INTERNATIONAL ENVIRONMENTAL GOVERNANCE: MANAGING FRAGMENTATION THROUGH INSTITUTIONAL CONNECTION

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The 'fragmentation' of international law is used as a term of description and — more commonly — as a lament. It emphasises the isolation and disconnect between regimes and institutions and has particular resonance within international environmental law; a complex regulatory field comprising multiple regimes and institutions giving rise to overlapping and, occasionally, conflicting legal and policy mandates. This article will focus on the extent to which environmental governance strategies, in particular, the creation of formal cooperative arrangements and other institutional connections between multilateral environmental agreements ('MEAs'), can be deployed, not just to manage the consequences of overlap and outright conflict between regimes, but also to maximise the benefits that arise from a confluence between MEA mandates. This article will argue that these governance strategies represent an important mechanism for managing the consequences of fragmentation and improving the effectiveness of international environmental governance. Nevertheless, closer cooperation and institutional integration among MEAs also raise serious questions relating to the accountability of the regime to its state parties and, more generally, to the legitimacy of that regime. Moreover, the impact of this new form of international environmental governance potentially extends beyond the realm of international environmental law; these governance strategies arguably challenge the fundamentals of the international legal system itself: who we regard as participants within the system, what the sources of international law are and even international law's ultimate basis in consent.

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I INTRODUCTION

The term 'fragmentation' in respect of international law is used as a term of description and, more commonly, as a lament. Characterised by 'the emergence of specialised and (relatively) autonomous rules or rule complexes, legal institutions and spheres of legal practice',[1] fragmentation emphasises the isolation and disconnect between regimes and institutions. Irrespective of its more general relevance, the concept of fragmentation has particular resonance within international environmental law, a complex regulatory field comprising multiple regimes and institutions giving rise to overlapping and, occasionally, conflicting legal and policy mandates. The question of how to manage conflation and confliction between multilateral environmental agreements ('MEAs') is the subject of this article. However, rather than focusing on the application of treaty law as a means of determining the relationship between MEAs, this article will instead explore the extent to which environmental governance strategies can be deployed, not just to manage the consequences of overlap and outright conflict between regimes, but also to maximise the benefits that arise from a confluence between MEA mandates.

In light of the focus of this article just one governance strategy will be explored: the creation of formal cooperative arrangements or other institutional linkages between MEAs. Institutional linkages inevitably occur beyond this narrow category, and include informal linkages as well as cooperative agreements between MEAs and environmental institutions, such as the United Nations Environment Programme ('UNEP') and the Global Environment Facility ('GEF'), but these other linkages will not be considered as part of this article owing to space constraints. The formal institutional linkages explored in Part III of this article are divided into three categories: formal agreements facilitating institutional cooperation, arrangements supporting deeper cooperation through institutional integrated management, and cooperative mechanisms associated with compliance issues. This article will conclude that the creation of cooperative arrangements and other institutional connections operates as an important mechanism for managing the consequences of fragmentation and improving the effectiveness of international environmental

[1] International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.682 (13 April 2006) 11 [8] ('*Fragmentation of International Law*').

governance. Nevertheless, closer cooperation and institutional integration among MEAs also raise serious questions relating to the accountability of the regime to its state parties and, more generally, to the legitimacy of that regime. Moreover, the impact of this new form of international environmental governance potentially extends beyond the realm of international environmental law. As Part IV of this article will demonstrate, these governance strategies challenge the fundamentals of the international legal system itself, who we regard as participants within the system, the sources of international law and even its ultimate basis in consent.

II FRAGMENTATION AND LINKAGES IN INTERNATIONAL ENVIRONMENTAL GOVERNANCE

A *Fragmentation and International Environmental Law*

There are over 500 global and regional MEAs in force today,[2] and whilst this arguably represents one measure of success in responding to environmental degradation,[3] the number of new treaties now in force has also led to criticism that international environmental law is characterised by both 'treaty congestion'[4] and fragmentation. Whilst fragmentation is not an inherently negative phenomenon, it has been described as 'leading to inefficiencies, a lack of synergy … inconsistent or contradictory standards'[5] or even jeopardising 'the credibility, reliability and, consequently, the authority of international law'.[6] On the other hand, it has also been asserted that fragmentation reflects an

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[2] Tadanori Inomata, 'Management Review of Environmental Governance within the United Nations System' (Review No JIU/REP/2008/3, Joint Inspection Unit, 2008) 10 [42] ('Management Review of Environmental Governance'). These are supplemented by numerous soft law instruments, joint work programmes and action plans, which also contribute towards environmental protection and constitute further components of the international environmental governance framework.

[3] Nevertheless, it has been noted by numerous commentators that despite the steady increase in the number of treaties and other instruments adopted for the purpose of environmental protection, paradoxically, the degradation of the natural environment has worsened: see, eg, Duncan A French, 'Managing Global Change for Sustainable Development: Technology, Community and Multilateral Environmental Agreements' (2007) 7 *International Environmental Agreements: Politics, Law and Economics* 209, 209–10.

[4] Edith Brown Weiss, 'International Environmental Law: Contemporary Issues and the Emergence of a New World Order' (1993) 81 *Georgetown Law Journal* 675, 697.

[5] Phillipe Roch and Franz Xaver Perrez, 'International Environmental Governance: The Strive Towards a Comprehensive, Coherent, Effective and Efficient International Environmental Regime' (2005) 16 *Colorado Journal of International Environmental Law and Policy* 1, 16.

[6] Gerhard Hafner, 'Pros and Cons Ensuing from Fragmentation of International Law' (2004) 25 *Michigan Journal of International Law* 849, 856. See also Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999; Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *Modern Law Review* 1; Christian Leathley, 'An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?' (2007) 40 *New York University Journal of International Law and Politics* 259.

'unprecedented normative and institutional expansion of international law'[7] and a 'positive demonstration of the responsiveness of legal imagination to social change'.[8] Whether positive or negative, the fragmentation of international environmental law arising from the creation of multiple regimes and institutions with similar or conflated regulatory mandates is extant, and has undoubtedly given rise to the risk of duplication, divergence, and even conflict between environmental standards and obligations.

For example, it is well known that restrictions on the production of chlorofluorocarbons, under the 1987 *Montreal Protocol on Substances That Deplete the Ozone Layer* ('*Montreal Protocol*'),[9] led to a significant increase in the production of alternatives to ozone-depleting substances such as hydrochlorofluorocarbons ('HCFCs'). Unfortunately, as HCFCs are 10,000 times more potent as a greenhouse gas than carbon dioxide, action taken under the auspices of the *Montreal Protocol* directly undermined the aims and objectives of the *Kyoto Protocol*.[10] Furthermore, the potential for conflict between obligations is exacerbated in circumstances where treaty provisions are open to interpretation. For instance, the 1997 *Kyoto Protocol*[11] promotes the enhancement of carbon sinks such as forests for the purpose of climate change mitigation.[12] Yet an interpretation that permits or even promotes planting homogenous young trees at the expense of managing old growth forests, whilst arguably permissible under the *Kyoto Protocol*, would potentially lead to conflict with obligations established under the 1992 *Biodiversity Convention* to protect and preserve wildlife habitats.[13] Moreover, even where no direct conflict between treaty obligations occurs, the creation of divergent standards or the development of different managerial approaches to environmental problems carries the potential to undermine the effectiveness of all the regimes concerned. This has been recently demonstrated by the responses of the parties to the 1996

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7 Mario Prost and Paul Kingsley Clark, 'Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter?' (2006) 5 *Chinese Journal of International Law* 341, 343.

8 Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553, 575.

9 *Montreal Protocol on Substances That Deplete the Ozone Layer*, opened for signature 16 September 1987, 1522 UNTS 3 (entered into force 1 January 1989) ('*Montreal Protocol*').

10 In response to this problem, the parties to the 1987 *Montreal Protocol* agreed, in 2007, to bring forward the final phase out date of HCFCs. See Conference of the Parties, United Nations Environment Programme, 'Decision XIX/6: Adjustments to the *Montreal Protocol* with regard to Annex C, Group I, Substances (Hydrochlorofluorocarbons)' in *Report of the Nineteenth Meeting of the Parties to the Montreal Protocol on Substances That Deplete the Ozone Layer, Held in Montreal from 7 to 21 September 2007*, UN Doc UNEP/OzL.Pro.19/7 (21 September 2007) 33–4.

11 *Kyoto Protocol to the Framework Convention on Climate Change*, opened for signature 11 December 1997, 2303 UNTS 148 (entered into force 16 February 2005).

12 Ibid art 2(1)(a)(ii).

13 *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).

London Protocol[14] and the parties to the 1992 *Biodiversity Convention* in respect of ocean fertilisation activities. Whereas the parties to the *Biodiversity Convention* have determined that, with the exception of small-scale coastal experimentation, ocean fertilisation must not take place until a global regulatory mechanism is in place,[15] the parties to the *London Protocol* are still exploring regulatory and non-regulatory options for fertilisation research activities.[16] Apart from the obvious duplication of efforts in respect of ocean fertilisation, any potential divergence in the emerging regulatory framework may lead to confusion and risk, undermining either or both instruments.

However, conflation and overlap between mandates also gives rise to the potential for improving synergy between obligations, policies and programmes as well as opportunities for mutually supportive and more effective implementation. The opportunities arising from fragmentation are perhaps no better illustrated than by the various synergies between wildlife treaties. For example, trade-related measures adopted pursuant to the 1973 *Convention on International Trade in Endangered Species of Fauna and Flora* ('*CITES*')[17] undoubtedly support broader measures to protect wildlife and their habitats developed under the auspices of the 1992 *Biodiversity Convention* and the 1979 *Convention on the Conservation of Migratory Species* ('*CMS*').[18]

The question facing international environmental lawyers and policymakers today is not how to eliminate fragmentation and its consequences, but how to manage its risks and maximise its potential. One narrow approach to managing conflation and conflict between regimes draws on the international rules and

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14 *1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of 29 December 1972*, opened for signature 7 November 1996, [2006] ATS 11 (entered into force 24 March 2006) ('*London Protocol*').

15 *Biodiversity and Climate Change*, UN Doc UNEP/CBD/COP/DEC/IX/16 (COP 9 Decision IX/16, Convention on Biological Diversity, 9 October 2008) 7.

16 See Thirtieth Meeting of the Contracting Parties to the *London Convention* and the Third Meeting of the Contracting Parties to the *London Protocol*, *Resolution LC-LP.1 (2008) on the Regulation of Ocean Fertilization* (31 October 2008) <http://ioc3.unesco.org/oanet/OAdocs/LC-LPResOF.pdf>. The parties to the 1996 *London Protocol* are in the process of developing a Risk Assessment Framework designed to guide fertilisation activities: see International Maritime Organization, 'Report of the Ocean Fertilization Working Group' (Report LC/SG 32 WP.7, International Maritime Organization, 28 May 2009) annex. They are also exploring long-term regulatory and non-regulatory options for fertilisation research: see International Maritime Organization, 'Report of the First Meeting of the LP Intersessional Legal and Related Issues Working Group on Ocean Fertilization' (Report LP/CO2 2/5, International Maritime Organization, 20 February 2009).

17 *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, opened for signature 3 April 1973, 993 UNTS 243 (entered into force 1 July 1975) ('*CITES*').

18 *Convention on the Conservation of Migratory Species of Wild Animals*, opened for signature 23 June 1979, 1651 UNTS 333 (entered into force 1 November 1983) ('*CMS*'). For a recent exploration of the interaction between *CITES* and other wildlife instruments, see John Lanchbery, 'The Convention on International Trade in Endangered Species of Wild Fauna and Flora: Responding to Calls for Action from Other Nature Conservation Schemes' in Sebastian Oberthür and Thomas Gehring (eds), *Institutional Interaction in Global Environmental Governance: Synergy and Conflict among International and EU Policies* (MIT Press, 2006) 157.

principles relating to the interpretation and application of treaties.[19] This approach has both dominated and defined the recent work of the International Law Commission on the problem of fragmentation.[20] But, valuable though this work is, it is also limited in relation to the problems it seeks to resolve and the solutions it offers. An alternative approach relies on the utilisation and development of governance mechanisms, not only to manage conflict between environmental regimes, but also to maximise the very real benefits that can be derived from conflated and overlapping mandates. It is this second approach — environmental governance mechanisms — that will be explored in this article both as a response to the challenges and opportunities resulting from the fragmentation of international environmental law and as a mechanism to improve the effectiveness of environmental regimes.

B *International Environmental Governance*

International environmental governance is a well established field of research for commentators and policymakers alike. Whilst academic enquiry focuses primarily on the effectiveness and legitimacy of international environmental governance,[21] policymakers are more directly concerned with reform. No less than four major international environmental governance reform processes and reviews have been undertaken during the last ten years and numerous smaller studies have been carried out by MEAs acting individually or collectively. It is ironic that the process of international environmental governance review is as fragmented as the system of governance under review! The most extensive review process to date was initiated by UNEP in 2000 with the adoption of the *Malmö Ministerial Declaration*, which called for greater coherence and coordination among international environmental law instruments.[22] An open-ended intergovernmental group of ministers was established in 2001 and was tasked with undertaking a comprehensive policy-oriented assessment of existing institutional weaknesses as well as future needs and options for strengthened environmental governance.[23] The report of the open-ended group of ministers was adopted at the Seventh Special Session of the Global Ministerial

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19 See generally, Rüdiger Wolfrum and Nele Matz, *Conflicts in International Environmental Law* (Springer, 2003) 119.

20 *Fragmentation of International Law*, UN Doc A/CN.4/L.682.

21 See, eg, Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93 *American Journal of International Law* 596; Steven Bernstein, 'Legitimacy in Global Environmental Governance' (2004) 1 *Journal of International Law and International Relations* 139.

22 United Nations Environmental Programme, 'Malmö Ministerial Declaration' (Declaration adopted at the 6th Special Session of the Governing Council of the United Nations Environment Programme, 31 May 2000) <http://hqweb.unep.org/malmo/malmo_ministerial.htm>. The Malmö Ministerial Declaration was adopted on the occasion of the first Global Ministerial Environmental Forum (established by *Report of the Secretary-General on Environment and Human Settlements*, GA Res 53/242, UN GAOR, 53rd sess, Agenda Item 30, UN Doc A/RES/53/242 (10 August 1999)).

23 United Nations Environment Programme, *Proceedings of the Governing Council at Its Twenty-First Session*, UN Doc UNEP/GC.21/9 (14 February 2001) annex I, 59 ('Decision 21/21: International Environmental Governance').

Environmental Forum in 2002.[24] After languishing for a number of years, the review process was revitalised in 2009 when the decision was taken to establish a group of regionally representative ministers or high-level representatives commissioned to develop a set of options for improving international governance, to be presented at the Eleventh Special Session in February 2010.[25] The 2009 report of the Group of Consultative Ministers[26] was endorsed at the Eleventh Special Session[27] and a second Group of Consultative Ministers was established at that meeting to consider broader reform options. This group is due to report to the Twenty-Sixth Session of the Governing Council in 2011.[28] Two additional review processes were initiated simultaneously but independently by the 2005 *World Summit Outcome Resolution* adopted by the UN General Assembly in September 2005.[29] The first resulted in the *Delivering as One: Report of the High-Level Panel on United Nations System-Wide Coherence in the Areas of Development, Humanitarian Assistance and the Environment*[30] and the second has led to the initiation of the so-called Informal Consultative Process on the Institutional Framework for the United Nations Environment Activities.[31] A fourth review of international environmental governance was subsequently initiated by the Joint Inspection Unit of the UN, and its highly critical report of the current system was released in 2008.[32] Finally, it should be noted that a number of MEAs including *CITES*, the *Biodiversity Convention* and the *United*

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24 United Nations Environment Programme, *Report of the Governing Council: Seventh Special Session*, UN GAOR, 57th sess, Supp No 25, UN Doc A/57/25 (13–15 February 2002) annex I, 23 ('Decision SS.VII/1: International Environmental Governance').

