SPECIAL SECTION

HOW INTERNATIONAL ORGANISATIONS SHAPE INTERNATIONAL ENVIRONMENTAL LAW THROUGH NON-BINDING INSTRUMENTS: AN ACCOUNT OF THE EXERCISE OF INTERNATIONAL PUBLIC AUTHORITY

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This article lays out a framework of authority for the analysis of non-binding instruments of international organisations as exercises of international public authority. This framework considers influence on freedom of addressees and law-appliers, rather than formal bindingness, to be the decisive criteria of authority. I argue that this approach can better explain the legal relevance and impact of these instruments on the conduct of different actors, particularly in the field of international environmental law. The article further proposes that the decision-making processes taking place inside international organisations, which are a distinctive feature of this form of governance, influence the authority of the instruments adopted. These processes have, at least, three characteristics that are particularly relevant in relation to environmental regulation: (i) the scientific and technical expertise of the organisation and other participants, (ii) the range of participants and the achievement of broad consensus within relevant communities of practice, and (iii) the development of procedural norms necessary to implement and comply with existing obligations. Finally, this framework of authority is applied to analyse the authority of the instruments adopted by the Food and Agriculture Organisation on the regulation of sustainable fisheries. This case study illustrates

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the explanatory value of the framework and draws conclusions on its implications for the law of international organisations.

Keywords: international public authority; non-binding instruments; international organisations; international environmental law; fisheries

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I. INTRODUCTION

International organisations have been at the forefront of contemporary developments in international environmental law, adopting influential codes of conduct, guidelines, and declarations of principles. However, the traditional, formalistic account of international law-making, reliant on a strict dichotomy between binding and non-binding instruments, provides limited analytical tools to conceptualise these instruments and to account for their influence on the conduct of different actors.[1] This has resulted in an

[1] José E Alvarez, 'Standard-Setting in UN System Organizations' in Jan Klabbers (ed), The Cambridge Companion to International Organizations Law (Cambridge University Press 2022) 122–123; Rita Guerreiro Teixeira, 'The Role of International Organizations in the Development of International Environmental Law: Adjusting the Lenses of Analysis' (2021) 53 Case Western Reserve Journal of International Law 237, 247.

explanatory gap in the way that international lawyers understand and theorise international organisations and their role in shaping international environmental regimes.[2]

This article aims to address that gap. It deals with the question of what the legal relevance of non-binding instruments of international organisations in international environment law is, and it argues that this can be better answered from the point of view of authority (rather than through a relation with formal sources).[3] In doing so, it inserts itself in two ongoing debates. First, it joins the discussion on the authority of international legal instruments, relying on accounts of authority as a measure of deference and on the literature on international public authority, and building on the argument that authority can be dissociated from formal validity, bindingness, and coercion.[4] It presents two main propositions to advance this debate. It establishes that the international regulation of the environment (a highly technical field, where scientific uncertainties and high-cost measures make effective regulation difficult to adopt) offers an optimal viewpoint to study the authority of non-binding instruments of international organisations. Additionally, it argues that certain characteristics of the decision-making processes of international organisations are determinant for the authority of their environmental instruments, influencing how they are received by different stakeholders and how much deference they induce.

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2 On the identification of this gap, see Jan Klabbers, 'The Normative Gap in International Organizations Law' (2019) 16 International Organizations Law Review 272, 272–274.

3 Statute of the International Court of Justice 1946 (UNTS vol 33, p 993), Art. 38(1). Further discussion in Guerreiro Teixeira (n 1).

4 See Fuad Zarbiyev, 'Saying Credibly What the Law Is: On Marks of Authority in International Law' (2018) 9 Journal of International Dispute Settlement 291, 294–295; Nico Krisch, 'Liquid Authority in Global Governance' (2017) 9 International Theory 237, 243; Armin von Bogdandy, Matthias Goldmann and Ingo Venzke, 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority' (2017) 28 European Journal of International Law 115.

Second, this article aims to contribute to the debate on the need for a revised framework for analysing international institutional law-making, by better understanding how international organisations influence the freedom of other actors. It joins the ranks of those that call for a recast of functionalist approaches for being unable to accommodate new legislative developments.[5]

The paper proceeds in three parts. Part II clarifies the concept of authority used and the characteristics that make it a fit tool for studying the legal relevance of non-binding instruments. Part III discusses three marks of authority[6] found in the legislative processes of international organisations. Finally, part IV is a case study of the authority of the Code of Conduct on Responsible Fisheries (CCRF) adopted by the Food and Agriculture Organisation (FAO), highlighting some important implications of the proposed approach.

