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(p. 632) Chapter 36 International Institutions

I. Introduction

International institutions involved in the development of international environmental law ultimately aim to regulate human activity, even if the addressees of the rules and standards are states and the European Union (EU).¹ To take a few examples, by February 2019 the government of Argentina had signed agreements with seventeen of its twenty-four sub-national entities to implement the United Nations Sustainable Development Goals (SDGs), adopted by the United Nations General Assembly (UNGA) in 2015.² In this context, the Autonomous City of Buenos Aires is developing a sustainable mobility plan, which supports implementation of the 2015 Paris Agreement.³ On 18 May 2018, the Global Environment Facility (GEF) took the first step towards the realization of a project on 'Agro-ecology, Ensuring Food Security and Sustainable Livelihoods while Mitigating Climate Change and Restoring Land in Dryland Regions' to be implemented in Burkina Faso, Brazil, Ethiopia, India, Morocco, Senegal, and South Africa, with the Food and Agriculture Organization (FAO) acting as implementing agency.⁴ The project will support implementation of the 2015 Paris Agreement, the 1994 United Nations Convention to Combat Desertification (UNCCD), and the 1992 Convention on Biological Diversity (CBD). These projects seek to influence the choices we make regarding modes of transportation and land use.

(p. 633) This chapter first maps the different roles of international institutions involved in the development of international environmental law by considering the initiating roles that some institutions play, the institutional structure of multilateral environmental agreements (MEAs) and the roles of scientific and financial institutions. It thereafter charts how MEAs link to each other substantively by focusing on the relationships between global and regional MEAs and the synergies and contestations between global MEAs. These mapping processes result in the identification of patterns that illustrate the different roles and types of links that exist between international institutions. Prior to engaging in this mapping exercise, a few remarks serve to delineate the topic of this chapter.

First, the origins and legal status of international institutions discussed in this chapter vary. They include the following:

- International organizations established by treaty, including the United Nations (UN) and UN specialized agencies,⁵ such as the FAO, which have international legal personality.
- Conferences or meetings of the parties (COPs), such as the COP of the 1992 United Nations Framework Convention on Climate Change (UNFCCC). COPs are established by treaties or their protocols, known as MEAs, and do not have international legal personality.
- Institutions established by other international institutions, including the United Nations Environment Program (UNEP), founded by the UNGA,⁶ and the GEF, founded by the International Bank for Reconstruction and Development (World Bank), itself a UN specialized agency, in cooperation with UNEP and the United Nations Development Program (UNDP). These institutions generally do not have international legal personality.

Second, this chapter focuses on institutions directly or indirectly established by states, even if relationships between these institutions and other actors are considered.

Third, the emphasis on the roles of and links between international institutions that develop international environmental law entails that specific institutions are referred to by way of example. This chapter, hence, does not seek to provide a complete overview of the institutions involved in the development of international environmental law.

Fourth, this chapter takes a broad approach to what constitutes international environmental law, including both legally binding and soft law instruments.⁷ While MEAs and the treaties establishing international organizations are legally binding texts, most of the other instruments referred to in this chapter are not.

(p. 634) II. Roles: No Centralized Coordination But a Pattern

The activities of the institutions referred to in this chapter are not centrally coordinated, even if numerous coordinating efforts are ongoing. This situation can be attributed to the fragmented nature in which international law, including international environmental law, has developed,⁸ and to lack of consensus among states on establishing a central coordinating institution.

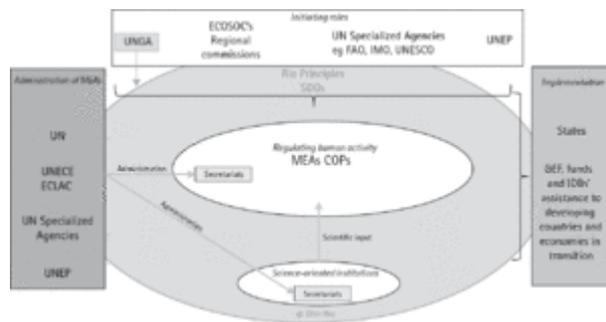
While it has been suggested that UNEP, also known as UN Environment, be given this coordinating role and upgraded to a UN specialized agency,⁹ UNEP remains a programme of the UNGA. This means that UNEP's budget largely depends on voluntary contributions from states and other partners, including the GEF, with most contributions earmarked for specific projects.¹⁰ UNEP's position also means that it cannot formally establish subsidiary organs without the endorsement of the UNGA.¹¹ The manner in which the Intergovernmental Panel on Climate Change (IPCC) and the GEF were established reflect UNEP's position.¹²

In 2012, UNEP's previous governing body, the Governing Council—consisting of fifty-eight UN member states elected by the UNGA for four-year periods—was succeeded by the UN Environmental Assembly (UNEA), consisting of all UN member states.¹³ This chapter illustrates that UNEP, despite being a programme of the UNGA, fulfils roles similar to those fulfilled by UN specialized agencies. One might also question whether transforming UNEP into an UN specialized agency would enable it to coordinate ongoing activities related to the environment. The well-established mandates of existing UN specialized agencies and COPs might also require amendment, steps which are unlikely to attract consensus among states.