25 United Nations Environment Programme, *Proceedings of the Governing Council/Global Ministerial Environment Forum at Its Twenty-Fifth Session*, UN Doc UNEP/GC.25/17 (26 February 2009) annex I, 18 ('Decision 25/4: International Environmental Governance').

26 The Consultative Group met twice during 2009; the first meeting was in Belgrade, 27–28 June 2009 and the second meeting was in Rome, 28–29 October 2009. See United Nations Environment Programme Executive Director, *'The Belgrade Process': Developing a Set of Options for Improving International Environmental Governance*, UN Doc UNEP/CGIEG.2/2 (30 September 2009); United Nations Environment Programme, *International Environmental Governance: Outcome of the Work of the Consultative Group of Ministers or High-Level Representatives*, UN Doc UNEP/GCSS.XI/4 (2 December 2009).

27 United Nations Environment Programme, *Proceedings of the Governing Council/Global Ministerial Forum at Its Eleventh Special Session*, UN Doc UNEP/GCSS.XI/11 (3 March 2010) annex I, 7 ('Decision SS.XI/1: International Environmental Governance').

28 Ibid [5]–[8].

29 *2005 World Summit Outcome*, GA Res 60/1, UN GAOR, 60th sess, Agenda Items 46 and 120, UN Doc A/RES/60/1 (16 September 2005) [169].

30 *Follow-Up to the Outcome of the Millennium Summit*, GA Res 61/583, UN GAOR, 61st sess, Agenda Item 113, UN Doc A/61/583 (20 November 2006).

31 See Enrique Berruga and Peter Maurer, *Co-Chairmen's Summary of the Informal Consultative Process on the Institutional Framework for the UN's Environmental Activities* (27 June 2006) <http://www.environmentalgovernance.org/cms/wp-content/uploads/reform_docs/GA_informal_plenary.pdf>; *Informal Consultative Process on the Institutional Framework for the United Nations' Environment Activities, Co-Chairs Options Paper* (14 June 2007) <http://www.un.org/ga/president/61/follow-up/environment/EG-OptionsPaper.PDF>.

32 Management Review of Environmental Governance, UN Doc JIU/REP/2008/3.

Nations Framework Convention on Climate Change ('*UNFCCC*')[33] have engaged, with varying degrees of intensity, in internal governance review processes.[34]

Despite their various origins and disparate mandates, the ensuing reports produced by these review processes demonstrate considerable synergy in the problems they identify and the reforms they propose. A common theme, which threads its way throughout all of these reports, is that of fragmented and multiple regimes and the challenges associated with managing their interaction. All of these reports recommend creating and strengthening linkages and institutional connections between MEAs as the primary means of responding to fragmentation and as a key component of international environmental governance reform. And it is these institutional and formal connections between MEAs that will be explored in the remainder of this article.

C *Conceptualising 'Linkage' as a Governance Strategy*

Institutional interaction and 'the idea of linkage emerged as a response to the problem of managing global dilemmas in an anarchic world that is governed by weak and fragmented international institutions'.[35] Linkage is designed to unleash 'hidden synergies between regimes'[36] and builds upon those connections in order to improve international environmental governance. Linkage and institutional interaction operate on a number of levels and may arise as a mere consequence of ecological, sociological or functional interdependence or as a result of a deliberate governance strategy.

At the most abstract level, all regimes and institutions are ultimately linked by the fact that they operate within the realm of public international law. Oran Young describes this form of linkage as 'embedded' and asserts that these links

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33 *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994) ('*UNFCCC*').

34 See, eg, Secretariats of the *Convention on Biological Diversity*, the *United Nations Convention to Combat Desertification* and the *United Nations Framework Convention on Climate Change*, *Note by the Secretariat — Options for Enhanced Cooperation among the Three Rio Conventions*, UN Doc FCCC/SBSTA/2004/INF.19 (2 November 2004). This paper sets out options to improve cooperation between the members of the Joint Liaison Group, which comprises the 1992 *Convention on Biodiversity*, the 1992 *UNFCCC* and the *United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*, opened for signature 14 October 1994, 1954 UNTS 3 (entered into force 26 December 1996) ('*UNCCD*'); Executive Secretary, Convention on Biological Diversity, *Options for Enhanced Cooperation among the Biodiversity Related Conventions: Note by the Executive Secretary*, UN Doc UNEP/CBD/WG-RI/1/7/Add.2 (14 July 2005); Conference of the Parties, United Nations Environment Programme, *Note by the Secretariat — Study on Improving Cooperation and Synergies between the Secretariats of the Basel, Rotterdam and Stockholm Conventions*, UN Doc UNEP/POPS/COP.2/INF/12 (20 March 2006).

35 Oren Perez, 'Multiple Regimes, Issue Linkage and International Cooperation: Exploring the Role of the WTO' (2005) 26 *University of Pennsylvania Journal of International Economic Law* 735, 735.

36 Ibid.

'reflect and represent the deep structure of international society'.[37] Public international law implicitly underpins all interaction between environmental regimes and institutions, and its rules and concepts, such as the law relating to treaties, international organisations and state responsibility, facilitate and limit the extent of their interaction.

At the next level, linkage might be described as 'functional'[38] or, more prosaically, 'overlapping'.[39] This occurs where the functional problems or subject matter of the regime are linked or overlap in 'biogeophysical or socioeconomic terms'[40] but, whilst they may intersect with one another on a de facto basis,[41] there may be minimal deliberate interaction between them. The term functional linkage might appropriately describe the current relationship between the 1982 *United Nations Convention on the Law of the Sea* ('*UNCLOS*')[42] and the 1992 *UNFCCC* in connection with the impacts of climate change on the oceans. Whilst the problems, such as coral bleaching and ocean acidification, are of relevance to both regimes, there is (as yet) little meaningful interaction between them with a view to addressing the impacts of climate change on the oceans. Of course, functional linkage or the identification of overlaps between regimes and institutions will often provide the basis for further, deliberate interaction.

Closely related to functional linkage is a species of interaction which has been described as 'behavioural'[43] or 'interaction through commitment'.[44] The behaviour, or indeed the commitments, undertaken in one regime may impact upon or influence conduct within, or treaty obligations agreed to as part of, another regime. Behavioural or commitment interaction may be mutually supportive. For example, action taken to protect individual migratory species under the auspices of the 1979 *CMS* is likely to reinforce the more general commitments to conserve biodiversity undertaken pursuant to the 1992 *Biodiversity Convention*. The work undertaken by the World Trade Organization in connection with fisheries subsidies is similarly likely to prove supportive of the fishery management measures adopted by various regional fisheries

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37 Oran R Young, 'Institutional Linkages in International Society: Polar Perspectives' (1996) 2 *Global Governance* 1, 8.

38 Thomas Gehring and Sebastian Oberthür, 'Interplay: Exploring Institutional Interaction' in Oran R Young, Leslie A King and Heike Schroeder (eds), *Institutions and Environmental Change: Principal Finds, Applications and Research Frontiers* (MIT Press, 2008) 187, 197.

39 Young, 'Institutional Linkages in International Society', above n 37, 6.

40 Gehring and Oberthür, 'Interplay: Exploring Institutional Interaction', above n 38, 197.

41 Young, 'Institutional Linkages in International Society', above n 37, 6.

42 *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 396 (entered into force 16 November 1994) ('*UNCLOS*').

43 Gehring and Oberthür, 'Interplay: Exploring Institutional Interaction', above n 38, 204.

44 Ibid 202; Sebastian Oberthür and Thomas Gehring, 'Conceptual Foundations of Institutional Interaction' in Sebastian Oberthür and Thomas Gehring (eds), *Institutional Interaction in Global Environmental Governance: Synergy and Conflict among International and EU Policies* (MIT Press, 2006) 19, 35.

management organisations ('RFMOs').[45] On the other hand, this form of linkage may lead to conflict between institutions or regimes. The interaction between the WTO and environmental treaties such as *CITES* and the *Kyoto Protocol*, which permit the adoption of trade-related measures to support the implementation of treaty commitments, provides arguably the most high profile example of behavioural or commitment-related linkage, which may lead to possible conflict between the regimes.[46] A recent and equally controversial example is provided by the divergent approaches taken by the WTO and the 1992 *Biodiversity Convention* with respect to access to genetic resources and the allocation of their benefits.[47]

The categories of linkage or interaction described above arise naturally as a result of overlaps in function, or the common use of legal tools, such as trade measures, to promote treaty objectives. Other forms of interaction or linkage may be pursued deliberately in order to better implement the objectives of a treaty or to improve international environmental governance. Cognitive interaction, for example, 'is driven by the power of knowledge and ideas'[48] and occurs when information or ideas generated by one institution or regime impacts on decision-making or activities within another institution or regime;[49] in essence, when regimes or institutions learn from one another.[50] For example, the compliance mechanism developed by the parties to the 1997 *Kyoto Protocol* was undoubtedly based on, but ultimately developed beyond, the compliance mechanism which was successfully operating under the auspices of the 1987 *Montreal Protocol*,[51] and provides a clear example of cognitive interaction.

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45 See Olav Schram Stokke and Claire Coffey, 'Institutional Interplay and Responsible Fisheries: Combating Subsidies, Developing Precaution' in Sebastian Oberthür and Thomas Gehring (eds), *Institutional Interaction in Global Environmental Governance: Synergy and Conflict among International and EU Policies* (MIT Press, 2006) 127.

46 The literature on the linkage and interaction between trade and the environment is copious. On the topic of institutional linkage between the WTO and environmental regimes, see, eg, Alice Palmer, Beatrice Chaytor and Jacob Werksman, 'Interactions between the World Trade Organization and International Environmental Regimes' in Sebastian Oberthür and Thomas Gehring (eds), *Institutional Interaction in Global Environmental Governance: Synergy and Conflict among International and EU Policies* (MIT Press, 2006) 181; Oren Perez, above n 35; Olav Schram Stokke, 'Trade Measures and Climate Compliance: Institutional Interplay between WTO and the Marrakesh Accords' (2004) 4 *International Environmental Agreements: Politics, Law and Economics* 339.

47 See G Kristin Rosendal, 'The Convention on Biological Diversity: Tensions with the WTO *TRIPS* Agreement over Access to Genetic Resources and the Sharing of Benefits' in Sebastian Oberthür and Thomas Gehring (eds), *Institutional Interaction in Global Environmental Governance: Synergy and Conflict among International and EU Policies* (MIT Press, 2006) 79.

48 Gehring and Oberthür, 'Interplay: Exploring Institutional Interaction', above n 38, 200.

49 Oberthür and Gehring, 'Conceptual Foundations of Institutional Interaction', above n 44, 35.

50 Sebastian Oberthür, 'Interplay Management: Enhancing Environmental Policy Integration among International Institutions' (2009) 9 *International Environmental Agreements: Politics, Law and Economics* 371, 378. See also Oran R Young, 'Institutions and the Growth of Knowledge: Evidence from International Environmental Regimes' (2004) 4 *International Environmental Agreements: Politics, Law and Economics* 215.

51 Oberthür, 'Interplay Management', above n 50.

Beyond sharing knowledge and ideas, institutions and regimes may choose to actively coordinate their activities through the development of joint work programmes and/or the creation of joint rules and institutions. Sebastian Oberthür describes this form of linkage as 'joint interplay management',[52] although it is sometimes referred to as 'clustering'.[53] One of the earliest examples of such interaction occurred — and is continuing to occur — in connection with the protection of the North Sea. The North Sea 'regime' comprises the soft law Ministerial Declarations adopted at periodic North Sea Conferences,[54] the 1992 *Convention for the Protection of the Marine Environment of the North-East Atlantic* ('*OSPAR Convention*')[55] and EU law. The synergy between these overlapping institutions with regard to the North Sea has undoubtedly contributed to the successful management of the region.[56] More recently, joint interplay management, or clustering, as a means of developing linkages and interactions between environmental regimes and institutions has received significant attention. Numerous examples of such interaction can be identified across a range of pollution prevention, wildlife, and fishery instruments, and some of these will be discussed in Part III of this article below. Moreover, the concept of 'clustering' as a governance mechanism has featured prominently within all four review processes noted above.[57]

The final or ultimate level of linkage and interaction has been described by Oran Young as 'institutional nesting'.[58] Regimes or institutions become institutionally nested when they are 'folded into broader institutional frameworks'.[59] The most common example of institutional nesting occurs when protocols are adopted under the auspices of one or more conventions such as the United Nations Economic Commission for Europe ('UNECE') 1979 *Convention on Long-Range Transboundary Air Pollution*[60] or the 1992 *UNECE Convention on the Protection and Use of Transboundary Water Courses and International*

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52 Ibid 376.

53 See Sebastian Oberthür, 'Clustering of Multilateral Environmental Agreements: Potentials and Limitations' (2002) 2 *International Environmental Agreements: Politics, Law and Economics* 317; Young, 'Institutional Linkages in International Society', above n 37, 5.

54 These are available online at OSPAR Commission, *Commission Protecting and Conserving the Marine Environment of the North-East Atlantic and Its Resources* (25 April 2011) OSPAR <http://www.ospar.org/content/content.asp?menu=01310624810000_000000_000000>.

55 *Convention for the Protection of the Marine Environment of the North East Atlantic*, opened for signature 22 September 1992, 2354 UNTS 67 (entered into force 25 March 1998) ('*OSPAR Convention*').

56 Jon Birger Skjaerseth, 'Protecting the Northeast Atlantic: One Problem, Three Institutions' in Sebastian Oberthür and Thomas Gehring (eds), *Institutional Interaction in Global Environmental Governance: Synergy and Conflict among International and EU Policies* (MIT Press, 2006) 103, 103.

57 See above Part II(B).

58 Young, 'Institutional Linkages in International Society', above n 37, 3–4.

59 Ibid.

60 *United Nations Economic Commission for Europe Convention on Long-Range Transboundary Air Pollution*, opened for signature 13 November 1979, 1302 UNTS 217 (entered into force 16 March 1983) ('*LRTAP*'). Eight protocols providing for specific regulation of particular pollutants are 'nested' within *LRTAP*.

Lakes.[61] The *Antarctic Treaty* system might also be viewed as an example of institutional nesting.[62]

The parameters of this article will be confined to selected formal institutional linkages between MEAs and the extent to which such linkages and institutional connections can be developed as a governance tool to manage the consequences of fragmentation. Informal linkages between regimes and the more official connections between treaties, which might be described as institutional nesting, will be excluded from consideration owing to space constraints.

