of the atmosphere, among other lasting impacts that imperil our only abode Earth. International environmental law-making process is ad hoc and piecemeal and is generally understood to be the product of a lack of a single, central specialized institution having expertise on the subject, scientific uncertainty on many environmental issues, and the hard-headed economic interests of sovereign states. Still, the international environmental law-making process with its inherent resilience could possibly be able to adapt to the vagaries of scientific assessments and the political realities of in the future.

Keywords: Global environmental problematique, anthropocene epoch, international environmental law-making process, multilateral environmental agreements, institutionalized international environmental cooperation

The traditional law-making process in the field of international law has been premised upon the consent of states, which remain the primary subjects of international law. The process of deciphering law as it stands is important. We find different sources such as international conventions, international custom, general principles of law, and other subsidiary means, as prescribed in Article 38(1) of the Statute of the International Court of Justice (ICJ).[1] International law has had a chequered history in terms of its normative character. Much before the advent of codification through treaty-making to give concrete shape to law, various facets of inter-state conduct were based upon customary practices and rules among states. For instance, the 1961 Vienna Convention on Diplomatic Relations (VCDR)[2] codified the institution of diplomatic relations that had grown through long-standing customary practices among the states. In fact, the ground rules concerning 'treaty making' were elevated from customary law into codified form through the 1969 Vienna Convention on Law of Treaties (VCLT).[3] Thus, both of these major 'institutions' of international law were codified following the painstaking efforts of the International Law Commission (ILC) – a subsidiary organ of the United Nations (UN) General Assembly (GA) – as it took twenty years (from 1949 to 1969) and eleven years (from 1949 to 1961) for the law on treaties and on diplomatic

The article is a revised and thoroughly updated version of a lecture that was originally designed to be delivered upon the author taking over as the Jawaharlal Nehru Chair Professor on 6 May 2004. Drawn from original publication in *Yearbook of International Environmental Law*, Vol. 29, No. 1 (2018), pp. 3–32; Advance Access published on January 9, 2020. Reprinted with permission from Oxford University Press.

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immunities, respectively, to fructify. Those aspects of law that are not covered under these conventions continue to be governed by customary rules. Since the establishment of the UN, the task of progressive development and codification of international law has grown by leaps and bounds.

It is in this context that this article seeks to make a modest effort in making sense of the international environmental law-making process. It comprises the subtle normative process that is at work, including 'global conferencing' resorted to by the UNGA, how it draws upon the basic legal underpinnings of international law, the unique treaty-making enterprise at work, and what this enormous process portends for the protection of the global environment at this critical time of perplexity in the Anthropocene epoch,[4] following humankind's mass destruction of plant and animal species, its pollution of the oceans, and its alteration of the atmosphere, among other lasting impacts.

1. Quest for a Threshold

Compared to the traditional modes of law-making in various spheres of international law, efforts to address some of the pressing environmental challenges, especially during the last quarter of the twentieth century, have witnessed unprecedented international legal restraints upon the behaviour of states. The practice of states has been in favour of prescribing a threshold for specific activity rather than outright prohibition *per se*. This technique, over the years, has taken the form of 'quotas,' 'ceilings,' 'timetables,' 'voluntary commitments', 'nationally determined contributions' and other tools. Interestingly, the process of law-making on most of the sectoral environmental issues has been generally linked to scientific evidence on the issue in question. Moreover, the number of states and other international actors participating in the negotiations, the number and frequency of the intergovernmental meetings organized, as well as the range of forums utilized for this purpose have made the law-making process unique in this field, compared to any other branch of international law. International environmental institutions often act as catalysts in this process.[5] These institutions are both products of the law-making process as well as contributors to it. As such, they are an integral part of the international environmental law-making process.

2. Treaty Galore

In the law-making process, multilateral environmental agreements (MEAs)[6] are the 'predominant legal method for addressing environmental problems that cross national boundaries.'[7] Moreover, they are in fact part of a broader trend of 'increasingly more complex web of international treaties, conventions, and agreements' (on the basis of topic, sector, or territory).[8] The continuous process of law-making becomes necessary in order either to justify the existing law or to make a new law that grapples with new problems. This ensures the continuous revitalization of the law. The employment of new tools and techniques as well as sheer range of issues covered and unprecedented number of sovereign states participating in it characterizes the law-making process in this rapidly expanding branch of international law. In view of the commonalities of interests for the common concerns and the workability of the lowest common denominator approach, 'state sovereignty' *per se* does not pose an insurmountable problem. Depending upon the level of consensus that emerges from negotiations, states are willing to 'share' their prerogative of sovereign consent for regulating a specific problem area in a global framework.

In view of the very nature of present-day environmental challenges, the legal responses have started to affect the day-to-day lives of people across the globe, as it is no longer confined only to matters of high state affairs. This expansion of international environmental law may be regarded as pervasive. It has been pertinently observed:

> International Environmental Law links individuals and their local governments into a worldwide network. This system is not often perceived locally, because each country's own legislation and institutions are assigned the job of applying the shared environmental rules. However, when one considers how the weather transports air pollution, how species migrate, how trade of a food product like coffee can carry pesticide residues, how tourists, business staff, or visitors move daily around the world, it is evident that each country needs to undertake roughly equivalent environmental protection measures. Law is the mechanism for defining and applying those services.[9]

It can be attributed to the development of both MEAs (so-called hard law) on a variety of sectoral issues as well as a host of other rules and standards (now widely known as soft law) for regulating state behaviour. The web-like structure of the multilateral environmental regulatory framework is gradually thickening in terms of its range as well as its content, notwithstanding its partial and uneven growth. The final form of hard law still requires explicit consent from states (expressed through signature, followed by ratification or accession of the legal instrument in question). Interestingly, the law-making process is not the exclusive preserve of states alone, as it is effectively becoming influenced and shaped by a host of non-state actors, including intergovernmental organizations, non-governmental organizations as well as think tanks, academic institutions, business groups, and individual experts.

Some intergovernmental institutions in the environmental field do actively contribute to the process. In a way, they act as a catalyst, providing a platform for states and facilitating negotiations by enabling vital scientific input on the sectoral environmental issue in question. In recent years, the emergence of several MEAs was actively shaped by international institutions on issues such as ozone layer depletion (the United Nations Environment Programme (UNEP)), climate change (World Meteorological Organization and UNEP), transboundary movements of hazardous wastes (UNEP), and persistent organic pollutants (Food and Agricultural Organization (FAO) and UNEP. This *sui generis* law-making process has started making inroads into the cherished domain of the sovereign jurisdiction of states. The increasing need for international environmental cooperation has propelled states to come together on common platforms, including institutional ones. The notion of 'sharing sovereignties' for some common concerns is now gaining firm ground in multilateral environmental negotiations.

If one examines the growing mosaic of international environmental law, one cannot but feel the absence of a central law-making institution, which could give a coherent shape and direction to the development of law. The law-making process hitherto has been distinctly characterized largely by ad hoc, need-based and sectoral responses. The remarkable growth of the sectoral environmental regulatory framework testifies to this fact. As a result, sector-specific rules and principles have proliferated in areas ranging from the atmosphere (for example, air pollution, ozone, climate change, and so on), to transboundary movements of substances (for example, hazardous wastes, chemicals, mercury and so on), to the conservation of living resources (endangered species, migratory species, wetlands, biological diversity, and so on). Many of the earlier MEAs were largely a result of the perceived need to take conservation or protection measures. Moreover, except for certain exceptional cases, the main thrust of these sectoral regulatory measures has been, primarily, anthropocentric—that is, to protect long-term human utilitarian interest in a species or a natural resource.

Most of these hard instruments have not ended being a one-time process as they have not adopted a comprehensive approach in negotiating a MEA, which was especially witnessed during the marathon negotiations on the Convention on the Law of the Sea (from 1973 to 1982) that resulted in the 'Constitution for the Oceans.'[10] This event imparted lessons in putting all issues into a single basket of negotiations for a threadbare discussion and arriving at a text on the basis of consensus. In the context of environmental issues, the negotiating process is often faced with the requirement for immediate action, usually in the face of little concrete scientific evidence on the issue as well as a high degree of adaptability in the legal system to rapid and frequent change. Compared to earlier traditional treaty-making experiences, environmental issues are generally surrounded by a considerable amount of scientific uncertainty as well as high political and economic stakes for states, especially the powerful ones. Cumulatively, these factors propel states to pursue a legal instrument that can gradually evolve and unfold, while it accommodates competing interests. Therefore, in the case of most of the recent MEAs, the so-called hard law turns out to be not so hard in actual practice.

MEAs that emerge as a product from marathon negotiations, spread over a relatively short time span, generally enshrine a framework or a skeleton. In turn, it necessitates a step-by-step process to harden the commitments and to flesh out the skeleton (which includes the definition of the core elements, removing calculated ambiguities and spelling out the details of the mechanisms in the convention). This process is mainly conditioned by the economic and political exigencies of the states parties, as compared to scientific evidence or legal requirements *per se*. Thus, many of the MEAs

provide a bare framework, which must be supplemented by 'fleshing out' the subsequent legal instruments (generally known as protocols). In this sense, some of the hard legal instruments comprise soft obligations at their core (a hard shell with a soft belly). Thus, Arnold McNair argues, there is a need to jettison the traditional notion that all treaties are governed by a single set of rules in view of material differences in different types of treaties. Instead, they may be judged from their contents, which will 'affect their legal character as well.'[11] The VCLT was an ambitious codification process that was based on the premise of the 'ever increasing importance of treaties as a course of international law', but it still did leave room for 'rules of customary international law [that] will continue to govern questions not regulated by the provisions of the present Convention.'[12]

Many of the traditional multilateral agreements among states, especially concerning the sharing of common international resources such as water, did enshrine provisions prohibiting the fouling or pollution of waters as well as a state's responsibility for this purpose. Issues of mainly regional concern such as acid rain and air pollution as well as the protection of flora and fauna followed later. The range of issues sought to be addressed within the framework of multilateral agreements in the past five decades, however, is quite remarkable. States are gradually more inclined, it appears, towards specialized multilateral agreements as a mode of grappling with environmental problems of a global character. The unprecedented range, complexity, and nature of the MEAs that result from global environmental negotiations surpass law-making endeavours in any other sphere of international law. As a corollary to it, various institutional structures have taken shape, which provide platforms for continuous institutionalized cooperation in the respective sectoral area. These institutions provide not only a servicing base for the contracting states to a MEA but also play an important role in the built-in law-making process enshrined into it. Therefore, many of the MEAs remain works-in-progress even though they are encapsulated in a hard treaty shell.