Despite the lack of central coordination, a pattern illustrating the roles and interactions between the international institutions involved in the development of international environmental law is discernible. These interactions provide a measure of coherence for the development of international environmental law. The identified pattern is depicted in Figure 36.1 and informs the organization of the rest of this section. It consists of the following elements:

1. Initiatives resulting in the development of international environmental law, including the negotiation of MEAs, are adopted by the UNGA, the governing (p. 635) bodies of UN specialized agencies, UNEP, and the regional commissions of the UN Economic and Social Council (ECOSOC). These same institutions also administer the secretariats of MEAs, even if not all MEA secretariats are administered by them.
2. Standards and rules aimed at regulating human activities, even if addressing states and the EU, are found in MEAs and further developed within the institutions established by MEAs or within UN bodies that administer the secretariats of MEAs.
3. International institutions focused on scientific research provide input for specific MEAs.

4. The implementation of MEAs in developing countries and economies in transition takes place with the assistance of the GEF, funds, and international development banks. The GEF cooperates with other international institutions, such as the FAO and UNEP, to realize projects it finances.



► [View full-sized figure](#)

Figure 36.1 Main pattern in the roles of international institutions

A. Initiating Roles

A number of UN-related institutions fulfil initiating roles in the development of international environmental law.

Prominent among these is the UNGA, which initiates the development of international environmental law in four main ways. First, it convenes global summits that develop international environmental law, such as the 1992 Conference on Environment and Development (Rio Conference) that adopted the Rio Principles. These principles, endorsed by the UNGA, are considered the main principles of international environmental law.¹⁴

(p. 636) Second, the UNGA itself adopts relevant instruments. For example, in 2015, it adopted Resolution 70/1, entitled ‘Transforming our World: the 2030 Agenda for Sustainable Development’, which includes the SDGs. The SDGs provide seventeen inter-related social, economic, and environmental goals that are to inform the activities of states and international institutions. Despite well-founded criticisms of the SDGs,¹⁵ they seem to be providing the overarching framework for realizing more integrated approaches to sustainable development.

The High-Level Political Forum on Sustainable Development (High-Level Forum),¹⁶ established in 2012 to replace the Commission on Sustainable Development, coordinates implementation of the SDGs together with bodies within the UN Secretariat, such as the Executive Committee of Economic and Social Affairs Plus.¹⁷ The latter brings together UN (-related) institutions involved in implementing the SDGs. The High-Level Forum is open to all UN member states and is a subsidiary body of ECOSOC and, when it meets every four years at the level of heads of state and government, it is a subsidiary body of the UNGA. Amongst other activities, it conducts reviews of national implementation plans which states submit to it on a voluntary basis. In its 2017 plan to the High-Level Forum, Argentina mentioned the agreements it was in the process of concluding with its sub-national entities, referred to in the introduction to this chapter. Presumably, these agreements will be reported on when Argentina submits its 2020 plan.¹⁸

Third, the UNGA initiates the negotiation of MEAs, such as the UNFCCC,¹⁹ the 1995 Fish Stocks Agreement,²⁰ and more recently the negotiations for an international legally binding instrument under the 1982 United Nations Convention on the Law of the Sea (UNCLOS) on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ-negotiations).²¹

Fourth, the International Law Commission (ILC), a UNGA subsidiary body, develops and codifies international law relating to the environment. It developed the 1997 Convention on the Non-Navigational Uses of International Watercourses (UN Watercourses Convention).²² Also relevant are the Draft Articles on the Prevention of Transboundary Damage from Hazardous Activities and the Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous (p. 637) Activities.²³ Currently, the ILC agenda includes two environmental topics: the protection of the environment in relation to armed conflicts and the protection of the atmosphere. The ILC agenda also includes topics of a broader scope that relate to the environment. These topics include peremptory norms, general principles of law, and crimes against humanity.²⁴ ILC treaties provide general principles, but differ from other MEAs because they do not establish institutions which further develop the regime.

