

Integrating Conflicting Interests through Biodiversity-Related Conventions

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Table of abbreviations and acronyms

ACCNNR	African Convention on the Conservation of Nature and Natural Resources (2003)
AOSIS	Alliance of Small Island States
BAT	best available techniques/technology
BEP	best environmental practice
BINGO	business initiated non-governmental organization
CASA	Citizens' Assessment of Structural Adjustment
CCC	Caribbean Conservation Corporation
CBD	Convention on Biological Diversity
CEC	Commission on Education and Communication
CEESP	Commission on Environment, Economics and Social Policy
CEL	Commission on Environmental Law
CEM	Commission on Ecosystems Management
CEPF	Critical Ecosystems Partnership Fund
CI	Conservation International
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CMS	Convention on Migratory Species
COICA	Coordinadora de Organizaciones Indígenas de la Cuenca Amazónica
CoP	Conference of the Parties
CONCORD	Confederation for Relief and Development
CRIC	Committee for the Review of the Implementation of the Convention
CSD	Commission on Sustainable Development
CSR	corporate social responsibility
CST	Committee on Science and Technology Development
GAP	Development Group for Alternative Policies
EBAs	Endemic Bird Areas
ECOSOC	Economic and Social Council
ENB	Earth Negotiations Bulletin
ENGO	Environmental non-governmental organization
ETIS	Elephant Trade Information System
FIELD	Foundation for International Environmental Law and Development

FSC	Forest Stewardship Council
G-77	Group of 77
GATT	General Agreement on Tariffs and Trade
GCAP	Global Call to Action Against Poverty
GDP	gross domestic product
GNP	gross national product
GEF	Global Environment Facility
GM	Global Mechanism
ICC	International Chamber of Commerce
ICDPs	integrated conservation and development programmes
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICJ	International Court of Justice
ICSU	International Council for Scientists
IDB	Inter-American Development Bank
IFAW	International Fund for Animal Welfare
ILO	International Labour Organization
ILO Convention No. 107/1959	ILO Convention on Indigenous and Tribal Populations
ILO Convention No. 169	1989 ILO Convention on Indigenous and Tribal Peoples
IO	intergovernmental organization
IPA	international parliamentary association
IPU	Inter-Parliamentary Union
ITLOS	International Tribunal for the Law of the Sea
ITTO	International Timber Trade Organization
IUCN	World Conservation Union
IWRB	International Waterfowl Research Bureau
MA	Millennium Assessment
MAB	Programme Man and the Biosphere” Programme
MARPOL	International Convention for the Prevention of Pollution from Ships
MDG	Millennium Development Goal
MEA	multilateral environmental agreements
MIKE	Monitoring the Illegal Killing of Elephants
MP	Member of Parliament

NAP	national action programme
NGO	non-governmental organization
NWF	National Wildlife Federation
OAS	Organization of American States
OAU	Organization of African Unity
ODA	official development assistance
OECD	Organization of Economic Cooperation and Development
PA	protected area
PGA	Parliamentarians for Global Action
PPP	Puebla-to-Panama Plan
PPY	Pronatura Peninsula de Yucatan
Ramsar Convention	Convention on Wetlands of International Importance especially as Waterfowl Habitat
Ramsar SGF	Ramsar Small Grants Fund
SAPRI	Structural Adjustment Participatory Review Initiative
SBSTTA	Subsidiary Body on Scientific, Technical and Technological Advice
SSC	Species Survival Commission
TAG	Technical Advisory Group
TNC	The Nature Conservancy
TRAFFIC	Trade Records Analysis of Fauna and Flora in Commerce
UN	United Nations
UNCCD	United Nations Convention to Combat Desertification
UNCED	United Nations Conference on Environment and Development
UNCHE	United Nations Conference on the Human Environment
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNEP-WCMC	United Nations Environment Programme-World Conservation Monitoring Centre
UNESCO	United Nations Educational, Scientific and Cultural Organization
USAID	United States Agency for International Development
WBCSD	World Business Council for Sustainable Development
WCO	World Customs Organization
WCPA	World Commission on Protected Areas
WCS	Wildlife Conservation Society
WHC	Convention Concerning the Protection of the World Cultural and Natural Heritage

WHF	World Heritage Fund
WSSD	World Summit on Sustainable Development
WTO	World Trade Organization
WWF	World Wide Fund for Nature

Introduction

International efforts for the protection of biological diversity make apparent to which extent environmental interests conflict with economic and social development interests. Both, development for poverty alleviation and biodiversity protection are international targets. The first United Nations Millennium Development Goal (UN MDG), is to halve, between 1990 and 2015, both the proportion of people whose income is less than US\$1 a day and the proportion of people who suffer from hunger. MDG 7 is to ensure environmental sustainability, whereby the area of land that is protected to maintain biological diversity, serves as an indicator of performance. It has been recognized at least since the 1980s that conservation and development are inextricably linked concepts or “opposite sides of the same coin.”¹ This linkage is expressed in the concept of sustainable development. Balancing ecological and development considerations means to acknowledge the importance of human needs while at the same time accepting the fact that our world’s capacity to meet those needs is exhaustible and depends on functioning ecosystems. Balancing the two interests remains difficult in practice. The main direct threats to biodiversity include: conversion of natural habitat to arable land, urban areas, or other human-dominated ecosystems and overexploitation or over harvesting of valuable species. Is it possible to counter these risks while promoting development?

This thesis deals with multilateral agreements that strive to protect biodiversity. The thesis argues that there is not one right answer to the complex question how thoroughly biodiversity should be protected. The closest approximation to a right answer is an agreement concluded with the involvement of all relevant stakeholders which takes into account environmental interests as well as economic and social development interests. Furthermore, considerations of equity as well as pragmatism require such stakeholder involvement. Stakeholder involvement is here understood to mean involvement of all states as negotiators but also of groups within states and non-state actors with a particular interest in conservation and development issues. The notion of “stakeholders” was introduced into the context of Sustainable development debate in the 1980s. The

¹ Gro Harlem Brundtland and World Commission on Environment and Development, eds., *Our common future. Brundtland-Report*, 1. publ. ed., Oxford paperbacks (Oxford: Oxford Univ. Pr., 1987).

expression underlines the idea of a negotiation process wherein equal partners, that is, organizations, agencies and citizens, achieve win-win solutions.²

Chapter 1 defines the concept of PAs and describes the phenomenon of international trade in endangered species. The most significant global conventions promoting the establishment of PAs, namely the Convention on Biological Diversity (CBD), the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention), the UNESCO Convention on the Protection of the World Cultural and Natural Heritage (World Heritage Convention/WHC) will be briefly introduced. The United Nations Convention to Combat Desertification (UNCCD) will likewise be introduced. This Convention is of great significance for biodiversity and it is particularly interesting for this thesis since it follows a different approach in that it does not promote the establishment of PAs. It instead focuses on land management in drylands. Finally, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is introduced with its approach to provide for the control of international trade in endangered species.

In the context of biodiversity protection the interests of states may prove to clash with one another because some states prioritize the global conservation of biological diversity while others are most concerned about poverty alleviation through economic development and stress the sovereignty over their land and living resources. International law's role is to provide equitable rules for a solution of conflicts of interests. It must take account of changing values, and demands and of the legitimate aspirations and the needs of all states.³

Chapter 2 will examine the interests of developing states, of the US, Canada and European states. It also clarifies and analyses the interests with respect to conservation and development of indigenous peoples, non-indigenous inhabitants of biologically diverse regions, international non-governmental organizations (NGOs) and corporations. This thesis argues that the mentioned conventions should be mutual gains solutions for states as well as stakeholders within states. Awareness of the divergence of interests in biodiversity conservation and development are crucial to

² Lisa M. Campbell and Arja Vainio-Mattila, "Participatory Development and Community-Based Conservation: Opportunities Missed for Lessons Learned?," *Human Ecology* 31, no. 3 (2003): 428.

³ Rosalyn Higgins, *Conflict of interests. International law in a divided world ; a background book* (London: The Bodley Head, 1965). 49, 50.

find common ground.⁴ Knowing about the varying interests of states will help to understand their positions in negotiations and it will help to verify whether international law succeeds in providing integrates all states' interest (Chapter 3). This knowledge prepares the examination (Chapter 4) in how far external actors help to facilitate and it serves to gauge in how far interests are reflected by the CBD, CITES and UNCCD (Chapter 5).

Inhabitants of biologically diverse regions usually strive to use the resources surrounding them freely and autonomously or at least to participate in decision-making concerning those resources. These interests may well conflict with the interests of their states' governments who may either restrict land use and trade in species or they may undertake or sanction environmentally harmful actions such as large-scale development projects in the form of mining or pipeline and road construction. Both these activities may encroach upon or threaten the quality of life or even livelihoods of local people – indigenous and traditional peoples amongst them – who are dependent on land and living resources. The establishment of a PA may lead to the eviction of former dwellers, it may exacerbate their poverty and infringe their rights.

Inhabitants may be directly and adversely affected by international rules promoting the establishment of PAs and prescribing trade limitations. On the other hand, they may rely on international law to strengthen their position because it provides for local participation in decision-making at the international level and promotes participation at lower levels. Indigenous peoples who often inhabit biologically diverse regions, are in a special position since their identity and culture depends on their lands and biological resources. International law grants them rights of internal autonomy and or participation in decision-making.

NGOs are a major presence at international negotiations of conservation and development issues. This raises the question whether they are legitimate stakeholders. They pursue numerous different interests. They may seek to make local populations be heard or support disadvantaged states. In addition, environmental NGOs see themselves as representatives of the global civil society and advocate the protection of

⁴ William. M. Adams et al., "Biodiversity Conservation and the Eradication of Poverty " *Science* 306, no. 5699 (2004): 1146-48.

biological diversity as “global commons.” This thesis will seek to establish whether NGOs are relevant stakeholders that should participate in decision-making.

Finally, corporations are powerful actors in negotiations too. This thesis will therefore examine whether they are stakeholders that should participate in negotiations.

Chapter 3 introduces some aspects of negotiation theory that may be of interest in the context of multilateral negotiations on sustainable development issues. It analyses to what extent experiences gained in negotiations and reflected in negotiation theory are useful or have a potential to be useful in such intergovernmental negotiations. Negotiation theory has developed the concept of “mutual gains negotiation” which is also referred to as “integrative negotiation.” This negotiation style is acknowledged as the most effective method to reach mutual gains solutions. Chapter 3 will therefore discuss the components of integrative negotiations and their significance and usefulness in multilateral negotiations aimed at the creation of a biodiversity-related convention. Some of the central aspects in integrative negotiations are the participation of all stakeholders and the strengthening of weaker state negotiators. When negotiators have asymmetric power this imbalance needs to be addressed in order to prevent powerful negotiators from dictating the terms of the agreement.

The adequate representation in negotiations of indigenous peoples, communities that inhabit biologically diverse regions and NGOs that see themselves as representatives of the global civil society will be discussed. It will be asked whether members of national parliaments are the more adequate representatives of the global civil society. Finally, the participation of corporations will be questioned.

Chapter 3 also outlines ways and guidelines to achieve mutual gains solutions and examines their practical significance for the negotiation of the selected conventions.

Chapter 4 examines whether mediation services can help integrate the conflicting interests in the context of conservation and social and economic development. Empirical evidence on mediation and mediation theory indicate the merits of mediation in fields ranging from international political crises to environmental disputes within states or between states. Mediation is understood to be an extended form of negotiation with third party intervention. While mediation is commonly used to solve a specific conflict of interest, experiences gained from the various mediation services may be transferable to negotiations of general rules that are meant to integrate conflicting interests. Arguably, complex conflicts of interest can only be

resolved with mediator assistance. Chapter 4 will therefore assess whether CITES, CBD, UNCCD or scientific networks, NGOs or members of national parliaments provide such services to integrate conflicting interests. Furthermore, the Chapter will analyse which mediation tasks can in future be carried out by the actors mentioned.

After the consideration of procedural issues in Chapter 3 and 4, Chapter 5 will address the question whether CBD, CITES and UNCCD represent and prompt mutual gains solutions. First, the convention texts and the convention outputs, that is, the rules, recommendations and programmes adopted by treaty bodies, will be examined. Second, the outcomes – the behavioural change prompted by the conventions – will be assessed. Here, the underlying assumption is that an agreement which amounts to a mutual gains solution will be implemented and complied with by member states and addressees within states. The compliance rates will be looked at and so will the possibilities treaty regimes have to improve implementation and compliance. Monitoring and other activities that advance implementation and compliance are typical mediation services. The analysis of reactions to and prevention of non-compliance therefore completes the examination of mediation services. The final section of Chapter 5 is dedicated to the consideration of impacts, that is, the degree to which agreements prompt factual mutual gains solutions for states, indigenous peoples, local communities and other stakeholders.

The working hypothesis is that international instruments and their output help to integrate the above mentioned conflicts of interest when drafted with input from all states and all other stakeholders concerned. The thesis points out ways to improve the negotiation process and suggests changes to the international provisions that would better integrate the various interests. It is argued that participation by all stakeholders in the setting of rules is the best way to ensure their implementation and compliance with them. For the sake of equity, public international law should in particular support local populations' autonomy in managing land and wildlife and should make room for direct public participation in the elaboration of international rules.

Chapter 1: Protecting biological diversity through the establishment of protected areas and the control of international trade in endangered species of wild fauna and flora

A. Protected areas

One crucial approach to protecting biological diversity centres on the prohibition or restriction of human activities within especially established “protected areas” (PAs). In these areas conservation is given priority over other land uses.⁵ This is a consequence of the realisation that the main direct threats to biodiversity include: Conversion of natural habitat to arable land, urban areas, or other human-dominated ecosystems and overexploitation or overharvesting of valuable species.

The conservation of biological diversity as envisaged by the Convention on Biological Diversity (CBD) goes far beyond the conservation of species and their habitats. The Convention’s notion of biological diversity includes diversity within species, between species and of ecosystems.⁶ PAs serve the conservation within species and among species. Maintaining self-sustaining populations of wild fauna and flora in their native habitats is even seen as the most effective and cost efficient way to fight the extinction of species.⁷ In addition, PAs help to safeguard the diversity of ecosystems. Due to their significance for all aspects of biological diversity PAs will be one of the main focuses of this thesis.

I. Definitions

What exactly are PAs and in which forms do they occur? The World Conservation Union (IUCN) has provided a definition and so has the CBD.

1. World Conservation Union (IUCN) Definition and typology of protected areas based on the primary management objectives

The IUCN-World Commission on Protected Areas (WCPA) definition of the term PA and of the six associated management categories of PAs were approved by the IUCN

⁵ Alexander Gillespie, "Obligations, gaps, and priorities within the international regime for protected areas," *Georgetown international environmental law review* (2006): 1.

⁶ Art. 2 CBD.

⁷ Secretariat of the Convention on Biological Diversity, *Biodiversity issues for consideration in the planning, establishment and management of protected area sites and networks*, ed. SCBD, vol. 15, CBD Technical Series (Montreal2004). 45.

General Assembly and published as IUCN Guidelines in 1994. The IUCN definition and category system helps to clarify the different kinds of PAs that are in existence.

PAs are defined as “areas of land and/or sea especially dedicated to the protection and maintenance of biological diversity and of natural and associated cultural resources and managed through legal or other effective means.”⁸ The use of the term “natural resources” implies that nature is not exclusively protected for its intrinsic value but also as a resource that can be used by humans. The reference to “associated cultural resources” demonstrates the assumption that PAs are not exclusively concerned with pristine nature and that cultural considerations are not per se conflicting with PAs.⁹

PAs are not all alike and they are far from excluding all human intervention. The term refers to a range of quite varied concepts of protection. IUCN provides the following classification system based on management objective:

- I. A strict nature reserve/wilderness is managed mainly for science or wilderness protection;¹⁰
- II. A national park is managed mainly for ecosystem protection and recreation;¹¹
- III. A natural monument is managed mainly for conservation of specific natural features;¹²
- IV. A habitat/Species Management Area is managed mainly so as to ensure the maintenance of habitats of specific species;¹³
- V. A protected Landscape/Seascape is managed mainly to safeguard the traditional interaction of humans and nature and for landscape/seascape conservation or recreation;¹⁴
- VI. A managed Resource Protected Area is managed mainly for the sustainable use of natural resources.¹⁵

⁸ IUCN and World Commission on Protected Areas, *Guidelines for Protected Area Management Categories* (Gland, Cambridge: IUCN, 1994), Basic Concepts.

⁹ Javier Beltrán and Adrian Phillips, eds., *Indigenous and Traditional Peoples and Protected Areas. Principles, Guidelines and Case Studies*, Best Practice Protected Areas Guidelines Series No.4 (UCN Publications, 2000), 3.

¹⁰ IUCN and World Commission on Protected Areas, *Guidelines for Protected Area Management Categories*, Category I.

¹¹ *Ibid.*, Category II.

¹² *Ibid.*, Category III.

¹³ *Ibid.*, Category IV.

¹⁴ *Ibid.*, Category V.

¹⁵ *Ibid.*, Category VI.

The categories imply a gradation of human intervention, ranging from effectively none at all in the case of Category I areas, to quite high levels of intervention in Category VI areas.¹⁶ Those categories can be classified into three groups: “protection against use,” “protection despite use” and “protection by use.” Large-scale development and exploitation of resources are generally prohibited while small-scale agriculture or forestry activities may be permissible.¹⁷

PA designations used by countries are not necessarily comparable across countries. Between 140 and 1,000 different terms are said to be used around the world to designate PAs.¹⁸ One of the purposes of the category system is to provide a common language for everyone.¹⁹ This thesis relies on the terminology provided by IUCN to clarify which kinds of PAs are being discussed.

The definition’s and the management categories’ general relevance in the PA discourse is underlined by the fact that they have been used for the United Nations (UN) list of PAs.²⁰ This comprehensive List is prepared by the IUCN-WCPA and the United Nations Environment Programme-World Conservation Monitoring Centre (UNEP-WCMC). It contains 68,066 PAs with IUCN Management Categories assigned to them.²¹ This means that to most of the world’s PAs (66.6 per cent of the total number and 81 per cent of the area) categories have been assigned. The assignment of management categories is seen as a mechanism for the rational international assessment of PAs.²² The CBD Conference of the Parties (CoP) too endorsed the categorization.²³

2. Convention on Biological Diversity (CBD) definition

The CBD defines the term “protected area” as “a geographically defined area which is designated or regulated and managed to achieve specific conservation objectives.”²⁴ One striking difference to the IUCN definition is the absence of any reference to

¹⁶ Ibid., Basic Concepts.

¹⁷ Nele Matz, "Protected areas in international nature conservation law. Can states obtain compensation for their establishment?," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 63, no. 3 (2003): 698.

¹⁸ World Conservation Monitoring Centre, *United Nations List of Protected Areas*, ed. Stuart Chape, et al. (UNEP World Conservation Monitoring Centre, 2003). 11.

¹⁹ IUCN and World Commission on Protected Areas, *Guidelines for Protected Area Management Categories*. Guidelines, Introduction.

²⁰ World Conservation Monitoring Centre, *United Nations List of Protected Areas*. VII.

²¹ Ibid. 1.

²² Ibid. 2.

²³ CoP CBD Decision VII/28 para. 31.

²⁴ Art. 2 CBD

“natural and associated cultural resources.” This raises doubts on whether human use of the environment and landscapes shaped by human influence are appreciated by the CBD. The CoP states that PAs may be defined in national law either as areas in which no human intervention is allowed, or as areas where impact assessment at an appropriate level of detail is required.²⁵ This indicates that use of PAs is permissible under the Convention even if it is not welcomed. It remains to be seen whether these inferences from the definitions correspond to the respective approaches.

II. Historic development of protected areas

The first ever PA – Yellowstone National Park – was established in 1872. It comprised an area of more than two million acres of north-western Wyoming, USA. The objective underlying its establishment was the preservation of “pristine” wilderness with a minimum of disturbance in the public interest. Only park staff was allowed to live permanently in the area which had previously been inhabited by Native Americans. The second National Park, the Australian “Royal National Park” was established in 1879 covering eighteen thousand acre near Sydney.²⁶ This model grew slowly at first. Not until the late 1960s many more countries established similar national parks and a variety of PAs.²⁷

The last decades have witnessed a considerable growth in PAs. In 1962 the first UN List of PAs encompassed 1,000 PAs while the most recent 2003 edition lists 102,102 sites covering approximately 18.8 million km², or 11.5 per cent of the global land surface.²⁸ The list includes all PAs regardless of size that meet the IUCN definition.²⁹ All but a few countries have established systems of PAs.

There is also a notable increase in transboundary PAs, a development starting in 1932, when the first recorded transboundary PA was created by Poland and Czechoslovakia. The US and Canada followed suit and established the Waterton-Glacier International Peace Park in the same year.³⁰ In 2001, there were 169 transboundary PAs, composed of 666 individual PAs in 113 countries. They represented at least ten per cent of all

²⁵ CoP CBD Decision VIII/28 para 16. (a).

²⁶ Robyn Eckersley, *Environmentalism and Political Theory* (London 1992). 39.

²⁷ Jeffrey A. McNeely, "Protected areas for the 21st century: working to provide benefits to society," *Biodiversity and Conservation* 3(1994): 392.

²⁸ World Conservation Monitoring Centre, *United Nations List of Protected Areas*. VII.

²⁹ *Ibid.* 2.

³⁰ Gillespie, "Obligations, gaps, and priorities within the international regime for protected areas," 13.

PAs.³¹ By April 2007, 227 transboundary PA complexes consisting of 3,043 individual PAs or internationally designated sites have been identified.³² Political boundaries arbitrarily divide functioning ecosystems. It may be necessary to coordinate human activity on both sides of the border to conserve the ecosystem and its species.³³

III. Range of protected areas

To ascertain the number and range of PAs, the UN list of PAs can be consulted as well as the World Database on Protected Areas – the most comprehensive database on PAs worldwide which is managed by the World Database on Protected Areas Consortium whose members are, inter alia, UNEP-WCMC and the IUCN-WCPA. There are terrestrial as well as marine PAs. This thesis will however examine exclusively terrestrial PAs, this is, PAs that are established on the territory of states. Marine PAs raise several additional questions since they may be established on the high sea, outside of state jurisdiction and are therefore not considered here.

PAs may be established in all existing ecosystems. The commonly used classification of natural ecosystems of the world goes back on the Udvardy biogeographical system which was launched in 1975. The system distinguishes 14 biomes, that is, groups of ecosystems that are similar to one another in their appearance and internal structure since they exist under the same climate, soil conditions and elevation conditions. The following biomes are distinguished: Mixed mountain systems, humid tropical forests, tropical dry/deciduous forests, mixed island systems, subtropical/temperate rainforest, warm desert/semi deserts, temperate broad leaf forests, temperate needle leaf forests, evergreen forests/scrub, tropical grassland/savannah, lake systems, tundra/polar desert, temperate grasslands and cold winter deserts.³⁴

Looking at the range of PAs in terms of their management objectives, the largest number of categorised sites lies within Category IV, comprising 27.1 per cent and Category III, comprising 19.4 per cent of all PAs. Often, however, these sites cover

³¹ Dorothy C. Zbicz, "Transfrontier Ecosystems and Internationally Adjoining Protected Areas ", (1999), http://www.unep-wcmc.org/protected_areas/transboundary/adjoining.pdf.

³² UNEP-WCMC, "TBPAs Inventory - 2007," http://www.tbpa.net/tpa_inventory.html. Last visited May 2009.

³³ Zbicz, "Transfrontier Ecosystems and Internationally Adjoining Protected Areas ".

³⁴ Gillespie, "Obligations, gaps, and priorities within the international regime for protected areas," 25, 26.

only relatively small geographic areas. The total area protected within Category IV sites amounts to 16.1 per cent and that within Category III sites 1.5 per cent.

On the contrary, Category VI sites account for 4.0 per cent of the total number representing 23.3 per cent of the area. The considerable extent of Category VI sites is a significant innovation. In the 1997 UN List, Category VI sites accounted for 27 per cent of the total extent of recorded PAs (non-categorised areas were not considered by this list). If non-categorised PAs are excluded from the 2003 figures, 28.9 per cent of the area of PAs has been assigned to Category VI.

The likewise extensive areas within Category I comprise 5.9 per cent of the total number and 10.9 per cent of the area.³⁵ Category II sites are particularly extensive, comprising 3.8 per cent of the number and 23.6 per cent of the area. National parks have traditionally been established to protect large areas. Category V sites are relatively minor in number and extent comprising 6.4 per cent of the total number and 5.6 per cent of the area. Unchanged since 1997, Category IV sites are the most numerous, Category II sites have the greatest extent and Category I sites are the least in number and extent.³⁶ The UN List is purely quantitative and provides no basis for assessing management effectiveness.³⁷

B. Control of trade in endangered species of wild fauna and flora

International trade in species is mainly a South-to-North phenomenon, driven by consumer demand for fashion and food products as well as rare animals and plants for medical/pharmaceutical research, exhibition or collection purposes.³⁸ The market is worth between US\$5 billion and US\$17 billion every year. The instrument currently governing the field is the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Before the adoption of CITES in 1973 the international community of states attempted twice to regulate wildlife management: in the 1900 London Convention Designed to Ensure the Conservation of Various Species of Wild Animals in Africa which are Useful to Man or Inoffensive and the

³⁵ World Conservation Monitoring Centre, *United Nations List of Protected Areas*. 21.

³⁶ *Ibid.* 22. ———, *United Nations List of Protected Areas*. 25.

³⁷ World Conservation Monitoring Centre, *United Nations List of Protected Areas*. 28.

³⁸ Matz, "Protected areas in international nature conservation law. Can states obtain compensation for their establishment?," 30.

1933 London Convention Relative to the Preservation of Fauna and Flora in their Natural State.³⁹

Both treaties provided regulations to address the unsustainable exploitation of wildlife, through hunting restrictions for threatened species listed in annexes, confiscation of illegally taken ivory and export licensing. The 1900 Convention never entered into force because it was not ratified by the requisite number of states. The 1933 London Convention became operative but failed to be implemented due to a lack of decision-making institutions and secretariat services. With decolonization it lost all its significance.

Two regional treaties also established export/import controls: the 1940 Washington Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere under the Organization of American States (OAS) and the 1968 Algiers African Convention on the Conservation of Nature and Natural Resources under the Organization of African Unity (OAU).⁴⁰ Neither of the two has had any practical effect though.⁴¹

C. Is it really necessary to actively conserve biological diversity?

One implicit assumption underlying what has been said above is the need to protect biological diversity. Is there really such a need?

I. The value of biodiversity

Biodiversity means diversity within species, between species and of ecosystems. It benefits human well-being and survival but it is also appreciated for its intrinsic value. It is not merely individual components of biodiversity, for example, a particular species that is valuable as biological resource. Rather, the diversity of genes, species and ecosystems is valuable in itself. The presence of a variety of species improves the resilience of an ecosystem. Equally, the variety of genes improves the resilience and adaptability of a species.⁴² Biodiversity is crucial to ensure the provision of ecosystem services to humans such as food, water, timber and fibre (provisioning services). Ecosystems regulate the climate, floods, disease, wastes and water quality (regulating

³⁹ Peter H. Sand, "Whither CITES? The evolution of a treaty regime in the borderland of trade and environment," *European journal of international law* 8, no. 1 (1997): 31.

⁴⁰ *Ibid.*: 32.

⁴¹ *Ibid.*: 33.

⁴² Z. Adeel, *Ecosystems and Human Well-being: Desertification Synthesis*, (Washington D.C.: Millennium Ecosystem Assessment, 2005). 2, 4., 2,4.

services). They provide cultural services including recreation, aesthetic enjoyment and spiritual fulfilment. Moreover, they are important for soil formation, photosynthesis and nutrient cycling (supporting services).⁴³

II. Biodiversity loss – a manmade and a natural phenomenon

The CBD defines biodiversity loss to be “the long-term or permanent qualitative or quantitative reduction in components of biodiversity and their potential to provide goods and services, to be measured at global, regional and national levels.”⁴⁴

Loss of biological diversity is not a purely manmade phenomenon. Rather it constantly occurred throughout the world’s history. Current species extinction rates are, however, estimated to be one thousand times higher than the typical rates. The current rates can be compared to the last mass extinction 65 million years ago.⁴⁵ Changes in biodiversity occurred more rapidly during the last 50 years than ever before in human history and they will continue or intensify.

Human actions significantly contribute to the loss of biodiversity. While the most drastic changes in ecosystems are taking place in the South, similar changes previously occurred in the North. More than half of the 14 biomes underwent a 20 to 50 per cent conversion to human use. Most notably, an approximate three quarters of temperate and Mediterranean forests and temperate grasslands have been converted to cultivated lands. Tropical and sub-tropical dry forests have been converted most rapidly in the past 50 years.⁴⁶ Genetic diversity too has declined globally.⁴⁷

Causes of these changes are very complex. The indirect anthropogenic drivers for changes in biodiversity and ecosystem services are of a demographic, economic, socio-political, cultural/religious and scientific/technological nature. Direct drivers are land use change (particularly from conversion to agriculture), climate change, invasive alien species, overexploitation of species and pollution.⁴⁸

III. Consequences of the loss of biodiversity

The values that are attributed to biodiversity point to the negative impacts associated with the loss of biodiversity. Over the last century many people gained from changing

⁴³ Ibid. 1, 2, 1,2.

⁴⁴ CoP CBD Decision VII/30 para 2.

⁴⁵ Secretariat of the Convention on Biological Diversity, *Biodiversity issues for consideration in the planning, establishment and management of protected area sites and networks*. 45.

⁴⁶ Adeel, *Ecosystems and Human Well-being: Desertification Synthesis*, . 2., 2.

⁴⁷ Ibid. 4., 4.

⁴⁸ Ibid. 8., 8.

ecosystems whereas the well-being, for example, the food security of others has been adversely affected. Agriculture and forestry, while causing homogenization or loss of biodiversity, were central in national development. Ecosystem modifications to enhance one service, namely crops, livestock, aquaculture and carbon sequestration, usually degrade most other services, such as timber production, water supply, waste treatment and detoxification, water purification, natural hazard protection, regulation of air quality, regulation of regional and local climate, regulation of erosion and cultural services.

Poor inhabitants of rural areas in developing countries are the most vulnerable to ecosystem degradation. Richer groups of people are better able to acquire substitutes or translocate production and harvest. The costs caused by modifications in biodiversity may be calculable only in retrospect and even then they may prove hard to assess because the loss of biodiversity eliminates unexplored options for the future.⁴⁹

Although the costs caused by such changes often exceeded gains, ecosystems have been converted since associated costs were not taken into account, possibly because of private revenues or distorting subsidies. The capital asset represented by a country's ecosystems and ecosystem services do not figure in conventional economic indicators such as the gross domestic product (GDP).⁵⁰ Especially supporting, cultural and regulating services are omitted as the willingness of people to pay for them cannot be measured. Purely for the sake of its economic worth biodiversity merits greater protection. Yet, it is estimated that utilitarian considerations would warrant the conservation of a smaller amount of biodiversity than is currently in existence as there are competing utilitarian considerations.⁵¹ Ethical, equitable distribution and spiritual considerations require a higher protection level.⁵²

The value of biodiversity, the rate of anthropogenic biodiversity loss and the damage caused by this loss call for action for biodiversity conservation and would therefore seem to underpin efforts to establish and manage PAs and to control international trade in endangered species.

⁴⁹ Ibid. 5., 5.

⁵⁰ Ibid. 6., 6.

⁵¹ Ibid. 7., 7.

⁵² Ibid. 8., 8.

D. International biodiversity-related conventions

Over the last decades there has been a gradual shift of international environmental law from a conservation approach focusing on the regulation of harvesting of and trade in species to the protection of habitats and finally ecosystems accomplished through the establishment of PAs. This shift came hand in hand with the growing awareness that the protection of species from certain actions would not ensure their survival if their natural surroundings deteriorated contemporaneously.⁵³ Habitat conservation continues to be the primary reason for the establishment of PAs under international instruments.⁵⁴ Instruments that aim to conserve habitats do not protect the diversity of ecosystems since they focus solely on specific areas which represent habitats for large numbers or rare species. Appreciation of the variety of ecosystems as such is a relatively new phenomenon. As early as 1972, the UN Conference on the Human Environment stated that “The natural resources of the Earth including the air, water, land flora and fauna and especially representative samples of natural ecosystems must be safeguarded for the benefit of present and future generations through careful planning and management as appropriate.”⁵⁵ The conference called on governments “to set aside areas representing ecosystems of international significance for protection under international agreement.”⁵⁶

Protection of ecosystems for their own sake can be found in few global instruments including first of all the CBD, the Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention/WHC) and in some respects the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention).⁵⁷ The Convention to Protect Birds Useful to Agriculture from 1902 is one of those early conventions providing for species protection without any reference to PAs.⁵⁸ Conversely, the International Convention for the Protection of Birds from 1950 provides for the establishment of reserves for

⁵³ Matz, "Protected areas in international nature conservation law. Can states obtain compensation for their establishment?," 696.

⁵⁴ *Ibid.*: 696, 97.

⁵⁵ Declaration Of The United Nations Conference On The Human Environment (1972), 11 ILM (1972) 1416, Principle 2.

⁵⁶ Declaration Of The United Nations Conference On The Human Environment (1972), 11 ILM (1972) 1416,) Recommendations for Action, Recommendation 38.

⁵⁷ Matz, "Protected areas in international nature conservation law. Can states obtain compensation for their establishment?," 696, 97.

⁵⁸ *Ibid.*: 699.

birds even though it has a focus on species' protection by limiting the hunting of birds.

The Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere from 1940 was one of the first conventions to acknowledge the necessity of PAs which did not only protect habitats. Today, this Convention has lost its practical applicability since subsequent conventions and domestic legislation comprise further reaching provisions. The Convention envisaged the establishment of "strict wilderness reserves" which excluded the passage of motorized transportation and commercial developments.⁵⁹

Today, numerous environmental instruments contain an obligation to increase the number of PAs and enhance their status and management domestically, regionally and internationally.⁶⁰ Agenda 21 calls on governments to establish, expand and manage PA systems in forest areas, which include units with environmental, social and spiritual functions and values.⁶¹ The maintenance and establishment of PAs is also viewed as a contribution to the protection of genetic resources in mountain areas⁶² and biological diversity as a whole.⁶³

The "Man and the Biosphere" (MAB) Programme is a particularly interesting approach to PAs. It was adopted by the 16th United Nations Educational, Scientific and Cultural Organization (UNESCO) General Conference on 23 October 1970.⁶⁴ A Task Force of the MAB Programme elaborated the concept of biosphere reserves in response to the realization that the interests of biological diversity, economic development and cultural values are often conflicting. In 1976 UNESCO launched the international biosphere reserve network which is now dispersed all the world over. UNESCO defined biosphere reserves as large and representative parts of the natural and cultural landscape. Their purpose is the protection of ecosystem types and the biogeographical units of the earth.⁶⁵

⁵⁹ Art. I no. 4 Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (1942).

⁶⁰ Gillespie, "Obligations, gaps, and priorities within the international regime for protected areas," 1, 2.

⁶¹ Agenda 21, para. 11.14. (b).

⁶² Agenda 21, para. 13.7. (b).

⁶³ Agenda 21, para. 15.5. (g).

⁶⁴ UNESCO, Records of the General Conference, Sixteenth Session, Paris, 12 October to 14 November 1970, (Paris: UNESCO, 1971), <http://unesdoc.unesco.org/Images/0011/001140/114046E.pdf>.p. 35 -38

⁶⁵ Lothar Gündling, *Implementing the convention on biological diversity on the ground - the example of biosphere reserves*, BfN-Skripten / Deutschland / Bundesamt für Naturschutz ; 58 (Bonn: BfN, 2002). 6.

The overall objective of biosphere reserves is to promote and demonstrate a balanced relationship between humans and the biosphere.⁶⁶ They remain under the sole sovereignty of the state where they are situated. Biosphere Reserves are expected to fulfil three functions. They shall (I) promote the conservation of landscapes, ecosystems, species and genetic variation; (II) contribute to socio-cultural and ecologically sustainable economic and human development; and (III) logistically support research, monitoring, education and information exchange in conservation and development issues.⁶⁷

A reserve should contain a mosaic of ecological systems that represent major biogeographic regions⁶⁸ and it should be of significance for biodiversity conservation.⁶⁹ It should provide an opportunity to explore and demonstrate regional approaches to sustainable development.⁷⁰ And finally, it should have an appropriate size to serve these three functions.⁷¹

Biosphere reserves are usually divided into three zones: the core area, the buffer zone and the transition area. The core area is the only area that necessitates legal protection. This does, however, not mean that its utilization must be prohibited. Rather sustainability of use must be ensured. The core areas' purposes are to conserve biological diversity, to monitor minimally disturbed ecosystems and to carry out non-destructive research and education. The buffer zones are meant for activities that do not conflict with sound ecological practices, such as education, recreation, ecotourism and research. Transition areas may permit agricultural activities, settlements and other uses.⁷² With respect to all functions, stakeholders, such as local communities, management agencies, scientists, non-governmental organizations (NGOs), cultural groups and economic interests cooperate to manage and sustainably develop the resources.⁷³ The MAB programme does not provide for any financial mechanism which might compensate for costs incurred by states when establishing Biosphere Reserves.

⁶⁶ Statutory Framework, Introduction.

⁶⁷ Art. 3 Statutory Framework of the World Network of Biosphere Reserves.

⁶⁸ Art. 4 (1), Statutory Framework.

⁶⁹ Art. 4 (2), Statutory Framework.

⁷⁰ Art. 4 (3), Statutory Framework.

⁷¹ Art. 4 (4), Statutory Framework.

⁷² Art. 4 (5), Statutory Framework of the World Network of Biosphere Reserves.

⁷³ Art. 4 (6), Statutory Framework of the World Network of Biosphere Reserves.

A recent regional convention requiring the establishment of PAs is the renewed African Convention on the Conservation of Nature and Natural Resources (ACCNNR) which was adopted in Maputo on 11 July 2003. Pursuant to the Convention parties are under an obligation to “establish, maintain and extend, as appropriate, conservation areas,” to “assess the potential impacts and necessity of establishing additional conservation areas and wherever possible designate such areas.”⁷⁴ The purpose of conservation areas is to “ensure the long term conservation of biological diversity.” Of utmost importance for conservation are “ecosystems which are most representative of and peculiar to areas” or possess “a high degree of biological diversity.”⁷⁵ Furthermore, conservation is aimed to “ensure the conservation of all species,” in particular when they exist in the territory of only one member state or they are threatened or valuable from a scientific or aesthetic point of view. Finally, the habitats such species depend on for their survival are to be conserved.⁷⁶ The parties are required to cooperate with competent international organizations in the identification of such areas.⁷⁷ By contrast, the Convention on Migratory Species and the Bern Convention use a species focused approach and the Ramsar Convention uses PAs as secondary principle.

I. Selected conventions relating to protected areas and land use

1. Convention on Biological Diversity (CBD)

The CBD was adopted in 1992 and entered into force on 29 December 1993. It has currently 190 parties (189 countries and the European Union). The objectives of the Convention are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.⁷⁸ The CBD is aiming to overcome the traditional dichotomy of ecology and economy by providing for sustainable use. In Article 2 the Convention defines: “Sustainable use means the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.”

⁷⁴ Art. 12 ACCNNR.

⁷⁵ Art. 12 (1)(a) ACCNNR.

⁷⁶ Art. 12 (1)(b) ACCNNR.

⁷⁷ Art. 12 (2) ACCNNR.

⁷⁸ Art. 1 CBD.

It is the most significant international treaty in the ambit of PAs. Efforts with respect to PAs are one aspect within the Convention's provisions for "in-situ conservation." In-situ conservation is defined to mean the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties.⁷⁹ In-situ conservation is clearly given priority over ex-situ conservation.

a) Purpose of efforts for protected areas

According to the CBD, properly maintaining sufficient natural habitat through a well designed and managed system of PAs is necessary to ensure in-situ conservation, sustainable use of biological diversity and the fair and equitable sharing of benefits arising from the use of genetic resources, hence for all three overarching objectives of the Convention. PAs are appreciated as essential components in national and global biodiversity conservation strategies, for the goods and ecological services they provide and for preserving natural and cultural heritage.

The Convention recognizes that PAs do not only have a conservation function but also a function in poverty alleviation by providing employment opportunities and livelihoods to people living in and around them. Additionally, they provide opportunities for research, environmental education, recreation and tourism.⁸⁰

In April 2002 the CoP set forth the target to significantly lower the rate of biodiversity loss by 2010 as a contribution to poverty alleviation and to the benefit of all life on Earth.⁸¹ Subsequently, the target was endorsed by the World Summit on Sustainable Development (WSSD) and the United Nations General Assembly and was incorporated as a new target under the Millennium Development Goals.⁸² PAs are seen as a crucial instrument to meet this target.⁸³

⁷⁹ Art. 2 CBD.

⁸⁰ CoP CBD Decision VII/28 Annex para. 1.

⁸¹ CoP CBD Decision VII/28 para. 18.

⁸² CoP CBD Decisions VI/26 Annex para. 11; VII/28 Annex para. 6; VII/30; VIII/15.

⁸³ CoP CBD Decision VII/28 Annex para. 2.

b) Obligations under the Convention to promote the establishment and to improve the management of protected areas

In its Article 8 on in-situ conservation, the CBD requires states as far as possible and as appropriate to: establish a system of PAs;⁸⁴ develop guidelines for the selection, establishment and management of PAs;⁸⁵ regulate or manage biological resources that are important for the conservation of biological diversity to ensure their conservation and sustainable use within and outside PAs;⁸⁶ Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings;⁸⁷ promote environmentally sound and sustainable development in areas adjacent to PAs so as to furthering protection of these areas.⁸⁸

The CBD contains several additional provisions which have implications for the establishment and management of PAs. Among those are Provisions on sustainable use in Article 6 and 10. Those provisions indicate that PAs are acknowledged as places managed for multiple purposes. By qualifying biodiversity as a resource⁸⁹ the CBD takes into account not only biodiversity's intrinsic value but also its economic potential.⁹⁰

States are under an obligation to “protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements”.⁹¹ They also have to “support local populations to develop and implement remedial action in degraded areas where biological diversity has been reduced;”⁹² and to encourage cooperation between its governmental authorities and its private sector in developing methods for sustainable uses of biological resources.⁹³

Additionally, there are Article 7 which provides for biodiversity monitoring and Article 14 on impact assessment. Both aspects are important for PA management and planning. Further articles that may be relevant are Article 11 on incentive measures, Article 12 on research and training and Article 13 on public education and awareness.

⁸⁴ Art. 8 (a) CBD.

⁸⁵ Art. 8 (b) CBD.

⁸⁶ Art. 8 (c) CBD.

⁸⁷ Art. 8 (d) CBD.

⁸⁸ Art. 8 (e) CBD.

⁸⁹ CBD Preamble.

⁹⁰ Gündling, *Implementing the convention on biological diversity on the ground - the example of biosphere reserves*. 13.

⁹¹ Art. 10 (c) CBD.

⁹² Art. 10 (d) CBD.

⁹³ Art. 10 (e) CBD.

c) Treaty bodies

The CBD is a treaty regime. Typically, treaty regimes are founded with a generally and vaguely termed framework treaty which is then dynamically concretized by treaty bodies. Executive tasks are carried out by a Secretariat.⁹⁴ Both aspects are also true of the CBD. The CBD's primary decision-making body is the CoP.⁹⁵ Apart from the Secretariat,⁹⁶ the Convention established the Subsidiary Body on Scientific, Technical and Technological Advice whose function is to advise the CoP and its subsidiary bodies on the implementation of the Convention.⁹⁷ The CoP moreover established several working groups, inter alia, one on PAs which is mandated to support and review the implementation of the CoP's programme of work on PAs and report to the CoP.⁹⁸

2. Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention)

The Convention on Wetlands of International Importance especially as Waterfowl Habitat, the so-called Ramsar Convention, was adopted in Ramsar, Iran, on February second 1971. It aims to stemming the encroachment on and irreparable loss of wetlands with a combination of national policies and coordinated international action.⁹⁹ Wetlands fulfil fundamental ecological functions as regulators of water regimes and as habitats for flora and fauna.¹⁰⁰ The Convention defines the term "wetlands" as "areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres."¹⁰¹

The Ramsar Convention was the first global conservation treaty which prioritized habitat protection. It even goes beyond the protection of wetlands that function as waterfowl habitats.¹⁰² Each State party is required to conserve and wisely use wetlands within its territory. The CoP defined "wise use" in 1987 as "sustainable

⁹⁴ Eberhard Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee. Grundlagen und Aufgaben der verwaltungsrechtlichen Systembildung*, 2., überarb. und erw. Aufl. ed. (Berlin; Heidelberg: Springer, 2006). 321.

⁹⁵ Art. 23 CBD.

⁹⁶ Art. 24 CBD.

⁹⁷ Art. 25 CBD.

⁹⁸ CoP CBD Decision VII/28 para. 25.

⁹⁹ Preamble Ramsar Convention.

¹⁰⁰ Preamble Ramsar Convention.

¹⁰¹ Art. 1 (1) Ramsar Convention.

¹⁰² Art. 2 (2) Ramsar Convention.

utilization for the benefit of mankind in a way compatible with the maintenance of the natural properties of the ecosystem.”¹⁰³ The Convention obliges each contracting party to designate at least one suitable wetland within its territory for inclusion in a List of Wetlands of International Importance, which is maintained by the bureau.¹⁰⁴ Wetlands are placed on the List for their “international significance in terms of ecology, botany, zoology, limnology or hydrology.”¹⁰⁵

Furthermore, the parties agreed to “promote the conservation of wetlands and waterfowl by establishing nature reserves on wetlands, whether they are included in the List or not and provide adequately for their wardening.”¹⁰⁶ While the Convention does not strictly prohibit anthropogenic utilization, it does not refer to incentives for conservation provided by use.

A deletion or restriction of the boundaries of a wetland included in the List is possible in an urgent national interest. Parties are however asked to compensate for any loss of wetland resources as far as possible. In particular they should create additional nature reserves for waterfowl and for the protection of an adequate portion of the original habitat.¹⁰⁷

3. UNESCO Convention on the Protection of the World Cultural and Natural Heritage (World Heritage Convention/WHC)

The WHC was adopted in Paris, on 16 November 1972. The Convention stresses the importance, for all peoples, of safeguarding natural heritage as “unique and irreplaceable property, to whatever people it may belong.”¹⁰⁸ According to the Convention each country can contribute and the entirety of heritage of all nations collectively represents the “patrimony of mankind.”¹⁰⁹ Natural heritage of particular interest is a “part of the world heritage of mankind as a whole” and thus needs to be preserved. The Convention recognizes the sovereignty of the state on whose territory the natural heritage is situated.¹¹⁰

¹⁰³ CoP Ramsar Convention Recommendation 3.3, Annex.

¹⁰⁴ Art. 2 (1), (4) Ramsar Convention.

¹⁰⁵ Art. 2 (2) Ramsar Convention.

¹⁰⁶ Art. 4 (1) Ramsar Convention.

¹⁰⁷ Art. 4 (2) Ramsar Convention.

¹⁰⁸ Preamble WHC.

¹⁰⁹ Third General Assembly of the States Parties to the WHC, CC-80/CONF. 018/6 para. 19, available at: <http://whc.unesco.org/archive/ga80.pdf>.

¹¹⁰ Art. 6(1) WHC.

Central to the work of the WHC are its lists of world natural and cultural heritage sites. Instead of being based only on the protection of habitats, the Convention defines “natural sites” that it protects, inter alia, as “areas of outstanding universal value from the point of view of science, conservation or natural beauty.”¹¹¹ The World Heritage Fund grants assistance for the preservation of sites. The levels of use or non-use of sites is determined by the contracting parties. The agreement does not require protection from all anthropogenic use of natural heritage sites. An obligation to exclude all human interference within an area may be necessary when the site cannot be safeguarded otherwise.¹¹² The WHC obliges states parties only “in so far as possible and as appropriate for each country” leaving room for economic and developmental interests.

4. United Nations Convention to Combat Desertification (UNCCD)

The United Nations Convention to Combat Desertification (UNCCD)¹¹³, the primary international instrument in the area of drylands, was adopted in 1994 as a consequence of the UN Conference on Environment and Development (UNCED). It entered into force in December 1996 and now benefits from a universal membership encompassing 191 member states and the European Community.¹¹⁴

a) Convention objectives

UNCCD is a multilateral instrument for environmental protection and for development cooperation.¹¹⁵ Even though the protection of biodiversity is not its primary objective, there is a strong linkage between both its objectives and biodiversity conservation. The UNCCD Strategic Plan underlines the importance of synergies of combating desertification and biodiversity conservation,¹¹⁶ and of the importance of cooperation of UNCCD with fora for biodiversity conservation and sustainable use.¹¹⁷ The Convention does not promote the establishment of PAs nor

¹¹¹ Art. 2 WHC.

¹¹² Matz, "Protected areas in international nature conservation law. Can states obtain compensation for their establishment?," 702.

¹¹³ Full title: The United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa.

¹¹⁴ <http://www.unccd.int/convention/ratif/doiif.php>, last visited: April 2008.

¹¹⁵ Bo Kjellén, "The Saga of the Convention to Combat Desertification: The Rio/ Johannesburg Process and the Global Responsibility for the Drylands," *Review of European Community & international environmental law* 12(2003): 131.

¹¹⁶ Operational objective 1, Outcome 1.1, Outcome 2.5.

¹¹⁷ Operational objective 1, Outcome 1.2.

does it state its view on the value of PAs.¹¹⁸ This distinguishes the UNCCD's approach to attain conservation and development from all the other conventions introduced so far and makes their comparison particularly interesting.

The Convention's first objective is "to combat desertification."¹¹⁹ The Convention defines the term "desertification" to mean "land degradation in arid, semi-arid and dry sub-humid areas resulting from various factors, including climatic variations and human activities."¹²⁰ Thus, the Convention is not concerned with action against land degradation in general. Instead it focuses exclusively on the phenomenon of land degradation occurring in the so call "drylands". Those areas shared characteristic is a paucity of rainfall.¹²¹ Finally, "land degradation" in drylands is defined as "reduction or loss [...] of the biological or economic productivity and complexity of rainfed cropland, irrigated cropland, or range, pasture, forest and woodlands." It may result from land uses or from processes such as "soil erosion caused by wind and/or water;" "deterioration of the physical, chemical and biological or economic properties of soil" and "long-term loss of natural vegetation."¹²² The Convention aims to prevent and/or reduce land degradation, rehabilitate partly degraded land and reclaim desertified land.¹²³

The second objective UNCCD pursues is to "mitigate the effects of drought" whereby the term "drought" is defined as the natural phenomenon that an unusually low precipitation level adversely affects productivity of land.¹²⁴

According to the UN Millennium Ecosystem Assessment drylands cover 41 per cent of the Earth's land surface and are inhabited by more than two billion people. The Assessment furthermore estimates that 10-20 per cent of drylands are already degraded which means that approximately 1-6 per cent of their inhabitants live in desertified areas, with many more being at risk from desertification.¹²⁵

In general terms, poverty is more acute in drylands than in any other kind of ecosystem area. The loss of productive land starts a vicious circle for many rural

¹¹⁸ Gillespie, "Obligations, gaps, and priorities within the international regime for protected areas," 23.

¹¹⁹ Art. 2 (1) UNCCD.

¹²⁰ Art. 1 (a) UNCCD.

¹²¹ Art. 1 (g) UNCCD.

¹²² Art. 1 (f) UNCCD.

¹²³ Art. 1 (b) UNCCD.

¹²⁴ Art. 1 (c) UNCCD.

¹²⁵ Adeel, *Ecosystems and Human Well-being: Desertification Synthesis*, . Summary. Available at <http://www.millenniumassessment.org/documents/document.355.aspx.pdf>, last visited April 2008.

people in Africa, Asia and Latin America in which land degradation is both a driver and a result of poverty.¹²⁶ Environmental refugees and conflicts are a consequence.¹²⁷

b) Treaty bodies

The treaty bodies under the UNCCD are first of all the CoP¹²⁸ and the Secretariat.¹²⁹ Subsidiary bodies are the Global Mechanism (GM),¹³⁰ the Committee for the Review of the Implementation of the Convention (CRIC),¹³¹ and the Committee on Science and Technology (CST).¹³²

The CoP convenes its meetings once every two years.¹³³ Its functions are, inter alia, to promote and monitor the implementation of UNCCD and to develop the Convention.¹³⁴

The Secretariat undertakes administrative tasks.¹³⁵ The CRIC assists the CoP in reviewing the implementation of UNCCD.¹³⁶ The GM is mandated to promote the mobilization and channeling of financial resources to affected developing state parties.¹³⁷

Finally, the CST provides the CoP with information and advice on scientific and technological matters.¹³⁸

II. Convention on International Trade in Endangered Species (CITES)

In spite of the aforementioned tendency in international law towards addressing the loss of biological diversity through the establishment of PAs to protect habitats and ecosystems, the regulation of international trade in endangered species remains another important conservation method.

In 1973, twenty-one states convened in Washington DC to address the effect of international trade on endangered species. Participants adopted CITES on 3 March 1973. It entered into force on 1 July 1975 and currently has 172 member states.¹³⁹

¹²⁶ Steinar Andresen and Jon Birger Skjaereth, "Science and Technology. From Agenda Setting to Implementation," in *The Oxford Handbook of International Environmental Law*, ed. Daniel Bodansky, Jutta Brunnée, and Ellen Hay (Oxford: Oxford University Press, 2007), 170.

¹²⁷ Tannetje L. Bryant, "A new approach to an old problem: the Convention to Combat Desertification," *Environmental and planning law journal* 13, no. 6 (1996): 445.

¹²⁸ Art. 22 UNCCD.

¹²⁹ Art. 23 UNCCD.

¹³⁰ Art. 21 (4) UNCCD.

¹³¹ CoP UNCCD Decision I.

¹³² Art. 24 UNCCD.

¹³³ Art. 22 (4) UNCCD.

¹³⁴ Art. 22 (2) UNCCD.

¹³⁵ Art. 23 (2) UNCCD.

¹³⁶ CoP UNCCD Decision I/ Annex.

¹³⁷ Art. 21 (4) UNCCD.

¹³⁸ Art. 24 (1) UNCCD.

¹³⁹ Available at: <http://www.cites.org/eng/disc/parties/alphabet.shtml>; http://www.cites.org/eng/news/party/sb_me.shtml last visited: 15 November 2007.

CITES is acknowledged as one of the most successful international environmental treaties in the world.¹⁴⁰ It is not merely a conservation treaty but also a trade instrument which attempts to strike a balance between these often competing values.¹⁴¹ The purpose of CITES, as stated in the first paragraph of its preamble is to protect wild fauna and flora for current and future generations. Wild fauna and flora are described as an irreplaceable part of the natural systems of the earth and as being valuable from aesthetic, scientific, cultural, recreational and economic points of view.¹⁴² CITES establishes international cooperation for the protection of certain species from over-exploitation through international trade.¹⁴³

1. The appendix system

CITES is first of all mandated to list species in one of three appendices.¹⁴⁴ Appendix I includes all species that are threatened with extinction and are or may be affected by trade. Trade in specimens of these species underlies the most stringent provisions and is only authorized in exceptional circumstances.¹⁴⁵

Appendix II includes species which may become threatened with extinction unless trade in them is strictly regulated and species which are not at risk themselves but resemble threatened species (so-called “look alike” species)¹⁴⁶ that are included in order to protect their threatened counterparts.¹⁴⁷

Appendix III includes all species which are protected within any member state when this state needs the cooperation of other parties in trade control.¹⁴⁸

There are approximately 5,000 fauna species and 28,000 flora species listed on the three CITES appendices. While some creatures, such as bears, elephants, tigers and whales, are the most widely known species listed by CITES, the majority of species included are less popularized species, such as aloes, corals, mussels and frogs.¹⁴⁹ In certain cases they include entire groups, such as primates, cetaceans (whales, dolphins and porpoises), sea

¹⁴⁰ Elisabeth M. McOmber, "Problems in enforcement of the Convention on International Trade in Endangered Species," *Brooklyn journal of international law* 27, no. 2 (2002): 673, 74.

¹⁴¹ Rosalind Reeve, *Policing international trade in endangered species. The CITES Treaty and compliance*, 1. publ. ed. (London: Earthscan, 2002). 28.

¹⁴² Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 3 March 1973, Preamble (1), (2), available at: <http://www.cites.org/eng/disc/text.shtml>.

¹⁴³ Preamble(4) CITES.

¹⁴⁴ Art. II CITES.

¹⁴⁵ Art. II(1) CITES.

¹⁴⁶ Patricia W. Birnie, "The case of the Convention on Trade in Endangered Species," *Enforcing environmental standards* (1996): 235.

¹⁴⁷ Art. II(2) CITES.

¹⁴⁸ Art. II(3) CITES.

¹⁴⁹ Available at: <http://www.cites.org/eng/disc/species.shtml>, last visited: April 2007.

turtles, parrots, corals, cacti and orchids.

2. Functioning of CITES' organs

At the international level CITES operates through CoPs which take place every two and a half years, a Secretariat, the executive Standing Committee,¹⁵⁰ and two functional, subsidiary or technical committees: the Animals and the Plants Committee.¹⁵¹ While the CoP and the Secretariat are provided for by the Convention, the other committees have been established by resolution of the CoP.¹⁵²

The essential actors at the national level are Management Authorities designated to issue export and import permits or certificates for species and Scientific Authorities, which advise on all scientific matters.¹⁵³

3. Procedure to amend appendices

CITES' appendices are amended in several steps. Amendments to Appendix I or II can be proposed for consideration at the next CoP meeting by any party.¹⁵⁴ Additionally, there is a postal procedure for urgent cases.¹⁵⁵ The proposal is communicated to the Secretariat. The Secretariat consults the other parties and interested bodies and communicates the response to all parties.¹⁵⁶

Amendments are adopted by a two-thirds majority of parties present and voting. Abstaining parties are not counted.¹⁵⁷ Amendments enter into force 90 days after the meeting for all parties except those which make a reservation.¹⁵⁸ Any party may, by notification in writing to the Depositary Government, make a reservation with respect to the amendment.¹⁵⁹ However, parties which enter reservations with respect to Appendix I species are recommended to treat the species as if it were listed in Appendix II and to report trade in their annual reports.¹⁶⁰ Current editions of appendices are published periodically and distributed to the parties by the Secretariat.¹⁶¹

¹⁵⁰ Conf. 11.1 (Rev. CoP14) (a).

¹⁵¹ Conf. 11.1 (Rev. CoP14) (b).

¹⁵² Conf. 11.1 (Rev. CoP14).

¹⁵³ Art. IX(1), (2) CITES.

¹⁵⁴ Art. XV(1)(a) CITES.

¹⁵⁵ Art. XV(2) CITES.

¹⁵⁶ Art. XV(1)(a) CITES.

¹⁵⁷ Art. XV (1)(b) CITES.

¹⁵⁸ Art. XV(1)(c) CITES.

¹⁵⁹ Art. XV(3) CITES.

¹⁶⁰ Reeve, *Policing international trade in endangered species. The CITES Treaty and compliance*. 36.

¹⁶¹ Art. XII(2)(f) CITES.

4. Trade coordination under CITES

While CITES' main activities include the amendment of its appendices, the monitoring of implementation of the Convention by member states and enforcement measures, the implementation itself is a task entrusted to the member states. CITES' activities in this latter context are limited to supporting and assisting its members.¹⁶²

Member states are under an obligation to coordinate trade in listed species. The export of Appendix I species requires an export permit, which is only granted provided that authorities of the state of export have advised that the export will not be detrimental to the survival of that species. Further conditions of a permit are that the authorities are satisfied that the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora, that any living specimen will be so prepared and shipped as to minimize risks of injury, damage to health or cruel treatment and that an import permit has been issued for the specimen.¹⁶³

The import requires an import permit and either an export permit or a re-export certificate. An import permit requires that the authorities of the state of import have advised that the import will be for purposes which are not detrimental to the survival of the species concerned, are satisfied that the recipient of a living specimen will care for it adequately and that the specimen is not to be used for primarily commercial purposes.¹⁶⁴ This limits trade to specimens used primarily for scientific and educational purposes and, in some instances, to hunting trophies.¹⁶⁵ The re-export or introduction from the sea of any specimen underlies similarly strict regulations.¹⁶⁶

The export of Appendix II species requires an export permit which is granted under the same conditions applicable to Appendix I species.¹⁶⁷ A Scientific Authority in each party monitors exports and advises to limit the granting of permits if necessary.¹⁶⁸ The import merely requires the prior presentation of either an export permit or a re-export certificate. Other requirements necessary with respect to Appendix I species need not to be fulfilled here.¹⁶⁹

¹⁶² Art. II(4) CITES.

¹⁶³ Art. III(2) CITES.

¹⁶⁴ Art. III(3) CITES.

¹⁶⁵ Birnie, "The case of the Convention on Trade in Endangered Species," 237.

¹⁶⁶ Art. III(4), (5) CITES.

¹⁶⁷ Art. IV(2) CITES.

¹⁶⁸ Art. IV(3) CITES.

¹⁶⁹ Art. IV(4) CITES.

The export of specimens of species listed in Appendix III from any state where it is listed in Appendix III requires an export permit.¹⁷⁰ The import requires the prior presentation of a certificate of origin and, where the import is from a state which has included that species in Appendix III, an export permit.¹⁷¹

There are exemptions from the requirements of Articles III, IV and V, for example for the benefit of scientists¹⁷² and, at the discretion of the states' authorities, travelling exhibitions.¹⁷³

CITES thus obliges its members to take concrete action concerning the control of international trade through the issuing of export and import permits. Member states are under an obligation to take appropriate measures to enforce the provisions of CITES, including penalties for trade in or possession of such specimens and the confiscation or return to the state of export of such specimens.¹⁷⁴

E. Theoretical background

The following paragraphs will serve to outline the theoretical background of this thesis. The thesis draws upon the knowledge and techniques of social sciences for its legal analysis, in particular, negotiation and mediation theory. The use of political, economic and social data and the related behavioural and quantitative aspects help to deepen knowledge and comprehension of international law.¹⁷⁵ It was the behaviouralist movement that introduced elements of psychology, anthropology and sociology into the study of international relations. This movement also emphasized politics, economics and philosophy. It examined the mode of operation of law glancing at the character of the particular society and its needs and values. Law was seen as a dynamic process which can be comprehended only in the context of society.¹⁷⁶ Behaviouralism considered two aspects of international relations: firstly, the foreign policy techniques and the reasons for choosing a particular technique and secondly, the analysis of the effects interaction of international players has on both, the international law and the players themselves.¹⁷⁷ The behavioural approach to

¹⁷⁰ Art. V(2) CITES.

¹⁷¹ Art. V(3) CITES.

¹⁷² Art. VII(6) CITES.

¹⁷³ Art. VII(7) CITES.

¹⁷⁴ Art. VIII(1) CITES.

¹⁷⁵ Malcolm N. Shaw, *International Law*, 5 ed. (Cambridge: Cambridge University Press, 2003). 58.

¹⁷⁶ *Ibid.* 55, 56.

¹⁷⁷ *Ibid.* 56.

international relations found its way into international law theory.¹⁷⁸ International law and international relations are closely linked disciplines.¹⁷⁹ International relations theory is increasingly used within international environmental law.

The thesis does not follow the traditional focus of legal scholars, that is, discerning what the law is that governs a particular area and what the law should be. Rather, considerations of what the law should be are enriched by questions that are usually brought up within international relations. International relations scholars, *inter alia*, seek to explain why specific laws have emerged and what kind of law will be effective. Considering these questions may help to design more effective and durable international environmental laws and institutions.¹⁸⁰

This thesis argues that international legal instruments should be mutual gains solutions. This concept of a mutual gains solution integrates ideas of equity, effectiveness and legitimacy. Law should amount to mutual gains solutions because they best reflect the needs and aspirations of the actors who form part of the concrete international system (states, indigenous peoples, individuals and corporations) in which law is functioning and law needs to be responsive to such needs and aspirations.¹⁸¹

Scholars of international environmental law frequently refer to the concept of equity. This raises the question of whether a mutual gains solution is a synonym to an equitable solution. A mutual gains solution will be perceived as equitable by states and stakeholders within states and it fulfils objective requirements of equity. A mutual gains solution comprises more than that. An agreement by which all parties lose to an equal degree might also be equitable. Mutual gains solutions encompass the concepts of equity outlined in the following paragraphs but it also encompasses considerations of effectiveness.

The concept of equity is deemed relevant at the inter-state level as well as with respect to individuals. Equity has both a procedural dimension aiming to reach decisions by the “right process” and a substantive dimension aiming at distributive justice. The hypothesis is that equitable proceedings render agreements and decisions more

¹⁷⁸ Ibid. 58.

¹⁷⁹ Ibid. 64.

¹⁸⁰ Danish, Kyle W. Danish, "International Relations Theory," in *The Oxford Handbook of International Environmental Law*, ed. Daniel Bodansky, Jutta Brunnée, and Ellen Hay (Oxford: Oxford University Press, 2007), 206.

¹⁸¹ Shaw, *International Law*. 64-66.

equitable. Two procedural components are highlighted. Decision-making must be based on certain criteria and stakeholders must participate, given the assumption that participation ensures that the agreement or decision treats stakeholders fairly.¹⁸² Procedural fairness may require notification, access to information and cooperation among states as well as participation of stakeholders in decision-making.¹⁸³

Where the substantive dimension is concerned, intra-generational equity strives for equity among currently living humanity. This implies that states must ensure that benefits of environmental resources as well as the costs linked to their protection or degradation are equitably shared by society. The concept of “sustainable development” is one expression of intra-generational equity; as well as inter-generational equity. This latter concept concerns present and future generations. The concept seeks to balance social and economic interests with a view to sharing resources fairly.¹⁸⁴ Concepts of equity have found their way into international law and they are also invoked to demand changes to the law, to help fill regulatory gaps or to guide the interpretation of law.¹⁸⁵ When this thesis examines in Chapter 5 whether CBD, CITES and UNCCD reflect and prompt mutual gains solutions, this examination is founded on equity considerations. The principle of common but differentiated responsibilities, whose legal quality is however contested, reflects equity considerations.¹⁸⁶

Besides considerations of morality and a sense of justice an additional reason to incorporate considerations of equity into environmental agreements is that they foster more effective agreements, particularly more effective implementation and compliance.¹⁸⁷ This strikes a link to the concept of legitimacy. Procedural equity largely overlaps with concepts of legitimacy as will be shown below. In its search for procedures leading to mutual gains solutions, the thesis analyses at the same time ways and means to respond to the demand to strengthen both, the legitimacy of international environmental law-making and the acceptance as legitimate of the resulting laws.¹⁸⁸

¹⁸² Dinah Shelton, "Equity," in *The Oxford Handbook of International Environmental Law*, ed. Daniel Bodansky, Jutta Brunnée, and Ellen Hey (Oxford: Oxford University Press, 2007), 640.

¹⁸³ *Ibid.*, 660.

¹⁸⁴ *Ibid.*, 642.

¹⁸⁵ *Ibid.*, 645.

¹⁸⁶ *Ibid.*, 654.

¹⁸⁷ *Ibid.*, 662.

¹⁸⁸ Jutta Brunnée, "COPing with consent. Law-making under multilateral environmental agreements,"

The fundamental assumptions of this thesis are concepts within the constructivist theory and the interactional law theory, inter alia, their concepts of legitimacy. These theories strongly differ from several but not all of the core aspects of neo-liberal institutionalist theory. The main traits of those three theories will be briefly introduced in the following paragraphs with a view to locating the thesis' approach within the existing theoretical context. They will then be alluded to in the relevant parts of this thesis.

I. Institutionalism

The neo-liberal institutionalist theory assumes that the self-interest of states is the reason for their cooperation in treaty regimes and organizations. Since the international system is anarchic, it is shaped by rationally and autonomously acting states that are pursuing their own interests.¹⁸⁹ This thesis agrees that states seek to maximize their benefits¹⁹⁰ and consequently agreements between states reflect state interests. Yet, states are not necessarily rational in the pursuit of their interests. Rather, states are represented by human beings and these state representatives may be influenced by values, sentiments, ideologies and powerful lobby groups as will be demonstrated in Chapter 3. Chapter 3 outlines for example the risk of irrationally confrontational state negotiations when the long-standing North-South divide, suspicions and reproaches burden negotiations.

Pursuant to Institutionalists, state interests are centred on national security and wealth. These interests are developed and maintained independently of any treaty regimes the states are members of. Instead of shaping preferences, legal regimes merely serve to clarify the behaviour expected of member states and to determine when rewards or sanctions are due.¹⁹¹ This thesis takes the opposite view in arguing that treaty regimes, NGOs, experts and corporations are well able to shape state interests and identities as is argued by Constructivism. Chapter 4 will elaborate more on this point and will ascertain whether and if so to which extent the mentioned actors influence state interests.

Leiden journal of international law 15, no. 1 (2002): 5.

¹⁸⁹ Scott Barrett, "An Economic Theory of International Environmental Law," in *The Oxford Handbook of International Environmental Law*, ed. Daniel Bodansky, Jutta Brunnée, and Ellen Hay (Oxford: Oxford University Press, 2007), 238, 39.

¹⁹⁰ Moshe Hirsch, "Game theory, international law, and future environmental cooperation in the Middle East," *The Denver journal of international law and policy* 27, no. 1 (1998): 81..

¹⁹¹ Danish, "International Relations Theory," 215.

II. Constructivism and interactional law theory

The reason for states to be susceptible to influence by treaty regimes, experts, NGOs and corporations is that the community of states represents a social structure which like any other social structure influences its members' interests through norms provided that states acknowledge these norms' legitimacy. Legitimacy is defined as "a property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process."¹⁹² Legitimacy relates to the qualities of the decision-maker or the decision-making process rather than the content of the decisions themselves. A legitimate rule is therefore not necessarily substantially equitable.¹⁹³ Looking at the resulting law and decisions themselves may be conclusive when thinking about legitimacy because states are more willing to accept an institution's or procedure's legitimacy when they expect good and effective decisions from them.¹⁹⁴ When a treaty regime's decisions proved to be inequitable states will lose their confidence.

One can assess legitimacy from a factual perspective, asking whether law has de facto legitimacy for those it purports to govern. This is a sociological and political question.¹⁹⁵ Legitimacy can be proved through state compliance. Yet, the demonstration of deference by a violator also indicates legitimacy of a rule.¹⁹⁶ Apart from that, there is the question of political philosophy whether law is normatively justified, that is, whether there are good reasons for its authority. Thinking about the normative dimension is a requisite in order to make suggestions, for instance, on what should be maintained a legitimate procedure and how to obtain it.¹⁹⁷

Constructivist and interactional theory, as does this thesis, go beyond the consideration of state perceptions. The argument is that legal norms are most effective when they have been constructed by a wide variety of participants to ensure that norms correspond to social practice and aspirations. The reference to social practice

¹⁹² Thomas M. Franck, *The power of legitimacy among nations* (New York: Oxford University Press, 1990). 24.

¹⁹³ Andresen and Skjaereth, "Science and Technology. From Agenda Setting to Implementation," 708.

¹⁹⁴ *Ibid.*, 709, 11.

¹⁹⁵ *Ibid.*, 709.

¹⁹⁶ Shaw, *International Law*. 61.

¹⁹⁷ Andresen and Skjaereth, "Science and Technology. From Agenda Setting to Implementation," 709, 11.

and aspirations indicates that the interactional law theory integrates substantive considerations into its concept of legitimacy. An additional consequence is that participation in the construction of law by all states does not necessarily suffice. Norm addressees within states too need to perceive rules as legitimate as their actions are decisive to ensure compliance. The perception of horizontal legitimacy between the states is of utmost importance. When this condition is fulfilled, the vertical legitimacy is decisive.¹⁹⁸ The acceptance of a treaty regime by non-governmental stakeholders is receiving more attention than formerly.¹⁹⁹ Such norms are perceived as legitimate and stand therefore a good chance of being complied with. Law does not determine action for the simple fact that it is in force.²⁰⁰ In other terms: input legitimacy creates output legitimacy. According to the interactional law theory, law's success depends on "the mutual generative activity and acceptance" and the energy, insight, creativity and intelligence of both, the governing and the governed.²⁰¹ Norm addressees will reason with a norm before applying it and laws therefore need to correspond to social practices and conventions.²⁰²

Chapter 3 will deal with questions of adequate participation that will ensure that input of stakeholders finds its way into international treaties. Chapter 5 will shed light on triggers for implementation and compliance, including self-interest, legitimacy and enforcement.

III. Evaluation

Some authors oppose the constructivist theory, rejecting the socializing effect of international law and the view that international negotiations tend to reveal that state interests converge even if they seem hard to reconcile at first glance.²⁰³ The thesis attempts to show that both statements are not correct.

Opponents further argue that for those stressing state interests, international law exists to obtain the objectives of the dominant members of the international community. The powerful actors will determine the "right" purpose of the rule. This tilts the balance in

¹⁹⁸ Brunnée, "COPing with consent. Law-making under multilateral environmental agreements," 13, 14.

¹⁹⁹ Andresen and Skjaereth, "Science and Technology. From Agenda Setting to Implementation," 710.

²⁰⁰ Jutta Brunnée and Stephen J. Toope, "International law and constructivism: elements of an interactional theory of international law," *Columbia journal of transnational law* 39, no. 1 (2000): 74.

²⁰¹ *Ibid.*: 46,48.

²⁰² *Ibid.*: 49, 50.; Oran R. Young, *Governance in World Affairs* (Ithaca, New York: Cornell University Press, 1999). 122.

²⁰³ Martti Koskenniemi, "What is international law for?," in *International Law*, ed. Malcolm D. Evans (Oxford: Oxford Univ. Press, 2003), 92-94.

favour of powerful actors with many policy-alternatives and resources at their disposal.²⁰⁴ The most powerful actors – Northern states and corporations – determine which issues will be placed on the international agenda to be addressed using the resources of the international community. At the same time weak states seek to maintain their achieved positions and privileges relying on arguments of sovereign equality.

When law is seen as a means to realise valuable purposes, so the argument, a detected failure of the law to realise these purposes makes the law “useless” and puts an end to the respect for it. When addressees do not attribute intrinsic worth to the rule, the reason for the rule will thus override the rule itself.

Opponents argue that law can only serve its true purpose to constrain powerful actors when a “formalist” view is adopted that does not take into account the potential objectives of the law.²⁰⁵ In this way the law helps to scrutinize the behaviour of all states to protect the weak.²⁰⁶ On the other hand, even opponents agree that thinking about the purpose of rules is necessary to find good rules or improve them.²⁰⁷

This thesis does not argue that state interests may serve to derogate from or violate existing rules when they fail to advance their interests. After having complied with a regime for some time, states will find it hard to give reasons to explain why it no longer corresponds to their interests in any event.²⁰⁸ The thesis is based on the assumption that treaties should reflect the interests of all state parties to ensure their compliance. The thesis acknowledges that powerful states are better equipped to shape international negotiations and that asymmetrical power of negotiators has negative implications on the resulting agreement. One of the major objectives of the thesis is to establish whether and, if so, in which way the asymmetry of states can be alleviated or counterbalanced. The thesis also acknowledges the intrinsic value of norms and of the reliability of norms. Norms are not at the subsequent disposition of powerful negotiators. It is true, however, that the creation and application of law are not strictly separate from one another. Interpretation and compliance promotion under

²⁰⁴ Ibid., 97, 98.

²⁰⁵ Ibid., 96.

²⁰⁶ Ibid., 102.

²⁰⁷ Ibid., 103.

²⁰⁸ Ronald B. Mitchell, "Compliance Theory. Compliance, Effectiveness and Behaviour Changes in International Environmental Law," in *The Oxford Handbook of International Environmental Law*, ed. Daniel Bodansky, Jutta Brunnée, and Ellen Hay (Oxford: Oxford University Press, 2007), 907, 08.

treaty regimes remake law in that they may modify the contents of law and develop new normative understandings.²⁰⁹ This can be a risk because powerful actors may dominate these processes. Transparency, however, helps to control the construction and reconstruction of norms.²¹⁰

Most of all, the thesis differs from this scepticism towards constructivism in that it points out the influence on state interests treaty regimes may have. It is a more challenging undertaking to bring state interests to convergence than to achieve the same for individuals or small groups. The convergence of the personal preferences of state representatives may be brought about by face-to-face negotiation. This does not suffice however. The preferences of the responsible sections of government as a whole need to be won over. When state representatives work towards influencing their governments' and constituencies' preferences, this is necessarily a more protracted process than convergence of interests through direct interaction.²¹¹

All states are part of the social structure and therefore susceptible to norms and knowledge that lead to a convergence of interests. Constructivism and interactional law theory are pragmatic which makes them strong approaches even though their search for possibilities of cooperative action might appear naively idealistic.²¹² The pragmatic approach becomes apparent from the interactional law theory's focus on the effect of treaty regimes rather than the formal validity of the various sources of law. This approach, which is also taken up by this thesis, proposes to evaluate law by looking at the influence it has, rather than analysing formal validity and differentiating legal sources.²¹³ The thesis also adopts the constructivist approach not to view constructivism as the solely valid and all encompassing explanation of action at the international level. Contrary to other theories constructivism is seen as a significant but not exclusive explanation since ideas, shared knowledge and norms do not automatically and invariably cause actions.²¹⁴

²⁰⁹ Brunnée, "COPing with consent. Law-making under multilateral environmental agreements," 36.