The emerging framework of MEAs has engaged an overwhelming number of states in multilateral negotiations. One of the important factors influencing these negotiations is the balance between 'national sovereignty and international interdependence.'[13] The unfolding scenario reveals that more and more states are gradually opting for legal, as well as institutional cooperation within multilateral frameworks for a host of environmental issues. A variety of factors are influencing state behaviour in this context. A number of non-state actors, variously recognized under the broad umbrella of major groups or the civil society or stakeholders, are increasingly playing an important role in this process.

Significantly, a notable feature of these negotiations (as well as of the MEAs resulting from them) is that they do not remain a one-time affair, especially due to the nature of the issues addressed. Most of these MEAs reflect a process, comprising several components that critically depend upon the emergence of consensus and the political will of the states to move ahead on the issue. The cumulative political and legal effect of the series of instruments adopted by states on a given environmental issue can be described by the nomenclature as a 'regime.' Irrespective of the binding or non-binding character of the obligations contained in these instruments, they have a gradual, pervasive regulatory effect on state behaviour. In turn, they make significant inroads into the domestic environmental policy and law-making process of states.

There has been huge growth in international instruments concerning environmental issues. It is estimated that during the period from 1857 to 2012, some 747 instruments were concluded in the field.[14] The latest treaty has been the much-celebrated 2015 Paris Agreement.[15] These instruments could be construed as MEAs, though the actual environment-specific modern treaties came into vogue in the aftermath of the 1972 Stockholm Conference. MEAs arrived at in recent years have a great diversity, and most of them underscore the global character as well as the multi-dimensional nature of environmental problems. Interestingly, there is an increasing tendency among states, especially industrialized ones, to push for a global framework for more and more environmental issues. There is, however, also a lot of scepticism and even some opposition to this approach. This attitude often makes multilateral environmental negotiations acrimonious and virtually a battlefield on such issues. In turn, it reflects the political and economic interests of states that often results in a stalemate.[16]

The subject matter of MEAs cover a wide range of issues that include the protection of a species (whales) or flora and fauna in general, cultural and heritage sites, the regulation of trade of hazardous

chemicals and wastes, air pollution, and persistent organic pollutants to more remote issues like ozone depletion, climate change, and biological diversity. The MEAs on a host of these issues have in fact 'changed over time, just as political, economic, social, and technological conditions have changed over time.'[17] The increasing reliance upon this source of international environmental law presents long-term implications for the law-making process as well as for the body of international law as a whole. The complex regimes created by the varied MEAs have generated debate about the need for, and efficacy of, such forms of 'global governance.'[18] The complex web of these regimes—the sheer art and craft used therein—the built-in law-making mechanisms, the inherent flexibility, the large participation of states, the role of non-state actors, and the issues of implementation and compliance need to be taken into account to assess the efficacy of such multilateral regulatory techniques to address global environmental *problematique*.

3. 'Soft' Law as a Convenient Tool

A widely used method of environmental law-making is the adoption of hortatory, inspirational, promotional, or programmatic statements. These statements could be described generally as declarations, conference statements, or statements of principles. The traditional modes of international law-making have evolved over a period of time, are time consuming, and have a built-in rigidity that must adapt to the sense of urgency that is necessary to address an environmental issue. In view of this and where states are not yet ready to make concrete commitments, they often prefer to use politically convenient 'soft instruments.' These instruments are less formal than the so-called 'hard law' that comes in the form of MEAs.[19]

However, even such soft instruments do go through intense and serious negotiations. In fact, the proceedings of many Conferences of the Parties for various MEAs reveal that the process of consensus building on a declaration or conference statement can be arduous and time consuming. The negotiations can stretch on for hours beyond the conference schedule. Many of these 'soft' instruments provide benchmarks that are often invoked by the parties even as the 'regime' evolves gradually. The need to arrive at consensus on the final declaration or a statement or specific outcome is considered so crucial that the duration of the conference is often extended to allow the negotiations to reach a conclusion.[20] In this process, the negotiating states do try to build a basis for an evolving normative process through consensus on a hortatory (non-legally binding) instrument. Here, the intention of the negotiating states is to have elasticity in the interpretation that is politically convenient to them as well as to retain the option of implementation at their own discretion and pace.

Apart from the language of the instrument, the difference lies in the intended outcome by the states that are negotiating such a 'soft' instrument. If an international instrument is not intended by the parties to establish legal rights and obligations among them, it is generally regarded as being devoid of legal character. In fact, the intention of the parties is a material element without which an agreement is regarded '*sans portee juridique*.'[21] The framers of such instruments do make their intention clear either through explicit reference to it or through the phraseology employed. It may even be implied from the instrument or inferred from the circumstances as well as the subsequent conduct (practice) of the parties.

At the normative level, these so-called soft rules or principles generally lack the requisite characteristics of international legal norms proper. Hence, they are legally regarded as non-binding. It would be more appropriate to state that negotiating states design them in such a fashion that they remain uncertain in application, with 'calculated ambiguity,' and generate conflicting signals.[22] Politically, this design suits most states, especially in the case of newly emerging areas, since they would rather wait for the normativity to harden. State practice reveals that, in the aftermath of both the 1972 UN Conference on the Human Environment (Stockholm Conference) and the 1992 UN Conference on Environment and Development (Rio Conference), most states preferred to implement the outcome of these global conferences at their own pace and convenience as well as to interpret them as it best suited them. In effect, such built-in drafting ambiguity may create a misleading impression about the legal force of an instrument (calling it non-legal soft law). Still, it can be argued that it 'promotes feelings of international comity and cooperation that are very valuable.'[23] This is especially true for states that do not wish to have specific ceilings, timetables, deadlines, or other

forms of verifiable prescriptions that impinge upon their sovereign will.

At the core of the efforts to put into place such a normative framework is the widely accepted view that it should be permissive in nature and that it should reflect the desire of states to ensure flexibility as well as room for manoeuvring. In such cases, states prefer to retain the discretion that is revealed in the language such as 'as far as possible and as appropriate' and 'with its particular conditions and capabilities.'[24] Such usage reflects the sharp differences stemming from the conflict of interests among states as well as the fragile consensus that has been delicately arrived at in the final outcome of the negotiations.

At the stage of negotiation, states engage in in-depth parleys with the same seriousness that they would use in the case of a MEA. The crucial difference lies in the terms of the intended consequence, as they are considered as guiding norms and are not even subject to procedures of signature and ratification. Such norms and the instruments with which they are clothed signify that the states regard them as politically important but devoid of legal consequence. As aptly pointed out by Baxter,

> There are norms of various degrees of cogency, persuasiveness, and consensus which are incorporated in agreements between States but do not create enforceable rights and duties. They may be described as 'soft' law; as distinguished from the 'hard' law consisting of treaty rules, which States expect, will be carried out and complied with.[25]

Thus, it is not surprising that soft law has played a significant role in the evolution of normative structure in various areas of international law, such as human rights, economic law, and now environmental issues. It is generally regarded that the hardness or softness of a rule 'does not, of course, affect its normative character.'[26] In fact, it can be considered to reflect the transitory stage of the normative threshold with an inherent expectation that the states party to it 'will gradually conform their conduct to its requirement.'[27] Most states, traditionally, are inclined to opt for some latitude in terms of giving effect to the behaviour that is expected of them within a prescribed normative framework. The knowledge that the instrument they are negotiating is not intended to be legally binding propels them to take every care to see that its prescriptive value does not go too far and tie their hands. Instead, they would prefer to let it harden over time, gradually.

4. Tools and Techniques

Soft law norms have their own significance at the normative level. Differences do persist in regard to their precise effect and their evolution into hard law. The mushrooming of soft law instruments in recent years underscores that states increasingly prefer them since they allow for the gradual crystallization of law proper on the subject. It has been metaphorically regarded as a rhetorical talisman and a 'Trojan horse'[28] that opens the course for the development of law by its sheer presence. The instrumentality for framing such soft law instruments is varied both at the intergovernmental and non-governmental levels. At the intergovernmental level, some of the common forums for adopting soft law include UNGA resolutions, decisions, or statements of multilateral conferences and other decisions of intergovernmental forums.

The circumstances in which they are adopted, the numbers of participating states as well as the manner of their adoption, often without a vote, contribute to imparting a significant normative halo around them. The UNGA, as plenary organ of the UN, has had a significant role to play in terms of declaratory principles on a variety of subjects. This has encompassed varied aspects of contemporary global concern such as principles of self-determination, decolonization, friendly relations, new international economic order, and human rights as well as some of the 'common concerns of humankind' (for example, ozone depletion and climate change). The recent process undertaken with respect to the French initiative and the resultant UNGA resolution (72/277 of 10 May 2018) concerning a 'Global Pact for the Environment'[29] is a case in point. As compared to expectation for a legally-binding 'Global Pact', the UNGA endorsed (resolution 73/333 of 30 August 2019) report of the ad hoc open-ended working group (after three rounds of Nairobi process during January to June 2019) and 'all its recommendations'. In turn, the UNGA asked the United Nations Environment Assembly (UNEA) 'to prepare, at its fifth session, in February 2021, a political declaration for a United Nations high-level

meeting' that will coincide with commemoration of 50 years creation of UNEP.[30] Due to unprecedented COVID-19 pandemic, the online first part of the fifth session of the UNEA took place on 22-23 February 2021. It decided to resume as in-person meeting in February 2022, ahead of the Stockholm+50 (2022) event. The final follow-up will remain with the UNGA. Thus, in overall supervision, the UNGA virtually acts as a 'conductor of a grand orchestra'[31] in concerted environmental regulatory process. In fact, in the emerging scenario, it will become necessary to address environmental issues of global ramification such as 'plastics pollution' as a new common concern of humankind.[32]

The familiar technique used in these resolutions comprises the general conduct expected from states on a given issue. In doing so, the resolutions invoke, by usage of terms such as recalling, reiterating, and so on, previously established customary norms or other authorities or the indication of new norms that could be said to have emerged from the practice of states—what states say and how they conduct themselves in actual practice.[33] The marshalling of this evidence could provide the necessary basis and justification for the political–moral values of a particular resolution. In the process, the principles laid down for the regulation of state behaviour led to the development of significant 'evidentiary' value. However, their hortatory form *per se* does not diminish their value as emerging norms.