The negotiation of MEAs also has been initiated within the governing bodies of UN specialized agencies, UNEP, and ECOSOC's regional commissions. For example, the 1973/78 International Convention for the Prevention of Pollution from Ships (MARPOL) was negotiated within the International Maritime Organization (IMO), the 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Compliance Agreement) within the FAO and the CBD within UNEP. The International Union for the Conservation of Nature (IUCN),²⁵ took on a similar role with respect to the 1973 Convention on Trade in Endangered Species of Fauna and Flora (CITES), which originated in a 1963 IUCN resolution.²⁶ Also noteworthy is UNEP's Regional Seas Program, established in 1974, which has fostered the negotiation of fourteen regional seas conventions.²⁷

ECOSOC's five regional commissions all address environmental issues. In particular, the Economic Commission for Europe (ECE) and, more recently, the Economic Commission for Latin America and the Caribbean (ECLAC), have fostered the development of MEAs. The following MEAs were negotiated within the ECE: the 1979 Convention on Long-range Transboundary Air Pollution, the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (ECE Watercourses Convention), the 1992 Convention on the Transboundary Effects of Industrial Accidents, and the 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). The 2018 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Convention) was negotiated within ECLAC.

The Espoo, Aarhus, and Escazú Conventions, contrary to most MEAs, provide cross-cutting norms. These norms, within the remit of the MEA in question, apply to all human activities instead of to human activities in relation to a particular component of the environment (eg human activities that harm biodiversity) or a particular human activity (eg trade in endangered species of wildlife).

(p. 638) B. The Institutional Structure of MEAs

Most MEAs provide the principles that are to guide decision-making and the institutional structure for further decision-making.²⁸ Relevant principles are, for example, the principle of 'common but differentiated responsibilities' (CBDR), explicitly included in the UNFCCC and the Paris Agreement but which also informs other MEAs²⁹ and the principle of 'wise use', which informs the 1971 Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention).³⁰ The institutional structure of most MEAs includes a COP, in which all states parties to the MEA are represented, and subsidiary bodies, often including a compliance mechanism.³¹ It is within these MEA-based

institutions that decisions are taken to develop the regime with the aim of regulating human activities.

The institutional and decision-making structures established by MEAs and their protocols have been found to operate in ways similar to international organizations.³² The role of the FAO's Committee on Fisheries (COFI) vis-à-vis the Compliance Agreement and the role of the CBD-COP vis-à-vis the CBD illustrate this similarity. All member states of the FAO and all parties to the CBD are represented on these bodies. Examples of relevant decisions include the 2001 'International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' adopted by COFI,³³ and the 2018 decision on 'Mainstreaming of Biodiversity in the Energy and Mining, Infrastructure, Manufacturing and Processing Sectors' adopted by the CBD-COP.³⁴ Within the FAO and the CBD these decisions also serve to implement broader strategies, respectively the 1995 Code of Conduct for Responsible Fisheries,³⁵ and the Strategic Plan for Biodiversity 2011-20, including the Aichi Biodiversity Targets.³⁶

C. Science-Oriented Institutions

Most MEAs establish subsidiary bodies that provide scientific input for decision-making. The Scientific Council established by the 1979 Convention on the Conservation of Migratory Species of Wild Animals (CMS) provides an example.³⁷ International institutions specifically focused on science and scientific advice have also been established.³⁸

(p. 639) The oldest of these institutions is a regional institution established in 1902, the International Council for the Exploration of the Sea (ICES). ICES was established by states, and provides scientific advice on ocean-related issues. It advises its member states in Europe and North America, the EU, the regional seas commissions for the North-East Atlantic (OSPAR Commission) and the Baltic Sea (HELCOM), as well as regional fisheries management organizations in the North Atlantic, such as the North-East Atlantic Fisheries Commission (NEAFC).³⁹

The global institution that provides scientific advice on marine environmental issues is the Joint Group of Experts on the Scientific Aspects of Marine Pollution (GESAMP). It was established in 1968 by the IMO, FAO, World Meteorological Organization (WMO), and the Intergovernmental Oceanographic Commission of the UN Educational, Scientific and Cultural Organization and is now sponsored by ten international organizations, which use its services. GESAMP currently has seventeen individual experts as members, works through a network of scientists, and the IMO administers its secretariat.⁴⁰

The IPCC is probably the most renowned of the scientific institutions. It was established, in 1988, by the WMO and UNEP and endorsed by the UNGA.⁴¹ Its main outputs are the authoritative scientific assessments of the state of climate change, its consequences, and mitigation and adaptation options. These assessments provide input for the development of climate change policy and law. The IPCC does not itself engage in research; instead it constitutes a cooperative network of thousands of scientists who assess 'the state of scientific, technical and socio-economic knowledge on climate change' and in cooperation with governments develop the IPCC reports.⁴²

The Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), established by states in 2012,⁴³ uses working methods similar to those of the IPCC. It provides scientific input for the development of biodiversity policy and law and developed the global assessment of biodiversity and ecosystem services for the CBD, as input for the evaluation and renewal of the Strategic Plan for Biodiversity 2011-20.⁴⁴