D *Creating Linkages: MEAs and Their Institutions*

MEAs are not only characterised by their subject matter but also by their distinctive approach to institutional governance. As a collective, MEA institutions, or 'autonomous institutional arrangements' as they are now known,[63] constitute 'a distinct and different approach to institutionalised collaboration between states, being both more informal and more flexible, and often innovative in relation to norm creation and compliance'.[64] Although not strictly an international organisation,[65] the composite structure of an autonomous institutional arrangement, which normally comprises a conference of the parties, a secretariat, scientific or subsidiary bodies and, more than likely, a compliance mechanism, performs functions similar to many international organisations.[66] For the purposes of this article, the most important function is the creation and nurturing of formal and informal relationships with other MEAs, as well as

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61 *United Nation Economic Commission for Europe Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, opened for signature 17 March 1992, 1936 UNTS 269 (entered into force 6 October 1996) ('*UNECE Water Convention*'). The 1992 *UNECE Water Convention* is supplemented by two protocols. Most unusually, the 2003 *Protocol on Civil Liability and Compensation for Damage Caused by Transboundary Effects of Industrial Accidents on Transboundary Waters*, opened for signature 21 May 2003, UN Doc ECE/MP.WAT/11-ECE/CP.TEIA/9 (not yet in force) is also a protocol to a second, entirely separate instrument: the 1992 *United Nation Economic Commission for Europe Convention on the Transboundary Effects of Industrial Accidents*, opened for signature 17 March 1992, 2105 UNTS 457 (entered into force 19 April 2000).

62 *Antarctic Treaty*, opened for signature 1 December 1959, 402 UNTS 71 (entered into force 23 June 1961) is supplemented by the *Protocol on Environmental Protection to the 1959 Antarctic Treaty*, opened for signature 4 October 1991, 30 ILM 1461 (entered into force 14 January 1998). However, three further closely related instruments (the *Convention on the Conservation of Antarctic Seals*, opened for signature 1 June 1972, 1080 UNTS 175 (entered into force 11 March 1978); the *Convention on the Conservation of Antarctic Marine Living Resources*, opened for signature 20 May 1980, 1329 UNTS 47 (entered into force 7 April 1982); and the *Convention on the Regulation of Antarctic Mineral Resource Activities*, opened for signature 25 November 1988, 27 ILM 868 (not yet in force)) as well as relevant decisions and other instruments combine with the *Treaty* and its *Protocol* to comprise the Antarctic Treaty System.

63 Robin R Churchill and Geir Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law' (2000) 94 *The American Journal of International Law* 623, 623.

64 Ibid 625.

65 The terms 'international organisation' and 'international institution' are not definitively defined and can be used to describe an intergovernmental body, an international regime or even a set of norms: see John Duffield, 'What are International Institutions?' (2007) 9 *International Studies Review* 1.

66 See Geir Ulfstein, 'Treaty Bodies' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007) 877.

international organisations and institutions; in short, a 'foreign policy' function.[67]

The first fundamental question, which must be explored, is whether autonomous institutional arrangements possess the legal capacity to develop foreign policy functions. Whilst it is undisputed that international organisations may possess treaty-making powers,[68] the extent to which autonomous institutional arrangements or, more narrowly, the Conferences of the Parties ('COPs') of such organisations, possess international legal personality is less clear. Unsurprisingly, no MEA has explicitly designated its institutions as international legal persons. However, such an express designation is not necessary under international law;[69] the possession of international legal personality can be implied by the nature of the organisation or institution and its functions. As articulated by the International Court of Justice ('ICJ'), an organisation's 'members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged'.[70] Although the ICJ was referring to an intergovernmental organisation, the United Nations, there is no obvious reason why the doctrine of implied powers cannot be applied to autonomous institutional arrangements.[71]

A significant proportion of the institutions established by MEAs are expressly given a mandate to cooperate with other appropriate convention bodies or international environmental organisations in order to further the objectives of the treaty. A typical example is provided by art 23(4)(h) of the *Biodiversity Convention*, which requires the COP to '[c]ontact, through the Secretariat, the executive bodies of conventions dealing with matters covered by this *Convention* with a view to establishing appropriate forms of cooperation with them'. Other MEAs have developed their foreign policy mandate through the adoption of decisions at the COP. For example, the Thirteenth Meeting of the Parties of the 1987 *Montreal Protocol*, decided to 'support appropriate collaboration and synergies that may exist between multilateral environmental agreements, as agreed by the Parties to those agreements'.[72] The parties to the 1971 *Ramsar*

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67 Ibid 885.

68 As evidenced by the adoption in 1986 of the *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, opened for signature 21 March 1986, UN Doc A/CONF.129/15 (not yet in force). For a discussion of international organisations and international legal personality more generally, see C F Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge University Press, 2nd ed, 2005) 66–104; Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions* (Sweet and Maxwell, 6th ed, 2009) 474–536; Henry G Schermers and Niels M Blokker, *International Institutional Law* (Hotei Publishers, 4th ed, 2004) [1562]–[1686]; Nigel D White, *The Law of International Organizations* (Manchester University Press, 1997) 240.

69 White, above n 68, 27.

70 *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174, 179.

71 This conclusion is supported by Churchill and Ulfstein, above n 63, 633.

72 'Decision XIII/29: Recognizing the Preparations for the World Summit on Sustainable Development 2002' in *Report of the Thirteenth Meeting of the Parties to the Montreal Protocol on Substances That Deplete the Ozone Layer*, UN Doc UNEP/OzL.Pro.13/10 (26 October 2001) 48 [3].

Convention on Wetlands of International Importance[73] have included a reference to supporting joint work plans and partnerships with other conventions in the *2009–15 Ramsar Strategic Plan*.[74] Even those MEAs that do not expressly provide for collaboration and cooperation clauses will normally include a wide-ranging provision that permits the COP or other bodies such as the secretariat to 'exercise such other functions as are required for the achievement of the objective of the *Convention* as well as all other functions assigned to it under the *Convention*'.[75]

Consequently, it can be concluded that to the extent that it is necessary to carry out the functions of the MEA, autonomous institutional arrangements, acting collectively or individually, have been implicitly endowed with legal personality and capacity by their contracting parties.[76] In many (if not most) cases that personality includes the capacity to enter into treaties and other agreements; these powers are nevertheless limited by the nature and functions of the MEA and, in many (if not all) cases, are restricted to collaboration with other MEAs, international institutions (such as UNEP or GEF) and scientific, technical or other non-governmental organisations.

III COOPERATIVE INSTITUTIONAL ARRANGEMENTS BETWEEN AND AMONG MEAS: SELECTED CASE STUDIES

The creation of institutional cooperative arrangements and formal linkages between MEAs has been identified as one mechanism for addressing the challenges presented by the fragmentation of international law, and partnerships between MEAs are now recognised as an integral 'element in the organisational landscape of environmental governance'.[77] The extent to which MEAs develop formal links and cooperative institutional arrangements depends, in part, upon

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[73] *Convention on Wetlands of International Importance Especially as Waterfowl Habitat*, opened for signature 2 February 1971, 996 UNTS 245 (entered into force 21 December 1975) ('*Ramsar Convention*').

[74] See The Ramsar Convention on Wetlands, *Resolution X.1: The Ramsar Strategic Plan 2009–2015* (26 May 2009) 14–15 <http://www.ramsar.org/pdf/res/key_res_x_01_e.pdf> ('*Ramsar Strategic Plan*').

[75] Although this text was taken from art 7(m) of the *UNFCCC*, it is typical of the vast majority of MEAs.

[76] This conclusion would appear to be supported by the opinion of the UN Office of Legal Affairs, which in 1993, asserted that the *UNFCCC* established 'an international entity/organization with its own separate legal personality, statement of principles, organs and a supportive structure in the form of a Secretariat (articles 3, 7, 8, 9 and 10)'. The Opinion went on to note that the UNFCCC had capacity to establish cooperative arrangements with other competent international organisations and bodies. See United Nations Office of Legal Affairs, 'Arrangements for the Implementation of the Provisions of Article 11 of the *United Nations Framework Convention on Climate Change* concerning the Financial Mechanism — Legal Capacity of the Conference of the Parties to the Convention and the Global Environment Facility to Enter into an Agreement or Other Arrangement with Third Parties and the Legal Nature of Such Agreement or Arrangement' [1993] *United Nations Juridical Yearbook* 427, 428–9; Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, *Note by the Interim Secretariat — Issues to be Addressed by the Committee*, UN GAOR, 9th sess, Agenda Items 3(a)–(b), UN Doc A/AC.237/50 (2 December 1993).

[77] Liliana B Andonova, 'International Organizations as Entrepreneurs of Environmental Partnerships' in Frank Bierman, Bernd Siebenhüner and Anna Schreyögg (eds), *International Organizations in Global Environmental Governance* (Routledge, 2009) 195, 220.

their legal capacity to do so (discussed above), and, in part, upon the enthusiasm and willingness of their institutions acting individually or collectively. In practice the success or otherwise of these arrangements often comes down to the role played by the MEA secretariat.[78] Increasingly, secretariats are regarded as 'actors in their own right',[79] capable of driving a normative agenda. In a recent study on environmental bureaucracies, significant differences in the perceived and actual influence of individual secretariats over the direction and operation of their respective MEAs were identified.[80] For example, the secretariats to the 1992 *Biodiversity Convention* and the 1994 *United Nations Convention to Combat Desertification* ('*UNCCD*') were both perceived as dynamic institutions capable of exercising 'considerable influence on international negotiations and cooperation'[81] and 'significant normative influence in the convention process'.[82] By contrast, the secretariat to the 1992 *UNFCCC* was regarded as operating within a straitjacket imposed by the parties to the *UNFCCC*, leaving little room for a 'proactive role or [for] autonomous initiatives'.[83]

Unsurprisingly, those MEAs benefiting from a more dynamic secretariat such as the 1992 *Biodiversity Convention* would appear to have engaged to a much greater extent in fostering institutional cooperation between MEAs, as will be demonstrated below. Although the linkages and examples of institutional interaction between MEAs are now numerous, this article will focus primarily on the formal linkages between MEAs and MEA institutions. Moreover, only three categories of institutional linkage will be explored. The first category comprises the formal agreements often referred to as Memoranda of Understanding

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78 It should be noted that the legal basis and structure of secretariats can be divided into four broad categories. First, secretariats which are provided by a UN body, such as the International Maritime Organization ('IMO'), which administers 50 instruments relating to shipping safety and marine environmental protection, or the United Nations Educational, Scientific and Cultural Organization ('UNESCO'), responsible for administering the *Convention for the Protection of the World Cultural and Natural Heritage*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975). Second, secretariats, which are administered by United Nations Environment Programme ('UNEP'); UNEP provides the secretariat for nine global conventions and protocols and eight regional conventions and protocols including the 1973 *CITES*, the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, opened for signature 22 March 1989, 1673 UNTS 57 (entered into force 5 May 1992) ('*Basel Convention*'), and the *CMS*. Third, secretariats that are institutionally linked with UNEP but which operate independently of it such as the *UNFCCC* and the *UNCCD*. Finally, there are those secretariats that operate entirely independently of the UN such as those that administer the *Antarctic Treaty* and the *OSPAR Convention*.

79 Steffan Bauer, Per-Olf Busch and Bernd Siebenhüner, 'Treaty Secretariats in Global Environmental Governance' in Frank Bierman, Bernd Siebenhüner and Anna Schreyögg, *International Organizations in Global Environmental Governance* (Routledge, 2009) 174, 174.

80 See generally Frank Bierman and Bernd Siebenhüner (eds), *Managers of Global Change: The Influence of International Environmental Bureaucracies* (MIT Press, 2009) 225–318.

81 Bernd Siebenhüner, 'The Biodiversity Secretariat: Lean Shark in Troubled Waters' in Frank Bierman and Bernd Siebenhüner (eds), *Managers of Global Change: The Influence of International Environmental Bureaucracies* (MIT Press, 2009) 265, 284.

82 Steffan Bauer, 'The Desertification Secretariat: A Castle Made of Sand' in Frank Bierman and Bernd Siebenhüner (eds), *Managers of Global Change: The Influence of International Environmental Bureaucracies* (MIT Press, 2009) 293, 300.

83 Per-Olf Busch, 'The Climate Secretariat: Making a Living in a Straitjacket' in Frank Bierman and Bernd Siebenhüner (eds), *Managers of Global Change: The Influence of International Environmental Bureaucracies* (MIT Press, 2009) 245, 261.

('MOU') between MEAs. The second category consists of three examples of institutionally integrated management, cooperative arrangements that go beyond the typical MOU but do not yet amount to full legal or nested arrangements. In the third category the focus will be on the connections and linkages that are being developed by MEA compliance mechanisms or in the more general context of compliance.

A *Formal Institutional Cooperation: Memoranda of Understanding*

The conclusion of a formal agreement or MOU between environmental regimes or institutions provides a clear external demonstration of linkage between those regimes or institutions. An ever increasing number of MEAs are adopting formal agreements with a growing number of partners. For example, the 1992 *Biodiversity Convention* has concluded 157 agreements to date with partners that include international organisations, universities, non-governmental organisations, botanical gardens and 18 other MEAs. The 1973 *CITES* has concluded a rather more modest 14 partnership agreements, four of which are with other MEAs. However, this trend is not ubiquitous; the 1959 *Antarctic Treaty*, for example, has entered into no official partnership agreements. Moreover, partnership agreements vary considerably in their objects and purposes; some are intended to provide for little more than the exchange of information and the facilitation of the mutual exchange of observers at meetings, whereas others establish joint work programmes and create liaison positions.

One important question, yet to be definitively determined, is whether these agreements are legally binding or whether they are merely political or administrative in nature. Whilst a minority of agreements expressly stipulate that they are *not* intended to be legally binding,[84] the vast majority are silent as to their status. Some commentators have taken the view that MOUs can *never* be legally binding,[85] whereas others suggest that they only *tend* to be legally non-binding.[86] In fact, the focus on the term 'MOU' is rather misleading. Not all agreements between MEAs are described as MOUs; several agreements between the 1992 *Biodiversity Convention* and other MEAs are described as 'memoranda of cooperation' ('MOC') and the 1971 *Ramsar Convention* uses the

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[84] The Memoranda of Understanding ('MOU') between the 1982 Commission for the Conservation of Antarctic Marine Living Resources ('CCAMLR') and the Western and Central Pacific Fisheries Commission ('WCPFC'), which entered into force in January 2009 expressly states that it 'does not contain legally binding commitments': Commission for the Conservation of Antarctic Marine Living Resources ('CCAMLR'), 'Report of the Twenty-Seventh Meeting of the Commission' (Report No CCAMLR-XXVII, Commission for the Conservation of Antarctic Marine Living Resources, November 2008) annex 6 ('*Memorandum of Understanding between CCAMLR and WCPFC*'). Similarly, the proposed MOU between the Commission for the Conservation of Antarctic Marine Living Resources and the Agreement on the Conservation of Albatrosses and Petrels is also expressly intended to be non-binding: Commission for the Conservation of Antarctic Marine Living Resources, 'Report of the Twenty-Eighth Meeting of the Commission' (Report SC-CAMLR-XXVIII, Commission for the Conservation of Antarctic Marine Living Resources, November 2009) annex 8 ('*Memorandum of Understanding between CCAMLR and ACAP*').

[85] Wolfrum and Matz, above n 19, 173.