In normal circumstances, resolutions adopted by organs of international organizations (such as the UNGA) have a recommendatory character.[34] There has been a great debate concerning the legal effect of such resolutions. Some of these resolutions are passed with an overwhelming majority of states voting in their favour, and they go through a very careful drafting process. Such declaratory statements may have non-binding value for the member states of the organization; however, they do create binding effect for the organization and its organs.[35] As such, the decisions are taken and the resolutions adopted by the concerned decision-making organs of other international organizations [for instance, the United Nations Educational, Scientific and Cultural Organization (UNESCO), the World Health Organization (WHO), the International Maritime Organization (IMO), the World Meteorological Organization (WMO), and so on] also have from time to time taken similar measures in their respective functional spheres.

Prior to the change in its nomenclature as UN Environment Assembly (UNEA), the Governing Council of UNEP (as a subsidiary organ of the UNGA) did adopt a number of decisions and guidelines,[36] which have become trendsetters in initiating soft law instruments, and, in some cases, they have graduated into hard law instruments (for example, the 1987 Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes, which took the shape of the 1989 Basel Convention on Transboundary Movements of Hazardous Wastes and Their Disposal).[37] In fact, UNEP's Montevideo Programme[38] was explicitly designed to have such a catalytic role in the development of environmental law, notwithstanding the absence of any explicit mandate in the constituent instrument for this purpose.[39] This appears to be a fine example of the use of implied powers by a subsidiary organ of the UNGA.

The development of soft law principles in areas such as human rights, following the adoption of the Universal Declaration of Human Rights,[40] or international economic law, after the adoption of the Declaration on the New International Economic Order (NIEO)[41] and the Charter of Economic Rights and Duties of States,[42] show the crucial role played by such declaratory norms at the international level. In the specific case of international environmental law, a series of such declaratory norms enshrined in the Stockholm Declaration,[43] the World Charter for Nature,[44] the protection of global climate,[45] and the Rio Declaration[46] have made a similar impact on the legal developments in the field. As mentioned earlier, the UNGA-mandated process[47] (*vide* Resolution 72/277 of 10 May 2018 that finally led to adoption of Resolution 73/333 of 30 August 2019) for a 'Global Pact for the Environment' would also fall in this category of instruments.

5. Hard Law with A Soft Belly

Apart from the instrumentality of declaratory statements by organs of intergovernmental organizations and multilateral conferences, normative principles and statements can also be enshrined in MEAs. This might add complexity to the hard instrument, which is *prima facie* legally binding upon parties. Such inclusion of hortatory principles or discretionary provisions as a part of a formal MEA does present an anomalous situation.

In view of the resulting ineffectiveness of such instruments, it 'relegates them to the ranks of non-legal norms... notwithstanding their status.'[48] Thus, a formal structure or form of a multilateral treaty (legal) instrument neither provides an evidence and nor sufficient enough to ensure the hardness or binding character of the law.

In this context, 'legal hardness' accounts for the legally binding character of a provision. Therefore, the test of a legal norm as 'soft in all its dimensions' could include its content, authority, as well as control or intention.[49] In many cases, such soft obligations are injected into the text of an agreement as a compromise formula or sheer calculated ambiguity to gain elusive consensus (which may be on account of a lack of political will among the negotiating states or a lack of concrete scientific evidence or uncertainty) on an issue among the negotiating states, with no immediate intention of making them effective. Such a consciously built-in contradiction, in the form of a hard treaty shell with a soft underbelly, mainly seeks to woo recalcitrant states to enter the framework as well as avoiding potential 'hold-out' problems. It is a 'consciously premeditated technique' used by negotiators to accommodate the hard-headed political and economic interests of the participating states.[50]

Interestingly, the VCLT does not make it a prerequisite for international treaties to enunciate any specific legal rights and obligations. It merely requires an international agreement to be in 'written form and governed by international law.'[51] Therefore, it is entirely up to the parties to prescribe the nature and content of the multilateral agreement. As the recent practice of designing 'framework' conventions reveals, negotiating states explicitly do not intend to lay down hard commitments in the first round itself. In such cases, the instrument in question will be incomplete without subsequent steps to work out the supplementary protocols or agreements to build upon the normative framework prescribed in the agreement. The task of fleshing out the skeleton of the agreement in such cases is done by the subsequent instrument that may be given nomenclature as the states deem it fit. Thus, without some subsequent follow-up measures, the normative value of the framework convention remains incomplete. It is basically a result of the built-in law-making process and ensures the gradual evolution of a legal regime as the political consensus materializes. It, in turn, requires application of deft legal engineering skills as the original ad-hoc instrument itself remains literally a work-in-progress. It entails innovative legal craft of building the edifice brick by brick over a period of time.

There are examples of recent MEAs as 'frameworks' that incorporate soft obligations within a formal multilateral treaty. Some of these agreements portray the miasma (illusion) of a non-legal norm as law. The 1985 Vienna Convention for the Protection of the Ozone Layer was adopted following scientific warnings.[52] When the ad hoc Working Group of Legal and Technical Experts started work (in 1981) on the issue, it was surrounded by considerable scientific uncertainty, with divided opinions as well as the rejection of such concerns by some states. This accounted for some of the ambiguity in the convention and the use of discretionary language for obligations of the states parties. As such, the parties were merely required to take 'appropriate measures' and, for this purpose, in accordance with the 'means at their disposal and their capabilities.'[53]

Thus, the nature of the obligations laid down was quite permissive and discretionary. The convention was tightened up with the adoption of a specific time frame for phasing out controlled ozone-depleting substances (ODS) in the subsequent 1987 Montreal Protocol on Substances that Deplete the Ozone Layer.[54] In view of the availability of further scientific evidence (through satellite pictures that showed the widening of the ozone hole), the crystallization of political consensus, the acceptance of 'grace periods' for developing country parties, and the agreement on making funding available as well as providing substitutes for ODS, the parties to the Montreal Protocol quickly decided to strengthen and even 'pre-pone' the phase-out schedules through 'amendments' and 'adjustments' at a series of subsequent meetings. Thus, the ozone regime has constantly evolved, from initial loose and soft obligations to a stringent time schedule and specific obligations for the parties, which have been kept under constant review by the parties, in consonance with scientific projections. It now regulates the production and consumption of nearly 100 man-made chemicals referred to as ozone depleting substances. Through the concerted regulatory process under the Protocol, ratified by all the UN Member States, the ozone layer is projected to recover by the middle of this century. It is claimed that in the absence of this Protocol, 'ozone depletion would have increased tenfold by 2050 compared to current levels'.[55]

Similarly, the 1989 Basel Convention on Transboundary Movements of Hazardous Wastes and their Disposal came in the wake of reports of unlawful hazardous waste dumping in several parts of the world, especially in the African continent.[56] In view of the nature of the issue as well as the short time span within which it came to be drafted, some of the key formulations in the convention were kept vague and even left undefined. For instance, the core issue of 'environmentally sound management of hazardous wastes' was merely defined as necessitating 'all practicable steps,'[57] and the parties were expected to settle the issue of liability and compensation for damage resulting from the transboundary movement of hazardous wastes by adopting a protocol 'as soon as practicable.'[58] In fact, the parties to the original convention did not define hazardous waste at all. It was this key component on which the regulation of export and import of wastes was to be premised. Moreover, it vested discretion in the exporting state not to allow the export of hazardous wastes if it had 'reason to believe'[59] that they would not be managed in an environmentally sound manner (which was also left undefined). In view of the sharp polarization of views and the conflict of economic interests of the hazardous waste-exporting countries, consensus on these issues remained elusive.

It appears that the negotiating states expected that the economic interests of the exporting and importing states would provide the basis for judging the parameters of such practical steps. Interestingly, when the parties reached an agreement in 1994, after arduous negotiations on the 'Basel Ban,' which sought to prohibit the export of hazardous wastes from countries in the Organisation for Economic Co-operation and Development (OECD) to non-OECD countries, they could not reach an agreement on prescribing criteria and elements for defining hazardous wastes, which was to take shape later amidst hard bargaining.[60] In fact adaptability of the Basel Convention and gradual process of tightening up of 'soft normativity' came in handy in view of global outcry against the growing menace of plastic wastes. It has now led to adoption of an amendment at the 14th meeting of the Basel Conference of the Parties (Geneva), during 29 April to 10 May 2019[61], wherein the parties decided to include plastic waste in a legally-binding framework which will make global trade in plastic waste more transparent and better regulated. This goes to underscore the softness of obligations as well as the calculated ambiguity left in a MEA, which is mainly dictated by the economic interests of the industrialized states.

We can find similar examples of vague and soft obligations in other important MEAs such as on climate change as well as on biological diversity. They indicate exhortatory statements, such as 'shall develop' or 'shall adopt,'[62] or fully discretionary implementation, such 'as far as possible' and 'as appropriate.'[63] The familiar pattern of phraseology used is akin to the conventions on ozone layer depletion and transboundary movements of hazardous wastes. The nature of the issue, the lack of full scientific evidence, the circumstances of adoption, the economic stakes, political convenience and the reluctance of states to go for hard measures immediately account for the use of such soft language in a hard legal instrument. The variations are decided by exigencies of the situation and peculiar nature of the sectoral environmental issue at stake.

Thus, soft law provisions play an important role in the formation of a normative process in international law, in general, and in international environmental law, in particular. The relative hardness or softness of norms will need to be judged from the specific context and the content rather than the form in which they are encased. They have emerged as an important tool and make an important normative contribution to the process of crystallizing emerging international regulatory process on a given subject. As a corollary, they could help in securing a MEA with a much harder edge later on (avoiding hold-out problems by securing the participation of as many states as possible). Even if the soft law does not get hardened in due course, it becomes a reference mark or a threshold to judge and guide states' environmental behaviour. It has a creeping, but subtle, influence upon state behaviour. In a way it reflects realities of the complex world driven by unending human needs that have triggered simmering global environmental crisis. As noted in the 1980 World Conservation Strategy,

> '[a]lthough soft law is unenforceable it is of great value because it provides a set of generally agreed standards of international behaviour and paves the way for the codification of such standards in a more binding form.'[64]

In fact, the usage of the term 'soft' conceals its practical role as well as its utility in the law-making

process. As such, the mere designation of softness does not diminish the role of such norms in the law-making process. The underlying assumption for soft legal instruments is the expectation that states voting in favour of a resolution or adopting it at a multilateral conference will 'gradually conform their conduct to its requirements.'[65] It remains a moot point as to what extent the sheer 'multiplying' of soft law norms propels states to comply with them.[66] It certainly may not constitute an estoppel in favour of soft law norms, yet considerable political and moral pressures are attached to them. It is rather difficult to draw a clear demarcation line between what is 'pre-legal and the legal.'[67] However, both hard law and soft law play their own roles at their own pace in the development of international environmental law.