D. The GEF, Funds, and Multilateral Investment Banks

The GEF finances projects that aim to implement international environmental law in developing countries and economies in transition, and acts as the financial mechanism (p. 640) for several MEAs.⁴⁵ It was initially established in 1991 by the World Bank. However, when developing states, after the Rio Conference, demanded a more inclusive financial mechanism for the UNFCCC and the CBD, the GEF instrument was revised. In 1994, the restructured GEF was de facto established by the World Bank, UNEP, and UNDP, even if de jure by the World Bank, which also acts as its trustee.⁴⁶ Besides its own fund, the GEF Trust Fund, the GEF administers other funds, including the Special Climate Change Fund and the CBD's Nagoya Protocol Implementation Fund.⁴⁷

Within the GEF a number of so-called GEF Agencies cooperate to design, develop, and implement GEF-funded projects. In early 2019, there were eighteen GEF Agencies, including seven regional development banks,⁴⁸ three UN specialized agencies,⁴⁹ two sub-states actors,⁵⁰ three NGOs,⁵¹ and its three founders.

The GEF, GEF Agencies, and funds administered by the GEF develop their own rules and standards that apply to projects they support. The GEF has adopted policies and guidelines, for example, on environmental and social safeguard standards, gender equality, and Indigenous peoples.⁵² These policies and guidelines apply to GEF-funded projects, such as a project to strengthen 'policies, laws, and criminal justice capacities to address poaching and illegal wildlife trade' in Gabon, Kenya, Malawi, Mozambique, and Zambia, with UNEP acting as implementing agency. The project aims to attain its goals, among others, by furthering gender equality and engaging Indigenous peoples, in line with GEF and UNEP policies.⁵³

The World Bank also administers funds that are relevant to the protection of the environment, including a number of carbon-related funds.⁵⁴ Most of these funds are financed by states with some, such as the World Bank's Carbon Partnership Facility,⁵⁵ being co-funded by private sector actors. International development banks, such as the World Bank, and regional development banks, also directly finance projects that implement international environmental law in developing countries and economies in transition. Moreover, these institutions and other donors regularly co-finance a single project. (p. 641) For example, the ADB, EBRD, and the International Finance Corporation (IFC), in 2015, invested in a hydropower project in Georgia.⁵⁶

As for the GEF, these funds and financial institutions develop their own policies and guidelines that apply to projects. Furthermore, many of these institutions have established bodies that assess complaints of non-compliance from members of the public in states where projects they finance are being implemented. Such bodies include the World Bank Inspection Panel (WBIP) and the Compliance Advisor Ombudsman of the IFC.⁵⁷ The standards against which these bodies assess compliance are the standards adopted by the institution in question.⁵⁸ In applying these standards, bodies such as the WBIP contribute to the development of international environmental law.

E. The Pattern and Coherence

Despite the lack of central coordination in the development of international environmental law, elements of the pattern can promote cohesion.

First, the initiating role of the UNGA has resulted in instruments that afford substantive cohesion to the system. Particularly relevant are the Rio Principles and the SDGs. The SDGs also come with an institutional structure that addresses their implementation by states and international institutions, which is likely to foster cohesion.

Second, the GEF and international financial institutions, such as the World Bank, at least to some extent, coordinate the implementation of international environmental law in developing countries and economies in transition. This mode of coordination, however, raises questions about the powers exercised by these institutions vis-à-vis developing countries and economies in transition, and the regulation of human activities in those states. While developed states themselves determine how they meet the requirements of different MEAs, international financial institutions co-determine how this happens in developing countries and economies in transition.

In addition to the above, substantive links also exist between MEAs. These links have the potential to enhance coherence in international environmental law and are discussed in the next section.

III. Substantive Links Between Meas

Given the lack of central coordination and the number of MEAs, their mandates overlap and links exist between them. These links manifest themselves between global and (p. 642) regional MEAs that cover the same or related topics, and between global MEAs. This section first discusses the links between global and regional MEAs and thereafter between global MEAs.

A. Links between Global and Regional MEAs

Global MEAs regularly require regional cooperation. For example, the UN Watercourses Convention requires states sharing a watercourse to cooperate. Watercourse specific agreements, such as the 1999 Convention on the Protection of the Rhine and 2004 Agreement on the Establishment of the Zambezi Watercourse Commission, are MEAs in their own right and implement the UN Watercourses Convention. In addition, they may implement regional water related MEAs such as the UNECE Water Convention and 2000 Revised Protocol on Shared Watercourses adopted within the Southern African Development Community.

While there are clear substantive links between global, regional, and watercourse-specific agreements, these links are not hierarchical in the sense that the institutions established by the watercourse-specific agreements formally report to institutions at regional or global levels. This is because obligations stemming from MEAs rest on states and the EU and not on international institutions.

Regional fisheries management organizations relate to the Fish Stocks Agreement, the Compliance Agreement, and UNCLOS, and regional seas agreements to UNCLOS, in ways similar to how watercourse-specific agreements relate to regional watercourse treaties and the UN Watercourses Convention.

