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EDITORIAL

FROM GOVERNMENT TO GOVERNANCE: REFLECTIONS ON CHANGE

Benedict S. Wray**

It is an exciting time to be writing my inaugural editorial as Editor-in-Chief of the EJLS. All around us, sea-changes in governance structures, so long discussed, are taking shape, developing and metamorphosing all over the globe. This evolution is also mirrored in academia on both the doctrinal and institutional levels, and I wish to offer some brief thoughts on what these changes may mean for the future, before turning to the very concrete cases which play out in the pages of this issue, both in terms of how we publish and what we publish at the EJLS.

I. ACADEMIA AND GLOBALIZATION: THE OLD STORY

The latest generation of aspiring academics could be forgiven for a certain jaded attitude towards the phenomenon of globalization and the host of new vocabularies that have grown up around it. Increasing economic interdependence, the so-called retreat of the nation-state, and the shift from nationalism to globalism and regionalism on the one hand and the countervailing trend of localism on the other, have become stock items for debate. One only has to look to the books under review in the present issue for examples: one book on the European Court of Human Rights, a regional endeavour, another on the interaction between human rights law and general international law, two books on the changing role of business in global affairs, and finally a contribution to the burgeoning jurisprudence of transnational law. The newcomer, confronted with apparently vast interlocking literatures that cross disciplines in ways hitherto unprecedented, might ask where on earth we go from here.

1. *Methodological Tectonics*

Predictably, substantive attempts to examine globalization initially fell along the well-known fault-lines of the nation-state and the international community. For example, it is a familiar theme for law and political science students to write essays on the democratic deficit in the European Union,

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essentially using the lens of a democratic nation-state to critically examine a supranational phenomenon. Ulrich Beck has famously warned against this type of "methodological nationalism", by which our national academic culture provides implicit assumptions which affect our approach to methodology. An excellent example of an area where such implicit bias is a particular risk is in the multitudinous attempts to grapple with the changing nature of the public-private divide, concepts which in their present form are as intrinsically national as popular sovereignty, something that has led to much mutual incomprehension and academic talking past each other, as authors rely, without explanation, on the words to do work that is no longer within their capability. And, while some conflate private with "non-state", others see national private entities as having become dislocated from their state-derived origins, without exploring whether this affects the label private per se.

But there has been a shift, and academia has been right to make it. As we move from the paradigm of government to governance in regulatory structures, with transnational corporations becoming simultaneously the regulatee and enforcers of global supply-chains, alongside an increasing reliance upon supranational or intergovernmental structures to harmonise, regulate and prescribe norms, academia has witnessed a similar progression. Doctrinally, this can be seen in the constructivism of research agendas such as Global Administrative Law, or the Transnational Private Regulation project, as much as in moves in jurisprudence towards understanding and theorizing an emergent transnational law. Institutionally, it is visible in the proliferation of centres for global governance, human rights and development, law and cosmopolitan values, transnational regulation, and so on, which may come to play an important role in disseminating ideas beyond the academic sphere and into the executive and political arenas, but which owe a corresponding responsibility to ensure the intellectual rigour of any ideas thus transmitted.

2. *Internal Frontiers?*

The tendency, in the globalized world of norm-proliferation, has been towards increasing specialization. Thus the EU began as an economic enterprise, similar to the WTO; Human Rights, as a similar "self-contained regime", to use the words of Bruno Simma. A more recent example is given by International Investment Arbitration, which has a comparable methodological bias derived from investors' rights regimes contained within bilateral investment treaties and customary international law. Yet the EU has fairly consistently moved towards increasing integration of non-economic issues, culminating in the Charter of

Fundamental Rights, while Ernst-Ulrich Petersmann and Philip Alston famously fell out over the issue of whether human rights considerations should be similarly integrated at the WTO. Some litigation creep in arbitration regimes is discernible in the increasing acceptance of *amicus* briefs, but some commentators oppose the use of such devices to introduce inappropriate considerations into the investment fora.

One can see a similar trend to specialisation in academic disciplines, maybe in response to the increasingly globalised and pluralist nature of academic dialogue. The rise of English as the *de facto* language of international communication has been accompanied by an enormous multiplying of the forums for debate on a given issue, while previously isolated debates now find themselves inescapably drawn into the heaving global morass of doctrine. Perhaps inevitably, there has led an increasing fragmentation of academic disciplines into interloping and overlapping sub-disciplines; the rise of the "law and ..." approaches providing but one celebrated example.

Without wishing to denigrate the importance of highly detailed study on specific areas and points of interest, this trend carries with it potential risks. I would point to three in particular, although this is not intended as in any way an exhaustive list. The first is isolationism, where a particular sub-discipline artificially shuts itself off from others, and becomes purely self-referential. While perhaps not a problem in itself, it risks creating widely divergent notions and missing key innovations from its neighbours which could lead to mutual advancement. The second is rock-hurling, whereby debate is weakened by a tendency to talk past one another and misunderstand the essential tenets of the other. The third is extreme path-dependency, whereby a particular (sub-) discipline becomes set along a track which is fundamentally unsound, or which cannot adapt to changing circumstances, but which thanks to self-interested behaviour and inter-disciplinary competition, mean that it is often difficult for the discipline itself to adapt.

My humble reflection is that, as we move away from national methodologies to post-national ones, we take time to reflect on the globalization of academia itself and adapt our methodologies accordingly. For, I would argue, not only have methods gone global in the geographical sense, escaping their national contexts and constraints, but many objects of study have also escaped the bounds of their original discipline. It is no longer enough, as it once was, to be "just" a private lawyer or political philosopher. We need research design, and training, that grounds research in its wider context while avoiding the risk of literary overload. Becoming a successful multidisciplinarian, it is often said, is overly ambitious to the

point of impossibility. My plea is rather for a return to limited poly-disciplinarity. Bentham's political philosophy is almost inseparable from his legal theory, and even H. L. A. Hart's work is infused with the political and the sociological in his discussion of primitive to complete legal systems. Today, the academic mileage of Amartya Sen's work on capabilities provides a roadmap for similar cross-disciplinary approaches, while interactions between economists and lawyers are pointing out fundamental weaknesses or omissions in each discipline's model of the firm/corporation. Private international law can both learn from and inform jurisprudence, while human rights and economic integration cannot fail to take account of one another without leaving accountability gaps in their wake. And, I would argue, even the specialist study must show a sensitivity to, and awareness of, the wider context and effects of a particular regime.

Nowhere is this truer than in the case of Climate Governance, which beyond being a pressing issue across the academic sphere, must confront a wide range of considerations, among them economic and social development, issues of inequality and the global south, the rights of indigenous peoples, migration, human rights, investment, the role of non-state actors, the nature of harm and remedy, sovereignty, rights and duties in respect of exploitation, property, and responsibility towards future generations. The cost of ignoring any one of these is potentially disastrous, and finding the way forward can only come from cooperation and understanding across disciplines, and research agendas which leave room for mutual learning and understanding.

II. In this issue

Our symposium on Legal Aspects of Climate Governance opens with a an exhortation from Massimiliano Montini to better analyse the 'reality' of the climate change regime, arguing that better protection can only come in the context of significant reform of the present climate governance framework. This reform, it is suggested, could go down two tracks, the first with international legal backing and UN architecture, and the second envisaging the G-20 as guiding and overseeing political agendas.

Beginning the substantive articles, Rafael Leal-Arcas continues in a similar vein, examining the failings of the UN-led negotiations and examining approaches based on cooperation between the major greenhouse gas emitting states. Anastasia Telesetsky, in the next contribution, takes a different tack, arguing that current interstate negotiations fail to acknowledge the necessity for collaboration from non-state actors. Instead, she proposes a hybrid, or co-regulatory solution and takes the Dutch covenant model as a case study. Although co-regulation has limits,

which she rightly acknowledges, it provides an avenue as yet unexplored in transnational climate governance which may bring benefits.

In his study of REDD (Reducing Emissions for Deforestation and forest Degradation), Sean Stephenson makes the case for using official development assistance as a source of REDD financing. He argues that this is consistent with both development and environmental goals, and provides a potential "win-win" situation for contributor states.

The last piece in our climate governance series comes from María León-Moreta, takes a critical look at the biofuels regimes, in particular the production of agrofuels, from the point of view of its environmental and human effects on local populations. She examines in particular the risks for the rights to land, water and food, and concludes with some interesting reflections on biofuel production and sustainability.

Our general articles come in two flavours this issue: jurisprudential and European. In the first, Alexander Green takes down an aggressively Dworkinian road, arguing for an interpretivist theory of legality. However, his thesis attempts to overcome some of the limitations of Dworkin's concept of law as integrity by instead holding that – properly understood by interpretivists – true propositions of law never conflict with morality. Davide Strazzari, on the other hand, looks at the often neglected area of cross-border cooperation, focusing on harmonizing trends within the EU and Council of Europe legal orders, as well as the role of national states.

Finally, the there are some interesting and varied book review. Vesselin Paskalev reviews List and Pettit on Group Agency, and offers some interesting conclusions on the rationality gaps between individual and collective personality. Axelle Reiter, meanwhile, critically appraises *The Impact of Human Rights Law on General International Law* by Profs. Kamminga and Scheinin. The fruits of a report by the Committee on International Human Rights Law and Practice at the International Law Association, it is rightly described as an 'ambitious' undertaking which inevitably raises new questions to which we must seek answers. Sticking with the human rights theme, Alba Ruibal reviews Anagnostou and Psychogiopoulou's 'landmark analysis' of the European Court of Human Rights and Minority Rights, while last but not least, Marco Rizzi offers some considered reflections on the trials and successes of *Rough Consensus and Running Code*, an incursion into the legal theory of transnational law by Calliess and Zumbansen.

III. CHANGES AT THE EJLS

I want to conclude with a discussion of changes that are underway at the EJLS. It is currently in vogue to lay bare the inner workings of some journals in a bid for transparency, but I would like to underline that the EJLS is, and always has been, committed to the highest standards of independence and transparency. Our peer review system involves anonymized, double-blind review for all articles that fall within the purview of the journal, whether commissioned or not. It has been exciting taking over at what is such a crucial stage in the development of a young journal, and inevitably there are ongoing challenges which must be met.

We have recently taken the decision, however, to change our governance structure to a tripartite one involving smaller, more efficient decision-making and consultation bodies, but a much wider pool of available editorial expertise. I am delighted to announce the creation of the new Editorial Advisory Board, made up of former members of the editorial board and the rest of the EUI scientific community. Similarly, the old Academic Advisory board has been streamlined, and now consists of four Departmental Advisors who meet regularly with the executive to discuss policy and provide guidance. Details of the membership of both these bodies, along with the current Editorial Board, may be found in the opening pages of this issue and on the website.

Parallel to the governance reforms have been changes to how we publish. In broad keeping with the old policy of three issues a year, we now aim to run two main issues, in summer and winter, with one special conference issue per year. Meanwhile the main issues are split into a section for general articles, and a themed section, or symposium, following a call for papers. The symposia thus continue our tradition of inviting inquiry and debate on noteworthy issues, while the general section opens up the doors for excellent articles on any subject within our core subjects. Thanks to change instigated by my predecessor, general articles can be submitted at any time, and will be advance published on our website as soon as they are processed, before being included in the next forthcoming issue. This, we feel, provides a real benefit in allowing authors to disseminate their work as soon as humanly possible, while retaining the benefits of definitive publication for citation purposes. Finally, we have integrated the oxford standard, OSCOLA, for the citation of authorities into our formatting. While not an enormous shift in terms of footnoting style, we believe it will help authors in submitting their articles to us, in particular given the OSCOLA support for footnote engines.

I hope you find the new-look EJLS agreeable, and will continue to follow and support our publication. In addition to our website, we can now be found on Facebook and LinkedIn. Our next issue, in December, will

contain a symposium on Citizenship and Migration, the Call for Papers for which may be found on our website.

COMMENT

RE-SHAPING CLIMATE GOVERNANCE FOR POST-2012

Massimiliano Montini*

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I. THE INADEQUACY OF THE PRESENT CLIMATE GOVERNANCE REGIME

In the last two decades climate change has been gaining more and more importance firstly in the scientific debate and subsequently in the political and public debate. Climate change is nowadays recognised as one the top priorities in the global agenda as well as in national countries.

Thanks primarily to the four reports produced and released by the IPCC, from 1990 to 2007, the level and quality of knowledge about climate change, its causes and its implications has significantly raised through the years and nowadays there is a greater awareness about the links between the progressive increase of anthropogenic GHG emissions and the climate change phenomenon.

Conversely, the present global regime for climate governance is essentially still the same one that was originally designed by the drafters of the UN Framework Convention on Climate Change, at the beginning of the nineties, about twenty years ago. To the rapid increase of the awareness on

the climate change phenomenon in the last two decades and the parallel improvement of the general knowledge about mitigation and adaptation needs has not corresponded a revision and update of the climate change governance.

The original institutions foreseen by the UNFCCC, which have been administering through the recent years the Framework Convention as well as the Kyoto Protocol, are essentially based on a Secretariat, assisted by a couple of technical support bodies, namely the SBI and SBSTA, and more importantly, on an annual meeting of the Conference of the Parties (COP). On the basis of such a governance model, the administrative and executive power lies essentially in the hands of the Secretariat, whereas the COP has the duty to provide the political guidance on climate change, both in terms of managing the existing agreements and in view of improving them, through the adoption of the necessary amendments or through the negotiation of further protocols and accords.

However, the variety and complexity of the several issues related to climate change, which can be somehow grouped under the headings of mitigation and adaptation, but which interfere with the domains of several other conventions and various other international organisations, make it very difficult for the UNFCCC Secretariat and the COP to efficiently solve all the pending issues and to effectively tackle climate change in all its interrelated aspects.

There are some key issues in the climate change debate which inevitably call for an improvement of the present climate change governance model. They are related for instance to the deployment of economic and financial support to help developing countries to put into practice their own national mitigation and adaptation actions, or to promote the improvement in the quantity and quality of green or low-carbon technology transferred towards less developed countries, or to increase the level of coordination of the climate change initiatives taken under the UNFCCC and the Kyoto Protocol with the climate change related actions performed under other conventions or by other international organisations.

The improvement of the institutional framework to tackle climate change should be at the forefront of the international negotiations, much more than and well before the definition of the concrete agreements, initiatives and actions for the next decades. However, looking at the development of the debate on the post-2012 global agenda in the last few years, before and after the too much awaited 2010 Copenhagen Conference, this does not

seem to have been the case.

In fact, looking at the development and the outcomes of the recent climate change negotiations, it clearly emerges a sense of inadequacy of the present climate change governance model. It has been argued by some scholars that one of the major problems surrounding the present climate change regime is "the challenge of fragmentation of negotiations and governance systems".[1] This means, in other terms, that the recent practice of the climate change negotiations has shown that it is almost impossible to reach within the framework of the COP's meetings comprehensive and practicable agreements on the future obligations to be assumed by the different groups of States for tackling climate change and the concrete initiatives to be undertaken.

Moreover, there are increasingly other *fora*, ranging from UN organisations, agencies and programmes to non-UN international organisations, which have been recently dealing in several ways and for different reasons with climate change issues, with a very scarce coordination among them. This leads us to the provisional outcome that the present climate change governance model and regime is inadequate for the next decades and needs some revision and improvement in order to effectively and efficiently cope with the future global climate change challenges and to provide the necessary responses to be developed at international, regional and national level, possibly in a coordinated way.

In sum, the UNFCCC COP does not seem the right forum to reach the long awaited agreement on the post-2012 scenario and to take the right decisions to effectively tackle climate change. This is however just an assumption, that needs to be corroborated by the analysis of the lessons learned in the last few years from the practice of the climate change negotiations.

II. Lessons learned from the climate change negotiations for post-2012: hopes, failures, reality

1. *The climate change negotiations*

The lessons learned from the climate change negotiations which took place in the last few years in order to devise the future of Kyoto Protocol or in more general terms the climate change regime for post-2012 speaks of hopes, failures, reality.

Let's start from the hopes. Following the long years from 1997 to 2004, when the Kyoto Protocol was awaiting the ratification of a number of

Annex I countries representing at least 55% of the global 1990 GHG emissions of the most industrialised countries, immediately after the entry into force of the Protocol, at the first meeting of the Parties to the Kyoto Protocol (CMP-1), held in Montreal in 2005, the Parties started negotiations on thepost-2012 scenarios.

The first formal step on the post-2012 negotiations was the institution of the *Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol* (AWG-KP). The establishment of such an AWG was based on art. 3(9) KP, which foresees for the possibility to establish further binding reduction commitments for the Annex I Parties under the KP. This would means that a second commitment period for the same Annex I Parties could be established, without changing the "equilibrium" among the duties of the Annex I and the Non-Annex I Parties which was found at the time of signature of the Kyoto Protocol, back in 1997.

This probably appeared to many countries to be, at the very beginning of the negotiations on post-2012, the most viable option for the future. However this was not the only option on the table. In fact, in parallel with this one, there were at least two other possibilities, which started to be considered at the beginning (since 2005) in a less official way. The second option consisted in the possibility to proceed to a revision of the Kyoto Protocol on the basis of art. 9 KP, for instance with a view to consider the feasibility of enlarging the number of countries with binding commitments under the Protocol, allowing it to expand its life-span after 2012.

Finally, the third option consisted in the possibility to consider abandoning the Kyoto Protocol in the post-2012 scenario, recognising its failure to include on the one side the (then) major GHG emitter at a global level, namely the USA, and on the other side the most relevant emerging economies not included in the Annex I, such as China, India and some others. This option was initially considered by the negotiators under the heading "the Dialogue" and consisted in a much less structured forum with respect to the other options, which however included the USA from the very beginning.

It was only at the 2007 Bali Conference (CMP-3), that a more substantive framework for negotiations on the post-2012 climate change regime was launched. In that occasion, the second option mentioned above, namely the one consisting in the possibility to revise the Kyoto Protocol on the basis of art. 9 KP, was practically abandoned, whereas the third option was officially recognised as a viable negotiating pattern, along the first one. This was made official and concrete through the institution of a new Ad Hoc Working Group, called to work in parallel with the first one already

established in Montreal two years earlier. Such a new AWG was named *Ad Hoc Working Group on Long-term Co-operative Action under the Convention* (AWG-LCA) and was given by the Parties the task to conduct a "comprehensive process to enable the full, effective and sustained implementation of the Convention".

This means, in other terms, that by establishing two different AWGs, working independently the one from the other, the Parties agreed to pursue in a parallel way both the negotiations on the possibility to define a second commitment period for the Kyoto Protocol as well as the negotiations for going beyond the KP, or maybe more precisely, for going back to the Framework Convention, so as to continue fighting against climate change in a different way as compared to the approach chosen some years earlier with the Kyoto Protocol.

The two AWGs, following the two parallel negotiating tracks mentioned above, were due to prepare viable options for the Copenhagen Conference (CMP-5), by which many Parties hoped that a solution could be found to design the post-2012 reference scenario for the climate change regime.

The 2009 Copenhagen Conference represented probably the highest peak in the popularity of the climate change debate among the general public at the global level. However, despite the many hopes and the high political momentum, the negotiating positions of most of the key Parties remained too distant among themselves, despite the long negotiating time already elapsed and the efforts made within and around the two AWGs. The result was that no binding agreement on the post-2012 obligations of the Parties could be reached in Copenhagen and the solution was shifted to the next Conferences of the Parties.

Despite the high hopes, Copenhagen essentially represented a failure, in the sense that it could not deliver any solution on the post-2012 scenario for climate change. The distance between the hopes and the failure opens up a question that cannot be avoided: between the hopes and the failure what is the reality?

The analysis of the "reality" of the climate change regime and its governance model ought to start from some of the basic underpinning features of the present system, relating to its governing principles, its key actors and its negotiating tracks.

To this effect, it should be firstly underscored that the UNFCCC and the KP are essentially based on the principle of common but differentiated responsibilities. Such a principle has developed in international

environmental law as a principle of asymmetric cooperation among the various members of the international community. It derives from the general principle of equity and it aims at promoting the recognition that the special needs of developing countries must be taken into account in the definition and implementation of international environmental law. The principle of common but differentiated responsibilities is crystallised in principle 7 of the Rio Declaration which reads as follows:

> "States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command".

In practice, the principle says that, on the one side, all States of the international community have a common responsibilities for the international protection of the environment and all must cooperate in good faith for pursuing common protection goals. However, at the same time, considering their different contribution to environmental degradation as well as their different human, technical, economic and financial capabilities, they may be assigned differentiated responsibilities in the framework of the multilateral environmental agreements (MEAs). Therefore, such a principle introduces a certain degree of flexibility in the definition and implementation of international environmental law, which is particularly suitable in the case of global environmental issues, such as the ozone layer depletion reduction, the fight against climate change and the preservation of biodiversity.

The principle of common but differentiated responsibilities is nowadays one of the most relevant principles of international environmental law, which has been included in the most important conventions and protocols for the protection of global environmental goods. However, the use of the principle made by the drafters of the UNFCCC in 1992, upon which it is grounded the distinction of the Parties to the UNFCCC into the two rigid groups of Annex I and Non Annex I Countries, was probably not the best way to give full justice to it. In fact, despite the fact that it might encourage the participation to the Convention of a greater number of developing countries, it has the evident disadvantage that it tends to put more stress on the different positions and interests of the Parties, rather than on their common objective to fight against climate change, which is

at the basis of the UNFCCC and which should govern the implementation of the Framework Convention and all the legal instruments related thereto, such as *in primis* the Kyoto Protocol.

Moreover, it should be recalled that the negotiations on the post-2012 scenario, which started as early as 2005 and are still on-going after so many years, did not manage to reduce the initial distance neither among the key Annex I Parties on the one side, most notably between the EU and the USA, nor among them and the most relevant emerging economies within the Non Annex I Parties, such as China, India and Brazil.

Furthermore, the presence of two parallel negotiating tracks, based on the activities of two parallel AWGs, most probably did not help the Parties to concentrate on the definition of a single comprehensive solution on the post-2012 scenario, leaving the possibility for many countries to play different games on different tables, without any evident *bona fide* commitment to try and find an acceptable solution for the future, as it would be required by the principle of co-operation under international environmental law.

There are however some positive lessons which can be learned from the failure to reach an agreement at the Copenhagen Conference. In fact, at Copenhagen, thanks to the last minute efforts of the heads of state of some key-countries, most notably USA and China, an "accord" among the Parties was indeed found, which was named "Copenhagen Accord". This is not a legally binding agreement, as it is the Kyoto Protocol, but is essentially a political agreement, based on voluntary commitments by the Parties to control and reduce their GHG emissions at a national level. However, its importance lies in the fact that it essentially responds to the basic request of both USA and China, its main sponsors. In fact, it satisfies the request for symmetry of the USA, which were asking for an agreements with similar commitments for both developed and developing countries, as well as the request of China, which in spite of its willingness to give a contribution to the fight against climate change, was not ready to accept binding GHG reduction commitments.

It has been widely criticised the fact that the Copenhagen Accord does not contain internationally binding obligations for the Parties, thus departing from the Kyoto Protocol model and going back to the less rigid and less structured regime established at the beginning of the nineties by the Framework Convention. Such an Accord, however, represents a very important milestone in terms of "reality".