The growing proliferation of soft law norms in recent years is only indicative of the complexities of the issues and realities of international life. In view of the frequent resort to soft law norms for environmental issues, they may be considered as the delicate 'thin end of the normative wedge' of international environmental law.[68] Since the evolution of international law is a continuing process, it requires a 'wide range of modalities,'[69] and soft law tools are just one of them, howsoever incongruent they might appear for the law proper. The best way to measure the softness of soft law is the attitude and actual behaviour of states. The more preferred course, however, needs to be to focus upon the sliding scale between soft law and hard law. In actual practice, though, the thin dividing line often gets blurred.

6. Fulcrum for Law-Making

In recent decades, the international environmental law-making process has witnessed a rate of growth that is faster than other areas of international law such as human rights and international economic issues. The advent of concerted efforts to diagnose global environmental problems, within multilateral frameworks, has created conducive conditions for this purpose. Prior to the 1972 Stockholm Conference, environmental problems were generally addressed either within bilateral or regional frameworks. The Stockholm Conference brought to the fore inter-linkages of the global environmental problems across the world and, in some cases, the need to address them within a global framework. Some of the shared common natural resources such as international rivers and lakes first entered the agenda. In these agreements, however, the protection of waters against pollution was only one of the goals. Similarly, migratory species of birds, wildlife and heritage also became subjects of regulatory frameworks. Several environmental catastrophes like mercury poisoning of fish stocks in Japan or oil pollution resulting from 1967 *Torrey Canyon* tanker disaster contributed in no less measure to international concerns calling for regulatory frameworks as well as liability and compensation in such cases.

These events did start making inroads into the cherished domain of state sovereignty. The dawning of an era of multilateral environmental cooperation necessitated the participation in some aspects of sovereign jurisdiction, as the states would need to give effect to the decisions of those regulatory frameworks within their domestic sphere. Similarly, a gradual focus upon some of the global commons has also brought to the fore the need for common efforts to address them. This has particularly taken shape in the case of Antarctica, outer space, law of the sea, and, more recently, the atmosphere. The evolution of the notion of the 'common heritage of mankind,' especially during the third UN Conference on the Law of the Sea (in 1973–82),[70] provided a basis for the preservation of those common areas in as pristine a form as possible. A series of developments have cumulatively contributed to new avenues in the legal field such as 'deep seabed genetic resources beyond the limits of national jurisdiction'[71] that makes institutionalized international environmental cooperation inevitable. This development has sought to pick up the threads of incomplete agenda concerning the 'area' (Part XI) under the UNCLOS. The UNGA resolution 72/249[72] of 24 December 2017 decided to convene an international conference to elaborate the text of an international legally binding instrument under the UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. This ambitious process has already undergone three sessions during September 2018 to August 2019 and the fourth session was slated to take place in first half of 2020.[73] In view of situation arising from Covid-19 pandemic in 2020, the General Assembly resolution 75/239 (30 December 2020) has now mandated convening of the fourth session of the Intergovernmental

Conference in New York during 16 to 27 August 2021.

The emergence of international law as a guardian of the global environment and the commons also reflects the capacity of international law to adapt and change with the new challenges and changing requirements of the international society. The changing character of international law for the protection of the environment underscores the embedded tension in the regulatory process even as the state of the global environment is a growing cause of concern. The advent of the Anthropocene epoch affirms this human predicament, which was forewarned by the 1972 Club of Rome report.[74] This process, as discussed earlier, has experienced various phases in the evolution of a distinct branch of international environmental law. Amidst various scattered and piecemeal efforts in this direction, the growing trend of 'centralization' in law-making on environmental issues is most discernible. Interestingly, soft law instruments, which have been described as the 'trojan horse of the ecologists' (*trojanische Pferd der Ökologistern*),[75] have played a pivotal role in the growing legalization of global environmental protection. The 1972 Stockholm Conference may be said to have set the ball rolling for multilateralism on global environmental issues. The inherent logic in the centralized international law-making on environmental issues appears to be the argument that many of them necessitate a global, as distinguished from international, framework.

The process of centralized legalisation has taken various forms. Unlike the development of traditional international law, the pace of law-making in this sphere has been relatively faster. Furthermore, it is more in the direction of 'conventional' (treaty) law than customary law. Interestingly, most of the international legal developments in the field of environment protection have taken place outside the precincts of the UN's ILC,[76] which was assigned the task of the progressive development and codification of international law. In the absence of a central law-making institution in the environmental field, this task has generally fallen upon the UNGA. The UNGA has in fact played a crucial role in terms of convening global conferences that, in turn, have contributed significantly to centralized law-making. The 1972 Stockholm Conference was followed by other major global conferences; the 1992 Rio Conference as well as the 2002 World Summit on Sustainable Development (WSSD) in Johannesburg and the Rio + 20 UN Conference of Sustainable Development in 2012 have been major milestones in this respect. It remains to be seen as to what does the UNGA sets up as a target (both political and legal) for the next milestone of 2022 – fiftieth anniversary of the 1972 Stockholm Conference.

The Stockholm Conference did not produce any international legal instruments, yet the Stockholm Declaration has played an important role in the internationalization of environmental issues.[77] In fact, Principle 21 of the Stockholm Declaration is now widely understood to have become part of customary international law. The Rio Conference, as explained earlier, was very productive in terms of contributing two international conventions—one on climate change and another on biological diversity—as well as three other soft instruments on the Rio Declaration, Agenda 21, and the Forestry Principles.[78] The UNGA again convened a Special Session (nineteenth) on the Earth Summit plus Five (1997),[79] to take stock of the follow-up to the implementation of Agenda 21. The 2002 WSSD became another milestone in the technique of global conferencing.[80] However, the Rio + 20 Summit produced a landmark document, *The Future We Want*,[81] which became a precursor to the advent of the Sustainable Development Goals[82] and took stock of the sincerity of the commitments of states for environmental protection and sustainable development.

Apart from the global conferencing on environmental issues, the UNGA has also from time to time played a catalytic role in launching a process for global regulatory frameworks such as climate change (1992 UNFCCC) and biological diversity (1992 CBD). In the specific case of the climate change issue, the UNGA adopted a resolution that declared that climate change is a 'common concern of mankind' and that 'necessary and timely action should be taken to deal with climate change within a global framework.'[83] Subsequent marathon climate change regulatory process[84] has taken the shape of 1992 UN Framework Convention on Climate Change (UNFCCC) as well as 1997 Kyoto Climate Protocol and the 2015 Paris Agreement. In fact UNFCCC is one of the two global conventions (other being the 1994 UN Convention to Combat Desertification) that carry the prefix 'UN'. It is directly serviced by the UN as the host.

As a subsidiary organ of the UNGA, UNEP has played an important role in galvanizing the international law-making process. The constituent instrument of UNEP has mandated that it 'promote

international co-operation in the field of the environment and to recommend, as appropriate, policies to this end.'[85] A familiar device employed by UNEP for this purpose is the constitution of an ad hoc Group of Legal and Technical Experts, which has come out with a set of recommendations as well as the preparation of drafts for adoption by the UNEP Governing Council, which has been re-designated in 2014 as the UN Environment Assembly with universal membership.[86] Through this technique, it has set in motion a number of soft law guidelines, principles, decisions, and recommendations, which provide a rich source for the further development of law in these respective areas. In turn, they have sometimes taken the shape of a global environmental agreement (for example, the 1989 Basel Convention).[87] Some other notable agencies, within the UN system, that have played roles in this context include the FAO, the WHO, UNESCO, the IMO, and the WMO. The intergovernmental and non-governmental institutions outside the UN system that have contributed to the process include the International Union for the Conservation of Nature (IUCN), the World-Wide Fund for Nature (WWF), the International Law Association (ILA), and the Institute of International Law (IIL).

The premise that some of the global environmental problems need global solutions has brought about change in the perception on these issues as common concerns of mankind. The efforts by Malta,[88] however, to have the UNGA declare the conservation of climate as the common heritage of mankind did not succeed.[89] The UNGA instead recognized the issue of climate change as a common concern of mankind. The echo of this salutary declaratory statement came to be reflected in two global conventions on climate change[90] and on biological diversity,[91] which were adopted at the 1992 Rio Earth Summit. In a sense, the notion of common concern caters to the requirements of the international community interest in a common resource as opposed to limited national interest. It lays down the *prima facie* basis for common action for a regulatory framework on those issues, which cannot be addressed in a bilateral context or by a limited number of states. As Alexandre Kiss has observed,

> [i]n principle, the proclamation that safeguarding the global environment or one of its components is a matter of common concern for the whole of mankind would mean that it can no longer be considered as solely within the domestic jurisdiction of States, due to its global importance and consequences for all... the States, under the jurisdiction of which environmental components are to be found and the conservation of which constitutes a common concern of mankind, should be considered as trustees charged with their conservation.[92]

It appears that the negotiators now consciously avoid the term 'common heritage,' which incidentally came to be applied with reference to the exploitation of the resources of the deep seabed. The idea of regarding a resource as a common heritage implies the duty of care to preserve it for future generations. Common concern can be regarded as forming part of the common heritage. An explicit reference to the term 'common heritage' appears to have been avoided as it ran into controversy in the case of the UNCLOS.[93] Following the 1994 Agreement for the Implementation of Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, the Area (Part XI of UNCLOS on common heritage of mankind) was explicitly targeted.[94] Hence, it lost the original purpose, content, and the sheen of the ideal that had galvanized the world when Arvid Pardo (from Malta) first mooted it before the UNGA on 1 November 1967.[95]

Interestingly, the subtle change in emphasis from common 'heritage,' to common 'interest,' to common 'concern' at various stages appears to have been made to accommodate conflicting interests of the negotiating states. However, it does underscore the nature of the issues that states were intending to deal with, the need for approaches beyond the confines of national or bilateral domains, as well as the conflicting demands it places on various international actors. The common concerns are to be addressed within a multilateral framework, on the basis of common, but differentiated, responsibility, on the part of the contracting states to a global convention (such as the UNFCCC).[96] The advent and usage of this new phrase in the legal parlance has wide ramifications both in terms of the centralization of environmental law-making as well as multilateral environmental negotiations. As a corollary to it, issues of ethics and equity hold the key to some of the common concerns being grappled with at the global level. It remains to be

seen if this is replicated in addressing the simmering challenge of plastics pollution as a 'new common concern of humankind'.[97]

7. New Treaty Making

A sense of urgency is generally inherent in most multilateral environmental negotiations. Unlike in traditional international law-making, states cannot now afford the luxury of waiting for the emergence of a hardened customary norm through the practice of states. Instead, the soft law norms are often adopted as an instant guideline for regulating the behaviour of sovereign states. Interestingly, even this soft law becomes in many cases just a prelude to the formulation of hard law in the form of a MEA, irrespective of the nomenclature used for the purpose. As mentioned earlier, the rapidity of the norm-setting process, due to the urgency of addressing a specific environmental issue amidst scientific uncertainty, does not leave much room for states to allow soft norms to harden. Therefore, one can often smell the flavour of these soft norms couched even in the hard shell of an agreement. However, this peculiar characteristic, normatively, does not pose much of a problem since it suits most states. Often the adoption of a MEA, with a 'soft belly' of obligations, becomes a stopgap that allows breathing space for the normativity to harden alongside the emergence of consensus for the evolution of a particular regime.