²¹⁰ Ibid.: 45.

²¹¹ George W. Downs, Kyle W. Danish, and Peter N. Barsoom, "The transformational model of international regime design: triumph of hope or experience?," *Columbia journal of transnational law* 38, no. 3 (2000): 497.

²¹² Jutta Brunnée and Stephen J. Toope, "International law and constructivism: elements of an interactional theory of international law," Ibid. 39, no. 1: 66.

²¹³ Ibid.: 65.

²¹⁴ Ibid.: 31.

F. Evaluation

The present Chapter highlights the necessity to counteract the current rates of biodiversity loss. It presents a selective overview of legal instruments applied at the international level to halt or limit biodiversity loss through the control of trade in endangered species or the promotion of sound methods of land use, including within PAs. While international instruments increasingly recognize and protect biodiversity in the terms of ecosystem diversity or they focus on habitats, species focussed approaches retain an important position within the spectrum of biodiversity related treaties. Most notably, CITES' trade controls are centred upon species rather than their habitats or ecosystems. While the establishment and improved management of PAs is an essential component within the approach set forth by the CBD, the concept of PAs does not feature within the UNCCD. Given that this thesis examines whether treaty negotiations reflect all relevant interests and lead to a mutual gains solution, these two instruments with their different approaches to land management are well-suited examples for the analysis.

The thesis examines whether adequate participation in negotiations will ensure that input of stakeholders finds its way into international treaties. Furthermore, it examines whether self-interest, legitimacy or enforcement will best prompt implementation and compliance.

This thesis is anchored in the constructivist and in the interactional law theory. Some of the premises for the analysis are that the international community represents a social structure which influences the interests of its members through norms and consequently state interests may converge through negotiations. This raises the question whether, and if so, in how far states are susceptible to being influenced by treaty regimes, NGOs and experts which play a role in the negotiations.

Chapter 2: Interests of stakeholders

This chapter clarifies and analyses the respective interests of states, indigenous peoples, non-indigenous inhabitants of biologically diverse regions, international non-governmental organizations (NGOs) and corporations with respect to conservation and development, in particular with respect to PAs and international trade in endangered species. As noted in Chapter 1 section E, this thesis argues that treaty regimes should be mutual gains solutions for states as well as stakeholders within states. Awareness of the divergence of interests in biodiversity conservation and development, especially poverty alleviation are crucial in order to find common ground as this thesis aims to do.²¹⁵ Awareness of interests serves to gauging subsequently in how far these interests are reflected by the CBD, CITES and UNCCD and their outcomes and impacts. Negotiation theory distinguishes positions and interests. When negotiators are firm about their interests this means that they may at the same time be flexible about the ways to achieve them. When they, on the other hand, stick to their position, this means that they will insist on their preferred ways to achieve their interests.²¹⁶ Since diverging positions are hard or even impossible to reconcile, this chapter will seek to ascertain the interests rather than the positions, because they leave room for several conflict-solving ways.²¹⁷

Knowledge about interests will prepare the examination (Chapter 4) in how far negotiations, in particular continual negotiations, help to shape these interests. Pursuant to the institutionalist theory, it is the self-interest of states which brings them to cooperate in regimes and organizations. Institutionalists view the international system as anarchic and thus freely shaped by states that pursue their interests in a rational and autonomous way.²¹⁸ There is no central international institution to order cooperation and enforce compliance. States attempt to maximize their proper benefits and states calculate potential costs and benefits before making decisions.²¹⁹ Therefore,

²¹⁵ Adams et al., "Biodiversity Conservation and the Eradication of Poverty ": 1146-48.

²¹⁶ Gail Bingham, *Resolving Environmental Disputes* (Washington, D.C.1986). 109.; Dean G. Pruitt, "Strategy in Negotiation," in *International negotiation. Analysis, approaches, issues*, ed. Viktor A. Kremenjuk (San Francisco: Jossey-Bass, 1991), 79, 80.

²¹⁷ Lawrence Susskind and Jeffrey Cruikshank, *Breaking the Impasse* (New York: Basic Books, 1987). 118.; Dean G. Pruitt, "Mediator Behavior and Success in Mediation," in *Studies in international mediation. Essays in honor of Jeffrey Z. Rubin*, ed. Jacob Bercovitch and Jeffrey Z. Rubin (Basingstoke: Palgrave Macmillan, 2002), 43.

²¹⁸ Barrett, "An Economic Theory of International Environmental Law," 238, 39.

²¹⁹ Hirsch, "Game theory, international law, and future environmental cooperation in the Middle East," 81.

all agreements between states reflect state interests. For institutionalists security and wealth are the predominant interests of states. They assume that states form their interests before entering a regime and maintain them independent of the regime. Legal norms are hence of a contractual nature rather than being in a position to shape preferences. Legal rules are interesting merely, so the institutionalists, to clarify which behaviour is expected of subscribing states and when rewards are distributed or sanctions applied.²²⁰

The thesis, on the contrary, will demonstrate the capacity of treaty regimes, NGOs and experts to shape state interests and identities. The thesis is therefore rooted in the constructivist theory.

All actors, states and NGOs at all levels, express some form of interest in nature. Their attitudes with respect to nature tend to stretch between the two poles of anthropocentricity and ecocentricity.²²¹ Anthropocentric approaches are: resource conservation and human welfare ecology. Ecocentric approaches are: preservationism, ecocentrism and animal welfare.²²² Positions vacillate between the preservationist protection of biodiversity which is viewed as a “global commons” and at the other extreme the defence of national sovereignty over biological resources for economic exploitation. Indigenous peoples’ interests focus mainly on autonomy to maintain their identity and culture. Interests reflect the respective political, ethical, religious and cultural attitudes of actors.²²³

A. Interests of inhabitants of biologically diverse regions

I. Interests of indigenous and traditional peoples

Many indigenous peoples live in biologically diverse regions and so they live in and around PAs.

1. Attempts to define the term “indigenous peoples”

The Martinez Cobo Study on the Problem of Discrimination Against Indigenous Populations set forth the following definition of indigenous peoples: “those which, having a historical continuity with pre-invasion and pre-colonial societies ... [who]

²²⁰ Danish, "International Relations Theory," 215.

²²¹ Eckersley, *Environmentalism and Political Theory*. 33.

²²² Ibid. 34.

²²³ David S. Favre, *International trade in endangered species. A guide to CITES* (Dordrecht: Nijhoff, 1989). 878. Saskia Young, "Contemporary issues of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the debate over sustainable use," *Colorado journal of international environmental law and policy* 14, no. 1 (2003): 173.

consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.”²²⁴

This is the most commonly used definition although it is not contained in any official document. Its problem is that indigenous peoples have in many cases been unable to maintain their connection to their lands mainly as a result of external influences, such as conquest and subjugation. They may have been dispossessed of traditional lands and their culture and identity may have been disrupted.²²⁵ The UN Permanent Forum on Indigenous Issues states that the term indigenous peoples does not need to be defined officially and it accepts the Cobo definition for practical purposes. Some states especially in Asia and Africa reject the Cobo definition. For them their regions have no indigenous populations but only minority groups.²²⁶

The economic, political and social situations of indigenous peoples differ greatly but they share the experience of a loss of lands, loss of autonomy and control and discrimination in municipal laws and policies. Pursuant to UN estimations the number of indigenous people amounts to more than 300 million in over 70 countries.²²⁷

The concept of indigenous peoples is also defined by two International Labour Organization (ILO) conventions. The 1959 ILO Convention on Indigenous and Tribal Populations (ILO Convention No. 107), applies only to economically and culturally distinct groups living within the borders of independent states, particularly, “indigenous populations” that existed prior to the state and its predominant population as is typical in North and South America and “tribal” groups that have lived alongside predominant societies for millennia as can be found in Asia and Africa. The stronger 1989 Convention on Indigenous and Tribal Peoples (Convention No. 169) is applicable to:

²²⁴ Megan Davis, "Indigenous struggles in standard-setting. The United Nations Declaration on the Rights of Indigenous Peoples," *Melbourne journal of international law* (2008): 441.

²²⁵ Aoife Duffy, "Indigenous peoples' land rights. Developing a 'sui generis' approach to ownership and restitution," *International journal on minority and group rights* (2008): 508.

²²⁶ Davis, "Indigenous struggles in standard-setting. The United Nations Declaration on the Rights of Indigenous Peoples," 442.

²²⁷ *Ibid.*: 443.

“(a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.”²²⁸

The Convention has been ratified by 17 mostly Latin American states. Both conventions have entered into force.

2. Indigenous peoples’ rights to their lands and resources

Indigenous peoples strive to obtain collective territorial autonomy basing their claim on the inseparability of territorial sovereignty and their distinctive ways of life. Their link to their land with its plants and animals is central in indigenous culture.²²⁹ They demand and are increasingly granted rights to lands they have traditionally occupied or used which includes the freedom to determine allocation and permissible uses of these lands and resources.²³⁰

Indigenous rights are collective rights. In support of their demands for collectively owned lands and living resources, they point out that collective rights promote sharing, moderation and conservation.²³¹ The ILO Convention no. 107 grants them a right of ownership over lands they traditionally occupy.²³² It obliges states not to remove indigenous populations unless they give their free consent. Exceptions are possible for national security reasons, in the interest of national economic development or of the health of the populations. Removed populations are to be provided with lands of equal quality or, if they so wish, with compensation in money or in kind.²³³ Indigenous customary laws and procedures governing the use and transmission of rights to land have to be respected by states.²³⁴

²²⁸ Art. 1 (1) ILO Convention no. 169.

²²⁹ Russel Lawrence Barsh, "Indigenous Peoples," in *The Oxford Handbook of International Environmental Law*, ed. Daniel Bodansky, Jutta Brunnée, and Ellen Hay (Oxford: Oxford University Press, 2007), 834.

²³⁰ *Ibid.*, 836.

²³¹ *Ibid.*, 839.

²³² Art. 11 ILO Convention no. 107.

²³³ Art. 12 ILO Convention no. 107.

²³⁴ Art. 13 ILO Convention no. 107.

The derogation possibilities for national security and development were opposed by indigenous peoples.²³⁵ Consequently, ILO Convention no. 169 introduced more extensive protection standards. Governments are required to cooperate with the peoples concerned, to protect their environment.²³⁶ In addition to the recognition of the rights of ownership and possession of the peoples concerned over the traditionally occupied lands, states are also called on to take measures to safeguard the right to use lands to which they have traditionally had access which applies particularly to nomadic peoples and shifting cultivators.²³⁷ Removal is possible only with their free and informed consent. Where their consent cannot be obtained, a removal can still take place following “appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.”²³⁸ Governments are required to protect the peoples against unauthorized intrusions of third parties.²³⁹ ILO Convention no. 169 does not merely protect rights to the land but also to resources on the land such as wildlife.²⁴⁰ Governments are required to establish mechanisms to resolve indigenous land claims.²⁴¹ ILO Convention no. 169 does not cover minerals. When the state holds the rights to the minerals it must negotiate with indigenous peoples to gain access to them.²⁴²

The Committee on the Elimination of Racial Discrimination construed the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) so as to require states “to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories, traditional owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories,” or to compensate them if possible with lands and territories.²⁴³

²³⁵ Barsh, "Indigenous Peoples," 845.

²³⁶ Art. 7 (4) ILO Convention no. 169.

²³⁷ Art. 14 (1) ILO Convention no. 169.

²³⁸ Art. 16 (2) ILO Convention no. 169.

²³⁹ Art. 18 ILO Convention no. 169.

²⁴⁰ Art. 13 (2) ILO Convention no. 169.

²⁴¹ Art. 14 (3) ILO Convention no. 169.

²⁴² Barsh, "Indigenous Peoples," 846.

²⁴³ Duffy, "Indigenous peoples' land rights. Developing a 'sui generis' approach to ownership and restitution," 528.

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is the most recent and most comprehensive instrument. It reaffirms the indigenous right to self-determination.²⁴⁴ UNDRIP was adopted by the United Nations General Assembly on 13 September 2007 with 143 votes in favour and four negative votes (Canada, Australia, New Zealand and the US).²⁴⁵ Indigenous observers participating in the UNDRIP deliberations argued with the evolving right of democratic governance instead of basing their claims for self-determination on the right to decolonisation.²⁴⁶

Self-determination comprises the “right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.”²⁴⁷ As one aspect of self-determination UNDRIP provides for land and resource rights in Articles 24 to 30.

Article 28 UNDRIP is new in that it recognizes the “right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.”²⁴⁸ Compensation shall take the form of lands, territories and resources unless otherwise freely agreed upon by the peoples concerned.²⁴⁹

The precise meaning of the requirements of a “free, prior and informed consent” is controversial. As a minimum it is understood to cover that indigenous peoples are consulted on the decisions that affect their communities.²⁵⁰ The processes applied need to permit and support indigenous peoples to determine their development path. The notion of free, prior and informed consent is relevant when indigenous peoples deal with the World Bank and transnational corporations where development projects are concerned. The concept is just as important when PAs are established. The

²⁴⁴ Art. 3 UNDRIP.

²⁴⁵ Duffy, "Indigenous peoples' land rights. Developing a 'sui generis' approach to ownership and restitution," 529.

²⁴⁶ Davis, "Indigenous struggles in standard-setting. The United Nations Declaration on the Rights of Indigenous Peoples," 458.

²⁴⁷ Art. 4 UNDRIP.

²⁴⁸ Art. 28 (1) UNDRIP.

²⁴⁹ Art. 28 (2) UNDRIP.

²⁵⁰ Davis, "Indigenous struggles in standard-setting. The United Nations Declaration on the Rights of Indigenous Peoples," 463.

Working Group on Indigenous Peoples and the Permanent Forum on Indigenous Issues have pointed to the necessity to define standards concretizing the concept.²⁵¹

All in all, indigenous peoples have a right to internal self-government under customary international law.²⁵² ILO Convention no. 169 is ranked as general source of law by human rights bodies, such as the Committee on the Elimination of Racial Discrimination and the Inter-American Commission on Human Rights.²⁵³ The universal membership of ICERD and the adoption of UNDRIP by the General Assembly indicate that land rights of indigenous peoples and arrangements permitting local autonomy or self-government are now parts of customary international law.²⁵⁴

It is important to note that the indigenous peoples' right to self-determination gives them a legal position and not just an interest or stake where the establishment of PAs on their territories is concerned.²⁵⁵

II. Interests of other local people

A study which compares the attitudes of people in Switzerland and in Ukraine living in proximity to a PA has revealed that local acceptance of a PA is increased provided that local people can identify their own interests in the goals of the PA. The study showed that Swiss PA managers communicated the goals of the PA, namely to achieve conservation and regional development, during the planning process. Those goals were in line with local interests. Consequently, the managers were successful in kindling the local interest for the PAs.

In Ukraine, on the other hand, the PA managers declared conservation as their priority. Local people consequently resented restrictions in the use of land and natural resources as running counter to their interests. The study concludes that good ecosystem based management requires that local interests are integrated into the planning of PAs. Interestingly, in neither of the two countries the initial perceptions of people towards PAs were too favourable. The study attributes this to the reputation of PAs to exclude inhabitants.²⁵⁶

²⁵¹ Ibid.: 464.

²⁵² Barsh, "Indigenous Peoples," 842.

²⁵³ Ibid., 843.

²⁵⁴ Ibid., 841.

²⁵⁵ World Parks Congress, "Indigenous Peoples' Declaration to the World Parks Congress," <http://forums.iifb.net/instantforum34/shwmessage.aspx?ForumID=116&MessageID=470>., para. 1, 2.

²⁵⁶ Astrid Wallner, "Local People's Perceptions of Protected Areas: A Cross-Cultural Study," <http://www.sampaa.org/PDF/ch1/1.2.pdf>.

Studies have shown that US and Canadian citizens generally support PAs even though they place higher importance on economic development and favour reduced governmental control.²⁵⁷ Some communities adjacent to PAs participate in sustainable development initiatives designed by federal and state natural resource agencies.²⁵⁸ Studies have also shown their widespread uncertainty or ambivalence towards PAs which PA proponents attribute to a general lack of knowledge about benefits afforded by PAs.²⁵⁹ Research results show that PA objectives need to take into account local interests in order to make PAs effective. Furthermore, PA objectives need to be communicated to inhabitants in order to make inhabitants aware of the benefits.

With respect to endangered species that are placed under protection and can no longer be traded, people living alongside wildlife have an interest that the destruction inflicted on them by such wildlife must be properly taken into account when considering conservation efforts.²⁶⁰

This thesis will apply the commonly used concept of “local communities” and sees such communities as significant stakeholders. It does so with the awareness that communities are not necessarily small and homogenous and they may have internal conflicts, unable to find a consensus. The social and economic differentiation of stakeholders must be taken into account. Local or proximate inhabitants are critical stakeholders. Other non-local actors may significantly influence resource use through relations of patronage with local groups. A thorough stakeholder analysis is therefore required.²⁶¹ It is necessary to acknowledge the existence of multiple stakeholders and interests concerning PAs rather than to rely on a unified local community. Often numerous actors with varying political and economic power and access to resources compete for resources and may even be in conflict.²⁶² All those stakeholders that exist underneath the state level are decisive for the accomplishment of conservation. Their sheer number and the complexity of their interrelatedness demonstrate that it is

²⁵⁷ James Cantrill, Thomas Potter, and William Stephenson, "Protected areas and regional sustainability. Surveying decision makers in the lake superior basin," *Natural resources journal* 40, no. 1 (2000): 19.

²⁵⁸ *Ibid.*: 42.

²⁵⁹ *Ibid.*: 43.

²⁶⁰ Young, "Contemporary issues of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the debate over sustainable use," 184.

²⁶¹ Katrina Brown, "Innovations for Conservation and Development," *The Geographical Journal* 168, no. 1 (2002): 9, 10.

²⁶² *Ibid.*: 11-13.

extremely challenging to involve these stakeholders in a meaningful way in negotiations.

B. State interests in “North” and “South”

I. Sovereignty of states over biological resources

Most components of biodiversity exist in areas under the jurisdiction of states. Biodiversity like other natural resources fall therefore under the sovereignty of states. International law does not touch upon these sovereign rights. Even though otherwise claimed²⁶³, the CBD reference to sovereign rights over national biological resources is not a novel legal development resulting from pressure exerted by biodiversity rich Southern states.²⁶⁴ The CBD preamble merely “reaffirms” these sovereign rights and introduces no alteration to the legal status quo.²⁶⁵ The IUCN and UNEP Convention drafts intended to classify biodiversity as “common heritage of mankind.” Developing states opposed this concept in order to check the access of industrialized states to their genetic resources.²⁶⁶ The introduction of the common heritage principle would have amounted to declaring state property as common property.²⁶⁷ This sovereign right is also reaffirmed by Principle 2 of the Rio Declaration.

With the exception of migratory species, that is, species that straddle national boundaries, biodiversity is mostly linked to its specific location rather than being a shared resource such as air or the oceans.²⁶⁸ International environmental law aims to balance competing sovereign interests. The fundamental concept is the “no harm” principle which permits states to use their territories and resources as long as they do not cause any serious transboundary harm. Neighbouring states must tolerate harm below this threshold.²⁶⁹ The loss of biodiversity within one state may impact upon neighbouring states yet, with the exception of serious harm to migratory species, this will usually not amount to serious harm.

²⁶³ Paul Gepts, "Who Owns Biodiversity, and How Should the Owners Be Compensated?," *Plant Physiology* 134(2004).

²⁶⁴ Andresen and Skjaereth, "Science and Technology. From Agenda Setting to Implementation," 565.

²⁶⁵ Nele Matz-Lück, "Biological Diversity, International Protection," in *Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (Oxford: Oxford University Press, 2009), para.11.

²⁶⁶ Clare Shine and Palitha T.B. Kohona, "The Convention on Biological Diversity: Bridging the Gap Between Conservation and Development," *RECIEL* 1, no. 3 (1992): 282.

²⁶⁷ Andresen and Skjaereth, "Science and Technology. From Agenda Setting to Implementation," 564.

²⁶⁸ Matz-Lück, "Biological Diversity, International Protection," para. 12.

²⁶⁹ Andresen and Skjaereth, "Science and Technology. From Agenda Setting to Implementation," 553.

With the exception of mineral resources on the deep-seabed the concept of common heritage of mankind does not play any role in international environmental law. States' fear of interferences with the administration of their national resources prevented them from introducing the concept of common heritage of mankind into international agreements on natural resources. The CBD instead uses the notion of a "common concern of humankind" which so far lacks legal content. It expresses the consciousness that the loss of biodiversity has implications for humankind and that it should therefore be jointly addressed by all states.²⁷⁰ As a consequence, measures for the protection of biodiversity, such as the establishment of PAs are per se purely national decisions.

In general, the interests of industrialized states with respect to the establishment of PAs and the control of trade in species very much differ from those of developing states. The terms "North" and "developed states" will be used interchangeably, as will be the terms "South" and "developing states." The "Northern" countries include the advanced industrialized countries which are for the most part members of the Organization of Economic Cooperation and Development (OECD). These terms are imprecise since the "developed" states of Australia and New Zealand are situated in the southern hemisphere and Mexico and South Korea are OECD members but tend to argue like developing states. Among the 30 OECD members Turkey, Mexico, Hungary, Poland, Slovakia were ranked as no high-income countries in 2006 by the World Bank. In spite of their lack of precision and being conscious of generalization, the terms will serve to demonstrate shared traits of states belonging to either group.

It is asserted that Northern countries, due to their higher per capita income, place higher priority on environmental regulation than the South.²⁷¹ The respective policy in PA establishment and management and trade in endangered species will shed light on the countries' interests.

II. The South

The most richly endowed states which are estimated to host between 50 per cent and 80 per cent of species diversity are mostly developing states. They are: Brazil,

²⁷⁰ Matz-Lück, "Biological Diversity, International Protection," para. 13.

²⁷¹ Downs, Danish, and Barsoom, "The transformational model of international regime design: triumph of hope or experience?," 499, 500.

Colombia, Ecuador, Peru, Mexico, Zaire, Madagascar, Australia, China, India, Indonesia and Malaysia.²⁷²

Many developing states have established numerous PAs. Predominant categories vary. Category II sites cover the greatest area in the Caribbean (39.0 per cent of the protected surface), in Central America (19.7 per cent) and in South America (17.5 per cent). The latter two regions have a high extent of non-categorized protected surface (34.6 per cent and 52.4 per cent respectively).

In East Asia 44.2 per cent of all PAs are in Category I. Category VI sites are predominant in Southeast Asia (26.8 per cent of the area), in Eastern and Southern Africa (28.3 per cent while 31.9 per cent are not classified), in North Africa and the Middle East (even 62.0 per cent) and in the Pacific region (52.6 per cent). Category IV sites prevail in Western and Central Africa (34.1 per cent), in North Eurasia (48.1 per cent) and in South Asia (50.5 per cent).²⁷³

In developing states development interests aiming to alleviate mass poverty take priority over environmental protection.²⁷⁴ Development interests focus on the utilization of natural resources, economic growth and industrialization.²⁷⁵ The developing state argumentation is influenced by colonial and post colonial experiences. Colonial powers exploited the raw materials of their colonies and thus caused an environmental depletion and an impoverishment of the population.²⁷⁶ Even after decolonisation productive lands and forests continued to be used to produce commodities for the North.²⁷⁷ Consequently, developing states tend to be suspicious and contrary to Northern conservation efforts. They emphasize their right to exploit their own resources pursuant to their environmental and developmental policies.

Developing states are also the states that host most endangered species. States that seek to resume trade in species (the so called “consumptive use block”), in particular the African elephant, are of the opinion that use of species provides both incentives to local people to conserve species and funds to improve enforcement and customs

²⁷² Shine and Kohona, "The Convention on Biological Diversity: Bridging the Gap Between Conservation and Development."

²⁷³ World Conservation Monitoring Centre, *United Nations List of Protected Areas*. 30.

²⁷⁴ CBD Preamble.

²⁷⁵ Maki Tanaka, "Bridging the gap between Northern NGOs and Southern sovereigns in the trade-environment debate. The pursuit of democratic dispute settlements in the WTO under the Rio Principles," *Ecology law quarterly* 30, no. 1 (2003): 120-22.

²⁷⁶ *Ibid.*: 123.

²⁷⁷ *Ibid.*: 124.

services.²⁷⁸ The economic value of species is even considered to be the only value that will help conserve wildlife. It is argued that a preservationist approach, that is an approach which opposes any commercialization of endangered species, places a disproportionate share of the costs on poorer range states while sustainable use helps to achieve a revenue for conservation measures.²⁷⁹

The prioritization of development interests means that conservation measures focus on resource conservation. The resource conservation approach strives to prevent waste of resources and to promote their efficient use in order to obtain their maximum yield. Development, so the argument, is to be promoted for the majority's benefit. Nature that is not exploited in any form is also seen as a kind of waste.²⁸⁰ This anthropocentric, utilitarian approach is focused on the satisfaction of material human needs. Nature is to be conserved for development. The aesthetic, recreational, psychological and spiritual needs of humans and needs of other species remain unheeded.²⁸¹ Such aspects are seen as a luxury developing states cannot afford.

Developing state policy does not only reflect the resource conservation approach as can be seen from the establishment of PAs. The establishment of PAs is in turn being criticized for its preservationist approach by persons who blame the conservation NGO influence and a lack of understanding of the human activity which has shaped species composition and density over millennia. These misconceptions are seen to have led to the unjustified eviction of humans from PAs.²⁸² For example, the Pulong Tau National Park in Sarawak, Malaysia and the Nanda Devi National Park in Nepal are cited amongst others.²⁸³

III. North America

North America but also Australia and New Zealand demonstrate a tendency towards a preservationist approach.²⁸⁴ In North America 36.7 per cent of the protected surface is

²⁷⁸ Birnie, "The case of the Convention on Trade in Endangered Species," 241.

²⁷⁹ Young, "Contemporary issues of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the debate over sustainable use," 183. Catharine L. Krieps, "Sustainable Use of Endangered Species under CITES: Is it a Sustainable Alternative?," *University of Pennsylvania Journal of International Economic Law* 17(1996): 477..

²⁸⁰ Eckersley, *Environmentalism and Political Theory*. 35.

²⁸¹ *Ibid.* 36.

²⁸² Steve Hellinger and Doug Hellinger, "The harmonization of wildlife habitat and human livelihood imperatives: Addressing common root causes through a participatory, collaborative and sustainable approach. Preliminary Findings," (2008): 5.

²⁸³ *Ibid.*: 6.

²⁸⁴ Eckersley, *Environmentalism and Political Theory*. 34.

classified as Category II. Only 2.3 per cent and 0.3 per cent of the total number of 13,369 PAs is classified as Category V and VI sites respectively.²⁸⁵

In Australia and New Zealand 22.2 per cent of the total number of 8,724 PAs are in Category I. Australia has also a significant number of Category III and IV sites accounting for 44.2 per cent and 14.1 per cent of the total number of PAs respectively.²⁸⁶ However, 39.8 per cent of the area within a relatively small number of 404 PA sites is classified in Category VI providing thus for conservation by use.²⁸⁷

The North American legislation and policies show a tendency towards an old fashioned preservationist approach. The early preservationists focused essentially on the appreciation of the aesthetic and spiritual qualities of nature free from human traces. This appreciation led them to partially preferring highly aesthetically appealing landscapes to ecologically valuable or endangered sites.²⁸⁸

Many North American park users and managers have a concept of National Parks which excludes land influenced by humans.²⁸⁹ This attitude is also reflected in the respective legislation. Under the Canada National Parks Act, the first priority in the management of parks is the maintenance or restoration of ecological integrity, through the protection of natural resources and natural processes.²⁹⁰ Parks Canada, the managing agency, defines that ecosystems have integrity when they have their native components intact, including: abiotic components, biodiversity (the composition and abundance of species and communities in an ecosystem) and ecosystem processes, for example, fire, flooding, and predation.²⁹¹ The terms "natural" and "native" are indicative for the importance given to landscape devoid of human interference.²⁹² The notion of land largely untouched by humans is deeply rooted in North American culture and politics, even though scholars point out that the North American landscape has partly been created by Native American land use.²⁹³

²⁸⁵ World Conservation Monitoring Centre, *United Nations List of Protected Areas*. 41.

²⁸⁶ *Ibid.* 37.

²⁸⁷ *Ibid.* 30.

²⁸⁸ Eckersley, *Environmentalism and Political Theory*. 39, 40.

²⁸⁹ Federico Cheever, "British national parks for North Americans. What we can learn from a more crowded nation proud of its countryside," *Stanford Environmental Law Journal* 26, no. 2 (2007): 304.

²⁹⁰ S 8 (2).

²⁹¹ http://www.pc.gc.ca/progs/np-pn/eco_integ/index_E.asp (last visited Sept. 2007).

²⁹² Cheever, "British national parks for North Americans. What we can learn from a more crowded nation proud of its countryside," 305.

²⁹³ *Ibid.*: 306.

The US Wilderness Act 1964 establishes a National Wilderness Preservation System which is composed of federally owned areas designated by Congress as “wilderness areas.”²⁹⁴ The Act defines the term “wilderness” as “an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain.”²⁹⁵ Since its adoption the US Congress has designated roughly 105 million acres of federal public land as “wilderness.”²⁹⁶ Park agencies tend to wield almost unlimited power over the publicly owned land.²⁹⁷

Two reasons are given to explain the narrow North American notion of landscapes worth protecting. First, North America, unlike most of Europe, possesses lands which show few human traces. Second, this approach saves Americans from deciding about the natural value of the various modified landscapes. Because of this narrow notion altered landscapes do not receive the protection they require.²⁹⁸ Yet, also in the US and in Canada governmental agencies have become aware over the last twenty years of the need to balance the aims of a sustainable regional economy and a sustainable environment and started to appreciate the human dimension of regional landscapes.²⁹⁹

The US regulates its international trade in endangered species more restrictively than is provided under CITES. It was one of the major proponents of the adoption of CITES in order to attain its conservation objectives and to avoid any competitive disadvantage towards states permitting unlimited trade.³⁰⁰

IV. Europe

The situation in Europe is different from that in North America. Most European PAs were established in the sixties, long after American parks.³⁰¹ Europe has the comparatively high number of 43,018 PAs of which 8.6 per cent are within Category III, 39 per cent in Category IV and 6.7 per cent in Category V.³⁰² The most extensive

²⁹⁴ S 2 (a).

²⁹⁵ S 2 (c).

²⁹⁶ Cheever, "British national parks for North Americans. What we can learn from a more crowded nation proud of its countryside," 308.

²⁹⁷ *Ibid.*: 301.

²⁹⁸ *Ibid.*: 311.

²⁹⁹ Cantrill, Potter, and Stephenson, "Protected areas and regional sustainability. Surveying decision makers in the lake superior basin," 20.

³⁰⁰ Sand, "Whither CITES? The evolution of a treaty regime in the borderland of trade and environment," 31.

³⁰¹ Roberto Gambino, "Park policies: a European perspective," <http://www.entrepreneur.com/tradejournals/article/97113974.html>.

³⁰² World Conservation Monitoring Centre, *United Nations List of Protected Areas*. 40.

part, 46.1 per cent of the protected surface is classified as Category V sites.³⁰³ Europeans tend to adhere to a human welfare ecology approach.³⁰⁴ Human welfare ecologists' foremost objective is a safe, clean, pleasant and generally amenable human environment, in short: environmental quality. It is the approach subscribed to by many citizens who are active for environmental protection and it is a part of European political initiatives. It is a consequence of the rapid degradation of the urban and agricultural environment and the rise of "post-material" values adopted by the so-called New Middle Class.³⁰⁵ Its more pronounced proponents are sceptic towards economic growth and towards the reliance on science and technology as expedients.³⁰⁶ Human welfare ecology has been the most significant strand in green politics in Europe, the most heavily industrialized and domesticated region of the world.

As reasons for protective measures ecologists would point to an enlightened self-interest of humankind to ensure the survival and health of current and future generations. Human welfare ecologists are convinced that their approach will coincidentally benefit the non-human environment. They see it therefore as unnecessary to use ecocentric theories that are hard to communicate to obtain the desired outcomes.³⁰⁷

Most European PAs, especially in Germany, France and Italy are inhabited and the PAs reflect people's working traditions, their history and social and cultural values. Since the 1990s European countries demonstrate a shift towards an intergovernmental and cooperative approach to the establishment and management of PAs. This is visible as a common tendency in spite of institutional and policy differences even in countries with top-down legislation, such as Italy. The relevant authorities are increasingly giving more attention to the process of developing and implementing plans, that is, to the negotiation among different stakeholders, than to the plan itself even when that is not explicitly provided for by law. Authorities acknowledge that they need to share management responsibilities with various stakeholders, especially with local communities, in order to make a PA effective.

³⁰³ Ibid. 30.

³⁰⁴ Eckersley, *Environmentalism and Political Theory*. 34.

³⁰⁵ Ibid. 36.

³⁰⁶ Ibid. 37.

³⁰⁷ Ibid. 38.

In Western Europe land within PAs is mainly privately owned. Local people will reject PAs when they do not benefit from them to the extent they feel is due to them, while they bear much of the costs. This local and participatory approach is embedded in large scale national and regional strategies.³⁰⁸

Britain, for instance, does not possess any wilderness which would fall under the definition contained in the Wilderness Act.³⁰⁹ Nor does it comprise any land which fulfils the “ecological integrity” condition under the Canadian legislation. Landscapes are nevertheless managed for the public good.³¹⁰ In Britain it is common for national parks to comprise privately owned farmed land and to be inhabited and receive visitors. Employees work to maintain biodiversity, visual character, archaeology and historic buildings within the parks.

The land use management plans for the British National Parks identify a wide range of aspirations and areas of concern, whilst they bestow only very limited coercive powers on the National Park authorities. As an example, the Pembrokeshire Coast National Park Management Plan 2003-2007 covers aspects such as sustainability, tranquillity, biodiversity, tidal energy, production, organic farming, ecosystem-based fisheries, air quality and water quality.³¹¹ The National Park Authority is responsible for the planning functions within the park with a view to improving the quality of life. This includes decisions concerning the erection, modification and demolition of buildings and other manmade structures and material changes in the use of land and buildings. Additionally, it is empowered to enforce the terms of public access. It seeks to coordinate authority flowing from ownership and regulation. The management staff’s approach is rather persuasive than regulatory.³¹²

If the land was publicly owned, the government would have to lease most of it to farmers to maintain the character of the land which prevailed in the 1950s, when most of the parks were designated. Farmers would have the right to exclude tourists from their land. Publicly owned land would not look much different from the landscape as it is now.³¹³

³⁰⁸ Gambino, "Park policies: a European perspective."

³⁰⁹ Cheever, "British national parks for North Americans. What we can learn from a more crowded nation proud of its countryside," 308.

³¹⁰ *Ibid.*: 309.

³¹¹ *Ibid.*: 300.

³¹² *Ibid.*: 301.

³¹³ *Ibid.*: 302.

Public decisions on land use are mostly made by public authorities which are, however, often influenced by private land users. Private owners do not dispose of an unlimited decision-making power either. Rather they underlie regulatory restrictions. Public and private decision-making powers are intertwined and counterbalance one another on public as well as private lands. They exist on a scale varying from high to low public as well as private authority. The lands in the British National Parks usually lie somewhere on a medium level on this scale.³¹⁴

C. Non-Governmental Organizations (NGOs)

I. Definition of the term “NGO”

Traditionally, only states were actors in international relations. They negotiated, accepted and enforced international agreements. This, however, is not true anymore. The current international society encompasses various non-state actors, non-governmental organizations (NGOs) being among the most dynamic and influential. The Yearbook of international organizations lists the total number of 53.815 NGOs. Together with international human rights law, the international environmental law is the field of law with the most significant NGO impact.³¹⁵

For the purposes of this thesis the term NGO will refer to a non-profit group or association which may be organized at the community, national or international level. NGOs are composed of individuals and freely created by private initiative.³¹⁶ NGO membership does not exclusively cover private individuals though, as can be seen with respect to the World Conservation Union (IUCN). IUCN's creation in 1948 was initiated by the French government. It is the only NGO that is made up of national and international conservation groups as well as states and other public law entities such as universities and research institutes.³¹⁷

³¹⁴ Ibid.: 303.

³¹⁵ Kal Raustiala, "The "participatory revolution" in international environmental law," *The Harvard environmental law review* 21, no. 2 (1997): 538. Hilary French, "The role of non-state actors," in *Greening international institutions*, ed. Jacob Werksman, *International law and sustainable development series* (London: Earthscan, 1996), 251. Alexandre C. Kiss and Dinah Shelton, *International environmental law*, 3. ed. (Ardsley, NY: Transnational Publ., 2004). 162. Edith Brown Weiss, *International environmental law and policy*, 2. ed. (New York, NY: Aspen Publishers Inc, 2007). 189.

³¹⁶ Jacqueline Peel, "Giving the public a voice in the protection of the global environment avenues for participation by NGOs in dispute resolution at the European Court of Justice and World Trade Organization," *Colorado journal of international environmental law and policy* 12, no. 1 (2001): 47, 48. Steve Charnovitz, "Nongovernmental organizations and international law," *The American journal of international law* 100, no. 2 (2006): 349.

³¹⁷ Kiss and Shelton, *International environmental law*. 168. Brown Weiss, *International environmental*

In a broad sense business associations are also classified as NGOs. Due to the fundamental differences between corporations and organizations financed by voluntary contributions they will be examined separately. This narrow definition of NGOs is in keeping with ECOSOC res. 1996/31 para. 13.

Alternatively NGOs are referred to as: “civil society organisations.”³¹⁸ The emergence of environmental NGOs (ENGOs) is put down to frustration with governments’ lack of initiative to take environmentally protective measures, while the communications revolution has made it possible for NGOs to communicate worldwide efficiently and inexpensively. Large Northern NGOs have an international reach and influence. Their annual turnovers exceed several million euros and they have hundreds of paid staff and “branded” conservation solutions and professionalized marketing, advocacy and policy departments.³¹⁹ Examples for NGOs that are multinational in composition and identity and that work on a global basis are: IUCN, Friends of the Earth, Greenpeace International and the World Wide Fund for Nature (WWF). Thousands of NGOs are working nationally or transnationally, some of them on single issues and others with broad fields of action.³²⁰ Over the last decade the geographic range of NGOs has been almost universal, while only thirty years ago, many countries lacked significant NGO activity.³²¹

NGOs are heterogeneous which makes it futile to ascribe shared political and ideological characteristics to them.³²² They can, however, be grouped into three categories according to their broad objectives, namely ENGOs (conservation NGOs being a subgroup of them), human rights NGOs and development NGOs. Organizations pertaining to either the first or latter category will be looked at in more detail in this thesis.

II. NGOs as advocates for biodiversity conservation

ENGOs’ main interest is the protection of the environment. They adhere to ecocentric approaches which vary in whether or not their proponents take note of the linkage

law and policy. 190.

³¹⁸ International Monetary Fund and Jan Aart Scholte, *Guide for Staff Relations with Civil Society Organizations* (IMF, 2003).

³¹⁹ Paul Jepson, "Governance and accountability of environmental NGOs," *Environmental Science & Policy* 8(2005): 515.

³²⁰ Kiss and Shelton, *International environmental law*. 163.

³²¹ Charnovitz, "Nongovernmental organizations and international law," 349.

³²² Terje Tvedt, "Development NGOs: Actors in a Global Civil Society or in a New International Social System?," *Voluntas: International Journal of Voluntary and Nonprofit Organizations* 13, no. 4 (2002): 371.

between the state of the environment and poverty. Preservationists advocating the strict enforcement of PAs in developing countries (protection against use) ignore that the loss of biodiversity and poverty are tied up with one another. At the maximum they see poverty as a constraint on conservation and consequently advocate poverty alleviation for nearby people to keep them from trespassing the PAs and from obstructing their conservation efforts. They have grown to realize that they have to offer development and poverty alleviation strategies so as not to become irrelevant.³²³

Preservationists who take account of human welfare, more specifically of the rights of local people to land and its resources, seek to ensure that conservation does not exacerbate poverty and seek to improve the income for local people to compensate them for lost opportunities due to the establishment of the PA.³²⁴ Finally, some conservation strategies see a direct link between conservation and development and aim to have surrounding people benefit directly from biodiversity (protection by use).³²⁵ Livelihoods thus incite conservation rather than being merely reconcilable. Most PAs combine several of these approaches.³²⁶

1. Advocacy initiatives

a) NGO campaigns toward states and corporations

NGOs engage in activities that advocate environmental protection and directly address states and corporations. They see themselves as advocates for the environment rather than being limited to a supportive role to governmental efforts. These activities may stretch from “naming and shaming” campaigns that guide consumer choices to environmentally sound products to the negotiation of codes of conduct. Not only corporations but also states have already been the target of successful boycotts. These are by some rejected as confrontational, unilateral trade measures.³²⁷ Boycotts are seen to conflict with Principle 12 of the Rio Declaration which requires that environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international

³²³ Steven Sanderson, "The Future of Conservation," *Foreign Affairs* 81, no. 5 (2002): 167.

³²⁴ Adams et al., "Biodiversity Conservation and the Eradication of Poverty": 1146-48.

³²⁵ Brown, "Innovations for Conservation and Development," 6, 7.

³²⁶ *Ibid.*: 7, 8.

³²⁷ Tanaka, "Bridging the gap between Northern NGOs and Southern sovereigns in the trade-environment debate. The pursuit of democratic dispute settlements in the WTO under the Rio Principles," 126.

consensus. And they conflict with this thesis' objective to find ways to reach mutual gains solutions.

NGOs also initiate selective investment, that is, investors either shun share ownership in corporations lacking sound environmental practices or they influence corporations from within through shareholder resolutions. Multinational corporations are increasingly conscious of NGO capacities and privately engage in dialogues with NGOs. They may decide to cooperate and engage in environmental standard setting outside of state action. NGOs develop and press for codes of conduct and certification schemes. An early example of a code are the CERES Principles from 1989, so named after its sponsor the Coalition for Environmentally Responsible Economies.

Sector-specific certification schemes also articulate specific environmental practices and link them to certification. The forest certification program, for instance, was developed by the Forest Stewardship Council (FSC) to make the management of international forest resources more sustainable. The FSC was established by environmental and human rights NGOs and the timber industry in 1993. The scheme has captured a substantial part of the lumber market in the developed world. Similar environmental certification schemes exist for several food products such as coffee and chocolate. Even though such codes are voluntary there may be high pressure on corporations to accept them and comply with them. Their effectiveness may resemble that of law.³²⁸

The creation by the UN of legal guardianships for certain species or habitats has been proposed. The guardians might be international NGOs with relevant expertise whose task would be to appear before legislatures and administering agencies, to intervene in bilateral and multi-lateral disputes and to initiate legal and diplomatic action to advocate for its charge.³²⁹ The political will to recognize any institution as such a guardian has so far been lacking. Concerns about national sovereignty make it unlikely that any organization will be equipped with a strong, independent guardian function.

³²⁸ Peter J Spiro, "Non- Governmental Organizations and Civil Society," in *The Oxford Handbook of International Environmental Law*, ed. Daniel Bodansky, Jutta Brunnée, and Ellen Hey (Oxford: Oxford University Press, 2007), 284-87.

³²⁹ Mary Risely, "Environmentally Responsible Global Governance: How NGOs Can Help," in *New directions in international environmental negotiation*, ed. Lawrence Susskind and William Moomaw, *Papers on international environmental negotiation* (Cambridge, Mass.: PON Books, 1999), 122.

b) IUCN World Park congresses

The long tradition of IUCN advocacy for PAs becomes apparent from a look at the World Park congresses. The outcomes of the World Park Congresses document the above mentioned shift in ecocentric approaches from preservationist to the inclusion of human welfare considerations.

The First World Congress on Protected Areas in 1962 recommended the creation of “series of natural reserves providing permanent examples of the many diverse types of habitats, both natural and semi-natural, so as to preserve them permanently for world science.” The congress also promoted the establishment of a world list for each bioclimatic region of the most representative habitats so that such habitats may be selected and legally established early on.

In 1972, the Second World Congress on Protected Areas called “upon all governments to widen the coverage of their protected areas so as to ensure that adequate and representative samples of natural biomes and ecosystems throughout the world are conserved in a coordinated system of national parks and related protected areas.”

There was a notable increase in areas designated for protection over the 1970s. Yet the Third World Congress on Protected Areas repeated its call on governments to establish new areas or enlarge existing ones.³³⁰

At the Fourth World Congress on National Parks and Protected Areas, which took place in Caracas, Venezuela in February 1992, participants concluded that more and better managed PAs were necessary. This time they also gave priority to inhabitants of areas they wished to protect. They emphasised the significance of PAs towards meeting people’s needs instead of being islands in a sea of development. Consequently they must be part of every country’s strategy for sustainable management of natural resources and must be set in a regional planning context.

The Fifth World Parks Congress was held in Durban, South Africa, from 8 to 17 September 2003. The main outputs of the Congress are the Durban Accord, the Durban Action Plan, the message to the CBD and a set of 32 recommendations approved by different workshops organized during the Congress. The Durban Accord calls for a fresh and innovative approach to PAs and their role in the broader conservation and development agenda and it calls for specific action, inter alia, on expansion and strengthening of worldwide systems of PAs, mainstreaming PAs within

³³⁰ Gillespie, "Obligations, gaps, and priorities within the international regime for protected areas," 8.

the overall development and poverty-alleviation agenda and interests and aspirations of all stakeholders.

The Durban Action Plan sets targets and specifies actions needed to achieve the commitments called for in the Durban Accord. The actions involve many stakeholders at global, regional, national and local levels. The two over-arching outcomes that the plan aims to achieve are:

1. PAs fulfil their full role in biodiversity conservation.
2. PAs make a full contribution to sustainable development.

The action plan includes fifteen main targets and a larger number of supporting targets. The main targets are consistent with targets agreed to at the World Summit on Sustainable Development (WSSD) and under the CBD and are to be achieved by the time of the Sixth World Parks Congress.³³¹

The message to the CBD calls on the CoP to adopt a rigorous programme of work on PAs including specific targets and time tables and to establish effective means of monitoring and assessing the implementation of the programme of work.

In the meantime the 10 per cent target established for the protection of biomes at the Third World Parks Congress in 1982 has been reached or exceeded for nine out of the 14 biomes. 23.3 per cent of tropical humid forests, 16.9 per cent of subtropical/temperate rainforests and 29.7 per cent of mixed island ecosystems are protected. Biomes that fall far short of the target are lake systems (1.54 per cent), temperate needle-leaf forests and woodlands (5 per cent) and temperate grasslands (4.59 per cent).³³²

c) Large-scale conservation approaches

Due to limited resources a decision needs to be taken on the areas which should be protected with priority. Since the mid- to late-1990s, WWF, Conservation International (CI), The Nature Conservancy (TNC) and other NGOs adopted ambitious global “large-scale conservation” approaches. CI has done so in the form of its “hotspots” strategy, WWF with its “ecoregions” and “Global 200” strategies, TNC

³³¹ World Parks Congress, "The Durban Action Plan, Revised Version," <http://www.iucn.org/themes/wcpa/wpc2003/english/outputs/durban/daplan.htm>.

³³² World Conservation Monitoring Centre, *United Nations List of Protected Areas*. 28.

with its “ecosystems” strategy and the Wildlife Conservation Society (WCS) with its “living landscapes.”

CI’s work is based on the principle to create PAs on sites where high numbers of species can be found, so called “hotspots.” In 1999 the NGO identified 25 hotspots (which included fifteen tropic rainforests and nine islands) and later extended this number to 32. Hotspot areas must fulfil the two criteria of endemism and threat.³³³

The other approaches are quite divergent. WWF advocates the “Global 200” mechanism to determine which areas should be placed under protection. This approach takes into account all ecosystem and habitat types. The mechanism’s objective is to protect major habitat types and their eco-regions, rather than specific species or hotspots of diversity.³³⁴ WWF distinguished 867 eco-regions and examined their richness in species, endemic nature, higher taxonomic uniqueness (for example unique genera and relict species) and extraordinary ecological or evolutionary phenomena (for example adaptive radiations, intact large assemblages and presence of migrations of large vertebrates). From among those, WWF chose 238 ecoregions that most urgently required conservation measures and named them “Global 200”.³³⁵

IUCN uses its Species Survival Global Habitat Classification. IUCN calculated the amount of habitat that would be necessary to protect species on the IUCN Red List. This three-tiered system contains 15 broad habitat categories which are divided into 78 habitat types, which are again divided into 154 categories. Those categories help to establish which habitats are poorly represented in international PA systems. Finally, Birdlife International elaborated Endemic Bird Areas (EBAs). In this approach one species is viewed as narrowly linked to a habitat that should be protected.

Those typologies are seen as supportive towards the governmental efforts to protect ecosystems and habitats since they indicate whether protection is comprehensive.³³⁶ The approaches take account of the need to look not merely at isolated endangered ecosystems but instead at the global system of ecosystems which is threatened. Pursuant to proponents, these strategies are strictly based on biological knowledge.

³³³ CI, "Annual Report 2008," (2008),

http://www.conservation.org/SiteCollectionDocuments/CI_AnnualReport08.pdf.

³³⁴ Gillespie, "Obligations, gaps, and priorities within the international regime for protected areas," 26.

³³⁵ *Ibid.*: 27.

³³⁶ *Ibid.*: 23.

2. Critical perspective

From a Southern perspective this priority for conservation is regarded as a consequence of advanced industrialism and affluence. Advanced industrialization and economic growth have caused environmental degradation but also shifted the relationship of humans and the environment since people mostly work in service sectors and are not involved in directly consuming natural resources. Their increased leisure time and improved transportation make natural tourism more and more popular. A consequence is the public support for nature conservation, apparent in the increase in NGO membership. Pursuant to the theory of postmaterialism, people whose basic needs have been satisfied direct their attention toward their quality of life and values, such as self-expression, meaningful work and aesthetics.³³⁷

NGO critics, see the large scale conservation strategies as mostly marketing slogans. It is crucial for NGOs to present their strategies in an engaging, visionary form to motivate stakeholders and partners.³³⁸ The distinction between marketing tactics and sound scientific considerations are hard to draw from looking at policy statements.

The scientific value of NGO recommendations is rejected as it is based in some instances on “best guesses” instead of extensive studies. This is true for many of the recommendations used in the Maya, Zoque and Olmec forest ecoregional plan. It is doubted that scientists can fully understand natural systems in their complexity. There is a risk of scientists imposing their visions.³³⁹ A successful example for the opposite approach are the Finish forests which are in a relatively good state while they are managed according to traditional practice handed down from generations of farmers.³⁴⁰ Western trained scientists, like those of the IUCN Marine Turtle Specialist Group tend to stick to methods they have been trained in to devise their conservation strategies.³⁴¹

Some criticisms go so far as to accuse people and NGOs of having a spiritual or emotional attitude towards environmental protection. For ENGOs manmade changes

³³⁷ Tanaka, "Bridging the gap between Northern NGOs and Southern sovereigns in the trade-environment debate. The pursuit of democratic dispute settlements in the WTO under the Rio Principles," 120-22.

³³⁸ Mac Chapin, "A Challenge to Conservationists " *World Watch Magazine* 16, no. 6 (2004): 23.

³³⁹ Gabriel Ramos-Fernandez, Martha Bonilla, and Eduardo García-Frapolli, "More responses to "A Challenge to Conservationists". Letter to the Editor," *Ibid.* (2005).

³⁴⁰ Campbell and Vainio-Mattila, "Participatory Development and Community-Based Conservation: Opportunities Missed for Lessons Learned?," 425.

³⁴¹ *Ibid.*: 426.

rob nature of its innocence and beauty, so the criticism. ENGOs fail to acknowledge that humans necessarily manipulate the environment they live in more than any other creature. Instead of being fragile, stable and harmonious, as nature is perceived by sentimental environmentalists, it is rather a dynamic system. Greenpeace, for example, follows an ecocentric approach attributing an intrinsic value to nature independent of its worth to humans. Its action is led rather by its ideology than by science.³⁴² Greenpeace is seen as fundamentalist since it endorses “the optimism of the action over the pessimism of the thought” and views issues in black and white. When a question of faith and values is at stake NGOs are not prepared to make compromises. Furthermore, they usually rely on official or academic data but distort it, or select only the data that serves their purposes.³⁴³

Traditionally, conservation NGOs adhered to a preservationist approach. The deficiency of preservationism to favour aesthetically appealing pristine wilderness has however been rectified in more recent times with preservationists becoming more ecologically informed. These modern ecocentric environmentalists acknowledge that the idea to maintain wilderness detracts from other, human influenced nature that is worth being protected and properly managed.³⁴⁴ They recognize the intrinsic value of all parts of biodiversity: organisms, species and ecosystems.³⁴⁵ Rather than posing a risk to a fragile ecosystem, they increasingly accept that human settlements can have positive impacts. South of the Sahara aerial photographs and statements of community elders indicate that forest cover is best in inhabited areas whereas abandonment of a settlement often entails deforestation in its vicinities.³⁴⁶

There remain however voices that demand the preservation of untouched islands surrounded by civilisation for biodiversity sake. North America, Australia and New

³⁴² Paul W. Meerts, "The Changing Nature of Diplomatic Negotiation," in *Innovation in diplomatic practice. Studies in diplomacy*, ed. Jan Melissen (Basingstoke: Macmillan u.a., 1999), 99. Peter Haas, "Epistemic Communities," in *The Oxford Handbook of International Environmental Law*, ed. Daniel Bodansky, Jutta Brunnée, and Ellen Hay (Oxford: Oxford University Press, 2007), 793. Peter M. Haas, "Obtaining International Environmental Protection through Epistemic Consensus," in *Global environmental change and international relations*, ed. Ian Rowlands and Malory Greene (London: Macmillan u.a., 1991), 42-44.

³⁴³ Richard D. North, "End of the Green Crusade," *New Scientist*, no. 1967 (1995).

³⁴⁴ Eckersley, *Environmentalism and Political Theory*. 40.

³⁴⁵ *Ibid.* 47.

³⁴⁶ Campbell and Vainio-Mattila, "Participatory Development and Community-Based Conservation: Opportunities Missed for Lessons Learned?," 426.

Zealand have the highest number of preservationist activists. Notable examples are the Earth First movement in the US and the Wilderness Society in Australia.³⁴⁷

Human welfare ecology considerations help to make amends for the insufficiencies of preservationism and the unfeasibility or ineffectiveness of isolated spots for protection. Anthropocentric reasons for conservation of biodiversity are its life-support, its early warning function, its stockpile of genetic diversity and its scientific, recreational, aesthetic, spiritual, symbolic and psychological health value.³⁴⁸

III. NGOs as advocates for local interests

1. Development NGOs

Development NGOs seek to promote development, to alleviate poverty and to advocate local interests. NGOs are important actors of the development process in the South. Civil society organizations working in the development context vary in their constitution and their priorities. UNDP, as an example, works with amongst others the following civil society partners: intermediary NGOs, service organizations, community-based organizations, indigenous peoples' organizations, youth and women's organizations and faith-based organizations. All of those organizations work towards inclusive globalization, promoting accountability, increased political participation and linkages between the grass-roots and the national policy arenas.³⁴⁹

In general terms, two types of development NGOs can be distinguished: membership organizations that work for their own benefit and service organizations that help others.³⁵⁰ They provide humanitarian relief in emergencies, they build local capacity enabling people to better meet their own needs through relying on themselves and they engage in policy formation and political advocacy.³⁵¹ Given that many developing states are relatively new democracies Southern NGOs engage mostly in making representational democracy more effective. This effort is complicated by the fact that many inhabitants are struggling to sustain their livelihoods and consequently prioritize economic gains to self-expression. Southern NGOs are mostly concerned with providing social welfare for the poor and marginalized. Some states restrict or suppress NGO activities which is another reason for Southern NGOs to focus on

³⁴⁷ Eckersley, *Environmentalism and Political Theory*. 46.

³⁴⁸ *Ibid.* 41.

³⁴⁹ UNDP, "UNDP and civil society organizations," <http://www.undp.org/partners/cso/index.shtml>.

³⁵⁰ Iain Atack, "Four Criteria of Development NGO Legitimacy," *World Development* 27, no. 5 (1999): 855.

³⁵¹ *Ibid.*: 856.

“service delivery” in poverty reduction, education and health problems. They tend to have broad agendas comprising social development and environmental aspects.³⁵²

International development NGOs base their legitimacy on the premise that they serve the needs of others. The governmental sector relies heavily on NGOs to perform humanitarian relief and long-term development activities. NGO delivery of official development assistance (ODA) increased from only 0.2 per cent in 1970 to more than 10 per cent by the end of the century.³⁵³ Development aid was not always based on local needs and interests. Participatory development appeared as a new concept in development assistance in the 1960s and early 1970s, partly in reaction to failures of development projects.³⁵⁴

In policy formation and advocacy activities NGOs look beyond the community level, seeking changes in policies and institutions at all levels. Their advocacy may include such farther reaching issues as Third World debt, military spending and international trade regimes. Development NGOs focus on sharing wealth more equitably. They challenge “the institutions and processes that perpetuate poverty and inequality across the world to defend and promote human rights, gender justice, social justice and security needed for survival and peace”.³⁵⁵ Many development NGOs started by responding to a crisis and their activities gradually became more long-term oriented and farther reaching over time since they realized that improvement on the local level required supportive policies on all levels.³⁵⁶

Organizations such as the US-based Development Group for Alternative Policies (Development GAP) which was founded in 1976, attempt to maximize control by poor communities and sectors in the South over their development. The approach is based on the principle of self-determination, the indispensability of local knowledge for sound development and the accountability of US and global institutions. The Development GAP seeks to promote active NGO participation in economic decision-making at all levels, in particular the global level, and to inform the North about

³⁵² Tanaka, "Bridging the gap between Northern NGOs and Southern sovereigns in the trade-environment debate. The pursuit of democratic dispute settlements in the WTO under the Rio Principles," 137-40.

³⁵³ Atack, "Four Criteria of Development NGO Legitimacy," 856, 57.

³⁵⁴ Campbell and Vainio-Mattila, "Participatory Development and Community-Based Conservation: Opportunities Missed for Lessons Learned?," 420, 21.

³⁵⁵ Global Call to Action Against Poverty (GCAP), "Strategy 2009-11," <http://www.whiteband.org/about-gcap/reports/gcap-global-council/2008-documents/final-gcap-strategic-directions-2009-11-english>.

³⁵⁶ Atack, "Four Criteria of Development NGO Legitimacy," 856.

Southern realities.³⁵⁷ An example for advocacy at the European level is the European Confederation for Relief and Development (CONCORD) which represents more than 1600 European NGOs at the European institutions.³⁵⁸ In the last few years advocacy NGOs increasingly formed coalitions across all regions of the world. The Global Call to Action Against Poverty (GCAP) links national coalitions of NGOs in more than 100 countries from all regions of the world.³⁵⁹

Development NGOs increasingly include environmental considerations into their policies.³⁶⁰ When they promote conservation this is with an anthropocentric approach. Consequently, they support conservation measures as a means to ensuring sustainable harvests in order to alleviate poverty.³⁶¹

NGOs can help to make governments and the international financial institutions accountable for their development strategies and programmes.³⁶² A positive example is the participatory tripartite approach Structural Adjustment Participatory Review Initiative (SAPRI) bringing together NGOs, governments and the World Bank.³⁶³ It benefited from both, local knowledge and the economic and political knowledge of organizations and academics at the national level. The initiative was launched in 1997 in eight countries (Ecuador, El Salvador, Ghana, Mali, Uganda, Zimbabwe, Bangladesh and Hungary). The governments of Mexico and the Philippines chose not to participate. NGOs from both countries launched the Citizens' Assessment of Structural Adjustment (CASA) on their own. Between 100 and 750 NGOs networked in each country forming SAPRIN, the NGO component in SAPRI.³⁶⁴ Other civic organizations represented all sectors, in particular trade unions, with the exception of big business.³⁶⁵

³⁵⁷ The Development Group for Alternative Policies, "The Development GAP's Mission and Operating Principles " http://www.developmentgap.org/mission%26principles/mission_principles.html.

³⁵⁸ CONCORD, "CONCORD Info Pack,"

http://www.concordeurope.org/Files/media/internetdocumentsENG/2_About_CONCORD/2_Information_about_CONCORD/About_CONCORD/CONCORD-info-pack-EN-2008.doc. Last visited May 2009.

³⁵⁹ Global Call to Action Against Poverty (GCAP), "Strategy 2009-11."

³⁶⁰ Campbell and Vainio-Mattila, "Participatory Development and Community-Based Conservation: Opportunities Missed for Lessons Learned?," 418.

³⁶¹ Adams et al., "Biodiversity Conservation and the Eradication of Poverty ": 1146-48.

³⁶² Hellinger and Hellinger, "The harmonization of wildlife habitat and human livelihood imperatives: Addressing common root causes through a participatory, collaborative and sustainable approach. Preliminary Findings," 32.

³⁶³ Structural Adjustment Participatory Review Initiative (SAPRI), "Overview," <http://www.saprin.org/overview.htm>.

³⁶⁴ Ibid.

³⁶⁵ Hellinger and Hellinger, "The harmonization of wildlife habitat and human livelihood imperatives:

Assessing the impact of World Bank-mandated structural adjustment policies encompassed a political-economy analysis of local problems, the large-scale involvement of stakeholders and the creation of alliances of people and organizations from a variety of sectors cooperating to achieve their objectives.³⁶⁶ SAPRI organized training in local economic dynamics and specific government policies forming part of national economic adjustment programmes with a mandate from international agencies. Local participants and visiting economists learnt from each other.³⁶⁷

2. Environmental NGOs

ENGOS are in favour of devolution because they assume that local communities are more interested in sustainability than either governments or corporations, in particular, when they develop a sense of proprietorship. ENGOS may thus support local interests as long as their goals correspond.³⁶⁸ The relationship between international ENGOS and indigenous and traditional peoples and other local groups underwent notable changes since the 1980s, stretching from ENGOS being seen as partners and supporters to the other extreme of being seen as hostile intruders. The starting point of cooperation between ENGOS and indigenous and traditional peoples can be traced back to the late 1980s and early 1990s. In 1989, the Coordinadora de Organizaciones Indígenas de la Cuenca Amazónica (COICA) suggested to the “community of concerned environmentalists” to join forces to defend the Amazon region, which was stronger than ever affected by development and colonization projects, cattle ranching and unregulated logging and mining. COICA attributed the failures of protection efforts to the lack of involvement of indigenous peoples.³⁶⁹ The government had launched a World Bank-supported program to colonize Rondonia in the Amazon without consideration of the roughly 10,000 indigenous people living there nor the rainforest. The coalition convinced the World Bank to suspend the remaining disbursements of the loans to the Polonoeste project. Shortly after, the Inter-American Development Bank (IDB) granted loans in order to extend the Polonoeste project into the Amazon state of Acre, putting at risk the tropical forest

Addressing common root causes through a participatory, collaborative and sustainable approach. Preliminary Findings," 29.

³⁶⁶ Ibid.: 28.

³⁶⁷ Ibid.: 11.

³⁶⁸ Campbell and Vainio-Mattila, "Participatory Development and Community-Based Conservation: Opportunities Missed for Lessons Learned?," 430.

³⁶⁹ Coordinadora de Organizaciones Indígenas de la Cuenca Amazónica (COICA), "Two Agendas for Amazonian Development," *Cultural Survival Quarterly* 13, no. 4 (1989): 75-78.

and the livelihoods of the 10,000 indigenous people and the 40,000 rubber tappers, who had migrated to the Amazon a century before.³⁷⁰

The rubber tappers organized in a national organization, formed partnerships with foreign and national organizations and the federation of indigenous peoples, who had hitherto been competitors for land, to obtain title to their lands and to protect the forest while at the same time harvesting sustainably. With their lobbying they made the World Bank and IDB modify their policies towards increasing extractive reserves and gained land tenure under national law.³⁷¹ The agendas prompted discussions about various forms of cooperation in the management of PAs.

In May 1990, COICA organized the first Amazon summit meeting between indigenous peoples and environmentalists in the Peruvian city of Iquitos. Participants represented indigenous communities from Peru, Bolivia, Ecuador, Colombia and Brazil, as well as the Bank Information Center, the Fundación Peruana para la Conservación de la Naturaleza, Friends of the Earth, Greenpeace, National Wildlife Federation, Probe International, Rainforest Action Network, The Rainforest Alliance, the Sierra Club Legal Defense Fund, the World Resources Institute, CI and WWF. They adopted the Declaration of Iquitos, which stresses the need for indigenous peoples and environmentalists to work together for an “Amazonia for humanity.”

As stated above, the role of indigenous peoples in PAs was a central concern at the Fourth World Congress on National Parks and Protected Areas. IUCN and WWF issued statements of principles and policy documents confirming and analysing the value of traditional knowledge for fragile ecosystems, the necessity for respect for indigenous traditions and ways to cooperate. The IUCN-WWF “Principles and Guidelines on Indigenous and Traditional Peoples and Protected Areas” point out that there is no inherent conflict between the objectives of conservationists and indigenous peoples.³⁷² The National Wildlife Federation (NWF) too emphasizes its successful conservation partnerships with Native Americans since the mid-1980s put into practice in the NWF’s Tribal Lands Conservation Program. It furthermore stresses its

³⁷⁰ Hellinger and Hellinger, "The harmonization of wildlife habitat and human livelihood imperatives: Addressing common root causes through a participatory, collaborative and sustainable approach. Preliminary Findings," 37.

³⁷¹ *Ibid.*: 38.

³⁷² Beltrán and Phillips, eds., *Indigenous and Traditional Peoples and Protected Areas. Principles, Guidelines and Case Studies*, IX.

respect for tribal culture and sovereignty as well as its efforts for environmental and economic justice for and the empowerment of Native Americans.³⁷³

Conservation groups began to include communities into their programs leading to initiatives such as: “community-based natural resource management,” “community-based conservation,” “sustainable development and use,” “grassroots conservation,” “devolution of resource rights to local communities,” and “integrated conservation and development programmes” (ICDPs).³⁷⁴

Opponents of management autonomy for indigenous peoples argue that they did not live in harmony with their local environment. They point to paleobiological, archaeological and botanical evidence showing that most tropical forests have been altered by humans before European contact. Moreover, they state that indigenous peoples are bound to take up new methods, new crops and new technologies as can be seen in the common use of firearms, flashlights and outboard motors for hunting. Innovations of this kind inevitably modify the interaction of humans and the environment and may thwart the long-term sustainability of an ecosystem. The reason for this tendency is that indigenous peoples have the same incentives to overexploit their environment as Europeans.

Preservationists, for instance the President and Chief Executive Officer of the Wildlife Conservation Society, contradict the compatibility of conservation and local inhabitants’ interests and they reject the assumption that biodiversity is only marginally impacted by indigenous peoples. As a proof they cite studies showing that large game animals are strongly depleted in tropical forests of all types including within lands of indigenous and traditional peoples where human population densities exceed one person per square kilometre, whereby most extractive reserves have a higher population density. And they point out two studies showing cases of local extinction of some species of game animals which occurred in extractive reserves by the hands of rubber tappers.³⁷⁵ Indigenous lands do not provide the level of

³⁷³ Garritt Voggesser, "More responses to "A Challenge to Conservationists". Letter to the Editor," *World Watch Magazine* (2005).

³⁷⁴ Mac Chapin, "A Challenge to Conservationists " *Ibid.* 16, no. 6 (2004): 21, 22.

³⁷⁵ Kent H. Redford and Steven E. Sanderson, "Extracting Humans from Nature," *Conservation Biology* 14, no. 3 (2000): 1361.

conservation needed, so the preservationist view, because they do not maintain an ecosystem in all its components and original form.³⁷⁶

They agree that indigenous populations use certain superior methods such as polycropping, enhancing soil fertility and sustainable harvesting of forest plants. Equally, they agree that indigenous cultures provide for the preservation of the resource base. The conditions for sustainability are, however, a low population density and abundance of land. Also, as soon as harvesting and hunting are undertaken to achieve surpluses rather than merely for subsistence, they tend to be unsustainable. These conditions are not met anymore in most places of the neotropics. Hence, the argument is that indigenous peoples can be learnt from but not relied on for conservation.³⁷⁷

With respect to trade in endangered species, preservationists accuse proponents of trade resumption of placing too little importance on the survival of species rather than on the exploiters. Any trading in a threatened species is said to encourage poachers because it establishes a market and helps to generate income for them and therefore thwarts the protection of species.³⁷⁸ Global trade is seen as the second most crucial reason for the decline of species after habitat loss.³⁷⁹ Preservationists emphasize the need to base decisions on whether or not to permit trade in a species exclusively on scientific advice rather than on the needs of the exploiters who, in any event, frequently exceeded quotas. In cases of scientific uncertainty they insist that the burden of proof that trade is not detrimental remains with the traders independent of economic and social pressures.³⁸⁰ Placing an emphasis on economic value leaves species without any apparent use unprotected.³⁸¹ Organizations, such as the International Fund for Animal Welfare (IFAW), also oppose the resumption of trade in elephants and other species that have been listed for animal welfare considerations.³⁸²

³⁷⁶ Ibid.: 1362, 63.

³⁷⁷ Kent H. Redford, "The Ecologically Noble Savage," *Cultural Survival Quarterly* 15, no. 1 (1991): 46-48.

³⁷⁸ Birnie, "The case of the Convention on Trade in Endangered Species," 241.

³⁷⁹ McOmer, "Problems in enforcement of the Convention on International Trade in Endangered Species," 674.

³⁸⁰ Birnie, "The case of the Convention on Trade in Endangered Species," 241.

³⁸¹ Young, "Contemporary issues of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the debate over sustainable use," 185.

³⁸² Hellinger and Hellinger, "The harmonization of wildlife habitat and human livelihood imperatives: Addressing common root causes through a participatory, collaborative and sustainable approach.

3. Critical perspective: NGOs as representatives of Northern values?

The issue of conservation NGO and local people cooperation is hotly discussed. The outcome of projects of conservation NGOs with local peoples is seen by some authors as a failure because NGOs dominated the development of programs and because conservation organizations lack expertise in social and economic matters.³⁸³

Ill-conceived projects dealing with agroforestry and organic gardening failed due to the lack of a market or because the wrong crops were chosen for the local ecological conditions. Environmental education programs were merely transferred from urban areas and failed to awaken the interest of indigenous people. As a result, relations between NGOs and indigenous peoples worsened.³⁸⁴

In particular the biggest three NGOs, WWF, Conservation International (CI) and The Nature Conservancy (TNC), which are generously provided with government and corporate money, have been accused of neglecting the interests of indigenous and traditional peoples whose lands they attempt to protect. This may lead to conflicts with local communities, national NGOs and human rights defenders. Those NGOs, so the criticism, do no longer work with the local populations. Rather they focus on large-scale conservation strategies based on natural science instead of social realities. The large-scale approach is opposed because it implies that conservationists see indigenous peoples as a possible means to achieve their ends and leave no room for their free determination. CI, for instance, has undergone a notable change since the mid-1990s. From a decentralized organization delegating authority to local people, it gradually shifted to becoming a think tank for desk-bound biology and economy in its Washington DC headquarters. Communication between field programs is limited.³⁸⁵

NGOs established a false dichotomy between poverty alleviation and conservation. NGOs lament how hard it is to work with indigenous peoples because they sometimes choose their economic wellbeing over preservation of natural resources. As examples for this phenomenon they cite the Kayapó in Brazil who log their forests and the Mayans who slash and burn the forests of the Petén of Guatemala. In these instances, NGOs tend to forget about the rights of indigenous peoples.³⁸⁶

Preliminary Findings."

³⁸³ Chapin, "A Challenge to Conservationists ": 21, 22.

³⁸⁴ Ibid.

³⁸⁵ Liza Grandia, "More responses to "A Challenge to Conservationists. Letter to the Editor," Ibid. (2005).

³⁸⁶ Mike Sansom, "Readers' Responses to "A Challenge to Conservationists"," Ibid. 18, no. 2.

Indigenous peoples have become increasingly hostile towards the establishment of PAs because they are seen to infringe the rights of their inhabitants. Communities blame international NGOs for the eviction from their territories and the prohibition of traditional uses of land.³⁸⁷ Some conservation professionals admit this contemptuous attitude held by some individuals within ENGOs. Frustration about failures of projects is cited as cause. Part of the problem is attributed to the employed project format, since the development of lasting solutions to land use and conservation and the building up of local NGOs may require decades and certainly more time than what is available under the usual funding period of a few years.³⁸⁸ The need for long-term strategies is also underlined by the fact that a successful project may cause new problems when more and more people become aware of the possibility to obtain income through a sustainable use project and want to participate.³⁸⁹ This shift away from participation is also made visible by the common replacement of the terms “indigenous” and “traditional” people in NGO statements by the terms “marginalized” or “poor” as well as “rural” and “local” people.

CI now promotes strict preservationism which it calls “direct conservation,” that is, purchasing concessions from third-world governments. CI protects conservation concessions “from agricultural and timber activities and providing key habitat for threatened species.”³⁹⁰ This strategy appears colonialist and it leaves the problem of enforcing the conservation of the lands unresolved.³⁹¹

The director of the Amazon Program of The Nature Conservancy affirms the frequent tensions between large conservation organizations and indigenous peoples and the need for such organizations to focus more on sustainable development in indigenous lands. At the same time he rejects the practical relevance of the debate on the adequate approach to the conservation of PAs going on between anthropologists and biologists. In his view, the fact that over 20 per cent of the Amazon basin and similarly large parts of other biodiversity-rich landscapes belong to indigenous

³⁸⁷ Mac Chapin, "A Challenge to Conservationists" *Ibid.* 16, no. 6 (2004): 17-19.

³⁸⁸ Marcus Walsh, "More responses to "A Challenge to Conservationists". Letter to the Editor," *Ibid.* (2005).

³⁸⁹ Hellinger and Hellinger, "The harmonization of wildlife habitat and human livelihood imperatives: Addressing common root causes through a participatory, collaborative and sustainable approach. Preliminary Findings," 40, 41.

³⁹⁰ Elizabeth Black, "The High Cost of Conservation: Can Enhancement-of-Survival Permits Save Foreign Endangered Species?," *The Georgetown Environmental Law Review* 20, no. 3 (2008): 27. 27.

³⁹¹ Liza Grandia, "More responses to "A Challenge to Conservationists. Letter to the Editor," *World Watch Magazine* (2005).

peoples make the academic discussion irrelevant.³⁹² The occurrence of conflicts between NGOs and indigenous peoples proves this assumption incorrect. Even though NGOs defend themselves stating their adherence to cooperative models it is clear that many conservationists themselves and human rights activists express concerns with respect to the situation on the ground.³⁹³ WWF is engaged in reviewing its activities to make them more cooperative.³⁹⁴

The differing financial capacities make the relationship of international and local NGOs asymmetrical.³⁹⁵ Funding for Southern NGOs is subject to criticism. The funding of NGOs in the least developed countries is argued to cause a loss in financial and human resources for states and a weakening and marginalisation of state institutions. Also, the funding that is intended to promote a pluralistic civil society instead makes NGOs dependent on their donors. As an example, the large NGOs receive the largest part of the United States Agency for International Development (USAID) support and they are meant to pass it on to local NGOs. This method gives large NGOs power over the work of local NGOs.³⁹⁶

4. Perspective for successful cooperation

a) Cooperation of NGOs from all regions

A trend against the dominance of Northern views is coming about thanks to the increasingly important role played by NGOs within states such as India and China.³⁹⁷ In the last twenty years, NGOs have joined together more often in large coalitions, which is a way to reach fair balance of NGOs from different parts of the world.³⁹⁸

The increasing cooperation of NGOs from all regions is reflected by the World Social Forum which was initially conceived and organized by Brazilian organizations and which aims, amongst other things, to link environmental NGOs, that are active at all

³⁹² David Cleary, "More responses to "A Challenge to Conservationists". Letter to the Editor," *Ibid.* .

³⁹³ Dan Brockington, Jim Igoe, and Kai Schmidt-Soltau, "Readers' Responses to "A Challenge to Conservationists"," *Ibid.* 18, no. 2.

³⁹⁴ Carter S. Roberts and Chris Hails, "World Wildlife Fund Response to Mac Chapin's article," (2004).

³⁹⁵ Chapin, "A Challenge to Conservationists ": 23.