II. Normative Instruments as Exercises of International Public Authority by International Organisations

The success of several non-binding instruments in guiding international practice has shown that (formal) law and authority 'can move along separate tracks'.[7] The Guidelines for Conducting Integrated Environmental Assessments developed by the United Nations Environmental Programme, the food safety standards of the Codex Alimentarius (jointly developed by the World Health Organisation and FAO), the International Maritime Organisation guidelines for the prevention of pollution at sea are all influential instruments that have been well received and widely implemented by states and other stakeholders, regardless of their formal status.[8] Consequently, this paper relies on the concept of international public

5 See Jan Klabbers, 'International Organizations and the Problem of Privity: Towards a Supra-Functionalist Approach' in George Politakis, Tomi Kohiyama and Thomas Lieby (eds), *ILO100: law for social justice* (International Labour Office 2019).

6 The terminology of "marks of authority" is proposed in Zarbiyev (n 4) 298.

7 Klabbers, 'The Normative Gap in International Organizations Law' (n 2) 297.

8 Jürgen Friedrich, *International Environmental "soft law"* (Springer 2013) 26, 31, 58.

authority as a more fitting tool to grasp the legal relevance of these various normative instruments.[9] This concept has the advantage of considering influence on freedom, rather than formal bindingness,[10] to be the decisive criteria of authority. According to this approach, a normative instrument adopted by an international organisation is an exercise of international public authority if, and to the extent that, it influences the freedom of other actors (both the norm addressees and/or law-appliers) in pursuance of a common interest.[11]

An instrument can influence an actor's freedom when it changes its legal position and also when it establishes a rule or standard of conduct whose violation determines that an act is illegal, creates a disadvantage (legal, economic, or reputational), prevents obtainment of a benefit, or requires it to justify its actions if it chooses to act differently from what is prescribed.[12] This understanding of authority presupposes a certain degree of freedom to act otherwise. Simultaneously, authority must remain content-independent, or it risks being assimilated to persuasion based on rational arguments.[13] An

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9 Normative instruments are understood here as instruments that make a claim to guide or regulate conduct of their addresses, rendering it mandatory, prohibited, permitted, or recommended—see Nicole Roughan, 'Sources and the Normativity of International Law', *The Oxford Handbook of the Sources of International Law* (Oxford University Press 2017) 680, 682. They are legally relevant to the extent that they produce legal effects (namely, influencing the freedom of legal actors), influence future developments in legal regimes, and/or are adopted under an international law framework.

10 On the alternative command model of authority, according to which it corresponds to the exercise of binding powers to create formal obligations, see Samantha Besson, 'The Authority of International Law — Lifting the State Veil' (2009) 31 Sydney Law Review 343; Joseph Raz, 'The Problem of Authority: Revisiting the Service Conception' (2006) 90 Minn. L. Rev. 1003.

11 I rely heavily on the definition of international public authority developed by several authors of the International Public Authority project, particularly on the revised definition put forward in von Bogdandy, Goldmann and Venzke (n 4) 117.

12 ibid 139–140; Armin von Bogdandy, Philipp Dann and Matthias Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' (2008) 9 German Law Journal 1375, 1381–1383.

13 Ingo Venzke, 'Between Power and Persuasion: On International Institutions' Authority in Making Law' (2013) 4 Transnational Legal Theory 354, 355.

authoritative directive is complied with, not because the actor finds its content agreeable, reasonable, or persuasive, but because it emanates from a particular person, and/or (I add) was adopted by a particular process. This apparent contradiction can be solved by reference to the social basis of authority: authority rests not on individual choices but on a prior recognition by the relevant community of practice. This community includes an instrument's direct and indirect addressees and law-appliers—i.e., the participants in the international legal system who must make decisions about how to act while considering the level of deference owned to the instrument issued by an authority.[14] It is their internal perspective that matters to determine the normativity of an instrument.[15]