In recent years, states have preferred to go for the legal soft law that is contained in many of the MEAs. For a variety of reasons, such MEAs require the formation of a subsequent legal instrument to bring original objectives to fruition by the requirement of further action on the part of the states parties. This has been described as the framework convention–protocol approach in law-making. The factors that contribute to states' inclination to follow this approach are complex. Multilateral treaty making is a painstaking process, especially when an overwhelming number of states (often all the 193 UN members) are participating in it.

In the past, the efforts of negotiating states to go for an all-comprehensive approach, comprising threadbare discussions, giving finality to all of the issues on the agenda of negotiations, and providing concrete obligations for the parties and a dispute settlement mechanism, have proven to be a time-consuming process. They do not envisage the use of calculated ambiguity and built-in law-making exercise. In view of the very nature of the environmental issues, states prefer to go for exhortatory and/or discretionary language in such agreements. At the same time, they prefer some scientific certainty before accepting concrete obligations. This is especially so as the legally binding obligations would entail some painful measures by states at the domestic level, which have the potential to unleash bitter political and economic implications.

In going for a skeletal form of a MEA, states seek to grapple with scientific uncertainty on the issue in question, avoid taking hard decisions in the short term, try to take as many states as possible on board, minimize hold-out problems, and yet have a legal regime that brings accolades for the signatory states (keeping an eye on domestic public opinion). Often the psychological pressure is so much that hardly any of the negotiating states prefer to be seen on the wrong side of the regulatory effort and, hence, prefer to be part of the resultant consensus. As the rationale for this approach goes, the contracting states just lay down broad policy outlines through the device of the framework convention and leave nettlesome details to be worked out in the protocols that may be negotiated at a later date.

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) was one of the earliest examples of this approach.[98] In fact, CITES contained endangered species listed in three appendices,[99] which the parties could review from time to time. A species' name could be put in a particular annex depending upon its endangered status. This has proved to be a flexible form of built-in law-making for the parties, though each amendment to the lists needs to be accepted by the states for its entry into force. The UN Economic Commission for Europe's (ECE) Convention on Long Range Transboundary Air Pollution (LRTAP Convention)[100] is another example of this approach. The LRTAP regime in fact comprises separate protocols designed for different long-range transboundary pollutants.[101] Thus, in terms of substance as well as precise timetables, the LRTAP Convention has shown remarkable flexibility and built-in law making. The Convention on Migratory Species of Wild Animals (CMS) also follows this genre of treaties containing flexibility and adjustment of the regime though a 'list of species' (in the concerned appendix)[102] as

well as providing an umbrella for the development of 'agreements' on specific species.[103]

Such framework conventions play an important role in setting in motion a normative process, through an exhortatory agreement, which is sought to evolve in due course. The process of enshrining precise legal obligations as well as a time frame for carrying them out is conditioned by the political will (coupled with economic considerations) on the part of the states. Curiously, various international actors, including civil society, play influential roles in goading states towards further regulatory measures. MEAs have generally followed the devices of protocols or agreements to strengthen the main framework conventions. Often the appendices to the convention also serve the purpose of a protocol (as in the cases of CITES and the CMS). The climate change regime has followed this familiar trajectory of the 1992 UNFCCC and two subsequent instruments: the 1997 Kyoto Protocol and the 2015 Paris Agreement.[104] Such protocols or agreements stand on their own feet as they are independent multilateral instruments that require a separate set of signatures and ratifications. In fact, states having powerful economic stakes can often hold out and block the process of a protocol's entry into force.

In spite of the flexibility and adaptability of this approach, doubts persist in regard to its utility, especially since it also takes a long time for the framework convention as well as its protocols to enter into force. Several powerful states, whose economic interests are to be affected, have tried to reduce the lowest common denominator to the barest minimum. Even for the negotiation and acceptance of the protocols, they are often marred by foot dragging and long delays. Such holdouts by powerful states can often effectively cripple the protocol as well as raise the abatement costs.[105]

8. Conclusion

The experience of the past fifty years shows that international environmental law-making process is essentially a product of a complex set of factors. Both state and non-state actors have contributed significantly to the process. It brings to the fore a whole set of tools and techniques put forward by various states that are employed in the wake of intense negotiations in inter-governmental meetings. If one can take an aerial view of the fascinating law-making process in recent decades, it reveals an interesting pattern at work, especially within each cluster of environmental issues. A closer look would also show that it has taken the shape of a piece of fine art and craft that weaves a fabric according to the political compulsions and convenience of the sovereign states even as it takes into account scientific evidence as well as requirements of commitments in a legal or non-legally binding instrument.

In fact, the states that finally adopt instruments try to grapple with a variety of legal responses to an environmental problem. The role of civil society appears to be gaining ground both at the stage of multilateral environmental negotiations as well as influencing the attitude of the states at the subsequent stage of signature and ratification. This is underscored by an unprecedented participation in the conferences of the parties (COPs).[106] Since they appeal to domestic public opinion, such pressure and lobbying by the civil society is not easy to ignore. Currently, most multilateral negotiations as well as some international environmental institutions have civil society groups as observers that enable them to perform the role of a watchdog.

In the absence of a central law-making institution, the initiative for an international environmental instrument, generally, comes from a specialized environmental institution such as UNEP that will act as a catalyst, either on its own accord or in conjunction with another international institution, to initiate intergovernmental negotiations. In other cases, functional international organizations of the UN system have taken the initiative (for example, the FAO or UNESCO) in matters that are closely related to their functional jurisdiction. However, it is the UNGA that occupies an important place—as the conductor of a grand orchestra—in providing decisive impetus to the norm-setting and treaty-making process as well as to overall political guidance for the entire process. A closer analysis of the range, scope, and depth of resolutions of the UNGA provides a spectacular view of the entire law-making process to a perceptive connoisseur of the field of international environmental law.

On many occasions, hortatory resolutions of the UNGA have been adopted by participating states without a vote. Though no precise legal value may be deciphered by this factor alone, such resolutions adopted by the plenary organ of the United Nations do convey powerful moral authority, which most states would not prefer to ignore or defy openly.

These resolutions, couched in familiar UN language, do carry their own force in regard to influencing the conduct of states in cases such as the Sustainable Development Goals (SDGs)[107] for attaining targets in 17 areas by 2030. Many states do follow up on these resolutions with appropriate domestic action. They also help to build consensus in terms of the seriousness of the challenge (for example, common concerns) as well as the need for requisite global action. The UNGA itself sometimes sets up intergovernmental negotiating committees either to draft a MEA or to assign the task of laying the groundwork to some intergovernmental forum. Initiatives taken by the UNGA on the work assigned to the UN Forum on Forests[108] on the forest issue provides an example of this approach.

In sum, the concerted environmental law-making process offers a veritable tapestry of steps, initiated by different agencies and participated in by both state as well as non-state actors, and works on the basis of the 'lowest common denominator' to arrive at consensual outcome. Ironically, the process is ad hoc and piecemeal. This is generally understood to be the result of a lack of a single, central specialized institution having expertise on the subject, scientific uncertainty on many environmental issues, and the hard-headed economic interests of sovereign states. The mega international environmental law-making process with its inherent resilience is able to adapt to the vagaries of scientific assessments and the political realities of the world. One only hopes that, amidst the perplexity of the rapidly changing world, it will be able to provide a robust instrumentality on the road to stockholm+50 (2022) and beyond for sovereign states to effectively address and provide workable legal solutions for the simmering global environmental challenges of the twenty-first century.

Endnotes

[1] Statute of the International Court of Justice, 1945, 1 UNTS 993, Art 38 (1) provides as follows: 'The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.' See United Nations (UN), *Charter of the United Nations and Statute of the International Court of Justice* (New York: UN, 1997) at 86.

[2] Vienna Convention on Diplomatic Relations, 1961, 500 UNTS 95 (VCDR). It came into force on 24 April 1964. It has 192 states parties; available at: https://treaties.un.org/doc/Treaties/1964/06/19640624%2002-10%20AM/Ch_III_3p.pdf (accessed on 12 January 2021).

[3] Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331 (VCLT). It has 116 states parties; see; available at: https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf (accessed on 12 January 2021).

[4] The Anthropocene Working Group at its meeting on 21 May 2019 decided to accept the unmistakable imprint of human activities on the planet Earth and recognized 'Anthropocene' as the new geological epoch. See Bharat H Desai, 'How India Fares in Fighting Pollution,' *The Tribune* (6 June 2019); see also 'The Age of the Humans: Living in the Anthropocene'; available at: https://www.smithsonianmag.com/science-nature/what-is-the-anthropocene-and-are-we-in-it-164801414/ (accessed on 12 January 2021).

[5] These international environmental institutions mainly comprise 'specialized agencies' of the UN, specialized environmental institutions, regime-based institutions, and multilateral development banks.

[6] An estimated 500 international conventions related to the environment have been arrived at since 1868. Out of these, almost 300 have been negotiated since the 1972 UN Conference on Human Environment. Multilateral environment agreements (MEAs) can be generally put in three categories: (i) core environmental conventions and related agreements of global significance, which have been closely associated with the United Nations Environment Programme (UNEP) (in terms of initiative for negotiation, development, and/or activities); (ii) global conventions relevant to the environment, including regional conventions of global significance, which have been negotiated independently of UNEP; and (iii) other MEAs, which are restricted by scope and geographical range. For further details on MEAs, see UNEP, *International Environmental Governance: Multilateral Environmental Agreements*, UN Doc UNEP/IGM/1/INF/1 (30 March 2001) at 3–4. Also see Bharat H Desai, *Multilateral Environmental Agreements: Legal Status of the Secretariats* (New York: Cambridge University Press, 2010).