³⁹⁶ Johanna Kalb, "The institutional ecology of NGOs. Applying Hansmann to international development," *Texas international law journal* 41, no. 2 (2006): 315, 16.; Tanaka, "Bridging the gap between Northern NGOs and Southern sovereigns in the trade-environment debate. The pursuit of democratic dispute settlements in the WTO under the Rio Principles," 141, 42.

³⁹⁷ Jonathan Schwartz, "Environmental NGOs in China. Roles and limits," *Pacific affairs* 77, no. 1 (2004).; Tejaswini V. Patil, "State civil society and democracy. The role of NGOs in India," *The Indian journal of public administration* 51, no. 4 (2005).

³⁹⁸ Risely, "Environmentally Responsible Global Governance: How NGOs Can Help," 119.; French, "The role of non-state actors," 253.; Charnovitz, "Nongovernmental organizations and international law," 367.

levels, from local to the international level. It helped, for instance, to create a network of rural/peasant movements which meets for discussion and adopts manifestos. Some of the Forum's leading principles are solidarity, equality and the sovereignty of peoples. The Forum also underlines its plurality and diversity in ethnicities and cultures. It serves as a framework for the exchange of experiences to encourage understanding and mutual recognition among its participants.³⁹⁹

To avoid the dominance of and bias towards views from the north, large NGOs need to learn from local groups. Credibility and legitimacy of the cooperation of an NGO with a local group partly depends on representativeness and reputation of the involved local organizations.⁴⁰⁰

Large NGOs can facilitate and support the forming of local NGOs, enter into collaborative partnerships with local groups or national conservation, development, economic-justice, human-rights or other organizations with good local links.⁴⁰¹ As truly participatory unobtrusive capacity building measures NGOs can organize workshops, the recording of the local history and land mapping. The capacity to draft and use maps helps local groups to make claims to land and point out when illegal hunting, farming or extraction occurs.⁴⁰² Building capacity for mapping means that large NGOs provide people with skills they value, bring them together and create a negotiating power in the community. The Mount Cameroon Project is an example of such successful, participatory mapping. The government had leased a part of the land surrounding a forest reserve to establish plantations and intended to privatize the remainder of the land which was used by villagers for farming, hunting and fishing. The farmers joint together with local cartographers and depicted all the sites used by the community in maps. The farmers could thus claim their lands and prevent the privatization of the buffer zone.⁴⁰³

NGOs can support indigenous peoples financially and technically in order to enable them to survey their lands effectively and protect it from intrusions.⁴⁰⁴ Another

³⁹⁹ Immanuel Wallerstein, "The World Social Forum: From Defense to Offense," (2007).

⁴⁰⁰ Hellinger and Hellinger, "The harmonization of wildlife habitat and human livelihood imperatives: Addressing common root causes through a participatory, collaborative and sustainable approach. Preliminary Findings," 22.

⁴⁰¹ *Ibid.*: 32.

⁴⁰² *Ibid.*: 24.

⁴⁰³ *Ibid.*: 25.

⁴⁰⁴ Janet Chernela, "Readers' Responses to "A Challenge to Conservationists"," *World Watch Magazine* 18, no. 2 (2005).

important NGO approach should be to subsidize scientific training and staffing of academic institutions, such as local universities, museums and research stations in biologically diverse regions. This is preferable to large NGOs employing academic staff on a project-by-project basis because it ensures the independence of local research and is long-term oriented. Local academic institutions are best suited to bring all stakeholders together.⁴⁰⁵

b) Cooperation of conservation and development NGOs

NGOs focus either on conservation or development. ENGOs and development NGOs pursue largely divergent interests and have divergent expertise. ENGOs prioritize conservation. When they can achieve their objectives through human use, they will opt for this alternative if it is not feasible they will discourage all use. Development NGOs prioritize development goals and will support conservation when it advances this goal.⁴⁰⁶ They lament that ENGOs ignore that income substitution may be inappropriate in areas of high poverty.⁴⁰⁷ While conservation NGOs such as IUCN are getting aware of the need to take development issues into account, development NGOs such as the Development GAP are beginning to be aware of the necessity to take environmental considerations and expertise into account. ENGOs should learn from the development assistance sector, that is, from participatory development experiences.⁴⁰⁸ Conservation and development NGOs should join forces as they struggle against the same external threats, in particular, commercial over-extraction of natural resources and because they represent the most vulnerable interests competing for land.⁴⁰⁹ Coalition building between NGOs from different backgrounds can generate innovative arguments by integrating issue areas.⁴¹⁰

c) NGO respect for indigenous rights and local interests

Conservation NGOs prioritize conservation but they are aware of the necessity to respect indigenous and other human rights and not to increase poverty or undermine the livelihoods of the poor. The Fifth World Parks Congress in 2003 reflected this

⁴⁰⁵ John Bates, *Ibid.* .

⁴⁰⁶ Campbell and Vainio-Mattila, "Participatory Development and Community-Based Conservation: Opportunities Missed for Lessons Learned?," 432.

⁴⁰⁷ *Ibid.*: 433.

⁴⁰⁸ *Ibid.*: 420, 21.

⁴⁰⁹ Hellinger and Hellinger, "The harmonization of wildlife habitat and human livelihood imperatives: Addressing common root causes through a participatory, collaborative and sustainable approach. Preliminary Findings," 33.

⁴¹⁰ Alan E. Boyle and Christine M. Chinkin, *The making of international law*, 1 publ. ed., Foundations of public international law (Oxford: Oxford Univ. Press, 2007). 65.

position.⁴¹¹ The legal recognition of indigenous areas provides some protection for indigenous land rights. Indigenous peoples and local communities need to be taken into account by NGOs when they lobby the establishment of PAs. To safeguard their own credibility they need to respect indigenous peoples' land rights whether or not they have been recognized by the state. WWF committed itself to the rule to support conservation or development activities in indigenous lands only provided that free, prior and informed consent is given.⁴¹² It should be a matter of course that all conservation NGOs respect indigenous rights contained in ILO Convention no. 107, ILO Convention no. 169, the ICERD and UNDRIP and that now make part of customary international law as set out above. With respect to non-indigenous communities, social impact issues need to be addressed too.⁴¹³ The treatment of more recent inhabitants is not equally evident. Back in 1982 at the Third World Parks Congress, delegates agreed to systematically integrate the needs of local people into PA planning. Yet, even now social impact^s are not fully understood and hence cannot be properly integrated.⁴¹⁴ Unfortunately the question of evictions from PAs and the social impact of PAs have not yet been studied systematically. The IUCN Commission on Environmental, Economic and Social Policy launched a global assessment of the social impacts of PAs at the World Conservation Congress in Bangkok. IUCN does not fund this assessment with its budget because some divisions within IUCN were concerned that findings might be used against conservation in general. This attitude is counterproductive. It is necessary to understand social impacts given the interrelatedness of conservation and poverty alleviation.⁴¹⁵

NGOs adopt codes of conduct to ensure that they do not infringe local peoples' rights and that they cooperate where this advances their conservation interest. More specifically, IUCN stresses in its guidelines and principles that indigenous rights and interests are not conflicting with PA management strategies where those peoples have a mind to conserve their land and use them traditionally and their fundamental human rights are accorded. This statement makes wonder what happens if the indigenous and

⁴¹¹ Adams et al., "Biodiversity Conservation and the Eradication of Poverty".

⁴¹² Beltrán and Phillips, eds., *Indigenous and Traditional Peoples and Protected Areas. Principles, Guidelines and Case Studies*, 5.

⁴¹³ Hellinger and Hellinger, "The harmonization of wildlife habitat and human livelihood imperatives: Addressing common root causes through a participatory, collaborative and sustainable approach. Preliminary Findings," 20.

⁴¹⁴ Adams et al., "Biodiversity Conservation and the Eradication of Poverty".

⁴¹⁵ Dan Brockington, Jim Igoe, and Kai Schmidt-Soltau, "Readers' Responses to "A Challenge to Conservationists", " *World Watch Magazine* 18, no. 2 (2005).

traditional peoples' view on the level of desirable conservation does not correspond to that of IUCN or external influences cause a degradation of the ecosystem and make alternative uses necessary to secure their livelihoods. Does the right of definition of the conservation level pertain to IUCN?

The IUCN-World Commission on Protected Areas (IUCN-WCPA) and WWF acknowledge that:

- PAs stand a chance only if the nation and in particular local people see they are worthwhile;
- Respect for rights of indigenous and traditional people inhabitants must be ensured through co-management undertaken in ways compatible with the objective of the PA management plan. Indigenous and traditional people “should be recognised as equal partners in the establishment and management of PAs.”⁴¹⁶ This partnership is not unconditional however. Rather, agreements between conservation institutions, including PA management authorities, and indigenous and traditional people concerning PAs should respect the rights of those people to traditional, sustainable use as well as their responsibility to conserve biodiversity within the PAs.⁴¹⁷
- PA management greatly benefits from indigenous and traditional knowledge, innovations and practices;
- Governments and PA managers should integrate indigenous and traditional tenure, resource use and controls in order to boost conservation.
- Indigenous and traditional peoples should have a full and equitable share of the benefits without neglecting other legitimate stakeholders.⁴¹⁸

The notion of “traditional sustainable use” inheres the risk that traditional is interpreted by IUCN and WWF as a static, never changing use that needs to satisfy IUCN's conception of sustainability. The reference to the use of indigenous knowledge to boost conservation confirms the criticism that indigenous and

⁴¹⁶ Beltrán and Phillips, eds., *Indigenous and Traditional Peoples and Protected Areas. Principles, Guidelines and Case Studies*, IX.

⁴¹⁷ *Ibid.*, X.

⁴¹⁸ *Ibid.*

traditional participation is viewed as a tool to achieve conservation objectives rather than a value in itself.⁴¹⁹

IUCN-WCPA and WWF point out that numerous PAs have been established without the expressed consent of the people who were evicted following the establishment. They also note that this practice is changing thanks to the growing acceptance of indigenous peoples' rights and to pragmatic considerations of effectiveness. They suggest that consultations between local groups and governments to address shortcomings in co-management of PAs might be facilitated by international organizations.⁴²⁰

On the ground, there are some examples of truly cooperatively established and managed PAs. In Mexico there are few PAs such as the Otoch Ma'ax yetel Kooh protected area (known as Punta Laguna) whose creation was initiated by indigenous inhabitants motivated to maintain its natural attractions for tourists. The local NGO Pronatura Peninsula de Yucatan (PPY) participates in the ecoregional plan and collaborated in the inhabitants' initiative leading to the declaration of the reserve in 2002. The inhabitants decided about the place, means and subject of protection while the NGO merely conducted research, improved tourist facilities and facilitated local decision-making and negotiations with state and federal authorities.⁴²¹

WWF has a community forestry program that works on forest management, certification and marketing. TNC field offices work with communities, and WCS's South American program concentrates on community-level conservation, co-management of PAs with indigenous peoples and sustainable community development. More high level financial support is needed for these efforts.⁴²² Whilst WWF US policy statements omit mentioning partnerships with indigenous and traditional peoples for ecoregional conservation, this partnership is highlighted by WWF International.⁴²³

Large NGOs are in a better position than local groups to involve with powerful economic and political actors.⁴²⁴ ENGOs should, also to further their own

⁴¹⁹ Ibid., IX.

⁴²⁰ Ibid., XI.

⁴²¹ Gabriel Ramos-Fernandez, Martha Bonilla, and Eduardo García-Frapolli, "More responses to "A Challenge to Conservationists". Letter to the Editor," *World Watch Magazine* (2005).

⁴²² Mac Chapin, "A Challenge to Conservationists " Ibid. 16, no. 6 (2004): 28.

⁴²³ Ibid.: 30.

⁴²⁴ Hellinger and Hellinger, "The harmonization of wildlife habitat and human livelihood imperatives:

conservation interest, advocate collaboratively the rights and interests of local groups. This means that they support claims of land. Large NGOs can more easily obtain required information and provide funds for awareness-raising.

NGOs should engage more often in the building of local capacity by supporting local NGOs, so indigenous peoples can devise their own workable strategies.⁴²⁵ NGOs can build capacity for resource management, agenda setting and strategic planning by local organizations.⁴²⁶

IV. NGOs as global civil society

NGOs might be representatives of the interests of the global civil society. It is difficult to identify genuinely global environmental values or concerns of humanity.⁴²⁷ NGOs are seen as an instrument for universalizing and unifying concern. They achieve this mostly through the cooperation of local and national NGOs of various countries and international NGOs.⁴²⁸

NGOs base their claim to participate in inter-state negotiations on their position as global civil society. Whether this is a legitimate claim is hotly debated.⁴²⁹ One central question in connection with the legitimacy of NGO involvement – particularly of large international NGO involvement – in lawmaking concerns their representativeness. Who are the constituencies whose interests NGOs represent?

The question of representativeness becomes particularly acute when NGOs are not only considered to be supportive towards states but to be themselves stakeholders as representatives of the diverse citizen interests of the global civil society. Agenda 21 points into this direction when it refers to NGOs as “partners for sustainable development”.⁴³⁰

Addressing common root causes through a participatory, collaborative and sustainable approach. Preliminary Findings," 12.

⁴²⁵ Chapin, "A Challenge to Conservationists ": 21, 22.

⁴²⁶ Hellinger and Hellinger, "The harmonization of wildlife habitat and human livelihood imperatives: Addressing common root causes through a participatory, collaborative and sustainable approach. Preliminary Findings," 14.

⁴²⁷ Andresen and Skjaereth, "Science and Technology. From Agenda Setting to Implementation," 555.

⁴²⁸ Edith Brown Weiss and Harold K. Jacobson, "Strengthening Compliance with International Environmental Accords," in *The politics of global governance : international organizations in an interdependent world* ed. Paul F. Diehl (Boulder, London: Lynne Rienner Publishers, 1997), 328.

⁴²⁹ Boyle and Chinkin, *The making of international law*. 58.

⁴³⁰ Agenda 21, Chapter 27.

NGOs are perceived to fulfil a crucial guardianship role where the interests of the global commons are concerned.⁴³¹ They view themselves as voicing the “planetary collective interests.”⁴³² Also the Brundtland Commission, which was mandated to suggest strategies to achieve sustainable development, recognized the importance of NGOs in informing the public and securing its support, creating political pressure, identifying risks, assessing environmental impacts and designing and implementing measures to deal with them.⁴³³

The NGO role in the development of international environmental law faces opposition. In the 1996 ICJ Nuclear Weapons cases, two judges expressed their concern with respect to the propriety of NGO influence on governments.⁴³⁴

NGOs are accused of only representing their own interests instead of speaking for the peoples of the world as “global civil society.”⁴³⁵ The ECOSOC attempted to address this problem. Pursuant to ECOSOC res. 1996/31 an NGO must “be of recognized standing within the particular field of its competence or of a representative character.”⁴³⁶

It is indeed difficult to ascertain who, apart from their members, NGOs are representing. In a domestic democratic society, NGOs are acting as “single-minded advocates” because they are not perceived to represent the people in a democratic sense. On the international level, however, they see themselves as representatives of all peoples and to stand between the people of the world and transnational institutions.⁴³⁷ NGOs cannot fill in the missing legitimacy caused by states passing on too extensive competences to international institutions.⁴³⁸

⁴³¹ Raustiala, "The "participatory revolution" in international environmental law," 567.

⁴³² Sanderson, "The Future of Conservation," 163.

⁴³³ Brundtland and World Commission on Environment and Development, eds., *Our common future. Brundtland-Report*, Chapter 12, paras.66 et. seq.”

⁴³⁴ Judge Guillaume, "Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, Dissenting Opinion," <http://www.icj-cij.org/docket/files/95/7509.pdf?PHPSESSID=3656c6880b9f7b5a07f52eb20c5e195d>., Judge Oda, "Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, Dissenting opinion," <http://www.icj-cij.org/docket/files/95/7517.pdf?PHPSESSID=3656c6880b9f7b5a07f52eb20c5e195d>. Last visited May 2009.

⁴³⁵ Kenneth Anderson and David Rieff, "Global Civil Society: A Sceptical View' " *Global Civil Society* 5(2004): 26.; Daniel M. Bodansky, "The legitimacy of international governance. A coming challenge for international environmental law?," *The American journal of international law* 93, no. 3 (1999): 619.

⁴³⁶ ECOSOC res. 1006/31 para. 9.

¹¹⁰ Anderson and Rieff, "Global Civil Society: A Sceptical View' ": 29.

⁴³⁸ *Ibid.*: 33, 34.

In spite of these doubts it must be acknowledged that more transparency and inclusiveness in decision-making processes may help to overcome the alleged democratic deficit of international governance.⁴³⁹ The best approximation to an effective representation seems to be the involvement of a wide variety of organizations that advocate consumer or economic interests as well as groups representing environmental protection respectively.⁴⁴⁰ Those positive effects may however be counteracted if the decision-making process is unduly prolonged by NGO participation.⁴⁴¹

NGOs should engage in processes of on-going discussion on values, issues and strategy with their stakeholders (constituencies, partner organizations and beneficiaries). Membership magazines can for instance publish opposing views from members on topical issues and encourage its readership to debate the issues. Thus, board members and senior executives enter into a dialogue with grass-root constituencies. Such a discourse would strengthen the representativeness for civil society.⁴⁴² The World Watch Magazine prompted such an exchange of arguments with respect to the position of WWF, CI and TNC.⁴⁴³

V. Independence of NGOs

The question of representativeness is closely linked to the question whether or not NGOs are truly independent of states, corporations and other donors.⁴⁴⁴ IUCN is a special case as its members are, inter alia, states and government agencies. To be eligible for IUCN membership, organizations must have as one of their central purposes the achievement of IUCN's mission and must be active in nature conservation. The mission is "to influence, encourage and assist societies throughout the world to conserve the integrity and diversity of nature and to ensure that any use of natural resources is equitable and ecologically sustainable."⁴⁴⁵ In practice, government agencies and political/economic groups merely need to apply for

⁴³⁹ Kiss and Shelton, *International environmental law*. 163.; Charnovitz, "Nongovernmental organizations and international law," 365.

⁴⁴⁰ Bingham, *Resolving Environmental Disputes*., p. 98; Elaine Smith, "Danger - Inequality of resources present: Can the environmental mediation process provide the answer?," *Journal of Dispute Resolution* 2(1996): 390, 91.

⁴⁴¹ Charnovitz, "Nongovernmental organizations and international law," 372.

⁴⁴² Jepson, "Governance and accountability of environmental NGOs," 521, 22.

⁴⁴³ Chapin, "A Challenge to Conservationists ": 17.

⁴⁴⁴ Jepson, "Governance and accountability of environmental NGOs," 518.

⁴⁴⁵ IUCN, "WCPA Strategic Plan 2005-2012,"

<http://data.iucn.org/themes/wcpa/pubs/wcpa/strategicplan0512.pdf>.

admission and express their endorsement of IUCN's objectives. States become members upon notifying IUCN of their adhesion to the IUCN Statutes.⁴⁴⁶

With respect to other NGOs the question arises whether NGOs are accountable to their donors for execution of a project on the agreed terms and how this accountability agrees with their representation of civil society. The term "global civil society" is in contrast to the state funding received by NGOs, the state influence on NGO work and the supportive role NGOs have towards states and their organizations.⁴⁴⁷ NGOs have been accused of rejecting to involve in legal actions to in favour of land tenure and the strengthening of indigenous organizations as well as action against companies that undertake harmful oil extraction, mining and logging. NGOs feel that those matters are "too political" or not covered by their mandate. Yet, this failure to act might indicate a lack of independence from governments and corporations.

1. Governmental and corporate funding for NGOs

Development assistance institutions reacted to the merging of conservation and development with support for ENGOs. ENGOs are competing with development NGOs for development funding and largely rely on funds from governments and development agencies.

During the 1980s, WWF never financed more than 50 per cent of its projects through USAID funding to ensure its independence. Subsequently, the organization gave up the 50 per cent rule and the other large NGOs followed this example. In the early 1990s, WWF-US and WWF International even split offices over, amongst other issues, the use by the US-section of World Bank money. Today, an approximate 22 per cent of WWF's revenue derives from governments and assistance agencies.⁴⁴⁸

IUCN receives funding from governments, multilateral agencies and conventions, NGOs, foundations, the private sector and individuals. Donors providing continued core funding for the period 2005–2008 under framework agreements were: Canada, Denmark, France, Italy, the MAVA Foundation, the Netherlands, Norway, Spain, Sweden and Switzerland. Additionally, the US provided annual voluntary contributions. Programme and project funding above 250,000 Swiss francs came from:

⁴⁴⁶ Ibid.

⁴⁴⁷ Tvedt, "Development NGOs: Actors in a Global Civil Society or in a New International Social System?," 371.

⁴⁴⁸ Chapin, "A Challenge to Conservationists ": 24-26.

- the governments of South Africa, UK, Germany, Ghana, Canada, Finland, the Netherlands, Spain, Switzerland and US;
- multilateral agencies and conventions: the Asian Development Bank, CITES, the European Commission, the Global Environment Facility (GEF), the International Timber Trade Organization (ITTO), Ramsar Convention, UNDP, UNEP, UNESCO, the World Bank Group;
- the foundations: Buffet Foundation, Ford Foundation, W.K. Kellogg Foundation;
- the NGOs: CI, Fondation Internationale du Banc d'Arguin, IUCN National Committee of The Netherlands and WWF;
- and the private sector: Holcim, Shell International and Sakhalin Energy Investment Company Ltd.⁴⁴⁹

2. Problematic consequences of dependence on funding

An NGO that gives account to a private donor is likely to be or at least to be seen to be driven by the agendas and worldviews of an elite minority.⁴⁵⁰ ENGO cooperation with government agencies or corporations may increase their influence or it may destroy their credibility.⁴⁵¹ Agencies that support NGOs such as USAID, the World Bank and GEF work closely with governments. NGOs thus lose some of their independence to criticize government activities even when they give concessions to oil companies, miners, loggers and pharmaceutical companies to work on indigenous lands.⁴⁵²

The absence of open advocacy in these cases is understandable considering international conservation organizations' concerns about being seen as partial intruders in a country's sovereignty which would consequently weaken their position with a government.⁴⁵³ Moreover, governmental and multilateral funding is understandably linked with administrative controls as donors are accountable to tax payers. The intermediary position of large NGOs between local groups and donors is

⁴⁴⁹ IUCN, "WCPA Strategic Plan 2005-2012."

⁴⁵⁰ Jepson, "Governance and accountability of environmental NGOs," 520, 21.

⁴⁵¹ Hellinger and Hellinger, "The harmonization of wildlife habitat and human livelihood imperatives: Addressing common root causes through a participatory, collaborative and sustainable approach. Preliminary Findings," 32.

⁴⁵² Chapin, "A Challenge to Conservationists ": 24-26.

⁴⁵³ David Cleary, "More responses to "A Challenge to Conservationists". Letter to the Editor," Ibid. (2005).

advantageous because they are in a position to properly account for their expenditure.⁴⁵⁴ These opposing exigencies are hard or even impossible to reconcile.

There are extreme examples for opportunist counterproductive NGO activities. In the late 1990s the search for new funds made CI cooperate in the Mesoamerican Biological Corridor which was linked to the Puebla-to-Panama Plan (PPP). Hundreds of NGOs all over Central America oppose this program supported by the Inter-American Development Bank (IDB).⁴⁵⁵ The PPP intends to privatize lands and resources to foster industrialization in the area stretching from Puebla, Mexico to Southern Panama. It aims to realize several large development projects such as a network of roads, hydroelectric dams, energy grids, natural gas pipelines, that pose a threat to Central America's forests. NGOs expect from it the displacement of indigenous peoples, destruction of natural lands and increased exportation of cheaply made, mass produced goods.⁴⁵⁶ While 95 per cent of PPP funding is intended for these development projects only five per cent of the budget is directed to conservation and ecotourism. CI was chosen as a partner for the IDB/PPP ecotourism contract. The PPP is feared to worsen landlessness among Q'eqchi' communities and to drive them to invade protected areas for their maintenance.⁴⁵⁷

Large NGOs depend on large amounts of funding. This makes them compete for donations and unable to cooperate with one another.⁴⁵⁸ Yet, this competition is necessary to develop a number of alternative approaches and ideas. It needs to be carried out in a transparent way.⁴⁵⁹

3. Successful cooperation of NGOs and donors

Cooperation of NGOs with governmental funders may have positive outcomes. A successful example of this kind of cooperation is the World Bank and WWF Global Forest Alliance which was created in 1998. Furthermore, CI, the World Bank, the Global Environmental Facility, the MacArthur Foundation and the government of Japan set up the Critical Ecosystems Partnership Fund (CEPF).

⁴⁵⁴ Ibid.

⁴⁵⁵ Miguel Pickard, "Grassroots Protests Force the Mexican Government to Search for a New PPP Strategy," <http://americas.irc-online.org/reports/2003/0303ppp.html>.

⁴⁵⁶ Sara Musfeldt, "Plan Puebla Panama,"

http://www.denjustpeace.org/Featured%20Articles/ppp_news.html.

⁴⁵⁷ Grandia, "More responses to "A Challenge to Conservationists. Letter to the Editor.".

⁴⁵⁸ Mac Chapin, "A Challenge to Conservationists " Ibid. 16, no. 6 (2004): 24-26.

⁴⁵⁹ David Cleary, "More responses to "A Challenge to Conservationists". Letter to the Editor," Ibid. (2005).

Corporations are usually the actors with the strongest impact on biodiversity and relatively minor changes in their behaviour can benefit local people. Complaints about the NGO failure to stand-up to corporations disregard the possibility of their engaging in non-confrontational, private deliberations with corporations which require the maintenance of contact.⁴⁶⁰ In general, in order to ensure successful cooperations of NGOs with states and corporations, transparency about donations and a limitation of funding from one source should be embraced to improve independence.

VI. Accountability of NGOs

The question which or whose interests NGOs represent is inextricably linked with the question of NGO accountability. NGOs are criticised for a democratic deficit which is caused by their hierarchic structure and by civil society's incapacity to control their actions effectively. To ensure trust and legitimacy NGOs need to show publicly that they act in accordance with their principles, such as protecting the global environment, being independent, truthful and cost effective. A crucial requirement within their governance system is an accountability regime.⁴⁶¹

NGOs are not formally democratic, that is, their members do not each have one equal vote. There is internal surveillance of the executive directorates though exercised by the members. In case the NGO disappoints its members or staff they will join a competing organization.⁴⁶² NGOs may defend themselves in pointing out the imperfect accountability of states.⁴⁶³

Growing concerns related to the legitimacy and accountability of NGOs are reflected by the 1996 ECOSOC resolution's provisions on internal NGO governance. The resolution requires "a democratically adopted constitution," "a representative structure" and "appropriate mechanisms of accountability to its members, who shall exercise effective control over its policies and actions through the exercise of voting rights or other appropriate democratic and transparent decision-making processes."⁴⁶⁴

NGOs become themselves aware of their own needs for transparency and disclose more often funding sources, membership and other governance issues. Moreover, they developed the Accountability Charter whose purpose is to identify and define shared

⁴⁶⁰ Kevin Starr, "Readers' Responses to "A Challenge to Conservationists"," Ibid. 18, no. 2.

⁴⁶¹ Jepson, "Governance and accountability of environmental NGOs," 518.

⁴⁶² Spiro, "Non- Governmental Organizations and Civil Society," 788, 89.

⁴⁶³ Ibid., 773.

⁴⁶⁴ ECOSOC res. 1996/31 para. 10, 12.

principles, policies and practices; to enhance transparency and accountability, both internally and externally; to encourage communication with stakeholders; and to improve NGO performance and effectiveness.⁴⁶⁵ The Charter has been signed by seventeen NGOs. Among these are the European Environmental Bureau and Greenpeace International.

Transparency and accountability in the cooperation with local groups are important since a hidden NGO agenda will destroy confidences. Equally important is confidentiality, since the dissemination of information and opinions, a community has imparted in confidence, can put the community at risk in their society.⁴⁶⁶ When large-scale commercial interests exploit an unfair amount of local resources because they have an influence with government or because they defy regulations, and an NGO abstains from backing local group resistance, the NGO will have an accountability and credibility problem.⁴⁶⁷

VII. Evaluation

NGOs have several diverse interests with respect to conservation and development, more specifically, with respect to PAs and trade in endangered species. Due to their questionable representativeness, independence and accountability, claims of NGOs to represent the interest of global civil society need to be met with caution. They help to create transparency and add to policy alternatives but they should not be idealized. They may also be in a position to promote the conservation of biodiversity yet their conservation objectives need to be verified looking at local social-economic realities and scientific data to ensure that they are not determined by idealism. Conservation and development NGOs can also act in the interest of indigenous peoples or local communities. Due to their superior capacities, resources and influence there is the inherent risk that NGOs will impose their interest instead of being supportive facilitators. Accountability can go some way to minimize such risks and to ensure that NGOs can bring benefits for conservation and inhabitants.

⁴⁶⁵ International Non Governmental Organisations' Accountability Charter, December 20, 2005.

⁴⁶⁶ Hellinger and Hellinger, "The harmonization of wildlife habitat and human livelihood imperatives: Addressing common root causes through a participatory, collaborative and sustainable approach. Preliminary Findings," 21.

⁴⁶⁷ *Ibid.*: 22.

D. Corporations

Business sector activities are of central importance to international environmental law. Corporations are directly causing serious environmental degradation and therefore they can prevent and remediate much of the harm. Given the impact international environmental law may have on the business sector, this sector strives to influence the development of international environmental law.

Two basic approaches of business to international environmental law can be identified. Numerous businesses participate in the race to the bottom of environmental standards. They are seeking to minimize costs and to maximize gains, favouring and promoting the absence of any legal restrictions. And they seek to convince states and international institutions that are intent on fostering economic development to let them operate freely. Other corporations emphasize the compatibility of economic and environmental considerations since following or developing the best available technology or the best practice brings profit. Eco-efficiency brings competitive advantages because it helps to win over ecologically conscious consumers.

Business positions are not as straight forward as it seems from the just said. They are not classifiable into either of the two categories of absolute scepticism towards environmental law or favouring environmental law because it is perceived to be supportive of their own environmentally sound strategies. Corporations share a wish for legal certainty which may lead to their favouring environmental regulations as opposed to continued uncertainty. In recent years, European companies more strongly promoted the concept of corporate social responsibility (CSR) than US corporations. Attitudes vary significantly across the wide range of corporations, stretching from large, transnational corporations, national corporations of all sizes to business-initiated non-governmental organizations.⁴⁶⁸

Some developments in the business sector indicate that biodiversity considerations are slowly catching on. The International Chamber of Commerce (ICC) established a CBD task force in January 2006.⁴⁶⁹ In March 2007, the World Business Council for Sustainable Development (WBCSD) made the issue of ecosystems one of four “focus areas” of its work with a view to “assess, measure and value the ecosystem impacts,

⁴⁶⁸ Steven Ratner, "Business," in *The Oxford Handbook of International Environmental Law*, ed. Daniel Bodansky, Jutta Brunnée, and Ellen Hey (Oxford: Oxford University Press, 2007), 811.

⁴⁶⁹ CoP CBD "Cooperation with other conventions, international organizations and initiatives and engagement of stakeholders. Addendum: Engagement of Business," <http://www.cbd.int/doc/meetings/cop/cop-09/official/cop-09-21-add1-en.pdf>. para. 23

dependence and assets of member companies and broader business; reduce business impacts on ecosystems by scaling up mitigation, offsetting or finding sustainable use solutions; explore and promote new business opportunities associated with sustainable management and stewardship of ecosystems and the creation of markets and payments for ecosystem services; advocate for ecosystem governance and policy frameworks that include flexible, innovative market orientated approaches; promote the actions of leading member companies in addressing their ecosystems impacts and mobilizing their ecosystem assets.”⁴⁷⁰

The CBD itself states that most companies remain unaware of the opportunities associated with sound biodiversity management.⁴⁷¹ However, various companies, particularly pharmaceutical companies, have concluded agreements with developing states or NGOs permitting the companies to harvest specific specimens for research while providing benefits to local actors through royalties, scientific training and support for research.⁴⁷²

E. Evaluation

The present Chapter outlined the interests which underlie the actions of states, indigenous peoples, non-indigenous inhabitants of biologically diverse regions, various types of NGOs and corporations regarding biodiversity conservation and development in the context of PAs and trade in endangered species. The interests of inhabitants of biodiversity rich regions need, for practical reasons, to be reflected by strategies concerning biodiversity conservation and development. This is because a failure to correspond to their interests would render any approach fruitless. Indigenous peoples have a legal position set forth in ILO Conventions No. 107 and 169, ICERD, UNDRIP and customary international law. States have acknowledged the indigenous interest in autonomy over their lands and resources which is inseparable from their identity, culture and spiritual needs, by way of the adoption of the aforementioned legal sources. Other dwellers’ interest has not been acknowledged by any specific legal instruments, yet their livelihoods directly depend on the biological resources surrounding them and those resources depend equally on their action.

⁴⁷⁰ Ibid., para. 24.

⁴⁷¹ Ibid., para.31.

⁴⁷² Ratner, "Business," 822.

The interests of governments vary considerably. In Europe, where nature untouched by human influence is rare, PA plans tend to be based on the interests of local people and tend to regulate human use of the PA rather than to exclude it. Conservation is meant to serve human welfare. By contrast, in North America preservationist tendencies prevail which strive to retain pristine nature unaltered by human traces. Third world countries too establish PAs. Yet, their interest in biodiversity is marked by the significant link that biological resources have to poverty alleviation and development in general. Biodiversity conservation through PAs and trade controls is a means to advance development rather than an end in itself.

The difference of interests concerning trade in endangered species is for once owed to the fact that most endangered species originate from the South and are exported to the North. The US and European countries tend to be in favour of trade controls while some Southern states voice their conviction that trade is essential in the maintenance of viable population levels of some species. This issue remains hotly debated. The South makes a point of emphasizing the national sovereignty over biological resources and to reject all foreign claims on such resource which are made, for instance, through the attempt of labelling them to be of concern of humankind. The current legal situation reflects the Southern interests. These conclusions are simplifications, yet they depict some fundamental differences in the interests of states from the various regions.

A clear determination of the interests of NGOs with respect to PAs and trade in endangered species is just as difficult to come by. Numerous large international as well as small and medium size national NGOs perceive themselves, and are sometimes perceived from outside, as advocates of biodiversity. They undertake advocacy campaigns aimed to shift the conduct of states and corporations in matters relating to biodiversity conservation. The World Park Congresses organized by IUCN once every ten years since 1962 are notable advocacy events with high visibility whose outcomes give an overview of the evolution of approaches in advocacy for PAs. However, IUCN is far from being the only NGO that is active in the field of conservation. A number of conservation NGOs have developed their particular advocacy approaches which, in recent years, constitute large scale approaches that select areas for prioritized protection. The inherent risk of such approaches is a detachment of NGOs from the situation on the ground. On the other hand, the

insufficiency of NGO resources to work everywhere at once understandably prompts them to adopt broad concepts that are based on empirical data. The value of the scientific base of these approaches is controversial and needs to be improved. It is far from accepted that NGOs are disinterested guardians of biodiversity that scrupulously follow reliable scientific indicators. Their position as advocates of local interests, which is generally claimed by development NGOs but also conservation NGOs, is just as doubtful. For once, the lack of economic expertise encountered in conservation NGOs as well as the similar lack of environmental expertise in development NGOs makes them unable to develop all encompassing strategies. Adequate cooperation of organizations from the different sectors would go some way towards alleviating this shortcoming. Likewise an effective cooperation of NGOs from all regions of the world would help to address the power imbalance which exists between Northern dominated NGOs and their counterparts from the South. Such cooperation would help to avoid frictions and suspicions. NGOs have become aware of this. And they have become conscious of the necessity to act in accordance with indigenous rights and local interests. In order to be successful they will have to act accordingly.

The NGO contention to represent the global civil society remains an elusive concept. While they are not in a position to address democratic deficits in international treaties or within states, their achievements in awareness raising and the creation of transparency are considerable. They make valuable contributions to conservation and development efforts even though they largely depend on government funding which may put their independence at risk. Also the incomplete accountability does not delegitimize them all together.

Finally, corporations are stakeholders in the context of conservation and development for the simple fact that their conduct can seriously harm biodiversity or obstruct development strategies while a shift in their operations can benefit conservation and development efforts. With the increase in ecologically and socially conscious consumers, environmentally sound business practices may be a competitive advantage. However, the concern remains that corporations' primary interest is guided by short-term economic profit which will certainly be in stark contrast to the conservation and development interests set out above.

States, indigenous peoples, other inhabitants of biologically diverse regions, NGOs of various types and sizes and corporations have their very own and specific interests

with respect to conservation and development, more specifically, to PAs and trade in endangered species. They are thus stakeholders and the next chapter will look into the possibility and desirability to have them participate in the creation of international instruments regulating international trade in endangered species or land management including within PAs.

Chapter 3: Do integrative negotiations take place?

This chapter introduces some aspects of negotiation theory that may be of interest in the context of multilateral negotiations on conservation and sustainable use issues. It analyses to what extent experiences gained in negotiations and reflected in negotiation theory are useful or have a potential to be useful in such intergovernmental negotiations. Negotiation theory has developed the concept of mutual gains negotiation also referred to as integrative negotiation. This negotiation style is acknowledged as the most effective method to reach mutual gains solutions. This Chapter will therefore discuss the components of integrative negotiation and their significance and usefulness in multilateral negotiations aimed at the creation of a biodiversity-related convention.

A. Two options to solve conflicts of interest

How can stakeholders go about to solve the differences mentioned in Chapter 2 concerning the establishment of protected areas (PAs) and the trading in endangered species? When differences between states arise in a particular case, have two different options to solve their differences. As a result of the equality of states both these options reflect the free will of all states involved. Either the will is reflected in a direct way, when parties agree in a treaty, or in an indirect way, when parties agree to have a third party settle the difference with a binding decision.⁴⁷³ Proceedings that may be used to attain the resolution are negotiation, inquiry, mediation, conciliation, arbitration and judicial settlement, as listed in Article 33 UN-Charter.⁴⁷⁴ However, this thesis deals with differences of interest of a general nature rather than in a particular case. In order to accommodate differing interests states negotiate treaties. The just mentioned proceedings that exist in addition to negotiation are not relevant to this purpose. The experience gained from mediation might nevertheless be transferred to the process of multilateral treaty negotiations in order to facilitate them through the introduction of third parties that participate in negotiations in addition to the states.

Negotiation, the proceeding devoid of any third party intervention, is the most prevalent means for states to achieve a solution to their differences.⁴⁷⁵ It is not only

⁴⁷³ Tullio Treves, *Diritto internazionale. Problemi fondamentali ; continuazione del "Diritto internazionale" di Mario Giuliano*, Nuova del Diritto internazionale, parte generale di Mario Giuliano, Tullio Scovazzi, Tullio Treves ed. (Milano: Giuffrè, 2005). 581.

⁴⁷⁴ Ibid. 582, 83.

⁴⁷⁵ Ibid. 585, 86.

useful to end disputes but may also be a means for preventing the occurrence of such disputes. The necessity to prevent disputes or to minimize their negative repercussions has traditionally attracted less attention from lawyers than their resolution. This is changing now and rules for inter-state consultations and preventive notifications as well as institutionalised cooperation and continued negotiations are becoming more and more widely used, especially in the environmental field.⁴⁷⁶ In its section entitled: “Disputes in the field of sustainable development” Chapter 39.9 of Agenda 21 encourages states to extend and increase the effectiveness of dispute avoidance and settlement techniques. In particular this encompasses “mechanisms and procedures for the exchange of data and information, notification and consultation regarding situations that might lead to disputes with other States in the field of sustainable development and for effective peaceful means of dispute settlement.”

States negotiate themselves, with the help of international organizations or treaty regimes, the framework of rules within which they cooperate. This chapter will focus on the negotiations undertaken to establish biodiversity-related global treaties. Multilateral environmental agreements (MEAs) are often one-sidedly viewed as cooperative actions to address a shared problem such as the loss of biodiversity. This view leaves aside that MEAs first of all need to integrate varying interests in order to amount to mutual gains solutions. The varying state interests, as set forth in Chapter 2, need to be integrated as well as indigenous peoples rights and interests. Conservation NGOs, development NGOs and corporations may have a legitimate stake in negotiations. The present chapter will scrutinize the role played by those actors within negotiations.

A clear demarcation between the other proceedings, which all include some form of third party involvement, is not always possible.⁴⁷⁷ When the origin of a dispute is mainly a differing view about facts, parties can make use of an inquiry/fact-finding undertaken by a third party, possibly in the form of a commission.⁴⁷⁸

Mediation is an assisted form of negotiation. Chapter 4 will seek to ascertain whether the concept of mediation may be useful in the context of biodiversity conservation and development. Definitions of the term conciliation differ somewhat. They do however

⁴⁷⁶ Ibid. 579.

⁴⁷⁷ Ibid. 587, 88.

⁴⁷⁸ Ibid. 589-91.

overlap with what is here understood as mediation which makes it superfluous to discuss conciliation separately.⁴⁷⁹

Arbitration is a proceeding in which the parties to the dispute choose the arbitrator and agree to consider themselves bound by his decision.⁴⁸⁰ The main difference to a judicial proceeding is that international courts and tribunals are preconstituted, not chosen by the parties. Hence, the parties to an arbitration or adjudication relinquish their problem-solving responsibility to an outsider. The thesis focuses on proceedings which aim at achieving a general, multilateral agreement of the parties. Arbitration and adjudication are not discussed since their objective is the solution of a particular case.

The present chapter examines the process of negotiating MEAs. It seeks to determine which conditions need to be fulfilled to make negotiations effective. Negotiations are effective when they bring forward as far as possible the chances to reach a mutual gains solution for all states, for indigenous peoples and for those who are stakeholders for reasons of justice or practicability. Case studies show that negotiations following a problem solving approach lead to integrative outcomes.⁴⁸¹ This thesis works with this hypothesis and will therefore examine the integrativeness/problem solving orientation of negotiation processes.

B. Preparation of negotiations

I. Initiation of negotiations

1. Initiators define the topic to be negotiated

Before negotiations can commence someone has to suggest to states to come together and negotiate.⁴⁸² The decision to organize multilateral negotiations is usually taken by a competent international organization (IO) and initiated by one or more of its member states.⁴⁸³ In the case of the CBD the UNEP Governing Council initiated negotiations. In 1988 it mandated an Ad Hoc Working Group of Experts on Biological Diversity to explore the need for a convention on biological diversity. In

⁴⁷⁹ Ibid. 592.

⁴⁸⁰ Ibid. 596-601.

⁴⁸¹ Lynn M. Wagner, *Problem-solving and bargaining in international negotiations*, International negotiation series ; 5 (Leiden: Nijhoff, 2008). 143, 44.

⁴⁸² Susskind and Cruikshank, *Breaking the Impasse*. 94.

⁴⁸³ Thomas Gehring, "Treaty-Making and Treaty Evolution," in *The Oxford Handbook of International Environmental Law*, ed. Daniel Bodansky, Jutta Brunnée, and Ellen Hey (Oxford: Oxford University Press, 2007), 472.

May 1989 the Ad Hoc Working Group of Technical and Legal Experts, which came to be known as the Intergovernmental Negotiating Committee, commenced drafting a convention on the conservation and sustainable use of biodiversity, building on preparations by the World Conservation Union (IUCN).⁴⁸⁴

Countries that bring a topic to the international attention usually define it and more strongly influence the course of negotiations.⁴⁸⁵ For each of the biodiversity-related conventions Northern countries have taken the initiative to negotiate the agreements. Developing countries should thus more often play the initiator role. Regional meetings of developing countries may be the suitable place to identify aspects to be brought to the international community's attention.⁴⁸⁶

When the subject of a convention is defined as trade or finance issues developing countries are usually at a disadvantage. They largely depend on assistance for access to technology, markets, investment and aid. When an agreement is based on moral arguments for aid, to alleviate the poverty and advance the development of developing states, they are at the mercy of the industrialized states' generosity.

The UNCCD is the only multilateral convention under consideration which was primarily promoted by developing countries. Land degradation is not a priority issue for donor governments, that is, the North does not fully acknowledge the extent to which land degradation is a phenomenon of global significance. While the African effort was successful in that it resulted in a convention, UNCCD faces the same difficulties in agreeing on financial matters as other conventions on development cooperation. The initiation of a convention by the less powerful negotiators does not mean that their interests are met. Yet, developing states can establish a more symmetric relationship when they initiate negotiations in an area where they have an economic position or they define the debate around environmental issues. The plentiful possession of biological resources, which they have because of their lack of industrialization and for climatic reasons, and the global significance of biodiversity

⁴⁸⁴ Matz-Lück, "Biological Diversity, International Protection." United Nations / Environment Programme, *Training manual on international environmental law* (Nairobi ; Stevenage, Hertfordshire, UK: United Nations Environment Programme, 2006). Chapter 15, para.12.

⁴⁸⁵ Gehring, "Treaty-Making and Treaty Evolution," 470.

⁴⁸⁶ Rober Blair, "Addressing North-South Power Asymmetry in International Environmental Negotiations," in *Reforming the international environmental treaty-making system*, ed. Kevin Gallagher, et al., *Papers on international environmental negotiation* (Cambridge, MA: PON Books, 2001), 227.

can place them in such a strong economic position.⁴⁸⁷ Developed states are interested in biological resource products and ecological processes, for example, tropical forests as carbon sinks.⁴⁸⁸

During the negotiations to the CBD developing states had a comparatively strong position thanks to their possession of the preponderance of components of biodiversity. They succeeded in incorporating the equitable sharing of benefits arising from the use of genetic resources as the third objective into the convention.⁴⁸⁹ Their objectives were a special system of intellectual property rights, compensations for access to and use of their genetic resources and a facilitation of access to biotechnology developed from these resources. A group of industrialized states opposed in particular the loosening of intellectual property rights and prevented a consolidated intellectual property rights regime.⁴⁹⁰ Thus, developing states achieved some but not all of their priorities and so did industrialized states.

In the case of CITES, negotiations were initiated and dominated by Northern consumer countries – Western European countries, the US, Canada and Australia. Southern states did not at first make use of their potential strength as hosts of the majority of species. Neither do Southern NGOs seem to have played any role. Consequently, the convention does not consider the needs, preferences and capabilities of exporting countries. In the early days of CITES IUCN provided Secretariat services to the convention. This reliance on IUCN points to the fact that the dominant negotiators saw IUCN's position with respect to endangered species as largely equal to their own.⁴⁹¹

Not until the mid-1980s, conflicts of interests started to come to the surface as developing countries became aware that strict trade restrictions ran counter to their interests and began to argue for resuming limited trade. It became apparent that funds for capacity building in the South were needed. The North proved to be reluctant to

⁴⁸⁷ Shelton, "Equity," 652.

⁴⁸⁸ *Ibid.*, 650.

⁴⁸⁹ Désirée M. MacGraw, "The CBD - Key characteristics and implications for implementation," *Review of European Community & international environmental law* 11, no. 1 (2002): 18, 19.

⁴⁹⁰ United Nations / Environment Programme, *Training manual on international environmental law*. Chapter 15, para.13, 14.

⁴⁹¹ Maaria Curlier and Steinar Andresen, "International Trade in Endangered Species: The CITES Regime," in *Environmental Regime Effectiveness. Confronting Theory with Evidence*, ed. Edward L. Miles (Cambridge, Massachusetts: MIT Press, 2002), 366.

equip the regime and the developing states with the resources needed.⁴⁹² At the same time some importing countries too realized that strict restrictions were not in line with their interest.⁴⁹³

The various range states have gradually become more unified. While they have divergent attitudes on some points they jointly try to safeguard their sovereignty over their species. Open disagreement will likely continue to occur in the future.⁴⁹⁴ This demonstrates that initiators of an agreement determine largely its focus. Under treaty regimes such as CITES it is however possible to rectify existing imbalances later on. This phenomenon will be discussed more in detail in Chapter 4.

2. Environmental law concepts rendering the relationship of negotiating states more symmetric

The equality of states requires rules to treat states in an identical way. For the sake of equity unequal treatment may be called for.⁴⁹⁵ This means to treat like alike and unlike differently with the aim of fostering true equality.⁴⁹⁶ Despite the obvious needs and claims of the least developed states, international law has been slow in taking up the need for distributive justice.⁴⁹⁷ Equity considerations are arguably more strongly present in international environmental law than in any other area of international law. The Rio Declaration for example contains three elements of importance to obtain equity: need, responsibility and capacity.⁴⁹⁸ The concept of equity helps negotiators to resolve their conflicts of interests.⁴⁹⁹

International environmental law provides moral and arguably legal requirements for compensatory payments of the industrialized world to developing states. Firstly, due to the overexploitation of natural resources financial mechanisms contained within regimes provide for a transfer of financial resources to developing states or states with economies in transition that have not contributed to the depletion of resources, for instance, biodiversity, yet are affected by the harm done. Arguably, a legal obligation to grant financial assistance flows from the principle of common but differentiated responsibilities, this is however highly controversial, as is the existence of a right to

⁴⁹² Ibid., 372.

⁴⁹³ Ibid., 367.

⁴⁹⁴ Ibid., 373.

⁴⁹⁵ Shelton, "Equity," 645.

⁴⁹⁶ Ibid., 647.

⁴⁹⁷ Ibid., 649.

⁴⁹⁸ Ibid., 651.

⁴⁹⁹ Ibid., 653.

development.⁵⁰⁰ The principle of common but differentiated responsibilities was formulated by UNCED. The principle introduced the developed states' obligation to compensate for environmental damage they have caused. Consequently, they now provide financial resources for sustainable development and environmental capacity building.⁵⁰¹ Financial assistance based on the principle of common but differentiated responsibilities play a role with respect to the global commons, such as the climate and the ozone layer. Conversely, the loss of biodiversity and the degradation of ecosystems are attributed rather to the actions within that ecosystem or in close proximity thereto, which means that the state whose ecosystems are concerned is itself responsible. Nevertheless, developed states have to a large extent lost their varied ecosystems and other components of biodiversity in the course of industrialization. Biodiversity is also of common concern of humankind⁵⁰² and benefits all humans. The transfer of financial assistance is therefore not foreign to the establishment of PAs nor to other conservation measures. The concept of common concern of humankind shows that states acknowledge that addressing the loss of biodiversity is beneficial to humankind. The concept shows that states consider aspects of equity in international environmental relations and they are aware that concerns of humankind must reflect both the extent to which any particular state contributes to the problem and its capacity to tackle it. The concept is manifested in differentiated obligations where timelines or degrees are concerned. Treaties also oblige developed states to provide technical and financial assistance and even make developing country implementation conditional upon receipt of such assistance.⁵⁰³

The second argument reinforcing the Southern negotiation position is that the South consents to restrictions which impact upon their development perspectives and therefore they are entitled to compensations by the community of states benefitting from such restrictions. Developing states see environmental restrictions as barriers for the development they aspire and that industrialized countries have enjoyed without limitations. In the context of PAs, the principle of common but differentiated responsibilities may mean that a treaty provides for compensation to developing states that place areas under protection, with a view to conserving biological diversity of

⁵⁰⁰ Matz, "Protected areas in international nature conservation law. Can states obtain compensation for their establishment?," 706.

⁵⁰¹ *Ibid.*: 707.

⁵⁰² Preamble CBD.

⁵⁰³ Andresen and Skjaereth, "Science and Technology. From Agenda Setting to Implementation," 568.

global interest, and therefore face developmental disadvantages since they are kept from exploiting natural resources, to undertake agriculture or forestry.⁵⁰⁴

A reference to a global environmental issue increases developing states' moral authority.⁵⁰⁵ It gives legitimacy and therefore strength to their position.⁵⁰⁶ Thus, the principle of common but differentiated responsibility renders the negotiations more symmetrical. The section on ways to achieve mutual gain agreements will analyze compensation mechanisms more in detail.

The Madrid Declaration, the outcome of the ministerial segment of the eighth meeting of UNCCD CoP (CoP-8), calls for stronger political will,⁵⁰⁷ since fully implementing the Convention is necessary to secure water and food for the poorest and most vulnerable people. The declaration gives force to this demand stating that desertification is a global problem directly or indirectly affecting the whole of humankind.⁵⁰⁸ One step towards clarifying this global responsibility might be to recognize topsoil as a global public good.⁵⁰⁹ The connection of biodiversity conservation in drylands and land degradation points to the industrialized world's responsibility even in the absence of this step.

Some authors fear that the increased attention to the issues of financial assistance, technology transfer and national sovereignty distract the attention away from the main point – the environmental problem on the agenda.⁵¹⁰ This attitude overlooks the necessity to find a mutual gains solution in order to have a successful agreement.

II. Negotiators and other participants in negotiation

It needs to be figured out which groups should be represented in negotiations and who should be their spokespeople. In international negotiations all states can of course participate in global negotiations or negotiations of their region. States have lost some of their exclusive position in negotiations, while NGOs, scientists, the media and

⁵⁰⁴ Principle 7 Rio Declaration.

⁵⁰⁵ Blair, "Addressing North-South Power Asymmetry in International Environmental Negotiations," 219.

⁵⁰⁶ *Ibid.*, 225.

⁵⁰⁷ David Fisk, "Environmental Science and environmental law," *Journal of Environmental Law* 10(1998): para.4.

⁵⁰⁸ *Ibid.*, para. 1.

⁵⁰⁹ Johan L Garrison, "The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Debate Over Sustainable Use," *Pace Environmental Law Review* 12 (1994): para.15.

⁵¹⁰ Pamela S. Chasek, *Earth negotiations. Analyzing thirty years of environmental diplomacy* (Tokyo: United Nations University Press, 2001). 225.

corporations are playing an ever increasing role.⁵¹¹ There is a growth in non-official Track 2 diplomacy of people-to-people meetings, of dialogue groups and of problem-solving workshops.⁵¹² In intergovernmental environmental negotiations ecological or business lobbies engage actively and do not content themselves with activities on the national level.⁵¹³ The involvement of all relevant stakeholders in negotiations is important to avoid resentments against the agreement. Frequently, there cannot be established one right answer to complex natural resource questions such as those concerning PAs. The closest approximation to a right answer is an agreement concluded with the involvement of all relevant stakeholders which takes into account environmental interests as well as economic and social development interests.⁵¹⁴

In accordance with constructivist and interactional theories this thesis argues that legal norms have the greatest effect when a wide variety of participants have constructed them. When legal norms are perceived to be legitimate, because they are in line with the social practice and aspirations, they will be complied with. This underpins the incapacity of law to directly determine action simply because it has been declared.⁵¹⁵ The interactional law theory views law as an incomplete construction and a legal system as the result of continued efforts. Law's success depends on "the mutual generative activity and acceptance" and the energy, insight, creativity and intelligence of both, the governing and the governed.⁵¹⁶ This argumentation confirms the inclusion of all stakeholders into negotiations which is advocated by this thesis. Pursuant to the interactional law theory, laws need to correspond to social practices and conventions because addressees will reason with a norm before applying it. Stable patterns of expectation and shared understandings are therefore required, both amongst the governed and between the governed and the governing.⁵¹⁷ In this context, the term "shared understanding" means that most of the parties can expect that most of the others will understand the relevant rules approximately the way they do themselves. Shared expectations means that parties can be generally relied upon to comply with

⁵¹¹ Meerts, "The Changing Nature of Diplomatic Negotiation," 90.

⁵¹² Louis Kriesberg, "Formal and Quasi-Mediators in International Disputes: An Exploratory," *Journal of Peace Research* 28, no. 1 (1991): 23, 24.

⁵¹³ Winfried Lang, "Negotiation on the Environment," in *International negotiation. Analysis, approaches, issues*, ed. Viktor A. Kremenuk (San Francisco: Jossey-Bass, 1991), 355.

⁵¹⁴ Cantrill, Potter, and Stephenson, "Protected areas and regional sustainability. Surveying decision makers in the lake superior basin," 45.

⁵¹⁵ Brunnée and Toope, "International law and constructivism: elements of an interactional theory of international law," 74.

⁵¹⁶ *Ibid.*: 46,48.

⁵¹⁷ *Ibid.*: 49, 50.; Young, *Governance in World Affairs*. 122.

the rules. Expectations and understandings are stable when they are founded on patterns of social practice.⁵¹⁸

Both approaches assume that shared understandings or behavioural expectations can develop across cultures, through institutionalization and learning. Even though actors are influenced by their culture they acknowledge that they will fail to persuade others to adopt the same worldview.⁵¹⁹

The interactional legal theory operates with the concept of an “internal morality” of the law, which is defined as a condition that needs to be fulfilled to enable human beings to pursue their purposes through law. If this internal morality, this condition, is not met, then the process of law creation is fundamentally flawed and thus illegitimate.⁵²⁰ This thesis analyses the connection of negotiation procedure and negotiation outcome in terms of participation and accommodation of all relevant interests respectively. The thesis thus demonstrates corollaries to the interactional law theory.

1. States

In concordance with the institutionalist theory this thesis views states as the main actors – the main negotiators in the international system. The thesis does, however, deviate from institutionalist thinking with regard to the desirable number of participating states in such negotiations. The institutionalist and constructivist approaches concerning the optimal level of state participation in treaty negotiations diverge significantly. Institutionalists favour cooperation of only the most committed states because they fear that the others would obstruct cooperation and complicate negotiations.⁵²¹ The thesis follows the constructivist approach in favouring wide state participation. Participation by a large number of states may mean that agreement can be reached only on a limited number of agenda items. At the same time this ensures that all participating states are under the socializing influence of the regime and the cooperation is likely to deepen gradually. States may reconsider their preferences and collectively follow the scientific advice given by expert bodies that operate under the regime. This socializing effect is stronger when there is a wide membership.

⁵¹⁸ Brunnée and Toope, "International law and constructivism: elements of an interactional theory of international law," 50.

⁵¹⁹ *Ibid.*: 69.

⁵²⁰ *Ibid.*: 53.

⁵²¹ Danish, "International Relations Theory," 223.

On the other hand, it may prove an effective approach that a limited group of progressive states start to cooperate under an agreement without the participation of key states whose position is strongly divergent. The agreement may impact on interests of non-parties since NGO activities and media coverage may target states and pressure them into participating.⁵²²

a) *Reasons for multilateral action or unilateral action*

Institutionalists presume that powerful states dominate the international arena. Even the most powerful states will, however, relinquish some of their autonomy and cooperate multilaterally because this cooperation may be advantageous to them. A multilateral regulation may help to advance their interests more effectively than unlimited freedom and unilateral action for all states.⁵²³ Institutionalists acknowledge that states are asymmetric and that their interests may vary strongly from one another. Yet, cooperation within regimes can be preferable for any state – developing state just the same as industrialized state – to unilateral action.⁵²⁴ When governments think they can achieve their goals through unilateral action and there is no mutual dependence of any kind, a successful negotiation is very unlikely.⁵²⁵ Participating and complying with an agreement need to be more attractive than unilateral action. From an institutionalist perspective this is usually the case when parties are eager to avoid further costs and other negative impacts on themselves, or a settlement of differences seems to bring significant benefits.⁵²⁶ Calculating potential gains of unilateral action compared to gains of negotiations is a complex task especially with respect to environmental values and other intangibles since they are extremely difficult to appraise.⁵²⁷ It is not necessarily the quantitative estimation of benefits that is decisive. For example the US favoured the adoption of CITES since it was interested in conservation and in reducing trade in endangered species.⁵²⁸ Consequently, it had a strong interest to address the issue of wildlife trade multilaterally. The purpose for

⁵²² Downs, Danish, and Barsoom, "The transformational model of international regime design: triumph of hope or experience?," 496, 97.

⁵²³ Barrett, "An Economic Theory of International Environmental Law," 241.

⁵²⁴ Ronald B. Mitchell, "Compliance Theory. Compliance, Effectiveness and Behaviour Changes in International Environmental Law," *Ibid.* , 906.

⁵²⁵ Jacob Bercovitch, "Introduction: Putting Mediation in Context," in *Studies in international mediation. Essays in honor of Jeffrey Z. Rubin*, ed. Jacob Bercovitch and Jeffrey Z. Rubin (Basingstoke: Palgrave Macmillan, 2002), 19.; Susskind and Cruikshank, *Breaking the Impasse*. 81.

⁵²⁶ Pruitt, "Mediator Behavior and Success in Mediation," 48.; Bercovitch, "Introduction: Putting Mediation in Context," 8.; Bingham, *Resolving Environmental Disputes*. 108.

⁵²⁷ Susskind and Cruikshank, *Breaking the Impasse*. 83.

⁵²⁸ Barrett, "An Economic Theory of International Environmental Law," 239-41.

states to internationally coordinate trade in endangered species was not only to avoid aggravation of the ecological problem of species extinction, but also to prevent a penalization of countries with stricter ecological legislation.⁵²⁹

States with an interest in conservation will aim to address this issue internationally because they are aware that concerted effort is needed to tackle this issue. Additionally, international trade law limits the permissibility of unilateral conservation measures. Even where states initially had no interest to create an MEA they may well choose to participate due to the social forces that influence state behaviour. States are parts of the international social structure and not completely independent. They are prompted to cooperate by more than just rational utility arguments. The socializing effect of the international community of states and in particular of MEAs will be examined more in detail in Chapter 4.

States may opt for unilateral action when they deem it in their best interest because they are neither concerned about conservation nor about development cooperation nor their reputation within the community of states when they refuse to cooperate on these issues. When a state prefers not to join in the efforts to protect biological diversity it obstructs the efforts while benefiting from commitments of other states. Some authors lament that international law has not yet developed mechanisms for an effective administration of components of the environment which are the concern of the world community.⁵³⁰ Agreements use some incentives for cooperation as will be seen below.

aa) Incompatibility of unilateral trade restrictions with international trade law

States with an interest to advance conservation will be deterred from utilizing unilateral trade restrictions, for instance, the prohibition of importing endangered species, because such unilateral action may be in conflict with international trade law. Some states have adopted national trade restrictions to achieve higher environmental standards. Those may be in the form of requirements for eco-labelling, import bans and import quotas.⁵³¹ The US Endangered Species Act imposes unilateral import restrictions. Under this act the responsible authority, the Fish and Wildlife Service, is mandated to issue import permits for specimens of species that are listed among the

⁵²⁹ Sand, "Whither CITES? The evolution of a treaty regime in the borderland of trade and environment," 31.

⁵³⁰ Rüdiger Wolfrum, "Means of ensuring compliance with and enforcement of international environmental law," *Recueil des cours / Académie de Droit International de La Haye* 272(1999): 103.

⁵³¹ *Ibid.*: 62.

legislation's endangered species. The authority does not make use of this possibility and a 2003 government proposal to change the practice so as to licence the import of "well-managed" species to provide an incentive for their maintenance remains controversial.⁵³²

Austria took unilateral action too and prescribed eco-labelling for imported tropical timber and derivative products. This initiative was challenged in the General Agreement on Tariffs and Trade (GATT) Council and Austria changed it consequently.⁵³³

The objective of the GATT is to obtain the reduction of regulatory and other trade barriers and economic distortions through the prohibition or at least the limitation of national measures which exclude imports or impose competitive disadvantages on them.⁵³⁴ Import restrictions or bans represent "prohibitions or restrictions" within the meaning of Article XI (1).⁵³⁵

A trade restriction within the scope of Article XI (1) GATT may be justified when it is introduced to directly or indirectly protect the environment. Article XX GATT provides that states may take measures to protect human, animal, plant life, health or safety⁵³⁶ and to conserve exhaustible natural resources.⁵³⁷ The term "exhaustible natural resources" is widely construed so as to cover environmentally protective trade restrictions. Renewable resources may also fall within the scope of the definition.⁵³⁸ Components of the environment that are of concern to the community of states can be characterized as an exhaustible natural resource.⁵³⁹ World Trade Organization (WTO) members are to a large extent free to choose their environmental goals and rules as long as the most-favoured-nation principle is respected and the rules are not applied in an arbitrary or unjustifiably discriminatory or disproportional way. The clauses have to be construed so as to ensure that the object and purpose of the GATT 1994 and of the WTO Agreement are not frustrated or defeated. The WTO Agreement favours

⁵³² Black, "The High Cost of Conservation: Can Enhancement-of-Survival Permits Save Foreign Endangered Species?," 397.

⁵³³ Wolfrum, "Means of ensuring compliance with and enforcement of international environmental law," 65.

⁵³⁴ *Ibid.*: 66.

⁵³⁵ *Ibid.*: 69.

⁵³⁶ Art XX subpara. (b) GATT

⁵³⁷ Art. XX subpara. (g) GATT

⁵³⁸ Wolfrum, "Means of ensuring compliance with and enforcement of international environmental law," 72.

⁵³⁹ *Ibid.*: 73.

multilateral approaches to deal with trade issues. GATT aims to make future planning of trade possible. Planning is impossible if members can unilaterally impose import conditions.

The WTO panels approved the introduction of trade restrictions for environmental purposes provided that such restrictions do not pose risks to the multilateral trading system. National restrictions are more likely to cause such a jeopardy than those based on international law.⁵⁴⁰

Purely national trade restrictions conflict with object and purpose of the multilateral trading system since they compel exporting states to comply with varying policy standards. Individual states cannot rely on the justification that they act in the interest of the world community. Only the community of states itself is competent to identify its concerns and adopt protective strategies. In such an agreement all groups of states need to be involved particularly those states which face the disadvantages in connection with the environmental policies.

International law based restrictions do not jeopardize the object and purpose of the multilateral trade system.⁵⁴¹ They are predictable and avoid the establishment of conflicting limitations. The UNCED developed the corresponding principle that common concerns are to be dealt with international agreements.⁵⁴² International trade law is an incentive to find a multilateral answer to the question of species conservation.

bb) Treaty reactions to address non-participation

Treaty regimes increasingly adopt measures to encourage cooperation. The financial mechanism under the Ramsar Convention grants "preparatory assistance" to non-contracting parties that have expressed their intention to adhere to the Convention, in this way promoting global participation. This innovative move to include non-contracting parties into a financial mechanism underlines the incentive based method of work within environmental law.⁵⁴³

⁵⁴⁰ Ibid.: 70.

⁵⁴¹ Ibid.: 64.

⁵⁴² Ibid.: 76.; Principle 7 Rio Declaration.

⁵⁴³ Matz, "Protected areas in international nature conservation law. Can states obtain compensation for their establishment?," 711.

Regimes such as CITES and the CBD attempt to prevent non-participants from undermining the effectiveness of these regimes.⁵⁴⁴ Whereby, both of them are now almost universal in any event. Non-participants may be treated in such a way as to eliminate all the advantages of non-participation. Environmental agreements for instance mandate trade restrictions also towards non-members.⁵⁴⁵

Under CITES non-members may be required to comply with treaty provisions when they intend to trade with member states. Trade with non-member states is regulated in Article X CITES and elaborated through resolutions of the CoP. Parties can only accept permits and certificates from non-party states whose competent authorities and scientific institutions are included in the most recent list compiled by the Secretariat, or after consulting with the Secretariat. Parties importing Appendix I and II species must require certificates stating that the competent scientific institution in the non-party state has made a non-detriment finding and that the specimens were not obtained illegally. Before allowing trade in Appendix I species with non-party states, parties are furthermore required to consult with the Secretariat and to only allow the trade of wild specimens in special cases for conservation or welfare purposes. CITES thus has a tool for making non-participation unattractive and virtually impossible.

b) Problem of power asymmetry

Arguably prospects of successful negotiations are dimmed when power is not evenly balanced between negotiators. Power disparity of negotiators may enable the stronger party to impose an agreement upon the other parties which is favourable to itself but not mutually acceptable. A strong negotiator tends to dictate rather than to negotiate and this attitude is likely to provoke resistance of other negotiators and escalate a disagreement.⁵⁴⁶ There are two reasons for states not to negotiate: because they are weak and cannot afford to, or because they are strong and do not need to.⁵⁴⁷

Interestingly, some studies indicate that negotiators with asymmetrical power make more use of integrative negotiation than symmetrical negotiators.⁵⁴⁸ Presumably, this

⁵⁴⁴ Wolfrum, "Means of ensuring compliance with and enforcement of international environmental law," 105.

⁵⁴⁵ Ibid.: 75.

⁵⁴⁶ Kenneth E. Boulding, *Conflict and defense. A general theory*, 1988 ed. (Lanham: Univ. Pr. of America, 1988). 323.

⁵⁴⁷ Coral Bell, *Negotiation from strength : a study in the politics of power* (London: Chatto & Windus 1963). 213.

⁵⁴⁸ Wagner, *Problem-solving and bargaining in international negotiations*. 148.

occurs when the international social structure wields its influence and states attempt to avoid reproaches for being uncooperative.

Two different forms of strength can be distinguished: strategic strength and tactical strength. While the first refers to all characteristics and capacities the negotiator possesses, the latter refers to action taken during the negotiations. This latter strength can be augmented more easily than the former.

Strategically powerful negotiators are states that are not split by any internal differences of opinion and at the same time independent from other states.⁵⁴⁹ Further aspects of relevance are the gross national product (GNP), territorial size and size of population.⁵⁵⁰

Relevant factors determining the tactical strength are the information at a country's disposition, scientific and technical expertise and negotiating skills. A state can increase its tactical strength and it can receive assistance to increase it.

c) Ways to increase tactical strength

aa) Gathering and exchanging information

A state can thoroughly gather information about its own interests as well as those of the other parties involved or third states that may become involved. On this basis the state can develop alternative proposals in the negotiations, which increases its strength.⁵⁵¹ The sharing of this information can be provided for during the preparation and drafting phase of an agreement.

States that are strategically weak tend to be less capable to engage in research. Hence, rather than providing for the exchange of information, it may be even more helpful to provide for joint research undertaken by an international organization or an independent network of scientists. These institutions make their findings known to all states and thus ensure that they can base their argumentation on scientific data which has not been obtained primarily from strong negotiators.

bb) Coalition-forming

Coalition-forming helps to strengthen a negotiator. Developing states can reinforce their negotiation power when they join together in coalitions. That is why negotiations

⁵⁴⁹ Meerts, "The Changing Nature of Diplomatic Negotiation," 81.

⁵⁵⁰ Bercovitch, "Introduction: Putting Mediation in Context," 250.; Peter J. Carnevale, "Mediating from Strength," in *Studies in international mediation. Essays in honor of Jeffrey Z. Rubin*, ed. Jacob Bercovitch and Jeffrey Z Rubin (Basingstoke: Palgrave Macmillan, 2002), 37.

⁵⁵¹ Meerts, "The Changing Nature of Diplomatic Negotiation," 81.

in a multilateral setting are advantageous for less powerful states.⁵⁵² In international negotiations states form regional or interest groups, which assemble delegations originating from the same region or sharing the same political views. They can thus distribute conference functions, such as chairman and rapporteur among the members.⁵⁵³

Unfortunately, coalitions are often composed of states with little in common, which weakens them. Coalitions must be stable enough to carry on for the time that negotiations last, that is, the duration of the treaty negotiations and preferably the further development of the treaty by the CoP. They must be flexible enough to adapt to changes during negotiations.⁵⁵⁴ Coalitions are solid and hence beneficial provided that they are not based on historical associations but on common issue specific interests.⁵⁵⁵

UNCCD's eighth meeting of the CoP (CoP-8) which was held in Madrid, Spain, from 3 to 14 September 2007 will serve as an example for the practice that states do not express their views individually. Instead one among them speaks on behalf of a regional/interest group. They develop common positions on the issues to be discussed by a CoP.⁵⁵⁶

In the context of UNCCD the Group of 77 and China (G-77/China) emphasized the usefulness of the Global Mechanism – the subsidiary body that promotes the mobilization and channelling of financial resources to affected developing state parties.⁵⁵⁷ They stressed the importance of adopting the budget of the Secretariat for 2008-2009.⁵⁵⁸ Also Central and Eastern Europe, the African Group and the Latin American and Caribbean Group stated the need for significant financial resources, to substantially increase the resources of the Secretariat and to finance the implementation of the strategic plan. The European Union, Turkey and Croatia promoted the adoption of the strategic plan to ensure a more streamlined and strategic

⁵⁵² Ibid., 82.; Susskind and Cruikshank, *Breaking the Impasse*. 135.

⁵⁵³ Lang, "Negotiation on the Environment," 346.

⁵⁵⁴ Blair, "Addressing North-South Power Asymmetry in International Environmental Negotiations," 208.

⁵⁵⁵ Ibid., 217.

⁵⁵⁶ African common position on the issues of relevance to Africa on the agenda of the eighth session of the Conference of the Parties to the United Nations Convention to Combat Desertification, <http://web.mac.com/starony/iWeb/RCU/Welcome.html>.

⁵⁵⁷ Art. 21 (4) UNCCD.

⁵⁵⁸ International Institute for Sustainable Development, "Summary of the Eight Conference of the Parties to the Convention to Combat Desertification: 3-14 September 2007," *Earth Negotiation Bulletin*, 4, no. 206 (2007), <http://www.iisd.ca/download/pdf/enb04206e.pdf>. 4.

approach for UNCCD. The Plan was also supported by Central and Eastern Europe and Africa.⁵⁵⁹

(1) Issue coalitions: UNCCD

Issue coalitions such as the African states that initiated negotiations on desertification are the strongest coalitions. Those states' common aim was to make desertification an international concern.⁵⁶⁰ They contrived to bring their interests to the international agenda and they achieved an agreement which reflects their interests even though industrialized states were initially opposed.⁵⁶¹

A group of more than 40 African environment ministers resolved to promote a desertification convention at a November 1991 preparatory UNCED meeting. Prior attempts to address the problem of desertification, the 1977 United Nations Conference on Desertification and the Plan of Action to Combat Desertification resulting from it, were regarded as failures. The ministers felt that the other conventions to be adopted at UNCED reflected only the interests of the non-African world. They adopted the African Common Position on Environment and Development and the Abidjan Declaration, calling for a convention to combat desertification.

They succeeded in convincing the international community to put the topic of desertification on the UNCED agenda. Agenda 21's Chapter 12 deals with desertification and drought and was initiated by the Organization of African Unity (OAU).⁵⁶²

The African countries' call for a global desertification treaty at UNCED was opposed by the other negotiators. Only France, among the industrialized countries, was in favour. Other industrialized countries and the international financial institutions tended to put desertification down to inadequate local policies. Even the G-77 abstained from supporting a desertification convention.⁵⁶³ The African countries managed to win the other industrialized countries over proving the strength of their coalition.⁵⁶⁴

⁵⁵⁹ Ibid. 4, 5.

⁵⁶⁰ Blair, "Addressing North-South Power Asymmetry in International Environmental Negotiations," 224.

⁵⁶¹ Ibid., 215.

⁵⁶² Ibid., 209.

⁵⁶³ Ibid., 210.

⁵⁶⁴ Ibid., 210.

(2) Coalition of developing states: The G-77

In spite of divergent preferences and ideological differences, developing states grouped together in a strong cohesive bloc: the G-77.⁵⁶⁵ The G-77 is a move of developing states to strengthen their position in negotiations through banding together, pooling resources and arguing with one voice. Rather than pursuing short-term, issue-specific objectives the G-77 pursues more general, long-term objectives which are supported by only some among its members.

There are more than 130 countries in the G-77, stretching from OPEC, China and India to least-developed states.⁵⁶⁶ Their common interest is to raise their standard of living which is not specific enough to create a solid coalition for negotiations.

(3) Negative impacts of coalitions

Complex coalitions of various constituencies may complicate negotiations. All these different constituencies have their own special interests. Coalitions slow down negotiations when the coalition needs to reconsider its position, when it needs to consult its members, to react flexibly during the course of negotiations. This may lead to frustration and render agreements difficult.⁵⁶⁷

cc) Resource pools and training

Apart from the formation of coalitions and information sharing resource pools and training for negotiators in general can also help to overcome inequality of negotiators.⁵⁶⁸ The existence of an institutional framework that organizes, invites and services an intergovernmental conference to negotiate an agreement, facilitates the initiation of negotiations by all states because this framework provides the necessary facilities. CITES was negotiated within the process associated with the 1972 United Nations Conference on the Human Environment.⁵⁶⁹ The CBD was prepared by UNEP.⁵⁷⁰

Special funds for negotiations under the auspices of the UN enable developing state representatives to participate. This is seen as a major trigger for the increase of the

⁵⁶⁵ Higgins, *Conflict of interests. International law in a divided world ; a background book*. 86.

⁵⁶⁶ Blair, "Addressing North-South Power Asymmetry in International Environmental Negotiations," 223.

⁵⁶⁷ *Ibid.*, 224.

⁵⁶⁸ Smith, "Danger - Inequality of resources present: Can the environmental mediation process provide the answer?," 389- 92.; Susskind and Cruikshank, *Breaking the Impasse*. 135.

⁵⁶⁹ Gehring, "Treaty-Making and Treaty Evolution," 472.