In fact, it could be argued that the Copenhagen Accord, despite its limits,

probably represents the only reasonable outcome which can be nowadays achieved at an international level to continue fighting against climate change, in a more or less concerted way, in the next decades. In other words, the Copenhagen Accord, despite its possible shortcomings, should be probably seen as an outcome which perfectly exemplifies the present international situation, where most of the countries are not willing to accept binding and costly obligations under international environmental law. Most of the countries, in fact, nowadays rather prefer to agree on some general steering principles and guidelines, leaving the implementation phase essentially to their national realm, with some possible room for international monitoring and verification on their concrete actions, premised on a facilitative rather than sanctioning approach. This is essentially the reality, coming out from the still on-going climate change negotiations, which deserves a further more detailed analysis, to be undertaken in the next paragraph.

2. *The Copenhagen Accord (lights and shadows)*

It is not the aim of the present contribution to provide a detailed analysis on the Copenhagen Accord, which has been already subject to a careful scrutiny.[2] However, it might be useful to recall here some of its main features, in order to better address the issue of what can now be the way forward at the international level, in order to complete the negotiations for the post-2012 climate change scenario.

Firstly, it should be underlined that, despite its limits, the Copenhagen Accord represents so far the only agreement reached by the UNFCCC Parties on the post-2012 scenario. For this reason, its importance should not be underestimated. Moreover, as already mentioned above, such an Accord probably represents an outcome which perfectly exemplifies the present international situation, where most of the countries are not willing to accept binding and costly obligations under international environmental law.

On the basis of this line of reasoning, the fact that the Copenhagen Accord is just a political agreement, not entailing binding obligations, which has been often perceived as one of its main shortcomings, could also be seen in a reverse way. In fact, if one assumes that the reality of the climate change negotiations is as such that a binding agreement among the Parties to be developed on the Kyoto Protocol's model was not (and probably is still not) feasible, the Copenhagen Accord could be seen instead as a great political success, which may enable the global climate change governance regime not to collapse after 2012.

Moreover, despite the fact that the Copenhagen Accord was reached outside the normal framework of the climate change negotiations, essentially by-passing the COP's competence and removing the negotiating power from the official country negotiators to put it in the hands of a few heads of state, who met in parallel with the official COP's meeting towards the end of the Copenhagen Conference, it cannot be argued that the Accord does not have a proper international support.

In fact, notwithstanding its origin, which essentially consisted in a two-party agreement between USA and China, backed by a total of 25 Parties and not endorsed by the COP, which limited itself to take note of the agreement already reached outside its control, in the subsequent months many UNFCCC Parties have become associated with the Accord and have duly communicated their voluntary mitigation (and adaptation) commitments to the UNFCCC Secretariat.

In this sense, therefore, it could be argued that the subsequent practice has probably made the Copenhagen Accord a much more feasible and serious agreement, as compared to what it seemed at the time of its conclusion, and nowadays it is possible to assume that, despite its limits, the Accord might essentially work and deliver some interesting results in terms of post-2012 contribution to the fight against climate change.

Another basic feature of the Copenhagen Accord, which should be given a proper weight, lies in the fact that despite the non-binding nature of the Accord, which is based on the voluntary commitments decided and communicated by the Parties, nothing prevents the Parties from creating and making and effective use of a solid monitoring, verification and report system, in order to carefully scrutinise the concrete fulfilment of the self-declared voluntary obligations by the Parties, as the Parties already envisaged in the Copenhagen Accord itself.

Moreover, in addition to the establishment of such a monitoring, verification and reporting system, the implementation of the Copenhagen Accord could be backed and reinforced also by an *ad hoc* compliance regime, which could be developed by the Parties on the basis of the well structured compliance regime of the Kyoto Protocol. This might finally mean that a non-binding agreement, based on voluntary commitments by the Parties, if adequately supported by a monitoring, verification and reporting system, and possibly also by a compliance regime, could finally prove a more effective legal instrument as compared to many of the existing MEAs.

On the basis of what I have been arguing above, it can be concluded that

the Copenhagen Accord, despite its non-binding nature, in practice should be taken as seriously as a legally binding agreement, giving the context in which it is placed, the broad support received by many Parties and the presence of adequate implementation means, such as *in primis* the planned monitoring, verification and reporting system.

3. *The way forward after the Copenhagen Accord*

Following the outcomes of the Copenhagen Accord and the subsequent 2010 Cancun Agreements, which clarified certain issues and started working on the implementation of the Accord, the international community is now trapped into a fundamental dilemma.

On the one side there is the possibility to give a full credit to the potential of the Copenhagen Accord, by making the greatest international efforts at all levels to give such an agreement a full and effective implementation, supplementing it with concrete actions by the Parties, grounded on voluntary commitments, and backing its implementation through the establishment of an *ad hoc* monitoring and verification system at international level, as envisaged by the Accord, and possibly through the support of a compliance regime.

On the other side, the UNFCCC Parties may consider that the Copenhagen Accord is essentially still a voluntary agreement, which if taken in isolation and not backed by a formal subsequent binding agreement, gives no solidity and no credibility to the future international efforts to fight against climate change in the next decades. A new binding agreement is therefore needed, substituting the Kyoto Protocol for the post-2012 period and possibly premised on the Copenhagen Accord. In other words, under such a view, a new international agreement would be necessary in order to give teeth to the Copenhagen Accord and formally overcome the Kyoto Protocol approach.

However, in order to achieve this result no clear and undisputed way exists. The Parties may in fact theoretically choose among different options, each of them is equally complex and presents its pros and cons. The available options may grouped into two main alternatives.

The first alternative option may consist in the continuation of the climate change negotiations within the UNFCCC COP (Durban and further); this is the easiest possibility, based on the consideration that the on-going negotiations within the COP, despite the story of hopes and failures shown so far, will finally manage to deliver some sort of binding agreements among the UNFCCC Parties on the future of the climate

change negotiations.

The second alternative option might consist in trying to overcome the present *enpasse* about the future of the on-going climate change negotiations for the post-2012 by removing the "political" part of the discussion, which could be taken away from COP and be treated within the framework of the reform of the global environmental governance, most probably starting from the Rio+20 Conference, scheduled for June 2012. Such an option could in fact follow two possible tracks.

Under the first one, the definition of the new and future climate change regime could be linked to the UNEP's reform, on the basis of a top-down approach aiming at the transformation of the present Environment Programme into a fully-fledged organisation, preferably consisting in a new UN agency, building up on the existing UNEP structure, budget and mandate, and trying to improve its effectiveness at a global level.

Under the second one, the Parties could instead choose to enhance the truly political (and neither the legal, nor the technical) dimension of the negotiations and promote a steering role on the political dimension of the climate change negotiations for the G-20, as enriched with a new environmental and sustainable development agenda. In such a context, the political debate on the basic terms of the future global climate change cooperation, given their relevant economic implications, would be better placed in an economic forum, such as the G-20, rather than in a technical one, such as the UNFCCC COP, thus leaving to the latter a merely "administrative" and technical role.

The possibility to treat separately the political dimension of the climate change negotiations will be addressed in more detailed terms in the next paragraph of the present contribution. In the meantime, however, it is worth spending some words on a further possibility which could be linked to each one of the future scenarios on the post-2012 climate change regime. This is the issue of the so-called decentralisation of the climate change governance.

In fact, irrespectively of the circumstances that the Parties will or will not be able to find any satisfactory and comprehensive agreement soon, going or not beyond the Copenhagen Accord, it may be worth exploring the option of a possible decentralisation of the climate change governance.

The decentralisation of the international approach to climate change, is in fact based on the premise that the Copenhagen Accord is just setting a very broad reference scenario, establishing the main goals and initiatives to

be undertaken to fight against climate change, which could be implemented not only within the UNFCCC framework, but also through several other international organisation, agencies and bodies.

In fact, as it has been argued in the literature, considering the slow pace and the uncertain outcome of the climate change negotiations, *a more promising approach to moving forward would be to split the climate change problem up into different pieces and address the more tractable pieces in more specialized forums.* According to the author,[3] *to some degree this is happening already. The International Maritime Organization (IMO), for example, is considering international shipping, the International Civil Aviation Organization (ICAO) is considering civil aviation, and the Montreal Protocol is considering HFCs.*

This demonstrates that the climate change governance problem may also be dealt separately from the concrete management of mitigation and adaptation policies and actions. In fact, while the former should necessarily have a reference forum, possibly at a centralised level, the single initiatives and actions in the climate change sectors, must be not necessarily be taken under the UNFCCC umbrella, but they could rather be split into different fora and be related to the implementation of several MEAs, as proposed by the supporters of the decentralised approach.

Having said that, in the next paragraph I will concentrate on the already mentioned possibility to solve the problem of the inadequacy of the present climate change governance regime within the framework of the need for the reform of the global environmental governance.

III. THE SEARCH FOR A NEW CLIMATE GOVERNANCE REGIME

1. *The need for reform of the global environmental governance*

At the beginning of the article, I started from the premise that as it has been argued by some scholars, one of the major problems surrounding the present climate change regime is "the challenge of fragmentation of negotiations and governance systems".[4] On the basis of such a premise, in the previous paragraphs I have been analysing the main features of the present climate change regime and the reasons why the many hopes related to the on-going negotiations for the definition of the post-2012 climate change have so far led just to a series of failures to reach a binding and comprehensive agreement among the UNFCCC Parties. The consequent disappointment for such failures has led us to consider more carefully the pros and cons of the 2009 Copenhagen Accord, which despite its limits and its deficiencies represents so far the only concrete step made towards the shaping of the post-2012 climate change regime.

However, as the analysis of the Copenhagen Accord and the related still on-going negotiations shows, the present difficulties of the UNFCCC Parties to agree on the post-2012 are related not only to the different views of the leading Parties on the type and degree of the efforts to be made by developed countries on the one side and developing countries on the other side, both in terms of mitigation and adaptation to climate change, but are also (and maybe more importantly) related to the basic inadequacy of the present climate change governance regime.

What is this inadequacy after all? In what it really consists? Is it related to the inability of the UNFCCC and KP Parties to agree on their future commitments only or is it a broader problem, which goes beyond the on-going climate change negotiations?

2. *The reform of the global environmental governance: UNEO and other options*

In my opinion, the solution to the inadequacy of the present climate change governance regime must be found essentially in the much more relevant and much greater inadequacy of the global environmental governance regime. It is, in fact, well known that the present global governance of the environmental matters is very fragmented and lacks an institution at international level which can exercise a leadership or at least an effective coordination of the existing multilateral environmental agreements and related initiatives and actions.

The seek for a better climate change governance regime is therefore an issue to be addressed within the broader context of the need to improve the global environmental governance, which is lacking a leading or coordinating institution and which is fragmented in a too excessive number of international conventions, agreements, accords, initiatives and actions.

Most of the discussions over the last few years which were related to the need to revise and update the international environmental governance system have highlighted the lack of an effective reference international organisation in this field with a broad and comprehensive mandate and the related power to enforce it. The reference point in such a context is in fact essentially represented by the UNEP, the United Nations Environment Programme, which is however a mere programme and not an organisation or agency operating within the UN system, with a limited budget and a limited mandate. The UNEP, in fact, does not have neither the theoretical nor the practical possibility to exercise a real leadership or at least an effective coordination for the implementation and enforcement of the

existing international environmental agreements, insofar many of them are managed by independent Secretariats or other international organisations, which cannot be influenced in any way by UNEP's policies, priorities and proposals.

The necessity to reform the UNEP, in order to create a fully fledged environmental organisation, possibly within the UN system, has been argued by many scholars and is supported by several countries. In this context, I would like to recall a study on the reform of the global environmental governance, in which I was involved a few years ago, which had been commissioned by the French Government to the European University Institute. Such a study represented a contribution to the solution of the international environmental governance problem, which was inserted in a series of scientific studies relied upon by the Government of the French Republic to support its proposal to reorganise the UNEP to better cope with the major existing environmental emergencies and coordinate all the efforts at the international level in this field.

In such a study, which was named "Options and Modalities for the Improvement of International Environmental Governance through the Establishment of a U.N. Environmental Organization",[5] the different options for reforming international environmental governance were proposed and analysed in a comparative way. For reasons of simplicity, feasibility and clarity, such options were reduced to only three ones.

The first option would consist in establishing a specialized agency of the United Nations with specific and exclusive competence in the environmental field, which should inherit the competences that are presently owned and exercised by the United Nations Environmental Programme (UNEP) and develop innovative functions for the coordination of environmental initiatives within the UN System as an umbrella organization. This organization could be named "United Nations Environmental Organization" (UNEO).

The second option would be represented by the possibility of reinforcing the structure and competences of UNEP, especially by expanding its existing functions and improving its administrative organisation and funding. This option, which would be the simplest one in technical and logistic terms, would therefore give rise to an enhanced UN programme that could be called "Enhanced UNEP" (EUNEP).

Finally, the third option would consist in establishing a new international organization – not belonging to the UN framework – based on the model of the World Trade Organization (WTO). This organization would be

characterized by a single structure – encompassing an autonomous administrative structure and a dispute settlement regime – and would be based on common principles informing the whole environmental management at the international level. To this effect, it could be named "World Environment Organization" (WEO).

When drawing a balance between the advantages and disadvantages which characterise each of the above mentioned three options, it emerges that the preferred solution for strengthening international environmental governance would be represented by the establishment of UNEO. In fact, despite the long and expensive negotiations that would be probably required in order to adopt an international agreement for the establishment of a new UN specialized agency and the increased budget that such a fully-fledged organisation would need, such a solution, as compared to the other two ones, would nevertheless present a number of notable advantages, as it will be mentioned below.[6] First, UNEO would be part of the UN system, being therefore characterized by a stronger institutional status than UNEP, hence facilitating its role as the "environmental authority" at the global level and owning a broader potential for wide membership than a UN-unrelated organization. Second, its status of "universal" environmental organization could ensure a greater coherence of international initiatives and actions in the environmental field. Third, UNEO would facilitate the coordination within the UN system of all the actions in the field of sustainable development, through ensuring stronger and more systematic cooperation with other international organisations, agencies or programmes somehow dealing environmental issues, such as UNDP, FAO, UNESCO, OMS, IMO and so on. Fourth, UNEO would favour the possibility of increasing participation to the existing Multilateral Environmental Agreements (MEAs) of all the international community, by improving their coherence with the global environmental agenda and eliminating possible contrasts and incompatibilities among them. Fifth, UNEO could prove beneficial to developing countries, since its institutional character and its functions would ensure adequate support for the needs of developing countries. Sixth, UNEO would present a very important forum for coordinating and enhancing a better implementation of international environmental law and promoting the conclusion of new MEAs. Seventh, UNEO would have huge visibility before the international civil society as the reference or principal environmental authority at the international level, therefore favouring partnership with NGOs and the private sector and facilitating their input to the global protection of the environment. Eighth, the efficiency of the global environmental action would be improved in light of the capacity of UNEO to dispose of its own budget. For all these reasons, the UNEO option should be preferred with respect to the other two possible solutions

mentioned above, consisting respectively in the EUNEP and in the WEO.

As already mentioned above, one of the most relevant positive consequence which may follow from the institution of the UNEO would consist in the possibility for the new agency to effectively coordinate the existing MEAs. In particular, UNEO could perform some innovative tasks which are presently not dealt with by MEAs Secretariats individually (such as annual global cluster coordination meetings, overall integrated assessment of MEA national reports, and support to national integrated MEA implementation), without prejudice to the decision-making and budgetary independence of the existing MEAs Secretariats. Therefore, the creation of UNEO would not affect the core of the current functions and/or the status of the MEAs Secretariats and would not create obligations or negative impacts on rights of States parties to certain MEAs, but not supporting UNEO. The UNEO, once instituted, would invite MEAs to accept the overall support offered by UNEO itself, particularly with regard to the management of the most relevant crosscutting issues at the global level. Moreover, support of the MEAs to the UNEO could be given by a single decision of the Conference of the Parties of each MEA concerned, therefore removing the need to renegotiate the text of all pre-existing MEAs.

3. *The reform of the global environmental governance: a G-20 for environment and sustainable development*

As argued above, the solution to the inadequacy of the present climate change governance regime must be found essentially in the much more relevant and much greater inadequacy of the global environmental governance. To this effect, we have been arguing in the previous paragraph the necessity to revise UNEP, possibly promoting the establishment of UNEO, as a specialized agency of the United Nations with specific and exclusive competence in the environmental field, which could promote the coordination of all the global efforts and initiatives in the environmental field, both within and outside the UN System.

The item of the institutional reform of the global environmental governance, including the necessity to revise and update the existing UNEP, is also on the agenda of the forthcoming Rio+20 international conference on sustainable development, which is scheduled for June 2012.[7] This could be the right time for all the Parties of the international community to discuss on the real and feasible options for reforming UNEP and improving global environmental governance. Hopefully, a broad support for the establishment of UNEO will be found in the Rio+20 2012 conference. If however, this should not happen and

UNEP, as it stands, should remain also for the future the only entity with a general competence on environmental matters at international level, other solutions for the improvement of the present climate change governance regime through the reform of the global environmental governance should be found.

An option in this sense might be represented by the possibility to establish a sort of permanent G-20 meeting on environment and sustainable development, based on the present G-20 model, which is however limited to financial and economic matters.

As it is well known, G-20 was conceived a few years ago as the group of the finance ministers and central bank governors of the 20 major economies in the world: 19 national States plus the European Union, as the only non-State Party. Taken all together, the G-20 Parties comprise 85% of global gross national product, 80% of world trade (including EU intra-trade) and two-thirds of the world population. Since 2008, the G-20 meets either in the ministerial form, with the participation of finance ministers and central bank governors, or in the heads of state form. Given the G-20 increased relevance during the still on-going economic crisis, as compared to other international institutions and entities, the Parties agreed in 2009 that the G-20 should replace the G-8, the former main economic forum of the most wealthy States of the world, as the reference forum for global economic governance.[8]

Since then, in fact the G-20 has started to play a pivotal role as the world leading forum for discussion on the most relevant economic and financial issues and has delivered concrete results to tackle the global economic crisis. The outcomes of the G-20 summits are not binding international agreements, but the group rather aims at defining the priorities for initiatives and actions to be pursued at international level by different organisations and institutions, actively supported by the G-20 Parties. The G-20 represents a sort of self-proclaimed steering group for the world economy, composed by the 20 major economies in the world. The group, which is meeting without the assistance of a permanent Secretariat, in a very light administrative way, represents itself as the reference framework for the promotion of a strong, sustainable and balanced growth at a global level, involving both developed and developing countries.

However, as the G-8 meetings evolved over time to comprise also non-economic issues and started dealing also with environmental matters, including climate change, it is now time that also the G-20 loses its solely financial an economic label, in order to become the real reference forum for the global agenda. As compared to the G-8, in fact, the G-20, has a

broader world coverage and includes the "new" most relevant emerging economies, among the developing countries group, along with the "old" major industrialised countries. In this sense, therefore it is certainly a better placed forum for dealing also with environment and sustainable development, or more precisely with environmental protection in the context of sustainable development, at a global level.

To this effect, I am convinced that one way to deal with the reform of the global environmental governance would consist in calling the G-20, encompassing the heads of state together with their economic ministers on the one side and environmental ministers on the other side, to become the steering international institution on sustainable development, which should define, in "political terms", the priorities for action. The priorities for sustainable development should also include the definition of the terms for a concerted action to tackle climate change, both in terms of mitigation and adaptation policies as well as in terms of economic and financial support from the major world economies to the poorer and most affected countries of the world.

Such a proposal moves from the consideration that the main reasons for the recurring failures experienced in the last few years on the definition of the terms of the international cooperation and the related international protocol and/or agreements thereto, are essentially of a "political" rather than of a "technical" nature. This means in other terms, that, as the Copenhagen Accord learns, the most effective solution for the definition of the future climate change governance should be probably found at a political level beforehand, in a smaller forum, including the major economies and the major world GHG emitters. Then, once agreed the terms of the future cooperation in this field, the details could be negotiated by the UNFCCC Parties, in a more traditional way, during the periodical Conferences of the Parties. By doing so, the "pressure" on the COP's meetings would also be reduced, by removing the scope of the political segment from those meetings. Conversely, the COP's meetings would regain the natural role of technical conferences, to be focused on the resolution of technical issues only.

Within such a context, it may be argued that the G-20, which so far has not dealt at all with sustainable development, environmental or climate change issues, is not the appropriate forum to exercise such a steering role for the climate change governance. This proposal, obviously, should be subject to further analysis and discussion. However, I am convinced that the political debates on the basic terms of the global climate change cooperation, given their relevant economic implications, would be better placed in an economic forum, such as the G-20, rather than in a technical

one, such as the UNFCCC COP, thus leaving to the latter a merely "administrative" and technical role. After all, the COP should not be allowed to take decisions which may have potentially affect quite heavily the economy of the Parties and, in fact, in recent years most States have become much more cautious about the possibility of future climate change protocols drafted on the Kyoto Protocol's model, also due to the experience gained in recent times about its relevant economic implications and costs. Moreover, the COP's role, if limited to technical negotiations only, would be probably much more fruitful if backed by a previous political agreement reached by the most relevant Parties on the basic terms of reference for the future action on climate change.

IV. Conclusion

As I have been discussing above, the recent outcomes of the climate change negotiations have revealed the difficulty to reach within the UNFCCC COP's framework a satisfactory and comprehensive binding agreement for the post-2012. However, the problem lies not only in the different positions of several of the key actors of the climate change negotiations, but it seems rather to be related to the inadequacy of the present climate change governance regime.

The only concrete result which so far emerged from the climate change negotiations on the post-2012 is represented by the 2009 Copenhagen Accord, which is not a legally binding agreement, as it is the Kyoto Protocol, but is essentially a political agreement, based on voluntary commitments by the Parties to control and reduce their GHG emissions at a national level.

This Accord, despite its limits, most probably represents the only reasonable outcome which could be reasonably achieved, within the present climate change governance framework, in order to continue fighting against climate change in the next decades.

The analysis conducted above has therefore highlighted that more ambitious solutions for the future management of climate change can only come from an improvement of the climate change governance regime. In this sense, I have been arguing that the possibility to solve the problem of the inadequacy of the present climate change governance regime should be better addressed within the framework of the need for the reform of the global environmental governance.

To this effect, the Parties could follow two possible tracks. Under the first one, the definition of the new and future climate change regime could be

linked to the UNEP's reform, on the basis of a top-down approach aiming at the transformation of the present Environment Programme into a fully-fledged organisation, preferably consisting in a new UN agency, building up on the existing UNEP structure, budget and mandate, and trying to improve its effectiveness at a global level. Under the second one, the Parties could instead choose to enhance the truly political (and neither the legal, nor the technical) dimension of the negotiations and promote a steering role for the G-20, as enriched with a new environmental and sustainable development agenda, thus leaving to the UNFCCC COP a merely "administrative" and technical role.

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[2] For instance, see D Bodansky, *The Copenhagen Climate Change Conference: A Post-Mortem*, 2010, available at http://ssrn.com/abstract=1553167.

[3] D Bodansky, *The International Climate Change Regime: The Road from Copenhagen*, 2010, available at http://belfercenter.ksg.harvard.edu/publication/20437/international_climate_change_regime.html?breadcrumb=%2Fproject%2F56%2Fharvard_project_on_climate_agreements%3Fgroupby%3D1%26parent_id%3D%26page_id%3D157%26filter%3D130%26page%3D5.

[4] F Biermann and others, *Climate Governance Post 2012 - Options for EU Policy Making* (n 1).