[7] Harvard Law Review, 'Developments in the Law: International Environmental Law' (May 1991) 104(7) Harvard Law Review 1484-1639 at 1521; available at: DOI: 10.2307/1341598; available at: https://www.jstor.org/stable/1341598 (accessed on 12 January 2021).

[8] United Nations University (UNU), *Inter-Linkages: Synergies and Coordination between Multilateral Environmental Agreements* (Tokyo: UNU, 1999) at 5, 8.

[9] See Nicholas A Robinson, *Agenda 21: Earth's Action Plan*, IUCN Environmental Policy and Law Paper no 27 (New York: Oceana, 1993) at xiv.

[10] Remarks by Tommy TB Koh, president of the third UN Conference on the Law of the Sea, Montego Bay, Jamaica, 10 December 1982; see UN, *UN Convention on the Law of the Sea* (New York: UN, 1983) at xxxiii.

[11] Arnold D McNair, 'The Functions and Differing Legal Character of Treaties' (1930) 11 BYIL 100.

[12] See VCLT, see note 3, Preamble.

[13] Richard Elliot Benedick, 'Perspectives of a Negotiation Practitioner' in Gunnar Sjöstedt, ed, *International Environmental Negotiation* (Newbury Park: Sage Publications, 1993) 229 (emphasis in original).

[14] RE Kim, 'The Emergent Network Structure of the Multilateral Environmental Agreement System' (2013) 23(5) Global Environmental Change 980.

[15] Paris Agreement, Decision 1/CP.21, Annex, UN Doc FCCC/CP/2015/10/Add.1 (29 January 2016). It was adopted at twenty-first Conference of the Parties (COP-21) to the United Nations Framework Convention on Climate Change, 1992, 1771 UNTS 107 (UNFCCC), on 12 December 2015 and entered into force on 4 November 2016. Out of total 197 signatory states, 180 have ratified it; available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf (accessed on 12 January 2021).

[16] For instance, the refusal of the Unites States to ratify the Kyoto Protocol to the United Nations Framework Convention on Climate Change, 1998, 37 ILM 32 (1998) (Kyoto Protocol), is a classical illustration of the vital national interests dictating state behaviour even on an issue regarded as a 'common concern of humankind.' Interestingly, the United States not only refused to ratify the Kyoto Protocol but also took an unprecedented step of 'designing' the protocol. The United States, being the largest emitter of greenhouse gases, has effectively engaged in a 'hold out' and derailed the protocol from coming into force. The Kyoto Protocol has been ratified by 110 states (as compared to the fifty-five ratifications required). Still the second part of the ratification process is not attained as the protocol has been so far ratified only by states contributing 43.9 percent of the greenhouse gas emissions (as compared to the 55 percent required); available at: http://www.unfcccc.int (accessed on 12 January 2021).

[17] Edith Brown Weiss, 'The Five International Treaties: A Living History' in Edith Brown Weiss and Harold K Jacobson, eds, *Engaging Countries: Strengthening Compliance with International Environmental Accords* (Cambridge, MA: MIT Press, 1998) 89.

[18] For a detailed exposition on this idea, see Bharat H Desai, *International Environmental Governance: Towards UNEPO* (Boston: Brill Nijhoff, 2014); see also Peter H Sand, *Lessons Learned in Global Environmental Governance* (Washington, DC: World Resources Institute, 1990) at 1–60; Peter M Haas, 'Global Environmental Governance' in Commission on Global Governance, *Issues in Global Governance* (London: Kluwer International, 1995) 333; Peter M Haas and Ernst B Haas, 'Learning to Learn: Some Thoughts on Improving International Governance of the Global Problematique' in Commission on Global Governance, *Issues in Global Governance* (London: Kluwer International, 1995) 295; Hilary French, *Vanishing Borders: Protecting the Planet in the Age of Globalization* (New York: WW Norton & Company, 2000) 144.

[19] For a detailed exposition on MEAs, see generally Bharat H Desai, *Multilateral Environmental Agreements: Legal Status of the Secretariats* (New York: Cambridge University Press, 2010; paperback 2013).

[20] For instance, COP-24 to the UNFCCC, *supra* note 15, took place in Katowice, Poland, although it was originally scheduled for 2–14 December 2018 and was extended by a day to enable the parties to reach agreement to finalize the rules for the implementation of the Paris Agreement on climate change under the Paris Agreement's work program. See *Earth Negotiations Bulletin*, vol. 12(747) (18 December 2018); available at: http://enb.iisd.org/download/pdf/enb12747e.pdf (accessed on 12 January 2021) .

[21] *International Status of South-West Africa*, Advisory Opinion, [1950] ICJ Rep 128 at 140.

[22] The Katowice Climate Package that was finally adopted at an extended session on 15 December 2018 reflects several loose ends as well as ambiguities to keep the process on track and deliver the rule book for the 2015 Paris Agreement and, in turn, its final operationalization in 2020. *Earth Negotiations Bulletin*, *supra* note 20. In this context, Oscar Schachter has also given an example of the intention of the parties in cases of the political agreements among big powers at Cairo, Yalta, and Potsdam, immediately prior to the United Nations Conference on International Organization in San Francisco in 1945. According to him, there was a calculated ambiguity about the obligatory force of these instruments particularly regarding some of their provisions. The respective governments, party to those agreements, treated them as 'simply a statement of common purposes by the heads of the participating governments and ... not as of any legal effect in transferring territories.' See Oscar Schachter, 'The Twilight Existence of Nonbinding International Agreements' (1977) 71 AJIL 297, n. 11.

[23] Geoffrey Palmer, 'New Ways to Make International Environmental Law' (1992) 86(2) AJIL 259 at 269.

[24] Bharat H Desai et al, *Implementation of the Convention on Biological Diversity: A Retrospective Analysis in the Hindu Kush-Himalayan Countries* (Kathmandu: International Centre for Integrated Mountain Development, 2011) at 3; see also Convention on Biological Diversity, 1992, 1760 UNTS 79, Arts 5, 12, 14; available at: https://www.google.com/search?client=firefox-b&q=download+1992+Convention+on+Biological+Diversity (accessed on 12 January 2021) (CBD).

[25] RR Baxter, 'International Law in Her Infinite Variety' (1980) 29 ICLQ 549.

[26] Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 AJIL 414.

[27] Patricia Birnie, 'International Environmental Law: Its Adequacy for Present and Future Needs' in Andrew Hurrell and Benedict Kingsbury, eds, *The International Politics of the Environment: Actors, Interests and Institutions* (Oxford: Clarendon Press, 1992) 53.

[28] See remarks by Gunther F Handl, chair at the panel discussion. Gunther F Handl, 'A Hard Look at Soft Law' (1988) 82 ASIL Proceedings 371 at 371.

[29] The United Nations General Assembly (UNGA) has adopted Resolution 72/277 on Towards a Global Pact for the Environment (10 May 2018); available at: http://undocs.org/A/RES/72/277 (accessed on 12 January 2021). As a sequel to this, the UN secretary general presented a report to the UNGA on 30 November 2018 to trigger the process for an ad-hoc open-ended working group that has been mandated to 'consider the report and discuss possible options to address possible gaps in international environmental law and environment-related instruments, as appropriate, and, if deemed necessary, the scope, parameters and feasibility of an international instrument, with a view to making recommendations, which may include the convening of an intergovernmental conference to adopt an international instrument, to the Assembly during the first half of 2019.'

[30] For the three rounds of the Nairobi Process held during January to June 2019 including deliberations, draft elements of the Co-chair's 'non-paper' and the outcome, see; available at:

https://www.unenvironment.org/events/conference/towards-global-pact-environment (accessed on 12 January 2021) . Also see the UNGA Resolution 73/233 on 'Follow-up to the report of the ad hoc open-ended working group established pursuant to General Assembly resolution 72/277'(30 August 2019); available at: https://undocs.org/en/A/RES/73/333 (accessed on 12 January 2021).

[31] Bharat H. Desai, 'UN General Assembly as the 'Conductor of a Grand Orchestra' in the Discourse on *Global Perspectives on a Global Pact for the Environment* (19 September 2018), Columbia Center on Sustainable Investment, Columbia University, New York; available at: http://ccsi.columbia.edu/2018/09/19/global-perspectives-on-a-global-pact-for-the-environment/ (accessed on 12 January 2021).

[32] Bharat H Desai and Balraj K Sidhu, 'Climate Change as a Common Concern of Humankind: Some Reflections on International Law-making Process' (Chapter 10) in Jordi Jaria Manzano and Susana Borràs (ed.), *Research Handbook on Global Climate Constitutionalism* (London: Edward Elgar, 2019). Also see Balraj K Sidhu and Bharat H Desai, 'Plastics Pollution: A New Common Concern of Humankind?' (2018) 48(5) *Environmental Policy and Law* 252.

[33] On this issue, see generally Louis Henkin, *How Nations Behave: Law and Foreign Policy* (London: Pall Mall for the Council on Foreign Relations, 1968); see also Jose E Alvarez, 'Why Nations Behave' (1998) 19 Michigan J Intl L 303; available at: http://repository.law.umich.edu/mjil/vol19/iss2/1 (accessed on 12 January 2021).

[34] See Charter of the United Nations, 1 UNTS 16 (1945) arts 10, 12 use the formulation that the UNGA 'may make recommendations.'

[35] For instance, Ignaz Seidl-Hohenveldern has argued that following the adoption of the Universal Declaration of Human Rights, UN Doc A/810 (10 December 1948) (Universal Declaration), the UN and its organs could no longer practice any policy that may run counter to the principles enunciated in the Universal Declaration. For example, there cannot be different wages for equal work by male and female employees of the UN. See Ignaz Seidl-Hohenveldern, 'International Economic Soft Law' (1979) 163(2) Recueil des Cours 195.