⁵⁷⁰ Matz-Lück, "Biological Diversity, International Protection." United Nations / Environment Programme, *Training manual on international environmental law*. Chapter 15, para.12.

number of developing state participants.⁵⁷¹ The sheer number of multilateral environmental and developmental negotiations that take place almost every week push developing states and the UN to the limits of their personnel and financial capacities.⁵⁷²

dd) NGOs providing financial, scientific-technical support

NGOs assist states that lack financial resources to get aware of their interest, enabling them to step in for these interests in negotiations with other states. A case in point is the cooperation of the Foundation for International Environmental Law and Development (FIELD) and the Alliance of Small Island States (AOSIS). During the climate negotiations FIELD supported these states, which are particularly threatened by a rising sea level. FIELD's experts provided scientific and negotiation advice and drafted a treaty proposal for them.⁵⁷³

Furthermore NGO members are included into state delegations.⁵⁷⁴ From their inclusion into state delegations on they are no longer representing their NGO but bound by official instructions.⁵⁷⁵ Even when they are parts of a state delegation they are argued to represent their own constituencies. Given their superior resources they enjoy a high level of power over or even autonomy towards the state they are working for which causes representativeness concerns and a credibility loss.⁵⁷⁶

Developing states can seek support from international NGOs to promote and advertise their interests. It is difficult to convince citizens from the north to lower their living standard through measures such as taxes on consumption or spending more for certified products. Moral arguments do not suffice to find a mutual gains agreement.⁵⁷⁷ NGOs help with public information campaigns.⁵⁷⁸ They can mobilize citizens in the North and pressure their governments into changing their positions.

⁵⁷¹ Chasek, *Earth negotiations. Analyzing thirty years of environmental diplomacy*. 225.

⁵⁷² Ibid. 225, 26.

⁵⁷³ Sonja Riedinger, *Die Rolle nichtstaatlicher Organisationen bei der Entwicklung und Durchsetzung internationalen Umweltrechts*, Veröffentlichungen des Walther-Schücking-Instituts für Internationales Recht an der Universität Kiel ; 131 (Berlin: Duncker und Humblot, 2001). 190.; Raustiala, "The "participatory revolution" in international environmental law," 551.

⁵⁷⁴ Riedinger, *Die Rolle nichtstaatlicher Organisationen bei der Entwicklung und Durchsetzung internationalen Umweltrechts*. 190, 95.

⁵⁷⁵ Ibid. 196.

⁵⁷⁶ Spiro, "Non- Governmental Organizations and Civil Society," 782-84.

⁵⁷⁷ Blair, "Addressing North-South Power Asymmetry in International Environmental Negotiations," 220.

⁵⁷⁸ Ibid., 222.

International NGOs might also provide developing countries with a better inside into the priorities of the North.⁵⁷⁹

ee) Decision-making by consensus or by voting

Arguably, decision-making by consensus, as it is applied by most conferences, ensures that parties are not simply overruled with a vote when they have objections. This increases the influence of weaker states. A voting arrangement that ensures procedural equity is used by the Global Environment Facility (GEF). GEF funds derive mostly from developed states. Its Council has a greater number of developing state members than developed states. There are 16 developing states, 14 developed states and two states with economies in transition. Decisions are adopted when 60 per cent of both, the total number of participants and of the total contributions, vote in favour. Thus, developing and developed states both have to support the decision.⁵⁸⁰

2. Indigenous peoples

States recognize the indigenous right to participate in national and international negotiations relating to conservation and development issues. Governments are under an obligation to conduct good-faith consultations with indigenous peoples when considering legislative or administrative measures that may affect them directly. They are furthermore under an obligation to establish means by which these peoples can freely participate at all levels of decision-making in bodies whose work may concern them and to help develop indigenous institutions and initiatives and where appropriate provide enabling resources.⁵⁸¹

Indigenous peoples have the right to decide about their development priorities and to exercise as far as possible control over their development. And they have a right to participate in the formulation, implementation and evaluation of large-scale development policies which may affect them directly.⁵⁸²

The wording of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) goes beyond good faith consultation. It obliges states to consult and cooperate in good faith with indigenous peoples through their own representative institutions in order to obtain their free, prior and informed consent before adopting

⁵⁷⁹ Ibid., 221.

⁵⁸⁰ Shelton, "Equity," 660.

⁵⁸¹ Art. 6 ILO Convention no. 169.

⁵⁸² Art. 7 (1) ILO Convention no. 169.

legislation or administrative measures that may affect them.⁵⁸³ With respect to the intergovernmental level, Article 41 UNDRIP states that intergovernmental organizations are under an obligation to contribute to the full realization of the rights and obligations set forth by UNDRIP and to ensure participation of indigenous peoples in decision-making that may affect them. It has already been ascertained in Chapter 2 which rights accrue to indigenous peoples. Decision-making that may affect indigenous land and resource rights and their internal autonomy consequently requires indigenous participation in decision-making.

This principle is applied by the Economic and Social Council (ECOSOC) which is advised by the Permanent Forum on Indigenous Issues whose independent expert members are to equal parts nominated by member states and by indigenous peoples' organizations.⁵⁸⁴ Well known indigenous organizations are the World Council of Indigenous Peoples, the International Indian Treaty Council and the Four Directions Council. When the Preparatory Committee for UNCED commenced its work a dozen indigenous peoples' organizations had consultative status with ECOSOC.⁵⁸⁵ Indigenous peoples lament their insufficient participation in the too brief, one and a half years, preparation phase for the CBD.⁵⁸⁶ States are under an obligation to ensure participation of indigenous peoples in decision-making and a longer negotiation phase may be called for when it is necessary for indigenous peoples to participate properly.

The right to participate raises the question which among the state-recognized organizations and groups of indigenous peoples, international indigenous NGOs, traditional polities and grassroots movements can legitimately represent indigenous peoples in international negotiations. The UN has not yet developed mechanisms to ascertain the legitimacy and representativeness of potential representatives. Internationally recognized organizations risk to evolve into a "global indigenous elite" and to compete with community rooted organizations and traditional leaders and institutions that are broadly supported. International fora thus need to find ways to establish the legitimacy and representativeness of organizations.⁵⁸⁷

⁵⁸³ Art. 19 UNDRIP.

⁵⁸⁴ Barsh, "Indigenous Peoples," 843.

⁵⁸⁵ *Ibid.*, 844.

⁵⁸⁶ International Alliance of the Indigenous Peoples of the Tropical Forests "The Biodiversity Convention: The Concerns of Indigenous Peoples," *Australian Indigenous Law Reporter* 1996, no. 1 (1996), <http://www.austlii.edu.au/au/journals/AILR/1996/84.html>.

⁵⁸⁷ Barsh, "Indigenous Peoples," 837.

3. NGOs

Institutionalism focuses exclusively on states as key actors in the international realm, leaving other actors such as the increasingly active transnational civil society unheeded.⁵⁸⁸ Yet, while not having a negotiator role, NGO participation in negotiations of MEAs has become particularly important starting with the UN Conference on the Human Environment (UNCHE) in Stockholm in 1972 and since then the activities of NGOs have increased steadily.⁵⁸⁹ The 1992 Rio conference was a watershed for NGO participation. It was attended by 20,000 citizens and activists, who outnumbered official representatives by at least two to one.⁵⁹⁰

States have increasingly accepted NGO participation in negotiations and decision-making on the international level. NGOs are now exerting a powerful influence in all phases of the creation of multilateral agreements and soft law instruments; although their strong position in the early stages of negotiations is decreasing gradually at later stages, when more and more use is made of informal meetings, NGOs are excluded from.⁵⁹¹

In negotiation theory in general, it is assumed to be preferable to include too many people or groups than too few into negotiations. The logistical advantage of a limited number of participants is more than out-weighed, by the negative impacts when groups feel to be unfairly left out.⁵⁹²

Arguably, NGOs are better suited to represent environmental concerns than states because the latter have to pursue various goals simultaneously and are influenced by national self-interest.⁵⁹³ NGOs see themselves as virtually the only actors that truly strive to conserve biodiversity and their success is hampered as they are not given

⁵⁸⁸ Kyle W. Danish, "International Relations Theory," *Ibid.*, ed. Daniel Bodansky, Jutta Brunnée, and Ellen Hay, 213.

⁵⁸⁹ Tanja Brühl, *Nichtregierungsorganisationen als Akteure internationaler Umweltverhandlungen. Ein Erklärungsmodell auf der Basis der situationsspezifischen Ressourcennachfrage*, Studien der Hessischen Stiftung Friedens- und Konfliktforschung ; 42 (Frankfurt am Main: Campus, 2003). 95.; Raustiala, "The "participatory revolution" in international environmental law," 541.; Kiss and Shelton, *International environmental law*. 165.

⁵⁹⁰ French, "The role of non-state actors," 254.

⁵⁹¹ Raustiala, "The "participatory revolution" in international environmental law," 570.; Charnovitz, "Nongovernmental organizations and international law," 352.

⁵⁹² Susskind and Cruikshank, *Breaking the Impasse*. 101.; Bingham, *Resolving Environmental Disputes*. 99.

⁵⁹³ Kevin Stairs and Peter Taylor, "Non-Governmental Organizations and the Legal Protection of the Oceans: A Case Study," in *The international politics of the environment*, ed. Andrew Hurrell and Benedict Kingsbury (Oxford: Clarendon, 1992), 111.; Charnovitz, "Nongovernmental organizations and international law," 361.

standing in governmental fora.⁵⁹⁴ Chapter 2 outlined that NGOs pursue primarily their own interests whose benefits for conservation are sometimes doubtful from a scientific perspective. Their work may be to the detriment of indigenous peoples and local communities. Furthermore, their lack of or imperfect representativeness, independence and accountability need to be kept in mind when considering their demands to participate in treaty negotiations.

a) Informal participation

NGOs can participate formally and informally in treaty negotiations. The main field of NGO activities lies within the informal field of lobbying state delegations, providing them, as well as treaty and IO bodies, with information and arguments.⁵⁹⁵

Furthermore, they organise parallel gatherings and distribute daily news briefs such as the Earth Negotiations Bulletin (ENB) and Eco, about the goings on at the conference, making sure that all decisions can be scrutinised by the world's civil society.⁵⁹⁶ Their reporting can also improve the parliamentary control and alert legislators of bureaucratic actions.⁵⁹⁷ The quality of the ENB reporting earned it the position of a quasi-official source of information. Official treaty websites provide links to the ENB and even negotiators consult the reports.⁵⁹⁸

NGO activities are regarded as being fruitful but their precise effect on negotiation results is hard to prove.⁵⁹⁹

b) Formal participation

Since the Stockholm Conference an observer status is regularly granted to NGOs enabling them to participate as observers in conferences and contribute oral and written statements. Article 71 of the UN Charter states: "The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence." Even though Article 71 refers only to ECOSOC, a consultative role for NGOs gradually became an

⁵⁹⁴ Sanderson, "The Future of Conservation," 163.

⁵⁹⁵ Stairs and Taylor, "Non-Governmental Organizations and the Legal Protection of the Oceans: A Case Study," 130.

⁵⁹⁶ Raustiala, "The "participatory revolution" in international environmental law," 564.

⁵⁹⁷ *Ibid.*: 562.

⁵⁹⁸ Brunnée, "COPing with consent. Law-making under multilateral environmental agreements," 46.

⁵⁹⁹ Riedinger, *Die Rolle nichtstaatlicher Organisationen bei der Entwicklung und Durchsetzung internationalen Umweltrechts*. 192, 93.

established practice throughout the UN system.⁶⁰⁰ Within its “Major Groups and Stakeholders Branch,” UNEP permits NGOs to comment on UNEP working documents in the same time frame as governments.⁶⁰¹

NGO participation in meetings of preparatory committees convened by the UN is now provided for under ECOSOC Res. 1996/31. NGOs with consultative status to the UN are as a rule accredited to participate. In the case of other NGOs the preparatory committee decides about the granting of accreditation. NGO participation is generally welcomed and accredited NGOs may make written presentations and at the chairman’s discretion they may also make oral statements.⁶⁰² NGO participation in conferences convened by the UN is likewise provided for under ECOSOC Res. 1996/31. In order to strengthen the role of NGOs, Agenda 21 calls on the UN system to consult with NGOs.⁶⁰³

c) Evaluation

First of all, local people may well be unaware of their stake in an international agreement with implications for their land or animal and plant species. Groups which represent the disenfranchised without political connections may need assistance in order to estimate, organize and present their interests effectively at the international level.⁶⁰⁴ Large NGOs can support the formation and the effective participation of local groups. For local populations to influence decision-making on the national level good governance is required as well as democratization, the development of civil society and the rule of law. The international promotion of civil society and the inclusion of NGOs into international negotiations may serve to compensate deficiencies in representativeness within states, that is, make the interests of parts of the population that have a particular interest in the matter, be heard within negotiations.⁶⁰⁵ Indigenous and traditional peoples established organizations to express their position effectively. Small southern NGOs may have a strong negotiation position thanks to their perceived legitimacy.⁶⁰⁶

⁶⁰⁰ Charnovitz, "Nongovernmental organizations and international law," 358.

⁶⁰¹ Riedinger, *Die Rolle nichtstaatlicher Organisationen bei der Entwicklung und Durchsetzung internationalen Umweltrechts*. 211.

⁶⁰² ECOSOC res. 1996 paras. 41-54.

⁶⁰³ Agenda 21, 27.9.

⁶⁰⁴ Susskind and Cruikshank, *Breaking the Impasse*. 103.

⁶⁰⁵ Spiro, "Non- Governmental Organizations and Civil Society," 776-81.

⁶⁰⁶ Tvedt, "Development NGOs: Actors in a Global Civil Society or in a New International Social System?," 371.

The largest NGOs have however been founded in the North. It is questionable whether such NGOs support indigenous and traditional peoples and other inhabitants of biodiversity rich areas. There are UN and other funds, including from international NGOs, to cover transportation costs and generally support groups from developing nations.⁶⁰⁷ The relationship between local groups and international NGOs is not always supportive and harmonious however as has been shown in Chapter 2.

A critical analysis of the work of NGOs is sometimes blocked because their field of action is considered legitimate and morally just.⁶⁰⁸ Yet, some authors lament the disparity of NGOs from the industrialized North and those from the South and the lack of participation of Southern NGOs as well as their comparative scarce resources.⁶⁰⁹ It is argued that Southern NGOs lack capacity to represent their public independently in international negotiations.⁶¹⁰ They work on community rather than on a global level.⁶¹¹ Some Southern NGOs trust more in making the participation of their governments more effective than improving civil society participation because they are competing with NGOs that are better financed and have better linguistic and negotiation skills.⁶¹² Northern NGOs receive considerable private and public funds to finance their activities and to develop their expertise.⁶¹³

Views from Northern NGOs are seen in some instances as “ecocolonialism”.⁶¹⁴ Influence by single-interest NGOs might make it even harder to find a genuine common interest. In spite of all these shortcomings the benefits from NGO participation should not be ignored.

4. Members of parliaments

Much of the considerations on involvement of people’s interests in international law-making expressed in the preceding sections run to some degree parallel to efforts for the democratization of international law-making. Proponents of democratization either

⁶⁰⁷ Raustiala, "The "participatory revolution" in international environmental law," 552.

⁶⁰⁸ Tvedt, "Development NGOs: Actors in a Global Civil Society or in a New International Social System?," 366.

⁶⁰⁹ Jayati Srivastava, "Non-governmental organizations as negotiators at the World Trade Organization. A perspective from the south," *International studies* 39, no. 3 (2002): 256, 57.

⁶¹⁰ Boyle and Chinkin, *The making of international law*. 60.

⁶¹¹ *Ibid.* 59.

⁶¹² Tanaka, "Bridging the gap between Northern NGOs and Southern sovereigns in the trade-environment debate. The pursuit of democratic dispute settlements in the WTO under the Rio Principles," 143, 44.

⁶¹³ *Ibid.*: 134- 36.

⁶¹⁴ Risely, "Environmentally Responsible Global Governance: How NGOs Can Help," 125.

seek to advance the domestic parliamentary oversight of governments that act internationally or they demand international parliamentary input.⁶¹⁵ Parliamentarians as elected representatives of civil society are arguably the most suitable representatives of public interests in international environmental negotiations. International organizations tend to engage with NGOs and to neglect parliaments. This attitude should be reconsidered.⁶¹⁶

Members of parliaments increasingly voice their positions internationally and they are the only participants in negotiations who are, for the most part, directly democratically elected and directly accountable to their voters, thus making negotiations more democratic. Parliamentarians organize in international parliamentary associations (IPAs) which are also referred to as legislative networks. The first IPA, the Inter-Parliamentary Union (IPU) was founded in 1889. IPU describes itself as “the international organisation of the Parliaments of sovereign States.”⁶¹⁷ It functions as focal point for worldwide parliamentary dialogue. Its objectives are to “work for peace and cooperation among peoples and for the firm establishment of representative institutions.”⁶¹⁸ Particularly during the last decades the number of IPAs has constantly grown. These institutions are praised by some authors for expressing openly criticism of government and for their efforts on behalf of international concern, which occasionally influences the intergovernmental decision-making processes. IPAs are valued as important actors in the complex international society. Others state that parliamentarians have so far had no impact on international cooperation and intergovernmental negotiations. Their prospects are good due to the fact that the international community is getting more and more networked, moving away from a hierarchical structure. This permits them to fulfil more functions and to institutionalize their involvement in decision-making.⁶¹⁹

An organization such as the IPU can facilitate dialogue and contacts among parliamentarians and decide on issues to advocate or promote. Yet, parliamentarians have more impact on decision-making when they are a parliamentary component of

⁶¹⁵ Boyle and Chinkin, *The making of international law*. 101.

⁶¹⁶ Uwe Holtz, "Important Outcomes of the Previous Five Round Tables of Members of Parliament on the United Nations Convention to Combat Desertification," *Round Tables of Members of Parliament on the United Nations Convention to Combat Desertification* (2005): 6.

⁶¹⁷ Art. 1 (1) STATUTES OF THE INTER-PARLIAMENTARY UNION.

⁶¹⁸ Art. 1 (2) STATUTES OF THE INTER-PARLIAMENTARY UNION.

⁶¹⁹ Zlatko Sabic, "Building Democratic and Responsible Global Governance: The Role of International Parliamentary Institutions," *Parliamentary Affairs* 61, no. 2 (2008): 255.

an institution or their involvement is at least institutionalized under an IO or treaty regime.⁶²⁰ This aspect will be considered in Chapter 4 when negotiations under the selected treaty regimes is analysed.

Since the 1990s, IPU and UN started to cooperate and the worth of parliamentary involvement was more highly rated.⁶²¹ The Millennium Declaration, for once, in its paragraph 30 stresses the significance of cooperation between the UN and national parliaments and encourages the building of relations through the IPU.

Another IPA of potential interest in the field of sustainable development is the association Parliamentarians for Global Action (PGA), which was created in 1978. From 1991 on, the PGA engaged in activities on issues stretching from democracy to sustainable development and population growth.⁶²² It has not yet addressed the issues of biodiversity conservation though. Their weaknesses are that IPAs tend to suffer from a lack of continuity, institutional memory and from a lack of funding.⁶²³

5. Corporations

Corporations are a powerful political constituency and nowadays they are a major presence at many environmental conferences. Governments recognize their importance.⁶²⁴ Business sector organizations are granted NGO status and thus enjoy the same entitlements as environmental and development NGOs. They underline the need for their participation pointing to their own specialist knowledge, inter alia, concerning the potential impact of envisaged rules on their industries.⁶²⁵

Corporations lobby governments and may be more or less successful in influencing or shaping their positions.⁶²⁶ Business sector organizations have the most extensive resources and consequently the best position to attract state attention within and outside of intergovernmental negotiations.⁶²⁷

The business sector often provides biased information to governments, especially when governments are not in a position to undertake their own research. Sometimes governmental delegations include members or advisers from the business sector.

⁶²⁰ Ibid.: 260, 61.

⁶²¹ Ibid.: 263.

⁶²² Ibid.: 264.

⁶²³ Ibid.: 265.

⁶²⁴ Raustiala, "The "participatory revolution" in international environmental law," 567.

⁶²⁵ Boyle and Chinkin, *The making of international law*. 53.

⁶²⁶ Ratner, "Business," 816.

⁶²⁷ Boyle and Chinkin, *The making of international law*. 60.

Business entities moreover involve directly in international organizations, CoPs and other conferences.⁶²⁸ Individual businesses or business initiated NGOs (BINGOs) are granted a consultative status and a right to attend meetings and to table papers. Representatives of some 700 corporations were present at the World Summit on Sustainable Development (WSSD). The International Chamber of Commerce and the World Business Council on Sustainable Development (WBCSD) established the BINGO Business Action for Sustainable Development as a representative of business interests. They succeeded in weakening the references to corporate responsibility contained within the Johannesburg Plan of Implementation.

Under the CBD business representatives are even nominated for membership to the CBD panel of experts and the ad hoc open-ended working group to address access to and the benefit sharing of genetic resources.⁶²⁹ The CBD CoP encouraged business representatives to participate in CoP meetings, meetings of the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) and other meetings.⁶³⁰ Moreover, the CoP encouraged national focal points to include private sector representatives on national delegations to CBD meetings and to nominate them to expert groups.⁶³¹ In fact, a number of delegations to recent meetings included business representatives who facilitated communication with the business observers attending meetings.⁶³²

This participation raises concerns about undue corporate influence. Yet, it forms part of the CBD effort to raise awareness for the linkages between business and biodiversity and the relevance of CBD negotiations for business.⁶³³

Because of their power the business sector influence on the development of environmental rules seems unavoidable. Given their participation in decision-making they should arguably be under a duty to comply with MEAs especially in light of their position as primary direct causes of environmental harm. Arguably, environmental law can be effective only provided that it succeeds in controlling corporate activities. It is a paradox to see law as a response to dynamic collective action problems and to

⁶²⁸ Ratner, "Business," 817.

⁶²⁹ *Ibid.*, 818.

⁶³⁰ CoP CBD Decision VIII/17 para. 7.

⁶³¹ *Ibid.* Para. 2.

⁶³² ———, "Cooperation with other conventions, international organizations and initiatives and engagement of stakeholders. Addendum: Engagement of Business." Para. 58.

⁶³³ *Ibid.* Para. 76.

involve business representatives in its development yet not to have any business duties.⁶³⁴ Consequently, development and environmental NGOs endeavour to make corporations accountable under environmental and human rights law.⁶³⁵

It is important to capture corporate awareness and interest in conservation as they, in particular large transnational corporations and BINGOs, can play an important role in treaty compliance. They can provide technical training and guidelines advising companies to become more environmentally sound and they can support governments financially. They participate actively in projects set up to meet environmental commitments in the South. They have a prominent role in Agenda 21, Rio+5 and the Johannesburg Plan of Implementation and the Public-Private-Partnerships.⁶³⁶

The business sector can also monitor company compliance and exert pressure by refusing to certify a product, the publication of the findings of an audit and denial of a BINGO membership. The sector cannot be relied on to be very active in these fields though since profits remain their objective.⁶³⁷

III. Drafting of rules of procedure and agenda setting

As another preparatory step the rules of procedure and the agenda for negotiations need to be drafted. The first settles aspects such as the location and the timeframe for negotiations and relations to the press.⁶³⁸ Where the press is concerned, it is helpful when negotiators agree to make only joint press releases and organize only joint press conferences.⁶³⁹

When drawing up the agenda for the negotiation the range of issues may not be too wide, since this may lead to superficial discussions or it may demoralize negotiators, nor may it be too restricted since every negotiator's key interest needs to be included and sufficient aspects need to form part of negotiations to allow for creative mutual gains negotiation.⁶⁴⁰ A possible expedient may be to cluster potential agenda items under wider headings and then to draw up a priority list with these headings.⁶⁴¹ If possible the agenda sequences complex tasks into manageable pieces or provides for

⁶³⁴ Ratner, "Business," 808.

⁶³⁵ Boyle and Chinkin, *The making of international law*. 61.

⁶³⁶ Ratner, "Business," 821.

⁶³⁷ *Ibid.*, 822-24.

⁶³⁸ Susskind and Cruikshank, *Breaking the Impasse*. 108.

⁶³⁹ *Ibid.* 109.

⁶⁴⁰ *Ibid.* 110.

⁶⁴¹ *Ibid.* 111.

items to be discussed by subcommittees. When it takes longer than foreseeable to discuss an agenda item, it should be possible to reorganize or even eliminate agenda items and to add emerging issues.⁶⁴²

IV. Exchanging information or joint fact-finding

Well informed negotiators have a wide range of alternatives to suggest and are therefore better able to solve differences.⁶⁴³ The formation of assumptions, opinions and even values hinges upon credible information. The two options to ensure well-informed negotiations are first, to gather information separately and exchange it or second, to engage in joint fact-finding.

1. Information sharing

Assumptions which are based on flawed information can be corrected through information sharing. This is just one example to show that gathering and exchanging information is very important for negotiations.⁶⁴⁴ Negotiators can share the information they have obtained from experts. Advancing the knowledge of actors is a central concern of constructivists and legal interaction theory since this knowledge influences the decision-making. Dialogue is seen as one way to advance knowledge and to create new ideas which alter self-perception and behaviour. Dialogue provides reasonable arguments which tend to have some weight.⁶⁴⁵

2. Joint fact-finding

Joint fact-finding of negotiators can be very useful not only to counterbalance the asymmetric power of negotiators.⁶⁴⁶ Joint fact-finding may work against the tendency to accept or selectively perceive only data which is in support of the original position. Negotiators should specify the information and the sources of information, which would make them rethink their attitude.⁶⁴⁷ The development of a shared base of knowledge prevents a polarized advocacy science which tends to undermine credibility of all science even though this shared knowledge will be interpreted and

⁶⁴² Ibid. 113.

⁶⁴³ Wagner, *Problem-solving and bargaining in international negotiations*. 144.

⁶⁴⁴ David H. Dunn, "How useful is Summitry?," in *Diplomacy at the highest level. The evolution of international summitry*, ed. David H. Dunn (Basingstoke: Macmillan, 1996), 247.

⁶⁴⁵ Brunnée and Toope, "International law and constructivism: elements of an interactional theory of international law," 71-73.

⁶⁴⁶ Susskind and Cruikshank, *Breaking the Impasse*. 113.

⁶⁴⁷ Ibid. 115.

valued differently.⁶⁴⁸ The joint fact-finding can also engender a propitious working relationship for negotiations.⁶⁴⁹

In environmental negotiations scientific data which shows environmental damage may motivate some governments to strive for an international solution to protect their country from harmful actions abroad or the environment as a whole. This data is usually questioned by states that are concerned about economic drawbacks caused by potential protective restrictions.⁶⁵⁰ Common scientific data would help to alleviate these doubts and differences of appreciation. Chapter 4 will address the question of whether scientific bodies established under the considered treaty regimes as well as epistemic communities and scientific networks assisting them, bring the said advantages of joint fact-finding.

V. Prenegotiations

In the case of high level conferences the preparation phase encompasses many more activities than those described above. Documents adopted by those conferences are usually prepared beforehand.⁶⁵¹ The preparation is undertaken first on the national level of interested states and subsequently in preparatory committees, which decide on objectives and extent of the negotiations and develop treaty drafts. If they have been well prepared, conferences can provide an opportunity for substantive discussions.⁶⁵²

C. Negotiation of instruments

States that negotiate an international treaty regime generally aim to reach an agreement that is acceptable to all participating states.⁶⁵³

I. Two negotiation strategies: zero sum approach or mutual gains negotiation

There are two approaches to negotiation. The “zero-sum” approach, surmises that there is only a limited amount of gains to be made. These are balanced among the negotiators. One side’s gain automatically means a loss for the other side.⁶⁵⁴

⁶⁴⁸ Ibid. 116.

⁶⁴⁹ Ibid. 117.

⁶⁵⁰ Lang, "Negotiation on the Environment," 350.

⁶⁵¹ Dunn, "How useful is Summitry?," 263.

⁶⁵² Ibid., 264.

⁶⁵³ Oran R. Young, "The politics of international regime formation: managing natural resources and the environment " *International Organization* 43, no. 3 (1989): 360, 61.

⁶⁵⁴ Susskind and Cruikshank, *Breaking the Impasse*. 85.

Negotiators who follow this approach tend to pursue their goals by trying to convince others to concede. Negotiators stick firmly to their demands and use pressure.⁶⁵⁵

The second approach is the integrative or mutual gains negotiation. Integrative negotiation avoids focusing on “win-lose” or “yes-no” dichotomies which are present within the “zero sum” approach.⁶⁵⁶ This approach involves yielding in some instances because it is impossible to find solutions for unrealistic aspirations. This means that parties, first of all, need to ascertain which of their aspirations are realistic in order to decide on which issues to undertake mutual gains negotiation.

Negotiations can be successful provided that negotiators have not only opposing but also common interests. When opposing interests are prevalent, negotiations will be competitive rather than cooperative.⁶⁵⁷ A mutual gains solution depends on setting an appropriately cooperative tone.⁶⁵⁸ Negotiators trained while the realist theory dominated international relations have a tendency to be led by considerations about relative gains and competition and engage in zero sum bargaining. Growing confidence in the integrative negotiation approach would mean that negotiators are increasingly guided by this approach.⁶⁵⁹

II. Five ways to obtain a mutual gains solution

Five different strategies which may also be combined may lead to a mutual gains solution:

- (1) scarce resources are augmented;
- (2) each party makes concessions on issues that are of inferior importance to itself and of great importance to the other parties;
- (3) Some parties obtain their aspirations while the others' expenditures are lowered or eliminated;
- (4) Some parties obtain their aspirations while the others are compensated; and
- (5) a solution is found that meets the high priority interests of all parties.⁶⁶⁰

Numbers 2 to 4 are forms of the so called “package deals,” that is, the strategy to create linkages between different wishes that are not necessarily interrelated.⁶⁶¹ This

⁶⁵⁵ Pruitt, "Strategy in Negotiation," 78.

⁶⁵⁶ Susskind and Cruikshank, *Breaking the Impasse*. 87.

⁶⁵⁷ Meerts, "The Changing Nature of Diplomatic Negotiation," 83.

⁶⁵⁸ Susskind and Cruikshank, *Breaking the Impasse*. 86.

⁶⁵⁹ Wagner, *Problem-solving and bargaining in international negotiations*. 147, 48.

⁶⁶⁰ Pruitt, "Mediator Behavior and Success in Mediation," 42.

⁶⁶¹ Meerts, "The Changing Nature of Diplomatic Negotiation," 84.; Susskind and Cruikshank, *Breaking*

striking of package deals requires the contemporaneous presence at negotiations of several branches of government, or representatives with authority in several fields, such as the environment and economy, permitting the consideration of issues from a holistic perspective⁶⁶²

1. Their practical relevance

With respect to the first strategy, the augmentation of resources, two options can be envisaged. Technological innovations or shifts in resource availability may help negotiators to agree.⁶⁶³ This means that the promotion of the development and application of techniques and technologies that facilitate the conservation of biodiversity fall within this first category. A case in point are techniques for the intensification of sustainable agriculture.⁶⁶⁴ Where the improved availability of resources is concerned, natural biodiversity can of course not be increased. Yet, and this proved to be relevant under CITES, ranched animals and artificially propagated flowers can replace their wild counterparts⁶⁶⁵ and thus help negotiators to agree.

An example for a package deal is the shift in the US position with respect to the negotiations aimed to combat desertification. During the UNCED preparations the US had rejected the idea of a convention to combat desertification but later shifted its position hoping to obtain, in return, African support for its positions on issues such as forests. This instance points to the difficulty to distinguish between a political compromise with random concessions and a mutual gains solution. It is decisive whether both states perceive the aspects in which respects they have given in as of low priority while the ones where they have achieved their aspirations are of high priority. Developed states give greater importance to the problem of climate change than developing states. Developing states pointed out that this problem has been addressed more vigorously than priority issues of the South, such as desertification. Such unequal treatment is a disincentive for cooperation and the opposite of the

the Impasse. 120-23.

⁶⁶² Dunn, "How useful is Summitry?," 251.

⁶⁶³ Downs, Danish, and Barsoom, "The transformational model of international regime design: triumph of hope or experience?," 499.

⁶⁶⁴ Adeel, *Ecosystems and Human Well-being: Desertification Synthesis*, . 13.

⁶⁶⁵ Sand, "Whither CITES? The evolution of a treaty regime in the borderland of trade and environment," 54.

mentioned option to make integrative package deals. The extension of the GEF to cover desertification was a step to counterbalance this neglect.⁶⁶⁶

Another notable example for a package deal is the CBD and in particular its third objective. The CBD is hailed as part of a new generation of international conventions that seek to reconcile the “development imperatives of the South with the environmental exigencies of the North.”⁶⁶⁷ The convention recognizes that developing states prioritize poverty eradication and development. The third objective of the Convention is the access to genetic resources and the fair and equitable sharing of benefits arising from their use. The provisions on benefit-sharing call on states to balance the interests of biodiversity rich states that provide genetic material for pharmaceutical and industrial use and states that have the means to exploit this material.⁶⁶⁸ States are requested to facilitate access.⁶⁶⁹ In return benefits are shared. Benefit sharing may comprise the granting of access to and transfer of technology which makes use of those resources,⁶⁷⁰ the sharing of research results,⁶⁷¹ participation in biotechnological research and development activities.⁶⁷²

CITES shift towards more flexibility for specific country interests can serve as an example for a solution that accommodates all interests. One step towards making CITES more adaptable to the varied situation across range states was taken with the Ford Lauderdale criteria which authorized the “split-listing” of species. The much contested question, whether or not to permit the split-listing of a species, that is, the listing of different populations of a species in different appendices, had particular relevance with respect to elephants. Southern African countries rejected the 1989 listing of all elephant populations in Appendix I. In 1997, the parties reached a compromise and agreed to leave the highly threatened East African populations on Appendix I, whilst downgrading the Southern African elephants to Appendix II.⁶⁷³ This flexibility helps to respond to all countries’ interests. It is said to have harmful effects though since selective bans make it difficult to monitor compliance with an agreement. Total bans, possibly backed by compensation schemes, are therefore

⁶⁶⁶ Shelton, "Equity," 661.

⁶⁶⁷ MacGraw, "The CBD - Key characteristics and implications for implementation," 18, 19.

⁶⁶⁸ Matz-Lück, "Biological Diversity, International Protection," para. 35.

⁶⁶⁹ Art. 15 (2) CBD.

⁶⁷⁰ Art. 16 (3) CBD.

⁶⁷¹ Art. 19 (2) CBD.

⁶⁷² Art. 19 (1) CBD.

⁶⁷³ McOmber, "Problems in enforcement of the Convention on International Trade in Endangered Species," 695.

favoured by some authors.⁶⁷⁴ Substituting commercial revenues is hard to realize as it requires additional international funding which is a constant problem.

2. Application of financial mechanisms

Many multilateral environmental treaties contain rules for funding, financial mechanisms and technology transfer, making the third and fourth ways to reach a mutual gains solution seem the most commonly applied or at least the most obviously detectable alternatives. There is a notable shift in international law and international environmental law in particular, which occurred in the course of the last three decades, away from confrontational means towards incentives and financial assistance for implementation and compliance.⁶⁷⁵ Do those financial mechanisms at the same time provide compensation and lower the costs in order to achieve an integrative agreement?

CITES, as well as most conventions that were adopted before the Rio Conference, lack incentive measures. CITES' Trust Fund's purpose is to meet administrative costs.⁶⁷⁶ Many environmental agreements use their own financial mechanisms. Others rely on the GEF to provide compliance assistance. GEF was created to assist developing states to meet their international environmental obligations. Later, states of Eastern Europe and the former Soviet Union were supported as well.⁶⁷⁷

Financial assistance might be provided as compensation for non-use of a site as well as to lower the costs of the establishment and management of a PA. The payments may thus be at the same time a compensation and the lowering of costs of participation in and implementation of the agreement. Those two alternatives correspond to the third and fourth alternative ways to reach a mutual gains solution mentioned above.

Usually, financial mechanisms compensate incremental costs, that is, costs for implementation of and compliance with an agreement. While the issue of assistance for implementation and compliance will be examined in Chapter 5, financial mechanisms will be taken into consideration here to determine whether or not they compensate states or lower their costs and thus help to achieve a mutual gains

⁶⁷⁴ Young, *Governance in World Affairs*. 91.

⁶⁷⁵ Matz, "Protected areas in international nature conservation law. Can states obtain compensation for their establishment?," 709.

⁶⁷⁶ *Ibid.*: 710.

⁶⁷⁷ Young, *Governance in World Affairs*. 96.

solution. Even though financial provisions are meant to encourage and facilitate implementation and compliance they may also render an agreement more attractive and hence a mutual gain. In the context of PAs incremental costs are caused by the identification, establishment and the effective management of a PA. No consensus has so far been achieved regarding the scope of the term “incremental costs” though and the views of GEF and the various CoPs may differ. It is therefore necessary to construe the text of each financial mechanism contained in an environmental agreement and the pertaining decisions of treaty organs individually to decide which costs are included.⁶⁷⁸

a) The World Heritage Fund and the Ramsar Small Grants Fund

The WHC and the Ramsar Convention both possess a financial mechanism. Both conventions established a fund with a relatively small budget: the Ramsar Small Grants Fund (SGF) and the World Heritage Fund (WHF).⁴⁵ Neither convention aims to compensate for incremental costs. This objective would not be feasible given their limited financial capacities. Instead the conventions attempt to increase funding through partnerships with other organizations such as the UN Foundation.

The WHC provides for compensation for national protective measures in the interest of the international community. The World Heritage Fund allocates funds to sites that are acknowledged to be of outstanding international importance. It engages in the preservation and identification of such sites.

Under the Ramsar Convention projects that promote the implementation of the Convention’s triennial Work Plan are financed. Due to its small budget the Small Grants Fund supports small-scale projects. This is meant as a stepping stone for more extensive projects that are subsidized from other sides.⁴⁵

Neither fund envisages a compensation scheme for the setting aside of land. The compensation for national efforts in the global interest within the World Heritage Fund and to some extent the Ramsar Small Grants Fund, are more a general and somewhat vague philosophy underlying the exchange.

⁶⁷⁸ Matz, "Protected areas in international nature conservation law. Can states obtain compensation for their establishment?," 708.

b) The Potential of the Global Environment Facility (GEF) to Compensate for Protected Areas under the CBD

The CBD has an elaborate financial mechanism, making it the only convention with a potential to provide substantial compensation for the establishment of PAs.⁶⁷⁹ The CBD in its Article 20 on financial resources provides that: “The developed country Parties shall provide new and additional financial resources to enable developing country Parties to meet the agreed full incremental costs to them of implementing measures which fulfil the obligations of this Convention and to benefit from its provisions.”⁶⁸⁰ Additionally, developed countries shall provide resources, so developing countries can meet the costs agreed between them and the CBD’s financial mechanism, established under Article 21 CBD.⁶⁸¹ Other parties can voluntarily provide financial resources.⁶⁸²

GEF’s focal area of biodiversity functions as the financial mechanism of the CBD. GEF’s objective is to assist developing states in environmental protection and the promotion of sustainable development. Most resources are allocated to facilitate states’ compliance with treaty regimes. To a lesser extent GEF supports capacity building to attain the necessary standards for entering environmental regimes. Thus, in addition to its function as treaty-specific financial mechanism for, inter alia, the protection of biodiversity, it promotes specific environmental activities.

GEF is guided by and accountable to the CBD CoP.⁶⁸³ The CBD organs established eligibility criteria for projects to receive grants. Projects are required to be of global benefit and to compensate for the agreed incremental costs of the implementation of the Convention.⁶⁸⁴

GEF finances, inter alia, projects promoting PAs, for example, the Brazil-Amazon Region Protected Areas Program (ARPA). Even though the arising costs are of global benefit and also fall within the definition of agreed incremental costs, the GEF grant only covers the basic costs. It is to attract additional external funds.⁶⁸⁵ The GEF falls short of compensating incremental costs under the CBD.

⁶⁷⁹ Ibid.: 704.

⁶⁸⁰ Art. 20 (2) CBD.

⁶⁸¹ Art. 20 (2) CBD.

⁶⁸² Art. 20 (2) CBD.

⁶⁸³ Art. 21 (1) CBD.

⁶⁸⁴ Matz, "Protected areas in international nature conservation law. Can states obtain compensation for their establishment?," 712.

⁶⁸⁵ Ibid.: 715.

III. Guidelines helping to obtain a mutual gains solution

The following guidelines help to find a mutual gains solution:

(1) Being firm about fundamental interests, unless they prove to be unattainable, and at the same time flexible about the ways to achieve them, that is, flexible to modify a position (interest-based instead of positional bargaining).⁶⁸⁶ This way parties are open to consider a different conflict-solving way which is advantageous also for the other parties.⁶⁸⁷

(2) A good working relationship is important for negotiations. States can achieve this by stressing everything they have in common rather than aspects that divide them. Understanding each other's history and culture may help to establish working trust, that is, a belief, that the other party is prepared to shift its position to render mutual gains possible.⁶⁸⁸

Where the cultural background is concerned, Westerners, generally speaking, have a more individualistic approach and place little importance on the context of negotiations, while, for instance, persons from Asian, Latin American or Egyptian "high-context" societies view the context as crucial. The western negotiation style is more direct and results-orientated. Contrarily, for the latter groups the most important aspect is attending the relationship.⁶⁸⁹ Conscience about the respective attitudes towards the relationship may help to prevent a worsening of atmosphere during the course of negotiations.

(3) Exchanging information to clarify which are priority issues and which are the interests underlying their positions.⁶⁹⁰

(4) Parties are required to reframe (reconceptualize) issues. When issues are framed as shared values this advances problem solving. When they are framed as distributive values, zero sum bargaining is more likely.⁶⁹¹

(5) Parties engage in "no-fault" brainstorming", that is, they suggest potential resolutions for discussion without being bound by them and comment on the other

⁶⁸⁶ Bingham, *Resolving Environmental Disputes*. 109.; Pruitt, "Strategy in Negotiation," 79, 80.

⁶⁸⁷ Susskind and Cruikshank, *Breaking the Impasse*. 118.; Pruitt, "Mediator Behavior and Success in Mediation," 43.

⁶⁸⁸ Pruitt, "Mediator Behavior and Success in Mediation," 43.

⁶⁸⁹ Dunn, "How useful is Summitry?," 258, 59.

⁶⁹⁰ Pruitt, "Mediator Behavior and Success in Mediation," 43, 44.

⁶⁹¹ Wagner, *Problem-solving and bargaining in international negotiations*. 149.

side's ideas on a non-committal bases. This way the number of ideas that are expressed and discussed is increased.⁶⁹²

(6) Setting deadlines, after which the outcomes become worse and other external pressure may lead to an interpretation of proposals in a more positive light. Consequently negotiators do not seem weak neither to the other side nor to the own constituencies when they offer concessions.⁶⁹³ Deadlines frequently move negotiators towards yielding.⁶⁹⁴ Summit meetings, such as UNCED, may serve as deadlines for a negotiation process. They provide a fixed date until which an agreement has to be signed and therefore prevents protraction of negotiations. Only when negotiators manage to conclude an agreement will the conference be seen as a success. Serial conferences (for example CoPs) do not impose a deadline in the way of "one-off" conferences, given that unresolved issues can be brought up at the next round of negotiations.⁶⁹⁵

On the other hand it may be that the parties' sense of urgency, created through a deadline, is more important than the deadline itself.⁶⁹⁶

IV. Confidentiality or transparency of negotiations

Negotiations may be most successful when held in privacy, without media coverage and interference from each side's constituents. This helps to lower the risk of rigidity of positions, caused by the intention of the negotiator to impress its own constituents with toughness.⁶⁹⁷

Multilateral environmental negotiations are divided into a formal part which is open to the public and during which decisions are made by vote or consensus and an informal part during which decisions are prepared. While the weight of participants is evenly balanced when decisions are adopted and each state casts one vote, their weight in informal deliberations depends on their strength.⁶⁹⁸

Informal negotiations may take place in small groups, often composed of only one representative from each negotiator. They are simply referred to as working groups or

⁶⁹² Susskind and Cruikshank, *Breaking the Impasse*. 118, 19.

⁶⁹³ L. Ross and C. Stillinger, "Barriers to Conflict Resolution," *Negotiation Journal* 7(1991): 399.

⁶⁹⁴ Pruitt, "Strategy in Negotiation," 81.

⁶⁹⁵ Dunn, "How useful is Summitry?," 250.

⁶⁹⁶ Bingham, *Resolving Environmental Disputes*. 107.

⁶⁹⁷ James A. Wall Jr., John B. Stark, and Rhett L. Standifer, "Mediation: A Current Review and Theory Development," *The Journal of Conflict Resolution* 45, no. 3 (2001): 384.; Pruitt, "Strategy in Negotiation," 82, 83.

⁶⁹⁸ Lang, "Negotiation on the Environment," 351.

meetings of the “friends of the chairman”.⁶⁹⁹ The division into formal and informal negotiations underlines the unofficial nature of statements made in the unofficial negotiations. For researchers these meetings’ lack of record poses the problem that the evolution of negotiations is impossible to ascertain. Sometimes not even interpreters are present which disadvantages negotiators who lack sufficient proficiency in English, the main working language.⁷⁰⁰

Privacy and confidentiality may be necessary for successful negotiation in some areas.⁷⁰¹ It may help to agree but at the same time it may make compliance difficult. When an agreement has been reached without constituent participation it is quite probably not supported by the people concerned, who have to be relied upon to ensure compliance.⁷⁰² Negotiations in privacy promise only success if the negotiator enjoys confidence from and authority over his constituents.

Sometimes states themselves seek public notice and issue press releases in order to arouse public pressure to influence the position of other negotiators.⁷⁰³ International, environmental negotiations engender particularly strong media interests. This is true even for negotiations among scientific experts. Media coverage is particularly extensive when negotiations take place outside the traditional negotiation venues and the host government hopes to be associated with a negotiation success and engages in a public relations campaign.⁷⁰⁴ Media coverage tends to create public expectations, which put pressure on negotiators to agree on commitments, given the media’s support of ecological lobbies.⁷⁰⁵

In the interest of effective implementation and future negotiations negotiators should not succumb to the temptation to sell the agreement to the own constituency as a victory, emphasizing gains and hushing up own concessions. This is particularly important where the conclusion of negotiations is reported in the media.⁷⁰⁶

⁶⁹⁹ Ibid., 346.

⁷⁰⁰ Ibid., 347.

⁷⁰¹ Andresen and Skjaereth, "Science and Technology. From Agenda Setting to Implementation," 718.; Kent L. Brown, "Confidentially in mediation: Status and implications," *Journal of Dispute Resolution* 2(1991): 307.

⁷⁰² Pruitt, "Mediator Behavior and Success in Mediation," 44, 45.

⁷⁰³ Lang, "Negotiation on the Environment," 352.

⁷⁰⁴ Ibid., 348.

⁷⁰⁵ Ibid., 351.

⁷⁰⁶ Dunn, "How useful is Summitry?," 256, 57.

Under treaty regimes privately held meetings may be provided for. As an example UNCCD CoP meetings are held in public, unless otherwise decided.⁷⁰⁷ Meetings of standing subsidiary bodies are equally public unless the subsidiary body objects. On the contrary, meetings of ad hoc subsidiary bodies are private unless it objects.⁷⁰⁸

V. Aspects making negotiations difficult

The substance of the issue being negotiated itself can be the reason why it is difficult to resolve differences through negotiations. For once, the sheer complexity makes it difficult to fathom which settlement would be equitable, that is, whether it correctly reflects weight and legitimacy of claims. On the other hand the great complexity of disputed issues arguably opens opportunities for sequencing and packaging and thus enhances the chances of successful negotiations.⁷⁰⁹

At the basis of differences there are quite often divergent values and norms, or ideologies rather than interests. This complicates the attempt to discuss objectively.⁷¹⁰ Negotiators may be prevented by their emotions to clearly perceive the other's interests. Emotions also lead to communication problems because they are hard to understand for the other parties.⁷¹¹

North-South negotiations in the past very much suffered from this. North-South negotiations were highly contentious until the 1980s. The North usually focused on economic mechanisms and outcomes, the South on morality. This made them inflexible and unable to budge from their position.

In the 1960s developed states considered conflicts of interest between themselves and developing states to be merely caused by a legacy of anti-colonialism, to be unsubstantiated and to reflect immaturity of developing states. Negotiations thus tended to be emotional. When issues giving rise to a conflict of interests are clearly defined as such, discussions will be more concerned with facts and increase the practical awareness of the problems of the others.⁷¹²

⁷⁰⁷ CoP UNCCD Decision I/1 Rule 36.

⁷⁰⁸ CoP UNCCD Decision I/1 Rule 28.

⁷⁰⁹ Jacob Bercovitch and Allison Houston, "Influence of mediator characteristics and behavior on the success of mediation in international relations," *The International Journal of Conflict Management* 4, no. 4 (1993): 677, 89.

⁷¹⁰ Ibid.: 677.; Meerts, "The Changing Nature of Diplomatic Negotiation," 85.

⁷¹¹ Meerts, "The Changing Nature of Diplomatic Negotiation," 85.

⁷¹² Higgins, *Conflict of interests. International law in a divided world ; a background book.* 49, 50.

In conflicts in which vital interests are at stake (for example, issues of sovereignty or territorial integrity, or concerns about scarce resources), negotiations will be tough.⁷¹³

In negotiations concerning the administration of land, the differing world views and modes of negotiation of persons from industrialized states and indigenous peoples further complicate matters. The traditional aboriginal relationship to land is based on the values of equity, cooperation and reciprocity that are reflected in local authority and common access. The relationship to land for persons from industrialized states is based on values of competition, exclusive rights to resources and centralized management authority.⁷¹⁴

A serious loss of face for diplomats in negotiations can entail a similar loss of "honour" of the country being represented.⁷¹⁵ This emotionally loaded aspect may obstruct a rational and efficient negotiation process. Especially because a negative impact on the public opinion and dissatisfaction of the parliament are to be expected. In the effort to avoid resistance from parliament and public opinion agreements are kept vague and contradictory.⁷¹⁶ If the national opposition sheds negative light on the negotiations this may threaten the negotiator's power. The negotiator may prefer inactivity as a consequence.⁷¹⁷

On the other hand, the preparation of an agreement and the identification with an agreement's success by a country's officials and bureaucrats may ensure continued efforts because of concerns about personal reputation.⁷¹⁸

In multilateral environmental negotiations it may well be that all parties frustrate progress, because they fear the short-term costs which the decisions may incur, even though they would benefit from them in the long-run.⁷¹⁹ Participants of large international and publicized negotiations do not necessarily take part in these events with the purpose to reach an agreement on items on the agenda. Conferences on high level have a propaganda value for both the countries and the individuals involved. Conferences may serve to arouse the perception in their constituency that

⁷¹³ C.R. Mitchell, *The Structure of International Conflict* (St. Martin's Press 1989). 295.; Jacob Bercovitch, "Understanding mediation's role in preventive Diplomacy," *Negotiation Journal* 12(1996): 251.; Bercovitch and Houston, "Influence of mediator characteristics and behavior on the success of mediation in international relations," 676.

⁷¹⁴ Chapin, "A Challenge to Conservationists ": 23.

⁷¹⁵ Meerts, "The Changing Nature of Diplomatic Negotiation," 86.

⁷¹⁶ *Ibid.*, 87.

⁷¹⁷ Ross and Stillinger, "Barriers to Conflict Resolution," 396.

⁷¹⁸ Brown Weiss, *International environmental law and policy*. 315, 16.

⁷¹⁹ Meerts, "The Changing Nature of Diplomatic Negotiation," 88.

governments take environmental concerns seriously and that they are engaging in consequential action.⁷²⁰

When stakeholders cannot be clearly identified (this may be relevant with respect to indigenous peoples or local communities) or the previous relationship of the negotiators has been hostile this complicates negotiations.⁷²¹ States that suffer from internal discord or communication difficulties between the representative at negotiations and the constituencies may pose insurmountable challenges for negotiations.⁷²²

Moreover, the strategy of negotiators may obstruct effective negotiation outcomes. A negotiator may pursue a strategy of concealing and deceiving the “adversary,” for example, presenting exaggerated claims, to achieve more extensive concessions while reducing the own concessions.⁷²³ Without any knowledge of each others real interests and priorities it is quite unlikely that they will reach a settlement which accommodates both sides. This strategy also damages trust between the negotiators. Without a certain level of trust negotiators will not be prepared to make concessions which might bring a temporary unilateral disadvantage because they will not trust the other side to stick to its promised concessions.

Negotiators may also frustrate negotiations because they hope that future negotiation terms may be advantageous due to a weakening position of their adversary or due to stronger external pressure. This strategy may be prompted by a negotiator’s fear that a demonstration of eagerness to settle may be exploited. When all negotiators act accordingly they will remain deadlocked.⁷²⁴ Especially when negotiators have been trained in negotiation strategies they generally respond in-kind to the other negotiators’ behaviour. Negotiators therefore stand a good chance to have a mutual gains negotiation when they apply a mutual gains approach.⁷²⁵

Negotiation success may also be hindered through psychological reasons. A proposed exchange of concessions may be declined because the negotiator feels it is unfair. Negotiators tend to attribute greater importance to losses than to gains which may

⁷²⁰ Dunn, "How useful is Summitry?," 249.

⁷²¹ Meerts, "The Changing Nature of Diplomatic Negotiation," 88.

⁷²² Bercovitch, "Understanding mediation’s role in preventive Diplomacy," 250.; Pruitt, "Mediator Behavior and Success in Mediation," 45.

⁷²³ Susskind and Cruikshank, *Breaking the Impasse*. 117, 18.

⁷²⁴ Ross and Stillinger, "Barriers to Conflict Resolution," 391.

⁷²⁵ Wagner, *Problem-solving and bargaining in international negotiations*. 145.

make them reluctant to bargain even when this would quite probably lead to mutual gains from an objective point of view.⁷²⁶ The simple act of giving up a concession increases the value of this concession to the party which is giving it up. Own concessions are calculated in a way to maximize their potential value while concessions of the opposing side are calculated so as to minimize their value.⁷²⁷

Suggestions are also devaluated simply because they derive from the adversary.⁷²⁸ This is true in particular when concessions are offered unilaterally. People tend to search for causality to explain the behaviour of others. Where there are no other satisfactory explanations this drives them to devalue proposals. It is however possible to show good-will which will be reciprocated by offering a concession instead of being viewed as weakness which prompts exploitation. One way is to invite other negotiators to choose the initial concession they would most appreciate from a list of concessions. This would be accompanied by a statement that reciprocation is expected.⁷²⁹

When there have been opportunities in the past to settle differences which did not lead to any settlement, it will be even harder for negotiators to agree to a settlement under the same conditions at a later date when there have been additional costs of delay.⁷³⁰

VI. Conclusion of a written agreement

The negotiation outcomes need to be translated into a written agreement.⁷³¹ A useful way to achieve this is the “single-text procedure” in which a participant or a small group of participants is asked to draft the text of an agreement which contains the outcomes of the negotiations. This text is then circulated among the negotiators, who can suggest modifications, until everyone is willing to subscribe to it.⁷³²

D. Evaluation

Chapter 3 examines whether the selected biodiversity-related conventions have been negotiated in an integrative way. It sets forth several conditions that render negotiations integrative. First of all, the state or states which initiate treaty negotiations are in a relatively good position to determine a treaty’s approach and the

⁷²⁶ Ross and Stillinger, "Barriers to Conflict Resolution," 392.

⁷²⁷ *Ibid.*: 393.

⁷²⁸ *Ibid.*: 394.

⁷²⁹ *Ibid.*: 398.

⁷³⁰ *Ibid.*: 395.

⁷³¹ Susskind and Cruikshank, *Breaking the Impasse*. 123.

⁷³² *Ibid.* 124.

less powerful states should use this fact in order to shift to some extent the power imbalance. Taking the initiator role they can avoid that a treaty focuses mainly on trade and finance issues which would make them depend on moral arguments to claim assistance from the North. On the contrary, they can determine a subject of priority interest to them such as land degradation or an issue where they have an economic stake such as biological resources. While UNCCD was initiated by African states to address their priority problem of land degradation, roughly two decades earlier, when the adoption of CITES was prepared, developing states failed to play a role in the preparation of the Convention. They later on had to adjust the Convention through the means of the CoP.

Environmental law provides developing states with a strong moral and legal position which is based on the Northern overexploitation of natural resources the South has not contributed to. While the principle of common but differentiated responsibility, which flows from this onesided overexploitation, is not accepted as general legal concept, it has led to developed states providing for financial resources for sustainable development and capacity building. The attribution of the concept of common concern of humankind to biodiversity underlines the global significance and the applicability of the concept of common but differentiated responsibilities. A second argument which strengthens the Southern negotiation position is that development restrictions placed on them bar them from the unlimited development that the North has pursued.

The second aspect in the preparation of negotiations which is of utmost importance is the question who may negotiate and who should participate in negotiations in some other form. States have lost somewhat their exclusive position as a result of the business and ecology lobbyists who are present at negotiations and the so-called Track 2 diplomacy accompanying official negotiations. In accordance with the constructivist and the interactional law theory, this thesis considers that law needs to be constructed by a broad variety of stakeholders. Only those norms will be perceived as legitimate and will be complied with.

With respect to states, wide state participation in negotiations is preferred to a participation of the most committed states. This wide participation brings a maximum number of states under the socializing effect of the treaty.

In order for a large number of states to participate in negotiations, multilateral action must be more advantageous to them than unilateral action of all states. States with an interest to advance conservation will favour multilateral action because advancing conservation on their own is not feasible. Nor is it permissible under international trade law.

Examples of mechanisms, rendering participation in treaties more attractive are the “preparatory assistance” granted by the Ramsar Convention fund. In addition to incentives of this kind, non-participation may also be counteracted by removing the advantages of non-cooperation. Consequently, CITES imposes similar obligations on trade with non-members as those existing with respect to trade between its members.

When the power of states taking part in negotiations is unevenly balanced this threatens integrative negotiations because the stronger states risk to dictate. States can be strong in two distinct ways. They can possess strategic strength, which means that a state’s characteristics and capacities make it strong, and tactical strength, meaning that its actions during the course of negotiations make it strong. Tactical strength can be raised through various means. The sharing of information and data or collective research are just two methods. Coalition-forming is another option which has been successfully used by African states promoting the adoption of UNCCD. The G-77 is a well-known and long-standing example of a coalition to increase tactical negotiation strength. However, its lack of shared specific interests renders it rather ineffectual. However, the inherent risk of coalition-forming is that they may slow down negotiations due to the need of reconsidering the coalition negotiation strategy.

Providing of resources and training to negotiators is a further means of strengthening them. Usually, negotiations take place under the auspices of an international organization, which in providing negotiation services, can unburden negotiators and level their strength. Unfortunately, the sheer number of negotiations is overburdening the UN’s capacities to provide such assistance.

NGOs can assist by improving negotiation skills and information at a state’s disposition. The risk is that the NGO may in fact dominate the state and push through its own interests in the guise of assistance.

NGOs can increase tactical strength by raising awareness of Southern needs and interests in Northern constituencies. Decision-making by consensus or majority

requirements of the kind used by GEF ensure that weaker states are not simply overruled.

Indigenous peoples are given NGO status to participate in negotiations. However, their land and resource rights are directly affected by rules on biodiversity conservation and indigenous peoples should therefore be negotiators in their own right. Mechanisms to ascertain the legitimacy and representativeness of potential representatives of indigenous peoples still need to be determined.

NGO presence at international negotiations has been increasingly accepted by states and steadily increased since 1972. All advantages that NGO participation in negotiations may bring cannot change the fact that they themselves define their agendas and set conservation or development priorities which may be incompatible with local interests, majority interests and scientific advice. Nor does it change their imperfect representativeness, independence and accountability.

Their main activities lie in the informal field of lobbying state or IO representatives or providing news briefs about conferences. The effect that these efforts have remains indeterminate. In addition, NGOs are increasingly authorized to participate as observers and contribute oral and written statements to the negotiations.

The power imbalance existing between NGOs from the North and those from the South does also have its effects on their participation in international fora. While there are travel funds and other assistance for NGOs from the South their interests are still underrepresented. The question remains whether the extremist views held by NGOs speaking in the name of an undefined minority from the North, make it harder to find a mutual gains solution. Furthermore, a doubt remains whether the assistance addressed to civil society in the South had better be invested in the government sectors, which at least in many cases are more democratically legitimized than the NGOs.

The international involvement of parliamentarians might be a solution to these concerns. Unfortunately, the participation in negotiations of parliamentary associations is still underdeveloped.

The business sector is a major presence at governmental negotiations of environmental agreements. Business involvement in negotiations has the advantage to make corporations aware of the issues of conservation and sustainability and the

contribution that is expected or even required of them. It risks to give them undue power over states and the decision-making process. On the other hand, this influence is unavoidable, given the financial resources and their crucial role for the states' economies. Hence it seems preferable to address the legitimacy problems of Business influence in the open and create as much transparency by institutionalization as possible. The participation of the business sector furthermore strengthened the argument for legal obligations deriving directly from international agreements. In the same way that NGOs cannot require democracy standards of states and scientific precision they do not comply with themselves, corporations cannot legitimately refuse to be bound by standards they themselves have helped to create.

In order to prepare negotiations, negotiators should engage in information sharing or in joint fact-finding. Being well-informed is essential to open opportunities for creative negotiations and to avoid disagreements as a result of misconceptions.

In the negotiations themselves, negotiators can pursue two distinct strategies. They can choose the "zero sum" approach, which means that they consider that there is only a certain number of gains to be made in negotiations and one negotiators gain means automatically the others loss. These negotiators tend to try and convince the others to give in and they may use pressure. As second alternative they may choose the integrative or mutual gains negotiation approach which avoids the dichotomies present in "zero-sum" bargaining.

Among the five strategies that are applied to obtain a mutual gains solution the first strategy, the augmentation of resources, can be helpful for conservation and development in the way that techniques and technologies can be developed and applied that improve the conservation of biodiversity. Moreover, the demand for certain specimens of endangered species can be supplemented by ranched or artificially propagated specimens of the same species.

Package deals can also lead to a mutual gains agreement. The third pillar of the CBD is a typical example of such a package deal. While developing states are called on to facilitate the access to their biological resources, developed states are required to share the benefits gained from these resources. Under CITES the authorization of "split-listing", that is, the listing of different populations of one species in different appendices, is also such an attempt to integrate all parties' interests. Nonetheless, split listing is rejected because the commerce in the population of one species makes the

ban on another population hard to monitor. Many conventions work with financial mechanisms or technology transfers, making the agreements financially attractive to those states which would otherwise not see their interests reflected in them. CITES like many conventions that were adopted before the Rio Conference lack a fund for compliance assistance. Most conventions that were adopted subsequently have such a fund or use GEF for this purpose. These financial mechanisms grant incremental costs, that is, they assist in the implementation and compliance. At the same time they make agreements more attractive and may therefore turn them into mutual gains agreements.

GEF, as the CBD financial mechanism has a potential to compensate for and to lower the cost of the establishment of PAs. In practice, GEF fails to fully compensate full incremental costs arising from the establishment of PAs.

In order to achieve any of the ways to a mutual gains solution, a number of guidelines need to be followed. It is important to engage in interest based negotiations, that is, to be firm about core interests but flexible about the way to achieve them. A good working relationship is important and can, *inter alia*, be achieved through consciousness about each other's history, culture and negotiation style. A reconceptualization of issues may be needed in order to frame them as shared values. The number of ideas within the discussion can be increased through "no-fault brainstorming". Finally, deadlines may be advantageous because they may move negotiators to see proposals in a more positive light and to make concessions without seeming weak.

The decision about how much privacy or how much transparency is needed for negotiations cannot be answered in general, definite terms. Negotiating in private can exclude excessive and counterproductive pressure from constituencies and may make negotiators more cooperative. On the other hand, transparency is needed in order to obtain a legitimate agreement that is well-complied with and pressure may exhilarate otherwise frustratingly protracted negotiations.

A whole range of aspects make it difficult to follow those guidelines in order to successfully use the strategies leading to a mutual gains agreement. The sheer complexity of the issues being negotiated may make it hard to determine a mutual gains solution. Divergent values and ideologies of negotiators as well as their emotions may complicate negotiations. With respect to land management, the

divergence of the world views of indigenous peoples and other persons are particularly challenging.

It needs to be kept in mind that negotiators of biodiversity-related conventions do not necessarily wish to reach an effective agreement. They may very well recoil from making commitments and from expenditures and be simply desirous to demonstrate to their own constituencies and the international community their willingness to act and cooperate.

A malfunctioning channel of communication between the negotiators and those represented harms negotiations. Ideally, states represent their inhabitants of biodiversity rich areas. The question if a shortcoming in this field can be offset through NGOs remains unresolved.

The negotiation strategies applied may hinder reaching a mutual gains agreement. Negotiators may deceive their negotiation partners or frustrate an agreement to obtain a more favourable agreement in the future. This conduct damages trust and the chances for a mutual gains agreement.

Attention must be given to the psychological reasons which may obstruct negotiations. There is the tendency to perceive concessions in a way to maximize their potential value while concessions of the others are perceived so as to minimize their value. Or suggestions are devaluated for the simple fact that they derive from the other parties. When concessions are offered it is particularly important that they cannot be misinterpreted as weakness. In order to achieve this the negotiator making the suggestion or offering the concession must make it clear that he expects corresponding concessions from the other side and that he aims to achieve a mutual gains solution.

Chapter 4: Can negotiations of the conflicts of interests be facilitated through mediation services?

The present chapter tackles the question whether strategies used in mediation can help integrate the conflicting interests relating to biodiversity conservation and the promotion of social and economic development. Mediation is an extended form of negotiation with third party intervention used to solve a particular dispute. Experiences gained in mediation may be transferrable to multilateral inter-governmental negotiations relating to the conflicting interests set forth in Chapter 2. Research on mediation and reports on practical experiences gained in mediation indicate the merits of mediation in a wide variety of fields ranging from international political crises to environmental disputes within states. Arguably, complex conflicts of interest can only be resolved when the contending parties are not left to their own devices but instead assisted by a third party. This chapter will therefore assess whether tasks inspired by mediator strategies are currently carried out by CITES, CBD and UNCCD through their treaty bodies or by scientific networks, NGOs or members of national parliaments. Furthermore, the chapter will analyse which mediation strategies can in future be taken up by the actors mentioned.

A. Definition of the term “mediation”

Mediation is an extended form of continued negotiations. Mediators intervene as third party in a non-coercive and non-binding way in the negotiations between two or more parties.⁷³³ They assist contending parties in voluntarily reaching a settlement.⁷³⁴ Mediation is nearly as widespread as conflict itself in international relations.⁷³⁵ Most complex disputes which involve numerous parties are arguably resolvable only with the assistance of a professional intermediary.⁷³⁶

Mediation may be undertaken by private individuals, government officials, religious figures, regional or global intergovernmental or non-governmental organizations (IOs or NGOs), ad hoc groupings, or small, medium and large states.⁷³⁷ The assistance of a mediator may be sought by the parties or accepted by them after having been offered

⁷³³ Bercovitch, "Introduction: Putting Mediation in Context," 4,5., Wall Jr., Stark, and Standifer, "Mediation: A Current Review and Theory Development," 375.

⁷³⁴ Wall Jr., Stark, and Standifer, "Mediation: A Current Review and Theory Development," 375.

⁷³⁵ Bercovitch, "Introduction: Putting Mediation in Context," 8.

⁷³⁶ Susskind and Cruikshank, *Breaking the Impasse*. 94.

⁷³⁷ Bercovitch, "Introduction: Putting Mediation in Context," 8.

by the mediator.⁷³⁸ Parties are free to accept or reject mediation or mediator proposals. Thus, mediation guarantees the sovereignty and freedom of choice of all parties involved in a difference.⁷³⁹ The increase of actors within negotiations through the presence of a mediator significantly changes the structure of communication. Mediators aim to influence, modify or resolve the conflict through their ideas, knowledge and resources.⁷⁴⁰ They aspire to reduce or remove one or several of the problems of the conflicting parties, or to provide a solution that meets the parties' needs.⁷⁴¹ Or they help to ensure that the participants follow a fair process.⁷⁴² Mediation processes are valued for their ability to produce a shift and accommodation of positions, outlooks and even the basic value perceptions of participants. Mediation may not only serve to manage or resolve a conflict but may also help to prevent conflicts. Preventive mediation is a relatively new and significant form of mediation.⁷⁴³

The contribution of the various forms and strategies of negotiation and mediation toward the agreement is difficult to assess because so many different factors may play together leading to the adoption of an agreement. A strict causal link between a certain form or strategy and an agreement can therefore not be shown. This thesis can however indicate propitious factors. This thesis' approach is premised on the need for balanced participation in negotiations of all stakeholders and on the strength of ideas and shared knowledge. It analyses the extent to which actors providing specific mediation services can impact these factors.

A successful negotiation (with or without the participation of a mediator) can be defined as process leading to the conclusion of an agreement that brings mutual gains.⁷⁴⁴ This definition fails, however, to take into account that the negotiation process itself may be a success because it improves the relationship between conflicting parties and may thus lead to a resolution of their differences in the long run.

⁷³⁸ Ibid., 7.

⁷³⁹ Ibid., 4, 5.

⁷⁴⁰ Ibid., 5.

⁷⁴¹ I. William Zartmann and Saadia Touval, "Introduction: Mediation in Theory," in *International mediation in theory and practice*, ed. I. William Zartmann and Saadia Touval, *SAIS papers in international affairs* (Boulder: Westview Pr. u.a., 1985), 8.

⁷⁴² Smith, "Danger - Inequality of resources present: Can the environmental mediation process provide the answer?," 392.

⁷⁴³ Bercovitch, "Introduction: Putting Mediation in Context," 264.

⁷⁴⁴ Zartmann and Touval, "Introduction: Mediation in Theory," 14.

B. Application of mediation services to facilitate international environmental negotiations

This section considers in how far the principles and ideas that have been developed for conflict resolution play a role or should play a role with respect to international negotiations that are aimed to integrate conservation and development interests. Would the provision of some specific mediation services, modelled on the example of mediation, help integrate development and protection of biological diversity? The effect of mediation depends on both the context and the process of mediation. In the same vein, the effect of mediation services provided in the context of biodiversity-related negotiations would seem to depend on the context and the process of this provision. For the context of any mediation three variables are relevant: the nature of the dispute, the nature of the parties and the nature of the mediator.⁷⁴⁵ Transferred to negotiations of treaties or under treaty regimes this means that the nature of the differences, the nature of the states and indigenous peoples which are negotiating and the nature of the actors providing mediation services are decisive.

I. The nature of the conflicts or differences

In international law in general and within the UN-Charter in particular the term mediation is almost exclusively discussed within the context of the resolution or prevention of armed conflicts and intra-state crises.⁷⁴⁶ Yet within states mediation is acknowledged in numerous fields which do not necessarily involve physical or other violence. These include environmental, school, divorce, organizational, consumer and sexual harassment disputes.⁷⁴⁷ It plays an important role in the resolution or management of environmental disputes within many states and for instance the use of mediation in US American environmental disputes has increased significantly since its inception in 1973.⁷⁴⁸ It is utilized in fields of different nature such as pollution control, land use decisions and disputes, conservation of natural resources, governmental or industrial planning of transportation and site developments, setting industry standards or regulations to preserve or restore the environment, development and revision of regulatory mechanisms themselves, power source development and

⁷⁴⁵ Bercovitch and Houston, "Influence of mediator characteristics and behavior on the success of mediation in international relations," 672.

⁷⁴⁶ Oran R. Young, *The Intermediaries. Third parties in international crises* (Princeton, N.J.: Princeton Univ. Press, 1967). 49.

⁷⁴⁷ Wall Jr., Stark, and Standifer, "Mediation: A Current Review and Theory Development," 386.

⁷⁴⁸ Smith, "Danger - Inequality of resources present: Can the environmental mediation process provide the answer?," 379.

utilization and remedies to technological crises or mistakes affecting the environment.⁷⁴⁹

Mediation is considered a useful tool to help resolve international environmental differences that concern shared or common resources of two or more states, such as land-use. Various kinds of land use and river-water use disputes, usually of a bilateral nature, have already been mediated successfully.⁷⁵⁰ Some authors have pointed to the potential of mediation to solve multilateral environmental issues.⁷⁵¹

II. The nature of the negotiators

Are the states and private interests that involve in multilateral negotiations undertaken to establish rules on conservation and development susceptible to such mediation services? Mediated negotiations tend to involve governmental agencies at different levels, NGOs and corporations.⁷⁵² The best known domestic environmental conflicts that are mediated are those in which environmental groups challenge proposals by private corporations.⁷⁵³ Yet a study has shown that in the US, government agencies at the federal, state or local level are involved in a far greater number of site specific cases than citizens' groups.⁷⁵⁴ The majority of mediated environmental disputes were exclusively intergovernmental disputes⁷⁵⁵ and often citizens' groups dispute with their local governments. Many environmental disputes involve multiple government agencies and interest groups.⁷⁵⁶ This indicates the general feasibility of participation of state and private actors in a mediation process.

In other instances government agencies may be reluctant to negotiating with NGOs or citizens' organizations because they fear that they would improperly delegate their responsibilities or that it would threaten their authority to make decisions.⁷⁵⁷ This dilemma will likely be encountered at the international level, lest the acceptance of mediation services creates a democratic deficit or undermines authority. These

⁷⁴⁹ Jay Folberg and Alison Taylor, *Mediation. A Comprehensive Guide to Resolving Conflicts Without Litigation* (San Francisco: Jossey-Bass, 1990). 224.

⁷⁵⁰ Bruce E. Barnes, "Environmental Mediation: A Tool for Resolving International Environmental Disputes in a Pacific Way," in *The Future of the International Law of the Environment*, ed. Jean-René Dupuy (The Hague Academy of International Law, 1984), 171.

⁷⁵¹ *Ibid.*, 176.

⁷⁵² *Ibid.*, 169.

⁷⁵³ Bingham, *Resolving Environmental Disputes*. 44.

⁷⁵⁴ *Ibid.* 45.

⁷⁵⁵ *Ibid.* 46.

⁷⁵⁶ *Ibid.* 48.

⁷⁵⁷ *Ibid.* 103.

concerns do not hinder the successful provision of mediation services within the domestic environmental/development fields. They stand just as good a chance to be overcome at the international level.

The attitude of the negotiators is of far greater importance. Prospects for mediation are good when disputants are motivated to resolve their differences and to cooperate to this end. As has been seen in Chapter 3, this is not always the case when states take up negotiations on conservation and development issues.

A second condition is that negotiators are prepared to permit mediator involvement. This is likely when a conflict is long, complex, or intractable and the parties have unsuccessfully tried to resolve the conflict by themselves. Developing rules on the control of trade in endangered species and on the international promotion of adequate land management is certainly highly complex and an ongoing task.

When negotiators irrationally follow the “zero sum” approach they are less prepared to accept mediation services, when they raise the other party’s outcomes, because they feel that this will automatically diminish their own outcomes.⁷⁵⁸ Negotiators following an institutionalist perspective will accept mediation services provided that they expect an increase in their own net outcome, rather than the joint outcome, compared to the status quo and any alternative to mediation. Alternatives to mediation may include other means of conflict resolution as well as termination of the relationship. Mediation is recommended for all differences where the involved parties will have a future relationship. Nowadays, all states and not only neighbouring states, are so closely linked with one another as to make them depend on a future relationship.⁷⁵⁹

This thesis deals with the creation of rules for the management of biodiversity with the involvement of mediation services. The conventional alternative to a mediation process, namely a judicial process, is therefore not an alternative here. But even where sufficiently precise rules have been set up, judicial and arbitration settlements are no alternatives. The practical problem with a judicial alternative is posed by the fact that international courts and tribunals are only accessible when all parties have voluntarily accepted their jurisdiction. Often, however, states are unwilling to submit their

⁷⁵⁸ Wall Jr., Stark, and Standifer, "Mediation: A Current Review and Theory Development," 374.

⁷⁵⁹ Barnes, "Environmental Mediation: A Tool for Resolving International Environmental Disputes in a Pacific Way," 171.

disputes to a binding dispute settlement procedure. A mediation style intervention does not face the same scepticism and avoidance as it is non-binding.⁷⁶⁰

In many contexts the mediation process is appreciated for being cheaper, swifter and more enduring than other forms of conflict resolution such as litigation and arbitration.⁷⁶¹ Mediation allows consideration of a wider range of relevant expertise and technical data without causing the same adversarial obstructive clash of experts which can be witnessed in court proceedings.⁷⁶² On the national level mediation is also viewed as being a more effective way to manage resources or resolve social conflicts than traditional legislation.⁷⁶³

The fact that mediation is non-binding has a persuasive effect on negotiators. They may also hope for its de-escalating effect or that it may help to shift the other parties' position. Also they may hope for enhanced cooperation and improved interaction. They may view mediation as an opportunity to publicly express their good will. Additionally, the mediator may prove useful to subsequently monitor an agreement and in the case of failure to agree he may provide a convenient scapegoat.⁷⁶⁴ The non-bindingness, potentially de-escalating effect and the other aspects just mentioned are also in the favour of mediation services in the context of international decision-making on conservation and development.