All these characteristics make authority a useful tool to reconceptualise the concept of international legal normativity and our scope of analysis as international lawyers. In this framework, the relevant question is no longer exclusively whether the instruments of international organisations being studied are 'formally law'—i.e., if they fit into one of the formal sources identified in the international legal system. To the extent that these are recognised as authoritative by the relevant community of practice—therefore, impacting the freedom of other actors and requiring regulation under a public law regime—, they are legally relevant, produce legal effects, and are of interest to lawyers.[16]

III. THREE FORMS OF AUTHORITY

The claim that international organisations influence the freedom of other actors through the adoption of various authoritative instruments begs the

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14 Zarbiyev (n 4) 294–296; Michael Zürn, *A Theory of Global Governance: Authority, Legitimacy, and Contestation* (Oxford University Press 2018) 38.

15 Matthias Goldmann, 'Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority' (2008) 09 German Law Journal 1865, 1878; HLA Hart, *The Concept of Law* (Third edition, Oxford University Press 2012) 88–90.

16 Case C-159/02 *Turner v Grovit and others* EU:C:2004:228, paras 27-31.

question of what the basis for their authority is—particularly as the elements traditionally relied on to discuss the authority of international organisations (delegated powers, formally binding status, and use of mandatory wording)[17] cannot provide any answers in relation to non-binding instruments. Focusing on environmental regulation, I propose turning our attention to the decision-making processes though which normative instruments are adopted to find the basis of their deference-entitling properties.

In doing so, we find that there are (at least)[18] three aspects of decision-making processes within international organisations that are recognised by the community of practice as contributing to the authority of environmental instruments: (i) the scientific and technical expertise of the organisation and other participants—epistemic authority; (ii) the wide range of participants and capacity to generate shared understandings in broad and inclusive discursive processes—interactional authority; and (iii) the development of procedural and institutional norms necessary for implementation and compliance with existing obligations—regulatory authority. While some studies have considered the exercise of epistemic authority by international organisations,[19] the other two types of authority, and the specificities of decision-making in environmental law, have not been systematically considered.

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17 E.g., Liesbet Hooghe and Gary Marks, 'Delegation and Pooling in International Organizations' (2015) 10 The Review of International Organizations 305; Allen Buchanan and Robert O Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20 Ethics & International Affairs 405. See, for an overview of the traditional model for analysing authority, Tim Staal, 'After Agreement: On the Authority and Legitimacy of Environmental Post-Treaty Rules' (UvA 2017) 29–31.

18 These three forms of authority do not intend to be exhaustive and the identification of other forms of international public authority is an ongoing task for international lawyers and scientists of related disciplines.

19 E.g., Pertti Alasuutari and Ali Qadir, *Epistemic Governance: Social Change in the Modern World* (Springer International Publishing 2019); David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2018); Ole Sending, *The Politics of Expertise: Competing for Authority in Global Governance* (University of Michigan Press 2015).

1. *Epistemic Authority*

Epistemic authority refers to the authority that is exercised on the basis of expertise and knowledge.[20] International organisations, particularly their secretariats, build important technical expertise in their specific fields of action, by collecting, generating, and organising information that is not immediately available to member states.[21] As an example, FAO has the most comprehensive statistical database on food, agriculture, fisheries, forestry, natural resources management, and nutrition—FAOSTAT—, covering over 254 countries and territories since 1961.[22] The knowledge produced by international organisations means that their technical advice holds considerable authority, particularly in eminently technical fields such international environmental law, and it often gets translated into normative instruments through their law-making processes.[23]

In addition, the knowledge developed within epistemic communities[24] is often promoted in law-making within international organisations when non-state actors (expert groups, scientists, NGOs) are consulted during the

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20 Klabbers, 'The Normative Gap in International Organizations Law' (n 2) 276; RB Friedman, 'On the Concept of Authority in Political Philosophy' in Joseph Raz (ed), *Authority* (Blackwell 1990) 80–81.

21 Piiparinen Touko, 'Secretariats' in Jacob Katz Cogan, Ian Hurd and Ian Johnstone (eds), *The Oxford Handbook of International Organizations* (Oxford University Press 2016) 843.