[5] The study on "Options and Modalities for the Improvement of International Environmental Governance through the Establishment of a U. N. Environmental Organization" was commissioned by the French Government and prepared by a working group based at the European University Institute (Florence). The authors were P. M. Dupuy, F. Francioni, F. Lenzerini, M. Montini, R. Pavoni, E. Morgera, F. De Vittor. The full text of this study is still available at the following address: .

[6] On this issue, see for more details the study mentioned above.

[7] See the agenda of the Rio+20 conference at http://www.uncsd2012.org/rio20/.

[8] At the G-20 Pittsburgh Summit in September 2009, the Parties agreed that the G-20 should become the "main international economic forum", in order to reflect the new world's balance and the growing role of emerging countries. Since then, the G-8 has been redefining its role and, as it energed clearly from the lastest G-8 meeting of heads of state, held in France in May 2011, the "new G-8" is refocusing mostly on geopolitical and security issues, enhancing its dual political and economic dimensions, rather than focusing on the priorities of the international economic agenda only.

ALTERNATIVE ARCHITECTURE FOR CLIMATE CHANGE: MAJOR ECONOMIES

Rafael Leal-Arcas*

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I. INTRODUCTION

This article argues that the Kyoto Protocol[1] to the 1992 Framework Convention on Climate Change (UNFCCC)[2] was doomed to face difficulties *ab initio* because it places the responsibility of reducing greenhouse gas (GHG)[3] emissions only with developed countries[4] as if they were the only *sinners* of climate change. A more plausible solution to reduce GHG emissions is to involve major GHG emitters irrespective

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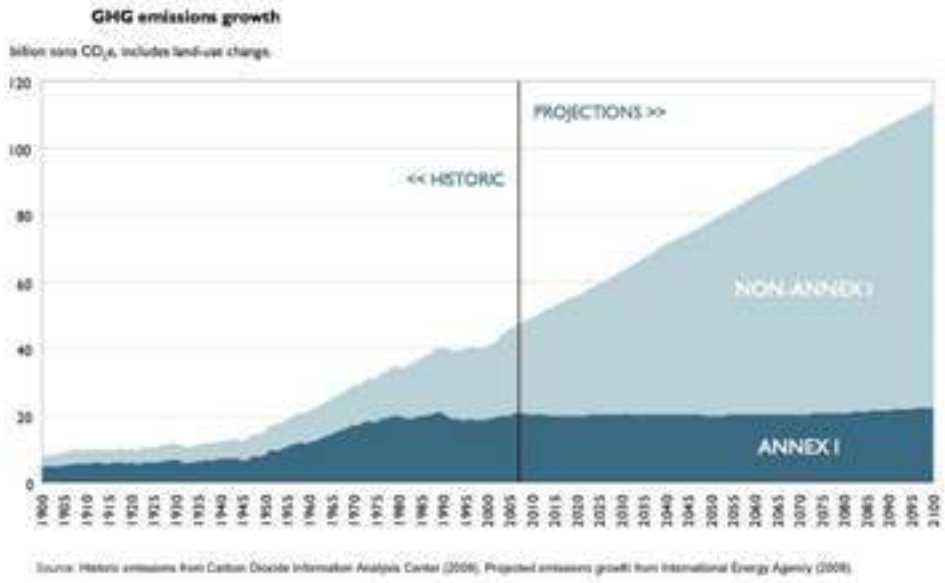
of their GDP. The article also proposes using the experience of trade agreements as a model for reaching a global climate treaty, since oftentimes the very same people are at the negotiating table for trade and environmental issues.[5]

The Kyoto Protocol is a top-down agreement on climate change which has proven to be very rigid in its approach to reducing GHG emissions.[6] For the purposes of GHG emission reduction, the UNFCCC divides the world into Annex I countries (or developed countries)[7] and developing countries, legally binding only Annex I countries to reducing their GHG emissions by a certain deadline.[8] Why so? Because seen retrospectively, rich-countries have been (and continue to be) the major polluters; they are responsible for most of the GHG emissions, and have the financial and technological means to tackle climate change.

However, instead of asking only Annex I countries to reduce GHG emissions, this article argues that a better (and arguably fairer) way to tackle the climate change issue today is by bringing together the major GHG emitters, irrespective of their GDP. Why? Seen prospectively, climate change is a developing-countries problem, as predictions indicate that, in the near future, developing countries will be the major polluters (see chart below) as well as the major victims of the consequences of climate change, especially countries near the equator.[9] The longer we wait, the harder and more expensive it will become to deal with climate change.[10] So major GHG emitters (whether developed or developing countries), which are responsible for historic, current, and future emissions, should therefore be the ones to take action.[11]



As of 2000, the top 25 GHG emitters accounted for approximately 83 per cent of global emissions.[12] Moreover, the top five GHG emitters today (China, U.S., the EU—treated as a single entity—India, and Russia) were responsible in 2000 for over 60 per cent of global emissions.[13] By contrast, most of the remaining countries contributed very little in absolute terms to GHGs in the atmosphere (i.e., the 140 least-pollutant countries were responsible for only 10 per cent of global GHG emissions).[14] These countries include the least-developed countries and many small island states.

II. Background

International efforts to negotiate a comprehensive, universal, and legally binding treaty on climate change have "been producing diminishing returns for some time"[15] and an alternative approach to this top-down fashion of law-making is needed "which develops different elements of climate governance in an incremental fashion and embeds them in an international political framework."[16] At the same time, there are 193 parties to the Kyoto Protocol, many of which are in favor of the continuation of the Kyoto Protocol for logical reasons. This continuation of the Kyoto Protocol could be conceived not in isolation but along with complementary climate agreements. For instance, countries in favor of the continuation of the Kyoto Protocol argue that it is currently the only legal instrument with legally binding constraints on GHG emissions of any sort. Bilateral and regional agreements could therefore complement the UNFCCC/Kyoto Protocol. Other smaller *fora* with major GHG emitters could provide stimulus for an agreement in the UNFCCC regime.

Moving the climate change agenda forward multilaterally among the 195 parties to the UNFCCC is proving to be a serious challenge.[17] The lack of progress in UNFCCC negotiations in recent years, especially the failure to obtain an international agreement on emissions limitations targets and timetables by all major developed and developing country emitters, has led many to question whether the UNFCCC is, in fact, the best and most effective forum for mobilizing a global response to climate change.[18] This current approach to negotiating a comprehensive, universal, and legally binding global agreement on climate change is unlikely to succeed.[19]Moreover, the current targets and the Nationally Appropriate Mitigation Actions (NAMAs) under the system of "pledge and review" are most likely insufficient toward the goal of limiting the increase in global temperatures to 2 degrees Celsius above pre-industrial levels agreed upon at the COP-15 in Copenhagen.[20] Furthermore, many of the world's larger emitters today are developing countries (such as China, India, Brazil, and South Africa), who thus far have refused to agree to binding emissions limitation obligations under the international UNFCCC/Kyoto Protocol regime, in part because of the lack of any U.S. limitations commitments.

The near-disaster Conference of the Parties[21] (COP)-15 in Copenhagen empirically demonstrated that the UN machinery is incapable of moving forward fast enough to produce a global climate deal. Moreover, international climate policy, as it has been understood and practiced by many governments of the world under the Kyoto Protocol approach, has failed to produce any discernible real world reductions in emissions of greenhouse gases since the mid 1990s.[22] The underlying reason for this is that the UNFCCC/Kyoto model was structurally flawed and doomed to face serious difficulties because it systematically misunderstood the nature of climate change as a policy issue between 1985 and 2009. In this sense, a group of authors from Asia, Europe, and North America produced the Harwell paper, which urged a radical change of approach.[23]

Arguably, agreement at the COP-16 in Cancún, however unsatisfying, could only be reached because the more difficult and contentious issues (such as internationally agreed emissions targets) were put to one side during the negotiations, despite the vocal objections of Bolivia. (In the UN machinery, consensus among the parties is required, which, according to COP-16 Chair, Mexican Foreign Minister Patricia Espinosa, does not mean unanimity. Therefore, one country—i.e., Bolivia in the COP-16—does not have the right to veto a decision that the other 194 members agree on).[24] In the absence of any further progress on GHG emission limitations agreements, there is growing concern that some key countries

will tire of the unmanageable negotiating process, and perhaps disengage from the issue of climate change entirely.

For the creation of a future global climate change agreement, the following fundamental points need to be kept in mind. First, assessing the emission reduction pledges: are they enough?; second, fast-track finance: what are the sources of finance and what are the targets; third, technology diffusion; fourth, the impact of investments in the energy sector; fifth, what will the political groupings be in the multilateral agreement on climate action and what will parties ask for?; sixth, what can be done to facilitate the UN process in the climate change context? Should the climate talks be 'multi-track'?; seventh, what are the complementary and supporting routes to an agreement on climate action?: The EU presidency? The G-20?[25] Bilateral agreements between major players?; eighth, can and will sub-national, national, and regional agreements reduce greenhouse gas emissions?;[26]ninth, are there any 'quick-win' multipliers for climate action? There is indeed no shortage of ideas on how to advance the aim of climate protection.[27] Below are some suggestions on how to move forward the climate change agenda.

III. THE MONTREAL PROTOCOL AS A MODEL FOR INTERNATIONAL ENVIRONMENTAL REGULATORY COOPERATION

The UNFCCC negotiation process has much to learn from the success of the Montreal Protocol on Substances that Deplete the Ozone Layer. [28]The legal point of departure of the process which led to the Montreal Protocol is the Vienna Convention for the Protection of the Ozone Layer.[29] Although the UNFCCC and its Kyoto Protocol are the principal instruments to fight climate change, the Montreal Protocol has emerged as a major mechanism for regulating certain GHGs with a high global warming potential. The Montreal Protocol was adopted in 1987 to eliminate aerosols and other chemicals that were blowing a hole in the Earth's protective ozone layer.[30] In 1985, an agreement was reached on a Framework Convention, i.e., an international agreement with vague objectives and no specific obligations for signatory countries. Nevertheless, the Convention anticipated specific numerical limits by calling for future negotiations of additional protocols. The combination of fear regarding the ozone hole, the threat of worse things to come, and the availability of an alternative path led countries to agree to a strong protocol to the Convention in Montreal in 1987. There is debate over how strong a role fear of the ozone hole (and possibly worse outcomes in the future) among policy-makers and the public played in the negotiations toward signing the Montreal Protocol.[31]

The Montreal Protocol and successor agreements are regarded as highly successful examples of international environmental regulatory cooperation that has been capable of rapid modification to take account of developing scientific information, spur credible regulatory commitments, and reflect technological advances.[32] This system has often been held up as a model for dealing with global warming (including recent proposals to use the Montreal treaty regime to control some specific greenhouse gases).[33] The analogy between ozone depletion and climate change works well in some respects: both the climate change and the ozone problems are long-lived because, once emitted, the problematic gases remain in the atmosphere for periods exceeding a century. As a result, emissions from any one country may affect many others, and current decisions to continue emitting or to minimally reduce emissions bear irreversible consequences. Moreover, both problems are characterized by large scientific uncertainty and potentially devastating outcomes.

Furthermore, the Montreal Protocol is one example of an international environmental agreement in which trade-related environmental measures form a key component. Most prominently, the Protocol's restriction on Parties trading in ozone-depleting substances with non-Parties has served the dual purpose of encouraging wide participation in the Protocol[34] and removing any competitive advantage that a non-party might enjoy (i.e., preventing leakage to non-participating jurisdictions). Additionally, provision within the Protocol for funding and transfer of alternative, ozone-friendly technologies was intended to promote trade between industrialized and developing countries.

There are legislative lessons to be learned from the ozone layer experience for the case of climate change. In the case of the ozone layer via the Montreal Protocol, the international community established a two-pronged international approach involving scientific research and assessment along with a parallel international negotiating process. In the case of climate change, an international regime was developed that is similar in some respects, involving a general Framework Convention envisioning sequential protocols with specific obligations (e.g., the Kyoto Protocol) and a parallel scientific assessment process (i.e., the Intergovernmental Panel on Climate Change). A fund which enables industrialized countries to finance emission-free projects (including private-sector initiative and investment) in developing countries was also established (in the form of the Clean Development Mechanism).[35]

Some of the questions and mistakes that arose from the Montreal Protocol can also be instructive for the climate negotiations process. For example, should more aggressive action have been taken in 1987 while negotiating

the Montreal Protocol so that some ozone depletion and skin cancer cases could have been avoided? This is precisely the dilemma decision-makers now face with global warming: given the uncertainties, how strong should the first steps be toward the creation of a meaningful global climate change agreement? The climate change problem affords an opportunity for humans to act in advance of a surprising, undesirable, and very noticeable outcome, analogous to the ozone hole.

However, the Montreal Protocol included both mandatory production limits for developing countries and enforcement provisions for non-compliance that were strong, at least on paper. Neither is envisioned in the Kyoto Protocol, and events at the 2009 COP-15 in Copenhagen highlighted the difficulty of reaching an agreement on binding GHG emission limits for developing countries. In addition, the threat of skin cancer posed by the ozone hole engaged public attention to a greater extent than climate change did, except during relatively brief periods when hurricanes, heat waves, or melting ice caps are in the news.

In spite of these differences, there is much to be learned from the ozone story, and at the very least it demonstrates that international environmental agreements can work, albeit a little too slowly. Countries can manage to come together, evaluate science, and act sensibly to avert natural disaster. Moreover, the Montreal Protocol process shows that it is not necessary for science to be certain and for impacts to be evident in order to develop strong policy initiatives that receive public and industry support, and it contains important lessons on risk, uncertainty, precaution, and on cooperative approaches to solving large environmental challenges. Furthermore, the Montreal Protocol experience provides specific guidance on how to engage developing countries as well as how to implement and enforce such an international agreement quickly to achieve unexpectedly rapid results. Finally, the politics of domestic implementation was straightforward and the cost of doing so, minimal. All these experiences are directly transferable to the climate change challenge.

Following the example of the Montreal Protocol, it is important to have a flexible approach in order to create a climate change agreement. The Kyoto Protocol is clearly not working, partly due to its lack of flexibility. Therefore, bilateral and regional climate agreements—which are more flexible and manageable than a universal climate change agreement—could complement the Kyoto Protocol in the reduction of GHG emissions.

IV. The Importance of a Flexible Approach

Given the fragmented and cyclical nature of international law generally,

bringing together a group of countries—as opposed to the entire global community—seems to make sense as a stepping stone toward the eventual creation of a future global climate change agreement. In the case of climate change, two leading scholars of international governance, Robert Keohane and David Victor, argue that the diverse range of institutions involved in climate change governance constitutes a regime complex, which has advantages and disadvantages compared to a unitary international regime.[36] The chart below shows a graphical map of the climate change regime complex:[37]

The case of international trade law is a good illustration of the fact that nature of international law, generally speaking, is fragmented and cyclical.[38] At first, international trade agreements were bilateral. Then came the 1947 General Agreement on Tariffs and Trade (GATT),[39] which multilateralized bilateral trade agreements. Years later, international trade law saw the collapse of multilateralism in 1979, which broke down during the Tokyo Round of multilateral trade negotiations. A series of new plurilateral (or selectively multilateral) agreements were adopted during the Tokyo Round, which caused a fragmentation of the multilateral trading system.[40]In 1994, international trade law was again multilateralized with the World Trade Organization Agreement.[41]

The same thesis could be used for climate change law. Given the success at multilateralizing international trade law—while not always easy—why not emulate the experience of multilateralization of international trade law for

the case of climate change law? While not always easy, this trend of using bilateral or plurilateral agreements to build toward eventual multilateralization, is worth emulating for the case of climate change law.[42] In the framework of the UNFCCC, there are currently 195 parties to the Convention. One option to move the climate change agenda forward is to bring together major GHG emitters via bilateral and plurilateral agreements (for example, in the framework of the G-20[43] or the Major Economies Forum on Energy and Climate [MEF]). Having a flexible system beyond the traditional top-down approach would be an efficient way to move forward multilaterally in climate change.[44] In environmental regimes, there is a particular need for flexibility and evolution,[45] because our understanding of environmental problems is likely to change as science and technology develop. Flexibility is therefore key for a successful climate change agreement.[46] This flexible approach was the success of the multilateral trading system.

1. *The Institutional Evolution of Multilateral Regimes: An Opportunity for Climate Change*

a. The Examples of the WTO and the EU

Experience from successful precedents tells us that multilateralism is often an evolutionary process, which, by definition, takes time and does not always have to grow in a linear manner. In this sense, the COP-15's failure in Copenhagen has led many people to rethink the best way to create an effective international response to climate change. Some think that the path to a new legally binding agreement on climate change may need to take a longer and more incremental approach than what has been attempted at the various COPs.[47] This path to a new legally binding agreement on climate change will involve a gradual process of evolution,[48] as has been the case of the GATT/World Trade Organization (WTO),[49] the European Union,[50] and the G-8[51]/G-20.

How and why do regimes evolve? Oftentimes regimes start out as non-legal, voluntary arrangements that eventually become legally binding.[52] The multilateral trade regime is a good illustration of a successful regime evolution. The 1947 GATT, which set out a plan for economic recovery after World War II by encouraging reduction in tariffs and other international trade barriers, started with just 23 members and did not establish any formal organization, as it was just an international trade agreement. Over the years, the GATT evolved through several rounds of negotiations to acquire enough credibility by the parties in order to transform a general agreement into an international organization. The 1986-1994 Uruguay Round of multilateral trade negotiations reformulated and institutionalized the GATT and replaced it with the WTO, which was

eventually born in 1995. The WTO, a global trade agency with binding enforcements of comprehensive rules expanding beyond trade, has grown to more than 150 members as of early 2011. The membership is expected to expand in the near future. The WTO is certainly a remarkable example of institutional evolution.

The same is true for the EU. From a small group of six rather homogeneous West-European countries in the 1950s, it later became a group of nine countries in the 1970s, 12 in the 1980s, 15 in the 1990s, up to 27 countries in the 2000s that are legally bound by common EU treaties. As the EU was progressing, European countries saw the benefit of being EU members and eventually joined. The European integration project is ongoing, and it is expected that more countries will join the EU in the future. However, if the EU were to have started with its current 27 Member States, chances are that it would not have succeeded. The EU, therefore, makes a good case for the incrementalist approach.

In the case of climate change, the temporal factor should not be a real concern if the 20 major GHG emitters, responsible for around 80 per cent of GHGs in 2008,[53] are on board from the beginning. An incremental expansion to the rest of the UNFCCC membership will not really be detrimental to the global warming effect, as the rest of the UNFCCC membership is only responsible for around 20 per cent of global emissions.[54]

The ultimate goals should still be a comprehensive and binding global climate change agreement but, in the meantime, small steps, both within and outside the UNFCCC, offer an effective way forward. Furthermore, when designing a future climate change agreement, one should take advantage of prior agreements to reduce transaction costs and increase legitimacy. In order to create a binding agreement, States need to have confidence and trust in the regime. A good example is the WTO's dispute settlement system, which has demonstrated over time to be an impartial judicial body.

The trade and climate change communities faced a double negative at the beginning of 2010, i.e., no global deal at the 2009 Copenhagen climate Conference of the Parties to reduce emissions of heat trapping gases and no concluding deal at the WTO of the Doha Round of multilateral trade negotiations. Both multilateral negotiations are highly complex, but also of great importance to all parties involved, whether industrialized or developing countries. Attempts to keep the two multilateral agreements and their respective negotiations apart, hoping to reduce complexities, have not been successful. The two multilateral processes could be more

directly linked to each other and bridges could be built to reach more ambitious goals in both multilateral *fora*.[55]

Given the possibly catastrophic consequences of climate change, of course a more rapid process would be ideal. However, this article argues that, given the current obstacles to multilateral climate change negotiations, the evolutionary approach is the most credible way forward.

b. An Incremental Approach for Climate Change

In the case of the climate change regime, although the international response has developed along an evolutionary pathway,[56] in some key respects, it has proceeded in fits and starts, and has, at this stage, stalled or even moved backward.[57] There have been many incremental steps so far—in fact, the regime has become fragmented, with the Major Economies Forum (MEF) and other initiatives emerging, which are only loosely connected with the UNFCCC. Another important way in which the climate change regime has evolved is in its financial mechanism. Examples are the Kyoto Protocol's Adaptation Fund[58] and the Clean Development Mechanism (CDM).[59] However, no such steps have been taken in one critical area—the legalization of countries' core commitments. In some ways, it seems the regime is moving in the direction of political rather than legal commitments.[60] Overall, the UNFCCC has remained very rigid because of the division between Annex I and non-Annex I countries, which has proven very resistant to evolution.

One reason the climate change regime appears to have stalled in recent years is that it has tried to forge ahead too quickly along the legal dimension. According to Bodansky and Diringer, "arguably, the leap was too ambitious for a relatively young regime, which had not had time for trust to develop".[61] Continuing to push for binding commitments in the near term could produce a string of failures and potentially undermine the credibility and relevance of the UNFCCC process in the eyes of both parties and observers.[62] The urgency to reduce GHG emissions made parties feel impatient to create a legal framework as soon as possible. The multilateral record, however, shows that "oftentimes strong, stable and legally binding architectures are not simply hatched; they are built step by step over time".[63]

So how should the climate change regime evolve?[64] One way is by giving priority to institutional development and then gradually turn to legalization. For example, even if parties do not formally agree on mitigation pledges, they can move forward in other areas, including stronger support for developing countries and better systems for the

measurement, reporting, and verification of mitigation efforts. These measures will build the UNFCCC's role as an international forum for *action*, as opposed to *negotiation*. Once parties are prepared to legalize their commitments, one possibility is to initially adopt parallel agreements, and only later merge the various tracks into a single agreement.

Some have proposed a top-down,[65] burden-sharing architecture for international climate policy going forward, designed to produce a fair distribution of burdens across countries,[66] while also giving priority to economic development, addressing concerns about wealth inequality, and achieving emission reductions consistent with limiting the expected increase in global average temperature to 2 degrees Celsius.[67] This proposal to change the current rules of the game accepts the UNFCCC's principle of "common but differentiated responsibilities",[68] but eliminates the distinction between Annex I and non-Annex I countries. The variables that could be used to differentiate the responsibilities of the UNFCCC parties are total GDP, per capita GDP, total emissions, per capita emissions,[69] and population *inter alia*.[70]

If we pursue the evolutionary approach to climate change, and defer for now the question of ultimate legal form, what happens to the Kyoto Protocol? Parties could choose to keep elements of Kyoto operational (for example the CDM) even after its first commitment period expires after 2012. Eventually, the CDM and other elements of Kyoto could be incorporated into whatever institutional structure is established by a new legal agreement.

i. Climate-based RTAs and the Building-Blocks Approach

Trade mechanisms can be an effective tool for securing environmental objectives. Since reaching a global climate change agreement is no easy task, this article proposes the use of regional trade agreements (RTAs)[71] with strong climate change chapters for the creation of a future global climate change agreement. This regional approach is more realistic than aiming for a global climate agreement. Both approaches share the objective of creating a strong international framework for climate action. However, they differ on how to achieve the goal.

The multilateral trading system—just like climate negotiations—has been besieged with institutional difficulties, resulting in an enormous proliferation of RTAs as a way to progress. WTO Members that traditionally favored most-favored-nation (MFN) liberalization based on the WTO rule of non-discrimination[72] are increasingly being drawn into RTAs. Given this tremendous proliferation of RTAs in recent years, the WTO is losing its centrality in the international trading system. RTA

proliferation implies the erosion of the WTO law principle of non-discrimination, which endangers the multilateral trading system.[73] RTAs can help countries integrate into the multilateral trading system, but are also a fundamental departure from the principle of non-discrimination.