III. Skills of mediators

A further condition for mediation to be successful is that the mediator possesses the required skills.⁷⁶⁵ Mediators as well as providers of mediation services should possess intelligence, tact, drafting skills, a sense of humour and specific knowledge and

⁷⁶⁰ Jan Klabbbers, "Compliance Procedures," in *The Oxford Handbook of International Environmental Law*, ed. Daniel Bodansky, Jutta Brunnée, and Ellen Hay (Oxford: Oxford University Press, 2007), 1001.

⁷⁶¹ Joseph A. Siegel, "Alternative dispute resolution in environmental enforcement cases. A call for enhanced assessment and greater use," *Pace Environmental Law Review* (2007): 196- 99., Wall Jr., Stark, and Standifer, "Mediation: A Current Review and Theory Development," 382. Folberg and Taylor, *Mediation. A Comprehensive Guide to Resolving Conflicts Without Litigation* 220., Eileen Carroll and Karl J. Mackie, *International mediation. The art of business diplomacy* (The Hague: Kluwer Law Internat., 2000). 66.

⁷⁶² Folberg and Taylor, *Mediation. A Comprehensive Guide to Resolving Conflicts Without Litigation* 220, 21.

⁷⁶³ *Ibid.* 221.

⁷⁶⁴ Bercovitch, "Introduction: Putting Mediation in Context," 9.

⁷⁶⁵ *Ibid.*, 8., Jeffrey Z. Rubin, "Conclusion: International Mediation in Context," in *Mediation in international relations. Multiple approaches to conflict management*, ed. Jacob Bercovitch (New York, N.Y.: St. Martin/0315 s Pr., 1992), 251.

expertise. Such personal qualities are connected to success in other areas of professions and are not less important in mediation.⁷⁶⁶

C. Mediation services

The expansion of mediation over the last decades is seen as a part of a paradigm shift, away from power and hierarchy as modes of decision-making to cooperation, negotiation and mediation.⁷⁶⁷ Mediation, and consequently mediation services, can be useful in any conflict; hence, the difficulty lies in deciding which kind of mediation strategies or services are appropriate for a particular conflict. The thesis will therefore assess which of the mediation strategies that have been tested in various fields can be useful for conflicts of interests arising from efforts to protecting or utilizing biodiversity.

I. Conceptualization of mediation services

The mediation strategy and consequently the services mediators provide to negotiators very much depends on the circumstances of the conflict. This section serves to setting out mediator strategies in order to analyse subsequently which of these services are used to facilitate international negotiations on conservation and development. The strategy may vary from passive to highly active.⁷⁶⁸ Sometimes mediators suggest settlements, in other instances they intentionally desist from doing so. Sometimes they aim to reach a settlement, sometimes to improve interactions between the disputants by easing tensions. Even if a conflict of interests remains unresolved, improved relationships may indirectly lead to a resolution of the conflict in the long run. Provided they have the resources for it, mediators may also provide incentives for parties.⁷⁶⁹

There are several ways in which mediator services may be classified. They can be classified into categories ranging from relatively low to high involvement: (a) communication facilitation, (b) formulation and (c) manipulation. Studies on outcomes of specific techniques are sparse. Apparently, however, communication

⁷⁶⁶ Bercovitch, "Understanding mediation's role in preventive Diplomacy," 253. Mitchell, *The Structure of International Conflict* 293.

⁷⁶⁷ Bercovitch, "Introduction: Putting Mediation in Context," 243.

⁷⁶⁸ *Ibid.*, 8.

⁷⁶⁹ *Ibid.*, 7.

strategies are most promising in low intensity conflicts while in high intensity conflicts more active strategies are held to be preferable.⁷⁷⁰

Conceptualizing mediator services is quite difficult. More than 100 techniques are known to be used.⁷⁷¹ The following list gives an overview of services mediators may provide to negotiators. The categories, the listed services are grouped into indicate merely their primary benefit as most strategies have multifaceted benefits. For instance, strategies that advance the knowledge of negotiators additionally tend to facilitate communication. Most of these activities are well suited to increase the tactical strength of negotiators which helps to alleviate asymmetries in negotiator strength.⁷⁷²

1. Strategies helping to create a propitious context for negotiations

- Choose remote locations to increase intimacy and flexibility;⁷⁷³
- Help to select the parties to be involved in the negotiations as well as the issues for discussion. It is not unusual that the parties to be included are unclear;⁷⁷⁴
- Encourage good working relationships;⁷⁷⁵

2. Cognitive strategies

- Gather information about the priorities and underlying interests of the parties but also on the context of a conflict and the nature of the parties involved;⁷⁷⁶
- Communicate each side's views to the others;⁷⁷⁷
- Assist in formalizing and legitimating the exchange of information;⁷⁷⁸
- Help to handle differences about data or risks;⁷⁷⁹
- Communicate diverging values and world views;⁷⁸⁰

⁷⁷⁰ Ibid., 16., Wall Jr., Stark, and Standifer, "Mediation: A Current Review and Theory Development," 383.

⁷⁷¹ Bercovitch and Houston, "Influence of mediator characteristics and behavior on the success of mediation in international relations," 303.

⁷⁷² Smith, "Danger - Inequality of resources present: Can the environmental mediation process provide the answer?," 379.

⁷⁷³ Bercovitch, "Understanding mediation's role in preventive Diplomacy," 254.

⁷⁷⁴ Kriesberg, "Formal and Quasi-Mediators in International Disputes: An Exploratory," 21, 24.

⁷⁷⁵ Pruitt, "Mediator Behavior and Success in Mediation," 45.

⁷⁷⁶ Jacob Bercovitch, "Introduction: Putting Mediation in Context," Ibid. , ed. Jacob Bercovitch and Jeffrey Z Rubin, 261, 62., Pruitt, "Mediator Behavior and Success in Mediation," 46.

⁷⁷⁷ Kriesberg, "Formal and Quasi-Mediators in International Disputes: An Exploratory," 22. Zartmann and Touval, "Introduction: Mediation in Theory," 7, 11.

⁷⁷⁸ Smith, "Danger - Inequality of resources present: Can the environmental mediation process provide the answer?," 393.

⁷⁷⁹ Bingham, *Resolving Environmental Disputes*. 120.

- Point out their common interests to the parties;⁷⁸¹
- Clarify and interpret events so as to change the image that parties have of one another;

3. Communication facilitation

- Help to protect the parties' image when making concessions by promoting mutual concessions;
- Systematically isolate disputed issues in order to elaborate options and alternatives;⁷⁸²
- Structure the agenda so as to negotiate unproblematic issues first to increase the willingness to make concessions on subsequent issues;⁷⁸³
- Organize workshops and brainstorming sessions;⁷⁸⁴
- Control communication between the parties to help them understand one another's positions. For this purpose, mediators may need to separate the parties and transmit information back and forth (also referred to as "caucusing"). Without the other party present negotiators tend to be less emotional, they are more willing to provide intimate information and they are more likely to admit weaknesses in their position and to discuss potential concessions without modifying their official stance;⁷⁸⁵
- Impose time pressure in the attempt to hasten the agreement when a solution is close at hand.⁷⁸⁶

4. Strategies that improve transparency and accountability

- Make the dispute public;⁷⁸⁷
- Provide acceptance and visibility for solutions which may improve good faith participation;⁷⁸⁸

⁷⁸⁰ Kriesberg, "Formal and Quasi-Mediators in International Disputes: An Exploratory," 21.

⁷⁸¹ Bercovitch, "Understanding mediation's role in preventive Diplomacy," 255. Young, *The Intermediaries. Third parties in international crises*. 51.

⁷⁸² Folberg and Taylor, *Mediation. A Comprehensive Guide to Resolving Conflicts Without Litigation* 7.

⁷⁸³ Pruitt, "Mediator Behavior and Success in Mediation," 50., Carnevale, "Mediating from Strength," 31.

⁷⁸⁴ Smith, "Danger - Inequality of resources present: Can the environmental mediation process provide the answer?," 392.

⁷⁸⁵ Pruitt, "Mediator Behavior and Success in Mediation," 46.

⁷⁸⁶ *Ibid.*, 47.

⁷⁸⁷ Wall Jr., Stark, and Standifer, "Mediation: A Current Review and Theory Development," 376.

⁷⁸⁸ Kriesberg, "Formal and Quasi-Mediators in International Disputes: An Exploratory," 22., Smith, "Danger - Inequality of resources present: Can the environmental mediation process provide the answer?," 393.

- Create public support and public pressure towards resolving a conflict expressed through public opinion surveys, social movements or elections. Public pressure can be particularly effective in long-term policies, such as environmental issues. Its effectiveness very much depends on the responsiveness of the government systems.⁷⁸⁹

5. Normative strategies directly aiming at integrative solutions

- Promote the reframing of issues;
- Advance the development of new ideas to increase options;⁷⁹⁰
- Develop and suggest solutions; for example, draft an agreement in the single-text procedure. Mediator suggestions as opposed to suggestions stemming from the other contendant, do not risk to be rejected, only because of their source of origin.⁷⁹¹

6. Counterbalance power asymmetry of stakeholders

- Criticize a side's position;⁷⁹²
- Temporarily reinforce one side to keep it in the conflict and prevent a unilateral victory;⁷⁹³
- Sell one side's case to the other;⁷⁹⁴
- Make sure that interests and concerns of stakeholders who are not directly involved in the negotiations are taken into account.⁷⁹⁵

7. Assistance raising and managing

- Obtain assistance from third parties;⁷⁹⁶
- Assist in creating a resource pool to fund activities such as travel expenses and fact finding;⁷⁹⁷
- Act as independent resource pool manager.⁷⁹⁸

⁷⁸⁹ Kriesberg, "Formal and Quasi-Mediators in International Disputes: An Exploratory," 20.

⁷⁹⁰ Pruitt, "Mediator Behavior and Success in Mediation," 46., Kriesberg, "Formal and Quasi-Mediators in International Disputes: An Exploratory," 22., Susskind and Cruikshank, *Breaking the Impasse*. 142.

⁷⁹¹ Pruitt, "Mediator Behavior and Success in Mediation," 47.

⁷⁹² Wall Jr., Stark, and Standifer, "Mediation: A Current Review and Theory Development," 376.

⁷⁹³ Zartmann and Touval, "Introduction: Mediation in Theory," 11.

⁷⁹⁴ Wall Jr., Stark, and Standifer, "Mediation: A Current Review and Theory Development," 376.

⁷⁹⁵ Kriesberg, "Formal and Quasi-Mediators in International Disputes: An Exploratory," 25. Susskind and Cruikshank, *Breaking the Impasse*. 143.

⁷⁹⁶ Wall Jr., Stark, and Standifer, "Mediation: A Current Review and Theory Development," 376.

⁷⁹⁷ Smith, "Danger - Inequality of resources present: Can the environmental mediation process provide the answer?," 396.

⁷⁹⁸ Ibid.

8. Help sustain an agreement

- Provide resources and services for example independent verification and monitoring.⁷⁹⁹

II. Mediation services amenable to states

It has been said earlier that state agencies are in fact involved in negotiation processes. But the underlying reasons for states to be amenable to mediation services remains to be looked at and so does the question which services are most suitable. Before examining whether the activities of experts, NGOs and treaty regimes can be referred to as mediation services, it needs to be established whether the states are amenable to mediation services. This section will therefore address the question which mediator activities the community of states is potentially amenable to.

The constructivist theory asserts that NGOs, experts as well as treaty regimes have a significant influence on state interests and even state identities. This implies that they can influence conflicts of interests between states, as well. Pursuant to constructivists these changes occur through social processes. Constructivists stress the social aspect of state cooperation within regimes. To them the international realm is a social structure made up of norms, identity, knowledge and culture.⁸⁰⁰ Hence, mediator activities can be directed at communication facilitation as in any other social context.

In concordance with the interactional law theory, this thesis is rooted in the assumption that the main goal of human life is not mere survival, but maintaining communication with one another.⁸⁰¹ Facilitating communication is the central purpose of law. Law can prompt changes of identity and interest because addressees feel themselves bound by laws they perceive as legitimate and thus they adhere to them.⁸⁰²

Where negotiators succeed in increasing the perceived legitimacy of the negotiation process and with it of the agreement, this will improve state adherence to the agreement. Both constructivism and the interactional law theory consider that interaction leads to shared understandings, shapes identities and prompts new treaty regimes and organizations.⁸⁰³ They perceive the actors and the social structure as

⁷⁹⁹ Kriesberg, "Formal and Quasi-Mediators in International Disputes: An Exploratory," 26.

⁸⁰⁰ Brunnée and Toope, "International law and constructivism: elements of an interactional theory of international law," 29.

⁸⁰¹ *Ibid.*: 60.

⁸⁰² *Ibid.*: 65.

⁸⁰³ *Ibid.*: 66.

mutually constitutive.⁸⁰⁴ Hence, mediation services which facilitate interaction help to converge the understanding of states and shape their identities.

States form their identities and interests through their participation within the international realm.⁸⁰⁵ States thus do not have rigid interests which they maintain independently of external influence, in the way asserted by institutionalists. Rather, state interests respond to influences from external sources. As a result, states are susceptible to mediator activities such as: pointing out to the states interests which they have in common and which they may have failed to perceive on their own account. A mediator may also elaborate options and alternatives for state action which may change state interests. Moreover, a mediator can assist in the gathering and exchanging of information which may inform states and consequently change their interests.

At the same time states and other actors react to regimes due to the social identities that they have or seek to have. A state may aim to be and to be perceived by its constituencies and other states as an environmentally protective or socially fair state or a generally law abiding state.⁸⁰⁶ In particular democratic states value an identity as respecting the “rule of law”.⁸⁰⁷ Hence, states are not merely prompted to comply with their obligations to obtain material gains but also because participation in regimes is important for state identity. Globalization increased the interdependence among states and with it state concerns about their position within the international structure.⁸⁰⁸ This tendency renders states amenable to such mediator activities as making the dispute public to improve good faith participation and to create public support and public pressure.

In the course of international negotiations states are prompted to re-define their interests in broader and longer-term perspectives. They may begin to consider even indirect or remote environmental impacts. The environmental or economic scientific research undertaken under multilateral environmental agreements (MEAs) reinforces this tendency and changes state interests.⁸⁰⁹ This trend towards broader and longer

⁸⁰⁴ Ibid.: 67.

⁸⁰⁵ Danish, "International Relations Theory," 216.

⁸⁰⁶ Ronald B. Mitchell, "Compliance Theory. Compliance, Effectiveness and Behaviour Changes in International Environmental Law," Ibid. , ed. Daniel Bodansky, Jutta Brunnée, and Ellen Hay, 902.

⁸⁰⁷ Ibid., 907.

⁸⁰⁸ Brunnée and Toope, "International law and constructivism: elements of an interactional theory of international law," 51.

⁸⁰⁹ Mitchell, "Compliance Theory. Compliance, Effectiveness and Behaviour Changes in International

term interests increases the chances to agree because it leaves room for the mediator strategies of reframing and reconceptualizing.

Hence, the nature of states renders their being influenced by mediation services possible. Institutionalists agree that social forces influence state actions but they view those as insignificant compared to political and economic considerations.⁸¹⁰ Pursuant to the institutionalist theory there would be very little room for mediation services to facilitate an agreement since changing the political background and economic implications of negotiations may be hard or even impossible. Following the constructivist approach and giving great value to the social dimension and the shaping force of ideas, shared knowledge and norms that are considered to be legitimate, gives mediators far greater room for action. Much legal writing on regime design shows an orientation towards constructivist thought, that is, authors stress the discursive and norm creating function of regimes.⁸¹¹ At first glance it would seem farfetched to examine the mediation capacities of treaty regimes as they are made up of states rather than being a third party in the classical mediator style. It remains to be seen whether single treaty bodies or the regime in its entirety, with the interplay of its organs, can mediate conflicts of interests. Regimes go beyond setting a mere frame for effective state negotiation. They go beyond the tasks of exchanging information, monitoring compliance and applying rewards and sanctions. Various mediation services therefore may be envisaged.

NGOs and experts are active in conservation and development matters within the intergovernmental system and outside of it. NGOs, experts and parliamentarians are truly third parties in negotiations of states. First, their independent activities will be examined to be followed by the examination of the activities of treaty regimes that cooperate with NGOs, experts and occasionally with parliamentary groups. This is in keeping with constructivism whose emphasis on the social and discursive nature of cooperation prompts to examine the role played by non-state actors, such as NGOs but also epistemic communities and other experts within environmental regimes.⁸¹²

It remains to be seen whether treaty regimes are capable of providing mediation services. Can they, as stated in the definition, influence, modify or resolve the conflict

Environmental Law," 905.

⁸¹⁰ Kyle W. Danish, "International Relations Theory," *Ibid.*, ed. Daniel Bodansky, Jutta Brunnée, and Ellen Hay, 219.

⁸¹¹ *Ibid.*, 222.

⁸¹² *Ibid.*, 217.

through their ideas, knowledge and resources? Can they reduce or remove the problems of the conflicting parties? The same questions arise with respect to the activities undertaken by NGOs, experts and parliamentarian groups respectively. NGOs and scientific networks accompany the whole process of regime preparation, negotiation and compliance control. Can the services they provide to state negotiators and to the treaty regimes be compared to mediation services?

D. Providers of mediation services

Mediators may be formally appointed, as is the case in collective bargaining in domestic labour disputes and other fields of institutionalized mediation. Also mediation of international armed conflicts is most commonly understood as some formal or institutionalized intervention by an outsider or a third party.⁸¹³ Nonetheless, individuals may also mediate informally. Informal mediators who mediate in international crises typically have a long-standing experience of international conflict resolution or they are scholars with relevant professional experience. They use their competence, credibility and experience to mediate,⁸¹⁴ and usually they focus on communication strategies and relational facilitation.

Formal mediators are political incumbents, who act in an individual capacity. They mediate within an official framework such as a conference or political forum. They are less flexible which is however counterbalanced by their access to decision-makers. Formal mediation cannot always be distinguished from ordinary diplomacy.

In most cases mediation in intra-state crises is undertaken by states and international organizations.⁸¹⁵ The presumed lack of clout of small states, makes them appear ideal mediators. When large states mediate they can use their position and resources to create momentum towards a settlement.⁸¹⁶

Regional organizations and the UN may be suitable and efficient as mediators since they have a moral authority, they embody some generally agreed upon norms and they are perceived as legitimate.⁸¹⁷

The consideration of mediators in the global protection of biodiversity has so far been limited to vague suggestions that international mediators are called upon to provide

⁸¹³ Bercovitch, "Understanding mediation's role in preventive Diplomacy," 248.

⁸¹⁴ _____, "Introduction: Putting Mediation in Context," 10.

⁸¹⁵ *Ibid.*, 11.

⁸¹⁶ *Ibid.*, 12.

⁸¹⁷ *Ibid.*, 261.

the process to resolve disputes involving the development and destruction of areas that have a worldwide impact, such as the Amazon rain forests, as one of the regions with the highest level of biological diversity. These mediators would ensure, so the argument, that the global interest is considered a legitimate interest which needs to be taken into account.⁸¹⁸ It follows that the sovereignty of states is viewed as being limited because the survival of each nation depends on the survival of all.⁸¹⁹

This thesis has an altogether different conception of mediators. They may temporarily advance one side's position but are not generally advocates for one particular interest. Also the priority given to the global environmental interest is not convincing and not in line with international law.

This thesis will consider whether the work undertaken by treaty regimes encompasses mediation services. Treaty bodies, NGOs and epistemic communities might at present or in the future provide such services, rather than being fully-fledged mediators. These actors do not manage the negotiating process in its entirety in the way a mediator does with respect to a particular case.⁸²⁰ Services provided by such actors will be compared to services provided by mediators. The rich experience gained by mediators will serve as a benchmark and an example for the activities of treaty regimes, experts and NGOs in the context of biodiversity conservation and development.

I. NGO activity outside of treaty regimes

NGOs are contracted to undertake supportive activities for treaty regimes which will be examined below within the section on treaty regimes. But they also undertake actions that are not requested by treaty regimes. The following paragraphs examine the extent to which NGO activities correspond to the mediator activities listed above.

1. Information gathering on the context of a conflict

NGOs may engage in the collection of data. IUCN played an important role with respect to endangered species. IUCN started to collect data on population numbers in the late 1950s and distributed it since 1966 in its "Red Data Books". Species protection through trade controls got momentum through the initiatives of IUCN. By

⁸¹⁸ Folberg and Taylor, *Mediation. A Comprehensive Guide to Resolving Conflicts Without Litigation* 230.

⁸¹⁹ *Ibid.* 231.

⁸²⁰ Susskind and Cruikshank, *Breaking the Impasse*. 133. Dunn, "How useful is Summitry?," 255.

providing the scientific data, IUCN triggered the process leading to the adoption of CITES in 1973.⁸²¹ This data, however, was not conclusive enough to ensure the functioning of the Convention. The data failed to establish the instances when trade would affect threatened species.⁸²² Scientific work had to continue under the Convention. Rather than gathering comprehensive information on conservation and social and economic aspects in mediator style, the collection of information was undertaken with a view to advocating the maximum conservation. While NGOs have a potential to engage in information gathering to facilitate finding a mutual gains solution, this can only be realized when they renounce advocating a particular interest and form coalitions with NGOs from all regions and from all fields of expertise in order to collecting well-balanced information.

2. Communicate each side's views and values to the others

NGOs can have a strong mediation function when they are truly international actors not confined by geographic boundaries or bound to one region. They can communicate each side's views and values to the others when they have input from all regions in a way that a state never will. NGOs even keep up relations with isolated states such as Myanmar and North Korea.⁸²³

3. Create public support and public pressure towards resolving differences

States may be influenced by NGOs in their decision on the initiation of negotiations of an instrument. NGOs raise awareness for the existence, extent and main causes of environmental problems or development problems. Thus, they play a significant role in placing environmental issues on the international agenda. In the case of CITES IUCN's General Assembly called for negotiations of an "international convention on regulations of export, transit and import of rare or threatened wildlife species or their skins and trophies" in a resolution in 1963, initiating the process which led to the negotiation of CITES.⁸²⁴ As mentioned above, a holistic NGO approach is important in order to create public support and pressure towards the adoption of a mutual gains agreement. Using government lobbying and media campaigning they draw the

⁸²¹ Riedinger, *Die Rolle nichtstaatlicher Organisationen bei der Entwicklung und Durchsetzung internationalen Umweltrechts*. 178.

⁸²² Curlier and Andresen, "International Trade in Endangered Species: The CITES Regime," 360.

⁸²³ Sanderson, "The Future of Conservation," 166.

⁸²⁴ Riedinger, *Die Rolle nichtstaatlicher Organisationen bei der Entwicklung und Durchsetzung internationalen Umweltrechts*. 183, 84.

community of states' and the citizens' attention to the problems.⁸²⁵ Campaigns before a conference tend to put pressure on state representatives to reach an agreement.⁸²⁶ Sometimes NGOs mobilize effective consumer actions.⁸²⁷

4. Develop and draft solutions

Conventions are not only drafted by states and international organizations but also by NGOs. Some States accept convention drafts from respected NGOs and enter into discussions aimed at their improvement. The 1971 Ramsar Convention was based on the International Waterfowl Research Bureau's (IWRB) draft. The IUCN Environmental Law Centre prepared and circulated draft texts for CITES reflecting comments from 39 governments and 18 NGOs.⁸²⁸ The drafting or circulating of drafts may facilitate state negotiations.

5. Further potential mediation services

There are several other ways in which NGO activities can be envisaged to influence the solution of conflicts of interest. They can provide acceptance and visibility for solutions thus improving good faith participation. They can, in collaboration with their scientists, advance the development of new ideas. They can publicly criticize a side's position and also temporarily reinforce one side to prevent a unilateral victory. Moreover, they organize workshops and brainstorming sessions and help to fund travel expenses and fact finding. They are also the appropriate actor to ensure that interests and concerns of stakeholders, who are not directly involved in the negotiations are taken into account. Closely cooperating NGOs from the environmental and the development sectors would be well equipped to promote the reframing of issues and to sell one side's case to the other.

6. Evaluation

NGOs perform several of the services mediators are hailed for and they have a potential to be even more active in this field. Yet, the concerns relating to NGO one-sidedness and power to overrule and disrespect local interests expressed in Chapter 2

⁸²⁵ Kieran Mulvaney, "The International Whaling Commission and the role of non-governmental organizations," *Georgetown international environmental law review* 9, no. 2 (1997): 350.; Jane H. Bock and Katy Human, "NGOs and the protection of biodiversity. The ecologists' views," *Colorado journal of international environmental law and policy* 13, no. 1 (2002): 175, 76.

⁸²⁶ Riedinger, *Die Rolle nichtstaatlicher Organisationen bei der Entwicklung und Durchsetzung internationalen Umweltrechts*. 181, 82.

⁸²⁷ Kiss and Shelton, *International environmental law*. 166, 67.

⁸²⁸ Reeve, *Policing international trade in endangered species. The CITES Treaty and compliance*. 27.

remain. They must be kept in mind when considering the services provided by NGOs. NGO suggestions have a chance to be convincing to states when they are perceived to represent a sizeable political constituency or to have superior expertise or field experience. NGOs may be useful in collecting national examples of best practice as an informative basis for international standards. They enrich lawmaking through the diverse knowledge and expertise they contribute.⁸²⁹ Yet, the ecoprocentric position of conservation NGOs and the danger of Northern dominance remain. As has been shown in Chapter 3 with respect to CITES, IUCN's data and initiative failed to take into account developing states' interests and local communities interests.

II. Scientific experts outside of treaty regimes

Decision-makers turn increasingly to experts in order to help them determine what their own interests are and to identify a way to achieve them. The uncertainty of states has increased since the end of the Cold War, because decision-makers are no longer guided by geopolitical doctrines in their foreign policy. In the future, the influence of scientists will quite probably become even stronger as issues to be regulated are becoming more and more complex.⁸³⁰ The merits of scientific assessments are twofold: they shape the actors' cognitive expectations on scientific matters and they help to obtain political consensus.⁸³¹ As a part of national administrations or external advisors scientists inform their government and the negotiation process.⁸³² This section will consider whether scientific experts provide mediation services.

Some scientists group together in scientific networks to improve their communication and scientific exchange and to organize themselves in order to involve at the international level. The literature examining the influence of scientists and scientific networks on international environmental law has developed the notion of "epistemic communities". This term refers to scientific networks that fulfil certain substantial requirements. Epistemic communities are – often transnational – networks of experts with policy relevant knowledge. They are experts with professional training in a social or natural science domain and suggest actions that would benefit human welfare.

⁸²⁹ Boyle and Chinkin, *The making of international law*. 66.

⁸³⁰ Jessica Templeton, "Framing Elite Policy Discourse: Epistemic Communities and the Stockholm Convention on Persistent Organic Pollutants," (2008): 12.

⁸³¹ Gehring, "Treaty-Making and Treaty Evolution," 484.

⁸³² Haas, "Obtaining International Environmental Protection through Epistemic Consensus," 43. James K. Sebenius, "Challenging conventional explanations of international cooperation: negotiation analysis and the case of epistemic communities " in *Knowledge, Power and International Policy Coordination*, ed. Peter M. Haas (University of South Carolina Press, 1997), 355.

Relevant in environmental law are for the most part natural scientists, engineers and economists. The natural scientists are mostly referred to as ecologists. Their discipline – ecology – integrates various traditional disciplines such as geology, oceanography, meteorology, chemistry, amongst others. Ecologists study the composition, behaviour and interactions of the earth's non-living realms or phases as well as its living realm, the biosphere. These latter ecologists are relevant for this thesis. Even though ecologists are from diverse and hybrid disciplines, they agree that it is necessary to analyze the biosphere in a holistic manner. Environmental protection is seen by them as an absolute end rather than being desirable merely for its economic value.

These experts may be parts of academia, think tanks, governments and firms. They tend to evolve around treaty regimes and include both governmental and non-governmental experts.⁸³³ They do not usually work with NGOs because NGOs give priority to their principles rather than the science. NGOs may, however, transmit scientific ideas to decision-makers⁸³⁴ and make them known to a broad public.⁸³⁵

Members of an epistemic community share values which are the rationale for their social action. They have a shared scientific theory and they develop possible policy actions that would lead to the desired outcomes. They share their criteria for validating knowledge. Interviews and specialized publications help to ascertain if scientists have such common beliefs.

It is questionable whether existing scientific networks can unambiguously be established to fall within the concept of epistemic communities, which has been developed from a theoretic perspective rather than from an empirical base. Looking in more detail at the concept and at the features of scientific networks shows that several shades of grey exist between the ideal of an epistemic community whose members are inspired by principles but who are reliable scientists in the first place and scientific networks whose primary purpose is to further the principles and interests of their NGO or government. When the term epistemic community is used in the following paragraphs this is with the awareness that this concept is more an ideal type than a description of any existing scientific network.

⁸³³ Gehring, "Treaty-Making and Treaty Evolution," 484.

⁸³⁴ Meerts, "The Changing Nature of Diplomatic Negotiation," 97, 98.

⁸³⁵ *Ibid.*, 100.

1. Scientific networks in the biodiversity context

Scientific networks in the context of biodiversity are the IUCN specialized commissions, Trade Records Analysis of Fauna and Flora in Commerce (TRAFFIC) and the United Nations Environment Programme-World Conservation Monitoring Centre (UNEP-WCMC). Furthermore, there is the International Council for Scientists (ICSU), a scientific NGO. These networks are sometimes classified as epistemic communities.⁸³⁶ Their independence and objectivity will be looked at more closely in the next section. Suffice it here to say that because of the difficulties to establish whether the networks fulfil all the characteristics of epistemic communities listed above, they will be more loosely termed as “scientific networks”. Particularly, the blurred demarcation between epistemic communities of scientists inspired by certain principles and ideological groups underpinned by science make it commendable to keep to the more open terminology.

a) UNEP-World Conservation Monitoring Centre (UNEP-WCMC)

UNEP-WCMC refers to itself as UNEP’s biodiversity arm.⁸³⁷ In the year 2000 UNEP and WCMC 2000, a UK based charity, entered into a partnership. WCMC had been established in 1979 by IUCN and gained status as an independent charity in 1988 with continued support from IUCN, WWF and UNEP. UNEP-WCMC is now primarily managed by UNEP. IUCN continues its significant involvement.⁸³⁸ During the last decades, both WCMC 2000 and UNEP-WCMC have been collecting and integrating data with a view to informing about the global biodiversity status.

In accordance with the definition of epistemic communities, UNEP-WCMC is guided by certain principles, namely the principles that the worth of biodiversity depicted in authoritative information on biodiversity should be given due attention in decision-making.⁸³⁹ UNEP-WCMC strives to fulfil the traits typical of epistemic communities. This becomes apparent when the Centre states its goal to function as an “internationally recognised Centre of Excellence for the synthesis, analysis and dissemination of global biodiversity knowledge, providing authoritative, strategic and

⁸³⁶ Curlier and Andresen, "International Trade in Endangered Species: The CITES Regime," 365.

⁸³⁷ UNEP- WCMC, "Strategic Plan 2006-2011," (2006): 14.

⁸³⁸ Ibid.: 4.

⁸³⁹ Ibid.: 6, 7.

timely information for conventions, countries, organizations and companies to use in the development and implementation of their policies and decisions.”⁸⁴⁰

b) IUCN commissions

IUCN has six volunteer commissions. Their names are as follows: Species Survival Commission (SSC); World Commission on Protected Areas (WCPA); Commission on Environmental Law (CEL); Commission on Ecosystems Management (CEM); Commission on Education and Communication (CEC) and Commission on Environment, Economics and Social Policy (CEESP).⁸⁴¹

The Species Survival Commission (SSC) was created in 1949 and is the largest among the commissions. It is a “knowledge network” of roughly 7,000 volunteers, researchers, government officials and leaders of conservation initiatives. Since 1986 it acted as a focal point of IUCN’s support for CITES. Its objective is to “promote conservation and sound management of plant and animal species in international trade.” SSC members advise governments, international conventions and conservation organizations in technical and scientific matters, inter alia, through the IUCN Red List of Threatened Species.⁸⁴²

The members of the World Commission on Protected Areas (WCPA) strive to provide guidance on PA issues to governments, NGOs, communities and other stakeholders through their knowledge and experience. The Commission’s mission is to promote an effectively managed, representative system of PAs.⁸⁴³

c) Trade Records Analysis of Fauna and Flora in Commerce (TRAFFIC)

TRAFFIC was set up in 1976 by IUCN. It has evolved into a global network, “research-driven and action-oriented, committed to delivering innovative and practical conservation solutions based on the latest information.” TRAFFIC is a network composed of nine regional programmes under the coordination of the headquarters in Cambridge, UK.⁸⁴⁴ Its objectives are to protect wild species and priority ecoregions

⁸⁴⁰ Ibid.: 7.

⁸⁴¹ IUCN, "WCPA Strategic Plan 2005-2012."

⁸⁴² IUCN/SSC, *Strategic Planning for Species Conservation: A Handbook*, (Gland: IUCN, 2008), http://cmsdata.iucn.org/downloads/scshandbook_2_12_08_compressed.pdf.

⁸⁴³ IUCN, "WCPA Strategic Plan 2005-2012."

⁸⁴⁴ TRAFFIC, "About TRAFFIC," <http://www.traffic.org/overview/>.

from the negative impact of wildlife trade, to conserve wildlife for human needs and to promote international instruments in these fields.⁸⁴⁵

d) The International Council for Science (ICSU)

The International Council for Science (ICSU; formerly International Council of Scientific Unions) is a scientific NGO. ICSU provides an independent source of information and thus helps to verify or complete public and private sector data which finally leads to an accepted scientific theory.⁸⁴⁶

ICSU organizes its members – National Scientific Bodies and International Scientific Unions – in a network and brings them together at international conferences to exchange their scientific experiences, data and views and call upon states to become active. Moreover, it organizes interdisciplinary research on issues that are relevant to both science and society. ICSU regularly publishes its research results on a wide range of scientific topics. The Council promotes equitable access to scientific data and information and facilitates science education and capacity building.⁸⁴⁷ The Council cooperates with IOs and NGOs. It maintains contact to several thousand scientists worldwide, who, for the most part, contribute voluntarily to ICSU's activities. ICSU feels called upon to act on behalf of the global scientific community, advising, inter alia, on environmental issues.⁸⁴⁸ It established Interdisciplinary Bodies, giving scientists a framework to work together.⁸⁴⁹ Those Interdisciplinary Bodies are co-financed by UN agencies and non-governmental actors.

ICSU has more scientific and less ideological objectives than either of the other networks discussed. The Council's goal is to ensure a more coordinated and inclusive approach to research on the environment in such a way as to make necessary high-quality scientific evidence available to policy-makers and, to develop new international programmes in key areas.⁸⁵⁰

⁸⁴⁵ Reeve, *Policing international trade in endangered species. The CITES Treaty and compliance*. 46.

⁸⁴⁶ Bock and Human, "NGOs and the protection of biodiversity. The ecologists' views," 171, 72.

French, "The role of non-state actors," 253., Stairs and Taylor, "Non-Governmental Organizations and the Legal Protection of the Oceans: A Case Study," 123.

⁸⁴⁷ International Council for Science, "Strategic Plan 2006-2011,"

http://www.icsu.org/Gestion/img/ICSU_DOC_DOWNLOAD/863_DD_FILE_ICSU_Strategic_Plan.pdf.

⁸⁴⁸ Ibid.

⁸⁴⁹ Ibid.

⁸⁵⁰ Ibid.

2. Mediation services by scientists

Scientists provide several of the services typical for mediators when they act outside of treaty regimes. The scientific work undertaken under the selected treaty regimes will be examined in the following section.

a) Provide information

Scientists may gather and provide information about the priorities and underlying interests of the parties to a conflict of interests but also on the context of this conflict. Scientists can identify problems. Like mediators, they establish which points are problematic and need to be addressed in an agreement. Quite often environmental problems, such as the loss of biological diversity are not apparent at first and are only discovered through scientific research. Even when environmental problems are clearly perceptible, for example, in the case of desertification and degradation of forests, scientific examinations are necessary to establish causes. To name a prominent example, the ICSU research is a component of the Millennium Ecosystem Assessment (MA).⁸⁵¹ The MA on ecosystems considerably advanced knowledge about biophysics and socio-economy. The MA was undertaken between 2001 and 2005 to examine the implications of ecosystem change for human well-being and to assess ways to conserve and sustainably use ecosystems and to enhance their benefits for human well-being. The MA is a response to requests for information from the CBD, UNCCD, the Ramsar Convention and the CMS. Furthermore, it is meant to inform business, civil society and indigenous peoples. It involved an approximate 1,360 experts from 95 countries working under the oversight of an independent Review Board. The purpose of the MA is to provide authoritative information to address policy questions and to lay open areas of scientific consensus and controversy.⁸⁵²

Even when scientists decide which aspects to prioritize in their research and their communication of results this influences decision-making.⁸⁵³ However, providing information does not suffice to mobilize relevant actors to tackle problems collectively and to construct a MEA.

⁸⁵¹ Ibid.

⁸⁵² Millennium Ecosystem Assessment, "Ecosystems and Human Well-Being. Biodiversity Synthesis. A Report of the Millennium Ecosystem Assessment," <http://www.maweb.org/documents/document.354.aspx.pdf>.

⁸⁵³ Templeton, "Framing Elite Policy Discourse: Epistemic Communities and the Stockholm Convention on Persistent Organic Pollutants," 7, 15.; Sebenius, "Challenging conventional explanations of international cooperation: negotiation analysis and the case of epistemic communities ", 355.

b) Develop and spread new ideas

Furthermore, epistemic communities perform the mediation activities of developing and spreading new ideas. Their research results extend opportunities to bargain.⁸⁵⁴ Thus, they may help to identify state interests and the legitimate participants in negotiations and they may influence the form and content of agreements.⁸⁵⁵

c) Create public support for an agreement

With their research results and the ideas they spread, epistemic communities can shape the views of the general public.⁸⁵⁶ Public support constitutes a propitious background for conflict resolution. At the same time, states are particularly amenable to new ideas provided by epistemic communities after highly publicized crises which lead to pressure from their constituencies and from abroad. Public visibility and awareness generally boosts the demand for scientific knowledge. In the case of highly controversial issues public awareness and pressure may, by contrast, very well aggravate the tensions, making rational use of scientific inputs more difficult.⁸⁵⁷ It is challenging to prevent that sound science is overruled in such situations.

d) Develop and draft solutions

Epistemic communities also suggest counter measures to address ecological problems and as a consequence call for specific agreements. Social and economic expertise is needed in an equal measure. Scientists will have a comparatively strong impact on governments when they can suggest a feasible remedy. This implies that scientific knowledge must be transformed so as to become usable by decision-makers. Ecological epistemic community members assisted in drafting the Ramsar Convention and the CMS. The SSC, based on its assessment of the status of species that are traded internationally, develops measures that, if applied, would provide the required protection of species.⁸⁵⁸

⁸⁵⁴ Templeton, "Framing Elite Policy Discourse: Epistemic Communities and the Stockholm Convention on Persistent Organic Pollutants," 11.

⁸⁵⁵ Haas, "Epistemic Communities," 792.

⁸⁵⁶ Templeton, "Framing Elite Policy Discourse: Epistemic Communities and the Stockholm Convention on Persistent Organic Pollutants," 10.

⁸⁵⁷ Tora Skodvin and Arild Underdal, "Exploring the dynamics of the science-politics interaction," in *Science and politics in international environmental regimes. Between integrity and involvement*, ed. Steinar Andresen and Jorgen Wettstad (Manchester and New York: 2000), 16..

⁸⁵⁸ Curlier and Andresen, "International Trade in Endangered Species: The CITES Regime," 364.

e) Provide acceptance for solutions

In practice, states acknowledge scientific research as valuable source of knowledge. States do not openly contest consensual scientific knowledge and often accept it as legitimate base for their decisions. The level of influence of science may be classified into three categories. At the lowest level decision-makers acknowledge the relevance and usefulness of scientific knowledge, turn to it for information and make use of some regular channels for communication. At the second level decision-makers additionally acknowledge the substantive contents of scientific results. At the highest level decision-makers do not merely acknowledge the facts revealed by scientists. Instead they acknowledge the suggested corresponding policy measures and let their actions be influenced by such suggestions. The influence of science may thus range from an informative function to policy guidance. The role of science typically increases gradually.⁸⁵⁹ Even in cases of scientific uncertainty scientists have some weight. States tend to stick to the interpretation that is most favourable for them.⁸⁶⁰ Scientific knowledge is likely to trigger some kind of collective action.⁸⁶¹ It is not clear to which extent the MEAs match the scientific advice given. Some authors lament the insignificant role scientific evidence has played within international treaties negotiated since the 1972 Stockholm conference.⁸⁶² Thanks to the efforts by scientists in treaty negotiations a growing number of MEAs reflect the comprehensive ecological approach and contain differentiated national obligations and substantive commitments.⁸⁶³

f) Assist in formalizing and legitimating the exchange of information

UNEP-WCMC describes as its objective to encourage and facilitate data sharing for instance through web-based information and to be a trusted global repository for centralized and distributed databases.⁸⁶⁴ UNEP-WCMC is evolving into a proper network, as it opted for managing data at the place of origin, linking these places with one another, rather than managing them from a central office.⁸⁶⁵

⁸⁵⁹ Skodvin and Underdal, "Exploring the dynamics of the science-politics interaction," 9.

⁸⁶⁰ Haas, "Epistemic Communities," 801.

⁸⁶¹ Steinar Andresen and Jon Birger Skjaereth, "Science and Technology. From Agenda Setting to Implementation," *Ibid.* , 190.

⁸⁶² Skodvin and Underdal, "Exploring the dynamics of the science-politics interaction," 1.

⁸⁶³ Haas, "Epistemic Communities," 800.

⁸⁶⁴ UNEP- WCMC, "Strategic Plan 2006-2011," 5.

⁸⁶⁵ *Ibid.*

g) Help to handle differences about data or risks

UNEP-WCMC's objective is to validate data in order to increase trust in biodiversity-related data and products.⁸⁶⁶ It thus helps handling differences about data and risks.

3. Going beyond mediation services: stakeholders or experts – an irreconcilable dichotomy?

When governments rely more and more on scientific advice, scientists are not merely enriching negotiations with their ideas and suggestions in mediator style. They are increasingly in a position to determine the acceptable levels of biodiversity loss and of the risk of biodiversity loss.⁸⁶⁷ Is this not in stark contrast to the legitimate determination by stakeholders of the acceptable level of environmental degradation?

The alternative to environmental management guided by scientific findings would be a market based approach to environmental management which sets no target levels of environmental quality. Under this approach, it is the interplay of interests to be balanced which determines the level of protection. Epistemic communities establish levels and formulate the legal instruments that would help to meet them. This does not mean, however, that it is exclusively natural science that counts. The ecological epistemic communities also take into account social aspects and promote stakeholder participation in research and negotiations, since indigenous peoples in particular are considered to have ecological knowledge outside the traditional domain. Scientists are aware that the involvement of other non-state actors improves compliance once the agreement is adopted. When economic or social interests conflict with environmental interests, scientific advice will be intensely scrutinized. When they advise decision-makers, they are therefore bound to consider social and economic issues.⁸⁶⁸

MEAs that are based on environmental standards developed by epistemic communities clearly indicate a sustainable level. Political compromises, on the other hand, are arbitrary. They are often least-common-denominator outcomes and may even cause economic costs without environmental benefit.⁸⁶⁹ The ecological epistemic community ensures that negotiations are accompanied by a scientific discourse and improves the chances that the agreement reflects an expert consensus on the capacity of ecosystems. For all its imperfections and scope for improvement, scientific

⁸⁶⁶ Ibid.: 9.

⁸⁶⁷ Templeton, "Framing Elite Policy Discourse: Epistemic Communities and the Stockholm Convention on Persistent Organic Pollutants," 2.

⁸⁶⁸ Ibid.: 6., Haas, "Epistemic Communities," 799.

⁸⁶⁹ Haas, "Epistemic Communities," 799.

guidance for negotiations is the preferable alternative. Also states are more likely to renounce short-term economic advantages for longer-term environmental benefits when the costs and benefits have been calculated and shown to them in concrete figures.

Provided that local populations play an adequate role in the drafting of rules the benefit of scientific input is undeniable. Local communities themselves will benefit from well informed decisions. In the scientists they may find advocates for their interest to safeguard the environment they live in. The final decisions must always be in keeping with the population's prioritized values independent of whether this leads to a deplorable loss of biological diversity. Local and scientific knowledge is crucial for the sustainable management of ecosystems as well as for social and economic development.⁸⁷⁰

The question is whether scientific networks respect stakeholder choices. ICSU does not see itself as separate and above stakeholders, rather it acknowledged the Commission on Sustainable Development (CSD) as a forum for "developing the multi-stakeholder dialogue that is required to define the research priorities and needs for sustainable development." It stresses its commitment to improving dialogue and understanding between scientists and society.⁸⁷¹

III. Treaty regimes

Treaty regimes are established by multilateral agreements.⁸⁷² Such agreements enshrine principles and basic commitments and set up several treaty bodies. There are several basic structural models treaty regimes establish to progressively tackle difficult negotiation matters.⁸⁷³ Commonly shared components are regularly held meetings of the parties and a secretariat which is entrusted with executive functions and works on a permanent basis.⁸⁷⁴ Furthermore, there are scientific bodies and committees overseeing the implementation.

⁸⁷⁰ Hellinger and Hellinger, "The harmonization of wildlife habitat and human livelihood imperatives: Addressing common root causes through a participatory, collaborative and sustainable approach. Preliminary Findings," 5.

⁸⁷¹ International Council for Science, "Strategic Plan 2006-2011."

⁸⁷² Brunnée, "COPing with consent. Law-making under multilateral environmental agreements," 7, 8.

⁸⁷³ *Ibid.*: 7.

⁸⁷⁴ Wolfrum, "Means of ensuring compliance with and enforcement of international environmental law," 48.

Whether or not a treaty establishes institutions, makes a crucial difference. Under the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere of 1940 and under the African Convention on the Conservation of Nature and Natural Resources of 1968, no institutions had been established. Consequently, it proved unfeasible to modify these conventions, especially their lists of species requiring protection.⁸⁷⁵ This realization led to the inclusion of strong institutional structures into the examined agreements. In the 1970s – the beginning of the creation of treaty regimes – there was a widespread scepticism towards IOs which were perceived as bureaucratic and costly, because of the need to acquire premises and employ more staff than required for a treaty regime. Treaty regimes were a welcome alternative. They are acceptable to states and have been established in many areas since 1972.⁸⁷⁶

Treaty regimes are not seen as “actors in their own right,” by some authors which makes it futile to ask whether they are successful in performing tasks, such as mediating conflicts of interests, that have been assigned to them. They are seen as nothing more than concerted action by their members. They may, however, over time become strong and obtain more and more momentum and independence of their member states.⁸⁷⁷ Some authors even see them as “virtual organizations for the management of substantive international treaties.”⁸⁷⁸ They are widely acknowledged for the numerous functions they fulfil: “regimes as utility modifiers, enhancers of cooperation, bestowers of authority, learning facilitators, role definers and agents of internal realignment.”⁸⁷⁹ They are apt to fostering conditions under which understandings on environment and development issues converge.⁸⁸⁰ IOs and treaty regimes tend to be the first to absorb new ideas that are relevant for them and transmit the new ideas to member states and partner IOs.⁸⁸¹ These tasks resemble those performed by mediators. An analysis of the biodiversity-related regimes under consideration will attempt to answer which of these assumptions is correct, and

⁸⁷⁵ Robin R. Churchill and Geir Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreements. A little-noticed phenomenon in international law," *The American journal of international law* 94, no. 4 (2000): 628.

⁸⁷⁶ *Ibid.*: 629, 30.

⁸⁷⁷ Young, *Governance in World Affairs*. 119.

⁸⁷⁸ Gehring, "Treaty-Making and Treaty Evolution," 475.

⁸⁷⁹ Young, *Governance in World Affairs*. 129.

⁸⁸⁰ Brunnée, "COPing with consent. Law-making under multilateral environmental agreements," 7.

⁸⁸¹ Haas, "Epistemic Communities," 797.

whether treaty regimes or the various treaty bodies may be in a position to provide mediation services.

1. Conferences of the Parties (CoPs)

The CoP is the main decision-making body of treaty regimes. It is composed of government representatives of all state parties. The first CoP function is to organize the internal functioning of the regime through the establishment of subsidiary bodies, the adoption of rules of procedure, financial rules, the budget and the provision of guidance to other treaty bodies. Second, CoPs develop the substantive obligations. They decide on amendments and protocols to agreements, which, however, need to be ratified by states before entering into force.⁸⁸² A more autonomous function is the amendment of annexes attached to the agreement.⁸⁸³ Third, CoPs monitor the implementation of and compliance with the MEA and decide about responses to non-compliance.⁸⁸⁴ This latter aspect will be looked into in Chapter 5. Some agreements authorize the CoP to fulfil such other functions that may be required, to achieve the purpose of the agreement.⁸⁸⁵

The role of CoPs is viewed quite divergently.⁸⁸⁶ They are argued to be organs with a will of their own.⁸⁸⁷ Sometimes they are described as issue-specific global legislatures. At the other end of the spectrum, they are envisaged as nothing more than fora in which lawmaking is undertaken by states. They are compared to a diplomatic conference, with the additional advantage that they permit continuous processes and cooperative engagements of technical experts, policy-makers and lawyers. The truth may well lie between those two extremes.⁸⁸⁸

⁸⁸² Churchill and Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreements. A little-noticed phenomenon in international law," 636, 37.

⁸⁸³ Brunnée, "COPing with consent. Law-making under multilateral environmental agreements," 4.; Churchill and Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreements. A little-noticed phenomenon in international law," 638.

⁸⁸⁴ Churchill and Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreements. A little-noticed phenomenon in international law," 626.

⁸⁸⁵ *Ibid.*: 631.

⁸⁸⁶ Brunnée, "COPing with consent. Law-making under multilateral environmental agreements," 16.

⁸⁸⁷ Churchill and Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreements. A little-noticed phenomenon in international law," 633.

⁸⁸⁸ Jutta Brunnée, "Reweaving the Fabric of International Law? Patterns of Consent in Environmental Framework Agreements," in *Developments of International Law in Treaty Making*, ed. Rüdiger Wolfrum and Volker Röben (2005), 106.

The following paragraphs will examine the extent to which CoPs determine the scope and functioning of an agreement. Are the CoPs of CITES, UNCCD and CBD treaty organs with their own dynamics that are distinct from the sum of state action?

In order to ascertain whether treaty regimes actually provide mediation services or whether they are at least in a position to do so, the functioning and competences of CoPs will be scrutinized first. Its functions may amount to mediation services or their traits may make them particularly susceptible to mediation services provided by experts, NGOs, presiding officers and parliamentarians.

An example for a CoP characteristic that improves the working relationship and hence improves the chances to find an integrative solution is that CoPs, in contrast to plenary bodies of international organizations, have no permanent seat and instead meet at the venues they decide on.⁸⁸⁹ Developing states prefer this arrangement because international organizations have their headquarters in the North while CoPs are frequently hosted by developing states.⁸⁹⁰

Another procedural aspect which promotes the attainment of mutual gains solutions is the decision-making by consensus. States rarely object to measures adopted by CoPs, presumably because they tend to be adopted by consensus.⁸⁹¹ Hereby, consensus means that no negotiator formally objects to the decision. Majority voting has the risk that the overruled minority will ignore the adopted decision. The search for consensus, on the other hand, prolongs negotiations and decisions risk to be least common denominator decisions or vaguely termed.⁸⁹² The widely applied consensus requirements are therefore seen by some as weakness.⁸⁹³

Yet, the consensus process engages states until the socializing effect of treaty regimes prompts a convergence of positions.⁸⁹⁴ Consensus procedures can enhance the inclusiveness of decision-making by protecting weaker states when conducted skilfully.⁸⁹⁵ As an example, UNCCD's CoPs usually take decisions on matters of substance by consensus and only resort to majority voting if all efforts fail to reach a

⁸⁸⁹ Churchill and Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreements. A little-noticed phenomenon in international law," 626.

⁸⁹⁰ *Ibid.*: 630.

⁸⁹¹ *Ibid.*: 641.

⁸⁹² *Ibid.*: 642, 43.

⁸⁹³ Young, *Governance in World Affairs*. 119.

⁸⁹⁴ Brunnée, "COPing with consent. Law-making under multilateral environmental agreements," 10.

⁸⁹⁵ Boyle and Chinkin, *The making of international law*. 102. Brunnée, "COPing with consent. Law-making under multilateral environmental agreements," 41.

consensus. A two-thirds majority vote of the parties is then required. Decisions taken under article 21 concerning the financial mechanisms and article 22 paragraph 2 (g) concerning the treaty bodies' budgets are always taken by consensus.⁸⁹⁶ Negotiations at UNCCD CoPs take place in plenary, that is, the Committee of the Whole and at times in a smaller "Friends of the Chair" group.⁸⁹⁷ The consensus decision-making and the flexibility of the venues are aspects improving the chances of integrative negotiations.

a) CITES' concretization of the rules for listing

The mandate of CITES to conserve wild fauna and flora through the listing of species in its three appendices, is rather vague and abstract. This made further concretization through resolutions of CoPs necessary. These resolutions have brought about a considerable reform of the Convention's mode of work and they have proven a useful tool to addressing the differing expectations of the various member states.⁸⁹⁸

For treaty regimes it is a common phenomenon that decision-making power gradually shifts from the states parties to the CoP.⁸⁹⁹ Typically, environmental problems need to be addressed in a flexible manner, which keeps pace with evolving knowledge or readiness to act. Thus, initial agreements only comprise general commitments of the parties while the success of the treaty regime largely depends on its adaptation capacities. This shifting of the decision-making power to the CoP helps to strike a balance between the interests of state sovereignty, which is safeguarded by consent requirements and efficiency, that is, the capacity to respond to new circumstances and changing interests.⁹⁰⁰ This flexibility makes CoPs a propitious place to absorb and apply new information and new ideas. Suggested solutions are absorbed more quickly than it is the case with respect to ordinary intergovernmental conferences. The CoP recommendations have made the CITES regime more dynamic and flexible than it would be, if changes in its procedures were only brought about by treaty amendments. Amendments have to be adopted by a two-thirds majority of the votes cast.⁹⁰¹ They enter into force for the parties which were in favour of them 60 days after two-thirds

⁸⁹⁶ CoP UNCCD Decision I/1 Rule 47.

⁸⁹⁷ International Institute for Sustainable Development, "Summary of the Eight Conference of the Parties to the Convention to Combat Desertification: 3-14 September 2007."

⁸⁹⁸ Birnie, "The case of the Convention on Trade in Endangered Species," 237.

⁸⁹⁹ Brunnée, "Reweaving the Fabric of International Law? Patterns of Consent in Environmental Framework Agreements," 102.

⁹⁰⁰ *Ibid.*, 104.

⁹⁰¹ Art. XVII(1) CITES.

of the parties have deposited an instrument of acceptance.⁹⁰² The Gaborone amendment which is intended to permit the accession to the EU shows the delay treaty amendments may cause. It was approved at CoP-4 in 1983 and still has not entered into force.⁹⁰³

Treaty interpretations undertaken by CoPs may either clarify the original intention of the parties or they may go so far as to alter the contents of the agreement. The boundaries between clarifying, sustaining of an agreement and adding to the agreement are fluid.⁹⁰⁴

b) CITES' form of and procedure for CoP recommendations

The Convention provides the CoP with the possibility to make recommendations but does not specify the form of those recommendations.⁹⁰⁵ Since 1994 they have taken the form of "resolutions," "revised resolutions" and "decisions." Resolutions are designed to take long-term effect, while decisions are generally only valid from one meeting of the CoP to the next.⁹⁰⁶ In practice, however, decisions with long-term effect are increasingly being approved.⁹⁰⁷ In 1994 the CoP decided to compile all its decisions not recorded in resolutions into a document that was to be updated after each meeting of the CoP.⁹⁰⁸ Recommendations have grown into a body of rules which, although not considered legally binding, transformed the regime in an unforeseeable way.⁹⁰⁹

CoP resolutions contain language that is typical of legally binding provisions ("shall") and, arguably, they affect the rights and obligations of the parties under the agreement. Non-compliance with them triggers reactions under the compliance regime. This entails their classification as de facto lawmaking, that is, they have a de facto effect on parties as if they were binding.⁹¹⁰ Whether or not CoP decisions are formally binding, is not the determining factor of state behaviour.⁹¹¹

⁹⁰² Art. XVII(3) CITES.

⁹⁰³ Reeve, *Policing international trade in endangered species. The CITES Treaty and compliance*, 41.

⁹⁰⁴ Brunnée, "COPing with consent. Law-making under multilateral environmental agreements."

⁹⁰⁵ Art. XI(3)(e) CITES.

⁹⁰⁶ Reeve, *Policing international trade in endangered species. The CITES Treaty and compliance*, 40.

⁹⁰⁷ *Ibid.* 41.

⁹⁰⁸ *Ibid.* 40.

⁹⁰⁹ Sand, "Whither CITES? The evolution of a treaty regime in the borderland of trade and environment," 35.

⁹¹⁰ Brunnée, "Reweaving the Fabric of International Law? Patterns of Consent in Environmental Framework Agreements," 111, 15.

⁹¹¹ ———, "COPing with consent. Law-making under multilateral environmental agreements," 32.

Until 1985, resolutions were adopted by a simple majority of the parties present and voting. The argument that wider support would improve implementation, led to the introduction of the requirement of a two-thirds majority of votes cast. In practice, parties try to achieve a consensus. The recommendations become effective on the date when they are notified to the parties, unless otherwise provided.

Until 1994, voting at CoP meetings on proposals to amend the appendices and on CoP resolutions was public. At CoP-9 an option for a secret ballot was introduced, in spite of expressed concerns about a loss of transparency. A vote can be by secret ballot, if so requested by ten parties.⁹¹² Although this is meant only as an exception, in practice, the secret ballot is being used more and more often for strongly contested proposals.⁹¹³ The importance of balancing the advantages of privacy and transparency have been discussed in Chapter 3. No one correct answer has been found. The same is true where the advantages and disadvantages of consensual decision-making or majority voting is concerned.

c) CITES' opt-out approach

CITES CoPs are not merely regularly held state conferences. Rather, the CoP is a treaty body with a certain level of influence on CITES' member states. As an example, CITES' CoPs decide on modifications to the Convention's appendices. CITES does not provide for formal state consent to the modification of appendices. Pursuant to Article 11 of the Vienna Convention of the Law of Treaties, states can express their consent by "any other means if so agreed." Most commonly formal consent requirements are discarded in the case of the amendment of annexes to an agreement. Those agreements tend to be adopted at sessions of the CoP and do not require the deposit of instruments of acceptance by parties in order to become effective. Rather, it is common to presume acceptance unless a party explicitly opts out.

While those annexes usually contain only technical details rather than substantive commitments, in the case of CITES the decisions about amendments to appendices are among the most controversial issues in the ambit of the Convention and impact directly on obligations of parties and individuals.⁹¹⁴ In this aspect CITES differs from

⁹¹² Reeve, *Policing international trade in endangered species. The CITES Treaty and compliance*. 42.

⁹¹³ *Ibid.* 43.

⁹¹⁴ Brunnée, "Reweaving the Fabric of International Law? Patterns of Consent in Environmental Framework Agreements," 108.

most other treaty regimes. This fact underlines the high level of influence CITES exerts on its members. The opt-out approach produces an internal dynamic that facilitates international lawmaking.⁹¹⁵ Potentially time-consuming national approval procedures can be avoided.⁹¹⁶ This procedure permits states to lower the number of decisions they have to take within a complex world.⁹¹⁷ On the whole, the competences of CITES' CoP open good chances for CITES to solve conflicts of interests with respect to trade in endangered species. Whether the CoP's cooperation with CITES' subsidiary bodies has mediation qualities will be assessed below.

2. Secretariats

Secretariats are typically financed by the member states, supervised by the CoPs and hosted by the institution that organized the negotiation of the treaty.⁹¹⁸ Typical Secretariat functions are to provide services to the CoP and the subsidiary bodies by, inter alia, conducting studies and preparing draft decisions. Further functions are assisting the states parties in the implementation and the development of cooperation. Secretariat tasks relating to implementation assistance will be discussed in Chapter 5. Secretariats also liaise with international organizations, financial institutions, such as the GEF and other regimes.⁹¹⁹

Secretariats can perform mediator functions, such as supply objective information, summarize proceedings and compare national position papers. They draft solutions, are engaged in fund raising and assist in the implementation of an agreement. Their acceptability is arguably diminished when they extensively engage in substantial matters.⁹²⁰

The CBD Secretariat provides administrative support to the Convention. Its functions include servicing CoP meetings; reporting to the CoP on the performance of its functions; coordination with other international bodies and any other functions the

⁹¹⁵ _____, "COPing with consent. Law-making under multilateral environmental agreements," 19.

⁹¹⁶ *Ibid.*: 20.

⁹¹⁷ Mitchell, *The Structure of International Conflict* 906.; Danish, "International Relations Theory," 210.

⁹¹⁸ Gehring, "Treaty-Making and Treaty Evolution."

⁹¹⁹ Churchill and Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreements. A little-noticed phenomenon in international law," 627.

⁹²⁰ Chasek, *Earth negotiations. Analyzing thirty years of environmental diplomacy*. 224.

CoP may assign to it.⁹²¹ CoP-1 designated UNEP as Convention Secretariat. The Canadian government hosts the Secretariat in Montreal.⁹²²

CITES' Secretariat is entrusted with executive functions in a way typical for treaty regimes.⁹²³ Another feature CITES shares with many regimes is that the Secretariat is provided by the Executive Director of UNEP.⁹²⁴ Several intergovernmental and non-governmental agencies and bodies provide assistance to the Secretariat which is located in Geneva.⁹²⁵ CITES was one of the first MEAs with a professional full-time Secretariat.⁹²⁶

An adequate funding for Secretariats is necessary to carry out their tasks. Under UNCCD the Secretariat's budget has evolved into the most hotly debated CoP issue.⁹²⁷ The consensus finally reached for the biennium 2008/2009 provides a 4 percent budget Euro value growth. The CoP also agreed to use the total amount for the current biennium as a starting point for negotiations concerning its budget for the subsequent biennium.⁹²⁸ This increase indicates a positive assessment of and commitment to the Convention's work by member states. It therefore gives reason for optimism towards UNCCD's work over the next years.

3. CITES' Standing Committee

In 1979, following a recommendation of CITES' Secretariat, the then existing advisory Steering Committee was re-established by resolution as a permanent executive Standing Committee. The Standing Committee's functions are "general policy and general operational direction" and overseeing the operation of the Convention between meetings of the CoP.⁹²⁹ This includes providing guidance and advice to the Secretariat,⁹³⁰ overseeing the Secretariat's budget and all financial

⁹²¹ Art. 24 CBD (1).

⁹²² United Nations / Environment Programme, *Training manual on international environmental law*. Chapter 15, para. 63.

⁹²³ Wolfrum, "Means of ensuring compliance with and enforcement of international environmental law," 48.

⁹²⁴ Churchill and Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreements. A little-noticed phenomenon in international law," 627.

⁹²⁵ Art. XII(1); Birnie, "The case of the Convention on Trade in Endangered Species," 238.

⁹²⁶ Reeve, *Policing international trade in endangered species. The CITES Treaty and compliance*. 43.

⁹²⁷ International Institute for Sustainable Development, "Summary of the Eight Conference of the Parties to the Convention to Combat Desertification: 3-14 September 2007."

⁹²⁸ UNCCD, "Press Release: The First Extraordinary session of the COP approves the UNCCD budget for 2008/2009," http://www.unccd.int/publicinfo/pressrel/showpressrel.php?pr=press27_11_2007.

⁹²⁹ Conf. 11.1, (Rev. CoP14) Annex 1, (a).

⁹³⁰ Conf. 11.1, (Rev. CoP14) Annex 1, (b).

activities,⁹³¹ providing coordination and advice to other committees and working groups,⁹³² drafting potential CoP resolutions,⁹³³ and performing any other functions that are entrusted to it by the CoP.⁹³⁴

Members of the Standing Committee are elected by the CoP.⁹³⁵ The Committee comprises 14 regional party representatives, plus Switzerland (the depositary government)⁹³⁶ and the previous and the next host country.⁹³⁷

Only the regional members or alternate regional members have the right to vote – with the Depositary Government voting only to break the tie.⁹³⁸ Decisions are in practice made by consensus.

Committee decisions do not convince member states because they have each given their consent but because the procedure leading to their adoption and the arguments on which they are based are accepted and they are thus perceived as legitimate. The delegation of certain decisions to treaty bodies helps to transform “power-based bargaining into reason-based arguing.”⁹³⁹ The Committee’s work therefore helps to find integrative solutions.

The developments relating to trade in elephants in which the Standing Committee plays a central role, can illustrate CITES’ efforts to accommodate conservation and development interests. CoP-10 decided to down-list the southern African elephants. The CoP limited the permissible trade to a sale of government held ivory stockpiles to Japan.⁹⁴⁰ In 1999 Botswana, Namibia and Zimbabwe made a one-time sale of 50 tons of ivory to Japan which generated US\$5 million.⁹⁴¹ In 2002, CoP-12 agreed to such another sale in principle but made it conditional on the provision of up-to-date and comprehensive baseline data on elephant poaching and population levels. The CoP continued to reject the introduction of annual ivory quotas as requested by several southern African states.⁹⁴² In June 2007 CITES’ Standing Committee

⁹³¹ Conf. 11.1, (Rev. CoP14) Annex 1, (c).

⁹³² Conf. 11.1, (Rev. CoP14) Annex 1, (d).

⁹³³ Conf. 11.1, (Rev. CoP14) Annex 1, (f).

⁹³⁴ Conf. 11.1, (Rev. CoP14) Annex 1, (i).

⁹³⁵ Conf. 11.1, (Rev. CoP14) Annex 1, (a)(III).

⁹³⁶ Conf. 11.1, (Rev. CoP14) Annex 1, (a)(i)(B).

⁹³⁷ Conf. 11.1, (Rev. CoP14) Annex 1, (a)(i)(C).

⁹³⁸ Conf. 11.1, (Rev. CoP14) Annex 1, (b)(i).

⁹³⁹ Gehring, "Treaty-Making and Treaty Evolution," 482.

⁹⁴⁰ Curlier and Andresen, "International Trade in Endangered Species: The CITES Regime," 371.

⁹⁴¹ Conf. 10.2 (rev. CoP11) <http://www.cites.org/eng/dec/valid12/10-02.shtml>;

<http://www.elefantasia.org/spip.php?breve95>.

⁹⁴² http://www.cites.org/eng/cop/12/Adopted_Amendments.pdf.

approved exports of 60 tons of elephant ivory stockpiles from Botswana, Namibia and South Africa to Japan which had been obtained from elephants which had died from natural causes or had been killed after having caused problems to humans. It also held Japan's domestic trade control system to be sufficiently well equipped. The International Fund for Animal Welfare disagrees arguing that poached ivory will find its way into the legal Japanese market. CITES requested the three countries to use the income for elephant conservation and community development programmes only.

To monitor policies concerning trade in elephant products and to track illegal activities involving elephants, CITES CoP-11 in 2000 introduced two mechanisms: MIKE (Monitoring the Illegal Killing of Elephants) and ETIS (Elephant Trade Information System).⁹⁴³ Both mechanisms are a reaction to CITES' growing awareness of the clash of opinions and emotions of its parties which threatened to thwart the functioning of CITES. MIKE and ETIS provide the reliable and transparent data needed to ensure effective protection of elephants. Both mechanisms are supervised by the Standing Committee and by an independent Technical Advisory Group (MIKE-ETIS TAG).

MIKE provides data on levels and trends in the illegal hunting of elephants, on their causes and their linkage to CoP decisions for elephant range states, enabling them to manage their elephants, enforce their policies and build the required institutional capacity. ETIS' objectives are similar to those of MIKE with the difference that it records and analyses levels and trends in illegal trade, rather than the illegal killing of elephants. ETIS' database is managed by TRAFFIC.⁹⁴⁴ In spite of all these efforts for transparency, the limited trade in elephant products remains contested.⁹⁴⁵

At CoP-15 in 2010, a heated discussion took place concerning the downlisting to Appendix II of Tanzanian and Zambian elephants and the possibility of a "one-off" sale of registered ivory from these countries. While the records of CoP-14 contain a nine-year moratorium only for African elephants listed on Appendix II, a coalition of 23 African range states remembered differently, arguing that the moratorium applied to all African elephants. They considered that a limitation of the moratorium would be contrary to the "spirit" of CITES even though the scientific data indicated that the Tanzanian and Zambian elephant populations are stable enough for downlisting. The

⁹⁴³ [Conf. 10.10 \(Rev. CoP12\)](#).

⁹⁴⁴ [Conf. 10.10 \(Rev. CoP12\)](#)

⁹⁴⁵ Curlier and Andresen, "International Trade in Endangered Species: The CITES Regime," 358, 62.

emotionally-charged negotiations, did not even give the modified Tanzanian and Zambian proposals a chance that were limited to trading in hunting trophies, raw hides and live animals. An opportunity was lost to create incentives for the sustainable management with the legally taking of elephants.⁹⁴⁶ Despite the Standing Committee's efforts and the establishment of expert bodies the negotiations remain challenging.

4. Presiding and executive officers

In multilateral negotiations the presiding officers, that is, the president or chairperson and the rapporteur play an active role in the course of negotiations as laid down in the rules of procedure of the respective conference. Often they go even beyond their official tasks and seek to mediate, animate, advance the process, prevent confrontations and brief the media.⁹⁴⁷ Also the chief executive officers of the institution hosting negotiations may have a significant impact on the outcome. They may act as mediators and assist delegations in legal matters.⁹⁴⁸ Presiding officers as well as executive officers can perform many of the above listed mediation services. The extent of the competences of the CoPs and the executive bodies indicate the wide field of activity open to such individuals. It is argued that their influence may be obstructed when they are perceived to have a direct stake in promoting the expansion of the treaty, possibly for the benefit of their own careers.⁹⁴⁹

5. Science within treaty regimes

Both constructivists and the interactional law theory consider that epistemic communities and issue networks support the creation of shared understandings through their participation and the mutual interaction within treaty regimes.⁹⁵⁰ They steer negotiations in a number of ways. When scientists are part of an international organization or treaty regime they can help to draw the attention of the members to certain issues, develop agendas, bound discussions and suggest solutions.⁹⁵¹ Epistemic

⁹⁴⁶ International Institute for Sustainable Development, "Summary of the Fifteenth Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora: 13-25 March 2010," *Earth Negotiation Bulletin*, 21, no. 67 (2010), <http://www.iisd.ca/download/pdf/enb2167e.pdf>. p. 18.

⁹⁴⁷ Lang, "Negotiation on the Environment," 349.

⁹⁴⁸ *Ibid.*, 350.

⁹⁴⁹ Chasek, *Earth negotiations. Analyzing thirty years of environmental diplomacy*. 224.

⁹⁵⁰ Brunnée and Toope, "International law and constructivism: elements of an interactional theory of international law," 69.

⁹⁵¹ Haas, "Obtaining International Environmental Protection through Epistemic Consensus," 43. Sebenius, "Challenging conventional explanations of international cooperation: negotiation analysis

communities can influence regimes also through external scientific networks. Both forms of scientific influence will be examined in the following paragraphs.

a) Scientific treaty bodies

MEAs normally provide for the involvement of scientists in their decision-making. Rather than carrying out primary research, scientific and technical committees established under treaty regimes tend to first evaluate information and then compile information that is generally accepted in the treaty regime.⁹⁵² Scientific bodies function similar to a mediator in that they prevent adversarial science and set out to establish common ground. When governments have scientific data at their exclusive disposition there is a risk of one-sided scientific knowledge. In order to please their own constituencies' decision-makers may very well select scientific information to underpin their own position. Where values and interests diverge, actors may even feel inclined to distort information to advance their own position.⁹⁵³ One way to avoid this is the reliance on a scientific body within a treaty regime.⁹⁵⁴

Most international environmental regimes have established scientific bodies, which comprise scientists from the member states as well as independent scientists.⁹⁵⁵ Those bodies suggest best available techniques/technology (BAT) for point sources, such as a power plant or an industrial facility and best environmental practice (BEP) for diffuse sources, such as agriculture.⁹⁵⁶

International environmental law shows a trend towards carefully designed scientific assessments, so that law can develop concurrently with scientific advice. Formal advisory processes that are institutionalized under an agreement are the most transparent and comprehensive forms of scientific input.⁹⁵⁷ Yet, there are cases when agreements and secondary rules fail to refer to what scientists have found to be the optimal response to resolve a conflict of interests. States will apply ideas developed by scientists when they think that the ideas are politically utile. Some states are,

and the case of epistemic communities ", 355.

⁹⁵² Gehring, "Treaty-Making and Treaty Evolution," 483.

⁹⁵³ Skodvin and Underdal, "Exploring the dynamics of the science-politics interaction," 28.

⁹⁵⁴ *Ibid.*, 6,7.

⁹⁵⁵ Andresen and Skjaereth, "Science and Technology. From Agenda Setting to Implementation," 184.

⁹⁵⁶ *Ibid.*, 188.

⁹⁵⁷ Fisk, "Environmental Science and environmental law," 7.

however, better able than others to develop environmental policies and to absorb ideas.⁹⁵⁸

Science has the greatest influence in the agenda-setting phase.⁹⁵⁹ MEAs and their output more strongly reflect politics than science which may occasionally even lead to regulations going beyond the scientific advice.⁹⁶⁰ Even when usable scientific knowledge is provided, it cannot always prevent that short-sighted economic interests prevail over long-term sustainability.⁹⁶¹ When powerful economic actors are involved, their interests may well prevail over science.⁹⁶²

Science cannot resolve a conflict of interests when values and moral questions are concerned, such as the question whether a species should be used for consumptive purposes.⁹⁶³ Research can merely facilitate decision-making and improve the quality of decisions.⁹⁶⁴ Strong treaty regimes drive states to agree when scientific consensus is lacking, for example, where the protection of biodiversity is concerned.⁹⁶⁵ Here, the knowledge does not suffice to guide target setting.

aa) CITES' Animals and Plants Committees

CITES' Animals and Plants Committees are its technical committees. Their members are chosen by the regions. North America and Oceania each elect one person, while the other four regions elect two. Additionally, there is a specialist on zoological nomenclature (Animals Committee) and a specialist on botanical nomenclature (Plants Committee) who are appointed by the CoP, bringing the total number of members to twelve.⁹⁶⁶ Even though not expressly required, members tend to be from the national Scientific Authorities.⁹⁶⁷

The Committees' main functions are to: provide advice and guidance to all other bodies, including proposals to amend the appendices;⁹⁶⁸ cooperate with the Secretariat

⁹⁵⁸ Haas, "Epistemic Communities," 795, 96.

⁹⁵⁹ Steinar Andresen and Jon Birger Skjaereth, "Science and Technology. From Agenda Setting to Implementation," *Ibid.*, 183.

⁹⁶⁰ *Ibid.*, 191.

⁹⁶¹ *Ibid.*, 185, 86.

⁹⁶² *Ibid.*, 186.

⁹⁶³ *Ibid.*, 192, 93.

⁹⁶⁴ Skodvin and Underdal, "Exploring the dynamics of the science-politics interaction," 5.

⁹⁶⁵ Haas, "Epistemic Communities," 801.

⁹⁶⁶ Conf. 11.1, (Rev. CoP14) Annex 2, (a).

⁹⁶⁷ Reeve, *Policing international trade in endangered species. The CITES Treaty and compliance.* 51. Conf. 11.1, (Rev. CoP14) Annex 2, (c).

⁹⁶⁸ Conf. 11.1, (Rev. CoP14) Annex 2, (a).

to assist Scientific Authorities;⁹⁶⁹ review and assess species that are significantly affected by trade;⁹⁷⁰ review species included in the appendices;⁹⁷¹ advise range states on management techniques and procedures, if requested;⁹⁷² draft potential CoP resolutions;⁹⁷³ and perform any other functions assigned to it by the CoP or the Standing Committee.⁹⁷⁴ Their advisory and guiding functions leave room for mediation services and so do their drafting and review functions.