[86] Ulfstein, above n 66, 887.

nomenclature of 'cooperative agreement' in addition to both MOU and MOC.[87] The title of the agreement is thus of limited assistance in determining its legal status. More significantly, many agreements between MEAs contain an articulation of apparently formal obligations in connection with information exchange or participation in joint activities, as well as detailed provisions relating to duration, modification and termination of the agreement. In at least two cases, the agreement includes a formal dispute settlement clause.[88] Two further agreements appear to include a clause which purports to limit the liability and agency capacity of each MEA.[89] To the untrained, and indeed the trained eye, many such agreements appear to wear (if not flaunt) some of the trappings of a legally binding instrument. Nevertheless, it should be noted that even in the event that an agreement is legally binding, the obligations contained therein are unlikely to extend beyond the institutions of the MEA, including — possibly — the COP. Such agreements are thus unlikely to impose direct legal obligations on individual states party to the relevant MEA in the absence of an express provision to the contrary.

The agreements highlighted below to demonstrate the nature and extent of institutional linkage and formal cooperation among MEAs represent only a snapshot of the hundreds of agreements which have been entered into to date. It is not intended, and indeed, it is not possible within the confines of this article, to

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87 The Ramsar Convention on Wetlands, *Memoranda of Understanding and Cooperation with Other Conventions and International Organizations* (23 May 2011) Ramsar <http://www.ramsar.org/cda/en/ramsar-documents-mous/main/ramsar/1-31-115_4000_0 _>.

88 See *Memorandum of Cooperation between the Food and Agriculture Organization of the United Nations and the Secretariat of the Convention on Biological Diversity on Cooperation between the Secretariat of the Convention on Biological Diversity and the Secretariat of the International Plant Protection Convention* (25 February 2004) <http://www.cbd.int/doc/agreements/agmt-fao-ippc-2004-02-25-moc-web-en.pdf>; *Memorandum of Understanding between the Secretariat of the Pacific Regional Environment Programme and the Secretariat of the Convention on Biological Diversity* (16 February 2009) <http://www.cbd.int/doc/agreements/agmt-sprep-2009-02-16-mou-web-en.pdf>. Both of these agreements contain dispute resolution clauses.

89 Article 3(A) of the 2005 MOC between the CBD and the *Ramsar Convention* stipulates that:

> this MOC constitutes an expression of a shared objective and vision. However, each party's actions will be considered to be that party's sole and separate action, for all purposes, and neither party shall claim to be acting on behalf of, or as agent for, the other party to this MOC.

See *Memorandum of Cooperation between The Convention on Wetlands (Ramsar, Iran, 1971) and the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region ('Cartagena Convention')* (27 July 2005) Ramsar <http://www.ramsar.org/cda/en/ramsar-documents-mous-memorandum-of-21243/main/ramsar/1-31-115%5E21243_4000_0__>.

Similarly, art 5(c) of the 2002 MOU between the Secretariat of CITES and the Secretariat of the *CMS* stipulates that '[n]either secretariat shall be legally or financially liable in any way for activities carried out jointly or independently': *Memorandum of Understanding between the Secretariat of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (*CITES *Secretariat) and the Secretariat of the Convention on the Conservation of Migratory Species of Wild Animals (*CMS *Secretariat)* (December 2002) CITES <http://www.cites.org/common/disc/sec/CITES-CMS.pdf>.

provide a comprehensive overview of these agreements.[90] Instead, a small number of agreements, which have been divided into three categories according to their objects and purposes, will be explored in order to demonstrate the possibilities and the limitations of these agreements as a mechanism for managing the challenges and opportunities associated with the fragmentation of international environmental law.

1 *Agreements and Other Cooperative Arrangements Based on Overlapping Subject Matter*

The largest category of formal agreements between MEAs comprises those predicated on synergies or overlaps in subject matter. As noted above, the most active MEA with respect to the adoption of agreements and the creation of cooperative arrangements is the 1992 *Biodiversity Convention*. The secretariat to the *Biodiversity Convention* is provided with an extensive mandate to establish appropriate forms of cooperation under art 23(4) of the *Convention*; this role has been reinforced in a number of decisions adopted under the *Convention*[91] and in the *Strategic Plan for the Convention on Biological Diversity*.[92] The *Biodiversity Convention* has entered into formal cooperative arrangements with more than a dozen wildlife MEAs as well as a multi-agency agreement with five other biodiversity instruments, which is the subject of further discussion below.[93] The majority of these agreements are similar in scope, extent and format. They all provide for obligations related to information exchange, normally through utilisation of the Biodiversity Convention Clearing House, for mutual participation at relevant meetings, and for the development of joint work programmes. All agreements provide for clauses governing the duration, modification and termination of agreements. One agreement, the 1998 MOC

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[90] See United Nations Environment Programme World Conservation Monitoring Centre, 'Synergies and Cooperation: A Status Report on Activities Promoting Synergies and Cooperation between Multilateral Environmental Agreements, in Particular Biodiversity-Related Conventions and Related Mechanisms' (Status Report, United Nations Environment Programme, May 2004).

[91] See *Cooperation with Other Biodiversity Related Conventions* (COP 2 Decision II/13, Convention on Biological Diversity, 6–17 November 1995) <http://www.cbd.int/decision/cop/?id=7086>; *The Relationship of the Convention on Biological Diversity with the Commission on Sustainable Development and Biodiversity Related Conventions, Other International Agreements and Processes of Relevance* (COP 4 Decision IV/15, Convention on Biological Diversity, 4–15 May 1998) <http://www.cbd.int/decision/cop/?id=7138>; *Cooperation with Other Organizations, Initiatives and Conventions* (COP 6 Decision VI/20, Convention on Biological Diversity, 7–19 April 2002) <http://www.cbd.int/decision/cop/?id=7194>; *Cooperation with Other Conventions, International Organizations and Initiatives*, UN Doc UNEP/CBD/COP/DEC/VII/26 (COP 7 Decision VII/26, Convention on Biological Diversity, 13 April 2004); *Cooperation among Multilateral Environmental Agreements and Other Organizations*, UN Doc UNEP/CBD/COP/DEC/IX/27 (COP 9 Decision IX/27, Convention on Biological Diversity, 9 October 2008); *Cooperation with Other Conventions and International Organizations and Initiatives*, UN Doc UNEP/CBD/COP/DEC/X/20 (COP 10 Decision X/20, Convention on Biological Diversity, 29 October 2010). There are a further 58 decisions on substantive topics that call for cooperation between the CBD and other biodiversity-focused MEAs. They are all available online at <http://www.cbd.int/cooperation/decisions.shtml>.

[92] See Convention on Biological Diversity, *COP 6 Decision VI/26: Strategic Plan for the Convention on Biological Diversity* <http://www.cbd.int/decision/cop/?id=7200> Goal 1: 1.2, 1.4.

[93] See Part III(A)(2).

between the *Biodiversity Convention* and the 1996 *UNCCD*,[94] is notable in that it goes well beyond the scope of the other agreements with respect to the obligations it imposes on both MEAs. For example, it requires the parties to begin the process of developing a harmonised approach to reporting, and encourages further integration of their respective secretariats. Moreover, the MOC recommends that the parties explore mechanisms to enhance links and processes in New York and other UN centres in order to provide for appropriate representation at relevant meetings. Other proposals contained within the MOC include the establishment of two liaison staff in New York that are employed by the *UNCCD* but report to both conventions, and the creation of a closed list forum designed to improve interaction and exchange of information among the secretariats. As noted above, a recent study of international environmental bureaucracies concluded that both the *Biodiversity Convention* Secretariat and, more particularly, the *UNCCD* Secretariat were dynamic and influential actors in their own right[95] and it is highly likely that the exceptional scope of this particular agreement is a result of the energetic nature of both institutions.

The cooperative agreements entered into by other MEAs such as the 1973 *CITES*, the 1971 *Ramsar Convention* and the 1979 *CMS* are all expressed in terms similar to those described above. The 1971 *Ramsar Convention* in particular has developed extensive institutional links with 21 MEAs[96] and the importance of partnership agreements and joint work plans was endorsed in the recently adopted 2009–15 *Ramsar Strategic Plan*.[97] Similarly, seven of the 30 *CMS* partners are MEAs and close cooperation 'with relevant multilateral environmental agreement and key partners to maximise synergies and avoid duplication' is a key component of the 2006–11 *CMS Strategic Plan*.[98] The consolidation of existing partnerships, rather than the adoption of new ones, through the development of renewable joint work programmes is an identified key priority area for the *CMS*.[99] The 1973 *CITES* has entered into fewer partnership agreements, and only two have been concluded with MEAs on the basis of overlapping subject matter: one in 1996 relating to the *Biodiversity*

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94 *Memorandum of Co-Operation between the Secretariat of the Convention on Biological Diversity (CBD) and the Secretariat of the United Nations Convention to Combat Desertification (CCD)* (31 July 1998) Convention on Biological Diversity <http://www.cbd.int/doc/agreements/agmt-unccd-1998-07-31-moc-web-en.pdf>.

95 See above nn 80–2 and accompanying text.

96 The full list of Ramsar partners are available online at: The Ramsar Convention on Wetlands, *List of Contracting Parties* (21 April 2011) Ramsar <http://www.ramsar.org/cda/en/ramsar-about-parties/main/ramsar/1-36-123_4000_0__>.

97 *Ramsar Strategic Plan*, above n 74, 14–15.

98 Conference of the Parties, Convention on Migratory Species, *CMS Strategic Plan 2006–11*, UN Doc UNEP/CMS/Resolution 8.2 (20–25 November 2005) 16.

99 Convention on Migratory Species, *Cooperation with Other Bodies*, UN Doc UNEP/CMS/Resolution 9.6 (Resolution 9.6 adopted at the 9th Meeting of the Conference of the Parties, Rome, 1–5 December 2008). See also Convention on Migratory Species, *Cooperation with Other Bodies and Processes* (Resolution 7.9 adopted at the Seventh Meeting of the Conference of the Parties, Bonn, 18–24 September 2002); Convention on Migratory Species, *Cooperation with Other Conventions*, UN Doc UNEP/CMS/Resolution 8.11 (Resolution 8.11 adopted at the Eighth Meeting of the Conference of the Parties, Nairobi, 20–25 November 2005). An overview of the *CMS* cooperative arrangements is provided in: Conference of the Parties, Convention on Migratory Species, *Report on CMS Activities with Partners*, UN Doc UNEP/CMS/Conf.9.23 (5 November 2008).

Convention[100] and one in 2002 relating to *CMS*.[101] Notably the *CITES/CMS* MOU was reaffirmed by 2004 *CITES* Resolution 13.3 within which the parties directly requested that *CITES* initiatives should support the ongoing regional collaborative activities under the auspices of the *CMS* in respect of the Saiga antelope, marine turtles, the great white shark, whale sharks and sturgeons.[102] Moreover, the conclusion of partnership arrangements with suitable MEAs and other organisations has been included as a central component of the 2008–13 *CITES Strategic Vision*.[103]

The adoption of partnership agreements is not exclusively the preserve of biodiversity MEAs, although these conventions undeniably dominate this category of cooperative arrangements. In 2006, the COP to the *Basel Convention*, *Stockholm Convention*[104] and *Rotterdam Convention*[105] ('*Basel*, *Stockholm* and *Rotterdam Conventions*' or '*Chemicals Conventions*') all adopted decisions establishing a joint working group with the task of making recommendations for improving cooperation and coordination between these instruments in the area of chemicals and hazardous waste management.[106] This process began what is arguably evolving into the most successful cooperative arrangement to date, which will be discussed further below. Similarly, RFMOs are establishing institutional cooperative links for the primary purpose of exchanging information and knowledge. For example, the 1982 Commission for the Conservation of Antarctic Marine Living Resources ('CCAMLR') has recently adopted an MOU with the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean[107] and has also agreed to conclude an MOU with the secretariat of the

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100 *Memorandum of Co-Operation between the Secretariat of Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington, DC, 1973) and the Secretariat of the Convention on Biological Diversity (Nairobi, 1992)* (23 March 1996) <http://www.cites.org/common/disc/sec/CITES-CBD.pdf>.

101 *Memorandum of Understanding between the Secretariat of Convention on International Trade in Endangered Species of Wild Fauna and Flora and the Secretariat of the Convention on Migratory Species* (18 September 2002) <http://www.cites.org/common/disc/sec/CITES-CMS.pdf>.

102 Convention on International Trade in Endangered Species, *Cooperation and Synergy with the CMS* (Resolution Conf 13.3 adopted at the 13th Meeting of the Conference of the Parties, Bangkok, 2–14 October 2004).

103 Convention on International Trade in Endangered Species, *Strategic Vision 2008–13* (Resolution Conf 14.2 adopted at the 14th Meeting of the Conference of the Parties, The Hague, 3–15 June 2007) objectives 3.3, 3.5.

104 *Stockholm Convention on Persistent Organic Pollutants*, opened for signature 22 May 2001, 2256 UNTS 119 (entered into force 17 May 2004).

105 *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*, opened for signature 10 September 1998, 2244 UNTS 337 (entered into force 24 February 2004).

106 See Ad Hoc Joint Working Group on Enhancing Cooperation and Coordination among the Basel, Rotterdam and Stockholm Conventions, *Chronology of the Consideration by Parties to the Basel, Stockholm and Rotterdam Conventions on Cooperation and Coordination between the Three Conventions*, UN Doc BC-RC-SC/AHJWG.1/INF/4 (13 February 2007) <http://ahjwg.chem.unep.ch/documents/1stmeeting/i04e.pdf> annex ('Decision VIII/8 on Cooperation and Coordination between the Basel, Rotterdam and Stockholm Conventions'; 'Decision SC-2/15 on Synergies'; 'Decision RC-3/8 on Cooperation and Coordination between the Rotterdam, Basel and Stockholm Conventions').

107 *Memorandum of Understanding between CCAMLR and WCPFC*, above n 84.

Agreement on the Conservation of Albatrosses and Petrels.[108] One of the most extensive cooperative institutional networks is the Regional Fishery Body Secretariats Network ('RSN') created in 2005.[109] This is an informal network of about 35 fishery secretariats, which focuses on information exchange and administration. The RSN has no decision-making powers and it has been expressly recognised 'that the policy making function and mandate essentially rests with the members of the organizations represented'.[110] The informal network met in 2007[111] and 2009[112] and provides a forum for fishery secretariats to exchange information, experiences and ideas connected to all aspects of fishing but with particular emphasis on Illegal, Unregulated and Unreported ('IUU') fishing; a model example of cognitive interaction.

Finally, it is worth noting that some MEAs have recognised the importance of cooperation with other MEAs but, rather than adopting cooperative arrangements with like-minded MEAs, have taken *unilateral* formal steps to promote cooperation through the adoption of formal decisions or resolutions. For example, the COP to the 1989 *Basel Convention* has adopted a number of decisions emphasising the close relationship in terms of subject matter between itself and the International Maritime Organization ('IMO').[113] Decision IX/12 (2008) requested that the Secretariat to the *Basel Convention* keep the IMO informed in connection with relevant developments taking place under the auspices of the *Basel Convention*, encouraged cooperation between the IMO and the Secretariat for the *Basel Convention*, with special reference to the implementation of *International Convention for the Prevention of Pollution from*

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108 *Memorandum of Understanding between CCAMLR and ACAP*, above n 84.