So why do countries conclude RTAs? There are both economic and political reasons. One of the economic reasons is that countries are in constant search for larger markets since they feel the pressure of competitive regional liberalization. "Moreover, deeper integration is always much easier at the regional level than it is at the multilateral level. Furthermore, as we know from previous experience, multilateral negotiations can take a very long time and are very complex, whereas RTAs move much faster.[74] Despite repeated statements of support and engagement, WTO Members seem incapable of marshaling the policies and political will needed to move the multilateral trade agenda forward".[75] Trade powers want to gain greater access to one another's markets but, at the same time, have struggled to lower their own trade barriers.[76]

There are also several political reasons for countries to engage in RTAs: they ensure or reward political support; regulatory cooperation is easier regionally than it is multilaterally; there is less scope for free riding on the MFN principle; and there are always geopolitical as well as security interests for the conclusion of RTAs. Thus, while most countries continue to formally declare their commitment to the successful conclusion of the Doha Round of multilateral trade negotiations—which would contribute toward enhancing market access and strengthening the rules-based multilateral trading system—for many countries, bilateral deals have taken precedence and their engagement at the multilateral level is becoming little more than just a theoretical proposition.

The current proliferation of RTAs may be an effective avenue toward a future global climate change agreement. We should capitalize on these RTAs in the climate arena. How so? Why not incorporate strong climate change chapters to RTAs so that they become building blocks toward reaching a multilateral agreement in the climate regime? For example, countries should include climate-protection chapters in their bilateral/regional trade agreements and support greenhouse gas-reducing activities in third countries.

As Houser argues, "the climate doesn't have time for a Doha-like approach",[77] referring to the extremely low progress of multilateral trade negotiations. This is how trade and climate change get to cooperate: based on the premise that RTAs can be used as building blocks for

multilateralism, one could envisage a global climate change agreement based on climate-related RTAs, especially large RTAs such as the Trans-Pacific Partnership.[78] Indeed, given how proactive developing countries are in the conclusion of RTAs, this option would be an effective way toward a future global climate change agreement, especially since Kyoto demands nothing concrete of them. In this sense, climate-based RTAs can be used as a legal mechanism to move forward the multilateral climate change agenda, thereby including also major developing countries.[79]

Admittedly, the approach of using climate-based RTAs as building blocks for multilateralism may lead to regulatory fragmentation as well as confusion,[80] legal conflict, and uncertainty,[81] whereas a global climate change agreement would serve as a more coherent and unified international framework for regulating climate change.[82] Moreover, since the building-blocks approach does not require universal participation, it may reduce the urgency of global cooperation.[83] Therefore, even if climate change policy does become increasingly bilateral, these agreements would ultimately have to lead to a global climate treaty with common rules and common procedures. Nonetheless, overall there is much within the trade experience that can be inspirational for the case of climate change.

ii. Incremental Bottom-up Approach

The idea behind the bottom-up approach[84]—which envisions the international climate change effort as an aggregation of nationally defined programs put forward by countries on a strictly voluntary basis—is to aim at economic change toward a low-carbon future through promoting energy efficiency and inducing technological breakthroughs throughout the economy.[85] Each country would determine what is socially, economically, politically, and technically feasible based on national circumstances.[86]

A good example of a bottom-up initiative is the 2005 Asia-Pacific Partnership on Clean Development and Climate, adopted in January 2006, where a group of major Asia-Pacific countries (Australia, Canada, China, India, Japan, Korea, and the U.S.) engages in discussions about energy security, air pollution reduction, and climate change.[87] Collectively, these countries account for more than 55 per cent of the world's GHG emissions, population, economy, and energy use.[88] The Charter of Asia-Pacific Partnership on Clean Development and Climate clearly stipulates in its preamble that "the purposes of the Partnership are consistent with the principles of the United Nations Framework Convention on Climate Change and other relevant international instruments, and are intended to complement but not replace the Kyoto Protocol".[89] The Charter further stipulates that one of the purposes of the Charter is to "create a voluntary,

non-legally binding framework for international cooperation to facilitate the development [...] and transfer of [...] cleaner, more efficient technologies and practices among the Partners".[90] At the same time, the Charter also stipulates that, while the Partners have come together voluntarily to advance clean development and climate objectives, they recognize that "development and poverty eradication are urgent and overriding goals internationally".[91]

At an individual-country level, the U.S. has some policy tools available that may allow for international cooperation with respect to GHG mitigation. For example, there are options for the U.S. Environmental Protection Agency to implement regulations under the Clean Air Act[92] to limit GHG emissions. The U.S. could also use some form of cap-and-trade scheme to limit its GHG emissions.[93] There may, within the cap-and trade scheme, be scope to trade offsets arising from emissions reductions in developing countries; thus, U.S. firms investing in emissions reductions in such countries could use the reductions as credits against their Clean Air Act emissions limitations requirements.[94] There is also a number of subnational carbon trading schemes already in operation or in development, notably the Regional Greenhouse Gas Initiative (RGGI),[95] a system for utility emissions limitations in Northeast states in the U.S., and the Western Climate Initiative, spearheaded by California's GHG emissions limitations program.[96] In addition, there are some early examples of international cooperation among sub-national jurisdictions looking toward some form of transnational emissions trading.[97] In this respect, RGGI has been in discussion with the UK about such a scheme. California has signed a Memorandum of Understanding with the Brazilian state of Acre and the Mexican state of Chiapas, forming a working group that seeks to promote efforts on Reducing Emissions from Deforestation and forest Degradation (REDD).

For the future, a very plausible scenario entails cooperative GHG regulatory arrangements among large GHG emitters (whether developed or developing countries), including progress towards some form of GHG limitations/emissions trading system. From the U.S. perspective, this scenario would allow U.S. firms to satisfy any obligations to reduce emissions by purchasing allowances or credits from developing countries at a substantially lower cost than they would incur if they achieved the reductions domestically. This cooperative scenario, along with an agreement by major developing country emitters to limit emissions, would enhance the prospects for securing climate legislation in the U.S. Congress, especially given the fact that the absence of any developing country emissions limitations obligations according to the Kyoto Protocol

was a key factor in the broad opposition in the U.S. Senate to the Kyoto Protocol with the Byrd-Hagel resolution in 1997. Major emitters such as China and Brazil would be interested in some form of cooperation if it brought, through emissions trading or otherwise, further investment and technology to their countries (as has been the case with China through the Kyoto Protocol's Clean Development Mechanism). Major emitters would also be interested in some form of cooperation if it provided an expanded market for their goods (for example, biofuels in the case of Brazil, and wind and solar equipment in the case of China). However, these two countries are currently reluctant to accepting regulatory obligations that might threaten their ability to continue high rates of economic growth, now or in the future.

iii. Multilateralizing Bilateralism: Beyond China and the U.S.

What is absurd is that the world's first and second largest CO2 emitters—i.e., China and the U.S. respectively—are not bound by the Kyoto Protocol.[98] Together, they account for 42% of the world's total GHG emissions. If we are serious about reducing GHG emissions, we must have both countries on board, without which it is difficult to continue with climate change negotiations effectively. The continuation of Kyoto as it is now is less effective in the absence of China and the U.S. The international community should amend Kyoto so that China and the U.S. are legally bound. The U.S. is a crucial country in climate change negotiations because it has both the technology and the financial capacity to reduce GHG emissions.[99] Having the U.S., China, and the EU on board would certainly expedite the creation of a future global climate change agreement.

The United States and China are cooperating on a number of joint efforts over clean technology, which plays a major role in the relations of the two countries.[100] If the United States and China can continue their clean technology collaborations, it will show the world that two major players on the international climate change platform are serious about combating the climate change challenge, and it will also encourage other countries to create alliances. Among the most noticeable efforts are:

> 1) The United States-China Clean Energy Research Center, which will facilitate research and development by a team of leading scientists and engineers in the clean technology industry. The initial research priorities include promoting energy efficiency, clean vehicles, and clean coal, which includes carbon capture and storage.[101]
> 2) The United States-China Energy-Efficient Buildings, which is an action plan for green buildings and communities, industrial energy

efficiency, consumer products standards, advanced energy efficiency technology, and public-private engagement.[102]

3) The United States-China Electric Vehicles, which reflects the shared Sino-American interest in greater utilization of electric vehicles to decrease oil dependence and greenhouse gas emissions, while promoting viable economic growth.[103]

4) The 21st Century Coal Program,[104] which calls for collaboration between a number of companies in the United States, including General Electric, AES, and Peabody Energy. These companies will be working with a number of Chinese companies to develop an integrated gasification combined cycle power plants, methane capture, and other technologies that promote a cleaner use of coal resources.

5) The China Greentech Initiative.[105]

6) The United States Alliances in Chinese Cleantech Industry.[106] Currently, many companies from the United States are exploring opportunities through alliances, clean technology and capital technology transfer investments. This new exploration leads to an increase in opportunities to assist clean technology into becoming one of the largest industries on a global platform.

7) The United States-China Renewable Energy Partnership,[107] which develops roadmaps for widespread and continual renewable energy research, development, and deployment in the United States and China,[108]including renewable energy road mapping, regional deployment solutions, grid modernization, advanced renewable energy technology research, and development collaboration in advanced biofuels, wind, and solar technologies, as well as public-private engagement to promote renewable energy[109] and expand bilateral trade and investment via a new annual United States-China Renewable Energy Forum.[110]

8) The United States-China Energy Cooperation Program,[111] which is a vehicle for companies from both countries to work together and pursue clean sector market opportunities, address any trade impediments, and increase sustainable development.

9) The U.S.-China Regional Cooperation Initiatives, such as the U.S.-China Green Energy Council (based in the San Francisco Bay area),[112] the U.S.-Clean Energy Forum (based in Greater Seattle),[113] and the Joint U.S.-China Cooperation on Clean Energy (based in Beijing, Shanghai, and Washington D.C.).[114]

A way forward in climate change negotiations is the creation of bilateral deals between developed and developing countries, possibly (and desirably) involving the U.S. These could include emissions allowances, a Kyoto-type

Clean Development Mechanism, cash, and non-climate change benefits in trade or other side payments[115] or linkages,[116] for instance, and may solve some of the equity problems among countries of who pays how much.

2. *Variable Geometry*

Variable geometry is a possible option to move forward toward a global climate change agreement. Variable geometry, a decentralized system, consists of making deals within smaller clubs[117] of like-minded countries such as those in the Major Economies Forum on Energy and Climate (MEF), which brings together large emitters of GHG.[118] These clubs could eventually expand to reach the entire UNFCCC membership, as is the case of the so-called Green Room in the WTO,[119] a similar practice of which already exists in many forms in the UNFCCC negotiations. Another example of variable geometry at the WTO was the July 2008 WTO Mini-ministerial Conference, composed of a trade G-7,[120] because of the serious difficulties that arose from the entire WTO membership of more than 150 Members trying to move the trade agenda forward. The desire to complete the Doha Round of multilateral trade negotiations was such that the negotiations' membership was reduced to 40 countries and eventually just the seven key players at the WTO; hence the name mini-Ministerial Conference. That said, the mini-ministerial conference was just a means to try to reach an informal agreement in the WTO framework, whereas the actual WTO agreement would need the approval of the entire WTO membership.[121] In the case of climate change, ideally these clubs of countries could be integrated into a single framework agreement on climate change, resulting in greater coordination and reciprocity.

In the EU context, there are two classic examples of variable geometry (or enhanced cooperation, as it is known in the EU parlance),[122] namely the Schengen Agreement and the Eurozone. The Schengen Agreement started in 1985 among five EU Member States for abolition of border control. As of 2008, 22 EU Member States and three other non-EU European countries were part of the Schengen Convention. In the case of the Eurozone, it started with 11 members. As of 2011, the Eurozone is composed of 17 of the 27 EU Member States, which have adopted the Euro as their common currency. These two experiences show that creating smaller working groups within the context of larger, less manageable systems can foster both cohesion among the members and advancement of the integration process.

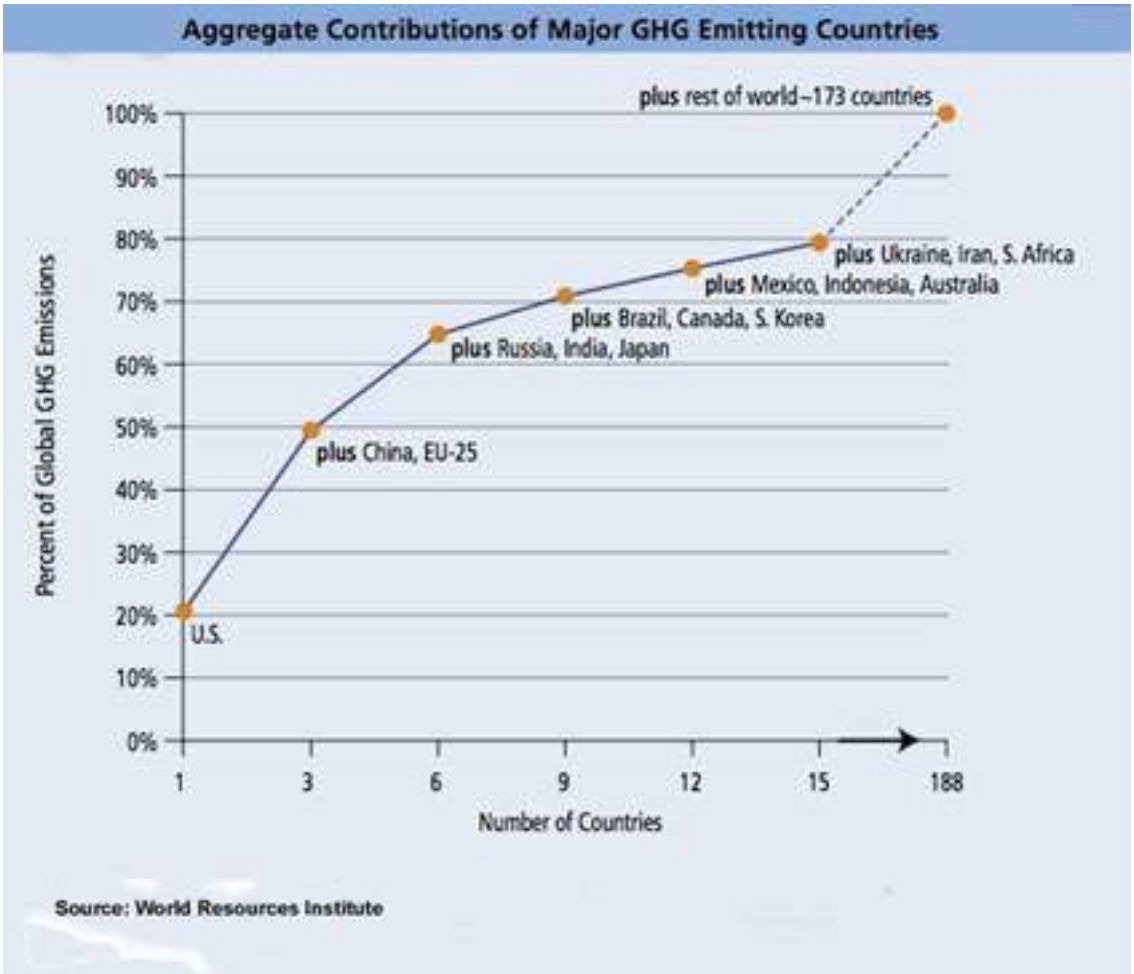
Pursuing the climate change challenge in *fora* other than the UNFCCC could complement evolution within the UNFCCC (i.e., it does not have to

be an either/or situation). If the UNFCCC stalls, these non-UNFCCC processes would become more urgent. For example, as countries move forward with domestic emissions trading systems, they likely will look for opportunities to link them through bilateral or plurilateral arrangements. Moreover, if, for instance, climate-related trade disputes begin to arise more frequently, they could easily lead to cases before the WTO, which might be then forced to consider rules to mediate between trade and climate policy.

a. The Underlying Rationale and Incentive Creation

Based on empirical observation, variable geometry (or a 'club' approach) seems both logical and fair as a mechanism to move forward the climate change agenda, given that a relatively small number of countries produces a large majority of GHG emissions. Moreover, from a practical viewpoint, it is easier to negotiate amongst a small number of large players than amongst a large number of small players, which explains the creation of clubs. So bringing together a group of countries (i.e., major GHG emitters in the case of climate change, whatever the format may be, whether bilaterally or plurilaterally) seems to make sense, especially because there is more pressure to deliver when the group of countries is smaller.[123] Furthermore, less time is spent on procedural matters when dealing with a small group of countries. Moreover, based on international negotiating experience from other fields, the only way to get any real business done is in small meetings (sometimes tête-à-tête meetings between key leaders).[124]

Indeed, the chart below shows that 15 out of the 195 UNFCCC members were responsible for approximately 80 per cent of global GHG emissions in 2005. This figure means that the remaining UNFCCC membership was only responsible for around 20 per cent of global emissions. In other words, very many countries have contributed very little to climate change, but very few countries have contributed very much. This latter small group of countries should therefore be responsible for fixing the current situation, which would be easier and less complex to fix in a small club than among the entire UNFCCC membership. The horizontal axis of the chart denotes the number of countries most involved in the UNFCCC. Moving from left to right, countries are added in order of their absolute GHG emissions, with the largest GHG emitter added first.[125]



If we accept this club approach, what *fora* may be used for formulating a global response to climate change?[126] The G-20, the MEF, the G-8,[127] the G-3,[128] and regional groupings all seem plausible options to provide political leadership. They all have the shared vision that GHG emissions must be reduced, with targets for developed countries and actions from developing countries. As mentioned earlier, though, not every part of the world needs to be represented at the beginning. The global GHG contribution of the least-developed countries and small island developing states is so minimal, that it seems logical to start with the major GHG emitters and eventually have the rest of the world join in the quest for GHG emission reduction. Once the major parties are grouping together, the chance of having other countries join increases.[129] Previous experience shows that negotiating and decision-making resulting from such clubs has been valuable in *fora* such as the UN Convention on the Law of the Sea, the WTO or the creation of the Montreal Protocol.[130] So there seems to be added value to formalizing negotiations in smaller groups.

As for the creation of incentives for a future climate change agreement, an optimal treaty should be such that no state can benefit from withdrawing and no party can benefit from failing to comply. Incentive is a major reason why countries agree to ratify agreements. The European Union is a good example of countries willing to give up (some of) their sovereignty to join a supranational institution because there are clear advantages to becoming a member. Another example is China's accession to the WTO, which meant reforming much of China's economy to be WTO-compatible, in return for which China has benefited immensely on a domestic front.

b. Forum Options

This sub-section argues that polycentric systems can produce collective action more effectively than unified institutions such as the UNFCCC/Kyoto Protocol process.[131] Moreover, it is also argued that climate governance should follow the examples of concentric circles in larger structures in other fields of global governance. For instance, just as the G-20 in the context of the International Monetary Fund or the Security Council in the context of the United Nation are examples of concentric circles for monetary and foreign policy respectively, the Major Economies Forum on Energy and Climate may serve as a concentric circle for global climate governance. However, in the case of climate change negotiations, least-developed countries and small island states have constantly shown their preference for the UNFCCC as a negotiating platform. Below are some non-exhaustive suggestions of plausible forum options to produce collective action in climate change mitigation and adaptation. The various selected concentric circles from smaller to larger are the G-3, the MEF, and the G-20.

i. The G-3

An agreement among a small group of major GHG emitters (for example, China, the U.S., and the EU, i.e., the G-3) could provide a starting point for building new international emission-reduction commitments involving all major emitting countries. If this group of countries can agree to some meaningful measures, then the arrangement might be expanded to include Brazil, Japan, Australia, Canada, India, Indonesia, South Africa, possibly Russia, and other major emitting countries. This major emitter "club" could be built under the auspices of an existing international forum, such as the G-20 group of major developed and developing countries, or a new network organization, and eventually feed back into the UNFCCC, which would provide much more legitimacy to the exercise. On the other hand, major countries that are not at the table may object to a three-party

initiative (such as the suggested one of China, the U.S., and the EU), triggering backlash that could impede progress on global emissions reductions.

ii. The Major Economies Forum on Energy and Climate

The Major Economies Forum on Energy and Climate (MEF) was launched on March 28, 2009.[132] The MEF is intended to facilitate a candid dialogue among major developed and developing economies, help generate the political leadership necessary to achieve a successful outcome at future UN climate change conferences, and advance the exploration of concrete initiatives and joint ventures that increase the supply of clean energy while cutting greenhouse gas emissions. The MEF partners include: Australia, Brazil, Canada, China, the EU, France, Germany, India, Indonesia, Italy, Japan, Korea, Mexico, Russia, South Africa, the UK, and the U.S.[133]Bringing together these major emitters, which were responsible for around 75 per cent of GHG emissions in the world as of 2009,[134] will increase the likelihood of reaching a climate change agreement, as the MEF is a more efficient negotiating forum than the UNFCCC.[135] Furthermore, an agreement amongst them would be almost as valuable as an agreement amongst all UNFCCC parties in terms of absolute GHG emission reductions, since most GHGs come from the MEF partners.

The MEF is therefore a means to facilitate progress in the climate change negotiations. The MEF has a controversial relationship with the UNFCCC/Kyoto Protocol process and offers a substantially different means to respond to climate change.[136] The Kyoto Protocol is universal in scope, whereas the MEF is based on small-group negotiations among 17 parties; the Kyoto Protocol is legally binding, whereas the MEF stresses voluntary measures; the Kyoto Protocol focuses on GHG emission reduction, whereas the MEF fosters technological innovation. To avoid the obstacles faced by the UNFCCC machinery, the MEF should focus on each member's economic weight as well as GHG emission reduction responsibilities, in order to fairly decide who should reduce GHG emissions and by how much.

iii. The G-20

Most of the largest GHG emitters have large economies, large populations, or both. Given the direct link between climate change and the world economy, the G-20 could be a plausible forum for moving forward the climate change agenda. The G-20 "brings together important industrial and emerging-market countries from all regions of the world. Together, member countries represent around 90 per cent of global gross national product, 80 per cent of world trade [including intra-EU trade] as

well as two-thirds of the world's population. The G-20's economic weight and broad membership gives it a high degree of legitimacy and influence over the management of the global economy and financial system".[137] In 2008, the G-20 represented 66 per cent of the world's population and produced over 80 per cent of the world's GHG emissions.[138]

V. INCENTIVES FOR COOPERATIVE COMPLIANCE

Moving forward post-COP-16 in Cancún, two main issues are necessary for the creation of a global climate change agreement: 1) obtaining binding commitments and 2) the enforcement of obligations. The first attempt to negotiate specific binding commitments began in 1995 with the Berlin Mandate, which grew out of the impending failure of industrialized countries to implement the voluntary commitments in Article 4 of the UNFCCC. Two years later, countries signed an agreement in Kyoto that contained binding provisions, including specific targets and timetables for emissions reductions below 1990 levels (-7% for the US, -8% for the EU, -5% for industrial countries overall, based on average emissions in 2008-2012 compared to 1990). The Kyoto Protocol also included novel and controversial flexible mechanisms for meeting those obligations, largely to satisfy the concerns of the U.S. that it would not otherwise be able to meet its target.