During the 1990s CITES shifted towards a more scientific approach in its work and CITES' technical committees played a central role in the process. CITES' CoP resolutions significantly revised the grounds upon which decisions concerning the categorization of species are based. At the first meeting of the CoP, the "Berne criteria" were adopted which specified the method used to list species and to transfer them from one appendix to the other.⁹⁷⁵ Decisions were to be based on data on population, habitat, trade and similar factors. This method was preferred to a strict application of precise biological data by the dominant western European and North American members because it helped to ensure the protection of species whose survival status was unknown due to scientific or financial reasons. These criteria were rejected, mostly by African states, as being too vague and unscientific.⁹⁷⁶

Dissatisfaction about the listing criteria was wide-spread. Industrialized states' efforts to assign charismatic mega fauna, such as elephants, rhinoceroses and tigers to Appendix I was considered as a form of cultural imperialism.⁹⁷⁷ At the same time environmentalists argued that the failure to list species, such as the Atlantic Bluefin tuna and the Brazilian mahogany resulted from powerful economic interests overruling sound science. The Berne criteria were also criticized for making it virtually impossible for certain species to be down-listed from Appendix I to Appendix II. Gradually, the understanding of the complex interplay of population

⁹⁶⁹ Conf. 11.1, (Rev. CoP14) Annex 2, (d).

⁹⁷⁰ Conf. 11.1, (Rev. CoP14) Annex 2, (f), (g).

⁹⁷¹ Conf. 11.1, (Rev. CoP14) Annex 2, (h).

⁹⁷² Conf. 11.1, (Rev. CoP13) Annex 2, (i).

⁹⁷³ Conf. 11.1, (Rev. CoP13) Annex 2, (j).

⁹⁷⁴ Conf. 11.1, (Rev. CoP13) Annex 2, (k).

⁹⁷⁵ Willem Wijnstekers, *The evolution of CITES. A reference to the Convention on International Trade on Endangered Species of Wild Fauna and Flora*, 7th ed. (Lausanne: Secretariat of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 2003).

⁹⁷⁶ McOmber, "Problems in enforcement of the Convention on International Trade in Endangered Species," 683. Garrison, "The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Debate Over Sustainable Use," 312.

⁹⁷⁷ Favre, *International trade in endangered species. A guide to CITES*. 876.

numbers of a species and international trade improved.⁹⁷⁸ The members regarded science as a means both to serve procedural, “rule of law” values and help to achieve a substantively correct listing result.

In 1992, CoP-8 decided to revise the criteria and the 1994 Conference finally agreed on more specific criteria for amendments.⁹⁷⁹ The Fort Lauderdale Criteria changed in particular three aspects. First, they introduced quantitative guidelines for the assignment of species to an appendix. Second, the criteria gave biology a priority over trade status. Third, the criteria recommended parties to down-list Appendix I species which failed to meet the new quantitative criteria.

A precautionary principle was established for cases of uncertainty about status of a species or impact of trade on a species, as well as a proportionality principle.⁹⁸⁰

After the adoption of the criteria listing decisions continue to be political decisions since the parties are not under an obligation to vote for the listing of a species even when it meets the quantitative guidelines. Instead, they act in accordance with their own conservation and economic priorities given the unfeasibility of a comprehensive protection of all species. Some commercially important species such as sturgeon, mahogany and ramin are included on CITES’s appendices. When the parties agreed at CoP-12 to list mahogany this decision was based on scientific evidence showing fragmentation of the species’ range and dramatic population declines. However, at CoP-15 in 2010 the parties rejected listing bluefin tuna given the species’ largely legal trade and its economic and food security significance. While all listing decisions taken at CoP-14 were in line with the FAO expert advice, the same did not happen in 2010 at CoP-15. For tuna and sharks, the scientific evidence provided by the FAO expert panel amongst others was equally alarming as for mahogany and yet implementation and livelihood concerns overruled the FAO recommendations. The implementation concerns arose with respect to the identification of shark fins, particularly for the hammerhead sharks. Moreover, the parties considered that CITES should stand back where issues are being addressed by other international agreements and let the

⁹⁷⁸ Curlier and Andresen, "International Trade in Endangered Species: The CITES Regime," 357.

⁹⁷⁹ McOmber, "Problems in enforcement of the Convention on International Trade in Endangered Species," 684. Sand, "Whither CITES? The evolution of a treaty regime in the borderland of trade and environment," 46.

⁹⁸⁰ Favre, *International trade in endangered species. A guide to CITES*. 686. Conf. 9.24 (Rev. CoP13).

International Commission for the Conservation of Atlantic Tunas (ICCAT) take the necessary measures.⁹⁸¹

The scientific approach helps, however, to find common ground and to legitimate suggestions and votes. Decision-making is rationalized through the adoption of general criteria on which decisions in a specific case, be it the most controversial decisions, are based.⁹⁸²

Despite the existence of the scientific bodies there are instances in which Convention activities fly in the face of scientific methods. A study undertaken by the Species Survival Network detected an omission of range states in fifteen reviews of significantly traded birds, quota-setting without biological data, lack of peer review of field studies, lack of uniform standards for non-detriment findings and a lack of follow-up recommendations. A further problem is that reviews consider only a limited number of species while the majority of species remains unheeded.⁹⁸³

The quota system is criticized for being uncontrolled, unscientific and open to abuse.⁹⁸⁴ The high cost of scientific studies and the lack of a scientific consensus to determine when a species is endangered pose additional problems.

The implementation of provisions relating to Appendix II species is hampered by the lack of accurate information on the health of a species and levels of trade in the species. This prevents parties from assessing whether trade will be detrimental to the survival of the species. The overwhelming percentage of all CITES species are listed in Appendix II which makes the significance of precise non-detriment findings all the more obvious.⁹⁸⁵ Unfortunately, the scientific backing falls far short of achieving the high scientific standard and of having the impact it would ideally have. Yet, The committees trigger a collective learning process that shapes state preferences.⁹⁸⁶

bb) UNCCD's Committee on Science and Technology (CST)

UNCCD acknowledges the importance of a scientific base. The third operational objective of its Strategic Plan is for UNCCD to become a global authority on

International Institute for Sustainable Development, "Summary of the Fifteenth Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora: 13-25 March 2010." p. 17.

⁹⁸² Gehring, "Treaty-Making and Treaty Evolution," 482, 83.

⁹⁸³ James B. Murphy, "Alternative Approaches to the CITES "Non-detriment" Finding for Appendix II Species," *Environmental Law* 2(2006): 542.

⁹⁸⁴ *Ibid.*: 540.

⁹⁸⁵ *Ibid.*: 533.

⁹⁸⁶ Gehring, "Treaty-Making and Treaty Evolution," 485, 86.

scientific and technical knowledge in the fields of anti-desertification work.⁹⁸⁷ The CST is given primary responsibility to fulfil this objective.⁹⁸⁸

UNCCD institutionalized many of the mediator activities pointed out above with respect to epistemic communities. The UNCCD strategic plan states the necessity to strengthen the CST, so as to enable it to “assess, advise and support implementation, on a comprehensive, objective, open and transparent basis” of scientific information.⁹⁸⁹ The dissemination of scientific data is necessary to share solutions across the drylands of this world.⁹⁹⁰

To clarify the CST mandate the plan emphasizes that the CST recommendations aim to be policy-oriented, scientifically sound and peer reviewed. The CST mobilizes experts under its auspices and engages in information exchange between institutions, parties and end users.

The CST is called upon to refine the Plan’s global indicators with respect to the strategic objectives. Those global indicators are not new. They mostly stem from the GEF strategic objectives, the Millennium Development Goals and the Convention on Biological Diversity (CBD) 2010 Target. The aim is now for CST to establish biophysical and socio-economic baselines on desertification/land degradation at the national level and guidelines to monitor trends.⁹⁹¹

The hitherto used Group of Experts mechanism was deemed to be inadequate to provide scientific advice to the Convention. The Group of Experts’ reports contained a number of research projects and resulting recommendations and were of varying quality. Some Experts showed limited commitment which can partly be attributed to the fact that they were not backed by any budget.⁹⁹²

Consequently, the CoP merely took note of the final report of the Group of Experts and encouraged the country parties to consider and use, as appropriate, the final report in the implementation of their national action programmes.⁹⁹³

⁹⁸⁷ CoP UNCCD Decision III/8, Annex V.

⁹⁸⁸ CoP UNCCD Decision III/8, Annex VI, A.13.

⁹⁸⁹ CoP UNCCD Decision III/8, Annex VI, A. 13.

⁹⁹⁰ Kjellén, "The Saga of the Convention to Combat Desertification: The Rio/ Johannesburg Process and the Global Responsibility for the Drylands," 132.

⁹⁹¹ CoP UNCCD Decision III/8, Annex VI, A. 14.

⁹⁹² International Institute for Sustainable Development, "Summary of the Eight Conference of the Parties to the Convention to Combat Desertification: 3-14 September 2007.",16.

⁹⁹³ CoP UNCCD Decision VIII/17.

To improve the Convention's scientific basis the CoP decided to organize future CST sessions as scientific and technical conferences. These conferences will focus on a specific theme which is determined by the CoP.⁹⁹⁴

The CoP requested the CST Bureau to link with networks, institutions, agencies and bodies and to include NGOs and other civil society stakeholders in the network.⁹⁹⁵ Interestingly, no clear distinction is drawn between NGOs and scientists.

The new format was welcomed by the scientists present at CoP-8. It can be hoped that this alternative format will increase the scientists' attendance at CST sessions and more thoroughly involve the scientific community in UNCCD's work. Thus, the scientific base of UNCCD will be strengthened. The problem how to formulate scientific advice in a way that is usable by member states remains, however, unresolved.

cc) The CBD Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA)

Functions of SBSTTA are specified in Article 25 CBD and CoP decisions. SBSTTA is mandated to advise the CoP and its other subsidiary bodies on the implementation of the Convention. The body is multidisciplinary and comprises expert government representatives. It reports to the CoP.⁹⁹⁶

Its functions are to: provide assessments of the status of biodiversity; assess the effects of measures taken under the Convention; identify technologies and knowledge about conservation and sustainable use and advise on their promotion, development and/or transfer; advise on scientific programmes and international cooperation in research and development; and respond to questions of the CoP and its subsidiary bodies.⁹⁹⁷ The SBSTTA supports the implementation of the multi-year programme of work and the Strategic Plan.⁹⁹⁸ Contribution of NGOs to the work of SBSTTA is encouraged.⁹⁹⁹ It cooperates with international, regional and national organizations.¹⁰⁰⁰

⁹⁹⁴ CoP UNCCD Decision VIII/13.

⁹⁹⁵ CoP UNCCD Decision VIII/14.

⁹⁹⁶ Art. 25 (1) CBD.

⁹⁹⁷ Art. 25 (2) CBD.

⁹⁹⁸ CoP CBD [Decision VIII/10](#) Annex III para. 3.

⁹⁹⁹ CoP CBD [Decision VIII/10](#) Annex III para. 19.

¹⁰⁰⁰ CoP CBD [Decision VIII/10](#) Annex III para. 20.

The CoP sought to improve the input into SBSTTA meetings by strengthening cooperation and communication with the scientific and technical community. It also suggested to promote informal debate, prepare delegates, especially those with little experience, for the discussions and to thoroughly consider results of assessments in order to improve the debate during SBSTTA meetings.¹⁰⁰¹ CoP-9 called on parties to participate in the peer-review process prepared by the Executive Secretary and to nominate experts with the relevant qualifications to their delegations.¹⁰⁰² At the conclusion of the 13th meeting of SBSTTA, intended to prepare CoP-9, several participants regretted that political considerations had prevented any detailed discussion of scientific aspects and obstructed the strengthening of the scientific profile of SBSTTA.¹⁰⁰³

b) Cooperating scientific networks

Treaty regimes are assisted by external experts in their mediation activities. The UNEP Governing Council mandated UNEP-WCMC to provide its services to UNEP, the biodiversity-related conventions and their member states and NGOs and the private sector.¹⁰⁰⁴ Several CoPs, such as CITES' CoP, have bestowed more specific tasks on the centre.¹⁰⁰⁵

CITES Secretariat contracts several other organizations to carry out specific tasks, such as the specialist commissions of IUCN, especially the Species Survival Commission. Furthermore, there are the IUCN Environmental Law Centre and TRAFFIC. ICSU has a formal role in the Commission on Sustainable Development but is not directly involved with any of the examined treaty regimes. WCPA has entered into a memorandum of understanding with the CBD Secretariat to provide assistance, such as compiling experience on the effective establishment and management of PAs, through an agreed annual work plan.¹⁰⁰⁶

¹⁰⁰¹ CoP CBD [Decision VIII/10](#) Appendix B.

¹⁰⁰² CoP CBD [Decision IX/29](#) Section II.

¹⁰⁰³ International Institute for Sustainable Development, "Summary of the Second Meeting of the ad hoc open-ended working group on Protected Areas and 13th meeting of the Subsidiary Body on Scientific, Technical and Technological Advice: 11-22 February 2008.," *Earth Negotiation Bulletin*, 9, no. 427 (2008), <http://www.iisd.ca/download/pdf/enb09427e.pdf>. p.17.

¹⁰⁰⁴ Decision GC 22/1/III.

¹⁰⁰⁵ UNEP- WCMC, "Strategic Plan 2006-2011," 8.

¹⁰⁰⁶ IUCN, "WCPA Strategic Plan 2005-2012.", para. 5.1.1.

aa) Help to select the issues for discussion

UNEP-WCMC holds regular meetings with the regimes' secretariat staff and agrees with them on programmes of work and participates in the conventions' major meetings.¹⁰⁰⁷ Through its involvement it makes sure that its findings are heard in international fora and thus helps selecting the issues to be discussed.

bb) Gather and provide information

TRAFFIC's 22 offices monitor wildlife trade and provide data to CITES' Secretariat and national authorities.¹⁰⁰⁸ UNEP-WCMC supports CoP meetings and provides input to expert and advisory bodies, such as the CMS Scientific Council, the CITES' Committees, the Ramsar Scientific and Technical Review Panel, the Informal Advisory Committee for the CBD Clearing-House Mechanism and the CBD Informal Advisory Committee on Communications, Education and Public Awareness. UNEP-WCMC assists convention secretariats by drawing up conference and information documents.¹⁰⁰⁹ Since 1980 it supported CITES' Secretariat by providing data on threatened species, habitats and PAs.¹⁰¹⁰ Since 2006 the Centre sought to widen its field of activity. Being aware of the need to produce information that is usable by decision-makers in order to have an impact on decision-making, its approach shifted towards making data more amenable to and supportive for decision-makers through attributing more importance to synthesizing and analysing of data.¹⁰¹¹

The issue networks cooperate with CITES in the preparation of amendments of the Appendices. The IUCN SSC and TRAFFIC International are authorized to review the proposals for amendments.¹⁰¹² The SSC collects information on the status and biology of species from its Specialist Group network and the scientific community as a whole, while TRAFFIC collects data on the trade and use of species, from its own sources as well as the CITES trade database. They both publish their analyses of proposals to amend the appendices online. A summary booklet is produced and widely distributed before and during the CoPs, with a view to enabling participants to base their decisions on accurate and up-to-date scientific data.

¹⁰⁰⁷ IUCN and World Commission on Protected Areas, *Guidelines for Protected Area Management Categories*.

¹⁰⁰⁸ Curlier and Andresen, "International Trade in Endangered Species: The CITES Regime," 364.

¹⁰⁰⁹ IUCN and World Commission on Protected Areas, *Guidelines for Protected Area Management Categories*.

¹⁰¹⁰ Curlier and Andresen, "International Trade in Endangered Species: The CITES Regime," 364.

¹⁰¹¹ UNEP- WCMC, "Strategic Plan 2006-2011," 5.

¹⁰¹² Reeve, *Policing international trade in endangered species. The CITES Treaty and compliance*. 32.

Before CoP-14 in 2007 they engaged in intensive consultations involving hundreds of experts around the world for three months. Thirty-six proposals were analyzed covering a wide range of species from mammals, such as the African elephant and leopard, to commercially important timber species, including three species of Central American rosewood and commercially valuable marine species of sharks, eels and coral. One third of the animal species proposed this time were marine species.¹⁰¹³

The indicated networks thus play a significant role with regard to amendment proposals. In a similar way, UNEP-WCMC assists in the assessment of World Heritage nominations.

cc) Assist in formalizing and legitimating the exchange of information

Since 1980 WCMC assisted CITES' Secretariat in particular through the computerization of trade statistics for listed species.¹⁰¹⁴ UNEP-WCMC developed and is now managing the CMS Information Management System, a compilation of data from numerous expert organizations, from CMS and other biodiversity-related treaty bodies and from national reports.¹⁰¹⁵

dd) Further mediation services facilitating agreement

Scientific networks seem ideal actors for the performance of several other mediation activities. They can point out their common interests to the parties, systematically isolate disputed issues in order to elaborate options and alternatives and promote the reframing of issues. Furthermore, they can advance the development of new ideas and obtain assistance from third parties.

ee) Evaluation

UNEP-WCMC sees its function as a "facilitator and convenor," collaboratively working with its national and global partners.¹⁰¹⁶ This self-perception underlines parallels to mediator functions. Notably, epistemic communities modify the states' perception of their own national interests and consequently their state practices.¹⁰¹⁷ They can bring state interests to converge. However, the positive implications of

¹⁰¹³ UNEP, "CITES Conference to Consider New Trade Rules for Marine, Timber and Other Wildlife Species," <http://new.unep.org/Documents.Multilingual/Default.asp?DocumentID=512&ArticleID=5594&l=en>. Last visited May 2009.

¹⁰¹⁴ UNEP- WCMC, "Strategic Plan 2006-2011," 5.

¹⁰¹⁵ UNEP-WCMC, Improving International Environmental Governance.

¹⁰¹⁶ UNEP- WCMC, "Strategic Plan 2006-2011," 8.

¹⁰¹⁷ Haas, "Epistemic Communities," 798.

varied scientific input may also prove problematic. The current proliferation of actors who contribute their reports, expert opinions, guidelines and studies to the international discourse makes it difficult to keep track of the information that is most relevant and reliable.¹⁰¹⁸

6. Cooperating NGOs

Several MEAs call for the automatic consultation with NGOs.¹⁰¹⁹ Provisions for mandatory NGO consultation can be found exclusively in international environmental law. In other fields of law consultations are only permissible. NGOs play an active role under the examined treaty regimes. They are involved in CoPs. The convention text or rules of procedure bestow an observer status on them. CITES stands out as the first major MEA to incorporate an active role for NGOs. The trend has been towards enhanced procedural guarantees for NGOs.¹⁰²⁰

Governmental or non-governmental bodies or agencies qualified within the field of action of CITES may attend CoP meetings without a right to vote unless at least one third of the parties present object.¹⁰²¹ At its 13th meeting the CoP specified requirements under Article XI (7)(a) such that a registration by the Secretariat would require a prior demonstration that the organization is qualified in protection, conservation or management of wild fauna and flora; and is an organization in its own right, with a legal persona and an international character, remit and programme of activities.¹⁰²² Rule 3, paragraph 5, of the Rules of the Procedure for CoP meetings established a one-month deadline to inform about observers.

The CoP further recommended that the parties make every effort to ensure that chosen venues for meetings have space for observers and that the Secretariat and the host country make every effort to ensure that each approved observer is provided with at least one seat in the meeting rooms, unless one third of the party representatives object. Finally, it instructed the presiding officers to make every effort to allow observers to make interventions.

The Secretariat is further asked to ensure that informative documents, prepared by observers, are distributed to the participants in the meeting, but not to provide

¹⁰¹⁸ Boyle and Chinkin, *The making of international law*. 91.

¹⁰¹⁹ Charnovitz, "Nongovernmental organizations and international law," 369.

¹⁰²⁰ Art. XI (7) CITES; Art. 23 (5) CBD.

¹⁰²¹ Art. XI (7) CITES.

¹⁰²² Conf. 13.8.

sponsorship through the Sponsored Delegates Project to any representative who is also an observer for an NGO.¹⁰²³

In practice, NGOs participate actively in CITES' CoP meetings. They make verbal interventions, suggest amendments to CoP recommendations and participate in working groups at the discretion of the chairs of the sessional committees.¹⁰²⁴

Pursuant to the Rules of Procedure of the CBD the Secretariat notifies NGOs of any meeting when they are qualified in fields of interest to the conventions and have informed the Secretariat of their wish to be represented. NGO observers may participate without the right to vote in the proceedings of meetings of the CBD in matters of direct concern to their NGOs upon invitation of the President and if there is no objection from at least one third of the parties present.¹⁰²⁵

Under UNCCD national as well as international, governmental or non-governmental bodies and agencies may be admitted as observers to the sessions of the CoP provided that they are qualified in matters of concern to UNCCD and they have informed the Secretariat of their wish to be present unless at least one third of the parties present object.¹⁰²⁶ Thus, the Convention does not grant a right to participate as observers. The rules of procedure of the CoP provide that such observers may participate in CoP proceedings which deal with matters of direct concern to their body or agency, when invited by the President unless at least one third of the parties present at the session object. A right to vote is not encompassed.¹⁰²⁷ The Secretariat notifies those entitled to be observers of the date and venue of CoP sessions.¹⁰²⁸

The importance attributed to NGOs is underlined by UNCCD in counting among its stakeholders not only its member states but also NGOs and scientific communities.¹⁰²⁹

This is just one example for a language shift from the use of the terms “consultative status” or “honoured guests” to “partnership.”¹⁰³⁰

Yet, at UNCCD CoP-8, IUCN demanded that more attention be given to civil society involvement.¹⁰³¹ UNCCD CoPs have an NGO-organized, open dialogue session. At

¹⁰²³ Conf. 13.8.

¹⁰²⁴ Reeve, *Policing international trade in endangered species. The CITES Treaty and compliance*. 38.

¹⁰²⁵ Rule 7, Rules of Procedure for Meetings of the Conference of the Parties to the CBD.

¹⁰²⁶ Art. 22 (7) UNCCD.

¹⁰²⁷ CoP UNCCD Decision I/1 Rule 7.

¹⁰²⁸ CoP UNCCD Decision I/1 Rule 8.

¹⁰²⁹ CoP UNCCD Decision VIII/III Annex V Outcome 1.3.

¹⁰³⁰ Boyle and Chinkin, *The making of international law*. 53.

¹⁰³¹ International Institute for Sustainable Development, "Summary of the Eight Conference of the

CoP-8 participants exchanged their views, inter alia, on questions of participation. Open dialogue sessions help NGOs to make their ideas and views known to UNCCD members and may have a model function for the national level. The UNCCD stated its reliance on NGO networking systems.¹⁰³² Participants in the open dialogue stressed the fact that their participation requires access to relevant information and adequate and predictable resources. NGOs also suggested a working group to consider NGO demands. This would mean an institutionalization of a platform for NGOs to express their demands and thus provide inputs. Participants called on parties to include at least one NGO on their delegations. Unfortunately, government delegates attended the open dialogue but poorly.¹⁰³³

The following paragraphs will shed light on the question whether NGOs provide any mediation services.

a) Secretariat tasks

NGOs support treaty regimes in their tasks. Under some conventions NGOs are given the possibility to consult the Secretariat.¹⁰³⁴ Article XII CITES provides that its Secretariat may be assisted by suitable IOs or NGOs. Furthermore, the Ramsar Convention in its Article 8 (1) even appointed IUCN as convention office. IUCN's bureau duties comprise to assist in the convening and organizing of CoPs; maintain the List of Wetlands; notify parties of alterations to the List and to arrange that they are discussed by the CoP; inform the party concerned of the resulting recommendations of the CoP.¹⁰³⁵ NGOs providing secretariat services may accomplish mediator tasks such as convening and organizing CoP meetings, facilitating communication between the CoP and parties concerned and steering discussions.

b) Develop solutions

NGO strategies have an influence on governmental activities. CI's idea to indicate biodiversity hotspots was taken up by the WSSD which called upon governments to "promote and support initiatives for hotspot areas and other areas essential for

Parties to the Convention to Combat Desertification: 3-14 September 2007." 5, 6.

¹⁰³² Ibid., 5, 6.

¹⁰³³ Ibid., 6.

¹⁰³⁴ Art. XII (1) CITES.

¹⁰³⁵ Art. 8 (2) Ramsar Convention.

biodiversity.”¹⁰³⁶ The CBD Programme of Work on PAs refers its parties to the IUCN red list in order to determine the most threatened species.¹⁰³⁷

c) Inform and cooperate

Under the WHC, natural sites that are nominated to be included in the World Heritage List are independently evaluated by IUCN. IUCN provides its recommendations to the UNESCO World Heritage Committee which then decides about the inscription of sites on the list.¹⁰³⁸

NGOs provide information to CoPs and other treaty bodies. They may also participate in GEF’s planning and realization of projects and non-governmental projects are susceptible to being subsidised. There are consultative meetings with NGOs every six months and NGO observers are authorized to attend GEF meetings.¹⁰³⁹

d) Evaluation

Treaty regimes do not have sufficient resources at their disposition to perform their mandates satisfactorily. NGOs are therefore welcomed to step in with their resources and expertise. NGOs also use the intergovernmental platform to promote their own interests.¹⁰⁴⁰ The line between both these activities may be fluid. The NGO activities reduce costs for governments while adding to the policy alternatives available.¹⁰⁴¹ In spite of their imperfect accountability and questionable representativeness, NGO participation in international environmental law yields political, technical and informational benefits for states. Their extended connections enable them to overcome cultural barriers. Provided that they cooperate across states and cultures, their inputs are more likely to be evenly balanced than the position of a particular state.

Instead of decreasing the importance of states, NGO participation empowers them to operate in a more effective way. Their participation enhances the transparency and

¹⁰³⁶ World Summit on Sustainable Development, "Plan of Implementation of the World Summit on Sustainable Development," http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf. See para. 44 (g).

¹⁰³⁷ CoP CBD Decision VII/28 Annex para. 1.1.4.

¹⁰³⁸ Rule 7 Committee Rules of Procedure Natural Heritage, established under the WHC; The IUCN Process for evaluating World Heritage Nominations.

¹⁰³⁹ Riedinger, *Die Rolle nichtstaatlicher Organisationen bei der Entwicklung und Durchsetzung internationalen Umweltrechts*. 211.

¹⁰⁴⁰ Boyle and Chinkin, *The making of international law*. 90.

¹⁰⁴¹ Riedinger, *Die Rolle nichtstaatlicher Organisationen bei der Entwicklung und Durchsetzung internationalen Umweltrechts*. 186, 87. Raustiala, "The "participatory revolution" in international environmental law," 559, 60.

legitimacy of international environmental treaty regimes. Attention needs to be given to the fact that NGOs and treaty regimes tend to be perceived to legitimate each other. For instance, when a treaty body refers to NGO findings in its official documents it helps to give weight to the NGO statements.¹⁰⁴² At the same time NGO cooperation tends to make treaty bodies appear independent and credible.¹⁰⁴³ Such superficial assumptions oversimplify considerations about legitimacy.

While states maintain their formal power in international treaty regimes the participation of NGOs has been ever increasing and an attempt to remove them would either fail or prove to be to the detriment of the institution. These benefits help explain that NGOs are granted access.¹⁰⁴⁴

Although NGOs do not have a negotiator role they play a significant role in international environmental law. Close participation in decision-making is in some instances checked by states that are worrying about NGOs' pervasiveness and are trying to protect their privileges as sovereign states.¹⁰⁴⁵ Collaborative problem solving before, during and after treaty negotiations should be mandated and funded.¹⁰⁴⁶ Wider attention should be given to a holistic approach encompassing economic and development aspects by NGOs.¹⁰⁴⁷ In the view of their abovementioned limited representativeness and accountability it is doubtful whether demands to significantly extend their powers¹⁰⁴⁸ are justified. Such a model for the future is envisaged as tripartite centralized global environmental organization modelled on the International Labour Organization and encompassing representatives of governments, corporations and NGOs on a level of parity. The UN Global Compact is composed in such a way. Rather than making decisions, it is nothing but a "forum" and it has only a rudimentary structure.¹⁰⁴⁹ It can be expected that NGOs will continue to provide facts and ideas to the international debate and will enrich international environmental law.¹⁰⁵⁰

¹⁰⁴² Boyle and Chinkin, *The making of international law*. 91.

¹⁰⁴³ *Ibid.* 92.

¹⁰⁴⁴ Raustiala, "The "participatory revolution" in international environmental law," 538, 39. Ulrich Beyerlin, "The role of NGOs in international environmental litigation," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 61, no. 2/3 (2001): 226.

¹⁰⁴⁵ Risely, "Environmentally Responsible Global Governance: How NGOs Can Help," 120.

¹⁰⁴⁶ *Ibid.*, 121.

¹⁰⁴⁷ *Ibid.*, 123.

¹⁰⁴⁸ French, "The role of non-state actors," 257, 58.

¹⁰⁴⁹ Spiro, "Non- Governmental Organizations and Civil Society," 782-84.

¹⁰⁵⁰ *Ibid.*, 771.

7. Parliamentarians

The Inter-Parliamentary Union (IPU) itself states that parliaments function as mediators between the public and treaty regimes. Parliaments are responsive to the needs of the people.¹⁰⁵¹

Under UNCCD the interests of citizens are inter alia represented by members of parliaments who assemble at Round Tables. Round Tables take place at the invitation of the UNCCD Secretariat and with support from the parliament of the host state of the CoP and IPU, particularly its Committee on Sustainable Development (now: IPU Standing Committee on Sustainable Development, Trade and Finance).¹⁰⁵²

The first Parliamentarian Round Table was convened parallel with CoP-2. Some 31 parliamentarians from 18 countries participated.¹⁰⁵³ Since then, the Round Tables showed participation of an increasing number of members of parliament (MPs).¹⁰⁵⁴ Many participants were high ranking MPs and/or specifically involved in the field of sustainable development. Compared to other IPU parliamentary activities, the number of MPs and countries, the regional representation appears in a very positive light at UNCCD Parliamentary Round Tables.¹⁰⁵⁵

Parliamentarians are elected at the national or state level which means that their primary allegiance is with their national electorate. By contrast, members of treaty bodies who are appointed by the CoP are in the first place responsible for the functioning of the regime and would therefore seem more interested in accommodating all interests in mediator style. Parliamentarian participation increases transparency and legitimacy. Parliaments adopt legislation and determine the budgets. Participation of parliamentarians under treaty regimes may therefore improve implementation of international agreements.

8. Conclusion

The CoP and the various treaty bodies are integral parts of the regime structure which advances dialogue and facilitates the evolution of shared knowledge and norms with

¹⁰⁵¹ IPU 108th Conference April 2003, para. 10 <http://www.ipu.org/conf-e/108-1.htm>.

¹⁰⁵² Holtz, "Important Outcomes of the Previous Five Round Tables of Members of Parliament on the United Nations Convention to Combat Desertification," 17.; Claudia Kissling, *Die Interparlamentarische Union im Wandel. Rechtspolitische Ansätze einer repräsentativ-parlamentarischen Gestaltung der Weltpolitik*, Studien zum öffentlichen Recht, Völker- und Europarecht ; 12 (Frankfurt am Main: Lang, 2006). 513.

¹⁰⁵³ Holtz, "Important Outcomes of the Previous Five Round Tables of Members of Parliament on the United Nations Convention to Combat Desertification," 9.

¹⁰⁵⁴ *Ibid.*: 10.

¹⁰⁵⁵ *Ibid.*: 13.

respect to conflicting interests.¹⁰⁵⁶ They stimulate interactive processes, the development of expectations and the growth of factual and normative understandings.¹⁰⁵⁷ Regimes are useful to pool resources, to collect and exchange information and to monitor state performance. Regular negotiations make it more likely that states will honour their obligations since states are keen to be seen as reliable negotiators in the next round of negotiations.¹⁰⁵⁸ But treaty regimes are more than that, they influence state interests and help to bring about a convergence of those interests. Treaty regimes provide for some degree of institutionalization of the provision of mediation services, without using this terminology. Treaty regimes mandate treaty bodies, NGOs and scientific networks to carry out certain mediation services.

Where mediation is not institutionalized, mediating services can be provided not only by designated mediators but also by various other actors.¹⁰⁵⁹ It is argued that mediation needs to be institutionalized to be effective.¹⁰⁶⁰ The institutionalization of mediation increases the likelihood of a mediation success.¹⁰⁶¹ In the same vein, the institutionalization of mediation services under a treaty regime would thus seem advantageous. Even complex problems can be addressed effectively when they are attacked with political and institutional skill and vigour within a treaty regime. The selected treaty regimes possess a number of propitious institutional characteristics.

D. Neutrality and impartiality

I. Neutrality and impartiality of mediators

Numerous authors stress the importance of neutrality and impartiality of mediators.¹⁰⁶² They argue that only neutral and impartial mediators can ensure that outcomes of the mediation will be based on the merits of each side's case.¹⁰⁶³

Often, however, mediators are themselves concerned by the conflict and have their own agendas with regard to it.¹⁰⁶⁴ Mediators are never entirely devoid of political

¹⁰⁵⁶ Brunnée, "COPing with consent. Law-making under multilateral environmental agreements," 15.

¹⁰⁵⁷ *Ibid.*: 39.

¹⁰⁵⁸ Mitchell, *The Structure of International Conflict* 906.; Danish, "International Relations Theory," 210.

¹⁰⁵⁹ Kriesberg, "Formal and Quasi-Mediators in International Disputes: An Exploratory," 19, 23.

¹⁰⁶⁰ Barnes, "Environmental Mediation: A Tool for Resolving International Environmental Disputes in a Pacific Way," 176.

¹⁰⁶¹ Wall Jr., Stark, and Standifer, "Mediation: A Current Review and Theory Development," 385.

¹⁰⁶² Mitchell, *The Structure of International Conflict* 294.

¹⁰⁶³ Susskind and Cruikshank, *Breaking the Impasse*. 137, 38.

¹⁰⁶⁴ Bercovitch, "Introduction: Putting Mediation in Context," 5.

interest. Why should governments engage in mediation and invest their political, moral and material resources and expose themselves to risks, without having any self-interest in the matter?¹⁰⁶⁵

Governments or international organizations may be motivated to mediate in conflicts because they fear their own political interest may be adversely affected by it. For example, a conflict between two allies of the mediator may weaken the alliance.¹⁰⁶⁶ They may also hope to enhance their own influence and in this way benefit from the mediation.¹⁰⁶⁷ Finally, a mediator may be willing to mediate because he is interested in developing closer relations with the parties.¹⁰⁶⁸ Governments who participate in negotiations are well aware of this fact and do not lend unlimited credibility to mediators. Instead, they interpret information received from the mediator in the light of the presumed mediator interest.¹⁰⁶⁹

Others argue that a mediator should be partial towards the weaker party to protect it, given that in unassisted negotiations less powerful parties, that is, groups that are unorganized or lack technical expertise or negotiation skills, often find it hard to safeguard their interests.¹⁰⁷⁰

Even though mediators are not impartial and uninterested as to the settlement of the dispute, to accept a mediator, parties to a conflict need to be convinced that the mediator can act fairly and consider their own interests.¹⁰⁷¹ It has, however, been shown that disputants who perceive the mediator as biased against their side are less accepting of and less influenced by the mediator than disputants who perceived the mediator as neutral. When disputants have high power over a mediator, that is, they have the capacity to influence the mediator's future, they are less concerned about bias. Parties with high power over the mediator tend to accept the mediator more but are at the same time less influenced by the mediator than disputants with low power.¹⁰⁷²

¹⁰⁶⁵ Zartmann and Touval, "Introduction: Mediation in Theory," 8.

¹⁰⁶⁶ Ibid.

¹⁰⁶⁷ Bercovitch, "Introduction: Putting Mediation in Context," 9.

¹⁰⁶⁸ Zartmann and Touval, "Introduction: Mediation in Theory," 9.

¹⁰⁶⁹ Ibid., 15, 16.

¹⁰⁷⁰ Susskind and Cruikshank, *Breaking the Impasse*. 134.

¹⁰⁷¹ Bercovitch, "Introduction: Putting Mediation in Context," 12.

¹⁰⁷² Gary L. Welton and Dean G. Pruitt, "The Mediation Process: The Effects of Mediator Bias and Disputant Power," *Personality and Social Psychology Bulletin* 13(1987): 123.

On the whole, mediation is possible when mediators are perceived to have their own interest and are not impartial and neutral. States are still going to accept a mediator when they expect to benefit from the mediation. It can be concluded from the just said that neither NGOs, scientists, parliamentarians nor treaty bodies are generally excluded as providers of mediation services even though they may pursue their own interests and may be neither impartial nor neutral.

II. Neutrality and impartiality of scientists

1. Independence versus responsiveness of scientists towards states

Are not scientists representatives of objective scientific research and consequently free from any partiality and bias and hence the most trustworthy providers of mediation services? They are praised for the impartial, politically untainted expertise they provide which gives them social authority. Their arguments are convincing for negotiators wishing to stress their impartiality.¹⁰⁷³

International institutions and national governments can support epistemic communities financially or through the publication of scientific papers and the organization of conferences.¹⁰⁷⁴ A certain independence of scientists is, however, crucial to prevent political and economic stakeholders from influencing them. At the same time the link between scientists and states must reflect a certain degree of responsiveness and involvement to obtain usable and policy relevant scientific data.¹⁰⁷⁵ Responsiveness requires that scientists attempt to provide relevant data. Responsiveness and involvement must be balanced against autonomy and integrity of scientists.¹⁰⁷⁶ Ensuring involvement and responsiveness requires a regular channel of communication between a scientific network or body and decision-makers which is open from both sides. The question is in how much detailed such communication is undertaken.¹⁰⁷⁷

UNEP-WCMC depends on government funds. Between 2001 and 2005 an average 7.5 per cent of UNEP-WCMC revenue originated from UNEP and the remainder from projects carried out with support from over 100 partners, most importantly UNEP, the UK Government, the European Commission and the UN Foundation. On the whole,

¹⁰⁷³ Haas, "Epistemic Communities," 793. ———, "Obtaining International Environmental Protection through Epistemic Consensus," 42-44.

¹⁰⁷⁴ Haas, "Obtaining International Environmental Protection through Epistemic Consensus," 45.

¹⁰⁷⁵ Skodvin and Underdal, "Exploring the dynamics of the science-politics interaction," 7, 10.

¹⁰⁷⁶ *Ibid.*, 11.

¹⁰⁷⁷ *Ibid.*, 13.

UNEP provided more than 40 per cent of the income. The Centre laments being significantly underfinanced. To address these shortcomings the Centre intends to expand provision of services to the private sector whose significance as income generator is increasing (14 per cent of the income in 2006).¹⁰⁷⁸ The Centre hopes to be furnished with commissions especially from developing countries and thus to increase its income.¹⁰⁷⁹

UNEP-WCMC is accountable to the UNEP Governing Council. UNEP appoints the Centre's director who accounts to UNEP's Executive Director. The Trustees of WCMC 2000 continue to advise and review the Centre's work. A Scientific Advisory Committee scrutinizes the Centre's work and reports to the UNEP Executive Director.¹⁰⁸⁰ UNEP-WCMC is just one example for the practical difficulties that scientific networks face when they seek to strike a balance between responsiveness and independence.

2. Objectivity and independence of scientists from NGOs

NGOs, such as IUCN organize scientific networks and choose scientists whose objectives correspond to their own objectives. Looking at the examples of the IUCN specialized commissions, TRAFFIC and the UNEP-WCMC makes clear how hard it is to draw a distinct line between scientific networks and NGOs. Both have principles that make them active. It is difficult to establish how strong the principles are that guide and inspire scientists to become active. IUCN has scientific members but they are a minority which justifies classifying IUCN as an NGO rather than a scientific network. The question becomes acute when members are predominantly scientists, yet, the network sees itself as integrate part of an NGO as is the case with respect to the IUCN specialized commissions. Are IUCN's specialized commissions merely NGOs with a scientific garb? The same question arises regarding TRAFFIC which is funded mainly by WWF but also by IUCN and other NGOs and states.¹⁰⁸¹ Yet, why should they per force be less scientific than scientists subsidized by states who may just as well be charged with nationally biased science.

Contrary to the assumption that epistemic communities avoid NGO partnership UNEP-WCMC closely collaborates with numerous NGOs from all levels. Examples

¹⁰⁷⁸ UNEP- WCMC, "Strategic Plan 2006-2011," 16.

¹⁰⁷⁹ *Ibid.*: 18.

¹⁰⁸⁰ *Ibid.*

¹⁰⁸¹ Curlier and Andresen, "International Trade in Endangered Species: The CITES Regime," 364.

for such cooperation are the World Database on Protected Areas and the 2010 Biodiversity Indicators Partnership. The Centre sees its own role in supporting NGO policy inputs.

It furthermore sees itself as provider of reliable biodiversity related information to the private sector helping industry to estimate potential risks associated with their activities. Its position as a trustworthy partner is ensured by the fact that it does not engage in campaigns, forms part of the UN and provides high quality information.¹⁰⁸²

TRAFFIC seeks to achieve its objectives by ensuring that governmental decisions concerning trade in endangered species are based on sound knowledge, by supporting the enactment and implementation of effective regulations, by working with governments and the private sector to develop and adopt positive economic incentives and by encouraging consumers of wildlife of sustainable consumption levels. While the first method reflects a scientific, analytic approach, the latter three make it plain that values and advocacy are involved. Whenever concrete suggestions for action are made scientists involve in more than pure science. Recommendations, translating abstract and complex scientific findings into usable guidelines, are, however, necessary to ensure an impact of science on decision-making.

TRAFFIC is intent on achieving set targets that are reviewed every four years.¹⁰⁸³ It stresses its reliability, impartiality and leadership in the issue of conservation and wildlife trade. At the same time, TRAFFIC works in partnership with IUCN and WWF. Specifically, its governing body, the TRAFFIC Committee, is made up of members of both organizations and TRAFFIC aims to support their work.¹⁰⁸⁴ These dilemmas are difficult to resolve.

3. How can credibility of scientific input be ensured?

a) Autonomy and integrity of scientists

The selection and funding of the scientists is indicative. Scientists selected and funded by scientific organizations have a higher level of independence than those selected and funded by national governments. Criteria for appointment which are purely qualitative and independent from nationality, ideology and formal position further ensure autonomy. The IUCN specialized commissions seek to attract members who

¹⁰⁸² UNEP- WCMC, "Strategic Plan 2006-2011," 16.

¹⁰⁸³ <http://www.traffic.org/work-overview/>

¹⁰⁸⁴ <http://www.traffic.org/overview/>

support IUCN's mission rather than applying qualitative criteria to choose members. Hence, they are more on the ideological side. The granting of operational autonomy, that is, the autonomy to set their agenda and divide labour, likewise increases independence.¹⁰⁸⁵ For autonomy's sake it is preferable when the scientists who produce knowledge do not at the same time formulate explicit policy advice. This way the pure scientific data, which clearly state uncertainties, remain separate from a subsequent suggestion for action which also takes account of the political and social context.¹⁰⁸⁶

b) Representation of all geographic regions

Developed countries view the autonomy of science as an essential guarantee for its credibility while developing countries are rather suspicious towards science which they perceive as done in the North and often for the North. Informal networks and epistemic communities that influence international decision-making are criticized for being dominated by experts from the developed countries.¹⁰⁸⁷ India's Center for Science and the Environment, for example, challenged results published by the Washington-based think tank, the World Resources Institute, stating that the carbon dioxide emissions from developing countries had been depicted with too high figures.¹⁰⁸⁸ States that do not participate in research tend to be the most sceptic.¹⁰⁸⁹ In particular the indigenous scientific capability of the South needs to be improved to enable Southern scientists to assess their options for action independently.¹⁰⁹⁰ The promotion of indigenous scientific expertise would strengthen the authority of epistemic communities.¹⁰⁹¹ This way a consensus can be found across scientists that are representative for all regions.

The Northern rebuff is that currently, environmental researchers are usually not dependent on governments. They are situated within countries that guarantee their independence.¹⁰⁹² This independence from governments will not be ensured within all

¹⁰⁸⁵ Skodvin and Underdal, "Exploring the dynamics of the science-politics interaction," 12.

¹⁰⁸⁶ Fisk, "Environmental Science and environmental law," 4.

¹⁰⁸⁷ Koskenniemi, "What is international law for?," 95.

¹⁰⁸⁸ Meerts, "The Changing Nature of Diplomatic Negotiation," 101.

¹⁰⁸⁹ Andresen and Skjaereth, "Science and Technology. From Agenda Setting to Implementation," 192.

¹⁰⁹⁰ Brown Weiss, *International environmental law and policy*. 317.

¹⁰⁹¹ Haas, "Obtaining International Environmental Protection through Epistemic Consensus," 45.

¹⁰⁹² ———, "Epistemic Communities," 795.

countries which makes it difficult to ensure equitable geographic representation while at the same time excluding scientists from intrusive countries.

UNEP-WCMC acknowledges the necessity of input from the South when it declares as one of its objectives to collaborate closely with its partners and to engage in capacity building if necessary.¹⁰⁹³ UNEP-WCMC underlines its adherence to the values of the UN, its respect for views and rights of governments and local institutions and its own political neutrality.¹⁰⁹⁴

ICSU is also aware of the need to integrate all regions. ICSU's newly established Regional Offices are meant to facilitate the participation of scientists from developing countries in ICSU activities and to ensure responsiveness to the needs of developing countries.¹⁰⁹⁵

c) Constant and open scientific verification of assumptions

Scientists do not deliver knowledge that is free from any uncertainties nor infallible answers to the questions of decision-makers.¹⁰⁹⁶ Scientific knowledge and a consensus among scientists is not understood as "the single truth." Even generally accepted theories and propositions are continuously verified by scientists.¹⁰⁹⁷ Quite often scientific knowledge in fields that are relevant to decision-makers is not uncontested.¹⁰⁹⁸ The strong position of scientists and the fact that they are neither completely disinterested sources of information, nor uninfluenced by politics, provokes concerns about the possibility of their strategic manipulation of information. Epistemic communities might abuse their knowledge to advance the policy they retain preferable.¹⁰⁹⁹ Can their involvement be legitimate in spite of those uncertainties and concerns?

"Scientific knowledge" is defined as the result of research. This excludes opportunist collection of data which distorts the reality. This does not mean that scientific knowledge must be known with objective certainty. Clearly stated uncertainties are also a part of scientific knowledge.¹¹⁰⁰ The legitimacy of ecological epistemic

¹⁰⁹³ UNEP- WCMC, "Strategic Plan 2006-2011," 9.

¹⁰⁹⁴ *Ibid.*: 8.

¹⁰⁹⁵ International Council for Science, "Strategic Plan 2006-2011."

¹⁰⁹⁶ Skodvin and Underdal, "Exploring the dynamics of the science-politics interaction," 4.

¹⁰⁹⁷ *Ibid.*, 24.

¹⁰⁹⁸ *Ibid.*, 26, 27.

¹⁰⁹⁹ Templeton, "Framing Elite Policy Discourse: Epistemic Communities and the Stockholm Convention on Persistent Organic Pollutants," 4.

¹¹⁰⁰ Fisk, "Environmental Science and environmental law," 4.

communities is founded on the transparent way in which they obtain a consensus.¹¹⁰¹ A science assessment process is necessary to prevent the risk of overestimating known facts and of underestimating uncertainties.¹¹⁰² Epistemic communities achieve their consensus through informal negotiations and the confronting of competing hypotheses.¹¹⁰³ Their legitimacy and strength lies in their competence, which is ensured by pluralism, competitive structure and review procedures.¹¹⁰⁴

When one single expert is invited to scientifically assess a phenomenon this assessment risks to be influenced by the so called “single expert bias.” Experts tend to overestimate the aspects in their own view that are shared by larger parts of the community. Peer reviews lead to a more balanced appreciation. They too may however be affected by a “disciplinary paradigm bias,” which may influence all reviewing scientists. An effective counter measure is a review by a multi-disciplinary panel of experts.¹¹⁰⁵

Data in the public domain may not be sufficiently representative and industry may not see any benefit in publishing its results. To ensure the highest standards of representativeness and to consider all suggested interpretations the conclusions of the assessment panel should be made widely available for public comment and not merely peer reviewed. Groups such as environmental and industrial NGOs are thus in a position to participate in the discussion.

Experts may also exaggerate the need for further examinations from their interest to procure funding. This peril can be shunned through a separation of the scientific assessment and the assessment of a future research agenda.¹¹⁰⁶ When the consensus of an epistemic community collapses, the community’s authority will erode as well because counter-communities will emerge and challenge the community’s theory.¹¹⁰⁷

Issue networks are aware of the need to cooperate openly. The SSC as well as TRAFFIC stress that they work in collaboration with the scientific community at large. UNEP-WCMC stresses its “scientific, objective and unbiased” methods. It operates under the supervision of an international Scientific Advisory Council and

¹¹⁰¹ Haas, "Epistemic Communities," 802.

¹¹⁰² Fisk, "Environmental Science and environmental law," 3.

¹¹⁰³ Skodvin and Underdal, "Exploring the dynamics of the science-politics interaction," 25.

¹¹⁰⁴ *Ibid.*, 10.

¹¹⁰⁵ Fisk, "Environmental Science and environmental law," 5.

¹¹⁰⁶ *Ibid.*: 5, 6.

¹¹⁰⁷ Haas, "Obtaining International Environmental Protection through Epistemic Consensus," 46.

shares information as widely as feasible. It reviews its performance and encourages peer reviews.¹¹⁰⁸ Whether this openness is realized in all instances cannot be determined here but it is certainly the right way to ensure independence and credibility.

III. Neutrality and impartiality of NGOs

NGOs seek to influence corporation and state behaviour outside of the intergovernmental structure, showing thus that they are active to advance their own interests and are not content with a supportive role (see chapter 2). Such activities would seem to render their provision of mediator services impossible? With their direct targeting of corporations they may, however, help to counterbalance the corporate power and thus indirectly assist in mediator style the comparatively less powerful state and local groups' efforts. NGOs are given consultative status with treaty regimes and their services are acceptable to governments. In spite of their dependence, they can to a certain degree, provide mediation services.

E. Mediator strength

I. Differentiation of strategic and tactical mediator strength

There are two forms of strength which help the mediator to influence the negotiators. The same terminology which has been introduced with respect to negotiator strength will be used in this context. Strategic strength refers to everything the mediator is endowed with and brings to the negotiation, such as resources and relationships. Tactical strength on the other hand, refers to the mediator's action at the negotiation.¹¹⁰⁹ This latter strength includes mediation techniques which have been discussed above.¹¹¹⁰

There are various factors that grant strategic strength to a mediator. A mediator's power can derive from his legitimacy, that is, from the belief that he has the right to mediate.¹¹¹¹ It may also derive from the information the mediator provides where such information underlines the rationality of the mediator's proposals, for example where it explains the constraints upon the other parties.

¹¹⁰⁸ UNEP- WCMC, "Strategic Plan 2006-2011," 8.

¹¹⁰⁹ Carnevale, "Mediating from Strength," 26-28.

¹¹¹⁰ *Ibid.*, 30.

¹¹¹¹ *Ibid.*, 28. Bercovitch and Houston, "Influence of mediator characteristics and behavior on the success of mediation in international relations," 301.

Mediators may impact the parties through their expert knowledge, or their reputation. Their status and prestige may prove decisive. In other instances their capacity to apply either pressure or rewards and compensation to attain an agreement may be a mediator strength.¹¹¹² This way they make alternatives agreeable or disagreeable.¹¹¹³ High-ranking mediators can be persuasive because they possess leverage and social influence.¹¹¹⁴

Furthermore, mediators may draw power from their relationship with the parties. They may benefit from the possibility to strike a coalition, or the threat to strike a coalition with one side.¹¹¹⁵ Mediators may be able to influence a party they have particular ties to.¹¹¹⁶ On the other hand, it may be their impartiality which makes them powerful, because it makes them and their suggestions acceptable.¹¹¹⁷

II. Implications of strategic strength for the effectiveness of mediation

Low power mediators tend to be more acceptable to the parties but they also tend to be less influential.¹¹¹⁸ Power of mediators may hasten agreements which will, however, not necessarily reflect the disputants' interests. The risk of an imposed settlement is that it will only temporarily accommodate the discord.¹¹¹⁹

The disadvantages of compensation may be that parties start to depend upon further compensations in future negotiations and the focus of negotiations moves away from the parties to a clear focus on negotiations between a party and the mediator to establish the price to be paid by the mediator. To achieve higher compensations parties may even tend to demonstrate less willingness to find an agreement.¹¹²⁰

The power to apply pressure can increase the effectiveness of mediation, since it increases respect for the mediator and it motivates the parties to find an agreement in order to avoid negative consequences. The power to compensate, on the other hand,

¹¹¹² Carnevale, "Mediating from Strength," 29. Kriesberg, "Formal and Quasi-Mediators in International Disputes: An Exploratory," 22. Zartmann and Touval, "Introduction: Mediation in Theory," 13.

¹¹¹³ Carnevale, "Mediating from Strength," 30. Bercovitch, "Introduction: Putting Mediation in Context," 260.

¹¹¹⁴ Bercovitch, "Introduction: Putting Mediation in Context," 20.

¹¹¹⁵ Zartmann and Touval, "Introduction: Mediation in Theory," 10.

¹¹¹⁶ Bercovitch and Houston, "Influence of mediator characteristics and behavior on the success of mediation in international relations," 302.

¹¹¹⁷ Carnevale, "Mediating from Strength," 30. Bercovitch, "Introduction: Putting Mediation in Context," 260.

¹¹¹⁸ Carnevale, "Mediating from Strength," 33.

¹¹¹⁹ Mitchell, *The Structure of International Conflict* 298., Carnevale, "Mediating from Strength," 33.

¹¹²⁰ Carnevale, "Mediating from Strength," 34.

has positive effects only provided that compensations are used to reinforce concessions or new ideas.¹¹²¹

III. Consequences for providers of mediation services

Turning now to the providers of mediation services under scrutiny, some conclusions can be drawn from the preceding paragraphs. It is of interest to determine their strategic strength in order to predict and explain their respective effectiveness and possibly to improve it.

Is legitimacy a source of mediation strength? The legitimacy of the transfer of decision-making power away from the state is controversial. State consent to treaties and CoP decisions provides some legitimacy to treaty regimes. Therefore, the legitimacy of the delegation of competences to non-governmental entities is more doubtful than that to treaty regimes. Yet, state consent is given by the executive branch, which means a loss of control of legislatures even though international law may impact individuals in a way that only national law used to do.¹¹²² This becomes particularly acute in the case of CITES, which requires its member states to penalize transgressions of the Convention.¹¹²³ A modification of the list of endangered species may extend the scope of the member states' criminal proscriptions which is problematic in light of the legality principle.¹¹²⁴ All aspects that raise doubts concerning the legitimacy of treaty regimes will not be discussed here. On the whole, the transfer of competences to a treaty regime enables it to resolve conflicts of interests, yet at the same time it raises legitimacy concerns. The very factors that have been set forth as mediation services, that facilitate a convergence of interests of negotiators and that strengthen the cooperative, mutual gains approach, as opposed to a focus on strict state consent, raise such concerns about a democracy deficit of treaty regimes. For example, the opt-out approach facilitates international decision-making, yet at the same time it shifts power from the domestic legislatures to the executive. The international level lacks popularly-elected, representative bodies. It also lacks an international civil society.¹¹²⁵ Measured against national legitimacy standards, treaty

¹¹²¹ Ibid., 35.

¹¹²² Andresen and Skjaereth, "Science and Technology. From Agenda Setting to Implementation," 714.

¹¹²³ Art. VIII (1) (a) CITES.

¹¹²⁴ Christine Fuchs, "Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) - Conservation Efforts Undermine The Legality Principle " *German Law Journal* 09, no. 11 (2008): 1590.

¹¹²⁵ Brunnée, "COPing with consent. Law-making under multilateral environmental agreements," 11,

regimes invariably fail. However, founded on legitimacy standards that are prevalent in the interactional law theory, treaty regimes incorporate many factors, that advance legitimacy as far as feasible.

Each conventions' output legitimacy, that is, their effectiveness will be analysed in the following chapter, specifically in the sections dealing with outcomes and impacts of the agreements respectively.

It is clear that the strategic strength of epistemic communities rises and falls with their reputation for providing expert knowledge and the perceived legitimacy of their involvement. Their legitimacy hinges upon their scientific pluralistic and transparent working processes as described in the preceding section.

NGOs derive their strength fundamentally from public trust and the perceived legitimacy of their activities. The determining factors where legitimacy is concerned are the representativeness of NGOs; their expertise which includes scientific knowledge, also about the political context and experience through their practical work on the ground, for example, the management of reserves. A further factor of relevance for their legitimacy is their effective governance structure, that is, the mode in which they steer themselves and the processes and structures they use to attain their objectives. The form of governance of an NGO is decisive in whether or not it succeeds in maximizing delivery on its mission.¹¹²⁶ In addition, legitimacy depends on their effectiveness in fulfilling their mission, and finally, it depends on their accountability, which is needed to show and control all the aforementioned factors. These aspects have been analysed in chapter 2.

F. Evaluation

The present chapter examines whether strategies used by mediators to move negotiators towards a mutual gains agreement are being applied by treaty bodies, NGOs, scientific networks or parliamentarians who are involved in inter-governmental negotiations on biodiversity-related issues. A further question is whether such services or additional services are at least potentially usable in this context. While mediation is undertaken by a third party in negotiations of a particular conflict, the strategies which have been developed by mediators and the experiences gained by them may be a valuable example for negotiations undertaken to adopt rules

12.

¹¹²⁶ Jepson, "Governance and accountability of environmental NGOs," 517.

to settle differences on conservation and development issues. Mediation is hailed as a very effective way to improve negotiations so as to lead to a mutual gains solution. Whilst a causal link between a particular mediator approach and an agreement cannot be shown, this chapter outlines strategies that are generally propitious. Even though the ultimate purpose of negotiations and mediation is a mutual gains agreement, a mediation procedure which succeeds in improving the working relationship of negotiators is a success in itself. It may lead to a mutual gains agreement in the long run. Since the effect of mediation depends on the context and the process of mediation, both aspects are examined with respect to mediation services provided to facilitate the regulation of international biodiversity conservation and development.

The conditions that make a conflict normally susceptible to mediation can shed light on the conditions that must be met in order for states engaging in multilateral negotiations of a treaty or under a treaty regime to accept mediation services. Environmental disputes within states or between neighbouring states are susceptible to mediation. The susceptibility of environmental disputes to mediation indicates that it is worthwhile to try and apply mediation strategies to state negotiations setting up rules on conservation and sustainable use of biodiversity. The disputes that are solved with the intervention of mediators involve mostly government agencies. Inter-state negotiations are therefore not precluded from being susceptible to mediation services simply because states are the negotiators.

The willingness of states to accept such services is crucial. They tend to be inclined to accept them because the integration of conservation and development interests is complex and protracted. Furthermore, states depend on the continuity of their relations with one another and do not wish to isolate themselves. If they subscribe to the integrative negotiation approach they will accept mediation services when they expect gains for the negotiations from them. Otherwise, they will accept them when they expect benefits for themselves. A final contextual precondition for the successful provision of mediation services is a skilful and well qualified provider.

The specific mediation strategies cannot only be applied within a comprehensive mediation process but also as a single mediation service for negotiators. The main benefits of these strategies help forming categories of mediation services. These strategies stretch from helping to create a propitious background for negotiations, cognitive strategies, facilitating communication, improving the transparency and

accountability, normative strategies that directly influence the negotiators' interests through mediator ideas and reconceptualization, counterbalancing the power asymmetry of stakeholders, raising and managing assistance to helping sustain an agreement.

The constructivist and interactional law theory concepts of the social structure of the community of states demonstrate that communication facilitation is a relevant mediation service. Mediation services that increase the perceived legitimacy of the negotiation process and the agreement are equally useful to states. Furthermore, a mediation service can consist in the promotion of shared understandings, *inter alia*, through the facilitation of interaction. Another strategy may be influencing the state interests for instance by drawing state attention to overlapping interests or providing them with other kinds of information. A state's concern about its reputation towards its constituencies and other states makes it amenable to the mediator activity of creating visibility and public support or pressure.

States are amenable to numerous mediation services and NGOs are in a position to provide them. NGOs acting outside of treaty regimes have a potential for providing the mediation service of information gathering provided they renounce advocating a particular interest and form coalitions with NGOs from all regions and from all fields of expertise in order to collect well-balanced information. When they are truly international actors they can develop international perspectives with understanding of all regions which helps them to communicate each state's views to the others. With their lobbying and campaigning they can raise public support and awareness for an agreement. It is in their hand whether they promote a mutual gains agreement, or, as happens all too often, a distorted one. Finally, they facilitate negotiations by drafting treaty texts and circulating them.

Scientific networks may also perform some mediation services. The most active networks that engage in biodiversity-related negotiations are predominantly ecological. Human sciences and economy are just as important. Since it is difficult to establish whether a specific network can be classified as an epistemic community, this thesis sticks to the unambiguous term of scientific network. There is no clear dichotomy of idealist NGOs with pseudo scientific propaganda on the one hand, and conscientious scientific epistemic communities that are merely prompted by their

principles to get socially active but are uncompromising scientists. The reality of scientific networks lies between those two poles.

Scientific networks provide information for negotiators which influences their interests and negotiations. They develop and spread new ideas and raise public support. They suggest solutions and their position as qualified source of suggestions renders them acceptable. They help in data and information sharing and in coping with clashing appreciations of data and risks.

The value of scientific information for decision-making changes in nothing the fact that scientists cannot substitute interests and preferences of local people. Scientifically founded decisions may not be imposed on these people for equity reasons, for pragmatic compliance-related reasons and because traditional local knowledge may very well be far superior to the latest scientific answers. If these limitations are kept in mind, scientific input will facilitate integrative negotiations and the obtaining a mutual gains agreement.

Treaty regimes can provide certain mediation services. While they are not always seen as actors that might perform certain activities such as prompting states to negotiate in an integrative way, they tend to gain momentum and independence from their state parties through the work of their treaty bodies. This raises them above the mere coordination of concerted state activity.

The functioning of CoPs facilitates the conduct of integrative negotiations. The consensus decision-making and the flexibility of the venues improve the chances of integrative negotiations. CoPs react more readily to new developments or new suggestions because their decisions do not need to be ratified by all states. CoP recommendations have de facto an effect on states like the legally binding treaty itself. CITES is a treaty regime where decision-making power gradually shifted from the member states to the CoP. The opt-out approach used for the amendment of CITES' appendices is the best example for CITES' capacity to promote integrative decision-making and to discourage self-minded state behaviour. It proved to have high adaptation capacities. The dynamic and flexible character of the decision-making of CITES' CoP makes it more amenable to new ideas and information than ordinary state conferences.

Secretariats perform several mediator functions. They supply objective information to negotiators, summarize proceedings, compare national position papers, draft decisions, engage in fund raising and assist in the implementation of an agreement.

CITES' Standing Committee is a good example for the tendency of states to delegate competences to treaty bodies. The Standing Committee takes consensual decisions, which have a strongly persuasive effect on member states because the procedure leading to their adoption and the arguments on which they are based are accepted and they are thus perceived as legitimate. The transfer of certain powers to treaty bodies makes negotiations more reason-based and better suited to achieve integrative solutions. Presiding officers as well as executive officers can perform many of the above listed mediation services.

In addition to their mediation services provided in order to facilitate the negotiation of treaties and independent of such treaties, scientists provide their services both as scientific bodies under treaty regimes and as external assistants of treaty regimes. Scientific treaty bodies compile scientific data and prevent adversarial science. Scientific ideas and suggestions help to find common ground. In many instances, however, political, economic or ideological considerations may leave no room for them. CITES' Animals Committee and Plants Committee have helped to make CITES more scientific. Thus, they have helped to find common ground and have legitimated suggestions and votes. Furthermore, CITES' adoption of general scientific criteria on which listing decisions are based rationalized decision-making.

While the scientific backing does not always have the impact it would ideally have the committees trigger a collective learning process that shapes state preferences. UNCCD has also worked on refining its scientific base and the services provided by its Committee on Science and Technology. The CBD is trying to improve the work of its Subsidiary Body on Scientific, Technical and Technological Advice. Yet, these efforts sometimes fail as a result of stronger political considerations. The finding of common ground, the legitimating of decisions and the development of ideas all correspond to mediation services.

Treaty regimes are assisted by external experts in their mediation activities. These experts select the issues for discussion, gather and provide information and assist in formalizing and legitimating the exchange of information. Their strength lies in modifying the states' perception of their own national interests, thus, bringing state

interests to converge. However, the great number of scientists contributing their expertise to the international discourse poses the risk of overwhelming and confusing rather than enlightening decision-makers.

NGOs are involved with treaty regimes. Competent NGOs are granted observer status to CoPs unless one third of the parties oppose it. The trend is towards more procedural guarantees for NGOs. The mediation services provided by them encompass the undertaking of secretariat tasks, the suggestion of solutions, provision of information and various forms of cooperation with treaty regimes and GEF. The NGO activities reduce costs for governments while adding to the policy alternatives available. In spite of their imperfect accountability and questionable representativeness, NGO participation yields political, technical and informational benefits for states.

Parliamentarians too are increasingly present at international negotiations, as can be seen from the UNCCD parliamentarian round tables. Since parliamentarians' primary allegiance is with their national electorate they are less well-suited to accommodate all interests than members of treaty bodies. Parliamentarian participation increases transparency and legitimacy of international negotiations. Their participation is also favourable to integrative solutions since parliaments adopt legislation and determine the budgets. Participation of parliamentarians under treaty regimes may therefore improve implementation of international agreements.

A question of interest with respect to all the discussed actors providing mediation services, is whether they need to be neutral and impartial in order to be able to provide their services successfully. Since mediators are never entirely devoid of any self-interest when they take it upon them to mediate in an international crises, and they may have close relations with one of the negotiators, neutrality and impartiality are no absolute preconditions for mediation success. It is decisive whether negotiators consider, that the mediation is beneficial for them or the negotiations even though his neutrality and impartiality may be imperfect. In order for scientists to provide convincing mediation services, they need to balance their independence of governments, corporations and NGOs on the one hand and responsiveness to these actors on the other hand, so as to provide relevant information to them. They have to continuously remain engaged in open scientific discourse.

While the mediation services constitute the tactical strength of their providers, their strategic strength is determined by their expertise and reliability, in the case of

experts, and on their perceived legitimacy, capacities and resources, in the case of NGOs. To the extent that treaty regimes, NGOs or experts lack legitimacy, their mediation strength will suffer.

Chapter 5: Do the agreements represent and prompt mutual gain solutions?

A. Evaluating agreements

The objective of negotiating MEAs is to solve conflicts of interest. Consequently, MEAs are successful/effective when they accommodate these conflicting interests. Conversely, most authors state that regimes are created to solve specific problems, such as to ensure the conservation of biodiversity. When assessing the effectiveness of MEAs authors focus exclusively on their delivery of environmental improvement or their obtaining of set environmental standards.¹¹²⁷ They too often see themselves exclusively or primarily as international environmental lawyers rather than attributing the same weight to the human rights, in particular indigenous peoples' rights and participatory and development aspects. This one-sided and biased approach is counterproductive and rather surprising, considering the apparent pervasiveness and omnipresence of the concept of sustainable development which encompasses environmental, economic and social considerations.

Even though this chapter concentrates on the result of the negotiation process, the thesis does not underestimate that in the absence of an effective agreement, as conclusion to negotiations, the negotiation process itself may constitute a success when it stabilizes cooperation between its parties and improves their relationship.

To ascertain the capacity of an agreement to integrate the various relevant interests, it can be enlightening to examine the treaty text as well as the output of the treaty bodies. The reference point for this examination needs to be determined. Should the successfulness be gauged from the subjective points of view of the stakeholders involved in negotiations or should it instead be measured using objective criteria?

I. Subjective and objective criteria to assess the successfulness of agreements

The successfulness of the negotiation procedure, the MEAs and their outputs, can be assessed using subjective or objective criteria. Hereby, outputs are understood as the rules or recommendations and programmes adopted by treaty bodies. Pursuant to purely objective criteria, substantive empirical indicators are applied to discern

¹¹²⁷ Brown Weiss and Jacobson, "Strengthening Compliance with International Environmental Accords," 307.

whether a negotiation process and its result have been successful.¹¹²⁸ Indicative for a successful process may be the number of ratifications – or in the case of treaty body decisions, the fact that it has been adopted by consensus or it has been supported by a broad majority.¹¹²⁹ A high rate of approval seems to indicate that the process has succeeded in striking a convincing balance between interests. The contents of the treaty text and also the regime output can be assessed objectively.

Pursuant to subjective criteria, on the other hand, negotiations have been successful when the parties express satisfaction with the process (procedural justice) and the adopted agreement. Parties will be satisfied with the agreement when it meets their short-term and long-term interests and when they see the agreement as fair (or equitable), efficient, or effective.¹¹³⁰

However, a clear statement of the negotiating states as to their appreciation may be lacking or their statement may be prompted by strategic rather than realistic considerations. It may thus be useful or even necessary to assess whether or not the interests have been met from an objective point of reference.¹¹³¹ It is much more difficult to discern actor perceptions¹¹³² and perceptions of the various groups of stakeholders and this thesis will for pragmatic reasons rely on objective considerations of a fair balance of interests. Developing countries' interests and industrialized countries' interests need to be equally reflected and so do indigenous peoples' interests if they are concerned and the interests of other inhabitant groups of biodiversity rich areas. This chapter will examine whether the agreements and their outputs promote or at least leave room for decentralized conservation and development decisions.

To establish the successfulness of an agreement it does not necessarily have to be efficient or to work efficiently,¹¹³³ that is, achieve a mutual gain solution with minimum expenditure of resources and in the shortest possible time. Inefficient

¹¹²⁸ Bercovitch, "Introduction: Putting Mediation in Context," 17.

¹¹²⁹ Lang, "Negotiation on the Environment," 353.

¹¹³⁰ Wall Jr., Stark, and Standifer, "Mediation: A Current Review and Theory Development," 381.

Young, "The politics of international regime formation: managing natural resources and the environment": 368.

¹¹³¹ Bercovitch, "Introduction: Putting Mediation in Context," 18. Smith, "Danger - Inequality of resources present: Can the environmental mediation process provide the answer?," 384, 91.

¹¹³² Arild Underdal, "Conclusions: Patterns of Regime Effectiveness," in *Environmental Regime Effectiveness. Confronting Theory with Evidence*, ed. Edward L. Miles (Cambridge, Massachusetts: 2002), 434.

¹¹³³ Young, *Governance in World Affairs*. 113.

negotiations will frustrate negotiators and may obstruct the achievement of an agreement. Yet, even protracted, complicated negotiations may be effective and come to an effective result.

The assumption that the effectiveness of an agreement is independent of its equity¹¹³⁴ is flawed. It disregards the fact that the purpose of international law is to solve conflicts of interests rather than to achieve the conservation of the environment by all means. Considerations of equity, that is, normative standards of fairness or justice, will therefore be central to the present evaluation of the effectiveness of agreements. In the long-run, it is also the pragmatic objective to solve an environmental problem that makes equity necessary for effectiveness.

A similar pragmatic consideration holds true where durability of agreements is concerned, that is, their capacity to dynamically evolve and adapt to changed circumstances and needs. For an agreement's short-term effectiveness durability is irrelevant. For its long-term effectiveness it is relevant indeed. Effective agreements tend to get more and more effective over time thanks to their outputs.¹¹³⁵

II. Outcomes and impacts of agreements

More telling than the agreements and outputs as such are their consequences. To discern the success of international environmental regimes it is useful to distinguish outcomes and impacts of the regime.¹¹³⁶ Outcomes are the positive changes in behaviour the regime succeeds in producing. This includes legislation, other rules that are adopted and policy changes within states as well as behavioural changes of non-state actors. When the agreement is successful, it will prove convincing and influential.

Impacts relate to the degree to which the addressed problem is resolved by the regime. The impact of the examined agreements would thus be favourable when they achieve a mutual gains solution for states, indigenous peoples and for other stakeholders. Outcomes and impacts are hard to gauge and assess.¹¹³⁷

Some agreements are self-executing, that is, they are effective without any further national legislation. Most agreements, including those under consideration, require

¹¹³⁴ Ibid.

¹¹³⁵ Ibid. 115.

¹¹³⁶ Ibid. 111.

¹¹³⁷ Andresen and Skjaereth, "Science and Technology. From Agenda Setting to Implementation," 185.

national legislation or regulations to become effective.¹¹³⁸ Is not the implementation of and compliance with an agreement the most reliable indicator for a successful agreement? Since states would seem to be prompted to implement an agreement that reflects their interests. And states and stakeholder groups within them that are addressed by the agreement would for the same reason do their best to comply with it. The failure of international instruments to satisfy domestic interests may jeopardize compliance when the accord is regarded as imposed from above. Including societal actors – NGOs – in the negotiation process may lead to a more inclusive consensus which reinforces compliance. NGO involvement thus plays a role in improving compliance rates with international instruments.¹¹³⁹ Similarly, all measures that increase the legitimacy of rules improve compliance.

While Chapters 3 and 4 set forth ways to ensure and increase input legitimacy, that is, a participatory mutual gains negotiation process, the present chapter is dedicated to questions of output legitimacy, measured in outcomes and impacts, assuming that there is a link between both aspects of legitimacy. A connected question is whether enforcement measures towards member states are as a consequence unnecessary in regimes that represent mutual gain solutions and whose treaty bodies have an effective mediation function.

Finally, focusing on the wording of the treaty text and the decisions adopted by treaty bodies plus the behavioural change of actors cannot suffice. It remains to be seen, whether the agreement's impact is a factual accommodation of all interests.

Outcomes and impacts can be assessed from a legal perspective, using the legal standards established under the agreement as a point of reference, that is, a compliance control. But they can also be compared to a factual goal which may derive from within or outside the agreement. Or they may be compared to the situation that would exist in the absence of the agreement.¹¹⁴⁰

International lawyers tend to look exclusively at compliance rates when examining the effectiveness of a treaty outcome. Whereas international relations scholars use a broader approach, looking at all behavioural changes prompted by the agreement.¹¹⁴¹

¹¹³⁸ Brown Weiss, *International environmental law and policy*. 309.

¹¹³⁹ Raustiala, "The "participatory revolution" in international environmental law," 563. Risely, "Environmentally Responsible Global Governance: How NGOs Can Help," 122.

¹¹⁴⁰ Mitchell, *The Structure of International Conflict* 897.

¹¹⁴¹ *Ibid.* 894.

This latter approach is more convincing given that good-faith non-compliance may still advance the interest of everyone involved and therefore be effective. Even in the case of non-compliance the situation under an agreement may be preferable compared to the situation that would exist without it.¹¹⁴² To capture all forms of benign behavioural change is an elusive scope of analysis. This chapter will therefore mainly refer to the clearer definable concepts of implementation and compliance with the awareness that they are not all-encompassing.

B. Are the examined agreements and their outputs integrative?

The conventions and their outputs should ideally reflect all legitimate interests that are represented in negotiations (see Chapter 2 and 3).

I. Classification of regimes and provisions

First of all, it is useful to classify regimes and the provisions contained in them into four categories, depending on their approach to achieve their objectives. In a second step propitious features, that is, features making a mutual gains solution likely, can be determined for each of these four categories respectively.

The first category, regulatory provisions, contains proscriptions or prescriptions for parties. Those rules may vary in their extent and specificity.

Second, procedural provisions provide for regular meetings for collective decision-making. They provide for regularly held CoPs and meetings of the regime's committees and other treaty bodies.

Third, programmatic provisions promote the pooling of resources to realize joint projects. The projects realized under programmatic provisions may include conservation projects as well as joint research and information sharing.¹¹⁴³ There is a need for human and institutional capacity to research a country's biota to obtain knowledge for policy decisions and education.¹¹⁴⁴ Programmatic provisions require most of all secure sources of funding to be successful.¹¹⁴⁵

Normative provisions, finally, inspire the formation of new practices.¹¹⁴⁶ Ideally, they inspire ideas and set in motion discourses among states and all other actors at the

¹¹⁴² Ibid. 895.

¹¹⁴³ Young, *Governance in World Affairs*. 82.

¹¹⁴⁴ Adeel, *Ecosystems and Human Well-being: Desertification Synthesis*, . 14.

¹¹⁴⁵ Young, *Governance in World Affairs*. 119.

¹¹⁴⁶ Mitchell, "Compliance Theory. Compliance, Effectiveness and Behaviour Changes in International Environmental Law," 911.

international and national levels.¹¹⁴⁷ The provision contained in the Ramsar Convention that countries make “wise use” of their wetlands is best classified among the normative provisions.¹¹⁴⁸ Similarly, the concept of biodiversity conservation as a common concern of humankind helps to guide the convention’s evolution and implementation.¹¹⁴⁹

The intended outcomes of provisions also greatly vary depending on the category they pertain to. The classification will therefore be of further use when examining the effectiveness of the outcomes.

II. Reflection of interests within the convention text and the convention output

The following section will examine whether UNCCD, CBD and CITES integrate the various stakeholder interests. Chapter 3, in its analysis of mutual gains bargaining by states, has already outlined aspects that ensure that the various state interests are reflected within conventions. The present section will therefore not consider this aspect of integrativeness but will instead concentrate on the integration of interests within states, most significantly interests of indigenous peoples and local communities.