109 The Regional Fishery Body Secretariats Network ('RSN') replaces the FAO Regional Fisheries Bodies Group, which was established in 1999. The change of name was agreed in 2005: Regional Fishery Bodies, 'Report of the Fourth Meeting of Regional Fishery Bodies' (Report No FIPL/R778, Regional Fisheries Bodies, 14–15 March 2005) <ftp://ftp.fao.org/docrep/fao/008/a0078e/a0078e00.pdf> [5]–[7].

110 Ibid [5].

111 See Regional Fishery Body Secretariats Network, 'Report of the First Meeting of Regional Fishery Body Secretariats Network' (Report No FIEL/R837, Regional Fisheries Bodies, 12–13 March 2007) <ftp://ftp.fao.org/docrep/fao/010/a1184e/a1184e00.pdf>.

112 See Regional Fishery Body Secretariats Network, 'Report of the Second Meeting of Regional Fishery Body Secretariats Network' (Report No FIEL/R908, 9–10 March 2009) <http://www.fao.org/docrep/012/i0993e/i0993e00.htm>.

113 See Basel Convention, *Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal on Its Eighth Meeting*, 8th mtg, Agenda Item 12, UN Doc UNEP/CHW.8/16 (5 January 2007) annex I, 35 ('Decision VIII/9: Cooperation between the Basel Convention and the International Maritime Organization'); Basel Convention, *Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal on Its Ninth Meeting*, 9th mtg, UN Doc UNEP/CHW.9/39 (27 June 2008) annex I, 39 ('Decision IX/12: Cooperation between the Basel Convention and the International Maritime Organization'). See more generally, Basel Convention, *Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal on Its Eighth Meeting*, 8th mtg, Agenda Item 12, UN Doc UNEP/CHW.8/16 (5 January 2007) annex I, 34 ('Decision VIII/7: International Cooperation and Coordination'); Basel Convention, *Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal on Its Ninth Meeting*, UN Doc UNEP/CHW.9/39 (5 January 2007) annex I, 38 ('Decision IX/11: International Cooperation and Coordination').

Ships ('*MARPOL 73/78*'),[114] and asked the open-ended working group to develop recommendations designed to identify and address gaps not covered by either the *Basel Convention* or IMO conventions.[115] More specifically, Decision IX/30, also adopted in 2008, addressed the relationship between the *Basel Convention* and the IMO in the context of ship dismantling, and made detailed recommendations to the IMO on matters of substance, as well as suggestions as to the process of consultation and collaboration.[116] A similar approach has been taken by the parties to the *Antarctic Treaty* in respect of their interaction with the IMO. Whilst in the past the *Antarctic Treaty* had deliberately avoided direct institutional interaction with MEAs and other institutions outside of the *Antarctic Treaty* system, issues such as the ban on the use and carriage of heavy grade fuels by vessels and the development of the Polar Code, has made cooperation with the IMO not only desirable but inevitable.[117] In response to what essentially amounts to a globalisation of Antarctic issues, the parties to the 1959 *Antarctic Treaty* adopted Resolution 5, which establishes a system of responsibility and procedure for keeping the parties informed of the progress of Antarctic initiatives within the IMO.[118]

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114 *International Convention for the Prevention of Marine Pollution from Ships*, opened for signature 11 February 1973, 1340 UNTS 184 (entered into force 2 October 1983), as amended by *Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973*, opened for signature 1 June 1978, 1340 UNTS 62 (entered into force 2 October 1983).

115 Decision IX/12: Cooperation between the Basel Convention and the International Maritime Organization, UN Doc UNEP/CHW.9/39, 39.

116 Basel Convention, *Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal on Its Ninth Meeting*, UN Doc UNEP/CHW.9/39 (27 June 2008) annex I, 56 ('Decision IX/30: Dismantling of Ships'). Representatives of the IMO, *Basel Convention* and International Labour Organization ('ILO') participated in three joint meetings between 2005 and 2008 of the Working Group on Ship Scrapping: Joint ILO/IMO/BC Working Group on Ship Scrapping, 'Report of the Working Group' (Joint Report No ILO/IMO/BC WG 1/8, Joint Working Group on Ship Scrapping, 18 February 2005); Joint ILO/IMO/BC Working Group on Ship Scrapping, 'Report of the Joint Working Group' (Joint Report No ILO/IMO/BC WG 2/11, Joint Working Group on Ship Scrapping, 14 December 2005); Joint ILO/IMO/BC Working Group on Ship Scrapping, 'Final Report' (Joint Report No ILO/IMO/BC WG 3/6, Joint Working Group on Ship Scrapping, 31 October 2008). Resolution 2 adopted at the conclusion of the 2009 International Conference for the Safe and Environmentally Sound Recycling of Ships acknowledged the contribution of the ILO and the *Basel Convention* to the development of the Convention: see International Maritime Organization, *Recycling of Ships* <http://www.imo.org/ourwork/environment/shiprecycling>.

117 Karen N Scott, 'Safety of Shipping in the Southern Ocean' (2010) 16 *Journal of International Maritime Law* 21, 43–4.

118 Antarctic Treaty Consultative Meeting, 'Co-Ordination among Antarctic Treaty Parties on Antarctic Proposals under Consideration in the IMO' (Resolution 5 (2010) adopted at ATCM Meeting XXXIII-CEP XIII, Punta del Este, 14 May 2010). The Resolution recommends that 'when a Party or group of Parties initiates a proposal that results in a referral to the IMO, that initiating Party or group of Parties' bears responsibility for reporting to the Antarctic Treaty Consultative Meetings ('ATCM') and intersessionally on the progress of that proposal within the IMO. That party is also made responsible for informing the ATCM when 'further action may need to be considered in order to further the objectives of the ATCM'.

2 *Agreements and Other Cooperative Arrangements Based on Intersecting Subject Matter*

In contrast to the cooperative agreements between MEAs based on overlapping subject matter, the number of agreements predicated on intersecting subject matter is much smaller. One high profile example of such an agreement is the Joint Liaison Group ('JLG'), which was formed in 2001 between the secretariats of the 1992 *Biodiversity Convention*, the 1992 *UNFCCC* and the 1996 *UNCCD*.[119] The JLG was established as an informal forum for the exchange of information and to facilitate the development of options for further cooperation. The group has met nine times since 2001 and has developed joint work programmes on forests and the biodiversity of dry and sub-humid lands.[120] However, its capacity to make policy decisions is institutionally constrained. Moreover, at the ninth meeting of the JLG in 2009, it was noted that 'there remains a disconnect between the roles and mandates given to the JLG by each convention' and that this disconnect has limited the extent to which tasks devolved to the JLG have been successfully implemented.[121] In particular, it was pointed out that only those activities that are mandated by the governing body of each convention could be implemented by the JLG.[122] This disconnect may result, at least in part, from the fact that in reality these three instruments have quite different aims and objectives and, although their subject matter intersects, it does not necessarily overlap.

3 *Agreements and Other Cooperative Arrangements Based on Functional Synergy*

The final category of cooperative arrangements exploits synergies in function rather than subject matter. The term function is used here to refer to the tools and mechanisms used by an MEA to achieve its objects and purposes. Regulating functions might include regulating trade in the subject matter of the treaty, establishing catch limits and licensing vessels or other users such as importers and exporters. It is of course not always possible to draw a distinction between function and subject matter; the networks and other cooperative arrangements between RFMOs for example exploit commonalities in function — utilisation of catch limits, licensing requirements, catch documentation schemes etc — as well as subject matter: fish. Similarly, the cooperative arrangement developed by the *Basel*, *Stockholm* and *Rotterdam Conventions* noted above, and to be discussed further below, might also be categorised as a functional arrangement

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119 See Conference of the Parties, Convention on Biological Diversity, *Report of the Sixth Meeting of the Conference of the Parties to the Convention on Biological Diversity*, UN Doc UNEP/CBD/COP/6/20 (7–9 April 2002) annex I, 206 ('*Cooperation with the United Nations Convention on Climate Change and the Convention to Combat Desertification*').

120 Further details are provided online at: Convention on Biological Diversity, *Activities* (6 December 2007) <http://www.cbd.int/cooperation/activities.shtml>.

121 Joint Liaison Group of the Convention on Biological Diversity, the United Nations Convention to Combat Desertification, and the United Nations Framework Convention on Climate Change, 'Report of the Meeting of the Joint Liaison Group of the Convention on Biological Diversity, the United Nations Convention to Combat Desertification, and the United Nations Framework Convention on Climate Change' (Report, Joint Liaison Group, 14 May 2009) 3 [11] <http://www.unccd.int/publicinfo/jlg/jlg-09-report-en.pdf>.

122 Ibid.

notwithstanding the close connection between the subject matter of each regime.[123]

However, a small number of cooperative agreements have been adopted by MEAs with very different objects and purposes but which demonstrate significant functional similarities. An unambiguous example of such an agreement is the 2002 MOU among the secretariats of the 1973 *CITES*, the 1987 *Montreal Protocol* and the 1989 *Basel Convention*.[124] This MOU seeks to capitalise on the synergies in functions between these very different instruments — they all to a greater or lesser extent seek to regulate trade and the transport and transfer of wildlife, ozone depleting substances and hazardous waste — in order to improve compliance with all three instruments. The MOU provides for the exchange of information, mutual observation of meetings, joint training (particularly for customs officers, the police and the judiciary) and sharing techniques relating to gathering and analysing information. The MOU permits each secretariat to seek information held in the databases maintained by each of the other conventions but requires the consent of the relevant secretariat before that information can be released. Finally, the MOU obliges each secretariat to nominate a liaison person responsible for the implementation of the MOU.[125] The purpose of this arrangement is primarily cognitive interaction; each regime learns from the experiences and initiatives of the other with a view to improving the effectiveness of all three regimes.

B *Institutional Integrated Management*

The second category of institutional cooperation comprises what is described here as institutional integrated management. Examples of cooperation within this category go beyond what is required by the standard MOU yet do not amount to fully nested arrangements. Institutional integrated management requires institutions to engage in broader and deeper cooperative activities. Three examples are identified in order to demonstrate institutional integrated

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123 This conclusion would appear to be supported by the adoption of the *Prague Declaration on Enhancing Cooperation among Chemical-Related Multilateral Environmental Agreements* by the parties to the 1987 *Montreal Protocol* in 2004. Amongst other things, through this *Declaration*, the parties affirmed their commitment to seeking alliances with other multilateral instruments like the *Basel*, *Stockholm* and *Rotterdam Conventions* 'to contribute to an effective strategic approach to international chemicals management'. See the *Prague Declaration on Enhancing Cooperation among Chemicals-Related Multilateral Environmental Agreements* (2004) reproduced in annex V of the Meeting of the Parties, United Nations Environment Programme, *Report of the Executive Director to the Sixteenth Meeting of the Parties to the Montreal Protocol*, UN Doc UNEP/OzL.Pro.16/2 (13 September 2004). The synergies and need to continue cooperation between the *Montreal Protocol* and the *Basel Convention* were recently noted at the 21st meeting of the parties to the *Montreal Protocol* in 2009: *Report of the Twenty-First Meeting of the Parties to the Montreal Protocol on Substances That Deplete the Ozone Layer*, UN Doc UNEP/OzL.Pro.21/8 (21 November 2009) 28 [207].

124 *Memorandum of Understanding among the Secretariat of the Basel Convention, on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (SBC) and the Secretariat of the Vienna Convention for the Protection of the Ozone Layer and the Montreal Protocol on Substances That Deplete the Ozone Layer (the Ozone Secretariat) and the Secretariat of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)* (26 April 2002) <http://www.cites.org/common/disc/sec/CITES-BASEL-OZONE.pdf>.

125 Ibid.

management: the Biodiversity Liaison Group ('BLG'); the Kobe process and joint activities of the tuna RFMOs; and the 2010 extraordinary meeting of the *Chemicals Conventions*.

1 *The Biodiversity Liaison Group*

The BLG was an initiative of the 2004 Conference of Parties to the 1992 *Biodiversity Convention*. Decision VII/26 urged 'further enhanced cooperation between the *Convention on Biological Diversity* and all relevant international conventions' and requested that the Executive Secretary 'invite the secretariats of the other four biodiversity conventions (*CITES*, *Ramsar*, *CMS* and the *World Heritage Convention*) to form a liaison group to enhance coherence and cooperation in their implementation'.[126] The liaison group was formalised in 2006 with the adoption of the *Memorandum of Cooperation between Agencies to Support the Achievement of the 2010 Biodiversity Target*[127] and expanded to include a sixth member: the Secretariat of the 2001 *International Treaty on Plant Genetic Resources for Food and Agriculture*.[128] The BLG normally meets annually at chief officers level[129] and meetings are convened by the 1992 *Biodiversity Convention*.[130] The BLG has identified two priority areas of focus, which comprise the 2010 *Biodiversity Target* and the *Global Partnership on Biodiversity*.[131] Overall, the achievements of the BLG are thus far rather modest. The focus to date has largely been confined to integrating the activities of all six biodiversity conventions into current initiatives rather than developing new projects or programmes. For example, the BLG agreed in 2005 to adopt biodiversity indicators for all five biodiversity conventions that are consistent with the framework of goals and targets adopted by the *Biodiversity Convention* in 2004,[132] in order to promote coherence among the conventions in both policy

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126 Conference of the Parties, Convention on Biological Diversity, *Report of the Seventh Meeting of the Conference of the Parties to the Convention on Biological Diversity*, UN Doc UNEP/CBD/COP/7/21 (13 April 2004) annex, 177 ('Decision VII/26: Cooperation with Other Conventions and International Organizations and Initiatives'). The mandate of the Biodiversity Liaison Group was renewed in 2008: Conference of the Parties, Convention on Biological Diversity, *Report of the Conference of the Parties to the Convention on Biological Diversity on the Work of Its Ninth Meeting*, UN Doc UNEP/CBD/COP/DEC/IX/27 (9 October 2008) annex I, 193 ('Decision IX/27: Cooperation among Multilateral Environment Agreements and Other Organizations').

127 *Memorandum of Cooperation between Agencies to Support the Achievement of the 2010 Biodiversity Target* (15 September 2006) <http://www.cbd.int/doc/agreements/agmt-hoatf-cites-2006-10-15-moc-web-en.pdf>.

128 *International Treaty on Plant Genetic Resources for Food and Agriculture*, opened for signature 3 November 2001, 2400 UNTS 303 (entered into force 26 June 2004).

129 It should be noted that no meeting took place in 2007.

130 This was agreed at the second meeting of the Biodiversity Liaison Group: Liaison Group of the Biodiversity-Related Conventions, 'Minutes of the Liaison Group Meeting of the Biodiversity-Related Conventions' (Minutes, Biodiversity Liaison Group, 16 August 2004) 1 <http://www.cbd.int/cooperation/BLG-2-rep-final-en.doc>.