Basically, States commit to treaties because it is in their own interest. In the first place, treaties are bilateral, where there is a *quid pro quo*. □□ example is bilateral investment treaties, where the investing State will provide investment capital in exchange for a degree of security in the way that capital and the resulting returns are treated. Later, there appear multilateral treaties setting up a legal regime,[139] so that a State does not bind itself without there being a credible multilateral regime under which a substantial number of States are bound, thus providing the *quid pro quo*.[140]

The basic problem with establishing a regime on GHG emission reductions has been the failure to establish a balance between setting up a regime and having a built-in reciprocal element—in part because of the insistence of the developing countries that, because of their low historic contribution to climate change, they should be excused from onerous commitments and, in part, but linked to the first element, because of the reluctance of the U.S. to undertake commitments which many see as unilateral as well as onerous.[141] In the past, the UN machinery has produced agreements well enough where it can be shown that there is a degree of fairness for all.[142]

So if the commitments are to be offered by States as binding obligations, one has to look for another way. In some cases, regional organizations might spearhead the way if each State thought that they were all in the same boat and that there was a balance. The EU has done this in several contexts and then extended its system broadly into a multilateral regime. Generally, in many areas the EU has adopted standards and then required aspirant trade partners or those countries hoping for EU development aid, partnership, or EU membership to swallow these standards by way of approximation. The essential-elements clauses for human rights and non-proliferation, to name but a few, show the technique. By conceptual analogy, one could well envisage the use of this technique for GHG emission reduction commitments. With the other areas, for the most part there exist multilateral agreements already to which the suppliant State is expected to accede.

As for the enforcement of obligations, if the Kyoto Protocol obligations are a last, rather than a first step toward worldwide GHG emission cuts, they would not, in and of themselves, reduce GHG emissions very much due to the absence of any long-term commitments or developing country involvement.[143] A global carbon trading zone was envisioned in Kyoto in 1997, but nothing came out of it in part because it would have to be established and enforced by a legally binding treaty. Therefore, this article suggests the creation of a new mechanism modeled on the General Agreement on Tariffs and Trade (GATT) that would monitor national commitments to cut GHG emissions, even if it is acknowledged that multilateralism is not doing that well these days.

Using the GATT monitoring as a model would be perfectly feasible so long as the monitoring is carried out by an international body with environmental expertise. There may well be lessons to be learned from the GATT techniques as regards compensatory adjustments for violations. Clearly, it would not be acceptable for country A to feel free to disregard its own GHG emission commitments because country B has—in the opinion of country A—already disregarded its commitments. The monitoring problem arises only once the commitments are made, even if sometimes States are reluctant to undertake commitments because they believe that others will cheat and not be caught out.[144]

So how would a new mechanism modeled on the GATT monitor national commitments to cut GHG emissions? Unlike the Kyoto Protocol, which would have subordinated a State's policies to the decisions of an international organization, a future General Agreement to Reduce Emissions (GARE) would perform in the same manner as the 1947 GATT in terms of setting rules, dispute settlement, and creating incentives for

countries to coordinate their efforts in reducing greenhouse gas emissions.[145] Just as was the case in the GATT, the advantage of the proposed GARE is that it would not have to be established or enforced by a legally binding treaty.[146] Countries could join the GARE by adopting their own ambitious and verifiable reductions targets based on domestic legislation. So although the international dimension of the GARE would be politically binding, the GARE would be based on legally binding national obligations.

Parties to the GARE would cooperate with each other to make sure that all of them have reliable reporting, monitoring, and enforcement mechanisms. Once the laws of the various participating countries are sufficiently ambitious in reducing emissions, and once they have confidence in one another's compliance with their own targets, international emissions trading would be the logical next step.[147] A single set of rules would presumably lower the transaction costs for participants; and investors would be inclined to fund projects[148] in countries with the most cost-effective emission-reduction policies.[149]

With the high barriers to legislative approval in the U.S.,[150] the GARE would be a major incentive for the U.S. because it would not be a treaty but an agreement. The practical implication of this distinction between a treaty and an agreement is that the GARE would require a sixty-vote majority in the U.S. Senate, instead of the sixty-seven votes necessary for treaty ratification. Moreover, current U.S. legislation already authorizes the United States Environmental Protection Agency (EPA) to trade emissions permits with any "national or supranational foreign government" that imposes a mandatory cap on GHG emissions. Furthermore, the current legislation also requires the EPA to determine that the foreign country's program is "at least as stringent as the program established by this title [Title VII], including provisions to ensure at least comparable monitoring, compliance, enforcement".[151] In other words, countries could legislate nationally and coordinate globally.

VI. Conclusion

To sum up, avoiding the linkage between trade and climate change is not possible. From an economic, environmental, and political point of view, these two areas are inextricably linked, and therefore the international community must find a mechanism to continue to lower barriers to trade while also combating climate change. Ideally, the conclusion of an effective and comprehensive global climate change agreement should be a priority. However, in the absence of that, it would make sense to explore the "clubs approach"—such as the MEF or the G-20—the RTAs

possibility, and the future General Agreement to Reduce Emissions avenue for the creation of a global climate change agreement based on the success of international trade agreements in the past. In this sense, using the evolution of the GATT and WTO as a model for building an effective global architecture to combat climate change is desirable.

Regarding ways to move the climate change agenda forward, it is well known that equitable and efficient international cooperation multilaterally is very difficult. No breakthroughs will take place regarding a global climate change agreement until there is more political maturity on the side of the U.S., and until rapidly emerging economies such as China and India indicate that they are ready to play their part in tackling climate change, since they are part of the solution. Large emitters of GHG need to be involved for negotiations to come to a conclusion. Much progress is still needed until we reach an international agreement that covers all the world's countries and that is strong enough to tackle climate change effectively, and equitable enough to gain the sympathy of all countries.

Based on the experience of incremental multilateralism in the context of the WTO and the EU, an incremental and gradual approach to multilateralism in climate change may take time until all countries of the world are covered by a global agreement on climate change. However, so long as the major GHG emitters are reducing their emissions, not having the full UNFCCC membership on board does not really matter, given that the contribution to climate change by non-major emitters of GHGs is minimal. Moreover, the fact that perhaps only a club of major emitting countries may move the climate change agenda forward plurilaterally to limit GHG emissions—instead of the entire UNFCCC membership—is not as problematic as would be the case in the multilateral trading system, where issues of violation of the WTO law principle of non-discrimination would arise. Unlike the case of multilateral trade agreements, in the climate field, it is better to have a mini-lateral climate change agreement (through clubs or coalitions of the willing) than no agreement at all, [152]if that means making sure that the Earth's rising temperature is being addressed. There are clear costs and risks to not reaching a climate change agreement. Therefore, in the absence of a global climate change agreement, proceeding without the entire UNFCCC membership as the second best option is a wise option.

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[1] Kyoto Protocol, FCCC/CP/1997/L.7/add.1, 10 December 1997, reprinted in (1998) 37 ILM 22. Currently, there are 193 Parties (192 States and 1 regional economic

integration organization) to the Kyoto Protocol to the United Nations Framework Convention on Climate Change. See http://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php.

[2] UNFCCC, 9 May 1992, 31 ILM 849.

[3] Article 1.5 of the UNFCCC defines greenhouse gases as "those gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation." So greenhouse gas is any gas that absorbs infra-red radiation in the atmosphere. Greenhouse gases include water vapor, carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), halogenated fluorocarbons (HCFCs), ozone (O_3), perfluorinated carbons (PFCs), and hydrofluorocarbons (HFCs).

[4] Article 3 of the Kyoto Protocol.

[5] For example, the climate change minister of New Zealand is the former trade ambassador to the WTO.

[6] Raymond J Kopp, 'The Climate has Changed—So Must Policy' (2011) Issue Brief 11-03 Resources for the Future <http://www.rff.org/News/Features/Pages/The-Climate-Has-Changed-So-Must-Policy.aspx> accessed 22 June 2011 (suggesting what the path for climate change might likely be, given the global economic and political forces shaping the foreign policies of the major nations).

[7] Including countries undergoing the process of transition to a market economy.

[8] Article 3 of the Kyoto Protocol.

[9] Daniel Farber, 'The Case for Climate Compensation: Justice to Climate Change Victims in a Complex World' (2008) 2 Utah Law Review 377.

[10] The Stern Review: The Economics of Climate Change, Summary of Conclusions, p. vi, available at http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/media/3/2/Summary_of_Conclusions.pdf.

[11] See for instance the UN's Rio Declaration on Environment and Development, A/CONF.151/26 (Vol. I), Principle 16, arguing the 'polluter pays principle,' i.e., a highly reasonable approach stating that the country responsible for polluting should take care of the consequences.

[12] These numbers exclude emissions from international bunker fuels, land use change, and forestry. See the report by Kevin Baumert, Timothy Herzog and Jonathan Pershing, 'Navigating the Numbers: Greenhouse Gas Data and International Climate Policy' (2005) World Resources Institute 12 figure 2.1.

[13] Ibid.

[14] Ibid, figures 2.2 and 2.3.

[15] Robert Falkner, Hannes Stephan and John Vogler, 'International Climate Policy after Copenhagen: Towards a 'Building Blocks' Approach' (2010) 1 Global Policy 253.

[16] Ibid.

[17] Currently, there are 195 Parties (194 States and 1 regional economic integration organization) to the UNFCCC. See http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php.

[18] See David G Victor, *Global Warming Gridlock: Creating More Effective Strategies for Protecting the Planet* (Cambridge University Press, Cambridge 2011) (arguing that a global warming gridlock has arisen because international talks have drifted away from the reality of what countries are willing and able to implement at home. Most of the lessons that policy-makers have drawn from the history of other international environmental problems will not actually work on the problem of global warming. Victor argues that a radical rethinking of global warming policy is required and shows how to make international law on global warming more effective).

[19] Matthew J Hoffmann, *Climate Governance at the Crossroads: Experimenting with a Global Response after Kyoto* (OUP, Oxford 2011).

[20] For an analysis of the 2 degrees Celsius requirement, see Malte Meinshausen *et al* 'Greenhouse-gas emission targets for limiting global warming to 2 degrees C' (2009) 458 Nature 1158.

[21] The Conference of the Parties (COP) is the supreme body of the UN Framework Convention on Climate Change. It comprises all the 180-plus states that have ratified the Convention. It held its first session (COP-1) in Berlin in 1995 and meets on a yearly basis unless the Parties decide otherwise. The COP's role is to promote and review the implementation of the Convention. It periodically reviews existing commitments in light of the Convention's objective, new scientific findings, and the effectiveness of national climate change programs. The COP can adopt new commitments through amendments and protocols. In December 1997, at its third session (COP-3), it adopted the Kyoto Protocol, containing stronger emissions-related commitments for developed countries in the post-2000 period.

[22] See Steve Rayner and Gwyn Prins 'The Wrong Trousers: Radically Rethinking Climate Policy' (2007) Discussion Paper of the James Martin Institute for Science and Civilization.

[23] Gwyn Prins, Isabel Galiana, Christopher Green, Reiner Grundmann, Mike Hulme, Atte Korhola, Frank Laird, Ted Nordhaus, Roger Pielke, Steve Rayner, Daniel Sarewitz, Michael Shellenberger, Nico Stehr, Hiroyuki Tezuka, 'The Hartwell Paper: A New Direction for Climate Policy after the Crash of 2009' (2010) London School of Economics and Political Science and University of Oxford <http://sciencepolicy.colorado.edu/admin/publication_files/resource-2821-2010.15.pdf> accessed 22 June 2011.

[24] Bolivia subsequently threatened to launch a legal challenge to the Cancún decisions before the International Court of Justice based on the alleged violation of procedural rules, i.e., the lack of complete consensus. This raises the following interesting questions: What does consensus mean in international law? Are the Cancún decisions legally binding agreements? Usually, if the agreement is adopted as a treaty—as opposed to a political agreement—it is legally binding. A politically binding agreement, however, is a *bona fides* pledge that a country will comply with an international agreement through its domestic laws. If a country does not comply with a politically binding agreement, it suffers embarrassment but not sanctions, which are typical of a legally binding agreement. For more analysis on the various dimensions of bindingness, see Judith Goldstein, Miles Kahler, Robert O. Keohane, and Anne-Marie Slaughter (eds) *Legalization and World Politics* (MIT Press, 2001); Daniel Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press, 2009).

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[27] See for example Onno Kuik, Jeroen Aerts, Frans Berkhout, Frank Biermann, Jos Bruggink, Joyeeta Gupta and Richard Tol, 'Post-2012 Climate Policy Dilemmas: A Review of Proposals,' (2008) 8 Climate Policy 317; Joseph Aldy and Robert Stavins (eds.) *Post-Kyoto International Climate Policy: Implementing Architectures for Agreement* (Cambridge University Press, 2010); Frank Biermann, Philipp Pattberg, Harro van Asselt and Fariborz Zelli, 'The Fragmentation of Global Governance Architectures: A Framework for Analysis,' (2009) 9 Global Environmental Politics 14; Joseph Aldy, Scott Barrett and Robert Stavins, 'Thirteen Plus One: A Comparison of Global Climate Policy Architectures,' (2003) 3 Climate Policy 373; Kevin Baumert, Odile Blanchard, Silvi Llosa and James Perkaus (eds) *Building on the Kyoto Protocol: Options for Protecting the Climate* (World Resources Institute, 2002); Daniel Bodansky *International Climate Efforts beyond 2012: A Survey of Approaches* (Pew Center on Global Climate Change, 2004); Matthew Hoffmann, *Climate Governance at the Crossroads: Experimenting with a Global Response after Kyoto* (OUP 2011).

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[29] 26 ILM 1529, 1985.

[30] See Donald Kaniaru, *The Montreal Protocol: Celebrating 20 Years of Environmental Progress, Ozone Layer and Climate Protection* (Cameron May, 2007); United Nations

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[31] Richard Benedick has argued that a strong Protocol regarding the ozone hole would have been created in any event. See Richard Benedick, *Ozone Diplomacy: New Directions in Safeguarding the Planet* (2nd edn, Harvard University Press 1998).

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[35] Article 12 of the Kyoto Protocol.

[36] Robert Keohane and David Victor, 'The Regime Complex for Climate Change' (2011) 9 Perspectives on Politics 7.

[37] Source: Ibid, 10. The regimes and institutions within the oval are those in which substantial rule-making or other activities have already taken place, focused on one or more of the tasks needed to manage the diversity of cooperation problems that arise with climate change. Those completely or partially outside the oval are those regimes in which additional rule-making is needed.

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[41] For further elaboration of the argument, see Rafael Leal-Arcas, *International Trade and Investment Law: Multilateral, Regional and Bilateral Governance* (Edward Elgar, 2010).

[42] See the work by Thomas Cottier, 'Confidence-building for Global Challenges: The Experience of International Economic Law and Relations' (2011) NCCR Trade Working Paper No. 2011/40 <http://www.wti.org/fileadmin/user_upload/nccr-trade.ch/wp5/5.5a/International%20Economic%20Law%20Cottier%20final%200311%20%282%29.pdf> (exploring to what extent the experience in international trade regulation could be employed to design an appropriate architecture in climate change mitigation).

[43] The members of the G-20 are the finance ministers and central bank governors of 19 countries: Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, South Korea, Turkey, the United Kingdom, and the United States. The European Union is also a member, represented by the rotating Council presidency (since the entry into force of the Lisbon Treaty, it is the European Council president) and the European Central Bank. To ensure that global economic *fora* and institutions work together, the Managing Director of the International Monetary Fund (IMF) and the President

of the World Bank, plus the chairs of the International Monetary and Financial Committee and Development Committee of the IMF and World Bank, also participate in G-20 meetings on an ex-officio basis. See http://www.g20.org/about_what_is_g20.aspx.

[44] In the case of the EU integration process trying to find the right balance between the maintenance of any redefined division of competences between the EU and its Member States and ensuring that the European dynamic does not come to a halt, the failed EU Constitutional Treaty had envisaged a flexibility clause (Article I-18 of the Constitutional Treaty), which is the procedure which gives the European Union new competences in areas unspecified by the Constitutional Treaty. According to the flexibility clause, if the European Commission deems it necessary to conduct a new action in order to reach the Union's objectives, it makes a proposal to that effect to the EU Council, which acts unanimously after obtaining the approval of the European Parliament. With respect to the control procedure of the subsidiarity principle, the EU Council may assign the necessary competences to the Union. The new competences cannot, however, entail harmonization of Member States' laws or regulations in cases where the EU Constitutional Treaty excludes such harmonization.

[45] See generally Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press, 1990).

[46] See Robert Keohane and David Victor, 'The Regime Complex for Climate Change' (2011) 9 Perspectives on Politics 7 (arguing that there is no integrated regime governing efforts to limit the extent of climate change. Instead, there is a regime complex: a loosely coupled set of specific regimes).

[47] See the views of UNFCCC Executive Secretary Christiana Figueres at http://www.clintonglobalinitiative.org/ourmeetings/2010/meeting_annual_multimedia_player.asp?id=26&Section=OurMeetings&PageTitle=Multimedia.

[48] On the complexity of setting agreements and institutions in any given area, see Kal Raustiala and David Victor, 'The Regime Complex for Plant Genetic Resources' (2004) 59 International Organization 277.

[49] See for instance Rafael Leal-Arcas, 'Proliferation of Regional Trade Agreements: Complementing or Supplanting Multilateralism?'(2011) 11 Chicago Journal of International Law 597 (arguing that, with the creation of the WTO in 1995, the pyramidal design of the international trading system placed multilateralism at the top of the pyramid, regionalism/bilateralism in the middle, and the domestic trade and economic policies of WTO Member States at the bottom of the pyramid. The author questions whether this vertical structure is still the case today, given the tremendous proliferation of regional trade agreements in recent years and the fact that the WTO is losing its centrality in the international trading system).

[50] Despite its evolutionary structure, the EU also went through crises. One example resulted from a provision in the Treaty of Rome which stipulated that, with effect from 1 January 1966, unanimous voting would gradually be replaced by qualified-majority voting. France, under General de Gaulle, opposed the changeover by rejecting a series of European Commission proposals, blocking their adoption in the EU Council, and refusing to move from unanimous to qualified-majority voting. The French Government decided to express its disapproval by applying the 'empty chair' policy, where France refused to participate in EU Council meetings. The veto of a single country was brought into question. On January 28, 1966, through the Luxembourg Compromise, France agreed to resume its Council seat. It was decided that the majority vote procedure would be replaced by unanimous vote if an EU Member State considers that "very important interests" are at stake.

[51] The members of the finance G-8 are the US, Canada, UK, Germany, France, Italy, Russia, and Japan.
[52] See generally Kenneth Abbot and Duncan Snidal, 'Hard and Soft Law in International Governance,' in Judith Goldstein, Miles Kahler, Robert O. Keohane, and Anne-Marie Slaughter (eds) *Legalization and World Politics* (MIT Press, 2001); Kal Raustiala, 'Form and Substance in International Agreements' (2005) 99 American Journal of International Law 581.
[53] See U.S. Energy Information Administration, *International Energy Statistics 2009*, 2009.
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[55] See the study in Raymond Saner, 'International Governance Options to Strengthen WTO and UNFCCC' (2011) CSEND.
[56] See generally Farhana Yamin and Joanna Depledge, *The International Climate Change Regime: A Guide to Rules, Institutions and Procedures* (Cambridge University Press, 2004).
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[61] Daniel Bodansky and Elliot Diringer, *The Evolution of Multilateral Regimes: Implications for Climate Change* (Pew Center on Global Climate Change, 2010).
[62] Ibid.
[63] Ibid, 23.
[64] For various options, see H Winkler and J Beaumount, 'Fair and Effective Multilateralism in the Post-Copenhagen Climate Negotiations' (2010) 10 Climate Policy 638.
[65] See for instance W Hare, C Stockwell, C Flachsland, S Oberthür, 'The Architecture of the Global Climate Regime: A Top-Down Perspective' (2010) 10 Climate Policy 600 (arguing that a legally binding, multilateral agreement is a necessary condition for achieving the highest levels of GHG emission reductions consistent with limiting warming to below either 2°C or below 1.5°C. Clear legally binding commitments within a multilaterally agreed process with strong legal and institutional characteristics are needed to give countries the confidence that their economic interests are being fairly and equally treated).
[66] H Shue, 'Global Environment and International Inequality' (1999) 75 International Affairs 531.
[67] J Cao, 'Beyond Copenhagen: Reconciling International Fairness, Economic Development, and Climate Protection' (2010) Harvard Project on International Climate Agreements Discussion Paper Series 2010.
[68] Article 3.1 of the UNFCCC.
[69] On per capita allocation proposals, see A Agarwal, 'Making the Kyoto Protocol Work: Ecological and Economic Effectiveness, and Equity in the Climate Regime' Centre for Science and Environment <http://old.cseindia.org/programme/geg/pdf/cse_stat.pdf>

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[72] GATT Article I.

[73] That said, the WTO's dispute settlement system is not applicable to disputes within an RTA.

[74] (*footnote original*) On the issue that decision-making in the WTO has become ever more difficult as the number of WTO Members rises and the range of issues tackled broadens, see Patrick Low, *WTO Decision-making for the Future* (World Trade Organization 2009), online at http://www.wto.org/english/res_e/statis_e/tait_sept09_e/tait_sept09_e.htm.

[75] Rafael Leal-Arcas, 'Proliferation of Regional Trade Agreements: Complementing or Supplanting Multilateralism?' (2011) 11 Chicago Journal of International Law 597.

[76] D Ljunggren, 'G20 Leaders Drop Doha Target, See Smaller Deals' (2010), Reuters <http://www.reuters.com/article/idUSTRE65P27P20100627>.

[77] T Houser, 'Copenhagen, the Accord, and the Way Forward' (2010) PB10-5 Peterson Institute for International Economics 16.

[78] Ghosh and Yamarik have studied the impact of RTAs on the environment. They found that membership in an RTA reduces the amount of environmental damage by increasing the volume of trade and raising per capita income. They did not, however, find that RTAs directly impact the environment. These results suggest that recent surge of regional trading arrangements will not increase the amount of pollution, but in fact may help the environment. See S Ghosh and S Yamarik, 'Do Regional Trading Arrangements Harm the Environment? An Analysis of 162 Countries in 1990' (2006) 6 Applied Econometrics and International Development.

[79] Some scholars have compared developments in the trade policy area with the building-block approach to climate change governance. See Daniel Bodansky and Elliot Diringer, 'Towards an Integrated Multi-Track Climate Framework' (2007) Pew Center on Global Climate Change <http://www.pewclimate.org/docUploads/Multi-Track-Report.pdf>; W Antholis, 'Five 'Gs': Lessons from World Trade for Governing Global Climate Change' in L Brainard and I Sorkin, (eds) *Climate Change, Trade, and Competitiveness: Is a Collision Inevitable?* (Brookings Institution Press, 2009).

[80] T Sugiyama and J Sinton, 'Orchestra of Treaties: A Future Climate Regime Scenario with Multiple Treaties among Like-minded Countries' (2005) 5 International Environmental Agreements 65.

[81] See for instance R Stewart, 'Environmental Regulatory Decision Making Under Uncertainty' in R O Zerbe, and T Swanson (eds), *An Introduction to the Law and Economics of Environmental Policy: Issues in Institutional Design* (Elsevier, 2002).

[82] See generally F Biermann, P H Pattberg, H van Asselt and F Zelli, 'The Fragmentation of Global Governance Architectures: A Framework for Analysis' (2009) 9 Global Environmental Politics 14.

[83] Ibid, 26.