22 FAO, 'FAOSTAT - Food and Agriculture Data' <https://www.fao.org/faostat/en/#home> accessed 30 October 2022.

23 Examples in part IV *infra* and in Jan Klabbers, 'Reflections on the International Telecommunication Union: International Organizations as Epistemic Structures' in Andrea Bianchi and Moshe Hirsch (eds), *International Law's Invisible Frames: Social Cognition and Knowledge Production in International Legal Processes* (Oxford University Press 2021) 205. On the use of expertise and knowledge as power in global governance, see Kennedy (n 18).

24 Defined as knowledge-based networks focused on scientific or technical matters—Peter Haas, 'Epistemic Communities' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (1st edn, Oxford University Press 2008) 793.

negotiation and drafting stages.[25] For example, main findings from the reports of the Intergovernmental Panel on Climate Change (IPCC) have systematically been used as the basis for legislative developments within the United Nations (UN) system.

2. Interactional Authority

The authority of an instrument can also be the product of discursive practices that both generate and reinforce shared understandings between communities of practice,[26] which are difficult to ignore for the participants in those communities—hence, influencing their freedom.

International organisations are international fora per excellence and often bring a wide range of participants into their legislative procedures: not only member states but also non-member states, other international organisations, NGOs, private actors, and experts. These inclusive discursive processes tend to generate consensus (or shared understandings) around certain concepts and standards of conduct suitable to pursue common interests, which are then incorporated into the normative instruments adopted by the international organisations and subsequently turn into reference points that those wishing to participate in the community are expected to engage with.[27] Ignoring them results in costs or the forgo of benefits. Each time that an actor engages with them, it reinforces the expectation of all participants that they will be considered in the future.

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25 Jutta Brunnée and Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010) 59–60.

26 Brunnée and Toope have first emphasised the role of shared understandings generated and reinforced by communities of practices as the basis for effective legal norms—ibid 56. I propose that their framework of interactional law-making is particularly fitting to analyse law-making by international organisations and explain the authority of their outputs. See also, on the role of discourse on the construction of authority, Venzke (n 13) 369.

27 Venzke (n 13) 366–368; Brunnée and Toope (n 24) 56–87; Haas (n 23) 797.

An illustration is the agreement reached by parties to the UN Framework Convention on Climate Change (UNFCCC) on the adoption of a maximum temperature goal for global warming: 2°C above preindustrial levels, to be lowered to 1.5°C in the near future. This agreement gave a more concrete meaning to the overarching aim of the convention of preventing 'dangerous anthropogenic interference' with the climate system.[28] It was preceded by several years of discussion within UNFCCC bodies, involving state parties, non-party stakeholders, and the scientific community—particularly the IPCC.[29] It was finally incorporated in the Cancun Agreements,[30] a set of non-binding decisions adopted by the Conference of the Parties (COP), and later in the Paris Agreement,[31] the first binding international instrument to contain a target for global warming.

3. Regulatory Authority

Several instruments adopted by international organisations do not intend to create new substantive legal obligations but, instead, are aimed at assisting states in implementing existing obligations. These regulatory norms influence the freedom of their addressees by detailing how they should comply with their obligations, namely, guiding implementation of substantive rules, specifying how they are to be given effect, how performance is to be monitored and assessed, and how involvement,

28 United Nations Framework Convention on Climate Change 1992 (UNTS vol 1771, p 107), Art. 3(3).

29 See, for an overview of discussion leading up to the Cancun Agreements, Brunnée and Toope (n 24) 148–151.

30 Decision 1/CP.16 - The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention 2010 (FCCC/CP/2010/7/Add1) para 4.

31 Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016), 3156 UNTS, Art. 2.

engagement, communication, and deliberation by relevant actors will take place.[32]

Due to the structure of international environmental law, namely the fact that it establishes numerous obligations of conduct (where compliance depends on following established procedures) and often develops through framework agreements (which require further detailing to be operationalised in practice), this type of instrument is very common in the field.[33] To the extent that certain treaty provisions require additional details to be implemented, it becomes difficult to comply with them without following the procedures established by international organisations, for lack of an alternative course of action that would be recognised as compliance by other actors in the community. This is particularly the case in relation to decisions adopted by the COPs to multilateral environmental agreements, such as the criteria adopted by the COP to the Convention on International Trade in Endangered Species of Wild Fauna and Flora for adding and removing species as endangered in the various appendixes to the convention.[34]

The next part illustrates the application of this framework of authority with an example: the analysis of non-binding instruments adopted by FAO on the regulation of responsible fisheries.