131 Ibid 2.

132 See Conference of the Parties to the Convention on Biological Diversity, *Strategic Plan: Future Evaluation of Progress*, UN Doc UNEP/CBD/COP/DEC/VII/30 (Decision VII/30 adopted at the Seventh Meeting of the Conference of Parties to the Convention on Biological Diversity, Kuala Lumpur, 13 April 2004) <http://www.cbd.int/doc/decisions/cop-07/cop-07-dec-30-en.pdf>.

development and implementation.[133] The most tangible achievement of the BLG to date has been their development of an interactive CD-ROM on the application of the *Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity*[134] within all six biodiversity conventions. This project was initiated in 2006[135] and completed in 2008. The CD-ROM contains all relevant decisions adopted by the six conventions connected to the *Addis Ababa Principles and Guidelines* and, most importantly, includes guidelines agreed to jointly by all six conventions for each principle.[136]

Although the focus on strengthening participation in existing projects is hardly surprising given the large number of joint and other collaborative programmes that are currently underway involving all six conventions, the lack of progress in other areas is disappointing. Whilst the six conventions have established a joint website,[137] there is little evidence of further administrative integration. This is despite the fact that ideas for closer cooperation, such as harmonised reporting, joint representation at non-biodiversity meetings and joint missions, have been discussed on a regular basis at meetings,[138] most recently at the tenth meeting of the Conference of the Parties to the *Biodiversity Convention*, held in Nagoya, Japan in October 2010.[139] One obstacle to further integration at the international level appears to be the fact that the national focal points for each convention are often in different government departments, which makes coherent implementation at both the national and international level a challenge.[140] Moreover, there is also evidence of an apparent level of tension within the BLG between the six biodiversity conventions resulting from differences in priorities and resources. For example, at the Fifth Meeting in 2006, the representative for *CITES* 'recalled that the 2010 *Biodiversity Target* was agreed within the

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133 Liaison Group of the Biodiversity-Related Conventions, 'Third Meeting of the Biodiversity Liaison Group' (Meeting Report No BLG-3/REP, Biodiversity Liaison Group, 8 June 2005) 3 [16] <https://www.cbd.int/cooperation/BLG-3-rep-final-en.doc>. For further information on the Biodiversity Indicators Partnership which extends beyond the six biodiversity conventions, see *Biodiversity Indicators Partnership* (10 April 2011) <http://www.bipindicators.net/>.

134 See Conference of the Parties to the Convention on Biological Diversity, *Sustainable Use (Article 10)*, UN Doc UNEP/CBD/COP/DEC/VII/12 (Decision VII/12 adopted at the Seventh Meeting of the Conference of the Parties to the Convention on Biological Diversity, 13 April 2004) <http://www.cbd.int/doc/decisions/cop-07/cop-07-dec-12-en.pdf>.

135 Liaison Group of the Biodiversity-Related Conventions, 'Fifth Meeting, Gland, 14 September 2006' (Draft Report No BLG-5/2, Biodiversity Liaison Group, 28 September 2006) 4 [20]–[24] ('BLG *Fifth Meeting*') <https://www.cbd.int/cooperation/BLG-5-rep-final-en.doc>.

136 The contents of the CD-ROM are also available to download online: see United Nations Environment Programme, Convention on Biological Diversity, *Sustainable Use of Biodiversity* (16 December 2010) <http://www.cbd.int/sustainable/>.

137 See Convention on Biological Diversity, *Joint Web Site of the Biodiversity Related Conventions* (29 September 2009) <http://www.cbd.int/blg/>.

138 'Third Meeting of the Biodiversity Liaison Group', above n 133, [19]–[21]; Liaison Group of the Biodiversity-Related Conventions, 'Report of the Seventh Meeting of the Biodiversity Liaison Group of the Biodiversity-Related Conventions' (Report No BLG/7/2, Biodiversity Liaison Group, 1 May 2009) 9–10 [47]–[48] <https://www.cbd.int/doc/meetings/blg/blg-07/official/blg-07-02-en.doc>.

139 See Convention on Biological Diversity, *Cooperation with Other Conventions and International Organizations and Initiatives*, UN Doc UNEP/CBD/COP/DEC/X/20 (Decision X/20 adopted at Tenth Meeting of the Conference of the Parties to the Convention on Biological Diversity, Nagoya, 29 October 2010) ('Decision X/20').

140 BLG *Fifth Meeting*, above n 135, 1.

Biodiversity Convention without prior consultation with other processes'.[141] He said 'that the 2010 Biodiversity Target as well as the process to achieve the Millennium Development Goals were not central objectives in *CITES* implementation and that the *CITES* constituency was only beginning to take these on board'.[142] Similarly, at the Sixth Meeting held in 2008, representatives of both *CITES* and the World Heritage Organisation indicated that it was difficult, if not impossible, to provide resources for the preparation of the third edition of the *Global Biodiversity Outlook*.[143] Most significantly, there appears to be no vision to take the BLG beyond the 2010 *Biodiversity Target*. Whilst the work of the BLG was undoubtedly endorsed at the *Biodiversity Convention*'s COP 10 held in October 2010,[144] it is disappointing that the six biodiversity conventions as a collective have taken so few steps to, at the very least, develop a proposed mandate to extend its operation meaningfully beyond 2010.[145]

2 *Cooperation between Tuna RFMOs and the Kobe Process*

A rather more successful example of integrated institutional management is demonstrated by the cooperative arrangement entered into by the five tuna RFMOs as part of the so-called Kobe process. Although informal cooperation between the RFMOs has occurred since 1999, Japan, in 2005, proposed that the five tuna RFMOs, the Inter-American Tropical Tuna Commission, the International Commission for the Conservation of Atlantic Tunas, the Indian Ocean Tuna Commission, the Western and Pacific Fisheries Commission, and the Commission for the Conservation of Southern Bluefin Tuna, convene a joint meeting. The first meeting was held in Kobe in 2007, followed by a Chairs' meeting held in San Francisco in 2008 and a second meeting of the RFMOs held in San Sebastian in 2009. Whilst an important function of the joint meetings is to provide a forum within which to share information, knowledge and experiences (which are the essentials of cognitive interaction), the primary objective is to 'go beyond reinforcing current work of the RFMOs and … to address issues at a global level where the work of the individual RFMOs is not sufficient'.[146] The Kobe process thus attempts to address the inherent structural weakness in tuna fisheries management: that 'vessels move globally from one ocean to another

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141 Ibid 2 [11].

142 Ibid.

143 Liaison Group of the Biodiversity-Related Conventions, 'Sixth Meeting, Bonn, 31 May 2008' (Minutes, Biodiversity Liaison Group, 31 May 2008) 4 [16]–[20] <https://www.cbd.int/cooperation/BLG-6-rep-final-en.doc>.

144 See Decision X/20, UN Doc UNEP/CBD/COP/DEC/X/20.

145 The Biodiversity Liaison Group and the Chairs of the Scientific Advisory Bodies of the Biodiversity-Related Conventions held a combined meeting in Paris on 20 January 2010. However, this was not a formal meeting but rather an exchange to coordinate activities amongst conventions for the International Year for Biodiversity. No formal report of the meeting has been issued. Email from Lisa Janishevski to Karen Scott, 3 August 2010 (on file with author).

146 This is the third principle identified by the chair of the second meeting: Tuna Regional Fisheries Management Organizations, 'Report of the Second Joint Meeting of Tuna Regional Fisheries Management Organizations (RFMOs)' (Report, Joint Tuna RFMOs, 29 June – 3 July 2009) 1 <http://www.tuna-org.org/trfmo2.htm> ('*Second Meeting*').

and from one resource to another, while fishing activities are managed through the respective RFMOs, which are "regional" by definition'.[147]

Although only three years into the Kobe process, the five RFMOs acting collectively have made some progress towards institutional integrated management. A joint website has been established[148] and the five RFMOs have agreed to allow access to their IUU vessel lists and licensed vessel lists centrally on this website.[149] Furthermore, the five RFMOs have agreed that their performance should be reviewed in accordance with a common methodology and that the review reports would be made available collectively on the joint website.[150] Moreover, the RFMOs have developed the so-called 'Kobe Chart', which is designed to standardise the presentation of stock assessments and to facilitate the adoption of management decisions on the basis of best scientific advice.[151] All five tuna RFMOs are now using the Kobe Chart[152] and have begun the process of developing a 'strategy matrix' for managers which will identify common 'options for meeting management targets, including if necessary, the options of ending overfishing or rebuilding overfished stocks'.[153] Compliance issues and the management of IUU fishing have dominated discussions at both meetings, as well as at the Chairs' meeting which took place in 2008.[154] Various options for improving compliance through collaborative measures have been explored, including the development of harmonised criteria for the listing and delisting of IUU vessels,[155] and the adoption of centralised and integrated compliance measures.[156]

The progress of the tuna RFMOs through the Kobe process towards integrated institutional management compares favourably with the progress (or lack thereof) of the BLG discussed above. However, it must be acknowledged that the tuna RFMOs, in contrast to the six biodiversity conventions that comprise the BLG, benefit from similar if not identical objects and purposes and very similar mandates for the management of tuna stocks. Nevertheless, just as the BLG is dominated by the question of how to progress the arrangement in order to improve biodiversity management, the parties to the Kobe process are similarly

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147 See opening statement made by Toshiro Shirasu, Director-General of Fisheries Agency of Japan: Tuna Regional Fisheries Management Organizations, 'Report of the Joint Meeting of Tuna RFMOs' (Report, Joint Tuna RFMOs, 22–26 January 2007) app 4 <http://www.tuna-org.org/meetingspast.htm>.

148 Tuna Regional Fisheries Management Organizations, *Tuna-org* (8 April 2011) <http://www.tuna-org.org/>.

149 This was agreed at the first joint meeting which took place in Kobe in 2007: Director-General of Fisheries Agency of Japan: Tuna Regional Fisheries Management Organizations, above n 147, app 14. It should be noted that the Commission for the Conservation of Southern Bluefin Tuna does not maintain an IUU vessel list that is publicly accessible.

150 Ibid app 14, annex I.

151 Ibid app 14.

152 As noted at the second joint meeting which took place in San Sebastian in 2009. See Tuna Regional Fisheries Management Organizations, *Second Meeting*, above n 146, 10.

153 Ibid 10.

154 Tuna Regional Fisheries Management Organizations, 'Report of Tuna RFMO Chairs' Meeting' (Report, Tuna RFMOs, 5–6 February 2008) <http://www.tuna-org.org/meetingspast.htm>.

155 See Tuna Regional Fisheries Management Organizations, *Second Meeting*, above n 146, 2.

156 Tuna Regional Fisheries Management Organizations, 'Report of Tuna RFMO Chairs', above n 154, 3.

focused on how to develop and further integrate the global tuna fisheries management. At the second meeting of the tuna RFMOs held in San Sebastian in 2009, the possibility of holding a ministerial meeting in conjunction with the third meeting was discussed.[157] While some participants were of the view that holding a simultaneous ministerial meeting would provide necessary additional political will to implement the Kobe process, others preferred to maintain the Kobe process outside the political framework; no consensus was reached on the proposal.[158]

3 *The 2010 Extraordinary Meeting of the* Chemicals Conventions

The final and most extensive example of integrated institutional management to date culminated in the decision to convene an extraordinary meeting of the *Basel*, *Stockholm* and *Rotterdam Conventions* in February 2010. This is the first simultaneous meeting of autonomous MEAs at the global level,[159] and provides the most visible demonstration of the evolving close cooperative arrangement between these three conventions. The origins of the Extraordinary Meeting and the broader cooperative initiatives developed by these MEAs can be found in decisions taken by all three COPs in 2006,[160] which established an ad hoc joint working group in order to make joint recommendations on mechanisms to improve cooperation between the parties whilst respecting their autonomy. The working group met three times between March 2007 and March 2008 and its third report[161] provided the basis for the adoption of the so-called synergy decisions by the three MEAs in 2008.[162] By virtue of these decisions, the three COPs initiated a detailed program of work to explore a wide range of options for enhancing cooperation and coordination among the conventions. Included among the many recommendations developed in the program of work were proposals for fostering joint implementation at the national level, promoting programmatic cooperation in the field and promoting the use of regional centres for supporting the implementation of all three conventions. The decisions also called upon the parties to improve coordination at the international level through exploring

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157 See Tuna Regional Fisheries Management Organizations, *Second Meeting*, above n 146, 2.

158 Ibid.

159 At the regional level it must be noted that a joint meeting took place between the OSPAR and the Helsinki Commissions (with responsibility for the North East Atlantic and the Baltic Sea respectively) in 2003. This led to a joint declaration (information is available online at: <http://www.helcom.fi/stc/files/MinisterialDeclarations/HelcomOsparMinDecl2003.pdf>) and a joint work programme on marine protected areas (information is available online at: <http://www.helcom.fi/stc/files/BremenDocs/Joint_MPA_Work_Programme.pdf>). Although a second joint meeting was proposed for 2010 this does not appear to be scheduled to take place, although both Commissions will be meeting independently during 2010.

160 Decision VIII/8 on Cooperation and Coordination between the Basel, Rotterdam and Stockholm Conventions; Decision SC-2/15 on Synergies; Decision RC-3/8 on Cooperation and Coordination between the Rotterdam, Basel and Stockholm Conventions, UN Doc BC-RC-SC/AHJWG.1/INF/4.

161 Ad Hoc Joint Working Group on Enhancing Cooperation and Coordination among the Basel, Rotterdam and Stockholm Conventions, *Report of the Ad Hoc Joint Working Group on Enhancing Cooperation and Coordination among the Basel, Rotterdam and Stockholm Conventions on the Work of Its Third Meeting*, UN Doc UNEP/FAO/CHW/RC/POPS/JWG.3/3 (29 March 2008) 3 [10] ('*Third Meeting*').

162 Conference of the Parties to the Basel Convention, *Note by the Secretariat — Enhancing Cooperation and Coordination among the Basel, Rotterdam and Stockholm Conventions*, UN Doc UNEP/SBC/BUREAU/9/2/3 (9 March 2011) 1.

options for harmonising the reporting obligations of parties[163] and in connection with compliance. A significant proportion of the decisions were aimed at enhancing institutional cooperation and directed the parties, in conjunction with the directors of the appropriate UN bodies,[164] to explore options for joint management, including a joint head of the three secretariats. Furthermore, the decisions established on an interim basis a joint resource mobilisation service within the secretariats of the respective conventions in Geneva, as well as authorised the establishment of joint financial, administrative, legal, information technology and information services (also on an interim basis). Finally, the decisions recommended that *Basel*, *Rotterdam* and *Stockholm* meetings should be held in a coordinated manner and, most significantly, that a simultaneous extraordinary meeting should be convened to further consider issues of cooperation and coordination.[165]

The first Simultaneous Extraordinary Meeting of the three MEAs was held in Bali in February 2010 and was organised as a back-to-back meeting with the Eleventh Session of the UNEP Governing Council/Global Ministerial Environmental Forum. In his opening remarks to the meeting the Executive Director of UNEP noted that the 'synergies process held the potential for a paradigm shift, through which the numerous and disparate instruments in existence would be managed holistically to achieve synergies of purpose and effort'.[166] Nevertheless, as a matter of process, the autonomy of each MEA was maintained and proposals on both substantive and procedural matters were presented separately by each of the Presidents of the parties to his or her convention. Decisions were taken separately by the COPs to each convention. However, in respect of the *Omnibus Decisions*,[167] the Presidents of each conference brought their gavels down simultaneously and declared in unison the adoption of the decisions in a gesture symbolising the new cooperative and integrated approach to environmental governance.[168] The *Omnibus Decisions* encourage the parties of all three conferences to implement the synergies decisions adopted in 2008.[169] In particular, the *Omnibus Decisions* promote the full use of regional centres and encourage the parties to report on their joint

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163 This recommendation was restricted to the reporting obligations under the *Basel* and *Stockholm Conventions* only: *Third Meeting*, UN Doc UNEP/FAO/CHW/RC/POPS/JWG.3/3.