[84] See G Prins, Isabel Galiana, Christopher Green, Reiner Grundmann, Mike Hulme, Atte Korhola, Frank Laird, Ted Nordhaus, Roger Pielke, Steve Rayner, Daniel Sarewitz, Michael Shellenberger, Nico Stehr, Hiroyuki Tezuka, 'The Hartwell Paper: A New Direction for Climate Policy after the Crash of 2009' (2010) London School of Economics and Political Science and University of Oxford < http://sciencepolicy.colorado.edu/admin/publication_files/resource-2821-2010.15.pdf> accessed 22 June 2011; M Hulme, 'Moving Beyond Climate Change' (2010) 52 Environment 15; S Rayner, 'How to Eat an Elephant: A Bottom-Up Approach to Climate Policy' (2010) 10 Climate Policy 615; N Pennell, R Fowler, A Johnstone-Burt and Ian Watt, 'Bottom Up & Country Led: A New Framework for Climate Action' (2010) Booz & Company.

[85] See T Nordhaus and M Shellenberger, 'The End of Magical Climate Thinking' (2010) Foreignpolicy.com <http://www.foreignpolicy.com/articles/2010/01/13/the_end_of_magical_climate_thinking>.

[86] R Reinstein, 'A Possible Way Forward on Climate Change' (2004) 9 Mitigation and Adaptation Strategies 295.

[87] Bodansky and Diringer have studied the possibility of a step-by-step integration process of the climate agenda. See Daniel Bodansky and Elliot Diringer, 'Towards an Integrated Multi-Track Climate Framework' (2007) Pew Center on Global Climate Change <http://www.pewclimate.org/docUploads/Multi-Track-Report.pdf>.

[88] See the fact sheet of the Asia-Pacific Partnership on Clean Development and Climate, available at http://www.asiapacificpartnership.org/pdf/translated_versions/Fact_Sheet_English.pdf.

[89] Charter of the Asia-Pacific Partnership on Clean Development and Climate, preamble.

[90] Ibid, para. 2.1.1.

[91] Ibid, para. 1.1.

[92] U.S. Code, Title 42, Chapter 85.

[93] That said, there are American organizations that oppose the cap-and-trade system. See for instance FreedomWorks at http://www.freedomworks.org/publications/top-10-reasons-to-oppose-cap-and-trade.

[94] John C Nagle, 'Climate Exceptionalism' (2010) 40 Envtl. L. 53; N Bianco and F Litz, *Reducing Greenhouse Gas Emissions in the United States Using Existing Federal Authorities and State Action* (World Resources Institute, 2010).

[95] Regional Greenhouse Gas Initiative, Memorandum of Understanding, December 2005, available at http://rggi.org/docs/mou_final_12_20_05.pdf.

[96] A Diamant, *Key Institutional Design Considerations and Resources Required to Develop a Federal Greenhouse Gas Offsets Program in the United States* (Electric Power Research Institute 2011) (which evaluates the governmental institutional requirements and resources needed to develop a large-scale national domestic GHG emissions offset program in the United States, and the potential institutional barriers that might limit the ability of the evolving carbon market to generate significant offset supplies in the U.S.).

[97] On international cooperation, see D Victor, 'Toward Effective International Cooperation on Climate Change: Numbers, Interests and Institutions' (2006) 6 Global Environmental Politics 90.

[98] Deborah Seligsohn, Robert Heilmayr, Xiaomei Tan, and Lutz Weischer, 'China, the United States, and the Climate Change Challenge' (2009) World Resources

Institute Policy Brief; Pew Center & Asia Society, 'Common Challenge, Collaborative Response: A Roadmap for U.S.-China Cooperation on Energy and Climate Change' (2009); R Stewart and J Wiener, *Reconstructing Climate Policy: Beyond Kyoto* (American Enterprise Institute 2003), Chapter 3 and pp. 102-109 (on how to attract the participation of China and other major developing countries).

[99] S Pacala and R Socolow, 'Stabilization Wedges: Solving the Climate Problems for the Next 50 Years with Current Technologies' (2004) 305 Science 968.

[100] S Wolfson, 'Gathering Momentum for U.S.-China Cooperation on Climate Change' (2009) Tsinghua University Law Journal.

[101] N Jiang and E J Chua 'Clean Development Mechanism in China' (2006) 21 J Int'l Bank L & Reg 569; M Kim and R Jones, 'China: Climate Change Superpower and the Clean Technology Revolution' (2008) 22(3) Nat Resources & Envt 9; Hiranya Fernando, John Venezia, Clay Rigdon, Preeti Verma, 'Capturing King Coal: Deploying Carbon Capture and Storage Systems in the U.S. at Scale' (World Resources Institute, 2008); M Gerrard 'Coal-fired Power Plants Dominate Climate Change Litigation,' (2009) New York Law Journal; D Biello, 'The Price of Coal in China: Can China Fuel Growth without Warming the World?' (2010) Scientific America.

[102] K Khoday, 'Mobilizing Market Forces to Combat Global Environmental Change: Lessons from UN-Private Sector Partnerships in China' (2007) 16(2) Rev Euro Comm & Int'l Envtl L 173.

[103] Fan Gang, Nicholas Stern, Ottmar Edenhofer, Xu Shanda, Klas Eklund, Frank Ackerman, Li Lailai and Karl Hallding (eds), *The Economics of Climate Change in China: Towards a Low Carbon Economy* (Earthscan, 2010).

[104] The White House, Office of the Press, 'U.S.-China Cooperation on 21st Century Coal' <http://www.chinafaqs.org/files/chinainfo/US-China_Fact_Sheet_Coal.pdf>.

[105] M Kim and R Jones, 'China: Climate Change Superpower and the Clean Technology Revolution' (2008) 22 (3) Nat Resources & Envt 9.

[106] See for instance PricewaterhouseCoopers, 'The US-China cleantech connection: shaping a new commercial diplomacy' (2011) <http://www.pwc.com/en_US/us/technology/assets/us-china-cleantech-connection.pdf>.

[107] See for instance US-China Quarterly Market Review, Spring 2011, (which examines the most significant developments in renewable energy markets, finance, and policy in the U.S. and China during the first quarter of 2011).

[108] L Hunter *et al*, *Renewable Energy in America: Markets, Economic Development and Policy in the 50 States* (American Council on Renewable Energy 2011).

[109] J Firestone and J Kehne, 'Wind,' in M Gerrard (ed), *The Law of Clean Energy: Efficiency and Renewables* (American Bar Association 2011); C Komanoff, 'Whither Wind? A journey through the heated debate over wind power' (2006) Orion 30; M Hoffert, 'Renewable Energy Options – An Overview' (2004) from workshop proceedings, *The 10-50 Solution: Technologies and Policies for a Low-Carbon Future*, The Pew Center on Global Climate Change and the National Commission on Energy Policy 1-19, <http://www.pewclimate.org/docUploads/10-50_Full%20Proceedings.pdf>.

[110] J McGee and R Taplin, 'The Asia-Pacific Partnership and the United States' International Climate Change Policy' (2008) 19 Colo J Int'l Envtl L & Pol'y 179.

[111] http://www.uschinaecp.org/.

[112] http://ucgef.org/en.

[113] http://www.cleanenergyforum.org/.

[114] http://www.juccce.com/.
[115] On side payments, see the analysis by Scott Barrett, *Environment and Statecraft: The Strategy of Environmental Treaty-making* (OUP, 2003).
[116] Ibid, chapter 12.
[117] See for instance B Müller, 'UNFCCC – The Future of the Process: Remedial Action on Process Ownership and Political Guidance' (2011) Climate Strategies (where Benito Müller looks at the use of small groups, be it during negotiations or informal consultations, and considers the way in which high-level stakeholders are to give guidance to the climate change negotiations process. The report gives a number of simple and practical ideas for dealing with these issues in a way that benefits the negotiating process).
[118] Choosing the appropriate *forum* is not always easy. For example, if the MEF were to be chosen as the *forum* to move forward the climate change agenda, there would be a free-riding issue with Iran, which is a major GHG emitter, but not an MEF member.
[119] The "Green Room" is a phrase taken from the informal name of the WTO director-general's conference room. It is used to refer to meetings of 20-40 delegations. These meetings can be called by a committee chairperson as well as the WTO director-general, and can take place elsewhere, such as at Ministerial Conferences. In the past, delegations have sometimes felt that Green Room meetings could lead to compromises being struck behind their backs. So, extra efforts are made to ensure that the process is handled correctly, with regular reports back to the full membership. In the end, decisions have to be taken by all members and by consensus. No one has been able to find an alternative way of achieving consensus on difficult issues, because it is virtually impossible for WTO members to change their positions voluntarily in meetings of the full membership.
[120] This trade G-7 should not be confused with the finance G-7 representing the most industrialized nations in the world. The trade G-7 has replaced the so-called "Quadrilateral Trade Ministers' Meeting" or Quad and is composed of the Quad (the US, the EU, Canada, and Japan) plus China, India, and Brazil. Its purpose is to see how key trade and investment matters can be moved forward.
[121] On variable geometry, see the criticism by Daniel Drache of the Sutherland and Warwick Commissions in Daniel Drache, 'The Structural Imbalances of the WTO Reconsidered: A Critical Reading of the Sutherland and Warwick Commissions' Chaos International 9 (arguing that the downside of variable geometry, if adopted, is that it would, de facto, create two classes of WTO Members, making it more difficult for developing countries to defend their legitimate interests at the WTO. <http://www.yorku.ca/drache/academic/papers/structuralimbalancesoftheWTO.pdf>.
[122] In the EU context, this concept refers to a situation in which some countries may integrate more (or faster) than others. This phenomenon has been given many other different names—among them, flexibility, differentiated integration, closer (or enhanced) cooperation, concentric circles, Europe *à la carte*, and two-speed (or multi-speed) Europe. The 1997 Treaty of Amsterdam represented the first attempt to formalize this principle. Before that, however, the UK's and Denmark's opt-outs on the Economic and Monetary Union, the UK's and Ireland's exemptions from the Schengen Agreement, and Denmark's opt-out on anything to do with a common EU defense policy had already created *de facto* variable geometry. Another example was the admission to the EU of the neutral states of Austria, Finland, Sweden, and Ireland, which were not full members of the Western European Union and would inevitably be forced to resort occasionally to constructive abstention in foreign and security affairs. Given the prospect of the EU growing even less homogeneous with

the accession of former Soviet bloc countries, such divergences appeared likely to increase rather than to diminish.

[123] K Abbot and D Snidal, 'Why States Act Through Formal International Institutions' (1998) 41 Journal of Conflict Resolution 1.

[124] A Poteete, M Janssen and E Ostrom, *Working Together: Collective Action, the Commons, and Multiple Methods in Practice* (Princeton University Press, 2010).

[125] Note that the data are pre-2007. Since then, China, and not the U.S., is the largest emitter of GHGs.

[126] See the views by Michael Levi, 'Beyond Copenhagen: Why Less May be More in Global Climate Talks' (2010) Foreign Affairs; see also R Stavins, 'Options for the Institutional Venue for International Climate Negotiations' (2010) Issue Brief 2010-3 The Harvard Project on International Climate Agreements.

[127] The climate G-8 would be composed of China, the U.S., the EU, India, Brazil, South Africa, Japan, and Russia.

[128] I am referring to the G-2 (U.S. and China) plus the EU.

[129] See S Barrett,*Environment and Statecraft: The Strategy of Environmental Treaty-making* (OUP, 2003).

[130] M Kahler, 'Multilateralism with Small and Large Numbers' (1992) 46 International Organization 706.

[131] See for instance the work of Elinor Ostrom on the management of common pool resources and on global environmental change in E Ostrom, 'Beyond Markets and States: Polycentric Governance of Complex Economic Systems' (2010) 100 American Economic Review 641; E Ostrom, 'Polycentric Systems for Coping with Collective Action and Global Environmental Change'(2010) 20 Global Environmental Change 550.

[132] The MEF has gone through a number of name changes. It was previously called the Major Emitters Forum and the Major Economies Process on Energy Security and Climate Change.

[133] See Major Economies Forum on Energy and Climate <http://www.majoreconomiesforum.org/about/descriptionpurpose.html>.

[134] J Broder 'Clinton Says U.S. is Ready to Lead on Climate' (2009) The New York Times <http://nyti.ms/huEbYb>. These numbers include land-use change.

[135] K Oye, 'Explaining Cooperation under Anarchy' (1985) 38 World Politics 21.

[136] On differentiation of countries' future commitments, see for instance M Berk and M den Elzen, 'Options for Differentiation of Future Commitments in Climate Policy: How to Realise Timely Participation to Meet Stringent Climate Goals?' (2001)1 Climate Policy 465; M den Enzen, 'Differentiation of Countries' Future Commitments in a Post-2012 Climate Regime: An Assessment of the 'South-North' Dialogue' (2007) 10 Environmental Science and Policy 185.

[137] See http://www.g20.org/about_what_is_g20.aspx.

[138] See U.S. Energy Information Administration, *International Energy Statistics 2009*, 2009.

[139] In the case of investment treaties, see for example Rafael Leal-Arcas, 'The Multilateralization of International Investment Law' (2009) 35:1 North Carolina Journal of International Law and Commercial Regulation 33.

[140] Some highly successful treaties both set up a regime and have a built in reciprocal element, such as the Vienna Convention on Diplomatic Relations. See E Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*(3rd edn, OUP, 2008). The Treaty on the Non-Proliferation of Nuclear Weapons of 1968 is an example of a treaty which contained a *quid pro quo* as well as establishment of a regime and a system for verification of compliance which has

been extended. For an analysis, see D Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (OUP, 2009) Chapter 1.

[141] See the proposal by the Brazilian Ministry of Science and Technology, "Technical Note on the Time-Dependent Relationship Between Emission of Greenhouse Gases and Climate Change," January 2000; see also proposed elements of a Protocol to the UNFCCC, presented by Brazil in response to the Berlin Mandate.

[142] See, for example, the string of law-making agreements and environmental agreements such as that on the ozone layer in the 1985 Vienna Convention for the Protection of the Ozone Layer (1985) 26 ILM 1527 and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (1987) 26 ILM 1550.

[143] S Barrett, 'Climate treaties and the imperative of enforcement' (2008) 24 Oxford Review of Economic Policy 239; Xueman Wang & Glen Wiser, 'The Implementation and Compliance Regimes Under the Climate Change Convention and its Kyoto Protocol' (2002) 11 RCEIL 181; D Victor and E Skolnikoff, 'Translating Intent Into Action: Implementing Environmental Commitments,' (1999) 41 Environment 16.

[144] For an analysis of the problem of enforcement of obligations, see G Ulfstein (ed), *Making Treaties Work: Human Rights, Environment and Arms Embargo* (Cambridge University Press, 2007).

[145] William Antholis and Strobe Talbott have studied the possibility of creating an international mechanism modelled on the GATT that would monitor national commitments and create incentives for other countries to coordinate their efforts to cut greenhouse gas emissions. See W Antholis and S Talbott, *Fast Forward: Ethics and Politics in the Age of Global Warming* (Brookings Institution Press, 2010).

[146] There is a difference between a treaty and an (executive) agreement. A treaty is an agreement formally signed, ratified, or adhered to between two or more nations or sovereigns and governed by international law. "The legal terminology used by the United States to describe international agreements is markedly different from that employed elsewhere. Under the U.S. Constitution, the term 'treaty' has a particular meaning—an agreement made by the President with the advice and consent of the Senate." See D Bederman, International Law Frameworks (2001) 158. An executive agreement, however, is an international agreement entered into by the President, without approval by the Senate, and usually involving routine diplomatic or military matters. See B Garner, *Black's Law Dictionary* (9th edn, West 2009) 651.

[147] For an examination of whether international emissions trading falls within the scope of WTO Agreements, whether it might violate substantive WTO rules and, if so, whether it could be covered by exemption clauses, see C Voigt, 'WTO Law and International Emissions Trading: Is there Potential for Conflict?' (2008) 2:1 Carbon and Climate Law Review 52.

[148] Already in the 2009 COP-15 in Copenhagen, consensus was emerging among the Parties to the UNFCCC that a new international climate fund should be established, a fund which would dwarf all existing funds dedicated to supporting developing-country climate change activities. At the same time, there is a growing realization that the current relationship providing guidance and ensuring accountability between the UNFCCC's Conference of Parties and the existing operating entity, is in need of reform. For an analysis of how such a reform could be carried out and how it could be used in providing a legitimate and effective process to set up the new fund, see B Müller, 'Why Reinvent the Wheel?: on establishing new funds while guiding and holding accountable operating entities of the UNFCCC financial mechanism' (2010) Oxford Energy and Environment Comment. See also B

Müller and A Chandani, 'What Expertise? On who should be drafting the framework documents for a new Global Climate Fund' (2010) Oxford Energy and Environment Comment.

[149] For more details on the GARE proposal, see T Stern and W Antholis, 'A Changing Climate: The Road Ahead for the United States' (2007-08) 31 Washington Quarterly 175; see also A Petsonk, 'Testimony before the Subcommittee on Energy and Air Quality' (2007) Committee on Energy and Commerce; N Purvis, 'Trading Approaches on Climate: The Case for Climate Protection Authority' (Summer 2008) Resources.

[150] According to the U.S. Constitution, for a treaty to enter into force, two third of the U.S. Senate have to ratify it. See Article II, Section 2, of the U.S. Constitution.

[151] U.S. House of Representatives, "American Clean Energy and Security Act of 2009," 111 Congress, 1 sess., HR 2454, Title VII, Part C, Section 728, International Emissions Allowances, 774.

[152] Mini-lateralism has been studied in fields other than climate change. For example, Daniel Kono has studied whether mini-lateral agreements help or hinder multilateral cooperation. See D Kono, 'When Do Trade Blocs Block Trade?' (2007) 51 International Studies Quarterly 165. See also mini-lateralism in the context of peace operations in F Attina and D Irrera (eds), *Multilateral Security and ESDP Operations* (Ashgate, 2010).

EXPERIMENTING WITH INTERNATIONAL COLLABORATIVE GOVERNANCE FOR CLIMATE CHANGE MIGRATION BY PRIVATE ACTORS: SCALING UP DUTCH CO-REGULATION

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For the past two decades, international climate policy has been handled as a matter for State to State deliberation. Non-state actors have played at best marginal roles in making and implementing international policy. This paper argues that climate change remains an intractable transnational problem because State to State deliberations failed to acknowledge that both climate mitigation and adaptation require ongoing collaborative governance with non-State actors to shift normative behavior. This paper proposes experimenting with scaling up Dutch environmental covenants as an international co-regulation strategy to improve both the legitimacy and accountability of international climate governance. This paper specifically proposes in the context of climate change mitigation implementing a co-regulatory approach through a combination of State-approved emission targets and binding individual firm environmental agreements.

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I. INTRODUCTION

In June 2010 reflecting on the 2009 United Nations Framework Convention on Climate Change's Conference of Parties in Copenhagen and its April and May follow up meetings in Bonn, the Japan Times wrote, "Global warming fight fizzles." After the COP-15 meeting, government officials from the G-77 negotiating bloc blamed the meeting for locking "countries into a cycle of poverty forever" and civil society leaders accused world leaders of signing "a death warrant for many of the world's poorest children." [1] Unsurprisingly, given the inability for States to make meaningful compromises because of a combination of ideological reasons and pressure from internal constituencies, there has been a lack of global enthusiasm for States to re-engage in future State to State negotiations. As a result, State to State negotiations continue in a desultory *ad hoc* fashion with United States negotiators waiting for clear signs of commitment from China and India while European negotiators lose patience with their North American counterparts.

Even though geographically specific consequence of continued climate change remain uncertain, the general trend is clear—we need to make systemic changes to avert future scenarios replete with unpredictable severe weather, depleted food stocks, and scarce freshwater. In order to maintain 500 ppm of carbon dioxide, the level at which scientists predict irreversible ecological shifts, global carbon dioxide emissions need to be reduced by 50% within approximately the next 50 years. [2] Since all policymaking is accompanied with some period of inertia before adequate implementation, the time frame is short.

Yet, as this paper will argue, the key to achieving mitigation relies not so much on the ability of States to cooperate at intergovernmental meetings as on the will power and decision-making powers of corporate stakeholders. Traditionally a state-centric model of international law has relied on a majority of States at intergovernmental meetings defining globally beneficial policies to be subsequently implemented domestically. This approach works well where there exists uniformity among States, a good faith effort to translate the agreed upon tenets of international law into binding and precise domestic law, and where States have authority.

Governance for the environment, however, has undergone massive shifts in the past few decades so that authority to respond to environmental challenges has shifted from top-down approaches by public actors to lateral interventions by private actors. Private corporate actors, especially transnational corporation, play key roles in environmental "governance without government." [3]

Drawing on the disaggregated power of globalization, transnational governance continues to expand its reach beyond simply commercial matters. What corporations decide to do matters to more than simply corporate shareholders and commercial actors. New forms of governance are branching across the classical schism between public international law and private international law. Repeat international interaction between public and private actors is leading to new international leadership roles for private commercial actors as well as the adoption of new norms by States.[4]

Yet in spite of the changes in governance, States have made few formal changes in incorporating corporate actors into governmental negotiations as both decision-makers and implementers of international policy. While corporations regularly exercise their rights to be heard in environmental lawmaking as lobbying interests, States have rarely formally engaged private actors in negotiations over emissions.[5] This lack of a public relationship between corporations and states in the arena of global environmental governance may become problematic since private actors "do influence the negotiations between public actors" and "more importantly, they govern in some areas."[6]

This paper calls for experimentation with new governance mechanism that formally recognizes both the political, economic, and social authority of both States and non-State commercial actors. Most hybrid international governance efforts related to climate change have been largely informal efforts which have been difficult to measure progress because there have been an absence of targets. This paper proposes instead scaling up domestic environmental co-governance mechanisms providing for binding agreements between States and private interests to an intergovernmental level. The proposal is not meant to be a universal proposal but to be an option for public-private partnership between willing States and willing corporate actors. The paper concludes with a review of some of the challenges of creating an environmentally adequate international co-governance system in light of some of the major emitters being nationally owned sovereign entities.

For purposes of this paper, mitigation is defined narrowly as either an

immediate reduction or elimination of greenhouse gases within a short time frame. Short-term mitigation requires not just a change to new low carbon products but also a cessation of existing high carbon activities. While this paper acknowledges that introducing new energy sources such as renewable and planting new carbon sinks are part of a long-term greenhouse gas mitigation strategy, short-term immediate mitigation will be crucial if we are to achieve anywhere near a 50% global carbon dioxide emissions reduction within the next 50 years.[7] Within this paper, the term mitigation does not include long-term carbon offset programs, preservation of existing carbon sinks, or any geo-engineering effort to absorb carbon. While these latter programs may be part of a long-term mitigation strategy, they do not easily translate into easily measured reductions in atmospheric greenhouse gases.