The CMS provides a different arrangement.⁵⁹ It requires its parties that are range states for a migratory species with 'an unfavourable conservation status' to 'endeavour to conclude' agreements that are legally binding instruments.⁶⁰ In practice, range states have concluded both legally non-binding Memoranda of Understanding (MoU) and agreements. An example of the former is the 2005 MoU Concerning Conservation Measures for the West African Populations of the African Elephant, signed by all thirteen range states, the CMS Secretariat, and IUCN's Species Survival Committee.⁶¹ The 1996 Agreement on the Conservation of African-Eurasian Migratory Waterbirds (AEWA) provides an example of a CMS agreement. It has been ratified by states in Africa, Europe, the Middle East, and Central Asia, even if not by all range states. AEWA itself has the characteristics of a MEA, with its own COP and secretariat, administered by UNEP.⁶²

Some MEAs, such as the Ramsar Convention and the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention), operate on the basis of listed areas, including transboundary areas. (p. 643) These areas meet certain conditions in terms of their special significance as a wetland or natural heritage site and if accepted for listing, require special protection. Relevant areas may also be covered by regional MEAs or area- or species-specific MEAs. The Wadden Sea offers an example of how various MEAs may apply to a specific area.

The Wadden Sea is a listed Transboundary Ramsar Site, a listed natural world heritage site, and a particularly sensitive sea area recognized by the IMO. Other MEAs relevant for its protection include the CBD, the CMS, AEWA, and the 1990 CMS Agreement on the Conservation of Seals in the Wadden Sea, concluded by the three Wadden Sea states—Denmark, Germany, and the Netherlands.⁶³ It is also protected by the Trilateral Wadden Sea Cooperation, based on the 1982 Joint Declaration on the Protection of the Wadden Sea. This declaration of intent, adopted by the three Wadden Sea states, established the Common Wadden Sea Secretariat (CWSS).⁶⁴ CWSS has observer status with the OSPAR Commission. Building on the GEF-financed project, Wings over Wetlands,⁶⁵ the CWSS, national and international NGOs, sub-national actors, and AEWA, as well as other partners, implemented the Wadden Sea Flyway Initiative. It furthered the protection of habitats of migratory birds along the East Atlantic Flyway and fostered capacity building in Western African range states. The current CWSS agenda specifies that the Flyway Initiative will be continued and expanded to include the Arctic and that an integrated Wadden Sea management plan will be developed, as requested by the World Heritage Committee.⁶⁶

B. Links between Global MEAs

Global MEAs develop synergetic relationships. However, when human activities are deemed to require additional or new regulation, there are often contestations because several MEAs might regulate the activity. This sub-section first discusses examples of synergetic relations between MEAs and thereafter examples of more contentious relations.

1. Synergies

Synergies between global MEAs are achieved by institutionalizing cooperation between MEAs. Examples include cooperation on land use within the Joint Liaison Group established by the UNFCCC, CBD, and UNCCD, and on biodiversity conservation in the Liaison Group of biodiversity-related Conventions. In addition, UNCLOS in a unique way links into IMO conventions, including MARPOL. The latter will be discussed first, followed by the former two examples.

(p. 644) UNCLOS links to MARPOL by way of so-called rules of reference. These rules refer to ‘generally accepted international rules and standards established through the competent international organization or general diplomatic conference’. According to UNCLOS the referenced international rules and standards provide the minimum standards that a flag state must impose upon its ships⁶⁷ and, special circumstances excepted,⁶⁸ provide the maximum standards that a coastal or port state may impose on foreign ships.⁶⁹ It is generally accepted that MARPOL is among the instruments referenced. As a result, UNCLOS incorporates MARPOL as it evolves. The 2014/2015 International Code for Ships Operating in Polar Waters provides an example.⁷⁰ It amended IMO-instruments, including MARPOL, and by virtue of the rules of reference in UNCLOS has attained normative relevance for all parties to the latter whose ships operate in Polar Regions.

Land use relates to biodiversity, desertification, and climate change. In 2001, the CBD, UNCCD, and the UNFCCC (the Rio Conventions), established the Joint Liaison Group to coordinate their activities on, amongst other activities, land use. In collaboration with the GEF, this group organized the 2004 ‘Regional Workshop for Africa on synergy among the Rio Conventions and other Biodiversity-related conventions in implementing the

programmes of work on dry and sub-humid lands and agricultural biodiversity'.⁷¹ More recently, in 2017, the Executive Secretaries of the three MEAs called for the establishment of a Project Preparation Facility that would finance integrated, coherent, and multidisciplinary projects on land degradation, biodiversity loss, and global warming.⁷² The GEF's 2018 'Food, Land Use and Restoration Impact Program' finances these types of projects⁷³ and the GEF project, mentioned in the introduction to this chapter, aims to realize such projects. This sequence of activities illustrate how MEAs may link to each other and to other international institutions and how together they may enhance substantive coherence.