164 These comprised the Executive Director of UNEP and the Director General of the Food and Agriculture Organization: see *Third Meeting*, UN Doc UNEP/FAO/CHW/RC/POPS/JWG.3/3 (29 March 2008) annex I/12.

165 *Third Meeting*, UN Doc UNEP/FAO/CHW/RC/POPS/JWG.3/3. See also the synergy decisions noted in above nn 106, 160 and accompanying text.

166 Conferences of the Parties to the Basel, Rotterdam and Stockholm Conventions, *Report of the Simultaneous Extraordinary Meetings of the Conferences of the Parties to the Basel, Rotterdam and Stockholm Conventions*, UN Doc UNEP/FAO/CHW/RC/POPS/EXCOPS.1/8 (7 April 2010) [7].

167 All three decisions are identical apart from a small number of minor differences between their preambles. See, eg, Conferences of the Parties to the Basel, Rotterdam and Stockholm Conventions, *Report of the Simultaneous Extraordinary Meetings of the Conferences of the Parties to the Basel, Rotterdam and Stockholm Conventions*, UN Doc UNEP/FAO/CHW/RC/POPS/EXCOPS.1/8 (7 April 2010) annex I ('*Omnibus Decision Adopted by the Conference of the Parties to the Basel Convention*') ('*Omnibus Decisions*').

168 Ibid 6 [27].

169 Ibid 8 [I:2].

activities and programmatic cooperation.[170] Furthermore, the *Omnibus Decisions* request that the three secretariats identify cross-cutting and joint activities that may be included in the programmes of work for each of the three conventions.[171] Moreover, the interim joint services designed to support all three secretariats as set out in the synergies decisions were endorsed by the parties through the *Omnibus Decisions*[172] and, most significantly, the *Omnibus Decisions* authorise the creation of a joint head function to manage the three conventions.[173] These arrangements are due to be reviewed at the ordinary meetings of the *Basel*, *Rotterdam* and *Stockholm Conventions* in 2013.[174]

The relationship between the *Basel*, *Rotterdam* and *Stockholm Conventions* represent the clearest example of clustering to date. These three MEAs have built upon the clear overlaps and links between the substance and functions of their respective conventions in order to create an integrated management and administrative structure, whilst acknowledging the autonomy of each instrument within its own regulatory sphere. The initiatives developed in the 2008 synergies decisions and confirmed in the 2010 *Omnibus Decision* are designed to improve implementation through mutual support, cognitive interaction, efficiency savings and ultimately, joint management. It is important to acknowledge that in 2006, when the process of review was initiated, neither of the secretariats established under the *Rotterdam* and *Stockholm Conventions* were fully functional. Pragmatically, this meant that there were fewer institutional obstacles to the creation of joint managerial and administrative functions. Nevertheless, the inherent logic of clustering as is being developed by these MEAs is abundantly clear. Although it is too soon to assess the success of this arrangement, it is likely that other MEAs that might be similarly clustered will be watching the progress of the *Chemicals Convention* cluster closely.

C *Cooperation and Compliance*

The third category of institutional cooperation focuses on institutional interaction in the context of compliance. A natural consequence of the proliferation of treaties and non-compliance mechanisms[175] is the conflation and possible conflict between proceedings in the event that a state is alleged to be in

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170 Ibid 8–9 [I:4]–[I:7].

171 Ibid 9 [I:9].

172 Ibid 11 [III:1]–[III:7].

173 Ibid 8 [II:3].

174 Ibid 12 [VI:1].

175 There are over twenty non-compliance mechanisms in operation today and a further four are in the advance stages of negotiation: See Jan Klabbers, 'Compliance Procedures' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007) 995; Karen N Scott, 'Non-Compliance Procedures and Dispute Resolution Mechanisms under International Environmental Agreements' in Duncan French and Nigel White (eds), *International Law and Dispute Settlement: New Problems and Techniques* (Hart, 2010) 225; Tullio Treves et al (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser Press, 2009).

breach of its obligations under two or more MEAs.[176] One high profile example of such conflation arose out of the dispute between Ireland and the United Kingdom over the Mixed Oxide Fuel ('MOX') reprocessing plant under construction on the north-west coast of the UK in the early 1990s. In that case, Ireland initiated proceedings under the 1982 *UNCLOS*[177] and separately under the 1992 *OSPAR Convention*[178] against the UK, although the dispute ultimately became dominated by the question of the division of competencies as between the EU and its member states with respect to marine environmental protection.[179] Notably, there was little if any institutional interaction between the bodies variously charged with resolving the dispute.[180] More recently, and rather more positively from the perspective of institutional cooperation, the Ukraine's controversial decision to construct the Danube–Black Sea Shipping Canal in the Bystroe Estuary of the Danube Delta led neighbouring state Romania and an interested NGO (Ecopravo-Lviv) to institute compliance proceedings under five separate MEAs: the 1998 *Aarhus Convention*,[181] the 1979 *Bern Convention*, the 1979 *CMS*, the 1991 *Espoo Convention*[182] and the 1971 *Ramsar Convention*. Whilst the obligations alleged to have been breached under the various conventions are not identical,[183] they are nevertheless closely related and mutually reinforcing.

To date, only a minority of non-compliance mechanisms have included provisions that expressly address their relationship and extent of interaction with

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176 The relationship between non-compliance mechanisms and dispute resolution is a further source of possible conflation and conflict but owing to space constraints, will not be discussed in this article. See, eg, M A Fitzmaurice and C Redgwell, 'Environmental Non-Compliance Procedures and International Law' (2000) 31 *Netherlands Yearbook of International Law* 35; Gunther Handl, 'Compliance Control Mechanisms and International Environmental Obligations' (1997) 5 *Tulane Journal of International and Comparative Law* 29; Scott, 'Non-Compliance Procedures and Dispute Resolution Mechanisms under International Environmental Agreements', above n 175, 254–8.

177 *MOX Plant Case (Ireland v UK) (Provisional Measures)* (2003) 41 ILM 405; *The MOX Plant Case (Ireland v UK) (Order No 3 — Suspension of Proceedings on Jurisdiction and Merits, and Further Provisional Measures)* (2003) 42 ILM 1187.

178 *Access to Information under Article 9 of the OSPAR Convention (Ireland v UK) (Final Award)* (2003) 23 RIAA 59.

179 *Commission v Ireland* (C-459/03) [2006] ECR I-4635.

180 See, eg, Robin Churchill and Joanne Scott, 'The MOX Plant Litigation: The First Half-Life' (2004) 53 *International and Comparative Law Quarterly* 643; Karen N Scott, 'The MOX Case before the European Court C-459/03' (2007) 22 *International Journal of Marine and Coastal Law* 303.

181 *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, opened for signature 25 June 1998, 2161 UNTS 447 (entered into force 30 December 2001).

182 *Convention on Environmental Impact Assessment in a Transboundary Context*, opened for signature 25 February 1991, 1989 UNTS 309 (entered into force 10 September 1997).

183 Alleged breaches variously referred to issues connected to an apparent failure to provide for appropriate public participation in the decision to build the canal, a lack of consultation with neighbouring states and the impact of the scheme on a vulnerable ecosystem and associated migratory and wetland species. For the background to this case, see Alistair S Rieu-Clarke, 'An Overview of Stakeholder Participation: What Current Practice and Future Challenges? Case Study of the Danube Delta' (2007) 18 *Colorado Journal of International Environmental Law and Policy* 611; Tanya D Sobol, 'An NGO's Fight to Save Ukraine's Danube Delta: The Case for Granting Non-Governmental Organizations Formal Powers of Enforcement' (2006) 17 *Colorado Journal of International Environmental Law and Policy* 123.

other non-compliance mechanisms and external bodies.[184] Four non-compliance mechanisms currently permit their compliance committee or equivalent body to consult with other relevant organisations and/or to solicit advice or information from other compliance mechanisms as appropriate: the Technical and Compliance Committee of the Western and Central Pacific Fisheries Commission;[185] the Compliance Committee of the 1998 *Aarhus Convention*;[186] the Compliance Committee of the 1999 *Protocol on Water and Health*;[187] and the Compliance Committee of the 1995 *Barcelona Convention for the Protection of the Mediterranean*.[188] Furthermore, the draft texts of two compliance procedures in the advanced stages of negotiation under the auspices of the 1998 *Rotterdam Convention on Prior Informed Consent*[189] and the 2001 *Stockholm Convention on POPs*[190] also permit their Compliance Committees to solicit

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184 See generally Cesare Pitea, 'Multiplication and Overlap of Non-Compliance Procedures and Mechanisms: Towards Better Coordination?' in Tullio Treves et al (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser Press, 2009) 439.

185 *Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean*, opened for signature 5 September 2000, 2275 UNTS 43 (entered into force 19 June 2004).

186 Meeting of the Parties to the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, *Report of the First Meeting of the Parties Addendum Review of Compliance*, ESC Dec I/7, UN ESCOR, UN Doc ECE/MP.PP/2/Add.8 (2 April 2004) 8 [39].

187 *Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Water Courses and International Lakes*, opened for signature 17 June 1999 2331 UNTS 202 (entered into force 4 August 2005). See also Meeting of the Parties to the *Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, *Decision I/2 — Review of Compliance*, UN ESCOR, UN Doc ECE/MP.WH/2/Add.3, EUR/06/5069385/1/Add.3 (3 July 2007) annex, 9 [37] ('*Compliance Procedure*'). Paragraph 38 permits the Committee to transmit information to the secretariats of other MEAs for consideration in accordance with their applicable procedures on compliance. The Committee may invite members of other compliance committees dealing with issues related to those before it for consultation.

188 *Convention for the Protection of the Marine Environment and Coastal Region of the Mediterranean*, opened for signature 16 February 2006, 1102 UNTS 27 (entered into force 9 July 2004) ('*Barcelona Convention*'). See Barcelona Convention, 'Procedures and Mechanisms on Compliance under the Barcelona Convention and its Protocol' (Decision IG 17/2, Barcelona Convention, 2008).

189 The draft text is annexed to *Procedures and Mechanisms on Compliance with the Rotterdam Convention* (Decision RC-4/7 adopted at the 4th meeting of the Conference of the Parties, Rome, 28–31 October 2008) 29 [28], available in Conference of the Parties, Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, *Report of the Conference of the Parties to the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade on the Work of Its Fourth Meeting*, UN Doc UNEP/FAO/RC/COP.4/24 (31 October 2008) 26.

190 The draft text is annexed to *Procedures and Mechanisms on Compliance with the Stockholm Convention* (Decision SC-4/33 adopted at the 4th meeting of the Conference of the Parties, Geneva, 4–8 May 2009) 89 [35], available in Conference of the Parties, Stockholm Convention on Persistent Organic Pollutants, *Report of the Conference of the Parties of the Stockholm Convention on Persistent Organic Pollutants on the Work of its Fourth Meeting*, UN Doc UNEP/POPS/COP.4/38 (8 May 2009) 89 [35]. In contrast to the draft compliance decision negotiated under the auspices of the *Rotterdam Convention*, which permits the Compliance Committee to solicit additional information from other committees on the request of the Meeting of the Parties or directly, the draft decision under the *Stockholm Convention* has imposed square brackets around the text that would permit the Compliance Committee to seek information *directly* from other institutions without the prior permission of the Meeting of the Parties.

information from other compliance committees dealing with hazardous substances and wastes.

No non-compliance mechanism has thus far developed formal procedures for coordinating on-the-ground information gathering missions and for facilitating the promulgation of coherent and complementary non-compliance measures. Such options are, however, under active consideration by the parties to the *Basel*, *Rotterdam* and *Stockholm Conventions*[191] and by the five tuna RFMOs as part of the Kobe cooperation process.[192] Nevertheless, a successful ad hoc joint compliance operation has been initiated in connection with the Brystoe Canal development referred to above. Representatives from the five MEAs within which non-compliance proceedings had been initiated by Romania, together with the European Commission and the International Commission for the Protection of the Danube River, conducted a joint fact-finding mission in the Ukraine in 2004.[193] Furthermore, in 2008, the Secretariat of the 1991 *Espoo Convention* organised an informal consultation among interested MEA bodies with a view to considering possible measures that might be taken to support the Ukraine's compliance with its international obligations.[194] This was followed by two further joint missions in July 2008 and September 2009, led by the secretariats of the *Bern Convention* and the *Espoo Convention* respectively.[195] At the most recent Informal Consultation Meeting held in June 2009, and attended by the secretariats of five MEAs and representatives from a further four organisations, the following joint statement was issued:

> The organizations agreed: (a) to continue to work together; (b) each to notify the other organizations on the outcomes of key events in the following months (including meetings of Parties); (c) to meet again within one year to continue to exchange information and experiences on specific issues common to the agreements and also to review developments on the matter discussed at the present meeting. The organizations noted with concern the recent developments related to the construction of the Bystroe Canal, which seem to contradict the formal communications from the authorities in Ukraine and may lead to breaching provisions of relevant multilateral environmental agreements. The organizations agreed to discuss at the next meeting possible concerted actions to ensure

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191 The consideration of these options is being undertaken pursuant to the mandate set out in Decision IX/10: Basel Convention, *Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal on Its Ninth Meeting*, 9th mtg, UN Doc UNEP/CHW.9/39 (23–27 June 2008) annex I, 32, 35 [B:2]–[B:3] ('Decision IX/10: Cooperation and Coordination among the Basel, Rotterdam and Stockholm Conventions').

192 See, eg, Tuna Regional Fisheries Management Organizations, *Second Meeting*, above n 146, app 14; Tuna Regional Fisheries Management Organizations, 'Report of Tuna RFMO Chairs', above n 154, 2–3.

193 See Joint Mission of the Expert Team of the European Commission and International Conventions to the 'Bystroe Project' in the Ukrainian Part of the Danube Delta, *Mission Report of the Expert Team* (17 November 2004) <http://ec.europa.eu/environment/enlarg/bystroe_docs/bystroe_joint_mission_report.pdf>.

194 Letter and attached background note from Marek Belka, Executive Secretary of the United Nations Economic Commission for Europe, to Heorhiy Philipchuk, the Ministry of Environmental Protection of Ukraine, 9 May 2008 (on file with the author).

195 Email from Nicholas Bonvoisin, Secretary to the 1991 Espoo Convention, to Karen Scott, 15 July 2010.

> compliance by the Government of Ukraine with relevant international agreements and decisions taken by international organizations.[196]

This ad hoc informal arrangement between the institutions of up to seven different MEAs, which focuses not only on information sharing but also on the development of mutually reinforcing compliance measures, demonstrates the possible extent and depth of potential cooperation between non-compliance bodies. Nevertheless, it is important to note that despite six years of apparently fruitful cooperation among these institutions, the Ukraine remains in non-compliance with a number of its treaty obligations in connection with the Brystoe Canal project. Moreover, it is far from certain that state parties to MEAs more generally would be keen to develop formal cooperative compliance arrangements or establish joint compliance institutions. It is notable that members of the Ad Hoc Joint Working Group on Enhancing Cooperation and Coordination among the *Basel*, *Rotterdam* and *Stockholm Conventions* demonstrated minimal enthusiasm for the idea of a joint compliance committee for the three conventions.[197] Given that the report of the working group recommended, and indeed led to unprecedented and wide-ranging integration initiatives amongst the three *Chemicals Conventions*, their reservations over a joint compliance committee is significant. However, as demonstrated by the international response to the Bystroe Canal project, there are a wide range of measures short of full institutional integration that might be adopted by MEAs to promote the exchange of information and to facilitate the adoption of compatible and mutually supportive compliance measures.