II. Existing Public-Private Hybrid Governance for Climate Change Mitigation

There are an array of hybrid public-private partnerships that are being forged internationally to address climate change. Almost of these international efforts are directed at jumpstarting the green economy that will wean States and firms from fossil fuel dependency and provide a transition to a low-carbon future. Two examples include the majority of the projects under the Clean Development Mechanism and EV20. The Clean Development Mechanism provides a framework for public and private entities from an investor state to support sustainable development projects in exchange for credits towards meeting reduction commitments. Many projects credited under the Clean Development Mechanism may not be actually eliminating existing greenhouse gas intensive products and or fossil fuel practices in the recipient countries but are rather creating long-term low-carbon infrastructure. EV20 includes as corporate partners Smith Electric Vehicles, Johnson Controls, and Deutsche Bank and as governments partners subnationals such as New York State and Quebec Province. The purpose of the EV20 initiative is to creating better collaboration on financing and promoting infrastructure for one million additional electric cars within the next five years. Understandably from a commercial perspective, very few of the international public-private partnerships focus on short-term mitigation rather than long-term adaptation projects such as green economy shifting projects. Projects like CDM and EV20 present new untapped business opportunities. If the projects come to fruition, they will contribute to long-term mitigation efforts by creating new demands for low-carbon products and processes. Businesses regard short-term mitigation of emissions for existing processes and products as lost commercial opportunities as long as companies can continue to market and access inexpensive fossil fuels.

There are very few short-term mitigation projects and efforts that can be characterized as public and private hybrid international governance. Under the Clean Development Mechanism, of the 1038 projects that have received credits as of April 2011, there are only a handful of projects that eliminate greenhouse gases. Two projects for example received credits for converting sulphur hexafluoride, a greenhouse gas which persists for a long time in the atmosphere, into a non-greenhouse gas sulfur dioxide. Twenty-nine projects received credit for Nitrous Oxide abatement 81 projects for methane recapture or avoidance, 18 projects for avoidance of hydrofluorocarbons, 23 projects for energy efficiency and 36 projects for switching fuel. The majority of the thousand plus projects had no direct effect on mitigation of existing greenhouse gases but instead provided new low-carbon infrastructure maximizing resources such as agricultural and animal waste. While the CDM projects bring benefit to non-Annex I communities, it remains to be seen whether they will have contributed substantially to the need for existing emission reductions. Only a few of the companies involved as project participants such as BHP Billiton and Mitsubishi are among the largest multinational company. There is a noticeable absence of large energy, oil, and transport companies.

One large public-private mitigation initiative exists in the Global Methane Initiative which was conceived of at the 2002 World Summit on Sustainable Development as the Methane to Markets Partnership. Led primarily by States with the US EPA providing administrative and steering group support, the initiative focuses on opportunities in initiative member countries to capture methane and transform it into electricity. Industry members network with States through subcommittees on coal, oil and gas, agriculture, and landfills. States provide some guidance while project network members including industry, academia, financial institutions, state and local governments implement methane capture and use projects in States belong to the Initiative.

Some sectors such as the international reinsurance sector in cooperation with governments have called for greater emission reduction efforts, but there are few links in insurance products between existing levels of greenhouse gas emissions and premiums. The industry has instead focused on indirect efforts that may in the long-term absorb emissions and reduce the industry's exposure to risk. For example in Ethiopia, a local insurance company, reinsured by Swiss Re and supported by the government's cash-for-work program, has issued micro-insurance for farmers which is triggered by a rainfall index. While this project may reduce short-term individual poverty in case of a drought, it doesn't reduce

directly or systematically greenhouse gases. While called a mitigation project, it focuses not on short-term changes in fossil-fuel dependence but rather on addressing long-term trends by promoting regional tree-planting.

Most of the short-term, mitigation-specific projects that might loosely be characterized under a label of public-private hybrid governance have been focused at soliciting volunteer participation at the domestic level from specific sectors. Corporations have quickly adopted these programs for fear of more stringent government regulation in response to growing political and social pressures to do something about the climate issues. These self-regulation voluntary programs have been largely and regrettably unsuccessful in achieving meaningful levels of mitigation. Morgenstern, Pizer, and Shih evaluated the Climate Wise program, a voluntary program administered by the United States Environmental Protection Agency and focused on efforts by non-utilities to reduce greenhouse gases. Participants were expected to develop baseline emission estimate and commit to reducing emissions. Yet in retrospect, the program ceased to deliver on the transformative possibilities of self-regulation. When the program ceased operation in 2000, it had only made a very modest 3% reduction in emissions over the course of six years. There was no third-party auditing of emissions and no public disclosure of emissions. Hindsight suggests that a better model might have been a larger role for the government in the Climate Wise program than simply as a facilitator providing external publicity and exercising only weak threats of regulation.

Most of the continuing international climate governance mitigation efforts especially those being spearheaded by fossil-fuel dependent private sectors continue to favor a model of self-regulation and voluntary commitments. Private actors are setting the mitigation agenda for not just public-private ventures but also for future public discussions. For example, the oil industry recently released the Petroleum Industry Guidelines for Emission Reductions from Carbon Capture and Geological Storage providing that implementing carbon capture strategies would be considered an emission reduction by the oil sector. If they are to maintain their international authority as legitimate rule makers, State and intergovernmental organization leaders will needs to re-engage the private sector to ensure that the private sector by making particular types of targeted investments such as in carbon capture rather than renewable infrastructure does not artificially reduce the choices available to public governance actors. As States have reached an impasse with other States in terms of negotiating public international mitigation strategies, engagement with the private sector provides an alternative negotiating table for States

to seek mitigation through private international law means. One means of engaging the private sector in a transparent fashion that will enhance State legitimacy while leveling the competitive field for private actors within a sector is through co-regulation of the largest global emitters. Corporate actors are already pledging to reduce emissions. A central co-governance mechanism linked to ability to trade would induce more corporate actors including large emitters to engage in short-term emission mitigation. The following section describes one national model for co-regulation and proposes scaling up the model as a basis for global international regulation.

III. Scaling up Co-Regulation for Climate Change: Dutch Co-Regulation and the Energy Efficiency Benchmarking Covenant

There is increasing recognition by the largest global companies that they will need to engage in some action on climate change to protect their corporate interests. In a report from global auditors Ernst & Young, 70% of the 300 corporate executives from companies with at least $1 billion in annual revenue indicated that they intend to increase spending on climate change initiatives between 2010 and 2012.[8] Most of this spending will likely be targeted at long-term transitioning into products and services for the green economy rather than on making short-term reductions that are needed to achieve mitigation. The unabated use of fossil fuels combined with the massive production of cement continues to contribute the lion share of emissions.[9]

The few public-private efforts described above to collaboratively mitigate corporate emissions all rely on voluntary self-regulation which encourages free-riding behavior by non-participants and early defection by parties that are unable to meet targets. So far no one has piloted a co-regulatory approach for governments and corporations to share regulatory rule-making and implementation responsibilities. As Karin Backstrand observes in her work on networked climate governance "no example of public-private partnerships in rule making can be identified in the climate governance arena."[10] Co-regulation is an underexplored option for improving rule-making and rule implementation in the context of climate governance. This section describes how co-regulation for environmental rule-making and implementation has operated within the Dutch legal system. The section that follows proposes using the Dutch co-regulation model to create an international co-regulation strategy for negotiators between States committed to reducing emissions and major greenhouse gas emitters.

Co-regulation is a model of regulatory interaction between public and

private actors, which involves a sequential combination of specific goal setting by the government for a sector coupled with a case-by-case implementation strategy for individual corporate actors within a sector. Co-regulation as a broad concept encompasses voluntary environmental management agreements as well as negotiated rule-making. Co-regulatory approaches have been experimented with in the Netherlands, Denmark, Germany, United States, Canada, New Zealand, and Japan.[11] In this paper, the term co-regulation specifically refers to the Dutch practice of co-regulation, which is one of the most integrated public-private regulatory systems. Co-regulation is not an isolated regulatory strategy but coexists with State-based command and control regulation. In a State that offers co-regulation options, firms have an incentive for participating in a co-regulation approach since public government agencies will waive command and control regulations as long as firms are making progress towards achieving a specific environmental target. Co-regulation has additional appeal for private actors because it provides certainty over the course of an industry-government agreement regarding regulatory targets.

The most cited general example of successful co-regulation in the environmental field is the Dutch environmental covenant which has introduced a whole new form of effective hybrid governance. The genesis of co-regulation in the Netherlands was the 1980s. When the Christian Democrats and Liberals came into power in 1982, the parties emphasized streamlining regulations to order to improve environmental outcomes and reduce government inefficiency. Pieter Winsemius, the Minister for Housing, Spatial Planning, and the Environment, approached regulatory streamlining by promoting an environment-wide planning process which would cross the gaps between different ministries with environmental responsibilities.[12] Pushing for internalization of regulations, the government decided to consult with private stakeholders such as industry to work towards setting viable environmental targets.[13]

The process of co-regulation in the Netherlands is an iterative process.[14] State agencies give private economic associations the powers to enter into binding environmental covenants with the government. [15] Prior to beginning negotiations with economic associations or industry representatives, the government has already legislated non-negotiable national environmental performance targets including, for example, abatement targets for 200 substances.[16] Once these performance targets are set, the parties collaborate during a two-part negotiation on strategies for efficiently achieving environmental performance. During the first phase of negotiations, the regulated Party makes a declaration of intent that is not binding. In the second phase of

negotiations, the Parties enter a binding legal relationship based on individual firms developing Company Environmental Plans. State agencies review and comment upon the plans before the plans are released to the public. A joint government-industry "steering group" reviews the performance of the industry in making progress towards meeting its goals under the covenant.

What is unusual about the Dutch process in contrast to other public-private voluntary negotiated agreements is that while the covenants may be entered into voluntarily, once parties conclude a covenant, the covenants are legally binding.[17] The contracts may include civil liability measures where a company has failed to comply with the terms of its agreement.

In the Netherlands, private firms in numerous industry sectors have entered legally binding environmental covenants[18] with the government in the sectors of agriculture, refining, energy, building and waste disposal. The 100 plus covenants cover a wide spectrum of problems including climate change, acidification, eutrophication, toxic pollution, soil contamination, groundwater contamination, and nuisance. To achieve performance goals, the covenants focus on specific aspects of the problems such as reducing of nitrous oxide and carbon dioxide from power plants, reducing ammonia from cattle breeding, cleaning up of contaminated soil underneath gasoline stations, recycling packaging, and phasing out harmful substances.[19]

In the 1990s the Ministry for Housing, Spatial Planning, and the Environment focused on addressing industry sector emission targets.[20] During the 1990s, the government concluded a number of emission reduction agreements including one with the chemical industry in 1993 and one with the oil and gas extraction industry in 1995. Environmental managers heralded the 1993 agreement with the chemical industry as a model agreement since it set specific emission targets for 1995, 2000, and 2010.[21]

Concerning specifically the reduction of greenhouse gas emissions, the Dutch government designed in 1999 a Benchmarking Covenant to promote energy efficiency across multiple industrial sectors in order to reduce immediate demands for fossil fuels. [22] The Benchmarking Covenant was a response to Netherland's obligation under the Kyoto Protocol to mitigate national emissions.[23] The Ministry of Housing, Spatial Planning and the Environment on behalf of the central government, provincial authorities, the VNO-NCW Confederation of Netherlands Industry and Employers and numerous sectoral organisations

including the chemical and the electricity production industries signed the Benchmarking Covenant.[24] The covenant functions as a civil law agreement. [25]In return for no additional national legislation being imposed on the participating companies and no "specific national energy tax" being levied, the companies agree in their production plants to become world leaders in energy efficiency by "complying with the best international energy efficiency standards."[26]Companies are expected to independently ratchet-up their compliance to become world energy efficiency leaders by 2012. The standards for leaders are based on a benchmark identified by third-party experts or best practice approach.[27] In setting benchmarks and best practices, experts are expected to look at the average energy efficiency of regions "outside the Netherlands that are comparable with the Netherlands in terms of size and number of processing plants", and to set an energy efficiency benchmark based on the performance of the top 10% most efficient production plants.[28] The energy efficiency benchmarks should be re-evaluated every 4 years.[29] Where a company fails to comply with its agreements under the Benchmark Covenant, Article 22 provides for sanctions. After conferring with parties that may be out of compliance, the Dutch government is expected to "make efforts to tighten the terms of the Company's current environmental licence in a unilateral action"[30]. Notably all commitments unless otherwise noted are "effort commitments" and not "result commitments."[31]

Some academics question whether the Dutch benchmarking covenants have been effective in improving energy usage because even where goals are clear and sanctions have been set since corporate actors have not made major changes in their business practices.[32] Others observe that there have been significant normative shifts with the benchmarking process and that some of the successes of the co-regulation process have included more ambitious targets than "business as usual", quantified objectives, clear staged goals, frequent reporting, independent verification of reporting, sanctions for non-compliance, and institutionalization of environmental cooperation through working groups. [33] While it remains to be seen whether the post 2012 review of the benchmarking covenant will yield the results expected by the government, the government has been sanguine about the impact of the covenant that includes participation by 84 per cent of industrial manufacturers comprising 94 per cent of the energy consumption by the industrial sector. [34]In a 2002 report, the government reported that they expect the Dutch industrial sector, as distinguished from the electricity producing sector, to reduce 4.6 million tons of carbon dioxide by 2012.[35]

Part of the success of co-regulation at an industry level is that industry

leaders may be implicitly encouraging better performance from their peers and subcontractors for fear of a return to command and control regulation if the industry as a whole fails to perform. Because industries play an active rather than passive role in co-regulation, a co-regulatory approach sustains long-term collective action on the part of an industry sector. Industries are perceived not just as part of the problem but also a key part of the solution. In addition to accelerating the achievement of some environmental goals, co-regulation in the Netherlands has also had the added advantage of improving overall collaboration between government and industry on general environmental problem solving. [36] Acknowledging that covenants are no "magic bullet" for super-wicked problems like climate change, covenants still have the potential to play an important role in international climate change governance by enhancing private participation in international climate governance and providing greater transparency in corporate decision-making related to emission reductions.

IV. International Co-regulation through Private Legal Agreements: Reimagining International Climate Negotiations to Achieve Greater Reciprocity, Legitimacy, and Accountability

Regular intergovernmental meetings convened by United Nations Environmental Programme or by Secretariats for the various multilateral environmental agreements are key fora where social relationships are built, reciprocity is extended, and parties contemplate potential international regulatory frameworks. There has been a notable absence of collaborative regulations between States and private actors to achieve greenhouse gas mitigation within international fora. The Dutch environmental covenants present an interesting model for international corporate climate mitigation particularly for the largest transnational corporations. Corporate change has been slow in climate mitigation in part because certain groups of high-emitting corporations have actively resisted intergovernmental regulation while other corporations have passively waited to see what regulatory scheme may be implemented before changing corporate behaviors.

A co-regulatory approached modeled on the Dutch approach presents opportunities as well as limitations. The remainder of this paper will examine the international context for co-regulation, explain why scaling up a Dutch covenant model could be effective in international efforts to mitigate greenhouse gases, and why co-regulation meets international standards.

1. *The Context for International Co-regulation*

If co-regulation presents a better collaborative public private model than self-regulation as this paper argues, it can only be implemented if there are substantial procedural changes in how parties conduct intergovernmental negotiations. It is time for a procedural paradigm shift moving international environmental law and policy from an exclusive State-centric club to a more "democratic" space where non-governmental interests are formally recognized as legitimate policymakers capable of being bound by international commitments.

Corporate actors already have marked informal influences on international law-making processes and exercise "coercive power" in governance processes because they are able to set standards and enforce compliance with these standards. [37] By setting standards that determine what products and services are available in the global marketplace, corporate actors define the parameters of international legal regulation. In the context of self-regulation, corporations legislate the technical aspects of their business by actively negotiating and creating consensus on international environmental management standards through organizations such as the International Standard Organization

These same actors also play key roles in existing international policymaking by supplying experts, lobbying State representatives, and participating as non-state observers at intergovernmental meetings. In certain intergovernmental processes such as the drafting and updating of the Codex Alimentarius, industry is expected to provide regular input on whether proposed rules and standards are technically feasible for commercial production. Technical experts employed by governments circulate proposed changes to the Codex Alimentarius to both government and industry representatives for comment.[38] In the cases of highly technical matters of regulation where both the government and industry participate, there is often little divergence between a standard proposed by a corporate interest and the ultimately legislated standard.

Corporations participate regularly as non-state observers at intergovernmental meetings. In this position, private for-profit entities have the opportunity to attend most sessions of the meeting, make oral interventions, disseminate information either directly at the meeting or through side events, and informally lobby members of State delegations. In recent meetings, business interests have advocated for States to adopt specific policy positions. For example, at the Sixth Conference of Parties for the Kyoto Protocol, the International Chamber of Commerce delegation pushed for States to adopt the position to permit carbon

transfers to be available for trade across State boundaries. [39]The ICC also supported the position that multinationals be able to participate in the Clean Development Mechanism regardless of whether the State where the parent corporation resided had ratified the protocol or not. [40]

Just as the idea of separating public from private in the domestic administrative legal world is a long-promoted legal fiction, so too is the idea that public international law must be separated from any private lawmaking influence. As social actors seeking reciprocity, government representatives actively seek strategic relationships with private businesses especially where the private sector is perceived as having some advantage in managing or solving a problem. These relationships between governments and businesses as social actors can be leveraged in both directions. The government receives a partner to provide technology and financial transfers to assist the public sector in meeting its existing international environmental obligations. Businesses receive a favorable reception for proposed technical standards.

International policymaking that was once the sole responsibility of the state or international governmental organization has truly become a space of shared responsibility.[41] There have been a number of other proposals for incorporating business interests within the frameworks of existing international environmental law including requiring companies to comply with existing multilateral environmental agreements. [42] These ideas have received little political traction because there is no incentive for corporations to participate in agreements where duties for private actors were never originally contemplated.

Co-regulation as captured by the Dutch model presents an interesting alternative to engaging the private sector in transnational environmental governance. It gives a structure for articulating an environmental result-based framework. Applying a co-regulation model would narrow the wide-ranging conversation about environmental protection and emission reductions to several concrete, technical goals that can be measured e.g. emission reductions, water quality standards, or percent of forest coverage. This shift from general to specific goal setting would be an explicit acknowledgment that international environmental policy requires a technical quantifiable rather than qualitative approach. As Contini and Sand have argued previously, "International environmental protection ... may and should indeed be a highly technical matter" rather than a more abstract ethical and philosophical concept. [43]With the structured involvement of the business sector in a coregulatory process, the current "light, thin, top-down" approach to domestic environmental regulations pursued by many States could be reconfigured to developing more "heavy,

thick and bottom-up" international environmental regulations.[44]

In principle co-regulation is a pragmatic approach to a State-to-State governance system that has reached an impasse. Public-private environmental agreements with targeted goals provide real opportunities to foster innovation that has been especially absent at an international level of engagement in spite of the transnational aspects of greenhouse gases. Co-regulation can provide simultaneously strict but flexible approaches to environmental problem-solving. As Michael Porter and Claas van der Linde argued in 1995, environmental regulatory regimes that are simultaneously strict at one level but flexible at another can stimulate innovation which in turn can lead to better environmental and business performance. States would supply the strictness in an international co-regulatory scheme by negotiating specific performance targets. Firms would supply the flexibility by determining how they can best comply with the target or how they can transform industry practices to remain economically viable.[45] This should "create the maximum opportunity for innovation" thereby "leaving the approach to innovation to industry and not the standard-setting agency."[46]

2. *Scaling up the Dutch Covenant Model*

How might a co-regulation system work to address current governance deficits in addressing climate change? One promising approach is the Dutch Covenant system that has been successful in part because environmental regulation in the Netherlands was fractured across ministries and effective implementation required actions by a large variety of stakeholders. The same conditions apply in the international system. Environmental regulation to provide for climate change mitigation is fragmented across numerous domestic and regional governance systems and there are numerous players from States, transnational corporations, state-owned corporations, and individual citizens contributing to ever-increasing emissions.

The Dutch covenant system's success also relies on two institutional arrangements that may be unique configured within the Netherlands to bolster the social and political conducive to environmental covenant negotiation. First, the Netherlands has a strong organization of trade and industry associations with whom the government initially engages. Second, the Netherlands has a pre-existing environmental permit system that poses a credible regulatory threat for companies that do not agree to enter environmental covenants. At the international level, the States do not formally recognize trade and industry associations as anything more than observers. There are no environment specific global regulatory

requirements that the international leaders can invoke as threats.
Given the relative success of the Dutch Covenant model at least in terms of nearly universal participation of industry actors in some sectors, the ability of the government to maintain some oversight, and the potential for sizable emission cuts, one means of scaling up the Dutch Covenant would be to encourage a proliferation of the model among every other State that has signed the UN Framework Convention on Climate Change to "Formulate, implement, publish and regularly update national and, where appropriate, regional programs containing measures to mitigate climate change."[47] Assuming that States were willing to experiment with Dutch style covenant system, national standard-setting for emission targets would result in a dizzying array of targets given the common but differentiated responsibilities of States. While this would not necessarily generate the feared "race to the bottom", it could very well have the unintended effect of corporate migration for those corporations that are not place-dependent such as mining or oil companies. Unlike some of the Dutch companies participating in the current environmental covenants, there may be no national pride shared across a given sector in having a reputation as a global leader in energy efficiency or emission reductions.

For a truly transnational problem, a global regulatory target makes sense in terms of not imposing barriers on inter-firm competition while still preventing corporate entities from externalizing costs of emission. Uniformity provides for predictability. Transnational corporations frequently exceed national regulatory standards because they adhere to a uniform standard across its own transnational network regardless of the geographical setting of a particular corporate entity. Transnational standards for appropriate climate emissions can and should emerge to prevent climate mitigation activities from posing competitive transboundary disadvantages. Based on previous public-private efforts in collaborative governance, transnational standards already exist for food safety, nuclear safety, product manufacturing, and environmental management. New transnational guidance standards are emerging including for social responsibility.[48]

In the remainder of this subsection, I discuss one possible approach to developing collaborative governance through co-regulation based on target-setting for mitigation and negotiating State-private legal agreements to meet targets. Two additional ideas are presented to address the role of corporations and industry organizations as participants in formal international governance and the need for credible regulatory threats.

a. Phase One of Coregulation Negotiations- Target Setting

In the first phase, a plenary of State parties and formal non-state participants would meet to debate appropriate regulatory performance goals. The idea of intergovernmental target setting is not new. In 2000, State governments set the Millennium Development Goals which include explicit targets for humanitarian relief by 2015 such as reducing the percentage of individuals living on less than a dollar a day.[49] Likewise, in 2010, State governments set the Aichi Targets providing for slowing the rate of habitat loss by 50% by 2020, increasing the land area to be protected from 13 to 17% by 2020, and increasing the marine protected areas from 1% to 10% over the same period.[50] Both State and non-state participants would participate in the pre-target negotiations, but only State parties would vote either by consensus or majority on the adoption of quantitative environmental regulatory performance goals in order to advance the goals of international climate change mitigation.

In the context of climate change, performance goals might be set for permissible carbon intensiveness for an industry[51] or based on broad sector-wide cuts. The performance goals would be ideally targeted to specific sectors to focus attention on those corporate entities that have the greatest impact on emissions such as electricity generation, cement-production, transport and industrial manufacturing. The current economy-wide target approach has failed to produce sufficient emission reductions. Sector wide goals may "help provide a more level regulatory playing field in areas where cross-border trade and investment is significant." [52]

It makes both financial and compliance sense to pursue this co-regulation approach. International regulatory harmonization has the advantage of increasing the geographical reach of a regulatory goal while simultaneously reducing the engagement costs of both States and industries in the regulatory process. As Kal Raustiala has observed in his work on transgovernmental networks, harmonization is advantageous "[t]o the degree it renders regulatory landscapes similar and provides regularity and predictability across borders ."[53] The industry sector negotiated goals would be measurable performance standards in contrast to management standards which only require changes in how something is processed or produced but do not necessarily lead to measurable improvements in environmental quality. [54]

b. Phase Two of Coregulation Negotiations- Private Legal Agreements between States and Firms

Once the targets are set, in the second phase of implementing a co-regulatory approach, representatives from both industry sectors and

individual firms within the sector would be invited to enter into legally environmental agreements with States to achieve negotiated international regulatory goals. Like the environmental efficiency agreements negotiated under the Dutch Benchmaking Covenant, any State-private firm legal agreement would provide specific timelines for achieving the regulatory goals and contractual language for creating internationally binding commitments. The commitments would be covered by private international law with interpretation provided through arbitration. In return for becoming a member of an industry sector environmental covenant, individual companies would not be subject to domestic State regulation unless a State party enters a specific objection at the time the regulatory goals are adopted indicating that it intends to impose within its jurisdiction more stringent regulatory performance targets than the internationally negotiated goal. As with the Dutch covenants, there would be a need for third-party verification of progress towards targets and regular firm reporting under the agreements.