IV. Practical Application and Implications: The Code of Conduct on Responsible Fisheries and Related Instruments

The CCRF, adopted in 1995 by the FAO Conference, is a central piece of the global fisheries regime, containing general principles and international standards of behaviour for responsible fisheries practices and being addressed

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32 Tim Staal, *Authority and Legitimacy of Environmental Post-Treaty Rules* (Hart Publishing 2019) 48–49.

33 Jutta Brunnée, 'Procedure and Substance in International Environmental Law', *Académie de droit international. Recueil des cours*, vol 405 (Brill 2020) 114.

34 CITES, Criteria for amendment of Appendices I and II, Conf. 9.24 (Rev. COP17).

to virtually all stakeholders concerned with fisheries and conservation.[35] Despite its voluntary nature,[36] the CCRF is one of the most authoritative instruments in fisheries management. Going back to the terms of the definition of authority proposed above, there is ample evidence that the relevant community of practice recognises this instrument as commanding deference, and that there is an expectation that participants in the community will consider it in determining their behaviour. According to FAO, the CCRF 'is probably the most cited, high-profile and widely diffused global fisheries instrument after the 1982 United Nations Convention on the Law of the Sea' (UNCLOS).[37] Several binding and non-binding international legal instruments include references to the CCRF, such as the Port State Measures Agreement,[38] several UN General Assembly resolutions,[39] and the Rome Declaration on Illegal, Unreported, and Unregulated Fishing.[40] Numerous references can also be found in literature in the fields of law, management, and science, indicating that these standards are reaching different stakeholders and the public.[41] Additionally, FAO reports positive trends in the implementation and dissemination of the CCRF, also evidencing the belief in its authority. Norms on responsible fisheries are now widely established among states, regional fisheries

35 FAO, *Code of Conduct for Responsible Fisheries* (FAO 1995), Art. 1.2, 1.3.

36 ibid, Art. 1.1.

37 FAO, 'Implementation of the Code of Conduct for Responsible Fisheries: Trends over the Last 25 Years' (2021) 2.

38 FAO, Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing 2009 (Report of the FAO Council, Hundred and Thirty-seventh Session (Rome, 28 September-02 October 2009), Appendix V), Preamble.

39 E.g, UNGA Resolution 75/89, of 8 December 2020 (UN Doc A/RES/75/89) 1–2, stating that the CCRF sets out the 'principles and global standards of behaviour for responsible [fisheries] practices'.

40 Rome Declaration on Illegal, Unreported and Unregulated Fishing 2005 (Outcome of the Ministerial Meeting on Fisheries (12 March 2005), Appendix B, CL 128/INF/11).

41 Joan Parker, David Doulman and Jean Collins, 'Citation Analysis for the 1995 FAO Code of Conduct for Responsible Fisheries' (2010) 34 Marine Policy 139, cited in Friedrich (n 9) 78.

organisations, NGOs, and industry.[42] Where states did not fully comply with the CCRF, they listed insufficient budgetary means, insufficient human resources, and other national constraints as a justification, rather than questioning the relevance of the instrument.[43]

While the authority of this instrument cannot be traced to its formal legal status, it can begin to be explained by reference to FAO's epistemic authority. FAO's expertise on fisheries is widely recognised both in international practice[44] and academia.[45] The FAO Secretariat concentrates important expertise on fisheries, conservation of natural resources, and the development of legal instruments on these topics. It also plays a role in the development of scientific knowledge, publishing, every two years, a comprehensive report on the State of the World Fisheries and Aquaculture.[46] These reports provide a scientific basis for decision-making and the development of normative instruments within the organisation and for establishing the reputation of FAO as an expert organisation. In addition, the development of legal instruments—here included the CCRF—is typically subject to several rounds of expert and technical consultations, during which

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42 FAO, 'Progress in the Implementation of the Code of Conduct for Responsible Fisheries and Related Instruments' (2021) COFI/2020/Inf.7 paras 3, 68, 87.

43 ibid 109–110.

44 E.g., UN, 'Plan of Implementation of the World Summit on Sustainable Development' (2002) Report of the World Summit on Sustainable Development, Johannesburg, 26 August-4 September 2002, UN Doc. A/CONF.199/20 para 31(c); UN, 'Agenda 21' (1992) Report on the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, UN Doc. A/CONF.151/26 (Vol. I), Annex II para 17.49.