IV INSTITUTIONAL INTEGRATION AND CLOSER COOPERATION: THE RISKS

Whilst institutional integration will undoubtedly improve and strengthen environmental governance and promote a more effective implementation of environmental commitments, it must be acknowledged that there are also risks associated with closer cooperation.

First, from the perspectives of states, and potentially other participants, there is a risk that they may be unwillingly drawn into regimes that they are not party to or affiliated with, and implicitly become subject to obligations under those regimes, by virtue of a cooperative arrangement. Such a risk is by no means theoretical and has been demonstrated by Argentina's recently articulated reservations in respect of CCAMLR's decision to participate in the RSN. At the 2009 meeting of the Commission, Argentina expressed concern about the 'implications for CCAMLR of an institutional and collective involvement with organisations which differ from CCAMLR in their objectives and

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196 Standing Committee, Convention on the Conservation of European Wildlife and Natural Habitats, 'Current Activities Related to the Bystroe Canal Project under Multilateral Environmental Agreements and by Intergovernmental Organizations' (Joint Statement, 28 September 2009).

197 One member commented that a joint compliance committee was a 'long-term option' and another said that such a committee 'could not be envisaged'; a third member indicated that 'the scope for coordinated activities on compliance overall was very limited': *Report of the Ad Hoc Joint Working Group on Enhancing Cooperation and Coordination among the Basel, Rotterdam and Stockholm Conventions on the Work of Its Second Meeting*, UN Doc UNEP/FAO/CHW/RC/POPS/JWG.2/18 (8 January 2008) 7 [36].

membership'.[198] It may be surmised that Argentina's objection to this cooperative arrangement between CCAMLR and the RSN is based on the assumption that Argentina implicitly regards the increased institutional cooperation between RFMOs under the auspices of the RSN as supporting the implementation of the 1995 *Fish Stocks Agreement*[199] and, more significantly, contributing to the process of incorporating that *Agreement* into customary international law.[200] Argentina is not a party to the 1995 *Fish Stocks Agreement* and does not consider the *Agreement* to be, nor desires it to become, part of customary international law. From an environmental perspective, this risk as perceived by states and other participants may have positive effects; increasing participation within environmental and fishery regimes directly or indeed indirectly will likely contribute to better and more comprehensive environmental management. However, there is — at least potentially — a risk that a state or other participant that objects strongly to a cooperative arrangement may withdraw from the cooperating regime altogether.

The second risk arises from the possibility that through participating in a cooperative arrangement, a regime or institution may overreach its regulatory mandate and may act in a manner which might be considered ultra vires. This may occur if the cooperative arrangement has the practical effect of extending the geographic scope of the regime or where the subject matter of the regime has been expanded to include species, ecosystems, substances or issues not previously regulated by that regime. This risk was similarly demonstrated within the forum of the 2009 meeting of the CCAMLR in connection with the scope of the proposed MOU with the *Agreement on the Conservation of Albatrosses and Petrels*.[201] Whilst Argentina was firmly of the view that activities outside of the CCAMLR area are beyond the jurisdiction of the Commission,[202] Australia, New Zealand, the UK and the USA disagreed.[203] Australia asserted an expansive view of the CCAMLR's regulatory mandate that supported the adoption of conservation measures that apply outside the CCAMLR area where those measures are designed to conserve Antarctic marine living resources situated within the CCAMLR area.[204] The practical expansion of a regime's regulatory remit by virtue of a cooperative arrangement may have both positive and negative consequences. On the one hand, broader coverage may improve environmental protection overall, but on the other, disputes over an expanded mandate may weaken the regime should states choose to reduce their support for it or even abandon it altogether.

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198 Commission for the Conservation of Antarctic Marine Living Resources, *Report of the Twenty-Eighth Meeting of the Commission* (26 October – 6 November 2009) 63 <http://www.ccamlr.org/pu/e/e_pubs/cr/09/all.pdf> ('*CCAMLR Twenty-Eighth Meeting*').

199 *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, UN Doc A/CONF.164/37 (8 September 1995).

200 See *CCAMLR Twenty-Eighth Meeting*, above n 198, 63.

201 Ibid 59.

202 Ibid.

203 Ibid.

204 Ibid.

The third risk is associated with the cooperative arrangement itself and its participating regimes and institutions rather than with the individual state parties and other participants within those regimes. Where a cooperative or institutional integrated management arrangement comprises participants that are unequal in size or status it is possible that the arrangement may become dominated by certain participants. This may lead to the prioritisation of the dominant participant's interests and objectives, and may ultimately result in the diversion of scarce resources away from the priorities of other participants. Similarly, it is also possible that a cooperative arrangement may become dominated by procedures, principles and concepts that are prevalent within one regime at the expense of other procedures, principles and concepts that are utilised within other regimes and institutions. This risk is demonstrated, at least to some extent, by disputes within the Biodiversity Liaison Group, which is undoubtedly dominated by the 1992 *Biodiversity Convention*, over differences in priorities (including the 2010 Biodiversity Target) and the allocation of scarce resources.[205] Nevertheless, this is a risk that can be mitigated with relative ease through careful drafting of a cooperative agreement within which priorities, procedures and principles agreed upon by all participants are clearly set out, and which includes appropriate provisions for protecting the autonomy of the respective participating regimes and institutions.

Finally, increased integration and closer cooperation may, in rare instances, simply transfer a problematic issue from one regime to another without resolving the problem and with potentially dire consequences for the future effectiveness of that other regime. This risk is perhaps no better illustrated than by the potential consequences which would likely arise should the parties to the 1959 *Antarctic Treaty* decide to directly address Japanese scientific whaling activities located within the Southern Ocean through the Antarctic Treaty Consultative Meeting ('ATCM'). In light of the fact that the whaling activities taking place are ostensibly 'scientific' and that they are located within the *Antarctic Treaty* area, there is a strong legal argument for suggesting such activities should be subject to the principles of environmental impact assessment under art 8 and annex I of the 1991 *Protocol on Environmental Protection to the Antarctic Treaty*.[206] Irrespective of the legal merits of this argument,[207] the political

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205 See above nn 141–3 and accompanying text.

206 The extent of the relationship between the *Protocol on Environmental Protection to the Antarctic Treaty* and the *International Convention on the Regulation of Whaling*, opened for signature 2 December 1946, 161 UNTS 72 (entered into force 10 November 1948) is unclear. Annex II of the 1991 *Protocol*, which sets out restrictions in connection with the taking or harmful interference of species, is not applicable to Japanese whaling activities as it contains a without prejudice clause, which confirms that '[n]othing in this Annex shall derogate from the rights and obligations of Parties under the International Convention on the Regulation of Whaling' (annex II, art 7). There is no such clause in annex I of the *Environmental Protocol* or in the *Protocol* itself. However, the Final Act of the Eleventh Antarctic Treaty Special Consultative Meeting at which the Protocol was adopted stipulates that

> [t]he meeting noted that nothing in the Protocol shall derogate from the right and obligations of Parties under the Convention on the Conservation of Antarctic Marine Living Resources, the Convention for the Conservation of Antarctic Seals and the International Convention for the Regulation of Whaling.

Antarctic Treaty Consultative Parties, 'Final Act of the Eleventh Antarctic Treaty Special Consultative Meeting' (4 October 1991) [7].

implications of involving the *Antarctic Treaty* directly or indirectly through increased cooperation with the International Whaling Commission ('IWC') in the scientific whaling dispute could be disastrous. The disagreement over Japanese scientific whaling has polarised and virtually paralysed the IWC to the extent that its very existence has been called into question. By contrast, the *Antarctic Treaty* system works well, notwithstanding the dispute over scientific whaling, principally because thus far it has sensibly avoided directly addressing Japanese whaling activities within the ATCM.[208] In the Antarctic, it might thus be suggested that fragmentation helps rather than hinders effective environmental governance!

The risks identified above relate to both the effectiveness and to the legitimacy of international environmental governance. An increase in the number and complexity of cooperative institutional arrangements raises important questions of accountability. This is particularly the case where the cooperative arrangements are comprised of, or largely driven by, treaty secretariats rather than by states. It has been noted that 'while environmental governance by no means achieves a democratic or deliberative ideal, it is among the most transparent, participatory, and accessible realms of global governance to state and non-state actors alike'.[209] The development of cooperative and integrated institutional regimes in pursuit of effectiveness should nevertheless not be pursued at the expense of legitimacy and accountability. Ideally, the development of governance solutions based on cooperation and institutional integration should be designed to promote both effectiveness *and* legitimacy. The clustering of the *Basel*, *Rotterdam* and *Stockholm Conventions* provides an excellent example of such an arrangement. The development of this chemicals cluster has been driven by the state parties themselves and decisions relating to substance, administration and management have been taken by both ordinary and extraordinary COPs. It is notable that the less ambitious and arguably less effective examples of the BLG and (to a lesser extent) the five tuna RFMOs acting collectively pursuant to the Kobe process, are both driven by treaty institutions without direct involvement of state parties. Consequently, it would appear that state parties to MEAs must themselves play a meaningful role in

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207 A discussion of the merits is beyond the scope of this article. For a detailed analysis of some of the issues raised by Japanese whaling within the Southern Ocean, see generally Special Issue, 'Japanese Whaling in Antarctica' (2008) 11 *Asia Pacific Journal of Environmental Law* 137.

208 The closest the Antarctic Treaty Consultative Meeting has come to discussing Japanese whaling was in 2007 when New Zealand presented an information paper relating to the fire on board the Japanese whaling vessel the *Nisshin Maru*, which took place in February 2007: New Zealand, 'Fire on Board the Japanese Whaling Vessel Nisshin Maru' (Information Paper No 40, XXXth Antarctic Treaty Consultative Meeting, 30 April – 11 May 2007). The discussion at the 2007 ATCM focused on the safety and search and rescue aspects of this incident and was promptly shut down by Japan which stated that 'it would not be constructive to further discuss the *Nisshin Maru* incident in the next Meeting because further discussion on this incident might lead to discussion on the whaling issue, on which Parties had differing views': see Antarctic Treaty Consultative Meeting, 'Final Report of the Thirtieth Antarctic Treaty Consultative Meeting Part I' (Final Report No ATCM XXX-CEP X, Antarctic Treaty Commission, 30 April – 11 May 2007) 46–7 [225]–[231] <http://www.ats.aq/devAS/ats_*meetings*_meeting.aspx?lang=e>.

209 Bernstein, above n 21, 140.

developing cooperative and integrated governance mechanisms, not only with a view to promoting legitimacy and accountability but, ultimately, effectiveness.

V CONCLUSION: MEA INSTITUTIONAL INTERACTION AND ITS IMPLICATIONS FOR INTERNATIONAL LAW

The fragmentation of international law cannot be reversed, but it can be managed. Moreover, governance mechanisms such as institutional cooperation and integration offer substantial potential not only to manage fragmentation but also to exploit the overlaps and synergies that exist between MEAs and environmental institutions in order to improve the effectiveness of environmental regimes. To a greater or lesser extent many MEAs, often as a result of institutional initiatives, are already beginning to engage in project and programmatic collaboration, integrated or even joint administration and management of MEAs, as well as cooperation with respect to implementation and compliance mechanisms. Whilst these initiatives are broadly aimed at improving the effectiveness of MEAs, they can also enhance their legitimacy at the national, regional or international level. Nevertheless, extensive cooperation and institutional integration also poses risks, actual and perceived, to the legitimacy and accountability of MEAs to their state parties. Maximising the potential of institutional cooperation and integration, whilst minimising its risks to legitimacy, accountability and effectiveness, is likely to prove a significant challenge for future international environmental governance. One possible response to that challenge is to deliberately manage institutional integration and other cooperative arrangements through an overarching global environmental institution such as a strengthened UNEP[210] or even a newly created 'World Environmental Organisation'.[211]

Regardless of how initiatives promoting institutional integration or cooperation are managed in the context of future international environmental

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210 The United Nations Environment Programme ('UNEP') as an organisation has been subject to consistent and cogent criticism over its performance almost since its inception. All four UN-related international environmental governance reform processes noted in Part II of this article (see above nn 22–45 and accompanying text) recommended that consideration be given to strengthening the UNEP through enhancing its legal mandate, opening it up to universal membership, improving its financial basis and turning it into the 'environmental pillar' of the UN. See Steinar Andresen, 'The Effectiveness of UN Environmental Institutions' (2007) 7 *International Environmental Agreements: Politics, Law and Economics* 317; Steffen Bauer, 'The Secretariat of the United Nations Environment Programme: Tangled Up in Blue' in Frank Bierman and Bernd Siebenhüner (eds), *Managers of Global Change: The Influence of International Environmental Bureaucracies* (MIT Press, 2009) 169; Maria Ivanova, 'UNEP as Anchor Organisation for the Global Environment' in Frank Biermann, Bernd Siebenhüner and Anna Schreyögg (eds), *International Organizations in Global Environmental Governance* (Routledge, 2009) 151; Roch and Perrez, above n 5.

211 The creation of a new 'World Environment Organisation' has been suggested by a number of commentators: see, eg, Frank Biermann, Olwen Davies and Nicolien van der Grijp, 'Environmental Policy Integration and the Architecture of Global Environmental Governance' (2009) 9 *International Environmental Agreements: Politics, Law and Economics* 351; Dena Marshall, 'An Organization for the World Environment: Three Models and Analysis' (2002) 15 *Georgetown International Environmental Law Review* 79. The 'World Environment Organisation' proposal has also been criticised: see Sebastian Oberthür and Thomas Gehring, 'Reforming International Environmental Governance: An Institutionalist Critique of the Proposal for a World Environment Organisation' (2004) 4 *International Environmental Agreements: Politics Law and Economics* 359.

governance, there is little doubt that their impact is already challenging the traditional landscape of international law. Non-state actors have long been present within the field of international environmental law, but they are becoming increasingly dominant through their participation in its creation, implementation and enforcement. The vast number of decisions, resolutions, agreements and other instruments are all integral components of the rich tapestry of an MEA, and the hard distinction between binding and non-binding instruments is increasingly blurred. Moreover, the very nature of international law as a system of law based on the consent of states is being brought into question. The development of complex systems of cooperation and integration in practice has the potential to lead to the development of norms outside of the fora within which states normally give their consent. This may occur in circumstances where MEA institutions acting collectively develop norms that become binding on states without their formal acceptance, or where the practice of MEAs acting individually or collectively contributes to the formation of customary international law. Consequently, the potential impact of these new forms of environmental governance mechanisms extends well beyond the realm of international environmental law; they challenge the very fundamentals of the international legal system itself, who we regard as participants within the system, the sources of international law and even its ultimate basis in consent.