[36] UNEP Governing Council has adopted a series of guidelines in specific areas, which may have invested them with a soft law character. These guidelines include the Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes, Doc UNEP(092)/E5 (17 June 1987); available at: https://www.informea.org/en/cairo-guidelines-and-principles-environmentally-sound-management-hazardous-wastes (accessed on 12 January 2021); the Exchange of Information on Chemicals in Trade, 1987 with Amendment for Prior Informed Consent Procedure, 1989; available at; https://www.jus.uio.no/lm/unep.chemicals.information.exchange.trade.london.guidelines.1989/landscape.pdf (accessed on 12 January 2021); the Goals and Principles of Environmental Impact Assessment, 1987; available at: https://www.soas.ac.uk/cedep-demos/000_P514_IEL_K3736-Demo/treaties/media/1987%20UNEP%20Goals%20and%20Principles%20of%20Environmental%20Impact%20Assessment.pdf (accessed on 12 January 2021); the Protection of the Marine Environment against Pollution from Land-Based Sources, 1985, the Protection of the Marine Environment against Pollution from Land-Based Sources, 1985; the Conclusions of the Study of Legal Aspects Concerning the Environment Relating to Offshore Mining and Drilling within the Limits of National Jurisdiction, 1982; available at: https://digitallibrary.un.org/record/42519 (accessed on 12 January 2021); Provisions for Co-operation between States in Weather Modification, 1980; available at: https://digitallibrary.un.org/record/42518 (accessed on 12 January 2021); and 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, 1978; available at: https://digitallibrary.un.org/record/41332?ln=en (accessed on 12 January 2021); see Bharat H Desai, 'Regulating Transboundary Movements of Hazardous Wastes' (1997) 37(1) Indian Journal of International Law 47, n 22.

[37] Cairo Guidelines, *supra* note 34; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1989, 1673 UNTS 126 (Basel Convention).

[38] The Programme for the Development and Periodic Review of Environmental Law (Montevideo Programme) is a ten-year action plan that aims at catalyzing progressive development of environmental law. On 28 November 2018, a first draft of the Montevideo Program V was released as Delivering for People and the Planet: Fifth Montevideo Programme for the Development and Periodic Review of Environmental Law (Montevideo V); available at: http://wedocs.unep.org/handle/20.500.11822/26801?show=full (accessed on 12 January 2021). It is a proposal for the work by UNEP in the area of environmental law for a specific period beginning in 2020

[39] The mandate of UNEP's Governing Council speaks, among others, of promoting 'international co-operation in the field of the environment and to recommend, as appropriate, policies to this end.' This may be construed as conferring a broad mandate to UNEP's Governing Council to embark upon an ambitious exercise for various guidelines, principles, and recommendations adopted over the years. In fact, they formed on a number of occasions the basis for the development of international agreements on concerned subjects. See UNGA Resolution 2997(XXVII) on Institutional and Financial Arrangements for International Environmental Co-operation (15 December 1972) at 43, Part I, para 2(a).

[40] Universal Declaration, see note 33.

[41] UNGA Resolution 3201 (S-VI) on the 'Declaration on the Establishment of a New International Economic Order' was adopted without a vote on 1 May 1974; available at: https://digitallibrary.un.org/record/218450 (accessed on 12 January 2021).

[42] Charter of Economic Rights and Duties of States, 1974, 14 ILM 251 (1975). UNGA Resolution < 3281 (XXIX) of 12 December 1974> on the Charter of Economic Rights and Duties of States was adopted without a vote on the report of the Second Committee; available at: https://www.un.org/ga/search/view_doc.asp?symbol=a/res/3281 (accessed on 12 January 201).

[43] Stockholm Declaration on the Human Environment, 1972, 11 ILM 1416 (1972).

[44] World Charter for Nature, Doc.A/RES/43/53 (27 January 1989). UNGA Resolution 43/53 on Protection of Global Climate for Present and Future Generations of Mankind (1988) was adopted without a vote on 6 December 1988.

[45] UNGA Resolution 43/53, *ibid.* Also see Patricia W Birnie and Alan Boyle, *Basic Documents on International Law and the Environment* (Oxford: Clarendon Press, 1995) at 248–51.

[46] Rio Declaration on Environment and Development, 1992, 31 ILM 874 (1992).

[47] See note, 29 and 30.

[48] It has been argued by Gunther Handl that one of the theoretical challenges, posed by the soft law phenomenon, lies in 'appreciating fully the declining reliability of formal criteria of international law as guideposts to what actually constitutes international law. Past warnings about mistaking those legal phenomena that masquerade as international law because they fit the formal categories of law as enumerated, for example, in article 38 of the Statute of the International Court of Justice, are more appropriate than ever.' See Handl, see note 28.

[49] See remarks by W Michael Reisman in Handl, see note 28 at 374.

[50] Ibid, at 376.

[51] VCLT, *supra* note 3, art 2; see also UN Doc no.A/Conf.39/27 (1969) <United Nations Conference on the Law of the Treaties; First and second sessions Vienna, 26 March-24 May 1968 and 9 April-22 May 1969, Official Records (New York: UN, 1971); available at: https://treaties.un.org/doc/source/docs/A_CONF.39_11_Add.2-E.pdf (accessed on 12 January 2021).

[52] Vienna Convention for the Protection of the Ozone Layer, 1985, 1513 UNTS 323.

[53] Ibid, Art 2 on general obligations.

[54] Montreal Protocol on Substances That Deplete the Ozone Layer, 1987, 1522 UNTS 3.

[55] For details see; available at: https://www.unenvironment.org/ozonaction/who-we-are/about-montreal-protocol (accessed on 12 January 2021).

[56] Basel Convention, see note 35.

[57] Ibid, Art 2(8) states: "Environmentally sound management of hazardous wastes or other wastes' means taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes.'

[58] Ibid, Art 12 provides: 'The Parties shall co-operate with a view to adopting, as soon as practicable, a protocol setting out appropriate rules and procedures in the field of liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes and other wastes.'

[59] Ibid, Art 4(2)(e).

[60] For details, see Desai, see note 34 at 55.

[61] For decisions of the 14th Basel COP, Geneva, Switzerland, 29 April to 10 May 2019, see: http://www.basel.int/TheConvention/ConferenceoftheParties/Meetings/COP14/tabid/7520/Default.aspx (accesssed on 12 January 2021).

[62] Eg, UNFCCC, see note 15, art 4 on 'commitments.'

[63] Eg, CBD, see note 24, arts 6–11, 14.

[64] International Union for the Conservation of Nature (IUCN), UNEP, and World Wildlife Fund, *World Conservation Strategy: Living Resource Conservation for Sustainable Development* (Gland: IUCN, 1980), s 15, para 10.

[65] Patricia Birnie, 'International Environmental Law: Its Adequacy for Present and Future Needs' in Andrew Hurrell and Benedict Kingbury, eds, *The International Politics of the Environment: Actors, Interests and Institutions* (Oxford: Clarendon Press, 1992) 53.

[66] In this context, Judge Manfred Lachs has observed: 'On the level of imperfect provisions which are not binding and which are recommendations only, by multiplying them we may exercise some influence in States to comply with them as far as possible.' See Manfred Lachs, 'The Challenge of the Environment' (1990) 39 ICLQ 668.

[67] As per Prosper Weil, this problem appears every time law resorts to the technique of a threshold. See Weil, *supra* note 26. In a judgment of the World Bank's Administrative Tribunal, this problem of drawing the line was described as choice 'between the reasonable and unreasonable, the equitable and the nonequitable, the essential and the non essential, the appurtenant and the nonappurtenant.' World Bank Administrative Tribunal Judgement no 1 (1981) at para 3, quoted in Weil, *supra* note 26.

[68] Günther Handl, 'Environmental Security and Global Change: The Challenge to International Law' (1990) 1 YIEL 8.

[69] As Christine M Chinkin aptly observes, '[t]hey must draw upon the entire continuum of mechanisms ranging from the traditional international legal forms to the soft law instruments. Labelling these instruments as law or non-law disguises the reality that both play a major role in the development of international law and both are needed for the regulation of States' activities and for the creation of expectations. Soft law instruments allow for the incorporation of conflicting standards and goals and provide States with the room to manoeuvre in the making of claims and counterclaims.' See CM Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38(4) ICLQ 866; see also Handl, see note 28 at 389–93.

[70] For documentation on the 1973–82 United Nations Convention on the Law of the Sea, 1982, 21 ILM 1261 (1982) (UNCLOS).

[71] See Decision VIII/21 on 'Marine and coastal biological diversity: conservation and sustainable use of deep seabed genetic resources beyond the limits of national jurisdiction', Eighth meeting of the Conference of Parties to the Convention on Biological Diversity, Curitiba, Brazil, 20-31 March 2006; available at: https://www.cbd.int/doc/decisions/cop-08/cop-08-dec-21-en.pdf (accessed on 22 January 2021).

[72] See the UN General Assembly resolution 72/249 of 24 December 2017 on 'International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyondnational jurisdiction'; available at: https://undocs.org/en/a/res/72/249 (accessed on 22 January 2021).

[73] United Nations, 'Delegates Discuss Environmental Impact Assessment Reports, Establishment of Scientific Body, as Marine Biodiversity Treaty Negotiations Continue', *Press Briefing*, 29 August 2019; available at: https://www.un.org/press/en/2019/sea2117.doc.htm (accessed on 22 January 2021). Also see; available at: https://www.un.org/bbnj/ (accessed on 12 January 2021).

[74] Donella H Meadows et al, *The Limits to Growth: A Report for the Club of Rome's Project on the Predicament of Mankind* (New York: Universe Books, 1972; available at: http://www.donellameadows.org/wp-content/userfiles/Limits-to-Growth-digital-scan-version.pdf (accessed on 23 January 2021).

[75] For details, see Winfried Lang, 'Die Verrechtlichung des internationalen Umweltschutzes: Vom "soft law" zum "hard law"' (1984) 22 Archiv des Völkerrechts 282 at 303.

[76] The International Law Commission (ILC) was set up by the UNGA in 1947. Its thirty-four members elected by the UNGA for a term of five years, serve as legal experts in their individual capacity. The ILC has over a period spanning more than five decades, done commendable work in progressive development and codification of international law. Some of its principal

achievements include the Statute of the International Criminal Court, 1997, 2187 UNTS 3; the Convention on the Non-Navigational Uses of International Watercourses, 1997; available at: http://legal.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf (accessed on 12 January 2021); the Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986; available at: http://legal.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf (accessed on 22 January 2021); the Convention on the Succession of States in Respect of State Property, Archives and Debts, 1983; available at: http://legal.un.org/ilc/texts/instruments/english/conventions/3_3_1983.pdf (accessed on 12 January 2021); the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973; available at: http://legal.un.org/ilc/texts/instruments/english/conventions/9_4_1973.pdf (accessed on 12 January 2021); the VCLT, *supra* note 3; the Vienna Convention on Diplomatic Relations, 1961; available at: http://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf (accessed on 12 January 2021); and VCCR, *supra* note 2; and the four Conventions on the Law of the Sea, adopted at the first UN Law of the Sea Conference (1958). UNCLOS, see note 68.