Biodiversity-related MEAs have developed a network of MoUs. In particular the CBD has concluded MoUs with the CMS, CITES, the Ramsar Convention, the 2004 International Treaty on Plant Genetic Resources for Food and Agriculture, and the 1952 International Plant Protection Convention.⁷⁴ Many of these MEAs have also concluded MoUs among themselves. Together with the secretariats of other MEAs, including the World Heritage Convention and the 1946 International Convention for the Regulation of Whaling, they coordinate their work through the Liaison Group of biodiversity-related (p. 645) Conventions.⁷⁵ Together with UNEP, the biodiversity-related MEAs seek to further harmonize their reporting requirements and most MEAs involved have embraced the CBD's Aichi Biodiversity Goals. CITES, for example, in 2016 amended its Strategic Visions 2008–20 to include the SDGs and mapped its own objectives against the Aichi Biodiversity Goals.⁷⁶ The Ramsar Convention's COP adopted, with Ramsar specific annotations, the guidance on environmental impact assessment (EIA) and strategic environmental impact assessment (SEA) developed within the CBD.⁷⁷ CITES and Ramsar thereby contribute to enhancing coherence amongst MEA-based norms.

2. Contestation

Contestation primarily arises when human activities require additional or new regulation. The regulation of ship dismantling, ship-generated wastes, CO₂ emissions from ships and aircraft, trade in endangered marine fish species, and accessing biodiversity in areas beyond national jurisdiction (ABNJ) provide examples.⁷⁸ This section discusses these examples, with the exception of the regulation of CO₂ emissions from ships and aircraft and trade in endangered marine fish species, both discussed in earlier chapters.⁷⁹

a) Ship dismantling and ship-generated wastes: IMO and Basel Convention

Ship dismantling, or recycling, as well as the regulation of ship-generated wastes are topics that have concerned the IMO and the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention). The unease of their interactions can be traced to the distinct context and related narrative associated with each of the regimes.⁸⁰

The IMO-based narrative is shaped by the 1948 IMO Convention which formulates the following aim for the organization: '[t]o encourage the removal of discriminatory action and unnecessary restrictions by Governments affecting shipping engaged in international trade so as to promote the availability of shipping services to the commerce of the world without discrimination'.⁸¹ The IMO furthers this aim by developing universal regulation for the shipping sector, including for purposes of preventing and controlling marine pollution from ships, with the objective of attaining non-discrimination and no more favourable treatment in the sector.⁸²

(p. 646) The Basel Convention was adopted in the 1980s when developing and Eastern European states found hazardous wastes dumped in their territories because developed states had adopted more stringent disposal regulations. It is rooted in the South-North divide, seeks to protect weaker states from often illegal waste dumping practices and entitles states to prohibit the import of hazardous and other wastes.⁸³ Moreover, the IMO has strong ties with the shipping industry, which has considerable influence within the IMO.

Moving decision-making about ship dismantling or ship-generated wastes from the IMO to the Basel Convention implied that the sector would lose that position.

Concerns about ship dismantling/recycling arose around the turn of the century when reports emerged about the unsafe working conditions under which beached ships, containing hazardous wastes such as asbestos, were being dismantled in developing states. At the time, the question arose whether ships travelling to be dismantled qualified as wastes under the Basel Convention. On the one hand, these ships have value in terms of, for example, the scrap metals they generate. On the other hand, if the purpose of their voyage is their dismantling they might qualify as wastes under the Basel Convention.

These considerations resulted in the Basel-COP adopting the 2002 Technical Guidelines for the Environmentally Sound Management of the Full and Partial Dismantling of Ships and the IMO adopting the 2003 Guidelines on Ship Recycling.⁸⁴ In 2004, recognizing that ships may become wastes under the Basel Convention, its COP adopted a resolution inviting the IMO to continue work on what would become the 2009 Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships (Hong Kong Convention), which has yet to enter into force.⁸⁵ The Hong Kong Convention sets out a cradle-to-grave approach to ship recycling and addresses both the ship-building and recycling sectors. In 2011, while encouraging parties to ratify the Hong Kong Convention, the parties to the Basel Convention could not achieve consensus on whether the Hong Kong Convention meets the equivalence requirement of Article 11 of the Basel Convention, which if it did, would exempt ship dismantling from the Basel Convention.⁸⁶ At present both institutions, as well as the International Labour Organization, cooperate to assist states in meeting the conditions of the Hong Kong Convention so that they may ratify it. The project on Safe and Environmentally Sound Ship Recycling in Bangladesh provides an example.⁸⁷