45 Tore Henriksen, 'The FAO and Ocean Governance' in David Joseph Attard, Malgosia Fitzmaurice and Alexandros XM Ntovas (eds), *The IMLI Treatise on Global Ocean Governance: Volume II: UN Specialized Agencies and Global Ocean Governance* (Oxford University Press 2018) 27; Friedrich (n 8) 62–63; Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd ed., Oxford University Press 2009) 74.

46 See the most recent report, FAO, 'The State of World Fisheries and Aquaculture 2022: Towards Blue Transformation' (FAO 2022) <https://www.fao.org/documents/card/en/c/cc0461en> accessed 30 October 2022.

the Secretariat develops successive drafts until all parties involved are satisfied with the text and it can be adopted.

Furthermore, because of its inclusive adoption process, the CCRF also benefits from interactional authority. States, international organisations, experts, and NGOs participated in several rounds of consultations and submitted substantial comments that were incorporated into the text.[47] The FAO Conference and the Council regularly bring together diverse stakeholders as observers (in addition to its almost universal membership), facilitating both the emergence of agreements (or shared understandings) between participants in the community of practice of fisheries that become incorporated in FAO's instruments and continued engagement with the instruments after their adoption. These continued interactions are essential in maintaining mutual expectations among participants in the community[48] and, more often than not, are also able to generate new agreements and lead to the adoption of new instruments. In turn, these new instruments reinforce the authoritative status of CCRF principles and standards. To date, more than thirty technical guidelines on fisheries and aquaculture, nine international guidelines, two strategies, and four plans of actions have been adopted by FAO to assist states, industry, and fishers in implementing the provisions of the CCRF.[49]

These follow-up instruments are also examples of the exercise of regulatory authority. The Voluntary Guidelines on Flag State Performance, for instance, were developed as a tool to strengthen compliance by flag states with their obligations regarding the flagging and control of fishing vessels

47 FAO, *CCRF* (n 34), Annex 1.

48 As Brunnée and Toope noted, reference points can only retain their salience "to the extent that actors continue to participate in their production and use"—Brunnée and Toope (n 24) 63.

49 As envisaged in FAO, *CCRF* (n 35), Art. 2(d). See full list of instruments adopted in FAO, 'Implementation of the Code of Conduct for Responsible Fisheries: Trends over the Last 25 Years' (n 36) 5–9.

(arising from provisions of the UNCLOS and the CCRF).[50] They illustrate the authority of this type of instruments, which lies on the fact that, as they define the parameters, steps for action, and even the language necessary to operationalise existing obligations (in this case, conducting flag state performance assessments), they become difficult to escape in practice.

Finally, this brief case study suggests three additional conclusions concerning the relevance of the framework of authority of instruments of international organisations proposed here, as well as its implications for the law of international organisations more broadly.

First, the recognition of certain instruments of international organisations as authoritative, based on the deference-entitling properties of their adoption processes (and/or others elements yet to be identified), helps explaining the growing engagement with those instruments and with their underlying environmental goals, regardless of their formal status. The mutual expectations created in the fisheries community that fisheries actors would engage with the CCRF principles and subsequent regulatory instruments—based on the expertise and scientific knowledge that they embody, on the establishment of shared understandings, and on the need of regulatory norms—make it difficult for those actors to ignore them in their operations. Additionally, the successive adoption of plans of action, strategies, and guidelines to implement specific aspects of the CCRF (such as the implementation of flag state obligations and the elimination of illegal, unreported, and unregulated fishing) illustrates how environmental regimes typically develop progressively. Continuous discursive processes within international organisations gradually generate deeper and more detailed shared understandings and these eventually lead to the adoption of more ambitious normative instruments.[51] Simultaneously, this idea of progressive

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50 FAO, *Voluntary Guidelines for Flag State Performance* (FAO 2015) para 1.

51 Brunnée and Toope have referred to this as the 'hard work of international law': to progressively deepen shared understandings and practices of legality to develop effective legal regimes—Brunnée and Toope (n 24) 82.

commitments, together with the understanding that the claim to authority of environmental instruments of international organisations is often not absolute, with many authorities competing to influence the conduct of addresses,[52] helps to explain why important challenges persist in the conservation of fisheries resources at a sustainable level[53] (as in many other environmental regimes, most notably climate change).