[77] Stockholm Declaration, see note 41.

[78] Rio Declaration, *supra* note 44; Agenda 21, 1992, UN Doc A/CONF. 151/26 (1992); Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, 13 June 1992; available at: https://digitallibrary.un.org/record/170126 (accessed on 12 January 201).

[79] The nineteenth Special Session of the UNGA was held on 23–8 June 1997 in New York, which was participated in by representatives of 165 countries. The assembled delegates took a grim note of the fact that the 'global environment has continued to deteriorate since 1992' (the Rio Earth Summit). It adopted the *Programme for the Further Implementation of Agenda 21* (New York: UN, June 1997) at 1–95.

[80] The UNGA decided to organize the ten-year review of progress achieved in the implementation of the outcome of the 1992 UN Conference on Environment and Development (Rio Convention) in 2002 at the summit level in order to reinvigorate the global commitment to sustainable development. It also decided that the Commission on Sustainable Development (CSD), a product of the Rio Convention, would be the task of the Preparatory Committee for the World Summit on Sustainable Development (WSSD), which was to be held in Johannesburg, South Africa, from 26 August to 4 September 2002. See UNGA Resolution A/RES/55/199 (20 December 2000); see also UNGA Resolution A/RES/56/226 (24 December 2001). For the final outcome of the WSSD, including the Johannesburg Political Declaration and the Plan of Implementation of the WSSD. See *Report of the World Summit on Sustainable Development*, UN Doc A/CONF.199/20 (New York: UN, 2002) at 1–173.

[81] The CSD came out with a focused political outcome document that contains clear and practical measures for implementing sustainable development. See UNGA Resolution 66/288 (27 July 2012); available at: https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_66_288.pdf (accessed on 12 January 201).

[82] The UNGA adopted UNGA Resolution 70/1 on Transforming Our World: The 2030 Agenda for Sustainable Development (25 September 2015); available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E (accessed on 12 January 201). It became a plan of action for people, planet, and prosperity. With seventeen Sustainable Development Goals and 169 targets, it sought to stimulate action over the next fifteen years in areas of critical importance for humanity and the planet.

[83] UNGA Resolution 43/53, see note 42, adopted without vote on 6 December 1988; see Birnie and Boyle, see note 43, paras 1–2.

[84] For details on all the instruments flowing from the marathon climate change regulatory process; available at: https://unfccc.int/ (accessed on 12 January 2021)

[85] UNGA Resolution 2997(XXVII), see note 37.

[86] Bharat H Desai, 'The Advent of the UN Environment Assembly' (2015) 19(2) ASIL Insights; available at: https://www.asil.org/insights/volume/19/issue/2/advent-united-nations-environment-assembly (accessed on 12 January 2021).

[87] Basel Convention, see note 35.

[88] The UNGA considered the agenda item proposed by the government of Malta on the 'conservation of climate as part of the common heritage of mankind' and adopted UNGA Resolution 43/53, see note 42, on 6 December 1988. UNGA Resolution 43/53 was adopted without vote.

[89] UNCLOS, see note 68, art 136 provides: 'The Area and its resources are the common heritage of mankind.' Art 1(1) defines *Area*, which 'means the sea-bed and the ocean floor and subsoil thereof, beyond the limits of national jurisdiction.' As per art 140, the activities in the Area were to be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States. The International Sea-Bed Authority was to provide for the equitable sharing of financial and other economic benefits derived from activities in the Area through appropriate mechanism. The idea of common heritage of mankind was mooted in a Maltese proposal by Arvid Pardo. UNCLOS came into force after a period of twelve years on 16 November 1994.

[90] The very first paragraph of the UNFCCC, see note 15, states: '*Acknowledging* that change in the Earth's climate and its adverse effects are a common concern of humankind.'

[91] CBD, *supra* note 24, preamble, states: '*Affirming* that the conservation of biological diversity is a common concern of humankind.'

[92] Alexandre Kiss, 'The Common Concern of Mankind' (1997) 27(4) Environmental Policy and Law 247.

[93] UNCLOS, *supra* note 68.

[94] The Agreement took shape to address 'certain difficulties with the seabed mining provisions contained in Part XI of the Convention, which had been raised, primarily by the industrialized countries'. It was result of the initiative of the UN Secretary-General's series of consultations from July 1990. It culminated in the Agreement on 28 July 1994 that came into force on 28 July 1996'. See Agreement for the Implementation of Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982; available at: https://www.un.org/Depts/los/convention_agreements/convention_overview_part_xi.htm (accessed on 12 January 2021).

[95] Arvid Pardo's historic proposal was mooted in address to the UN General Assembly on 1 November 1967; available at: https://www.un.org/depts/los/convention_agreements/texts/pardo_ga1967.pdf (accessed on 10 January 2021).

[96] UNFCCC, see note 15.

[97] Desai and Sidhu, see note 32

[98] The Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973, 993 UNTS 243. It entered into force on 1 July 1975.

[99] Ibid, Arts III, IV, V.

[100] Convention on Long-Range Transboundary Air Pollution, 1979, 1302 UNTS 217. Its participation is open to all member states of the United Nations Economic Commission for Europe. However, it also includes the United States, Canada, and the former Soviet Union. It entered into force on 16 March 1983.

[101] The eight protocols to the 1979 LRTAP Convention include : (i) Protocol on Long-term Financing of a Cooperative Programme for Monitoring and Evaluation of the Long-Range Transmission of Air Pollutants in Europe, 1984, 27 ILM 701 (1988); (ii) Protocol on the Reduction of Sulphur Emissions or their Transboundary Fluxes, 1987, 27 ILM 707 (1988); (iii) Protocol Concerning the Control of Emissions of Nitrogen Oxides or Their Transboundary Fluxes, 1988 28 ILM 212 (1989); (iv) Protocol Concerning the Control of Emissions of Volatile Organic Compounds or Their Transboundary Fluxes, 1991, 31 ILM 573 (1992); (v) Protocol on Further Reduction of Sulphur Emissions, 1994 33 ILM 1542 (1994); (vi) the 1998 Protocol on Heavy Metals and its 2012 amended version of 29 December 2003; (vii) the 1998 Protocol on Persistent Organic Pollutants (POPs) and its 2009 amended version of 23 October 2003; and (viii) the 1999 Protocol to Abate Acidification, Eutrophication and Ground-level Ozone and its 2012 amended version of 17 May 2005; available at: https://www.unece.org/env/lrtap/status/lrtap_s.html (accessed on 12 January 2021).

[102] See Convention on Migratory Species of Wild Animals, 1979, 1651 UNTS 333 (CMS), Appendix I (Endangered Migratory Species) and Appendix II (Migratory Species to be Subject to Agreements), arts III, IV.

[103] Ibid, Art V provides detailed guidelines for 'agreements' that covers individual species or, more often, for a group of species listed in Appendix II. The legal character of these agreements comprises legally binding multilateral environmental agreements and 'less formal' memoranda of understanding. Their objective is to restore the migratory species to a favourable conservation status or to maintain it at that status. A series of such agreements worked out under the tutelage of CMS include: the Agreement on the Conservation of Seals in the Wadden Sea, 1990; available at: http://www2.ecolex.org/server2neu.php/libcat/docs/TRE/Full/En/TRE-001100.txt (accessed on 12 January 2021); the Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas, 1992; available at: https://treaties.un.org/doc/Treaties/1994/03/19940329%2005-25%20AM/Ch_XXVII_09p.pdf (accessed on 23 January 2021); the Agreement on the Conservation of Bats in Europe, 1991; available at: https://www.eurobats.org/official_documents/agreement_text (accessed on 22 January 2021); the Agreement on the Conservation of African Eurasian Migratory Waterbirds, 1995; available at: https://www.unep-aewa.org/sites/default/files/basic_page_documents/agreement_text_english_final.pdf (accessed on 20 January 2021); the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area, 1996; available at: https://www.cms.int/raptors/sites/default/files/instrument/Anglais_Text%20of%20the%20Agreement%20English.pdf (accessed on 23 January 2021); Memorandum of Understanding concerning Conservation Measures for the Siberian Crane (1993); Memorandum of Understanding concerning Conservation Measures for the Slender-billed Curlew (1994); Memorandum of Understanding concerning Conservation Measures for Marine Turtles of Atlantic Coast of Africa (1999); Memorandum of Understanding on the Conservation and Management of the Middle-European Population of the Great Bustard (2000); Agreement on the Conservation of the Albatrosses and Petrels (2001); Memorandum of Understanding concerning Conservation Measures for Marine Turtles of the Indian Ocean and South-East Asia (2001); Memorandum of Understanding concerning Conservation and Restoration of the Bukhara Deer (2002); Memorandum of Understanding concerning Conservation Measures for the Aquatic Warbler (2003). For the text of all the above agreements and MoUs; available at: https://www.cms.int/en/cms-instruments/agreements (accessed on 12 January 2021).

[104] Kyoto Protocol, *supra* note 16; Paris Agreement, see note 15. For the entire climate change 'process' and the all of the instruments; available at: https://unfccc.int/process (accessed on 22 January 2021).

[105] Eg, the Kyoto Protocol, *ibid.*, was adopted by COP-3 to the UNFCCC, see note 15, in Kyoto, Japan, on 11 December 1997. It provided commitments exclusively for the developed country parties to reduce their combined greenhouse gas (GHG) emissions by at least 5.2 percent compared to 1990 levels, by the period 2008–12. This delicately arrived at comprise for reduction of GHG emissions within a time bound program was grounded by the holdout from the United States, which has been among the largest GHG emitters in the world. Some other industrialized countries followed the US example to upset the Kyoto apple cart. See Kyoto Protocol, see note 16.

[106] Eg, COP-24 to the UNFCCC in Poland on 2–15 December 2018 brought together over 22,000 participants, including nearly 14,000 government officials, over 7,000 representatives from UN bodies and agencies, intergovernmental organizations, and civil society organizations, and 1,500 members of the media. see *Earth Negotiations Bulletin*, see note 20.

[107] For a detailed view of the UN General Assembly engagement as regards the mandate, the process and the targeted goals is in this ambitious venture; available at:https://www.un.org/sustainabledevelopment/sustainable-development-goals/ (accessed on 22 January 2021).

[108] For a detailed study on this process, see Bharat H Desai, 'Forests: International Protection' in R Wolfrum, ed, *Max Planck Encyclopedia of Public International Law*; available at: https://www.sai.uni-heidelberg.de/sapol/pdf/Forests.pdf (accessed on 22 January 2021).