Ship-generated wastes are another topic on which the IMO and the Basel Convention have interacted.⁸⁸ Within the IMO, MARPOL, based on uniform regulations for the (p. 647) sector, regulates the reduction of ship generated wastes and requires port states to accept such wastes and provide adequate port reception facilities. MARPOL does not address the further treatment or disposal of the wastes, after they enter the port reception facility. The Basel Convention focuses on minimizing and regulating inter-state transport of wastes, hazardous wastes in particular, and entitles states to prohibit the import of wastes. Moreover, it focuses on the environmentally sound management of wastes once they enter a state of import. Since 2006, both MEAs have adopted measures to address ship-generated wastes. A 2017 Guidance Manual on how to improve the sea-land interface prepared by the Basel Secretariat, in cooperation with the IMO, illustrates the difficulties involved in aligning the two regimes.⁸⁹ For example, MARPOL does not distinguish between hazardous and non-hazardous wastes and the Basel Convention addresses states, but not in their flag state capacity.

b) Accessing marine biological diversity in areas beyond national jurisdiction

Accessing marine biodiversity in areas beyond national jurisdiction is not regulated by an MEA, which is why the UNGA initiated the BBNJ negotiations. The starting point for the negotiations was the 2017 final report of the Preparatory Committee (BBNJ PrepCom).⁹⁰ The report illustrates that the negotiations are likely to be difficult because in the BBNJ negotiations three global regimes interact.

The final report of the BBNJ PrepCom contains recommendations, and identifies a list of elements which generated convergence, and a list of elements on which views diverged. The former list includes issues such as the application of the ecosystem and precautionary approaches, the need to address access and benefit sharing, as well as more technical issues, including the need to develop area-based management measures. However, it also shows that difficult choices have not been made, for example, about which institution is to designate area-based management measures or regulate access and benefit sharing. The

latter list indicates why these choices have not been made. It mentions that further discussion is required about, among other things, the principles of the common heritage of mankind and the freedom of the high seas as well as about the institutional arrangements to be adopted.

In the negotiations, three narratives about how to regulate access to genetic resource in areas beyond national jurisdiction meet, with each narrative presenting a different worldview about regulating access. The three narratives are grounded in three different principles linked to three regimes: the freedom of the high seas/fishing applicable to the high seas, the common heritage of mankind applicable to the Area, and the common concern of mankind applicable to the conservation of biodiversity.

(p. 648) The high seas/fisheries regime implies freedom of access to the resources, subject to regulations of a technical nature, aiming to conserve the resource and marine ecosystems. These regulations would be adopted internationally but administered by states. Moreover, benefits would accrue to those who are able to access the resource. The regime for the Area suggests internationally regulated access to the resources based on technical regulations and on benefit and burden sharing. Such a regime would be administered by an international institution, possibly with the competence to license activities and oversee benefit and burden sharing, similar to the International Seabed Authority (ISA) for deep-sea mining. The CBD regime suggests a regime based on technical regulations and, based on the principle of CBDR, that developed states commit to facilitate access to BBNJ and the benefits obtained therefrom for developing states. The CBDR-related commitments would be guided by international standards, but otherwise left for states to agree amongst themselves.

Related to the BBNJ negotiations are also initiatives of regional seas commissions and regional fisheries management organizations adopting area-based management measure in areas beyond national jurisdiction. The OSPAR Commission and NEAFC, for example, based on a 2008 MoU and the 2014 Collective Arrangement are seeking to implement such measures in the North-East Atlantic.⁹¹ Striking a balance between the various global regimes and determining the role of regional institutions are among the thorny tasks that the BBNJ negotiations have to address.

IV. Conclusion: Multifaceted Governance

The analysis presented above shows that the origin and legal status of an international institution do not necessarily determine its roles. The similarity of the roles engaged in by UNEP and UN specialized agencies illustrates this point. NGOs also take on roles similar to those engaged in by institutions of a public nature. CITES originating in an IUCN resolution might be an exception; however, it is well known that IUCN has played a pivotal role in the development of other biodiversity conservation treaties, including the CBD. NGOs furthermore act as GEF agencies, thereby fulfilling roles that UNEP and UN specialized agencies also fulfil.

The analysis presented in this chapter also illustrates that international institutions, together with NGOs,⁹² engage in two types of activities in developing international environmental law. First, they engage in normative development. That is the development of rules and standards that are to regulate human activity. Second, they engage in (p. 649) implementing these rules and standards. Implementation generally is effected by states or the EU, for example when the World Heritage Convention's normative framework is applied to the Wadden Sea and the three Wadden Sea states cooperate through the CWSS to develop an integrated management plan. However, implementation in developing countries and economies in transition also takes place through the GEF, GEF agencies, funds, and

international development banks. In so doing, these institutions apply the MEA-based rules, but also their own internal rules on, for example, gender equality.