1. From utilitarian approaches to strict protection in international instruments

There has been a notable shift of biodiversity-related instruments with respect to the level and purpose of protection. Generally speaking, early conservation treaties pursued a utilitarian approach while later treaties shifted to the other extreme of the spectrum and favoured strict protection from all forms of human intervention. One example illustrating the first case is the Convention Designed to Ensure the Conservation of Various Species of Wild Animals in Africa, which are Useful to Man or Inoffensive from 1900. It represents one of the first treaties to conserve nature and provides for the establishment of PAs within which the hunting, taking and killing of wild animals is prohibited.¹¹⁵⁰ The exemptions provided for under the Convention make apparent that the Convention, far from aiming to establish areas free from use, nor even free from hunting, aimed to prevent large-scale overexploitation and to

¹¹⁴⁷ Young, *Governance in World Affairs*. 83.

¹¹⁴⁸ Mitchell, "Compliance Theory. Compliance, Effectiveness and Behaviour Changes in International Environmental Law," 912.

¹¹⁴⁹ Steinar Andresen and Jon Birger Skjaereth, "Science and Technology. From Agenda Setting to Implementation," *Ibid.* , 568.

¹¹⁵⁰ Art. II, no. 5 Convention Designed to Ensure the Conservation of Various Species of Wild Animals in Africa, Which are Useful to Man or Inoffensive.

maintain game for future hunting. The 1933 London Convention Relative to the Preservation of Fauna and Flora in their Natural State was equally inspired by a traditional concern to preserve colonial big-game hunting grounds and revenues.

An example for strict protection is presented by the “strict nature reserves” under the African Convention on the Conservation of Nature and Natural Resources, adopted in 1968 in Algiers. These reserves are practically free from any use. Hunting, agriculture, grazing and any acts likely to harm or disturb the fauna or flora are prohibited as well as residence, entry or camping.¹¹⁵¹ Only scientific research may be carried out provided that the relevant authorities issue a permit. States are, however, not under an obligation to establish such areas. Nor does the Convention provide for any financial incentives for the creation of PAs.¹¹⁵²

In comparison, the more recent African Convention on the Conservation of Nature and Natural Resources of 2003 requires its parties to “promote the establishment by local communities of areas managed by them primarily for the conservation and sustainable use of natural resources.”¹¹⁵³ These measures are to be complemented with the establishment of buffer zones around conservation areas.¹¹⁵⁴ The mention of sustainable use and buffer zones indicate an intention to balance conservation and human use of biodiversity.

Treaties since the UNCED tend to view sustainable use as an incentive for conservation rather than as threat.¹¹⁵⁵ The Brundtland Report and Agenda 21 both stress the concept of “sustainable development,” that is the need to strike a balance between development and environmental protection.¹¹⁵⁶ The following paragraphs examine to which extent CBD, CITES and UNCCD integrate the conflicting interests.

¹¹⁵¹ Art. III (4)(a) ACCNNR.

¹¹⁵² Matz, "Protected areas in international nature conservation law. Can states obtain compensation for their establishment?," 700.

¹¹⁵³ Art. 12 (3) ACCNNR.

¹¹⁵⁴ Art. 12 (4) ACCNNR.

¹¹⁵⁵ Matz, "Protected areas in international nature conservation law. Can states obtain compensation for their establishment?," 699.

¹¹⁵⁶ Brundtland and World Commission on Environment and Development, eds., *Our common future. Brundtland-Report*. United Nations Conference on Environment and Development, "Agenda 21, UN doc. A/42/427.," <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm>. Lst visited May 2009.

2. UNCCD

a) Anthropocentric environmental and development approach

The UNCCD preamble stresses the Convention's anthropocentric approach which reflects the recognition that an acceptable level of degradation can only be established with reference to the human needs of local people.¹¹⁵⁷ The twofold approach of UNCCD, as expressed in its preamble, is to pursue environmental and socio-economic development objectives. The Convention gives equal importance to both aspects, an "improved productivity of land and the rehabilitation, conservation and sustainable management of land and water resources" on the one hand and to "improved living conditions, in particular at the community level."¹¹⁵⁸ The overarching objective pursued by the Convention reflects development and environmental interests.

The requirements for all state parties to "adopt an integrated approach addressing the physical, biological and socio-economic aspects of the processes of desertification and drought"¹¹⁵⁹ and to "integrate strategies for poverty eradication into efforts to combat desertification"¹¹⁶⁰ further underline this balanced approach. These provisions can best be classified as normative provisions; and so can the strategic objectives contained in the Convention's strategic plan since they are meant to inspire discourse and ideas among actors and partners.

The strategic plan and framework to enhance the implementation of the Convention (2008–2018) have been drafted by an intersessional intergovernmental working group and adopted by CoP-8. The strategic plan strives to address impediments to an effective implementation of UNCCD. The strategic plan expresses a shared vision for the progressive development of the Convention over the next ten years.

The plan sets forth four "strategic objectives" which are intended to provide guidance to actions of all UNCCD stakeholders and partners. Under each strategic objective the plan formulates "expected impacts" that is, long-term effects to be achieved under the respective strategic objective. "Long-term" in this context means a period of a minimum of ten years.

The first strategic objective is to improve the living conditions of affected populations. Corresponding expected impacts include an improved livelihood base

¹¹⁵⁷ Philip Dobie, "A future for the drylands?," *Review of European Community & international environmental law* 12, no. 2 (2003): 141.

¹¹⁵⁸ Art. 2 (2) UNCCD.

¹¹⁵⁹ Art. 4 (2) (a) UNCCD.

¹¹⁶⁰ Art. 4 (2) (c) UNCCD.

and an income from sustainable land management for such populations as well as their reduced vulnerability to climate change and drought.

Two further strategic objectives are to improve the condition of affected ecosystems and to generate global benefits through effective implementation of the UNCCD. Such benefits may concern biodiversity and the climate.

Finally, the fourth strategic objective is to mobilize resources to support implementation of the Convention through national and international partnerships.¹¹⁶¹ These strategic objectives reaffirm the Convention's endorsement of an integrated multi-facet approach. Linkages between dryland management and the protection of biological diversity are underlined.

b) Bottom-up approach

UNCCD is hailed as a unique instrument for one remarkable innovative feature it applies, namely its participatory or "bottom-up" approach. This term is commonly used for UNCCD's requirements of participation in decision-making of local populations affected by desertification as well as NGOs. Negotiators of the Convention expected that local community knowledge and support would be vital for a successful implementation. Hence, direct participation has played a significant role in the working practice of UNCCD from the outset.

Pursuant to Article 5 (d) UNCCD country parties undertake to promote awareness and facilitate the participation of local populations with the support of NGOs, in efforts to combat desertification. The approach is also reflected in the obligation to develop and implement national, subregional and regional action programmes in such a way as to inspire cooperation in a spirit of partnership between the donor community, governments at all levels, local populations and community groups and facilitate access by local populations to appropriate information and technology.¹¹⁶² Moreover, affected countries are required to establish and implement their national action programmes (NAPs) through participatory means.¹¹⁶³ The bottom-up approach ensures that conflicting interests are balanced by decision-makers with input from those directly concerned rather than merely from a theoretical, distant, large-scale point of view.

¹¹⁶¹ CoP UNCCD VIII/3 Annex, IV.

¹¹⁶² Art. 10 (2) (e) UNCCD.

¹¹⁶³ Art. 10 (2) (f) UNCCD.

UNCCD's integrated objectives and its bottom-up approach are its main assets. UNCCD sets a propitious basis for the attainment of mutual gains solutions.

Successful regimes include both, top-down and bottom-up features linking political representatives and civil society.¹¹⁶⁴ UNCCD does not content itself with promoting bilateral and multilateral arrangements¹¹⁶⁵ linking donors and local entities. The need for a comprehensive, coordinating framework for action is reflected by the central element the Convention uses to achieve its aims, the NAPs. In addition, the convention obliges affected country parties to strengthen relevant legislation, to enact new laws and to establish long-term policies.¹¹⁶⁶

A solid legislative or other regulatory framework is a precondition for the creation of a stable enabling framework to combat desertification. Legislation and regulation is necessary, not to impose solutions from above, but to encourage and support such solutions and to create transparency and coherence.

3. CBD

This section will examine whether the CBD integrates local conservation and development interests and advances or at least respects indigenous rights.

a) Primacy of conservation and protected areas

Article 1 CBD states the overarching objectives of the Convention which have also a normative, inspiring quality and guide the performance under the Convention.¹¹⁶⁷ The Convention's objectives are the conservation of biodiversity, its sustainable use and the fair and equitable sharing of benefits arising from the use of genetic resources.¹¹⁶⁸ The CBD objectives and the 2010 target are concretized through the adoption of international guidelines, programmes of work and through national biodiversity strategies and action plans.

The mere fact that the Convention distinguishes conservation and sustainable use indicates that the omission of any use may be necessary and is promoted by the CBD. The term "conservation" is not defined by the CBD. The single components of its conservation approach, especially the reliance on PAs, indicate that conservation is

¹¹⁶⁴ Young, *Governance in World Affairs*. 94.

¹¹⁶⁵ Art. 4 (1) UNCCD.

¹¹⁶⁶ Art. 5 (e) UNCCD.

¹¹⁶⁷ Matz-Lück, "Biological Diversity, International Protection," para. 30.

¹¹⁶⁸ Art. 1 CBD.

understood as “protection against destruction by humans.”¹¹⁶⁹ In spite of its threefold objectives, conservation of biological diversity is the convention’s priority. Conservation needs are decisive rather than needs and interests of inhabitants. Yet, the Convention reflects the link between human welfare and biodiversity. It stresses not only the intrinsic value of biodiversity but also its benefits for human food, health and other needs and friendly relations between states.

To achieve its objectives the CBD relies on the promotion of the establishment of systems of PAs. This also shows that the CBD prioritizes the protection of biodiversity at a level determined by scientists instead of the market. It would seem that biodiversity protection is the overriding interest whose impact is only corrected, alleviated for local communities by creating income alternatives. This raises the question whether biodiversity is a value whose importance does not leave room for the accommodation of other interests. The Millennium Ecosystem Assessment (MA) holds it to be necessary to not only strengthen efforts aimed at sustainable use of biodiversity and ecosystem services, but also efforts focusing on biodiversity conservation, such as first of all systems of PAs.¹¹⁷⁰ The need for PAs remains a cornerstone that does not allow any room for concessions. Some sensitive ecosystems and some endangered species may require “protection against use” in order to continue to exist. This raises the question who should decide about the acceptable level of biodiversity loss. The MA expresses the view of experts. At the same time the MA emphasizes the responsibility of society to choose. The CBD seeks to better inform and educate the public to convince it of conservation needs. The success of protection against use depends on the capacity to inform and educate and thus change the appreciation of biodiversity’s intrinsic value.

Programmatic provisions on education and communication strategies under the CBD have informed and altered attitudes of the public and decision-makers and improved compliance with biodiversity conventions. More human and financial resources are needed.¹¹⁷¹ Such programmatic education programmes overlap with education for improved compliance dealt with below.

¹¹⁶⁹ Matz-Lück, "Biological Diversity, International Protection," para. 31.

¹¹⁷⁰ Adeel, *Ecosystems and Human Well-being: Desertification Synthesis*, . 11.

¹¹⁷¹ *Ibid.* 12.

b) Promotion of opportunities for sustainable use

The CBD also relies on incentives for conservation through sustainable use of resources.¹¹⁷² This is also true in the context of PAs. For example, the Guidelines on Biodiversity and Tourism Development comprise activities related to sustainable tourism development, inter alia, in PAs.¹¹⁷³

The MA lists efforts with the primary goal of sustainable use that have proven successful and that should be extended. First, it is necessary for sustainable use to provide for payments and markets for biodiversity and ecosystem services. Relevant examples are ecotourism, tax incentives, easements (that is, rights to use someone else's land with the purpose to more conveniently enjoy one's own piece of land) and contractual arrangements (for example between upstream landowners and beneficiaries of downstream water services). In spite of the positive assessment of the potential of such market mechanisms the MA points out related challenges, namely the need to ensure transparency to ascertain that people actually receive the services they have paid for. Furthermore, institutions are required to ensure the functioning of a market and the equitable distribution of benefits. Brazilian extractive reserves can serve as an example of a case in which economic empowerment, particularly access to markets, is required. The reserves aim to integrate conservation and maintenance of livelihoods of traditional rubber tappers and other resource-dependent groups. They permit the continuation of small-scale extraction of forest products. Since 1990, the Brazilian government established extractive reserves over nearly one million hectares in Rondonia. The long-term economic sustainability remains doubtful as rubber tappers are dependent on international prices for their rubber.¹¹⁷⁴

Second, conservation aspects need to be integrated into business sectors, such as agriculture and forestry.¹¹⁷⁵ More programmatic provisions and work are needed for human and institutional capacity to integrate conservation and human well-being into ecosystem management. This is true in the agriculture and forestry sectors and for other ecosystem services even more so. A coordination of concerned ministries, for example for agriculture and forestry, is needed to develop cross-sectoral policies.¹¹⁷⁶

¹¹⁷² Matz, "Protected areas in international nature conservation law. Can states obtain compensation for their establishment?," 704.

¹¹⁷³ CoP CBD Decision VII/14.

¹¹⁷⁴ Brown, "Innovations for Conservation and Development," 13, 14.

¹¹⁷⁵ Adeel, *Ecosystems and Human Well-being: Desertification Synthesis*, . 11.

¹¹⁷⁶ *Ibid.* 13.

Third, benefits must accrue to local communities, for example through their marketing of particular species and ecotourism. For sustainable use to be successful local communities should be encouraged to make management decisions that are compatible to biodiversity conservation. While “win-win” situations do exist, an enabling environment, which encompasses appropriate rights to the resources, access to information and stakeholder involvement, needs to counterbalance incentives for local communities to exceed sustainable levels.¹¹⁷⁷

Market failures can be corrected and environmental externalities leading to the degradation of ecosystem services can be internalized. For ecosystem services which are not marketed, market based incentives for sustainable use are normally lacking and therefore should be created. Costs linked to the management of one ecosystem service need to be weighed and felt in the managing sector. For instance, taxes or user fees for activities causing “external costs,” and mechanisms that permit informed consumer choices through the introduction of certification schemes should be introduced.¹¹⁷⁸

The CBD CoP sees a high potential to link forest certification with protected areas. Globally, about 120 million hectares of forest, which include mostly production forests and hardly any PAs, have been certified. However, there are some certified forests within PAs, and some certification schemes provide that a part of the forest be designated as PA.¹¹⁷⁹ The CoP further noted that certification systems are scarcely applied in some developing countries, notably in the tropics. The CoP attributes this to a lack of enabling conditions to implement these systems. Among those conditions it mentions institutional and technical capacity, and markets for certified wood.¹¹⁸⁰

For the benefit of conservation and development, conservation considerations should be integrated into national development strategies or in poverty reduction strategies. The ecosystem approach adopted under the CBD provides a framework to assess biodiversity and ecosystem services and evaluate and implement response measures.¹¹⁸¹ The ecosystem approach focuses on the functional linkages and processes within ecosystems, the sharing of benefits generated by ecosystem services, adaptive management practices, management activities at various levels and

¹¹⁷⁷ Ibid. 12.

¹¹⁷⁸ Ibid. 13.

¹¹⁷⁹ CoP CBD Decision VII/11 Annex II A. 14.

¹¹⁸⁰ CoP CBD Decision VII/11 Annex II A. 15.

¹¹⁸¹ CoP CBD Decision V/6.

cooperation between sectors. The ecosystem approach is designed to address needs to achieve conservation and sustainable use and indirect and direct drivers influencing ecosystems.¹¹⁸² The approach relies on the continuum of measures stretching from strict protection to human-made ecosystems integrated into regional strategies.¹¹⁸³ The Convention intends to achieve a balance of its three objectives in its work on PAs through the utilization of the ecosystem approach. More specifically, the ecosystem approach is to provide a framework within which the goods and services flowing from multiple-use PAs are valued and the relationship of the PA and its surrounding landscape is considered. Where a PA straddles political boundaries the ecosystem approach requires the entire ecosystem or bioregion to be taken into account.¹¹⁸⁴ The CoP provided guidance on the implementation of the ecosystem approach principles and states that the ecosystem approach assists to implement the convention's work on PAs and ecological networks, (that is, networks that integrate PAs into the broader land- and/or seascapes) for effective conservation of biodiversity and sustainable use.¹¹⁸⁵

No matter how many incentives for sustainable use are created, this will not change the fact that a certain level of change in biodiversity is inevitable. Scientists can inform decision-makers. Yet, ultimately the choice of biodiversity levels remains with society.¹¹⁸⁶

c) Addressing the unsustainability in the economic system

Conservation and sustainable use considerations need to be integrated into international macroeconomic decision-making structures. So far, they limit themselves to considering institutional and macroeconomic stability, sectoral growth and reducing the number of people living on less than \$1 a day. Studies have shown that numerous structural adjustment programmes in the mid- to late-1980s deteriorated ecosystem services and aggravated poverty.¹¹⁸⁷

The NGO network in the Structural Adjustment Participatory Review Initiative (SAPRIN) demonstrated that adjustment policies and trade liberalization were to the detriment of biodiversity in Mexico. They forced small-scale corn producers to

¹¹⁸² Adeel, *Ecosystems and Human Well-being: Desertification Synthesis*, . 14.

¹¹⁸³ Ibid. 75.

¹¹⁸⁴ CoP CBD Decision VII/28 Annex para. 8.

¹¹⁸⁵ CoP Decision VII/11 Annex I, A. 4.

¹¹⁸⁶ Adeel, *Ecosystems and Human Well-being: Desertification Synthesis*, . 16.

¹¹⁸⁷ Ibid. 73.

migrate to areas in Chiapas and other parts of Southern Mexico where they caused damage to biodiversity. Agricultural-sector adjustment policies favour large-scale monoculture and push small-scale farmers onto more marginal quality land they than overexploit to ensure their income. SAPRIN showed that in five countries on three continents adjustment policies have caused an exacerbation of rural inequality. Adjustment programmes are criticized for creating opportunities for large corporations to exploit natural-resources directly, in an incompatible way with resource use by local populations and conservation objectives.¹¹⁸⁸

Friends of the Earth point to a conceptual problem of structural adjustment programmes and stabilization programmes. Their objective is to generate foreign exchange that meets the International Monetary Fund (IMF) targets and positive government budget balances. Consequently, export rates of natural resources have risen significantly under IMF adjustment programmes. At the same time unsustainable forestry and disruptive agricultural practices are promoted.¹¹⁸⁹

The World Conservation Society reports on the situation of the Maya in the Peten region of Guatemala. They used to live from hunting, gathering, small-scale agriculture and chicle production for large corporations until 1990 when the government established the Maya Biosphere Reserve. The reserve encompassed protected areas, multiple-use areas and buffer zones. While the exploitation of resources, such as chicle and oil has been strongly restricted in the multiple-use areas, the far more detrimental large cattle ranches have not been interfered with and the buffer zones have been seriously deforested. The perceived inequitable treatment of the poor inhabitants causes them to resent and disrespect rules for multiple-use and PAs. Fairness requires to address structural issues rather than simply to demand of people with few economic options to reduce their impact on biodiversity. Community development and conservation efforts are inextricably linked and they both need to be backed by broader policy.¹¹⁹⁰ The complex problems in the region of Chiapas include unequal land and resource distribution, landlessness, poverty, resource degradation, corporate interests, corruption, and civil conflict.¹¹⁹¹

¹¹⁸⁸ Hellinger and Hellinger, "The harmonization of wildlife habitat and human livelihood imperatives: Addressing common root causes through a participatory, collaborative and sustainable approach. Preliminary Findings," 8.

¹¹⁸⁹ *Ibid.*: 9.

¹¹⁹⁰ *Ibid.*: 10.

¹¹⁹¹ *Ibid.*: 12.

The preceding sections noted the CBD's prioritization of conservation compared to human interests to use biological resources. The promotion of protection against use is maybe understandable considering that the economic and development sectors fail to take into account conservation needs. Conservation and sustainable use require an enhancement of synergies between MEAs and international economic and social institutions. Economic and environmental conventions' specialized objectives and approaches separately fail to address the complex issue of ecosystem services and human well-being. Coordination needs to prevent that economic agreements counteract biodiversity-related MEAs.¹¹⁹² Institutions dealing with economic and social issues are those with the greatest impact on biodiversity. In order to truly integrate conservation and development interests they need to join in this effort.

The present conception of economic growth disregards economy's impact on natural resources.¹¹⁹³ In order to create enabling conditions for sustainable use agricultural subsidies as they are used mostly within OECD countries that promote excessive use of ecosystem services should be abolished and instead be employed to subsidise non-marketed ecosystem services. Subsidies cause overproduction, lower the profitability of agriculture in developing countries and lead to excessive use of fertilizers and pesticides.¹¹⁹⁴ This elimination may need to be complemented by compensatory measures to poor groups that currently benefit from low prices and direct payments of subsidies.¹¹⁹⁵

In order to cope with conflicting provisions contained in other treaties the CBD seeks to establish a priority for biodiversity protection. The CBD contains the commonly used statement that "[t]he provisions under the Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement" but it excludes cases in which "the exercise of those rights and obligations would cause a serious damage or threat to biological diversity." This prioritization is an innovation of the CBD.¹¹⁹⁶ It remains to be seen whether it will help to strengthen the position of biodiversity towards the more dominant economic agreements.

The Millennium Development Goals need to be tackled with an integrated approach in order to be partially attainable in the long-run. From a short-term perspective there

¹¹⁹² Adeel, *Ecosystems and Human Well-being: Desertification Synthesis*, 12.

¹¹⁹³ *Ibid.* 13.

¹¹⁹⁴ *Ibid.* 12.

¹¹⁹⁵ *Ibid.* 13.

¹¹⁹⁶ Matz-Lück, "Biological Diversity, International Protection," para. 44.

are synergies as well as trade-offs. Poverty, hunger reduction and health targets pose risks for biodiversity. Hunger reduction strategies include for instance the improvement of rural road networks yet at the same time leading to habitat fragmentation and facilitation of unsustainable harvests of bushmeat amongst other products. The values of biodiversity and ecosystem services need to be taken into account in development planning. An integrated approach takes particular note of the conservation of biodiversity that is relevant for the well-being of poor and vulnerable people.¹¹⁹⁷ Long-term considerations are required to capture the benefits of biodiversity to human well-being.¹¹⁹⁸

The complex issue of sustainable use of biodiversity requires to address numerous other interrelated aspects that threaten biodiversity including: human-caused climate change, growth in consumption of ecosystem services and corruption as a consequence of weak systems of regulation and accountability.¹¹⁹⁹ These aspects do, however, go beyond the current research agenda and cannot be looked at in more detail.

d) Indigenous peoples' rights

The International Alliance of the Indigenous Peoples of the Tropical Forests which represents indigenous organisations from 31 countries laments a lack of respect for their rights by the CBD. The CBD repeatedly refers to state sovereignty over natural resources¹²⁰⁰ and fails to refer to indigenous land rights. Article 8 (j) CBD requires states parties to “respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and to promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits.” These obligations are, however, made “subject to national legislation.” The Convention omits any reference to indigenous land rights contained in ILO Convention no. 107, ILO Convention no. 169, the International Convention for the Elimination of Racial Discrimination and the UN Declaration on the Rights of Indigenous Peoples. It fails to integrate indigenous rights and interests towards states.

¹¹⁹⁷ Adeel, *Ecosystems and Human Well-being: Desertification Synthesis*, . 15.

¹¹⁹⁸ Ibid. 16.

¹¹⁹⁹ Ibid. 13.

¹²⁰⁰ Preamble, Arts. 3, 4, 9, 14 (2), 15 (1) CBD.

The neglect of indigenous rights is further exacerbated by the preamble and Article 8 (j) using the wording “indigenous and local communities embodying traditional lifestyles.” This phrase is problematic because it does not recognize that indigenous communities are first of all parts of indigenous peoples. They should be admitted as negotiators to prevent scientists from determining levels of sustainability that conflicts with indigenous traditional knowledge and indigenous management choices.

Moreover, the notion of “traditional” is problematic because it usually refers to beliefs or customs which are passed on from one generation to another. It risks to be construed so as to refer only to inalterable, uninfluenced customs and beliefs even though all cultures are dynamic. Cultural change and improved living conditions are permissible only provided they do not compromise sustainability as defined under the Convention.¹²⁰¹ The process of continuity should be decisive rather than a static content. Self-identification should be used to determine the content of the term “traditional.” This has nothing to do with romanticizing the conduct of indigenous peoples. They must have secure tenure of natural resources and revenue must be equitably divided to ensure that they have incentives for conservation. The reasons for local overexploitation need to be fully understood and addressed.¹²⁰²

Indigenous peoples are sceptic towards PAs because they deprive them of their lands and rights to resources. Agenda 21, the Rio Declaration and the CBD place conditions on their respect for indigenous rights. Chapter 26 of Agenda 21 states that indigenous peoples have a historical relationship with their lands and a distinct role in sustainable development. This distinct role is confirmed in Principle 22 of the Rio Declaration which states:

“Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.” This ascribed role arguably makes the enjoyment of indigenous

¹²⁰¹ Barsh, "Indigenous Peoples," 850.

¹²⁰² Hellinger and Hellinger, "The harmonization of wildlife habitat and human livelihood imperatives: Addressing common root causes through a participatory, collaborative and sustainable approach. Preliminary Findings," 7.

autonomy conditional on their continuance as custodians for their lands. Unsustainable use would terminate their rights.¹²⁰³

Also the CBD requires states to protect and encourage customary use of biological resources but it adds the condition that such uses must be “compatible with conservation or sustainable use requirements.”¹²⁰⁴

The Convention lacks a reference to indigenous peoples’ participation in the work of the convention. It merely refers to “cooperation among States and intergovernmental organizations and the non-government sector for the conservation of biological diversity and the sustainable use of its components.”¹²⁰⁵ Control and decision-making of indigenous peoples is not provided for. The inherent risk is that PAs are set up and managed irrespective of the wishes of indigenous peoples living in the area.

Indigenous peoples’ land rights to PAs situated within their territories need to be recognized. The elements for an action plan on article 8(j) on traditional knowledge may improve the situation. According to it indigenous and local communities should be actively involved in the management of PAs and their rights should be respected when establishing PAs.¹²⁰⁶ PAs can also support indigenous culture. Declaring an area as PA gives a legal status to the land which can help to legally secure sites such as sacred groves and mountains, support conservation efforts by indigenous and traditional peoples from external disruption.¹²⁰⁷

The CBD is still in the midst of its efforts to ensure the implementation of Article 8 (j). The Ad Hoc Open-ended Working Group on Access and Benefit-sharing was established by CoP-5 in May 2000.¹²⁰⁸ CoP-5 adopted a Programme of Work to implement Article 8 (j) and to advance the involvement of indigenous and local communities in convention work. As a result of the Programme of Work parties adopted the Akwé: Kon Guidelines dealing with cultural, environmental and social impact assessments where suggested developments are likely to impact sacred sites, lands and waters traditionally occupied or used by indigenous and local communities. The guidelines are meant as a collaborative framework ensuring the full involvement

¹²⁰³ Barsh, "Indigenous Peoples," 834.

¹²⁰⁴ Art. 10 (c) CBD.

¹²⁰⁵ Preamble CBD.

¹²⁰⁶ CoP CBD Decision VII/16 Annex, 17, 18.

¹²⁰⁷ Beltrán and Phillips, eds., *Indigenous and Traditional Peoples and Protected Areas. Principles, Guidelines and Case Studies*, 3.

¹²⁰⁸ CoP CBD Decision V/26.

of indigenous and local communities. CoP-7 in 2004 mandated the Working Group to elaborate and negotiate an international regime for the fair and equitable sharing of benefits arising from the utilization of genetic resources in order to fully implement Article 15 and Article 8 (j) CBD and to this purpose cooperate with indigenous and local communities, NGOs, industry and scientific and academic institutions and international organizations.¹²⁰⁹ Its results are to be discussed by CoP-10.

Currently, indigenous peoples are only given a consultative NGO status with the CBD. This is not sufficient to make their interests heard.¹²¹⁰ Indigenous peoples organize as NGOs, yet they are peoples not merely NGOs. The CoP should establish procedures so that indigenous peoples can report on the biodiversity in their territories.¹²¹¹ This way they would be participants in the convention's work instead of being valued exclusively as means for conservation. They should be admitted as negotiators to prevent scientists from determining levels of sustainability that conflict with indigenous traditional knowledge and indigenous management choices.

e) Subsidiarity system

As stated earlier with respect to UNCCD, in order to be successful, all governance levels need to support conservation and sustainable use through strong institutions. Supportive laws and policies are needed to secure tenure and authority to lower levels in order to encourage a sustainable management. Different levels of participation in land and resource management of local communities can be envisaged. When participation only means passive forms of consultation within a top-down management system, power imbalances and underlying conflicts remain unresolved.¹²¹² Co-management may be an option. Here, local communities and national agencies share management responsibility. A final option is the full devolvement of managing authority over land and resources to local communities. Communities' rights to natural resources should be secured, including their intellectual property rights and communities should benefit from an equitable distribution of revenue generated from their lands.¹²¹³ Legal empowerment is an end

¹²⁰⁹ CoP CBD Decision VII/19.

¹²¹⁰ Barsh, "Indigenous Peoples," 851.

¹²¹¹ International Alliance of the Indigenous Peoples of the Tropical Forests "The Biodiversity Convention: The Concerns of Indigenous Peoples.", The Alliance's Concerns about the Convention on Biodiversity

¹²¹² Brown, "Innovations for Conservation and Development."

¹²¹³ Mike Sansom, "Readers' Responses to "A Challenge to Conservationists", " *World Watch Magazine* 18, no. 2 (2005).

in itself and at the same time it helps to achieve conservation and development goals.¹²¹⁴

Decentralization can occur in the form of devolution or in the form of a federal system. Devolution means that power is transferred from a central government to smaller units such as states, regions or local authorities. In contrast to federal systems where the power allocation is laid down in a state's constitution, devolution usually occurs through statutes. Hence, devolution does not turn unitary systems of government into federal systems. The unitary central authority can withdraw the powers of the subnational authorities at any time.¹²¹⁵

Together with decentralization of authority large-scale planning is also needed to coordinate various stakeholders relevant to ecosystems. The best governance structure is a subsidiarity system, that is, competencies that smaller units can carry out effectively had best be vested in these units and the central government supports, coordinates and communicates.¹²¹⁶ Informal local institutions may be far stronger than they would seem from looking at legislation.¹²¹⁷

4. CITES

Since the 1990s CITES has increasingly been trying to integrate conservation and development interests. CITES' working documents were a US draft text, based on an World Conservation Union (IUCN) text and a proposal from Kenya. IUCN played a central role during the preparatory phase of CITES. IUCN drafted a treaty proposal which provided a strong position for experts in controlling wildlife trade. Clearly IUCN's interest was to achieve the best possible protection of species free from any political and short-term economic considerations.

The Kenyan draft, on the other hand, insisted on the right of each range state to list its species to be traded. This draft text thus stressed national sovereignty as opposed to scientific decision-making.¹²¹⁸

¹²¹⁴ Brown, "Innovations for Conservation and Development," 10, 11.

¹²¹⁵ Encyclopedia Britannica, "Britannica Online Encyclopedia," <http://www.search.eb.com/eb/print?tocId=9384367&fullArticle=false%20Encyclopædia%20Britannica%20Article:%20devolution>.

¹²¹⁶ Adeel, *Ecosystems and Human Well-being: Desertification Synthesis*, . 72.

¹²¹⁷ Ibid. 73.

¹²¹⁸ Sand, "Whither CITES? The evolution of a treaty regime in the borderland of trade and environment," 34. Reeve, *Policing international trade in endangered species. The CITES Treaty and compliance*. 28.

CITES' primary concern is the conservation of species. Its preamble lists the economic value among species' values and the convention does not generally prohibit but merely strives to coordinate trade in species that may become endangered. This underlines that the convention does not one-sidedly favour an unlimited conservation approach and does not neglect trade interests outright. However, the convention text does not refer to the need to balance environmental and development interests in the way envisaged by the sustainability principle and after CITES' adoption formulated in the Brundtland report and Agenda 21.

The 13th CoP, however, urged the parties to utilize the Principles and Guidelines for the Sustainable Use of Biodiversity.¹²¹⁹ The CITES' Strategic Vision adopted by CoP-14 confirms that sustainable trade in wild fauna and flora can make a major contribution to achieving the broader objectives of sustainable development and biodiversity conservation.¹²²⁰ The Strategic Vision provides a framework for the future development of Resolutions and Decisions. It takes into account issues, such as:

- meeting the UN Millennium Development Goals;
- significantly reducing the rate of biodiversity loss by 2010;
- achieving deeper understanding of the cultural, social and economic issues at play in producer and consumer countries; and
- promoting wider involvement of civil society in the development of conservation policies and practices.

These developments indicate a shifting of CITES goals towards a more integrative approach, increasingly taking into account the various interests and actors concerned. Yet, whilst the draft of the Strategic Plan 2008-2013 stated as one of its four goals to adopt balanced wildlife trade policies compatible with human well-being, livelihoods and cultural integrity, the final version of the Strategic Vision omitted this goal.¹²²¹

C. Do the outcomes demonstrate effectiveness of the treaty regimes?

Widespread participation in, implementation of and compliance with agreements seems to be the safest indicator for their being a mutual gain solution. It is difficult to fathom why any actors would slack in implementation or target groups in compliance

¹²¹⁹ Conf. 13.2(a).

¹²²⁰ Conf. 14.2 Annex Goal 3; Objective 3.4; SC54 Doc. 6.1, Annex 2.

¹²²¹ SC54 doc. 6.1.

when the agreement corresponds to their best interest. A connected question is whether compliance monitoring is necessary to ensure transparency and to make mutual gain solutions which are enshrined in the agreements reality? Is the same true for review procedures? Do agreements that represent mutual gain solutions make compliance enforcement measures redundant?

I. Implementation and compliance as indicators

1. Definition of the terms implementation and compliance

For the purposes of this thesis the implementation of a treaty requires only the enactment of relevant laws and regulations from a state. Compliance, on the other hand, means that conventions and other instruments are effectuated in their entirety in practice nationally as well as internationally. Compliance may thus require additional administrative procedures to enforce the rules nationally.¹²²² A look at domestic legislation does not suffice to determine whether a country is complying with an instrument.¹²²³

Pursuant to Article 26 of the Vienna Convention on the Law of Treaties States are obliged to ensure the effective implementation of treaties they have entered into. Typically, Member states are responsible to elicit compliance with key provisions of regimes.

2. Varied forms of conduct required under agreements

Not all provisions contained within agreements wield their influence through setting rules to be implemented and complied with. The effect of proscriptions and prescriptions within regimes is comparatively easy to assess by looking at compliance rates and other induced behavioural changes of states and other actors.¹²²⁴ This does not mean, however, that other provisions lack influence. Rather, based on constructivist assumptions, the three other groups of provisions – procedural, programmatic and normative provisions – are of particular importance.¹²²⁵ Normative provisions may prompt new ways of thinking about conflicting interests.¹²²⁶ Even

¹²²² Wolfrum, "Means of ensuring compliance with and enforcement of international environmental law," 29.

¹²²³ Brown Weiss, *International environmental law and policy*. 306.

¹²²⁴ Young, *Governance in World Affairs*. 81.

¹²²⁵ Mitchell, "Compliance Theory. Compliance, Effectiveness and Behaviour Changes in International Environmental Law," 912.

¹²²⁶ Young, *Governance in World Affairs*. 83.

though they may seem too vague to produce any tangible effects they may have far-reaching effects in the long-run.¹²²⁷

Procedural provisions are particularly commendable where issues are concerned in which various stakeholders take a legitimate interest. The stakeholders can take part in the decision-making of CoPs and other meetings and react to needs that were unknown at the time of the regimes establishment. Apart from states IOs and NGOs active in the field of conservation as well as development are granted access. Procedural provisions under the examined regimes thus advance the achievement of integrative agreements.

The key challenge for programmatic provisions is whether actors establish an appropriate organizational structure to realize collective projects and to raise sufficient supportive resources. States are hesitant to commit themselves to furnish resources and they occasionally even draw back from commitments already made.

The UNCCD Strategic Plan gives high importance to the need of additional funding for the implementation of the Convention. Lack of financial resources is the most frequently cited impediment to effective implementation.¹²²⁸ Official development assistance should at least reach the 0.7 per cent target by 2015.¹²²⁹

After a period of stagnation official development assistance increased lately since the Global Environment Facility (GEF) became a financial mechanism of the UNCCD.¹²³⁰ Concretizing the fourth Strategic Objective, the fifth operational objective is to mobilize and improve the use of national, bilateral and multilateral financial and technological assets.¹²³¹ Here, the Global Mechanism (GM) has a central responsibility.¹²³²

The Parliamentarian Round Table described current financial resources that are at the disposition of UNCCD as “neither substantial nor adequate, nor timely or predictable.” A convention success may require an extension of financial mechanisms, such as debt-for-nature swaps and air ticket taxes.¹²³³ The UNCCD aims

¹²²⁷ Ibid. 84.

¹²²⁸ Charles Bassett and Joana Talafré, "Implementing the UNCCD. Towards a recipe for success," *Review of European Community & international environmental law* 12, no. 2 (2003).

¹²²⁹ Declaration of Members of Parliaments para. 23.

¹²³⁰ CoP UNCCD Decision VIII/3, Annex, The Strategy, Introduction.

¹²³¹ CoP UNCCD Decision VIII/3 Annex, V.

¹²³² CoP UNCCD Decision VIII/3 Annex Annex, VI, C.17.

¹²³³ Declaration of Members of Parliaments para. 13.

to identify innovative sources of finance including from the private sector, market-based mechanisms, trade, foundations and NGOs.¹²³⁴

II. Implementation to ensure state benefits

In theory, the fact that all parties agree to incur certain obligations under an agreement makes it likely that the agreement corresponds to their proper interests and that they will abide by this agreement and implement it fully. The assumption that an agreement which meets the interests of all states will be implemented seems to be in line with the institutionalist theory. Institutionalists argue that regimes must be self-enforcing because there is no international executive power to enforce participation in or implementation of regimes.¹²³⁵ States devise regimes that correspond to their interests. Why should they spend time and energy on agreements they expect to be breached? Being self-enforcing implies that states do neither benefit from withdrawing from the regime nor from modifying it. When adherence to regimes is within the interest of a state enforcement measures become superfluous.

This positive assessment of self-enforcing agreements is opposed by critiques who point out that self-enforcing agreements mostly comprise only few parties and require a low level of behavioural change. Regimes that demand significant changes, so the critiques, suffer from wilful non-compliance and consequently attempt to react by establishing enforcement measures. Free riding and wilful non-compliance, so the argument, need to be addressed through credible threats. The most effective regimes are those with enforcement possibilities, for example the EU and the WTO.¹²³⁶

Institutionalists themselves tend to be sceptic towards the possibility of treaty regimes to solve the most pressing environmental questions.¹²³⁷ International environmental law can prevent free riding behaviour and other “market failures” and ensure that all states engage in the protection of biodiversity through a strategic manipulation of incentives. In the case of CITES, for instance, with the increasingly effective control of trade in species the value of protected species will equally increase which means from an institutionalist perspective that incentives for member states, not to free ride,

¹²³⁴ Outcome 5.4.

¹²³⁵ Barrett, "An Economic Theory of International Environmental Law," 232, 33. Danish, "International Relations Theory," 209.

¹²³⁶ Klabbers, "Compliance Procedures," 1004.

¹²³⁷ Kyle W. Danish, "International Relations Theory," *Ibid.*, ed. Daniel Bodansky, Jutta Brunnée, and Ellen Hay, 212, 27.

will have to grow at the same rate to ensure that cooperation remains more attractive than unilateral action.¹²³⁸

It may also be in the interest of a state to implement and to comply with an agreement because a failure to comply with the agreement will shake the confidence of the negotiating partner and complicate future negotiations.

III. Legitimacy prompts implementation and compliance

Arguably, it is legitimacy of agreements that prompts implementation and compliance. As an example, the more information is available and the more problems addressed by a regime are understood, the better the prospects for it to be implemented and complied with¹²³⁹ because information and understanding increase the legitimacy.

1. Social forces prompt implementation and compliance

Constructivists expect more impact of self-enforcing regimes, because of the regimes' influence on state interests and identities. State interests are not static nor are they independent of the regime. Regimes are social structures that develop consistent patterns of behaviour which have a constraining or enabling effect upon states; and they create the background for in depth discussion to determine which behaviour is classified as legitimate and which as illegitimate. Norms that have been developed under a regime influence their behaviour and identity because states tend to implement rules that they perceive as legitimate similar to citizens who respect rules they accept as legitimate. Continued interaction and discourse tend to lead to shared understandings and a convergence of views.¹²⁴⁰ International momentum toward compliance improves compliance as is the case in other social structures. Consequently, widespread participation, ratification and implementation tends to induce more states to ratify and implement an agreement. Momentum is also created by the international public opinion which may be articulated and influenced by NGOs.¹²⁴¹ Publicized scientific reports and large scale conferences trigger such momentum since governments do not wish to be seen as laggards.¹²⁴² States are not

¹²³⁸ Scott Barrett, "An Economic Theory of International Environmental Law," *Ibid.*, ed. Daniel Bodansky, Jutta Brunnée, and Ellen Hay, 238, 39.

¹²³⁹ Brown Weiss, *International environmental law and policy*. 312.

¹²⁴⁰ Brunnée and Toope, "International law and constructivism: elements of an interactional theory of international law," 51.

¹²⁴¹ Brown Weiss, *International environmental law and policy*. 315.

¹²⁴² *Ibid.* 328, 29.

merely self-interested utility maximizers.¹²⁴³ Cost and benefit cannot always be reliably calculated in any event. States comply with regimes because they feel a need to coordinate activities and to create consistent and predictable patterns of behaviour.¹²⁴⁴ The social aspects of the international community make states acknowledge that compliance with legitimate rules is the right and proper thing to do.¹²⁴⁵

2. Inclusive negotiation prompts compliance

Contrary to the assumption by the institutionalist theory that state compliance merely depends on benefits that can be obtained by the state, it also depends on the internalization of the relevant rules within national legal systems which usually occurs with the help of national interest groups. One study indicates that democracies are more likely to comply with their environmental obligations.¹²⁴⁶ This may be due to the inclusive deliberations within democracies which lead to a more thorough internalization, that is, a conviction of the legitimacy of the adopted rules. Rules are persuasive when they are acknowledged by citizens as legitimate.¹²⁴⁷ Some go even further and argue that a consensus which is negotiated within a state is more likely to meet the stakeholders' interests than a parliamentary, an administrative or a court decision.¹²⁴⁸ The interactive law theory agrees with constructivists on the impossibility of enforcing abstract norms that are not rooted in social practice.¹²⁴⁹

In general, it is acknowledged that some internal groups are very likely to reject the outcome of negotiations if the negotiator's mandate does not result from inclusive internal negotiation or consultation. Some hostile subgroups that may prevent a party's compliance with the agreement cannot in any event be anticipated.¹²⁵⁰ Internal consensus is a key element to create legitimacy and it is legitimacy that makes negotiations a success.¹²⁵¹

Government and private-sector decisions relating to ecosystems should be more transparent, accountable and provide for involvement of stakeholders. Rules that are

¹²⁴³ Young, *Governance in World Affairs*. 97.

¹²⁴⁴ Brown Weiss, *International environmental law and policy*. 308.

¹²⁴⁵ Young, *Governance in World Affairs*. 98.

¹²⁴⁶ Danish, "International Relations Theory," 214.

¹²⁴⁷ *Ibid.*, 215.

¹²⁴⁸ Susskind and Cruikshank, *Breaking the Impasse*. 81.

¹²⁴⁹ Brunnée and Toope, "International law and constructivism: elements of an interactional theory of international law," 68.

¹²⁵⁰ Susskind and Cruikshank, *Breaking the Impasse*. 128.

¹²⁵¹ Meerts, "The Changing Nature of Diplomatic Negotiation," 85.

developed with public participation have a better chance to be viewed as just and to be effective. And participation improves their quality and accountability and reduces corruption.¹²⁵²

IV. Compliance rates

What happens if a state is induced to undertake environmental commitments for utilitarian reasons, by pressure from outside or incentives and the attitude or preferences of the government change? A country may also undertake a commitment without the intention to change its behaviour simply to pretend internationally as well as domestically its participation in an international effort. Or it fails to comply because of a lack of capacity.¹²⁵³ This may lead to its non-compliance. For institutionalists non-compliance is the inevitable result when states expect higher benefits from non-compliance than from compliance or compliance costs exceed its benefits.¹²⁵⁴

To properly ascertain the extent of non-compliance this section will shed light on this issue. The implementation of and compliance with international environmental regimes has rarely been assessed systematically. The few studies in existence find low compliance.¹²⁵⁵

The CBD is not satisfied with the number and type of PAs that have been established. It criticizes that systems of PAs do not represent all ecosystems, nor do they address the conservation of critical habitat types, biomes and threatened species.¹²⁵⁶ The CBD Secretariat stresses that there are more than 1,300 species of mammals, amphibians and threatened birds that are not represented in PAs.¹²⁵⁷ Similarly, the representation of threatened or endangered plant species is seen as inadequate. For example, in Eastern Europe, 170 areas of the total number of 796 areas containing threatened plant species, have not been granted any protection.¹²⁵⁸

¹²⁵² Adeel, *Ecosystems and Human Well-being: Desertification Synthesis*, . 14.

¹²⁵³ Brown Weiss, *International environmental law and policy*. 308.

¹²⁵⁴ Wolfrum, "Means of ensuring compliance with and enforcement of international environmental law," 31.

¹²⁵⁵ Brown Weiss, *International environmental law and policy*. 307.

¹²⁵⁶ CoP CBD Decision VII/28 para. 16.

¹²⁵⁷ CBD Secretariat, *Biodiversity Issues for Consideration in the Planning, Establishment and Management of Protected Area Sites and Management*, CBD Technical Series, No. 15, p. 46, available at: <http://www.cbd.int/doc/publications/cbd-ts-15.pdf>.

¹²⁵⁸ Gillespie, p. 19.

Parliamentarians at the last UNCCD CoP lamented that many affected country parties fail to prioritize tackling land degradation in their development plans. Many developed Parties, on the other hand, abstain from promoting the provision of sufficient financial resources. The parliamentarians noted a lack of peasant participation causing a neglect of rural policy.¹²⁵⁹

Some findings raise doubts concerning the influence CITES wields on states parties. Some states show a tendency towards diminished compliance since the mid-1980s. The Species Survival Network's review of international trade in birds found nine species of birds and thirteen countries for which quotas established under the significant trade process had been exceeded between 1994 and 1999.¹²⁶⁰ In 1999, sixty-seven quotas for fauna and two for flora were reportedly exceeded. Half of these were exceeded by at least 150 per cent and two were exceeded by over 1000 per cent.¹²⁶¹

When affluent states such as the United States lack adequately trained personnel, it is not surprising that poorer range states' record of controls is not any better.¹²⁶²

And still, some positive outcomes of CITES are undeniable. CITES succeeded in limiting trade in endangered species.¹²⁶³ In spite of its limited annual budget of approximately US\$5 million the Secretariat of CITES has a strong position.¹²⁶⁴ Its infraction reports are now perceived as reliable and impartial documents which help to reinforce national implementation and accountability.¹²⁶⁵

Some changes in consumer demands are attributed to CITES. The food and fashion industries shifted away from products from Appendix I listed species, such as turtle soup or leopard fur coats. Medical/pharmaceutical research and partly the pet trade, substituted captive-bred for wild-caught animals. Crocodile leather is increasingly obtained from CITES controlled ranching operations and plants, such as orchids and

¹²⁵⁹ Declaration of Members of Parliaments para. 4.

¹²⁶⁰ Murphy, "Alternative Approaches to the CITES "Non-detriment" Finding for Appendix II Species," 541.

¹²⁶¹ *Ibid.*: 540.

¹²⁶² Krieps, "Sustainable Use of Endangered Species under CITES: Is it a Sustainable Alternative?," 473.

¹²⁶³ Curlier and Andresen, "International Trade in Endangered Species: The CITES Regime," 357.

¹²⁶⁴ Reeve, *Policing international trade in endangered species. The CITES Treaty and compliance*. 45.

¹²⁶⁵ Sand, "Whither CITES? The evolution of a treaty regime in the borderland of trade and environment," 50.

cacti are artificially propagated. In many cases CITES listed species have been replaced by other species.¹²⁶⁶

One example for concerted efforts by CITES' African member states is the Lusaka Agreement on Co-operative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora which entered into force in 1996.¹²⁶⁷ The agreement established a permanent law enforcement institution to facilitate cooperation in the investigations of illegal trade in wild fauna and flora in order to reduce and ultimately eliminate it.¹²⁶⁸ The EU, the US and Japan tend to be more compliant than other states.¹²⁶⁹

Implementation and compliance under all three agreements is imperfect. Hence, the following section will examine whether treaty regimes can gradually improve implementation and compliance.

D. Six strategies responding to or preventing non-compliance

The involvement of stakeholders in treaty negotiations improves chances of compliance. Treaty regimes need to take measures to prevent and/or react to non-compliance. Strategies to induce compliance most notably include but are not limited to compliance regimes. Usually, compliance regimes are composed of two elements which may overlap: the first monitoring element assesses compliance and, establishes instances of non-compliance; the second element provides for responses to non-compliance by inducing or enforcing compliance. In some cases the second element is lacking. Both these elements may influence compliance, the actual responses to non-compliance as well as the monitoring procedures. Because of instances of institutional overlaps and the accumulative effect of both elements they shall be analysed jointly with a view to establishing their impact on compliance. In order to develop a comprehensive picture of the opportunities a treaty regime has to induce compliance strategies outside of the compliance regime, which are included in the assessment.

Treaty regimes apply six distinct strategies to promote compliance: cognitive, normative, preclusive, generative, punitive and remunerative strategies.¹²⁷⁰ The following paragraphs will examine the extent to which these strategies can impact

¹²⁶⁶ Ibid.: 54.

¹²⁶⁷ Lusaka Agreement

¹²⁶⁸ Art. 2 Lusaka Agreement.

¹²⁶⁹ Brown Weiss, *International environmental law and policy*. 323.

¹²⁷⁰ Mitchell, "Compliance Theory. Compliance, Effectiveness and Behaviour Changes in International Environmental Law," 913.

implementation and compliance and whether the strategies amount to mediation strategies. Monitoring is a classical mediator activity. The functions carried out by treaty bodies, NGOs and scientific networks will be considered in order to establish their mediation qualities.

Non-compliance procedures are widely applied in international environmental law. The right approach towards non-compliance is highly contested whereby the controversy focuses mainly on the question of whether an “enforcement” or a “managerial” approach is more adequate. In particular the necessity or desirability of a mechanism to settle disputes and to enforce obligations is controversial.

I. Cognitive strategies

Cognitive strategies provide information which modifies or influences the perceptions of actors and thus advance compliance. They are similar to the cognitive mediation strategies set forth in chapter 4. These cognitive strategies are aimed to improve knowledge, be it about compliance, about the contents of obligations and means to comply with treaties in order to find common ground and mutual gains.

1. Render compliance transparent

Environmental regimes containing proscriptions and prescriptions tend to establish a monitoring mechanism to create transparency, that is, knowledge about compliance. Agreements can only yield mutual gain solutions when they are faithfully complied with. Negotiators must trust the others to fulfil their obligations under the agreement. The agreement must therefore include a mechanism to assess compliance. The text needs to specify the way in which performance is to be measured at certain intervals and the mode in which this is to be financed. Ideally, the acceptable sources of data and ways of measuring performance are set out from the start in the agreement.

CITES contains comparatively precise obligations. This facilitates the task of establishing whether parties are complying with these obligations. The WHC is much vaguer and the compliance monitoring poses more problems.¹²⁷¹ Monitoring may be carried out by treaty bodies (for example by a secretariat or commission), an international organization, or an NGO. The CoP is usually awarded a general supervisory function.¹²⁷²

¹²⁷¹ Brown Weiss, *International environmental law and policy*. 325.

¹²⁷² Churchill and Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreements. A little-noticed phenomenon in international law," 643.

a) Information gathering and assessment of compliance

As a precondition for monitoring, treaty regimes establish information systems.¹²⁷³ While most information is provided through state reports, this information may be completed through on site inspections or other surveillance activities carried out by an international entity or one or more states.¹²⁷⁴

Since the Stockholm Conference in 1972 reporting systems have become the norm in international environmental law. Usually, states are required to submit annual reports. It is then the Secretariat's task to write its synthesizing report. Most of the times secretariats are neither mandated to gather information, to request states to provide further information, to assess the information, nor to react to a failure to report adequately.¹²⁷⁵

There are, however, agreements which specify more in detail the information that is to be submitted, for example legislative and administrative measures taken to ensure compliance. Other more elaborate reporting requirements include requesting more and more detailed information and specifying the way in which the information is to be submitted.

Scientific networks may assist in the creation of reporting systems. UNEP-WCMC has assisted in the creation of national reporting systems for CBD, CMS, CITES and UNCCD.

aa) Information gathering and assessment under CITES

To make the monitoring of the implementation possible, CITES parties are required to transmit an annual report to the Secretariat listing the number and type of permits granted, exporters and importers and the states with which they are trading and the numbers or quantities and types of specimens.¹²⁷⁶ Furthermore, they have to furnish a biennial report on legislative, regulatory and administrative measures taken to enforce the provisions of the Convention.¹²⁷⁷ These reports are made public if the law of the party so permits.¹²⁷⁸

¹²⁷³ Mitchell, "Compliance Theory. Compliance, Effectiveness and Behaviour Changes in International Environmental Law," 912.

¹²⁷⁴ Wolfrum, "Means of ensuring compliance with and enforcement of international environmental law," 36.

¹²⁷⁵ *Ibid.*: 37.

¹²⁷⁶ Art. VIII(6), (7) CITES.

¹²⁷⁷ Art. VIII(7) CITES.

¹²⁷⁸ Art. VIII(8) CITES.

The essential tasks of collecting, analysing and disseminating information on compliance are undertaken by the Secretariat. CITES relies mainly on party reports, but also on information from NGOs and international organizations, from organizations, such as Interpol and the World Customs Organization (WCO). The Secretariat may also be asked to make an ad hoc visit to any party to verify information, or in cases of serious non-compliance.¹²⁷⁹

When the Secretariat is convinced that any species included in Appendix I or II is adversely affected by trade or that the Convention is not implemented effectively, it communicates such information to the Management Authority of the parties concerned.¹²⁸⁰ The concerned states inform the Secretariat of any relevant facts and, propose remedial action.¹²⁸¹

The Secretariat draws the attention of the parties to any matter which pertains to the aims of CITES¹²⁸² and it prepares annual reports on the implementation of the Convention.¹²⁸³ Within the monitoring mechanism the Secretariat has thus further reaching competences than secretariats under the majority of treaty regimes.¹²⁸⁴

bb) Information gathering and assessment under the CBD

Parties to the CBD are required to submit to the CoP national reports on measures taken to implement the provisions of the Convention and their effectiveness.¹²⁸⁵ The CoP specifies reporting intervals and the nature, structure and content of the reports.¹²⁸⁶ The CBD CoP established the Ad Hoc Open-ended Working Group on Review of Implementation of the Convention (WGRI).¹²⁸⁷

b) Clarification and assistance to improve reporting

Smaller states are frequently overburdened by the numerous reporting obligations. The dialogue entered into by the Secretariat and the reporting states can help to clarify obligations under the treaty and means to achieving them.¹²⁸⁸ The CoP or another

¹²⁷⁹ Reeve, *Policing international trade in endangered species. The CITES Treaty and compliance*. 62.

¹²⁸⁰ Art. XIII(1) CITES.

¹²⁸¹ Art. XIII(2) CITES.

¹²⁸² Art. XII(2)(e) CITES.

¹²⁸³ Art. XII(2)(g) CITES.

¹²⁸⁴ Wolfrum, "Means of ensuring compliance with and enforcement of international environmental law," 49.

¹²⁸⁵ Art. 26 CBD.

¹²⁸⁶ United Nations / Environment Programme, *Training manual on international environmental law*. Chapter 15, para. 64.

¹²⁸⁷ CoP CBD Decision VII/30 para. 23.

¹²⁸⁸ Brown Weiss, *International environmental law and policy*. 325.

treaty body itself can develop the reporting requirements.¹²⁸⁹ CoP decisions give advice or assistance, ask for further reporting, or request a compliance action plan.¹²⁹⁰ Many regimes cooperate with NGOs which provide incentives for reporting.¹²⁹¹ Incentives for reports and capacity building tend to render better results than sanctioning non-reporting. All those tasks mentioned which assist in reporting are non-adversarial mediation activities.

c) NGO data and assessments to improve transparency

Some treaties entrust NGOs with the collection of information on the implementation of the agreement which may be necessary as states may be reluctant to create transparency and to grant a right of access to environmental information thus limiting the possibility to monitor compliance. Democracies tend to be more transparent and hence more amenable to be monitored than authoritarian governments. NGOs too stand a better chance to be active within democracies.¹²⁹² NGOs make available their assessments of state compliance when states fail to report due to a lack of capacity or good-faith effort.¹²⁹³ Some agreements call on NGOs to monitor compliance.¹²⁹⁴ Even in the absence of such an authorization NGOs monitor the environmental performance of states and the private sector. NGOs inform the public, international organizations or national authorities.¹²⁹⁵

CITES possesses one of the best information sources available to any environmental treaty, with independent case studies and reports on seizures and prosecutions being publicized in the Trade Records Analysis of Fauna and Flora in Commerce (TRAFFIC) Bulletins.¹²⁹⁶ NGOs, such as IUCN, WWF (World Wide Fund for Nature) and TRAFFIC, provide data on the status of species, the threat to them posed by trade and the strictness of observance of the Convention enabling the Secretariat to identify problems and to engage in counter measures.¹²⁹⁷

¹²⁸⁹ Wolfrum, "Means of ensuring compliance with and enforcement of international environmental law," 55.

¹²⁹⁰ Klabbers, "Compliance Procedures," 999.

¹²⁹¹ Brown Weiss, *International environmental law and policy*. 327.

¹²⁹² *Ibid.*

¹²⁹³ Raustiala, "The "participatory revolution" in international environmental law," 560, 61.

¹²⁹⁴ Wolfrum, "Means of ensuring compliance with and enforcement of international environmental law," 52.

¹²⁹⁵ *Ibid.*: 53.

¹²⁹⁶ Sand, "Whither CITES? The evolution of a treaty regime in the borderland of trade and environment," 50.

¹²⁹⁷ Birnie, "The case of the Convention on Trade in Endangered Species," 239. Sand, "Whither CITES? The evolution of a treaty regime in the borderland of trade and environment," 49.

2. Clarify obligations under the treaties

Bilateral agreements rely simply on parties to comply step by step reciprocally.¹²⁹⁸ In multilateral agreements this will usually not suffice.¹²⁹⁹ Here, guidance for implementation is required.¹³⁰⁰ Compliance mechanisms can clarify the interpretation of provisions and strive to solve disagreements on interpretation and to find mutually acceptable interpretations.¹³⁰¹ To avoid uncertainties and render compliance possible an agreement requires procedures for a continual interpretation and clarification of the treaty text.¹³⁰² The involvement of experts in a treaty regime produces knowledge on the substance of the conflicting interests and consequently reduces or eliminates differences between the parties.¹³⁰³

External scientists may provide data needed for implementation. UNEP-WCMC manages and analyses the data that underpins implementation making use of databases and it provides information and analyses online. Since 1980 UNEP-WCMC has been managing the CITES Trade Database.¹³⁰⁴ Similarly, the CBD CoP acknowledged the value of the World Database on Protected Areas.

Target-setting, such as the 2010 target set by the CBD, may also clarify the rather abstract treaty requirements. The 2010 target is a political target. It is not legally binding and therefore neither enforceable nor subject to compliance control. Yet, it can influence state behaviour by creating expectations that pull towards compliance.¹³⁰⁵ Such targets are relevant since the will of the parties is decisive not the legal nature.¹³⁰⁶

Scientists develop indicators for convention impacts. In 2004, the CBD CoP called on UNEP-WCMC to assist its Secretariat in developing indicators to assess progress towards the 2010 target of significantly reducing the loss of biodiversity. As a consequence UNEP-WCMC organized conferences and created the 2010 Biodiversity Indicators Partnership, which coordinated and supported the cooperative elaboration of indicators by various partners.

¹²⁹⁸ Susskind and Cruikshank, *Breaking the Impasse*. 125.

¹²⁹⁹ *Ibid.* 127.

¹³⁰⁰ Bingham, *Resolving Environmental Disputes*. 123. Young, *The Intermediaries. Third parties in international crises*. 357.

¹³⁰¹ Young, *Governance in World Affairs*. 96, 97.

¹³⁰² *Ibid.* 102, 03.

¹³⁰³ *Ibid.* 104.

¹³⁰⁴ UNEP-WCMC Species Programme

¹³⁰⁵ Boyle and Chinkin, *The making of international law*. 108.

¹³⁰⁶ Matz-Lück, "Biological Diversity, International Protection," para. 46.

3. Capacity building and education for implementation and compliance

Knowledge and capacity at all levels among addressees are conditions for implementation and compliance. With respect to PAs the CBD Secretariat organizes regional workshops on capacity-building for the implementation of the Programme of Work on PAs and seeks to obtain government funds for such workshops.¹³⁰⁷ UNEP-WCMC assisted the CBD Secretariat in the drafting of both editions of the Global Biodiversity Outlook.¹³⁰⁸ The second edition of the Global Biodiversity Outlook informs and suggests action that is necessary to achieve the 2010 target to significantly lower the loss of biodiversity.¹³⁰⁹

The CBD Secretariat is also engaged in communication, education and awareness raising of the business sector.¹³¹⁰ By means of, inter alia, its newsletter and its partnership with business schools¹³¹¹ it seeks to illustrate that sound biodiversity management can be advantageous, through the reduction of operating costs, securing the formal and social license to operate, improving the corporate image and facilitating access to capital.¹³¹² The Secretariat collected information on good biodiversity practice and made it available through the Clearing-House Mechanism.¹³¹³ The CBD seeks in particular to address the needs of small and medium sized companies and developing countries.¹³¹⁴

UNCCD and CITES are active in these fields (see the sections below) and they are supported by NGOs and scientific networks.

UNEP-WCMC helped to build national capacity to implement MEAs in particular with its Biodiversity Indicators for National Use project. UNEP-WCMC supports governments' implementation of international conventions through technology support, training and facilitation of the sharing of experiences and expertise.¹³¹⁵

¹³⁰⁷ CBD Executive Secretary, "Quarterly Report on the Administration of the Convention on Biological Diversity (January – March 2009)," <http://www.cbd.int/doc/quarterly/qr-44-en.pdf>. UNEP/CBD/QR/44, para. 35, last visited 04.06.09.

¹³⁰⁸ IUCN and World Commission on Protected Areas, *Guidelines for Protected Area Management Categories*.

¹³⁰⁹ {<http://www.biodiv.org/doc/gbo2/cbd-gbo2.pdf> Global Biodiversity Outlook 2 Secretariat of the Convention on Biological Diversity @IV }

¹³¹⁰ CoP CBD "Cooperation with other conventions, international organizations and initiatives and engagement of stakeholders. Addendum: Engagement of Business." Paras. 60-66.

¹³¹¹ Ibid. Para. 78.

¹³¹² Ibid. Para. 27.

¹³¹³ Ibid. Para. 32.

¹³¹⁴ Ibid. last visited 25.06.09.

¹³¹⁵ UNEP- WCMC, "Strategic Plan 2006-2011," 14.

In reaction to the failure of 85 per cent of CITES parties to adopt the legislation needed for implementation, the CITES Secretariat in collaboration with the IUCN Environmental Law Center drafted guidelines for legislation.¹³¹⁶

More than just capacity building, for states to make compliance possible in all parts of the world, information should be more readily available to improve the public's perception of natural resource policies. This is particularly true where environmental damage is not easily visible, as in the case of loss of biodiversity.¹³¹⁷

Educational programmes should include whole communities and not merely school children.¹³¹⁸ These campaigns may for instance clarify the monetary value associated with networks of PAs. The information should focus equally on economics of PA networks, as on their recreational and ecological value.¹³¹⁹

NGOs can support the implementation of environmental agreements, for example, the requirement to establish and adequately manage systems of PAs with their projects and thus make them social reality.¹³²⁰

4. Compliance monitoring and support under the UNCCD

a) The functioning of the Committee for the Review of the Implementation (CRIC)

The UNCCD CRIC's function is to monitor the implementation of the Convention and to facilitate the exchange of information on measures taken by parties. The CRIC's work shows that monitoring and non-compliance reaction may well overlap. In the past, member states have criticized the CRIC for its unclear function and mode of operation, that is, its statements concerning country reports failed to provide to member states the information needed to ensure improved implementation. The CRIC's mandate was clarified under the strategic plan.

The plan states the necessity to strengthen the CRIC¹³²¹ and lists the following tasks for the CRIC: to determine and disseminate best practices on implementation of the UNCCD, to review the implementation of the plan and of the Convention and to assess CRIC performance and effectiveness.¹³²² Future CRIC and Committee on

¹³¹⁶ Curlier and Andresen, "International Trade in Endangered Species: The CITES Regime," 368, 69.

¹³¹⁷ Cantrill, Potter, and Stephenson, "Protected areas and regional sustainability. Surveying decision makers in the lake superior basin," 44.

¹³¹⁸ *Ibid.*

¹³¹⁹ *Ibid.*: 45.

¹³²⁰ Boyle and Chinkin, *The making of international law*. 82.

¹³²¹ CoP UNCCD Decision VIII/3 Annex, VI, B. 15.

¹³²² CoP UNCCD Decision VIII/3 Annex, VI, B. 16.

Science and Technology (CST) sessions will be synchronized so as to benefit from synergies between both bodies.

The plan stresses the importance of simplifying the reporting procedure, using new reporting guidelines and to provide generally comparable information, taking into account action programmes.¹³²³

However, the CoP did not modify the terms of reference of the CRIC. It postponed the consideration and revision to CoP-9.¹³²⁴ To bring the compliance monitoring forward the CoP asked the Secretariat, in collaboration with the GM, to develop and establish draft reporting guidelines for reports on implementation of action programmes.¹³²⁵ It remains to be seen what the next CoP will agree upon. At least, the clarification resulting from the plan shows the way to address the noted deficiencies in the work of the CRIC.

b) Awareness raising and education

Among the UNCCD's strategic plan's "operational objectives" which are to provide short and medium-term guidance over a three to five-year period to stakeholders and partners, the first operational objective comprises advocacy, awareness raising and education on the international, national and local levels. In this context the plan underlines the role that NGOs and scientific communities from North and South should play.¹³²⁶ The CST and GM are called upon to play a supportive role in the implementation of this objective.¹³²⁷ The fourth operational objective aims to promote capacity-building.¹³²⁸

c) UNCCD's guidance in the development and implementation of national action programmes and legislation

Does UNCCD provide guidance to its members on how to implement their obligations to adopt national action plans and adequate legislation or other regulation? Unfortunately, the convention remains silent on the specific content and form of legislation which member states are called on to adopt to combat desertification.

¹³²³ CoP UNCCD Decision VIII/3 Annex, VI, C.

¹³²⁴ CoP UNCCD Decision VIII/7.

¹³²⁵ CoP UNCCD Decision VIII/8.

¹³²⁶ CoP UNCCD Decision VIII/3 V Outcome 1.3.

¹³²⁷ CoP UNCCD Decision VIII/3 Annex, V.

¹³²⁸ CoP UNCCD Decision VIII/3 Annex, V.

Convention bodies have so far failed to address this vagueness. This lack of support is one reason for the failure of many affected states to adopt relevant legislation.¹³²⁹

The Convention includes five Regional Implementation Annexes for Africa, Latin America and the Caribbean, Asia, the Northern Mediterranean and for Central and Eastern Europe. Those annexes contain guidelines for the preparation of action programmes and their focus and content.

In the spring of 2008 there were 37 national action programmes and six subregional action programmes in Africa, 28 national and one subregional action programme in Asia, 25 national and one subregional action programme in Latin America and the Caribbean, four national action programmes in the Mediterranean and four national action programmes in Central and Eastern Europe.¹³³⁰

The most recent Parliamentary Round Table pointed out various weaknesses which impede the effectiveness of national action programmes, such as their lack of appropriate strategic actions, limited funding, missing links between policymakers and scientists and an incomplete integration of international policies on the national level.¹³³¹ Most national action programmes are irrelevant in national policy development.¹³³² The strategic plan's second operational objective points out the necessity for action in this context too.

The Parliamentary Round Tables strive to formulate public policies and environmental legislation. Unfortunately, the Members of Parliaments do not go beyond stating deficiencies. They do not provide practical advice on the content of legislation needed to address the perceived shortcomings. At the Round Table during CoP-8 the members of parliament themselves noted with regret the weak contributions that parliaments made to the UNCCD implementation process.¹³³³ The Round Tables remain a mere platform for the exchange of views.¹³³⁴

The strategic plan's second operational objective is to support the creation of enabling environments through a policy framework. This aspect includes, inter alia, a reformulation of national action programmes with a view to making them more

¹³²⁹ Ulrich Beyerlin, "Desertification," in *Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (2008). available online in August 2008.

¹³³⁰ <http://www.unccd.int/actionprogrammes/africa/africa.php>.

¹³³¹ Declaration of Members of Parliaments para. 6.

¹³³² Bassett and Talafre, "Implementing the UNCCD. Towards a recipe for success," 135.

¹³³³ Declaration of Members of Parliaments para. 7.

¹³³⁴ Declaration of Members of Parliaments para. 9.

strategic, basing them firmly on biophysical and socio-economic knowledge and incorporating them into an investment framework. From the developed country side this involves mainstreaming UNCCD objectives into their development cooperation programmes. Support from the GM is intended to facilitate these tasks.

d) Evaluation

The assistance in development of legislation and the restructuring of the reporting system still need to be addressed adequately. The strategic plan gives the necessary momentum for such reform. It clarifies the mandates and methods of work of its treaty bodies, in reaction to their perceived operational inefficiencies. The plan is also a success in that it adopts a results-based management approach, stating global indicators which will be refined by the CST.

NGOs lament passivity and inaction in combating desertification.¹³³⁵ However, the strategic plan inspired their optimism for the future.¹³³⁶

The Convention is gradually evolving into an implementable instrument with strong treaty bodies, procedures and mechanisms.¹³³⁷ The strategic plan has further advanced this development.

5. CITES' support for implementation and compliance

a) Clarification of obligations

CITES assists its members in the implementation of their obligations under the convention in several ways. CoPs helped to interpret some of the vague treaty provisions, for example the term "any readily recognizable part or derivative"¹³³⁸ of specimens, to lead to more conformity and effective implementation.

Where the non-detriment finding is concerned CITES does not, in many cases, support its members.¹³³⁹ The parameters for non-detriment findings are not specified in the Convention or in any of the CoP's resolutions.

The setting of export quotas has evolved into a standard practice to fulfil the non-detriment condition. Quotas establish the maximum number of specimens of a species

¹³³⁵ Wijnstekers, *The evolution of CITES. A reference to the Convention on International Trade on Endangered Species of Wild Fauna and Flora.* para.3., para. 3.

¹³³⁶ *Ibid.* para.15.

¹³³⁷ Bassett and Talafré, "Implementing the UNCCD. Towards a recipe for success," 133.

¹³³⁸ Art. Ib)(ii), (iii) CITES.

¹³³⁹ Murphy, "Alternative Approaches to the CITES "Non-detriment" Finding for Appendix II Species.", Conf. 10.3 (h).

that may be exported over the course of a year without causing a detrimental impact on its survival. The CoP usually sets quotas only for species of special concern while most quotas are set voluntarily by parties.¹³⁴⁰ They are hence left to their own devices to determine whether trade in a species would be detrimental.

A part of the problem may be rooted in the significant trade review process itself, which is criticized by some as being complex, difficult to understand and ineffective.¹³⁴¹ The Significant Trade Review process was, however, successful in some cases. The committees reviewed more than 200 animal taxa, succeeded in limiting trade to a sustainable level and in increasing cooperation among range states, for example, with Caspian Sea range states regarding sturgeon and paddlefish.¹³⁴²

b) Capacity building and information

Another important strategy to facilitate implementation is the organization of capacity-building training seminars for officials from CITES' Management Authorities and enforcement services, since institutional and financial constraints, especially in developing countries are often the cause for failure of implementation.¹³⁴³ To support the implementation the Secretariat also undertakes scientific and technical studies in accordance with programmes authorized by the CoP.¹³⁴⁴

6. CBD support for implementation and compliance

In order to improve compliance the CBD CoP established a Clearing House Mechanism to promote and facilitate technical and scientific cooperation.¹³⁴⁵

The CoP also established several programmes of work and working groups.

CoP-7 in 2004 adopted the programme of work on PAs.¹³⁴⁶ The purpose of this programme of work is to support the establishment and maintenance by 2010 for terrestrial and by 2012 for marine areas of comprehensive, effectively managed and

¹³⁴⁰ Conf. 10.14 (Rev. CoP13); Conf. 10.15 (Rev. CoP12); Conf. 12.3 (Rev. CoP13); available at: <http://www.cites.org/eng/resources/quotas/index.shtml>.

¹³⁴¹ Murphy, "Alternative Approaches to the CITES "Non-detriment" Finding for Appendix II Species," 534,41.

¹³⁴² Kriebs, "Sustainable Use of Endangered Species under CITES: Is it a Sustainable Alternative?," 462.

¹³⁴³ Sand, "Whither CITES? The evolution of a treaty regime in the borderland of trade and environment," 51.

¹³⁴⁴ Art. XII(2)(c) CITES.

¹³⁴⁵ Art. 18 (3) CBD; Matz-Lück, "Biological Diversity, International Protection," para. 42.

¹³⁴⁶ CoP CBD VII/28 Annex.

ecologically representative national and regional systems of PAs that contribute to achieving the objectives of the Convention.¹³⁴⁷ The programme of work is seen as one essential means to meet the Convention's objective to significantly lower the rate of biodiversity loss by 2010.¹³⁴⁸

The programme is a response to the data on the status and trends on protected areas, which show that the current global systems of protected areas are neither sufficiently large, nor sufficiently well-planned, nor sufficiently well-managed to achieve their conservation potential. The Convention therefore stresses the urgent need to take action to improve the coverage, representativeness and management of protected areas nationally, regionally and globally.¹³⁴⁹

With its programme of work the CBD intends to assist parties in the establishment of national programmes of work with targeted goals, actions, specific actors, time frame, inputs and expected measurable outputs. Parties may select from, adapt and add to the suggested activities according to their national and local conditions and their level of development.

The programme of work comprises four elements. Under each element it sets forth several goals with corresponding time-bound targets and suggests actions to be taken by the parties as well as actions to be taken by the Executive Secretary.

The first element concerns direct actions for planning, selecting, establishing, strengthening and managing PAs. The first target under this element is the establishment of a global terrestrial network of comprehensive, representative and effectively managed PA system by 2010. The activities suggested to the parties to be accomplished by the years 2006 to 2009 include to establish PAs in particularly intact or irreplaceable areas, areas under high threat and areas containing the most threatened species.¹³⁵⁰ Furthermore, states are called upon to review, together with indigenous and local communities and stakeholders, existing and potential forms of conservation, including innovative types of governance for PAs by government agencies at various levels, co-managed PAs, private PAs, indigenous and local community conserved areas.¹³⁵¹ States are asked to carry out a gap analyses looking at

¹³⁴⁷ CoP CBD Decision VII/28 para. 18; Annex para. 6.

¹³⁴⁸ CoP CBD Decision VII/28 para. 18.

¹³⁴⁹ CoP CBD Decision VII/28 Annex para. 2.

¹³⁵⁰ CoP CBD Decision VII/28 Annex para. 1.1.2.

¹³⁵¹ CoP CBD Decision VII/28 Annex para. 1.1.4.

the representativeness of PAs¹³⁵² and then designate PAs identified by the gap analysis¹³⁵³ and to promote the establishment of PAs that benefit indigenous and local communities.¹³⁵⁴ Under the three subsequent elements of the Programme of Work suggestions to parties follow this example to call upon parties to examine the status quo and options for improvement and to design response strategies accordingly. Parties are also called on to collaborate with one another and relevant organizations.

The supportive role of the Executive Secretary under the first element includes to identify global PA targets and indicators, to invite relevant organizations to assist in gap analyses, to compile and disseminate advice on PA planning and facilitate the exchange of experiences.¹³⁵⁵ These activities too are a general theme running through the Programme of Work. Typical supportive activities assigned to the Executive Secretary are to compile and disseminate through the Clearing-House Mechanism and other means case studies and best practices and to facilitate the exchange of experiences. The OECD, IUCN, WWF and the secretariats of other conventions are referred to as key partners of the Executive Secretary.¹³⁵⁶

The second target under the first element envisages that all PAs are integrated into the wider landscape and relevant sectors by 2015. Parties are called upon to evaluate their experiences, including the inclusion of PAs into poverty reduction strategies and to improve the integration.¹³⁵⁷ The Executive Secretary encourages workshops for the exchange of relevant experiences and compiles and disseminates reports on the application of the ecosystem approach.¹³⁵⁸ The third target addresses regional networks and transboundary PAs. The fourth target is that all PAs are effectively managed by 2012, using participatory and science-based planning processes with clear biodiversity targets, management strategies and monitoring. The fifth target is to minimize negative impacts of key threats to PAs.