Second, focusing on the decision-making processes that precede the adoption of normative instruments permits shifting the attention from international organisations and member states as the main actors in international regulation to the variety of actors that intervene in the development of these instruments. What is more, it shows that the authority of environmental instruments depends on the intervention of a range of stakeholders, all of which contribute to strengthen different forms of authority—until, eventually, the instruments become difficult to ignore without incurring reputational, economic, or other costs. This change of perspective provides important insights for revisiting the traditional tenets of international institutional law, particularly since one the most persistent criticisms to the functionalist approach to international organisations is that it is designed only to address the relationship between member states and the organisation, and it is blind to all other actors and relationships.[54] The

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52 According with the deference framework, an authoritative instrument provides reasons for action, but it does not necessarily dislodge all alternative reasons—see, Roughan (n 9) 682. On the multiplicity of claimants of authority in international law, see Nicole Roughan, 'Mind the Gaps: Authority and Legality in International Law' (2016) 27 European Journal of International Law 329, 336–340.

53 FAO has reported that there is still an increasing trend in the percentage of stocks fished at biologically unsustainable levels and states report their partial compliance in FAO's implementation questionnaires—FAO, 'The State of World Fisheries and Aquaculture 2022' (n 45) 46–47.

54 Angelo Golia and Anne Peters, 'The Concept of International Organization' in Jan Klabbers (ed), *The Cambridge Companion to International Organizations Law* (Cambridge University Press 2022) 31; J Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (2015) 26 European Journal of International Law 9, 11, 27–28.

analysis of the authority of normative instruments provides new elements that permit putting international organisations in their context[55] and developing a new framework for understanding the legal relevance of their instruments. Future research could revisit the traditional questions of legitimacy of international instruments, stakeholder participation, and rule of law from this new standpoint.

Third, the findings above have at least two important implications for institutional design. First, they suggest that the design of decision-making processes leading to the adoption of legal instruments might be more determinant for their capacity to influence different actors than the choice between binding and non-binding instruments. Second, they indicate that the existence of procedures that permit continuous interaction between all participants in a community of practice might be the decisive factor for the success of a regime, particularly in international environmental law which tends to develop through progressive commitments.

V. CONCLUSION

This article has made the case for refocusing the analysis of the legal relevance of non-binding instruments of international organisations on the concept of international public authority. It aimed to show that this alternative focus permits stepping away from the formalistic approaches to international law-making and offers better analytical tools to understand both the impact of those instruments on the conduct of different actors and their relevance for the development of international environmental law.

International organisations develop instruments through complex legislative procedures, which typically involve the participation of a variety of actors. These procedures lead to the adoption of provisions that reflect shared

[55] Arguing for the need to bring the context in which international organisations operate into their theory, see Jan Klabbers, 'Beyond Functionalism: International Organizations Law in Context' in Jan Klabbers (ed), *The Cambridge Companion to International Organizations Law* (Cambridge University Press 2022).

commitments and understandings and create mutually reinforcing expectations (and corresponding social pressures) that those provisions will be followed by participants in the relevant community. In addition, international organisations concentrate an important level of scientific and technical expertise, which reinforces the social recognition of their environmental instruments as inducing deference. Finally, they are often in a unique position to provide the institutional, procedural, and operational mechanisms and regulations necessary to implement broadly defined goals, obligations, and mechanisms, which are characteristic of environmental instruments. I have argued that, for these reasons, their instruments frequently become reference points for conduct that are hard to escape for those participating in the respective communities of practice (as ignoring them entails legal, economic, or reputational disadvantages or prevents the obtainment of benefits). In other words, they are authoritative in international legal practice and influence the freedom of other actors.

Furthering the research agenda on the authority of instruments of international organisations can provide insights for a revised approach to international institutional law; one that can better explain and support normative developments in fields such as environmental law, where organisations have taken the front seat in regulation. This approach sheds new light on the merits and limitations of authority-based environmental regimes and offers new tools to investigate the role of different actors and their influence in authoritative outcomes. Finally, an analysis of authority allows deriving lessons for better institutional design and more effective law-making by international organisations, in particular by acknowledging the role of various stakeholders and highlighting the importance of providing for procedures that permit continuous interaction between them.