While synergies between international institutions involved in the development of international environmental law have emerged, there is also contestation. Such contestation is intimately linked to law, as it is law that enables states to construct and maintain the various narratives underpinning different regimes. For instance, benefit sharing is central to the regime for the Area and the principle of CBDR is a basic tenant of the biodiversity regime, but neither of these principles are components of the freedom of fishing. A further example is the IMO seeking to attain the universal regulation of a sector, while the Basel Convention enables states to decide unilaterally on the import of wastes. Similarly, by allocating the regulation of CO₂ emissions from ships and aircraft to respectively the IMO and the International Civil Aviation Organization, developing states lost the principle of CBDR that is central to the climate change regime.⁹³ Ultimately, which regime addresses a human activity determines how it will be regulated and who benefits and bears burdens as a result of regulation. As a consequence, when human activities become candidates for additional or new regulation, contestation is likely to emerge and compromise is required. The ongoing BBNJ negotiations provide an example.

Finally, the multiple international institutions involved in the development of international environmental law together provide a complex network of regulations that is neither layered horizontally (suggesting a hierarchy between global and regional institutions) nor layered vertically (assuming functionally clearly defined pillars). Instead, the network reflects multiple facets that each aim to regulate human activity with a limited number of elements in place to secure a measure of coherence.

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Footnotes:

- ¹ EU is a party to most MEAs and participates in the work of international organizations; see Chapter 37, 'Regional Organizations: The European Union', in this volume.
- ² See Chapter 39, 'Sub-National Actors', in this volume.
- ³ <<https://www.odsargentina.gob.ar/Provincias>> accessed 2 January 2020.
- ⁴ <<https://www.thegef.org/project/avaclim-agro-ecology-ensuring-food-security-and-sustainable-livelihoods-while-mitigating>> accessed 2 January 2020.
- ⁵ A UN specialized agency is a formal international organization established by states through a treaty and linked to the UN through an agreement; see UN Charter, arts 57, 63.
- ⁶ UNGA Res 2997/27, 'Institutional and financial arrangements for international environmental co-operation' (15 December 1972) UN Doc A/RES/2997(XXVII).

- ⁷ See Chapter 25, 'Soft Law', in this volume.
- ⁸ See Chapter 5, 'Fragmentation', in this volume.
- ⁹ Frank Biermann *et al*, 'Navigating the Anthropocene: Improving Earth System Governance' *Science*, 335/6074 (2012): 1306; Bharat Desai, 'The Advent of the United Nations Environment Assembly' *ASIL Insight*, 19/2 (2015).
- ¹⁰ UN Environment, 'Funding Facts' <<https://www.unenvironment.org/about-un-environment/funding/funding-facts>> accessed 2 January 2020.
- ¹¹ UNGA Res 29/3351, 'Pattern of conferences' (18 December 1974) UN Doc A/RES/3351(XXIX), para 5.
- ¹² See text at, and fns 41 and 46.
- ¹³ UNGA Res 67/213, 'Report of the Governing Council of the United Nations Environment Programme on its twelfth special session and the implementation of section IV.C, entitled "Environmental pillar in the context of sustainable development", of the outcome document of the United Nations Conference on Sustainable Development' (15 March 2013) UN Doc A/RES/67/213.
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- ¹⁷ <<https://sustainabledevelopment.un.org/topics/sids/ecesaplus>> accessed 2 January 2020.
- ¹⁸ <<https://sustainabledevelopment.un.org/memberstates/argentina>> accessed 2 January 2020.
- ¹⁹ UNGA Res 45/212, 'Protection of Global Climate for Present and Future Generations of Mankind' (21 December 1990).
- ²⁰ UNGA Res 47/192, 'UN Conference on straddling fish stocks and highly migratory fish stocks' (22 December 1992).
- ²¹ UNGA Res 72/249, 'International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction' (24 December 2017).
- ²² See Chapter 30, 'Freshwater Resources', in this volume.
- ²³ See Chapter 16, 'Harm Prevention', in this volume.
- ²⁴ ILC, 'Analytical Guide to the Work of the International Law Commission' <<https://legal.un.org/ilc/guide/gfra.shtml>> accessed 2 January 2020; see also Chapter 31, 'Marine Environment: Pollution and Fisheries', in this volume.
- ²⁵ IUCN is a hybrid organization. Its membership consists of NGOs and sub-national actors; see Chapter 39, 'Sub-National Actors', in this volume.
- ²⁶ IUCN, 'Resolution on illegal traffic in wildlife species' GA 1963 Res 005.
- ²⁷ For information on regional seas conventions see Chapter 31, 'The Protection of the Marine Environment: Pollution and Fisheries', in this volume.

- 28** See Chapter 24, 'Multilateral Environmental Treaty Making', in this volume.
- 29** See Chapter 19, 'Differentiation', in this volume.
- 30** See Chapter 32, 'Wildlife', in this volume.
- 31** See Chapter 56, 'Non-Compliance Procedures', in this volume.
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