The second element of the Programme of Work relates to governance, participation, equity and benefit sharing. In order to promote equity and benefit-sharing the Programme of Work sets the target to establish by 2008 mechanisms for the equitable

¹³⁵² CoP CBD Decision VII/28 Annex para. 1.1.5.

¹³⁵³ CoP CBD Decision VII/28 Annex para. 1.1.6.

¹³⁵⁴ CoP CBD Decision VII/28 Annex para. 1.1.7.

¹³⁵⁵ CoP CBD Decision VII/28 Annex paras. 1.1.8 - 1.1.10.

¹³⁵⁶ CoP CBD Decision VII/28 Annex para. 3.1.12.

¹³⁵⁷ CoP CBD Decision VII/28 Annex paras. 1.2.1, 1.2.2.

¹³⁵⁸ CoP CBD Decision VII/28 Annex paras. 1.2.6, 1.2.7.

sharing of costs and benefits arising from PAs. Parties are asked to assess the economic and socio-cultural costs and benefits connected with PAs particularly for indigenous and local communities and to minimize negative impacts and where appropriate compensate costs and share benefits.¹³⁵⁹ Furthermore they are asked to use benefits stemming from PAs for poverty reduction in a manner consistent with PA management objectives.¹³⁶⁰ Indigenous and local communities and relevant stakeholders are to be involved in the planning and governance, bearing in mind the ecosystem approach.¹³⁶¹

The second target is full and effective participation by 2008, of indigenous and local communities, in the establishment and management of PAs, taking account of their rights and responsibilities, consistent with national and international law. The Programme of Work reiterates the rule that resettlements of indigenous communities as a consequence of PAs should occur only with their prior informed consent.¹³⁶²

The third element of the Programme of Work deals with enabling activities. The first target is an enabling policy, institutional and socio-economic environment for PAs. Suggested activities partly overlap with those under the first and second elements, for instance, where harmonizing sectoral policies and laws is concerned.¹³⁶³ States are to consider principles, such as the rule of law, decentralization and participatory decision-making.¹³⁶⁴ They are advised to establish incentives, legal frameworks, institutions to promote PAs and economic opportunities and markets for PA goods and services.¹³⁶⁵

The second target under the third element is that comprehensive capacity building programmes develop knowledge and skills at individual, community and institutional levels. The third target is to improve the transfer of technologies and innovative approaches for the management of PAs by 2010. The fourth target is to secure by 2008 financial, technical and other resources for PAs from national and international sources, in particular to support developing states. The fifth target is to strengthen by 2008 public understanding and appreciation of PAs.

¹³⁵⁹ CoP CBD Decision VII/28 Annex para. 2.1.1.

¹³⁶⁰ CoP CBD Decision VII/28 Annex para. 2.1.4.

¹³⁶¹ CoP CBD Decision VII/28 Annex para. 2.1.5.

¹³⁶² CoP CBD Decision VII/28 Annex para. 2.2.5.

¹³⁶³ CoP CBD Decision VII/28 Annex para. 3.1.3.

¹³⁶⁴ CoP CBD Decision VII/28 Annex para. 3.1.4.

¹³⁶⁵ CoP CBD Decision VII/28 Annex paras. 3.1.6 - 3.1.9.

The fourth element of the Programme of Work concerns standards, assessments and monitoring. Its first target is to adopt minimum standards and best practices for national and regional PA systems by 2008. The second target is to adopt and implement by 2010 monitoring mechanisms for the effectiveness of PA management. The third target is to likewise monitor by 2010 PA coverage, status, trends and progress in meeting global biodiversity targets. The fourth target is that scientific knowledge contributes to the establishment and effectiveness of PAs.¹³⁶⁶

The CBD CoP established the Ad Hoc Open-ended Working Group on Protected Areas to support and review the implementation of the programme of work and report to the CoP.¹³⁶⁷ The Group's tasks are, inter alia, to explore options for mobilizing financial resources for the implementation of the programme of work by developing countries; to contribute to the further development of "tool kits" for the identification, designation, management, monitoring and evaluation of systems of PAs, taking particular note of indigenous and local communities and stakeholder involvement and benefit sharing; to consider reports from the parties, academia, scientific organizations, civil society and others on progress in the implementation of the Programme of Work; and to recommend to the CoP methods to improve the implementation of the Programme of Work.

Many delegates attending the second meeting of the Working Group on PAs expressed disappointment about the large number of bracketed references that left much to be resolved by CoP-9. The meeting suffered from a lack of political will and did not facilitate the workload of the CoP significantly.¹³⁶⁸

The Executive Secretary supports the review of the implementation of the Programme of Work by compiling information on PAs. It collaborates with Parties and relevant organizations, particularly the IUCN-WCPA and transmits the information to the Working Group on PAs.¹³⁶⁹ It collaborates with WCPA in the establishment of a roster of experts to assist parties in the implementation of the programme of work.¹³⁷⁰

¹³⁶⁶ CoP CBD Decision VII/28 Annex.

¹³⁶⁷ CoP CBD Decision VII/28 para. 25.

¹³⁶⁸ International Institute for Sustainable Development, "Summary of the Second Meeting of the ad hoc open-ended working group on Protected Areas and 13th meeting of the Subsidiary Body on Scientific, Technical and Technological Advice: 11-22 February 2008..",17.

¹³⁶⁹ CoP CBD Decision VII/28 paras. 33, 35.

¹³⁷⁰ CoP CBD Decision VII/28 para. 35.

Protected areas are central in various other thematic programmes which have been addressed by the CoP of the CBD. The Programme on Dry and Sub-Humid Lands lists the use and establishment of additional PAs and the strengthening of measures in existing PAs as necessary target action.¹³⁷¹ The Expanded Programme of Work on Forest Biodiversity underlines the importance of PAs.¹³⁷² The Programme of Work on Mountain Biodiversity calls to establish and strengthen adequate and effective networks of mountain PAs.¹³⁷³ The Programme of Work also advocates integrated transboundary cooperation which should cover PAs among other aspects.¹³⁷⁴

The CoP also placed activities within PAs, in the vicinity of PAs or that directly influence PAs on the list of activities for which an environmental impact assessment is mandatory.¹³⁷⁵ In the context of biodiversity and climate change the CoP requested the Subsidiary Body on Scientific, Technical and Technological Advice to develop draft guidance on the integration of climate change impacts and response activities into the programmes of work of the Convention, taking into account, inter alia, contributions of PAs.¹³⁷⁶

7. Evaluation

Cognitive strategies go some way to promote implementation and compliance. They have an even greater potential which the treaty regimes should make better use of. Cognitive strategies are narrowly linked to normative strategies discussed in the next section.

II. Normative strategies

Normative strategies alter the value structure of actors. They reframe issues, support the commencement of dialogue between actors and thus reshape the perceptions and goals of those actors.¹³⁷⁷ Continued interactions and exchanges, informed by policy reports and scientific and social investigations, assisted by scientific networks and

¹³⁷¹ CoP CBD Decision V/23 annex 1, B, activity 7(a).

¹³⁷² CoP CBD Decision VI/22.

¹³⁷³ CoP CBD Decision VII/27 Action 1.2.5.

¹³⁷⁴ CoP CBD Decision VII/27 Action 2.3.1.

¹³⁷⁵ CoP CBD Decision VI/7 Appendix 2, A(c); Decision VIII/28 Appendix 1, Category A.

¹³⁷⁶ CoP CBD Decision VIII/30 8. (d).

¹³⁷⁷ Mitchell, "Compliance Theory. Compliance, Effectiveness and Behaviour Changes in International Environmental Law," 916.

NGOs, flesh out treaty provisions and shape the normative understanding of participants.¹³⁷⁸

Normative and cognitive strategies pressure actors to abstain from violations. Both strategies can shift actor perceptions and behaviour in the long-run. They are, however, criticized for being too slow to be able to save the environment.¹³⁷⁹

Yet, in the last years instruments increasingly follow a non-controversial approach towards non-compliance. This reflects the reasons for non-compliance more appropriately. What has been said at the beginning of this chapter with respect to the potentially strong impact of normative provisions is valid also in the context of normative strategies to improve compliance.

Monitoring is unlike jurisdiction. It desists from classifying acts as legal or illegal and rather negotiates what compliance means. It reacts to the different levels of compliance and takes note of the fact that many environmental rules permit several interpretations and are too vague to establish an unambiguous infringement. Compliance monitoring establishes which cases and levels of violation are acceptable under a regime.¹³⁸⁰ Both points render a comparison of regime activities in compliance control to mediator activities a promising consideration. The discursive style of monitoring may lead to a convergence of views which makes it a normative strategy to promote compliance.

III. Preclusive strategies

Preclusive strategies aim to make it harder or more costly to violate proscriptions. Rather than functioning ex post like a sanction they link costs to the action itself. An underlying assumption is that the factors that prompt states to free ride and benefit from the protective efforts of others are greed but also fear to have competitive disadvantages when others fail to comply with the commitments.¹³⁸¹ The so called “leakage” phenomenon, that is, a shift of the comparative advantage towards non-cooperating states, may undermine environmental cooperation.¹³⁸² Preclusive strategies ideally eliminate competitive advantages of non-compliance.

¹³⁷⁸ Boyle and Chinkin, *The making of international law*. 83.

¹³⁷⁹ Mitchell, "Compliance Theory. Compliance, Effectiveness and Behaviour Changes in International Environmental Law," 917.

¹³⁸⁰ Young, *Governance in World Affairs*. 85.

¹³⁸¹ Barrett, "An Economic Theory of International Environmental Law," 244, 51.

¹³⁸² *Ibid.*, 252.

IV. Generative strategies

Generative strategies on the other hand aim to establish new opportunities to comply.¹³⁸³ The convention text and the subsequently adopted rules can make it more attractive to abide by treaty provisions or they make their fulfilment easier. The assistance provided by financial mechanisms has been examined in chapter 3. In addition to such financial mechanisms under treaty regimes there are other opportunities to facilitate treaty compliance.

1. Creating coherence of conventions to facilitate implementation

Coherence of conventions makes compliance with them easier. UNEP-WCMC engaged in the UNEP/IUCN Tematea project aimed to increase the coherence of biodiversity conventions and to facilitate their implementation and it supports the Ramsar Convention and the CBD in the development of a reporting system on inland waters that corresponds to both their exigencies. It has furthermore, been working with the CBD and UNCCD to harmonize their work.

2. Debt-for-nature swap

NGOs are helpful in advocating compliance with regimes.¹³⁸⁴ A method NGOs use to induce compliance with environmental agreements is a debt purchase, commonly referred to as “debt-for-nature” swap. This procedure starts with fund raising by an NGO in order to purchase a country’s external debt on the secondary market. The NGO pays only a fraction of the face value of the debt, typically, between 15 and 30 per cent of the face value. The reason for this reduction is the low expectation of complete repayment by the debtor. The NGO and the debtor country agree upon a favourable rate to convert the debt from the currency in which it is denominated to the currency of the debtor country. The thus established “redemption price” usually amounts to 100 per cent of the face value of the debt, but it may be as low as the price at which it has been acquired. Eventually, the debtor country adopts a financial instrument, mostly in the form of a government bond, which is used to finance environmental projects and which is usually worth the same as the redemption price.¹³⁸⁵

¹³⁸³ Ronald B. Mitchell, "Compliance Theory. Compliance, Effectiveness and Behaviour Changes in International Environmental Law," *Ibid.* , 915.

¹³⁸⁴ Young, *Governance in World Affairs*. 94.

¹³⁸⁵ Wolfrum, "Means of ensuring compliance with and enforcement of international environmental law," 54.

3. Public-private-partnerships in sustainable development

The Johannesburg summit (World Summit on Sustainable Development/WSSD) brought a further innovative NGO role: the rise of public-private-partnerships in sustainable development. The summit thus attempted to induce governments, civil society, business and industry to jointly and actively engage in projects for sustainable development. The Consolidated List of Partnerships for Sustainable Development, a compilation of the various partners, is one of the so called "type 2" outcomes of the summit.

While the concept of public-private-partnerships existed since the late 1990s, it was the WSSD to raise it to a more formal level. At the same time the decentralized and non-binding nature of the partnerships is maintained.

Partnerships are viewed as a less formal, more collaborative and integrated approach to environmental governance. The partnerships are an action-oriented form of implementation. Pursuant to the Guiding Principles, they should contribute to and reinforce the implementation of the outcomes of the WSSD. Hence, partnerships complement intergovernmental action.

Many NGOs opposed the move towards partnerships though and blamed industrialized states for neglecting their responsibility for the environment and development. To distract from the required firm commitments, so the criticism, the states opted for decentralized, unverifiable action.¹³⁸⁶ The UN guidelines governing those partnerships are criticized for being too vague and for their failure to authorize the CSD to control that the partnerships have a benign impact and involve stakeholders.¹³⁸⁷

V. Punitive strategies

Punitive strategies imply that other states, NGOs, or a state's own citizens react with economic, political, or social sanctions to non-compliance. These mechanisms rely on the deterring effect of such sanctions. Their effectiveness therefore largely depends on the credibility and potency of the threat of the sanctions. Governments incur high expenses to national enforcement mechanisms and do so with good reason. This raises

¹³⁸⁶ Beyerlin, "The role of NGOs in international environmental litigation," 226-35.

¹³⁸⁷ Ratner, "Business," 822.

the question whether enforcement is necessary for international regimes to be effective.¹³⁸⁸

Punitive measures would seem to be adequate if one assumes that states will only trust in the other parties' performance when their behaviour is independently monitored and deviations are punished.

In the past, environmental instruments tended to pertain to the category of instruments of command and control. Their responses to non-compliance were typically of a repressive character – including countermeasures and the invocation of state responsibility.¹³⁸⁹ Non-compliance procedures usually supplement general international law or a special adversarial procedure. Treaties state that the non-compliance procedure is “without prejudice” to existing mechanisms.¹³⁹⁰

1. Invocation of state responsibility

Traditional international law, such as the system of state responsibility does not represent a satisfactory option in environmental matters,¹³⁹¹ and in the administration of ecosystems even less so. An inherent shortcoming of regimes on responsibility for environmental damage is their applicability to single occurrences rather than addressing environmental protection in an all encompassing way.¹³⁹² Those regimes are more useful in the transboundary context and are hard to envisage in the context of global biodiversity conservation.¹³⁹³

The concepts of a wrongful act, due diligence and significant harm are hard to determine and a causal link between action and environmental degradation is hard to prove. The level of protection of an ecosystem is particularly hard to measure. Rules on responsibility are applicable when the harm is done and cannot contribute to the sustainable management of ecosystems and endangered species in any way.

¹³⁸⁸ Young, *Governance in World Affairs*. 80.

¹³⁸⁹ Wolfrum, "Means of ensuring compliance with and enforcement of international environmental law," 30,31,56.

¹³⁹⁰ Klabbers, "Compliance Procedures," 1005.

¹³⁹¹ Churchill and Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreements. A little-noticed phenomenon in international law," 629.

¹³⁹² Wolfrum, "Means of ensuring compliance with and enforcement of international environmental law," 78.

¹³⁹³ *Ibid.*: 79.

2. Termination and suspension of a treaty

Pursuant to Article 60 of the Vienna Convention on the Law of Treaties States can terminate or suspend a treaty which has been breached.¹³⁹⁴ Environmental agreements' function is the creation of reliable norms. Their continued validity and applicability is therefore of utmost importance. The objective to protect biological diversity requires that non-compliance is met by other action than suspension or termination.

3. Withdrawal of benefits

Under some environmental treaties, privileges of membership, that is, incentives may be withdrawn in response to non-compliance. Such privileges may be the reception of assistance from the fund under the respective treaty. Under the WHC a site may be taken from the list of protected sites if the country does not conserve the site adequately.¹³⁹⁵ Additionally, voting rights or representation may be suspended.¹³⁹⁶

4. Trade suspensions under CITES

Countries that continue to violate CITES can face a recommendation of trade suspension issued by the Standing Committee or the CoP.¹³⁹⁷ Trade sanctions were not explicitly provided for in CoP Resolution 11.3 (Rev. CoP14) which deals with non-compliance response. They are, however, used in practice.¹³⁹⁸

The Standing Committee initiates collective action against non-compliance from member states as well as third states. It recommends parties to take stricter domestic measures than those provided by the treaty, including suspension of trade, as envisaged in Article XIV (1).¹³⁹⁹ In the case of non-member states, these measures are used when the state concerned persistently refuses to provide comparable documents pursuant to Article X.¹⁴⁰⁰

At the time of writing, 31 countries are subject to a recommendation to suspend trade. In the case of Djibouti, Guinea-Bissau, Liberia, Mauritania, Rwanda and Somalia a

¹³⁹⁴ Art. 60 (2).

¹³⁹⁵ Wolfrum, "Means of ensuring compliance with and enforcement of international environmental law," 57.

¹³⁹⁶ Churchill and Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreements. A little-noticed phenomenon in international law," 646.

¹³⁹⁷ Murphy, "Alternative Approaches to the CITES "Non-detriment" Finding for Appendix II Species," 537.

¹³⁹⁸ Reeve, *Policing international trade in endangered species. The CITES Treaty and compliance*. 91.

¹³⁹⁹ Sand, "Whither CITES? The evolution of a treaty regime in the borderland of trade and environment," 38.

¹⁴⁰⁰ *Ibid.*: 39.

suspension of all trade is recommended due to a lack of adequate national legislation. Mauritania and Somalia are additionally subject to a recommendation of a comprehensive trade suspension due to a failure to provide annual reports. Niger is subject to a recommendation to suspend all trade because of enforcement matters.¹⁴⁰¹ The procedure for Significant Trade Review for Appendix II species may lead, as a last resort, to a suspension of trade in the affected species with the state concerned issued by the Standing Committee.¹⁴⁰²

CITES thus disposes of two rather sophisticated and complex enforcement mechanisms. Failures of importing states to comply with trade suspensions recommended under CITES do occur.¹⁴⁰³

CITES powers under the enforcement mechanism exceed the powers of many mediators. Is it contradictory to bestow compulsory forces upon a provider of mediation services or, on the contrary, necessary to make a regime effective? The necessity and desirability of enforcement measures will be discussed below.

5. Public pressure

Certified non-compliance leads to negative publicity and politically harmful media coverage.¹⁴⁰⁴ Thus, public pressure can help to improve compliance. NGOs can exert pressure through mobilizing shame by publicizing violators of environmental norms.¹⁴⁰⁵ NGOs can also play an important role within a domestic political system in pressing the government to meet its obligations under a ratified treaty.¹⁴⁰⁶ International regimes are generally administered by a specific agency within a government. But these agencies may not be able to make their field of responsibility taken into proper consideration by all parts of the administration and the legislator and they may find it difficult to impose rules on relevant groups within civil society.

NGO activities, such as organizing boycotts of certain products and naming and shaming of violators, raise questions about the legitimacy of their intervention, that simply be self-minded fund raising campaigns.¹⁴⁰⁷ NGO campaigns are influenced by

¹⁴⁰¹ Available at: http://www.cites.org/eng/news/sundry/trade_suspension.shtml.

¹⁴⁰² Conf. 12.8 (Rev. CoP13) (s).

¹⁴⁰³ Murphy, "Alternative Approaches to the CITES "Non-detriment" Finding for Appendix II Species," 542.

¹⁴⁰⁴ Sand, "Whither CITES? The evolution of a treaty regime in the borderland of trade and environment," 49.

¹⁴⁰⁵ Risely, "Environmentally Responsible Global Governance: How NGOs Can Help," 119.

¹⁴⁰⁶ Charnovitz, "Nongovernmental organizations and international law," 355.

¹⁴⁰⁷ Young, *Governance in World Affairs*. 101.

their ideology and not always led by objective science as has been shown in chapter 3. Additionally to those legitimacy problems, NGOs may face practical problems to undertake these tasks within authoritarian states. They may find it hard to mobilize public opinion when the majority gives priority to short-term economic considerations.¹⁴⁰⁸

When an agreement regulates an activity that can be carried out only by a limited number of persons it may be possible for an agreement to impose rules successfully. Yet, in the case of CITES, millions of people might illicitly trade endangered species. Large multinational corporations are easier to control than small traders in timber or species because their international visibility makes them more easily subject to pressure.¹⁴⁰⁹

VI. Remunerative strategies

Remunerative strategies rely on actors to provide benefits in the form of loans or grants or improved trade relations. Such incentives may either be project related or of a general kind.¹⁴¹⁰ One of the advantages of such an incentive based strategy to sanctions is a more constructive cooperation of a potentially addressed party during the process leading up to the decision about benefits or sanctions. Actors facing sanctions are incited not to cooperate but to hide their continued circumventions of regulations. The breach will have to be demonstrated by other states or treaty bodies. In the face of benefits actors are, on the contrary, prompted to comply and to provide proves of this compliance.¹⁴¹¹

VII. Conclusion

Constructivists usually put down non-compliance to deficiencies of the regime itself or a capacity deficit, inadvertence, or normative differences.¹⁴¹² Governments that lack sufficient administrative capacities may find it difficult to influence the behaviour of those national actors whose cooperation is needed for compliance. They

¹⁴⁰⁸ Brown Weiss, *International environmental law and policy*. 327.

¹⁴⁰⁹ *Ibid.* 324.

¹⁴¹⁰ Wolfrum, "Means of ensuring compliance with and enforcement of international environmental law," 31.

¹⁴¹¹ Mitchell, "Compliance Theory. Compliance, Effectiveness and Behaviour Changes in International Environmental Law," 914. Barrett, "An Economic Theory of International Environmental Law," 256.

¹⁴¹² Mitchell, "Compliance Theory. Compliance, Effectiveness and Behaviour Changes in International Environmental Law," 911.

may, as an example, be unable to restrict tree clearing or wetland draining by peasant farmers.¹⁴¹³

Accordingly, the suggested counter strategies are continued discourse and interaction with improved participation to facilitate finding a consensus. To this end the regime is strengthened, that is, reporting requirements, assessment processes and the awarding of assistance are improved. Also a constant treaty review mechanism, a mode to review the success of the agreement, is promoted¹⁴¹⁴ to keep pace with scientific and technical issues. In this way CITES' organs review the Convention's effectiveness themselves. Additionally, the CoP as well as the Secretariat may make recommendations to improve CITES' effectiveness.¹⁴¹⁵

Constructivists oppose hard-edge enforcement tools such as sanctions and adjudication-style dispute mechanisms because they are rarely applied by states in any event. And they are viewed as too adversarial and backward-looking. They hinder the kind of dialogue that leads to a convergence of views and consensus.¹⁴¹⁶ From a pragmatic point of view, one has to remember that states are in any event reluctant to confer competences to monitor and even more so to enforce actions onto international organizations or regimes.¹⁴¹⁷

The importance of international adjudication has been stressed at UNCED and Consequently the International Court of Justice (ICJ) and the International Tribunal for the Law of the Sea (ITLOS) created Chambers for environmental matters which are, however, not made use of. Typically, parties to environmental disputes prefer non-confrontational means to solve their differences. Most environmental treaties contain a possibility to resort to adjudication where negotiations did not lead to the settlement of a dispute.¹⁴¹⁸ General dispute settlement institutions do not possess any special competences in environmental matters. Only ITLOS possesses such functions for the protection of the marine environment.¹⁴¹⁹ The ICJ is not a suitable place for solving international environmental disputes. Negotiation as alternative dispute

¹⁴¹³ Ibid., 909. Bingham, *Resolving Environmental Disputes*. 120, 21.

¹⁴¹⁴ Susskind and Cruikshank, *Breaking the Impasse*. 131.

¹⁴¹⁵ Arts. XI(3)(d), (e); XIII(3); Art. XII(2)(h).

¹⁴¹⁶ Danish, "International Relations Theory," 226. Barrett, "An Economic Theory of International Environmental Law," 250, 51.

¹⁴¹⁷ Wolfrum, "Means of ensuring compliance with and enforcement of international environmental law," 49.

¹⁴¹⁸ Ibid.: 96.

¹⁴¹⁹ Ibid.: 98.

resolution method is more flexible, permits the involvement of stakeholders and is therefore more likely to reach an acceptable solution.¹⁴²⁰

Under the CBD, parties are requested to resolve their disputes on the interpretation or application of the convention by resorting to negotiation and mediation.¹⁴²¹ Only in the case of failure of such efforts the convention requests parties to make use of arbitration or to submit the dispute to the International Court of Justice, provided that the parties have accepted these means as compulsory.¹⁴²² As an alternative in the case of non-acceptance of arbitration or adjudication the CBD requests that the dispute be submitted to conciliation by a commission unless the parties decide otherwise.¹⁴²³ CITES too calls upon its parties to resolve disputes through negotiation.¹⁴²⁴ If this is not possible states may refer their dispute to arbitration.¹⁴²⁵ These procedures have been used but rarely and are likely to remain practically insignificant. Arbitration and adjudication would fail to acknowledge informal parts of the treaty regime and might thus disrupt package deals. The internalization of dealing with disagreements on compliance is therefore preferable.¹⁴²⁶ CoPs may make their decisions in the form of package deals. State parties cannot ignore decisions that are disadvantageous to them because this is likely to cause other parties to withdraw from other decisions forming part of the package deal. Hence, states that are interested in the functioning of a treaty regime will implement obligations irrespective of their legal bindingness.¹⁴²⁷

Non-compliance procedures seem more adequate than traditional adjudication because they address non-compliance in a multilateral context according to its relevance for all parties.¹⁴²⁸

Non-compliance procedures are argued to share many of the problems diagnosed for adjudication style settlements of differences. Non-compliance systems, so the argument, do not make vague norms more specific,¹⁴²⁹ nor causality and standards of wrongfulness clearer. As has been shown above, cognitive and normative strategies

¹⁴²⁰ Barnes, "Environmental Mediation: A Tool for Resolving International Environmental Disputes in a Pacific Way," 169.

¹⁴²¹ Art. 27 (1), (2) CBD.

¹⁴²² Art. 27 (3) CBD.

¹⁴²³ Art. 27 (4) CBD.

¹⁴²⁴ Art. XVIII (1) CITES.

¹⁴²⁵ Art. XVIII (2) CITES.

¹⁴²⁶ Gehring, "Treaty-Making and Treaty Evolution," 494.

¹⁴²⁷ *Ibid.*, 493.

¹⁴²⁸ Churchill and Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreements. A little-noticed phenomenon in international law," 644.

¹⁴²⁹ Klabbers, "Compliance Procedures," 1002.

assist in clarifying obligations. Non-adversarial, non-accusatory compliance procedures help to identify compliance problems before non-compliance actually occurs. Moreover, they help to address non-compliance caused by a lack of resources or capacity. Monitoring processes may also perform an assessment of need and capacity of states. Preferably they rely on objective criteria to ensure that equity considerations, for example, embodied in the principle of common but differentiated responsibilities, can in practice be realized.¹⁴³⁰

Compliance assistance is provided for by the CBD and the UNCCD. And compliance control forestalls diverging interpretations.¹⁴³¹

Treaty regimes do not often possess the authority to use sanctions. And if they do they encounter difficulties in giving them effect.¹⁴³² Is the absence of stringent enforcement mechanisms in the agreements under consideration simply an indicator for the unwillingness of states, especially powerful states that trust in the force of their argumentation, to be subjected to law? Is the praise of non-adversarial compliance mechanisms simply due to the resigned acceptance of the impossibility of any other, stronger reaction to non-compliance? The most effective examples for interstate cooperation, the EU and the GATT, possess the most sophisticated enforcement tools.¹⁴³³ The two environmental conventions that are usually praised for their depth in cooperation, the Montreal Protocol on Substances that Deplete the Ozone Layer and the International Convention for the Prevention of Pollution from Ships (MARPOL), are those conventions that contain comparatively refined enforcement measures.¹⁴³⁴

Non-adversarial compliance strategies have numerous opportunities to prompt behavioural changes. Whichever position one takes on the desirability of enforcement mechanisms, it is futile to lament the missing willingness of states to subject themselves to enforcement mechanisms. Scepticism towards the use of sanctions at the international level may be founded, because in the absence of a government they inherently prompt concerns about the risk of illegitimate and self-interested sanctions.

¹⁴³⁰ Dinah Shelton, "Equity," *Ibid.*, ed. Daniel Bodansky, Jutta Brunnée, and Ellen Hey, 656.

¹⁴³¹ Jan Klabbers, "Compliance Procedures," *Ibid.*, ed. Daniel Bodansky, Jutta Brunnée, and Ellen Hay, 1003.

¹⁴³² Young, *Governance in World Affairs*. 100.

¹⁴³³ Downs, Danish, and Barsboom, "The transformational model of international regime design: triumph of hope or experience?," 501.

¹⁴³⁴ *Ibid.*: 502.

It is more constructive to reinforce the other strategies to improve compliance. Also for the pragmatic reason that due to the increasing complexity of agreements and the discretion granted to states in choosing the means to obtain the prescribed result, it is hard to ascertain whether or not a state is complying with its obligations. This makes environmental regimes less amenable to enforcement through controversial means.¹⁴³⁵

The shift towards compliance assistance is connected to the Rio negotiations and results from the realization that the enforcement through confrontational means cannot succeed when non-compliance often results from lacking capacities. Compliance assistance is also based on the principle of common but differentiated responsibilities.¹⁴³⁶

E. Does each regime's impact represent a factual mutual gains solution?

This section attempts to answer the question of whether the examined agreements in fact succeed in providing mutual gains solutions. A thus established effectiveness of the agreements would at the same time mean their output legitimacy.

Impacts of a regime are hard to ascertain as causality may be hard to establish.¹⁴³⁷ Studies are rare and inconclusive. The Ramsar Convention is estimated to be ineffective while CITES is assessed more favourably.¹⁴³⁸ The effectiveness of regimes changes over time.¹⁴³⁹ Most assessments focus on the impact a regime has on the environment and not whether it achieves a mutual gains solution. Consequently, this section will only be able to indicate some impacts of the conventions and will not undertake a comprehensive examination. Possibilities for biological and economic sustainability need to be better researched.¹⁴⁴⁰ Impacts need to be looked at in their complexity. Ecotourism can serve as an example to illustrate how difficult it is to gauge benefits. Tourism to PAs with benefits to local people, for example, through the selling of hunting licenses to tourists or providing tourist services is a frequently promoted strategy for community-based conservation. Yet, tourism does not guarantee success since in practice benefits to local people tended to be minimal and

¹⁴³⁵ Wolfrum, "Means of ensuring compliance with and enforcement of international environmental law," 32.

¹⁴³⁶ Matz, "Protected areas in international nature conservation law. Can states obtain compensation for their establishment?," 710.

¹⁴³⁷ Young, *Governance in World Affairs*. 109.

¹⁴³⁸ *Ibid.* 115.

¹⁴³⁹ *Ibid.* 116, 17.

¹⁴⁴⁰ Brown, "Innovations for Conservation and Development," 10, 11.

local people were not encouraged to participate. Only a small percentage of community members received employment. There are no studies to examine the impact on poaching, yet people tended to attribute more worth to wildlife after the inception of tourism projects.¹⁴⁴¹ There are however successful projects, for example, in Costa Rica where a US-based ENGO, the Caribbean Conservation Corporation (CCC) helped to establish tourism as alternative income to marine turtle harvest. Tourism is the primary income generator for some villages in Costa Rica. Even though local ownership of tourism services and local involvement in the establishment of the PA and the project were marginal, people support the conservation effort. Negative impacts on the environment are kept at a minimal level.¹⁴⁴²

Bioprospecting by drug companies is another option to have local people gain from PAs. Local people with knowledge of medicinal uses of plants can be employed in inventory activities as parataxonomists. Employment opportunities are, however, limited and intellectual property rights to the developed medicines are granted to the pharmaceutical industry disregarding the crucial value of the parataxonomist knowledge.¹⁴⁴³

The MA states that the actions taken by communities, NGOs, governments and, increasingly also, business and industry have been successful in mitigating biodiversity loss and supporting sustainable use.¹⁴⁴⁴ The MA acknowledges in general terms the contributions made by CBD, CITES, WHC, the Ramsar Convention and UNCCD towards conservation.¹⁴⁴⁵ It laments the insufficiency of the current system of PAs for the conservation of even representative components of biodiversity.¹⁴⁴⁶ The MA criticizes the location, design, management and a lack of policy and institutions that would ensure fair and equitable sharing of costs and benefits at all levels.¹⁴⁴⁷

The MA found a slowing down in habitat loss rates in temperate regions but expects increases in the tropics. Even though habitat loss is the main driver of species

¹⁴⁴¹ Campbell and Vainio-Mattila, "Participatory Development and Community-Based Conservation: Opportunities Missed for Lessons Learned?," 424.

¹⁴⁴² *Ibid.*: 425.

¹⁴⁴³ *Ibid.*: 426.

¹⁴⁴⁴ Millenium Ecosystem Assessment, "Ecosystems and Human Well-Being. Biodiversity Synthesis. A Report of the Millenium Ecosystem Assessment." 10

¹⁴⁴⁵ *Ibid.*, 73.

¹⁴⁴⁶ *Ibid.*, 10,11.

¹⁴⁴⁷ *Ibid.*, 11.

extinction in terrestrial ecosystems the complex relationship between habitat and species and the additional factors that are expected to augment, such as climate change, nutrient loading and invasive species, indicate no improved prospects for species extinction rates. The MA maintains that it is feasible to reduce the rates of biodiversity loss if particularly significant areas are conserved as PAs or other mechanisms and measures are taken for the protection of threatened species.¹⁴⁴⁸ Whether market instruments are successful in encouraging and achieving conservation is unclear.¹⁴⁴⁹

In spite of the efforts under the UNCCD desertification trends have not abated.¹⁴⁵⁰ Even though the bottom-up approach used under UNCCD has failed to produce widespread successes¹⁴⁵¹ examples for success show that it can be hoped to be more effective than the traditional top-down approach of development planning in the long-run.¹⁴⁵² Provided that the position of the civil society in affected countries will become stronger the Convention's work will become more effective, too.

CITES' effectiveness is hotly debated. Most analyses concerned with CITES' effectiveness focus exclusively on its performance in limiting trade or preventing species extinction. Poverty reduction and all the other aspects needed for meeting the UN Millennium Development Goals remain unheeded.

The status of a species depends on a multitude of factors, such as the state of their habitat and impacts by alien invasive species which the Convention has no influence on. International trade is only one form of species exploitation. Domestic trade is said to have a greater impact.¹⁴⁵³

The effectiveness of the Convention can therefore not be correlated directly with the conservation status of a species.¹⁴⁵⁴

¹⁴⁴⁸ Ibid., 14.

¹⁴⁴⁹ Ibid., 70.

¹⁴⁵⁰ Declaration of Members of Parliaments para. 3; Leslie C. Clark, "A call to restructure existing international environmental law in light of Africa's renaissance. The United Nations Convention to Combat Desertification and the New Partnership for Africa's Development (NEPAD)," *Seattle University law review* 27, no. 2 (2003): 541.

¹⁴⁵¹ Ibid.: 540.

¹⁴⁵² Shirley Bethune, "Review of legislation and policies pertinent to combating desertification. A case study from Namibia," *Review of European Community & international environmental law* 12, no. 2 (2003): 180.

¹⁴⁵³ Curlier and Andresen, "International Trade in Endangered Species: The CITES Regime," 361.

¹⁴⁵⁴ Sand, "Whither CITES? The evolution of a treaty regime in the borderland of trade and environment," 54.

CITES' effectiveness in regulating global trade seems doubtful considering that the global illegal trade in wildlife is estimated to be worth US\$5 to 10 billion every year. Only drugs and arms generate more illegal income.¹⁴⁵⁵

There is a notably sharp decline of some Appendix I species, such as the Kenyan rhinoceros population which dropped from 18,000 rhinos in 1968 to only 400 rhinos in 1992. A similar decline is notable with respect to tigers.¹⁴⁵⁶ Arguably, the situation could be much worse without the convention.

Some species' populations such as the Hawksbill turtle and the crocodylian recovered over the 1990s.¹⁴⁵⁷ Crocodylians were the first species for which CITES permitted sustainable trade, in response to scientific advice. The positive status of this species and the opportunity to make economic gains demonstrate that CITES can have an integrative impact. Reasons for this success are the high commercial value of crocodylians and the fact that they are less attractive to humans than the panda, the cetaceans, or the elephants. The legal trade of crocodile and alligator skins has put an end to illegal trade thanks to continuous supply and strengthened enforcement. The fight against trade in elephants is attributed to their greater popularity.¹⁴⁵⁸ The limited trade in elephants described above remains controversial.

F. Evaluation

Treaties are effective when they accommodate the conflicting interests they relate to. In assessing the effectiveness, the output of the treaty bodies is just as significant as the treaty text itself. This thesis relies on objective criteria to establish whether interests have been balanced fairly. Considerations of equity, that is, normative standards of fairness or justice, are central in the evaluation of the effectiveness of agreements because these concepts depict the balance of relevant interests.

Moreover, to discern the success of international environmental regimes it is useful to look at their outcomes and impacts. While Chapters 3 and 4 set forth ways to ensure and increase input legitimacy, that is, a participatory mutual gains negotiation process, the present chapter examined the output legitimacy, measured in outcomes and

¹⁴⁵⁵ McOmber, "Problems in enforcement of the Convention on International Trade in Endangered Species," 674.

¹⁴⁵⁶ Kriepps, "Sustainable Use of Endangered Species under CITES: Is it a Sustainable Alternative?," 462.

¹⁴⁵⁷ Curlier and Andresen, "International Trade in Endangered Species: The CITES Regime," 361.

¹⁴⁵⁸ *Ibid.*, 370.

impacts, assuming that there is a link between both aspects of legitimacy. The regime outcomes have mainly been looked at in the context of implementation and compliance control.

Agreements and their outputs may be integrative in different ways, depending on their characteristics. Four kinds of provisions that may be contained within an agreement can be distinguished. There are regulatory provisions, that is, proscriptions and prescriptions within agreements and their outputs, procedural provisions that provide for regular meetings of the various treaty bodies, programmatic provisions, that are the basis for joint projects and, finally, Normative provisions that ideally inspire ideas and set in motion discourses among states and all other actors at the international and national levels. While the effect of proscriptions and prescriptions within regimes can be assessed by looking at compliance rates and other induced behavioural changes of actors, other provisions function differently. Procedural, programmatic and normative provisions are of particular importance in finding integrative solutions.

UNCCD's approach is largely integrative, focussed equally on ecology and socio-economic development. This is reflected particularly in its normative provisions and the normative strategic objectives contained in its strategic plan. UNCCD's bottom-up approach ensures that conflicting interests are balanced by decision-makers with input from those directly concerned. The integrative approach is also reflected in the prescription by the Convention of the adoption of integrative legislation and national action programmes.

The CBD's priority is the conservation of biodiversity. It sees conservation as distinct from sustainable use which means that it promotes protection against use in some instances. It uses the means of information and education in order to convince relevant groups that conservation is in their best interest. Creating incentives for sustainable management of biodiversity remains a challenge. And so does addressing the unsustainability in the economic system. The promotion of protection against use is a reaction to the economic and development sectors failure to take into account conservation needs. Conservation and sustainable use require an enhancement of synergies between MEAs and international economic and social institutions. Economic and environmental conventions' specialized objectives and approaches separately fail to address the complex issue of ecosystem services and human well-being. Coordination needs to prevent that economic agreements counteract

biodiversity-related MEAs. Institutions dealing with economic and social issues are those with the greatest impact on biodiversity. In order to truly integrate conservation and development interests they need to join in this effort. Furthermore, the CBD will have to modify its approach in order to be in conformity with indigenous rights. And it should more strongly promote subsidiarity systems within states.

CITES has been shifting towards a more integrative approach, increasingly taking into account the various interests and actors concerned. During the first two decades of its existence it was focussed on trade restrictions, later on it realized that assistance in various forms is necessary to ensure compliance. More awareness for local needs is evident even though controversies continue.

States implement and comply with treaty regimes because those regimes are social structures that develop consistent patterns of behaviour which have a constraining or enabling effect upon states. And they create the background for in depth discussion to determine which behaviour is legitimate and which is illegitimate. Norms that have been developed under a regime influence state behaviour and identity because states tend to implement rules that they perceive as legitimate similar to citizens who respect rules they accept as legitimate. Thus, inclusive internal and inter-state negotiations improve the legitimacy and therefore the compliance. Yet, since the compliance with CITES, CBD and UNCCD is imperfect they need to take measures to prevent and/or react to non-compliance. They established compliance regimes to monitor compliance, that is, to assess compliance and to establish instances of non-compliance. Compliance regimes furthermore provide for responses to non-compliance by inducing or enforcing compliance. Both these elements may overlap and both influence compliance, the actual responses to non-compliance as well as the monitoring procedures.

Treaty regimes apply six distinct strategies to promote compliance: cognitive, normative, preclusive, generative, punitive and remunerative strategies. Cognitive strategies provide information which modifies or influences the perceptions of actors and thus advances compliance. These strategies render compliance more transparent by gathering and assessing information on compliance. In addition, they clarify reporting obligations of states and assist in their fulfilment. NGOs contribute their information to improve the compliance assessment. Cognitive strategies go beyond rendering compliance transparent. They also clarify the obligations contained in a

treaty and they, with the assistance of scientific networks and NGOs, engage in capacity building and education to bring relevant actors in a position to implement and comply with the agreement.

When treaty regimes use normative strategies they alter the value structure of states. These strategies reframe issues, support the commencement of dialogue between states and other actors and thus reshape the perceptions and goals of those actors.

Preclusive strategies aim to make it harder or more costly to violate proscriptions. Rather than functioning *ex post* like a sanction they link costs to the action itself. Preclusive strategies ideally eliminate competitive advantages of non-compliance.

Generative strategies aim to establish new opportunities to comply or make abiding by treaty provisions more attractive or easier. Financial mechanisms are one option. Other important steps are the creation of coherence of conventions to facilitate their implementation. NGOs developed the concept of debt-for-nature swaps to further facilitate compliance. Public-private-partnerships in sustainable development are projects that constitute a supplementary action-oriented form of implementation. Many NGOs oppose the move towards partnerships. They see them as an attempt by states to distract from their commitments by relying on decentralized, unverifiable action.

Punitive strategies imply that other states, NGOs, or a state's own citizens react with economic, political, or social sanctions to non-compliance. Since these mechanisms rely on the deterring effect of sanctions their effectiveness largely depends on the credibility and potency of the threat of the sanctions. The fact that governments incur high expenses to national enforcement mechanisms raises the question whether enforcement is necessary for international regimes to be effective. The traditional system of state responsibility is not transferable to the management of biodiversity. Nor is the termination or suspension of the treaty a possible sanction for non-compliance. By contrast, the withdrawal of benefits granted by the treaty can be envisaged. Under CITES trade can be suspended. Public pressure, usually organized through NGO campaigns, can also help to enforce an agreement.

Finally, remunerative strategies rely on benefits in the form of loans, grants or improved trade relations. It remains controversial which strategies are the most effective, in particular, whether enforcement measures are necessary and whether they are the most effective response to non-compliance. Their opponents argue that non-

compliance results more often from deficiencies of the regime itself or a capacity deficit, inadvertence, or normative differences. Governments that lack sufficient administrative capacities may find it difficult to influence the behaviour of those national actors whose cooperation is needed for compliance. Given the great number of persons who might engage in the killing and trading of endangered species or the overexploitation of ecosystems, biodiversity conservation measures are very hard to enforce effectively on the ground.

In practice, states may be reluctant to furnish treaty regimes with well equipped enforcement mechanisms. This pragmatic consideration is a convincing reason for exploring the other strategies which continue the search for mutual gains solutions through improved knowledge, convergence of interests through interaction and the shifting of costs.

The impact of the agreements needs to be assessed comprehensively. The hitherto undertaken assessments are mostly focussed on environmental impacts rather than on mutual gain solutions. Even those assessments that are limited in their scope are highly complex since causality is hard to prove. Despite the even greater complexity of the assessment whether an agreement prompts mutual gain solutions, such assessments are needed in order to improve the agreements' effectiveness.

General evaluation and concluding remarks

The establishment of PAs and the improvement of their management are means that international conventions such as the CBD, Ramsar Convention and World Heritage Convention promote to conserve biodiversity. The widely used World Conservation Union (IUCN) definition and typology of PAs indicate that PAs may serve the purpose of protecting biodiversity against use. This is the case for PAs classified in Category I or II. Development interests such as income generation for local communities and hunger reduction are not considered in these cases. However, not all PAs are to function independently of human use. PAs that are placed into Categories III to VI permit use or even provide for protection through use. This differentiated concept opens scope for adapting each PA to local needs and interests as well as scientifically underpinned protection needs. The establishment of PAs leaves room for a well balanced approach towards conservation and development.

The UNCCD promotes sound dryland management without having recourse to the concept of PAs. Even though the conservation of biodiversity is not a primary objective of UNCCD, its work is closely linked to biodiversity conservation and UNCCD cooperates with biodiversity-related conventions to enhance synergies. UNCCD is interesting for its promotion of sound drylands management which is to be beneficial to biodiversity without having recourse to the establishment of PAs.

While international instruments increasingly recognize and protect biodiversity in the terms of ecosystem diversity or habitats, species focussed approaches retain an important position within the spectrum of biodiversity related treaties. Most notably, CITES' trade controls are centred upon species rather than their habitats or ecosystems. The coordination of international trade in endangered species is the second means for biodiversity conservation considered in this thesis. The differentiation of the first and second appendix of CITES and the mentioning of the economic value of species in the preamble indicate some awareness of the need to balance conservation needs against other needs. Instead of prohibiting all trade in endangered species, CITES constitutes a basis on which integrative solutions can be built.

Active protection of biodiversity is necessary. This is illustrated by the current rate of biodiversity loss, the significant contribution that human activity makes to exacerbate

the loss, the value of biodiversity for the maintenance of all life on earth and the intrinsic value that is attributed to biodiversity.

The thesis' outline of possibilities for mutual gains negotiations and mediation services to lead to a mutual gains agreement runs parallel to the main features of the constructivist and interactional legal theory. The international community represents a social structure which influences the interests of its members through norms. Consequently state interests may converge through negotiations. This underpins the susceptibility of states to influence by treaty regimes, NGOs and experts which play a role in the negotiations.

The great differences of conservation and development interests make clear that they cannot be integrated with mutual gains if actors insist on a general prerogative of their own interests. The interests of inhabitants of biodiversity rich regions need to be reflected in strategies concerning biodiversity conservation and development. This is because a failure to correspond to their interest would render any approach futile. Indigenous peoples have a legal position set forth in ILO Conventions No. 107 and 169, ICERD, UNDRIP and customary international law. Thus, states have acknowledged the indigenous interest in autonomy over their lands and resources which is inseparable from their identity, culture and spiritual needs. Other dwellers' interest has not been acknowledged by any specific legal instrument, yet their livelihoods directly depend on the biological resources surrounding them and those resources depend equally on their action.

Government interests vary considerably. Europe possesses hardly any nature untouched by human influence. PA plans tend to regulate human use of PAs rather than to exclude it since conservation is meant to serve human welfare. By contrast, in North America preservationist tendencies prevail which strive to retain pristine nature free from human traces. Third world countries see PAs and trade controls as a means to advance development rather than an end in itself.

Concerning trade in endangered species the US and European countries, the importing countries, tend to be in favour of trade controls while some Southern states voice their conviction that trade is essential in the maintenance of viable population levels of some species. The South emphasizes the national sovereignty over biological resources and rejects all foreign claims on such resources, for instance, through the

concept of concern of humankind. The current legal situation reflects the Southern interests.

These conclusions are simplifications, yet they demonstrate the general line of differences in the interests of states from the various regions. Awareness of these differences is a cornerstone for successful negotiations.

The interests of NGOs are quite as diverse and hard to determine. They define themselves and are defined as advocates of biodiversity, since they are campaigning to shift the conduct of states and corporations. In recent years these advocacy approaches constitute large scale approaches that select areas for prioritized protection. Their inherent risk is a detachment of NGOs from the situation on the ground. Close contact and collaboration with the inhabitants is essential to ensure legitimacy and effectiveness of NGO work. A sound scientific base for these approaches is just as crucial. Development NGOs but also conservation NGOs wish to be advocates of local interests, they need both economic expertise as well as environmental expertise to develop all encompassing strategies. Cooperation of organizations from the different sectors would go some way towards alleviating the present shortcomings. NGOs from all regions need to cooperate in order to address the power imbalance, frictions and suspicions between Northern dominated NGOs and their counterparts from the South. NGOs have become aware of this need and will have to continue extending their cooperation. They have also become conscious of the necessity to act in accordance with indigenous rights and local interests. In order to be successful they will have to act accordingly.

The NGO contention to represent the global civil society remains an elusive concept. While they are not in a position to address democratic deficits in international treaties or within states, their achievements in awareness raising and the creation of transparency are considerable. They make valuable contributions to conservation and development efforts even though their dependence on government funding may pose a threat to their independence. Also the incomplete accountability does not delegitimize them all together.

Finally, corporations are stakeholders in the context of conservation and development for the simple fact that their conduct can seriously harm biodiversity or obstruct development strategies while a relatively slight shift in their operations can benefit conservation and development efforts. With the increase in ecologically and socially

conscious consumers, environmentally sound business practices may be a competitive advantage. However, the concern remains that corporations' primary interest is short-term profit which is incompatible with the conservation and development interests of the other stakeholders.

In order for biodiversity-related conventions to be negotiated in an integrative way several conditions need to be met. All relevant interests need to be involved in negotiations. The practical ensuing problem is to figure out which interests are legitimately represented in negotiations and in which way these interests can be adequately represented in negotiations. Where states are concerned, sovereign equality of states makes them in theory equal negotiators. Yet, their negotiation strength strongly differs. When the power of states taking part in negotiations is unevenly balanced this threatens integrative negotiations because the stronger states risk to dictate. There is a potential to counterbalance this asymmetry. It is particularly important for weaker states to jointly initiate negotiations because initiators can best determine the issues to be negotiated. Taking the initiator role Southern states can determine a subject of priority interest to them such as land degradation or an issue where they have an economic stake such as biological resources.

Environmental law is more advantageous to developing states than other fields of law. It provides developing states with a strong moral and legal position which is based on the Northern overexploitation of natural resources the South has not contributed to. While the principle of common but differentiated responsibility, which flows from this onesided overexploitation, is not accepted as general legal concept, it has led to developed states providing for financial resources for sustainable development and capacity building. The attribution of the concept of common concern of humankind to biodiversity underlines the global significance and the applicability of the concept of common but differentiated responsibilities. A second aspect which strengthens the Southern negotiation position is that development restrictions placed on them bar them from the same kind of unfettered development that the North has enjoyed.

In addition to playing the initiator role and determining the issue of negotiations so as to be advantageous for otherwise weaker negotiators, coalition-forming helps to give weight to the arguments of weaker negotiators provided that the coalition is strong enough, that is, it is based on specific issues that will carry the coalition. This strategy has been successfully used by African states promoting the adoption of UNCCD. The

G-77 is a well-known and long-standing example of a coalition to increase tactical negotiation strength. However, its lack of shared specific interests renders it rather ineffectual. The inherent risk of coalition-forming is that they may slow down negotiations due to the need of reconsidering the coalition negotiation strategy.

Joint research by negotiators and information exchange also help to strengthen relatively weak negotiators. Negotiators should engage in information sharing or in joint fact-finding. Being well-informed is essential to open opportunities for creative negotiations and to avoid disagreements as a result of misconceptions.

Negotiation support from intergovernmental organizations and NGOs are further means to increase tactical strength of negotiators. The risk of NGO negotiation assistance is that the NGO may in fact dominate the state and push through its on agenda. NGOs can be very helpful by increasing tactical strength through the raising of awareness of Southern needs and interests in Northern constituencies. Finally, decision-making by consensus or majority requirements of the kind used by GEF ensure that weaker states are not simply overruled.

Wide state participation in negotiations is preferable to a participation of the most committed states. This wide participation brings a maximum number of states under the socializing effect of the treaty. In order for a large number of states to participate in negotiations, multilateral action must be more advantageous to them than unilateral action of all states. Mechanisms that render participation in treaties more attractive are the “preparatory assistance” granted by the Ramsar Convention fund. In addition, the advantages of non-cooperation may be removed. To this end CITES imposes similar obligations on trade with non-members as those existing with respect to trade between its members.

The rights that have been granted to indigenous peoples under international law make them legitimate participants in negotiations. ILO Convention no. 107, ILO Convention no. 169, the International Convention for the Elimination of all Forms of Racial Discrimination and the United Nations Declaration on the Rights of Indigenous Peoples contain the right of internal self-government and the participation in decision-making on all levels. Indigenous land rights and arrangements for local authority or self-governance form now also part of customary international law. In practice, however, the participation of indigenous peoples in international treaty negotiations is far from perfect. African and Asian states deny having indigenous peoples and instead

speak of minority groups. For recognized indigenous peoples it is still difficult to participate properly. In the case of the CBD, for instance, the relatively brief negotiation process of a year and a half made it difficult for indigenous peoples to participate. Finally, procedures to determine legitimate representatives of indigenous peoples, who do not represent an international indigenous elite, are still lacking. Indigenous peoples are granted NGO status by UN conferences preparing treaties and by treaty regimes such as the CBD and may therefore participate as observers. This observer status is not adequate considering that the CBD makes indigenous rights conditional on their performance of their role to conserve and sustainably use their biological resources. Indigenous peoples should therefore report to the CBD similar to states.

Law needs to be constructed by a broad variety of stakeholders in order to be perceived as legitimate and to be complied with. The adequate representation of local communities' interests on the international level is doubtful. Considerations of equity and pragmatic considerations make it imperative that treaties on conservation and development take the local perspective as a benchmark. Biodiversity can be conserved only in so far as local people support the conservation, be it for ethical or utilitarian reasons. Local people will not and cannot contribute to conservation efforts if they continue to be marginalized economically and politically. Costs for biodiversity conservation must be borne to an equitable proportion by those benefitting from it. Conservation cannot succeed as long as poor inhabitants of biodiversity rich areas have a disproportionate share of the costs while all humans benefit from it. Local communities need to be involved in the development of sustainable solutions. Intergovernmental conferences and biodiversity-related conventions should promote their involvement in decision-making. Their influence on decision-making on the national level, where the decision whether and in which form to establish a PA is made, is not necessarily provided for. CITES more directly impacts local community interests by listing species on its appendices and by obliging its member states to prohibit and penalize trade in contravention of the Convention. This direct impact makes the necessity to make local interests heard at the international level even clearer.

States have lost their position as sole participants in negotiations. NGO representatives are present at negotiations and organize so-called Track 2 diplomacy

events. NGOs participate formally and informally in conferences. Especially development NGOs but also conservation NGOs see their influence on decision-making legitimated because they advocate local people's interests whose voice would otherwise not be heard at the international level. The risk is that Northern NGO views are dominant making it hard for Southern NGOs to pursue their freely determined agenda because they have less resources and capacities. There are ways to counteract these dangers by coalition forming and capacity building for personnel from the South. Some conservation NGOs still pursue a preservationist approach, whose scientific foundation is questionable. Moreover, this approach ignores the fact that biodiversity can only be conserved provided that people living with it see its value and have an interest to conserve it. Most NGOs, including IUCN and WWF International, are aware of the need to take account of local interests. They seek not to exacerbate poverty and have local people benefit from biodiversity. Yet, the determining factor for them remains biodiversity conservation. Development NGOs point to the inappropriateness of seeking income substitutes in areas of high poverty. Development NGOs acknowledge the worth of biodiversity for human life and wellbeing and similarly conservation NGOs acknowledge human economic and social development needs. Yet, the divergence of priorities remains. NGOs should more often cooperate to benefit from each others expertise in economic and social as well as environmental matters. This way they would contribute to making negotiations more integrative.

NGOs see themselves as representatives of the global civil society. The conservation of biodiversity is recognized to be a common concern of humankind. NGOs might be the best suited actors to voice this common concern. However, their decision-making follows a rather top-down approach. NGOs can create transparency of decision-making and provide useful information but they are not representing the planetary collective interest. Their imperfect accountability and independence underline this statement.

Members of parliaments may be more suitable representatives of the interests of all citizens thanks to their direct democratic legitimation. They increasingly participate in international negotiations but are neither sufficiently well organized nor active to achieve a significant impact on state negotiations. They should make more use of their potential.

The interest of corporations needs to be taken into consideration too when attempting to integrate conservation and development interests in an agreement. The business sector has the most significant direct impact on the environment. A relatively minor change in business behaviour can therefore significantly benefit the environment. The participation of corporations in international negotiations and their involvement with treaty regimes is justified because they need to be aware of the gains they can make by being eco-efficient and by using their competitive advantage to win over consumers. Moreover, they need to be aware of their potential to mitigate or eliminate their harmful impact or to promote conservation by advancing ecologically sound technologies. Their influential position within decision-making is a powerful argument in favour of making them accountable to international environmental law. Given that large corporations are the actors that are best equipped financially their participation in negotiations has the risk of undue influence. However, business influence is unavoidable, due to their financial resources and their crucial role for the states' economies. Hence it seems preferable to address the legitimacy problems of business influence in the open and create as much transparency as possible by institutionalization.

In negotiations, negotiators can pursue two distinct strategies. Either They follow the "zero sum" approach, considering that there is only a certain number of gains to be made in negotiations and one negotiators gain means automatically the others loss. These negotiators tend to try and convince the others to give in and they may use pressure. Or they follow the integrative or mutual gains negotiation approach which avoids the said dichotomies. Among the five strategies that are applied to obtain a mutual gains solution the first strategy, the augmentation of resources, can be helpful for conservation and development in the way that techniques and technologies can be developed and applied that improve the effectiveness of conservation. Moreover, the demand for certain specimens of endangered species can be supplemented by ranched or artificially propagated specimens of the same species.

Package deals can also lead to a mutual gains agreement. The third pillar of the CBD is a typical example of such a package deal. While developing states are called on to facilitate the access to their biological resources, developed states are required to share the benefits gained from these resources. Under CITES the authorization of "split-listing", that is, the listing of different populations of one species in different

appendices, is another attempt to integrate all parties' interests. Nonetheless, split listing is rejected because the commerce in the population of one species makes the ban on another population hard to monitor. Both examples demonstrate the difficulty to distinguish a package deal, that helps achieving a mutual gains solution, from a compromise.

Many conventions work with financial mechanisms or technology transfers, making the agreements financially attractive to those states which would otherwise not see their interests reflected in them. CITES like many conventions that were adopted before the Rio Conference lack a fund for compliance assistance. Most conventions that were adopted subsequently have such a fund or use GEF for this purpose. These financial mechanisms grant incremental costs, that is, they assist in the implementation and compliance. At the same time they make agreements more attractive and may therefore turn them into mutual gains agreements.

GEF, as the CBD financial mechanism has a potential to compensate for and to lower the cost of the establishment of PAs. In practice, GEF lacks the financial resources to compensate full incremental costs arising from the establishment of PAs.

In order to apply with success any of the ways to a mutual gains solution, a number of guidelines need to be respected. It is important to engage in interest based negotiations, that is, to be firm about core interests but flexible about the way to achieve them. A good working relationship is important and can, inter alia, be achieved through awareness of each other's history, culture and negotiation style. A reconceptualization of issues may be needed in order to frame them as shared values. The number of ideas within the discussion can be increased through "no-fault brainstorming". Finally, deadlines may be advantageous because they may prompt negotiators to see proposals in a more positive light and to make concessions without appearing to be weak.

The question how much privacy or how much transparency is needed for negotiations has no one right answer. Conducting negotiations in privacy can remove excessive and counterproductive pressure from constituencies and may make negotiators more cooperative. On the other hand, transparency is needed in order to obtain a legitimate agreement that is well-complied with and pressure may exhilarate otherwise frustratingly protracted negotiations.

A whole range of aspects make it difficult to follow those guidelines. To name but a few of the factors complicating negotiations, the sheer complexity of the issues being negotiated may make it hard to determine a mutual gains solution. Divergent values and ideologies of negotiators as well as their emotions may complicate negotiations. With respect to land management, the divergence of the world views of indigenous peoples and other persons are particularly challenging.

A number of actors, that participate in negotiations in some form or other without being negotiators, may help states to overcome these difficulties and achieve a mutual gains agreement after all. Scientific networks, NGOs and the treaty regimes CBD, CITES and UNCCD perform several tasks that are known to be used by mediators to facilitate the resolution of conflicts of interests. These actors cannot mediate in the strict sense of the term, that is, they are not a third party which facilitates the settlement of a specific conflict. Yet, the strategies which have been developed by mediators and the experiences gained by them are transferable to negotiations of rules that integrate conservation and development interests. Mediation services help to achieve mutual gains agreements or they improve the working relationship of negotiators which may lead to a mutual gains agreement in the long run. The effect of mediation services depends on their context and the process of their provision.

Where the context is concerned, conflicts of interest on environment and development issues between states are generally amenable to mediation services. The willingness of states to accept such services is likely because the integration of conservation and development interests is complex and protracted. Furthermore, states depend on the continuity of their relations with one another and do not wish to isolate themselves. If they subscribe to the integrative negotiation approach they will accept mediation services when they expect gains for the negotiations from them.

The specific mediation strategies cannot only be applied within a comprehensive mediation process but also as a single mediation service for negotiators. Categories of mediation services can be formed according to their respective primary benefits. These services or strategies encompass helping to create a propitious background for negotiations, cognitive strategies, facilitating communication, improving the transparency and accountability, normative strategies that directly influence the negotiators' interests through mediator ideas and reconceptualization,

counterbalancing the power asymmetry of stakeholders, raising and managing assistance and helping sustain an agreement.

States are amenable to mediation services because they exist within the international social structure and their interests and identities are susceptible to external influence. The constructivist and interactional law theory concepts of the social structure of the community of states demonstrate that communication facilitation is a relevant mediation service. Mediation services that increase the perceived legitimacy of the negotiation process and the agreement are equally useful to states. Furthermore, a mediation service can consist in the promotion of shared understandings, *inter alia*, through the facilitation of interaction. Another strategy may be influencing the state interests for instance by drawing state attention to overlapping interests or providing them with other kinds of information. A state's concern about its reputation towards its constituencies and other states makes it amenable to the mediator activity of creating visibility and public support or pressure.

States are amenable to numerous mediation services and NGOs are in a position to provide them. NGOs operating outside of treaty regimes engage in activities, such as information gathering, which may add to the options for negotiators and thus facilitate the adoption of an agreement. However, the NGO bias towards either preservationism or development may lead to an unbalanced agreement as happened in the case of CITES, which was based on IUCN data and, in its initial phase, failed to recognize the developing states' need for assistance to compensate income from trade and to properly implement the Convention. CITES also neglected the possibility that limited trade may create incentives and funds for long-term conservation.

NGOs may also create public support and pressure for the adoption of international agreements. Whilst this may make it easier for states to adopt an agreement it by no means leads automatically to an agreement with mutual gains. Broad NGO coalitions encompassing all regions of the world as well as the ecological and social and economic development fields are needed for the provision of mediation services.

Scientific networks seem more promising providers of mediation services outside of treaty regimes because science inherently avoids the polarization over ideals and values witnessed with respect to NGOs. In the context of biodiversity-related conventions the most relevant scientific networks are: the UNEP-World Conservation Monitoring Centre (UNEP-WCMC), the six IUCN commissions, Trade Records

Analysis of Fauna and Flora in Commerce (TRAFFIC) and the International Council for Science (ICSU). They, *inter alia*, advance the development of new ideas, develop and draft solutions and assist in formalizing and legitimating the exchange of information. Despite the fact that human sciences and economy are just as important these networks are predominantly ecological.

When discussing the influence of scientists on decision-making, authors usually refer to the theoretical concept of epistemic communities. Epistemic communities are defined as scientific networks composed of governmental and non-governmental experts. Rather than being dominated by principles, the scientists share values which prompt them to become active without influencing their untainted scientific work. In reality, the demarcation line between such a science based epistemic community and NGOs that are active in research is hard to draw. Even the choice of subject to be researched strongly influences the findings and this choice depends on values. As an example, a condition for scientists to become members of the IUCN specialized commissions is that they support IUCN's mission. Scientists with a more anthropocentric approach, whose research objective is to find ways to create local income, are unlikely to join. Cooperation of scientists from various backgrounds is needed to ensure unbiased scientific advice.

ICSU is a network which focuses on the organization of scientific exchange. It does not require the allegiance of scientists to any particular values. It also seems best suited to ensure an interdisciplinary discourse of scientists, including not merely all disciplines of ecology but also anthropologists, economists and various social sciences. It thus helps to avoid a disciplinary paradigm bias and is a convincing provider of mediation services.

The involvement of scientific networks poses the risk that experts might use their special knowledge to manipulate decision-making pursuant to their beliefs. It needs to be ensured that stakeholders take decisions and that experts only inform them.

Treaty regimes themselves have a certain capacity to provide services to mediate conflicts of interests. While they are not always seen as actors that might perform certain activities such as prompting states to negotiate in an integrative way, they tend to gain momentum and independence from their state parties through the work of their treaty bodies. This raises them above the mere coordination of concerted state activity.

The functioning of CoPs facilitates the conduct of integrative negotiations. The consensus decision-making and the flexibility of the venues improve the chances of integrative negotiations. CITES is an example of a treaty regime where decision-making power gradually shifted from the member states to the CoP. It proved to have a high adaptation capacity. The dynamic and flexible character of the decision-making of CITES' CoP makes it more amenable to new ideas and information than ordinary state conferences. CoPs react more readily to new developments or new suggestions because their decisions do not need to be ratified by all states. CoP recommendations have de facto an effect on states like the legally binding treaty itself. CITES' CoP facilitates integrative agreements especially because of the opt-out procedure used for amendments of the appendices.

Secretariats perform several mediator functions. They supply objective information to negotiators, summarize proceedings, compare national position papers, draft decisions, engage in fund raising and assist in the implementation of an agreement.

CITES' member states relinquished certain competences to the Standing Committee. The Standing Committee takes consensual decisions, which have a strongly persuasive effect on member states because the procedure leading to their adoption and the arguments on which they are based are perceived as legitimate. The transfer of certain powers to treaty bodies makes negotiations more reason-based and better suited to achieve integrative solutions. The procedure set up under CITES intended to find common ground where the controversial issue of trade in elephants is concerned, is a case in point but it also shows the limits of any rationalized procedure with the involvement of several treaty bodies. Also presiding and executive officers fulfil mediation functions to member states.

In addition to their mediation services provided in order to facilitate the negotiation of treaties and independent of such treaties, scientists provide their services both as scientific bodies under treaty regimes and as external assistants of treaty regimes. Scientific treaty bodies compile scientific data and prevent adversarial science. Scientific ideas and suggestions help to find common ground. In many instances, however, political, economic or ideological considerations may leave no room for them. CITES' Animals Committee and its Plants Committee have helped making CITES more scientific. Thus, they have helped to find common ground and have legitimated suggestions and votes. Furthermore, CITES' adoption of the Fort

Lauderdale Criteria, as a scientific basis for listing decisions rationalized decision-making.

While the scientific backing does not always have the impact it would ideally have, the committees trigger a collective learning process that shapes state preferences. UNCCD has also worked on refining its scientific base and the services provided by its Committee on Science and Technology. The CBD is likewise trying to improve the work of its Subsidiary Body on Scientific, Technical and Technological Advice. While the strengthening of scientific bodies and approaches is a convincing concept, these efforts are often swept aside by stronger political considerations. The finding of common ground, the legitimating of decisions and the development of ideas provided by scientists all correspond to mediation services. The establishment of scientific committees under treaty regimes and the recommendations provided by them significantly contribute to the mediation capacity of the regimes.

Treaty regimes are assisted by external experts in their mediation activities. These experts select the issues for discussion, gather and provide information and assist in formalizing and legitimating the exchange of information. Their strength lies in modifying the states' perception of their own national interests, thus, bringing state interests to converge. However, the great number of scientists contributing their expertise to the international discourse poses the risk of overwhelming and confusing rather than enlightening decision-makers.

NGOs are involved with treaty regimes. Competent NGOs are granted observer status to CoPs. The trend is towards more procedural guarantees for NGOs. Treaty regimes rely heavily on NGO services. The mediation services provided by them encompass the undertaking of secretariat tasks, the suggestion of solutions, provision of information and various forms of cooperation with treaty regimes and GEF. For instance, IUCN and TRAFFIC provide extensive information and their assessments to CITES.

Due to their limited financial and technical resources, treaty regimes need to rely on NGOs in order to fulfil their tasks. In spite of their imperfect accountability and questionable representativeness, NGO participation yields political, technical and informational benefits for treaty regimes. The examined treaty regimes should focus more strongly on the concept of sustainable development. For this purpose, they should collaborate with a more balanced selection of NGOs. They should become

more aware of indigenous organizations. Anthropocentric organizations focusing on social and economic development could provide additional input. Treaty regimes could provide a long-term framework for NGO projects.

Parliamentarians too are increasingly present at international negotiations as can be concluded from the UNCCD parliamentary Round Tables. While these Round Tables ensure parliamentary scrutiny of negotiations they have so far not used their potential to contribute constructive suggestions.

Since parliamentarians' primary allegiance is with their national electorate they are less well-suited to accommodate all interests than members of treaty bodies. However, parliamentary participation increases transparency and legitimacy of international negotiations. Their participation is also favourable to integrative solutions since parliaments adopt legislation and determine the state budgets. Participation of parliamentarians under treaty regimes may therefore improve implementation of international agreements.

Providers of mediation services do not need to be neutral nor do they need to be impartial since mediators themselves are never entirely devoid of any self-interest and they may have close relations with one of the negotiators. It is decisive whether negotiators consider, that the mediation services are beneficial for them or the negotiations even though the providers neutrality and impartiality may be imperfect.

In order for scientists to provide convincing and relevant mediation services, they need to balance their independence of governments, corporations and NGOs on the one hand and their responsiveness to these actors on the other hand. The independence of scientific networks and with it their credibility is at stake when they are sponsored by or closely connected with states, corporations or NGOs or when they are dominated by scientists from the North. The best guarantor for their credibility is their openness towards the scientific community at large. Hereby assistance for the establishment of research institutions in the South is necessary to create a truly global scientific community.

While the mediation services constitute the tactical strength of their providers, their strategic strength is determined by their expertise and reliability, in the case of experts, and on their perceived legitimacy, capacities and resources, in the case of NGOs. To the extent that treaty regimes, NGOs or experts lack legitimacy, their mediation strength will suffer.

Treaties are effective when they accommodate the conflicting interests they relate to. It is therefore not enough to examine the effect on the environment that CITES, UNCCD and CBD have as do many authors. Progress in development is just as important. For the assessment of the effectiveness, the output of the treaty bodies is equally telling as the treaty text itself. To establish whether interests have been balanced fairly objective considerations of equity are being applied.

Moreover, the outcomes and impacts of the three conventions are crucial. Their effectiveness establishes output legitimacy, which is directly linked to input legitimacy.

Agreements and their outputs may be integrative in different ways, depending on their characteristics. This thesis distinguishes four kinds of provisions that may be contained within an agreement. There are regulatory provisions, that is, proscriptions and prescriptions within agreements and their outputs, procedural provisions that provide for regular meetings of the various treaty bodies, programmatic provisions, that are the basis for joint projects and, finally, Normative provisions that ideally inspire ideas and set in motion discourse among states and all other actors at the international and national levels. While the effect of proscriptions and prescriptions can be assessed by looking at compliance rates and other induced behavioural changes of actors, other provisions function differently. Procedural, programmatic and normative provisions are of particular importance in finding integrative solutions.

Each of the three conventions possesses a number of characteristics that make it integrative. They follow neither a preservationist approach nor a purely utilitarian resource conservation approach. UNCCD is more anthropocentric than the other two conventions. It is hailed for its bottom-up approach but it also takes account of the necessity to support the Convention's objectives at all levels. The Convention requires member states to adopt Legislation and national action programmes in addition to local projects, to set an enabling framework. The Convention's assistance for member states in the development of such large-scale measures needs to be improved.

The CBD seeks to strike a balance between conservation and the anthropocentric interests to use biodiversity. The CBD's priority is the conservation of biodiversity. It sees conservation as distinct from sustainable use which means that it promotes protection against use in some instances. It uses the means of information and education in order to convince relevant groups that conservation is in their best

interest. Creating incentives for sustainable management of biodiversity remains a challenge. And so does addressing the unsustainability in the economic system. The promotion of protection against use is a reaction to the economic and development sectors' failure to take into account conservation needs. Conservation and sustainable use require an enhancement of synergies between MEAs and international economic and social institutions. Economic and environmental conventions' specialized objectives and approaches separately fail to address the complex issue of ecosystem services and human well-being. Coordination needs to prevent that economic agreements counteract biodiversity-related MEAs. Institutions dealing with economic and social issues are those with the greatest impact on biodiversity. In order to truly integrate conservation and development interests they need to join in this effort.

Highly problematic is that the CBD fails to acknowledge the legal position that indigenous peoples enjoy pursuant to treaty law and customary international law. The CBD makes indigenous rights conditional on their performance of their role to conserve and sustainably use biological resources. The CBD should instead give indigenous peoples the clear mandate to determine the management of their resources. It should not prescribe methods it deems traditional or to be called for by scientific findings, which may, however, be ineffective under the specific local conditions. The UNCCD's bottom-up approach might also be a good model for the CBD.

CITES is gradually moving towards a more integrative approach. It accepts the usefulness of trade in species to create incentives for their maintenance. During the first two decades of its existence it was focussed on trade restrictions, later on it realized that assistance to range states is necessary to ensure compliance. More awareness for local needs is evident even though controversies continue.

States implement and comply with treaty regimes because those regimes are social structures that develop consistent patterns of behaviour which have a constraining or enabling effect upon states. Moreover, treaties create the background for in depth discussion to determine which behaviour is legitimate and which is not. Norms that have been developed under a regime influence state behaviour and identity because states tend to implement rules that they perceive as legitimate similar to citizens who respect rules they accept as legitimate. Thus, inclusive internal and inter-state negotiations improve the legitimacy and therefore the compliance.

Nevertheless, the implementation of and compliance with the three conventions is imperfect. The three conventions follow six strategies to prevent or respond to non-compliance. Cognitive strategies modify or influence the perceptions of actors and thus advance compliance. Cognitive strategies encompass monitoring activities that render compliance transparent. Furthermore, they encompass the clarification of obligations under the conventions and capacity-building and education for compliance. Normative strategies reframe issues, support the commencement of dialogue between actors and thus reshape the perceptions and goals of those actors. Both strategies correspond to typical mediation services.

Preclusive strategies aim to make it harder or more costly to violate proscriptions by linking costs to the violation. Generative strategies make it more attractive to abide by treaty provisions or they make their fulfilment easier. Both strategies can also help to make agreements more integrative.

Punitive strategies involve economic, political or social sanctions. They are often appreciated as the only strategies that can seriously change the behaviour of a state or other actor. Under CITES the CoP and the Standing Committee can issue recommendations to suspend all trade with a country because of continual violations of the Convention. The procedure for Significant Trade Review for Appendix II species may lead, as a last resort, to a suspension of trade in the affected species with the state concerned. The necessity and desirability of enforcement mechanisms is controversial. To use the experiences gained from mediation in this discussion, the power to apply pressure can enhance a mediator's effectiveness and pressure by treaty regimes or NGOs may similarly improve compliance with a treaty regime. But pressure may also be counterproductive and worsen the working relationship.

In practice, states are reluctant to bestow compulsory competences on treaty regimes. Adjudication is met with the same scepticism. This being the case, the way to promote compliance is for treaty regimes to refine their non-adversarial strategies.

Finally, remunerative strategies rely on rewards as incentives for compliance. The disadvantages of rewards are the same as for rewards granted by mediators. Parties may start to depend on them in future negotiations and compliance monitoring may focus too strongly on the price to be paid. To achieve more rewards parties may reduce their own efforts.

In order to properly assess the conventions' impact, that is, whether they achieve mutual gains solutions for all stakeholders, more information is needed than is currently available. Most assessments limit themselves to considering the environmental impact while neglecting impacts on economic and social development. Impacts need to be assessed comprehensively as a first step to improving the integrativeness of conventions.

CITES, CBD and UNCCD help in some instances to integrate conservation and development interests. There is however scope for improving the negotiation procedures of MEAs in general and under the conventions that are being considered. The conventions should integrate the various interests more than they do at present. The most promising way to improving the outcomes and impacts of these conventions is to conduct negotiations in a more integrative way and to make good use of mediation services.

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