In terms of seeking co-management solutions to transboundary problems, co-regulation provides an advantage over the current domestic regulatory approach. Co-regulation simultaneously provides a uniform standard for a sector coupled with flexibility at the firm level in achieving specific environmental targets. Instead of certain practices and technologies being mandated, firms can decide what practices and technologies will best ensure that the firm achieves its environmental commitments within the context of the sector agreement. Since there is no one-size-fits-all approach for industries to meet environmental targets, businesses may find business opportunities through the process of developing individual company environmental plans to meet sector targets. Collaborative governance provides for the potential for new solutions emerging "from face-to-face deliberative engagement among knowledgeable parties who would never otherwise share information or devise solutions together." [55]

c. Jumpstarting Public-Private Agreements

Since it would be logistically impossible and pragmatically unwise to include every relevant non-state stakeholder at the negotiating table, there is a need for streamlining actor participation. As noted above, at the international level there is no formal recognition of industry bodies except as non-governmental observers. This paper proposes that three organizations be formally authorized to participate as non-voting participants in any target-setting intergovernmental meeting. The International Chamber of Commerce (ICC), World Business Council on Sustainable Development (WBCSD), and the International Standards

Organization would each be assigned a formal non-voting negotiating seat. These organizations would be entitled to submit formal proposals to be distributed through the Secretariat, to attend all meetings including inter-sessional workshops, and to participate in phase two negotiations over State-firm environmental agreements. Presently, the participation of non-state actors is restricted to observing subsidiary meetings where policymaking takes place. [56]

While none of the proposed organizations are representative of the diversity of global business interests, all of these organizations have had successful long histories in representing corporate interests. The International Chamber of Commerce (ICC) would be an obvious candidate for a formal business interest seat at the intergovernmental negotiating table. The organization has been in existence since 1919 and, in fact, enjoyed full voting rights before the League of Nations[57] where it participated in negotiating conventions on industrial property, scientific property, and bills of exchange.[58] While it has not been permitted the same voting and negotiating rights under the UN framework, it has been an active participant at contemporary intergovernmental meetings. It was present at the first United Nations Conference on Human Environment where it presented a short intervention. Its presence has been ubiquitous at recent meetings including the 1992 Earth Summit in Rio and the 2002 World Summit on Sustainable Development.

Presently, the ICC has general consultative status which means that it can submit oral and written interventions during international meetings and can attend meetings open to the public. As a body representing many of the largest transnational companies, the ICC is an ideal membership candidate to formally advocate for the interest of its members such as Chevron, Coca-Cola, Canon, DuPont, Dow Chemicals, Exxon Mobil, General Electric, Monsanto, Shell, and Total. In terms of international environmental agreement, the ICC could function as an international equivalent of the Dutch nationwide trade and industry associations. Just as the Dutch business groups negotiate in advance their preferred language for the covenants and the strategies that they intend to pursue, the ICC formal position on various issues would be pre-negotiated at ICC plenaries.

Another possible candidate for an industry interest seat at intergovernmental meetings is the WBCSD. In contrast to the ICC which promotes and protects its members international commercial interests, the WBCSD is focused on fostering environmentally desirable business practices. The organization started with 50 senior CEOs of major companies who spoke on their own behalf and not just on behalf of the

companies that they represent. The organization now has CEOs from 160 of the world's largest companies and has formed 35 international business councils. WBCSD regularly coordinates with think tanks such as the International Institute for Environment and Development and intergovernmental organization such as the World Bank and UNDP on developing pro-environment business strategies.

A final permanent candidate for representative engagement in intergovernmental meetings and negotiations would be the International Organization for Standards as the institution responsible for some of the most widely adopted standards for product specifications and environmental management. ISO standards are negotiated primarily by industry actors through national standard organizations and then subsequently incorporated into intergovernmental policies such as the World Trade Organization agreements on Sanitary and Phytosanitary measures. [59]The ISO would bring not just a commercial perspective but also a technical perspective for what it might take to make long-term systemic changes in existing industrial systems to achieve particular negotiated performance standards.

Depending on the type of target being set, it would be appropriate to seek participation of key private firm interest groups representing major players in the international energy industry such as the International Association of Oil & Gas producers or organizations involved in transportation such as the International Association of Independent Tankers Organization. The success of any international co-regulatory experience would depend on broad sector-wide participation.

Why would ICC, WCSBD, ISO, or industry interest groups participate where they have been hesitant to engage previously in intergovernmental processes? There are a number of reasons for intergovernmental engagement including normative shifts in perceptions about climate change and advancement in new technologies. Corporations may engage today in a co-regulatory experiment because of internal shifts in corporate decision-making where company leadership perceives the need to invest in climate solutions out of their own long-term self-interest. The potential for rising sea levels impact coastal refineries and port infrastructures. Corporate sectors may also be more willing to engage today in a co-regulatory governance experiment because alternatives to "business as usual" are more readily available for adoption. In between the era of denying climate change and tentatively accepting climate change, innovation has happened in everything from ship design[60] to material production.[61]

There are also long-term institutional advantages to being an early adopter of greenhouse gas reducing technologies. Firms that demonstrate commercial viability of alternative technologies may gain a competitive advantage in future domestic and international standard setting or products and processes. If the adopters of new technologies are key industry players, it becomes even more likely that these same targets will ultimately be adopted domestically just as standards set by the International Standard Organization have frequently become the basis for numerous domestic rules and regulations.[62]

d. Incentivizing Participation

The success of public-private environmental agreements in the Netherlands is predicated on the existence of a credible regulatory threat. Corporations that opt out of voluntary agreements are still subject to regulation. Where a firm believes that an external regulatory framework threatens their interests by being administratively burdensome or interfering with core corporate interests, there is a clear incentive to agree to generalized targets and then select appropriate means to achieve the target.

In an analysis of negotiated environmental agreements, researchers found that in addition to having an environment conducive to negotiation and a body that was representative of members' interests, successful negotiated environmental agreements also included "the stick behind the door." Within the Dutch Benchmarking covenant, "the stick behind the door" included subjecting industries to specific yet to be determined energy taxes and future energy efficiency legislation. Failure for Dutch corporations to appear cooperative would have consequences. Parliamentarians responding to the public could reference the lack of a critical mass of industry participation as a reason for stricter regulation. Firms may lose autonomy over their decision-making.

There is no global legislature or global permitting system that would operate as a "stick" for international co-regulation. The one international system that matters to all multinational firms and to many small and medium sized firms is global trade. Firms within a carbon intensive industry sector that opt out of participating in a co-regulation experiment might be restrained from trading with States that have agreed to targets. This is a potent behind the door stick.

As proposed, this "stick" may seem to violate tenets of most-favored nation treatment under WTO law. Yet, there is something substantively different. A State that refuses products or services from a

particular set of large emitting companies who have refused to participate in State-firm environmental agreements may do so on the basis of its commitments under an emission target negotiation, the UNFCCC or the Kyoto Protocol. There is precedent for this approach with State responses to private actors engaged in unregulated fishing. Under regional fishing management agreements in order to promote conservation efforts and regulated fishing, Port States can deny port entry to boats suspected of illegal, underreported and unregulated fishing. They can also deny landing and transshipment of fish products.[63]

The same logic applies here. States who have agreed to general emission targets can exercise the option to restrict trade with corporations that have not independently demonstrated that they are meeting sector-wide targets or participating in a co-regulation scheme. Assuming that the Dutch would support targets for a global co-regulatory scheme to reduce carbon, the Netherlands would be able to unilaterally restrict trade in products from unregulated U.S. based concrete companies. As with fish commodities, there are weaknesses in this approach. Illegal fish become mixed with legal fish. Fossil fuels are equally fungible. Yet having access to trade as a "stick" could result in subtle ripple effects through economies. Transport companies that fail to commit to meeting targets may find ports closed to their services which should result in competitive advantages for transport companies that do agree to meet targets. Transport companies seeking to lower their emissions may put commercial pressure on oil and gas companies to innovate and develop less carbon intensive products.

3. *Legitimacy and Transparency in Climate Governance*

This paper's proposal seeks to remedy an increasing democratic deficit in international governance where public transnational policy decisions that rely on cooperation from non-State actors remain under the exclusive aegis of States. The exclusive State-only club has not produced behavioral shifts since private firms assume that what is negotiated by States in international fora may or may not translate into domestic policy. With the exception of a few private firms such as those participating in the World Wildlife Fund's Climate Saver program, firm await regulatory direction before acting.

Co-regulation provides an impetus for firm action. Under the model proposed in this paper, private industry is offered both strict regulatory certainty and regulatory flexibility. While the public representatives set sector wide performance targets, corporations and industry sectors have broad latitude on how to achieve the performance targets. The formal participation of industry actors in negotiating agreements creates the

opportunity to enhance both the existing legitimacy of the intergovernmental process and the effectiveness of international policy. As Karin Buhmann suggests, "participation makes for legitimacy of norms in regulatory instruments, and the legitimacy makes for acceptance of resulting constraints."[64] Allocating formal seats for business organizations at the intergovernmental negotiating table desegregates the international policymaking club of States and opens the process up to new and potentially greater norm-generating dynamics. In the proposed co-regulation framework, firms have the opportunity to participate in a more meaningful international regime by becoming active stakeholders in the international process rather than largely silent participants watching to see the outcome of negotiations.

The environmental agreement component of the proposal enhances the transparency of what firms are doing to meet publicly defined goals. Because the Kyoto Protocol relies on exclusively State based commitments, there is little opportunity for the public to understand what firms are doing to reduce emissions unless a State requires disclosure of emission reduction programs or a firm has entered into an environmental covenant requiring public disclosure (e.g. Netherlands and United Kingdom). When firms publicly disclose their efforts, government regulators, civil society monitoring groups and other private firms understand what a firm is doing to address emissions. The transparency of the covenants should contribute to higher levels of accountability on the part of sector participants. Government regulators may be able to intervene earlier and assist corporate institutions with environmental management challenges. Civil society groups will be able to alert the public both to corporate leaders and corporate laggards. Private firm participants may be able to use public information to internally sanction or openly criticize other firms that fail to participate effectively in sector efforts. Where firms can distinguish themselves on the basis of their environmental commitments, they may do so to enhance their corporate reputation and potentially improve their market share.

The co-regulatory model presented here with non-state party formal participation, public goal-setting and private international contracts satisfy criteria that scholars have proposed as essential to a functioning climate change policy including a measurable environmental outcome, equity in application, participation and compliance. [65]Where States negotiate in good faith for meaningful quantitative environmental targets and individual firms commit to making quantitative reductions, then there will be measurable environmental outcomes. Likewise, the co-regulatory method offers an equitable approach because it focuses on sector-wide reductions and adaptations rather than on the artificial division of Annex 1

versus non-Annex 1 membership. More so than other approach, co-regulation provides for meaningful participation from more stakeholders which should contribute to greater levels of compliance with negotiated agreements.

4. *Challenges Inherent in Co-Regulation as a Climate Governance Strategy*

While this proposal should remedy some of the deficiencies in legitimacy of the current intergovernmental system and address some of the self-regulation accountability concerns, an international proposal for co-regulation has certain inherent challenges including biases in favor of certain types of corporation, lowest common denominator problem, administrative costs, and quasi-state corporations.

First, certain sized business entities are likely to dominate the membership groups that States might invite to formally participate in intergovernmental meetings. Most of these entities will be based in Northern countries. Transnational corporations from the North have some of the strongest economic interest in setting global emission standards and are more likely to be involved in business interest groups such as the ICC and WBCSD than small and medium sized domestic based companies. Better-resourced groups from the North may set the industry agenda without the input of business actors from the South who may or may not be able to comply with the sector standards because of financial constraints.

This North-South imbalance is an inevitable problem of attempting to create single shared targets for industry-wide sectors. In terms of the success of this proposal, States should seek participation by the largest emitters such as transnational companies who are more likely to have the capacity to create company-specific implementation plans. Large polluting national firms that do not participate in substantial cross border trade such as China's largest coal producer Shenhua Energy will likely be reluctant to participate since they are not concerned with influencing international standards so much as they are concerned with influencing domestic policymaking. These industries would be regulated under the domestic legislations that States are expected to promulgate in response to the adoption of the international performance standards.

For the success of an international covenant, not all companies within a corporate sector need to participate in the covenant process for the environmental covenants to still be a success in terms of changing firm behavior. The key will be persuading the largest players in a sector to participate in hopes that their participation will create normative or

possibly economic pressures on smaller industry players to adapt their corporate behavior.

A second limitation on the sector wide covenant approach is the high likelihood of disagreements among corporate actors within a sector. On key environmental implementation issues, there are likely to be differences of opinion. Where individual companies have already invested in certain strategies, they will be unlikely to concede to the environmental management choices of their competitors. What may result is that sectors who cannot reach consensus among its members to define best environmental practices will instead defer to a lowest common denominator solution. Sectors will only be willing to commit to achieving easy environmental targets. The more difficult targets will remain subject to the fragmentation of domestic policymaking. While there is no singular solution to the problem of the lowest common denominator, this paper argues that meaningful non-State participation even at less than optimal levels will still create conditions of social reciprocity among State and non-State actors. These linkages may generate unexpected compromises among industry actors which can more rapidly achievement of environmental goals than the current State-centric system.

A third limitation to the covenant approach is the cost of administering the program. In the Netherlands, the government was committed to negotiating environmental covenants and allocated $70 million to cover negotiations with 600 companies representing 85-95% of the primary energy consumption within the State. [66]The number of global companies involved in ongoing negotiations would be obviously much higher if international co-regulation approach is adopted even if only the largest multinationals were approached to enter covenants. Secretariats may be able to better manage costs if they focus on negotiating a single covenant targeted at the largest sector contributing to a specifically defined collective problem (e.g. agriculture sector for methane reduction, chemical sector for HCFCs and oil, gas, and coal sectors for carbon dioxide reductions).

Finally, there will be problems with applying co-regulation approaches to fully owned government companies. These companies may or may not be subject to rigorous government environmental regulation in their home country or in the countries they currently operate. States are likely to resist imposing performance standards on these entities. This is an issue that would need to be addressed explicitly by both States and private actors especially for industries such as the oil production industry where many of the largest producers are nationalized oil companies. [67]

V. Conclusion

Co-regulation of corporations alone will not address all responsible actors. Industries are only one part, albeit a large part, of the emission reduction puzzle. States with their large operating budgets and individuals (e.g. farmer cutting rainforest in Brazil) are also notable carbon contributors. Yet international co-regulation based on scaling up the success in the Dutch covenant model is an underexplored international regulatory strategy. States have relied too heavily on seeking national commitments rather than creating an ongoing dialogue with non-state transnational actors about what steps private large emitters are willing to undertake to reduce their firm and sector emissions. Co-regulation provides an opportunity to get beyond the current State to State impasse by instead offering a more transparent and legitimate regulatory space for both public and private stakeholders to seek mutually possible environmental management solutions.

Co-regulation is proposed as a method. Whether it will deliver adequate mitigation on an international level or even on a national level remains to be seen. But at least, it should be considered as a legal option to shift the existing status quo where some companies innovate and many wait for direction on how to innovate. Franklin D. Roosevelt in a speech at Ogelthorpe University in 1932 urged students to "not confuse objectives with methods...The country needs and .... demands bold, persistent experimentation. It is common sense to take a method and try it: If it fails, admit it frankly and try another."[68]

The UNFCCC has declared a global objective that includes mitigating emissions. As this paper argues, co-regulation may be a method that leads both public and private actors a more pragmatic cooperation. Even if co-regulation is only a partial solution to mitigation of emissions, it will be something. Roosevelt's sentiments in his 1932 speech continue to remain true in this time of super-wicked problems, "But above all, try something." [69]

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DOES ODA GROW ON TREES?
A LEGAL ANALYSIS OF REDD-ODA FINANCE

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At COP16 REDD was accepted by State Parties to the UNFCCC as a new element of international environmental law. Throughout 2011 and the following years decisions will be made to operationalize REDD. One of the key decisions that will be made is how REDD will be financed. With various reports pointing to a "financing gap" in a purely markets approach, many authors advocate for public funds to be used for REDD.

This paper examines how public finance, specifically ODA, can/ should play a role in financing REDD. More specially, it looks at the possible synergies that can be created between REDD finance and development. It looks at selected donor country laws and policies surrounding ODA and explores the policy arguments around its use. Lastly, it puts forth a set of 5 building blocks that should be adopted by AWG-LCA in a decision on REDD finance

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I. INTRODUCTION

Forests cover roughly one third of the earth's total land area.[1] Tropical

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forests, which are primarily located in developing countries, have lost over 500 million hectares of forest cover since 1961 and they are expected to be lost at a rate of 5% per decade over the next 30 to 50 years.[2] Deforestation has become commonplace in most of the developing world as it responds to the demands of various drivers such as agriculture, product for export, and the needs of local populations. This ever-increasing rate of deforestation has concurrently become a driver of climate change. As trees absorb and store terrestrial carbon, the destruction of forests releases those stored gases into the atmosphere, contributing a major portion of global greenhouse gas emissions.[3] The Stern Review noted this when it stated that deforestation was estimated to increase global greenhouse gas emissions by 17%.[4] However, the Review also noted that avoided deforestation is one of the most economical ways to reduce climate change.[5] This was elaborated in the follow-up to the Stern Review, the 2008 Eliasch Review, which stated that the economic benefits of halving avoided deforestation may amount to $3.7 trillion in net savings over the long term.[6]

Forests are also linked to poverty. The World Bank estimates that 350 million people are highly dependent on forests, 60 million indigenous people are solely dependent on forests, and more generally, that 1.2 billion people are dependent on forests for their livelihoods.[7] The forest-poverty link has been generally affirmed through legal instruments such as the OECD's 2006 *Declaration on Integrating Climate Change Adaptation into Development Cooperation*, which states "...the poor are particularly dependant on natural resources for their livelihoods."[8] Moreover, the forest-poverty link has also been evidenced in the World Bank's and the Asian Development Bank's forestry strategies[9] as well as in a wealth of academic literature on the subject.[10] Angelsen and Wunder suggest that forests may benefit the poor in five dimensions: as beneficiaries of forests, through forest products and services, in their livelihood strategy, through resource management, and lastly, via high and low rent products.[11] Thus, it can be concluded that the forest-poverty relationship is both material and direct.

In response to the deforestation phenomenon, Costa Rica and Papua New Guinea introduced the concept of Reducing Emissions from Deforestation into the international climate change debates in 2005.[12] Over the course of these debates this concept evolved into its current form: Reducing Emissions for Deforestation and Forest Degradation (REDD+),[13] which was adopted at the United Nations Framework Convention on Climate Change (UNFCCC) Conference of the Parties (COP) 16 in Cancun as a new element of international environmental law.[14] At its heart, REDD is a financial mechanism that provides

incentives to developing countries for protecting their forests from deforestation and degradation. Currently, REDD is being operationalized through various decisions being made throughout 2011 at both the international and national levels

Hence, REDD has the potential to affect both poverty and climate change. First, as a mitigation activity, REDD will help reduce emissions. Secondly, as REDD is implemented, both forests and those who are dependent on them will be affected.

One of the key decisions to be made this year that will affect REDD's ability to fight poverty and to promote development is the decision on the REDD financing mechanism.[15] Until recently, the debate on REDD finance has been focused on whether a market mechanism or a fund would be better suited to address the problem of deforestation. However, it has now being widely acknowledged that both of these options have their own respective shortcomings. A market based mechanism would not generate the funds necessary for the preparation and development of a global REDD market, and it would potentially exclude States with weak governance structures[16] while a fund approach would not be sustainable on a long-term basis.[17] Faced with this dichotomy, a third finance option has been proposed.[18] This approach recognizes the urgency for action on mitigating climate change and advocates for a three-phased approach moving from a publicly financed fund to a market mechanism as REDD develops over time. This approach appears the most likely option for the operationalization of a REDD financing mechanism.

As a result of this third proposal, there is a growing body of state practice and academic literature that supports financing REDD with Official Development Assistance (ODA).[19] On its face, this proposal offers a potential win-win situation. Developed countries could increase their ODA spending and potentially fulfill their 0.7% ODA commitments while concurrently fulfilling their climate change obligations. However, this proposal is potentially dangerous for development aid. Financing REDD with current ODA funds without knowing how REDD will be operationalized risks diverting scarce ODA resources away from key goals such as poverty reduction. In this respect, capacity building projects such as institutional development must be distinguished from continuous REDD funding. The former is something traditionally financed by ODA and recognized in article 76 of the Cancun Agreements, while the latter is a potentially new and contentious use of ODA. [20] Financing REDD with ODA casts some doubt on whether climate mitigation can include development benefits such as poverty reduction.[21] In this regard, strong arguments for a co-benefits approach to REDD finance, and additionality

present possible alternatives which promote a more comprehensive view on the possible scope of REDD benefits. The co-benefits approach, which would also uses ODA as a source of funding would allow developed States to fulfill their climate change obligations while progressing towards their 0.7% of GDP commitment while at the same time providing development benefits to developing countries. Thus, such an approach would create a positive synergy between REDD and development and would get around the short-comings of other policies. This paper reviews the current REDD finance options, examines the legal authority for ODA-financed mitigation activities (looking at select donors as well as the international legal system), identifies reasons for and against REDD-ODA finance, and concludes by supporting a phased funding approach with ODA and by describing the building blocks for an international legal framework on REDD finance.

II. REDD FINANCE OPTIONS

The Cancun Agreements adopted REDD as an element of the international climate change framework and requested that the Ad Hoc Working Group on Long Term Cooperative Action (AWG-LCA) to explore REDD financing options.[22] The AWG-LCA is scheduled to report back to COP17 in December, 2011, with a decision on the REDD financing mechanism.[23] The following will review the possible REDD financial mechanisms.

1. *Fund v. Market Approach*

Until 2009, the debate surrounding REDD finance revolved around implementing a market or a fund approach. A market approach would allow for developing States to take voluntary actions to reduce their deforestation rates or to maintain carbon stocks on the basis of a pre-determined national or sub-national baseline. Emission reductions would generate carbon credits that could be sold at a market-determined price. This could later be linked to a post-Kyoto carbon market.[24] In contrast, a fund approach to REDD finance would rely on voluntary contributions from developed countries in the form of ODA or other funds as well as funds from international institutions. [25] Here, it should be noted that the fund approach would only be temporary until a market for these carbon credits could be developed. This approach could be modeled on past environmental funds such as the fund created under the Montreal Protocol.[26] However, over the past two years there has been a growing movement in favor of a hybrid approach between the two that is phased in over time. This is, in large part, because of the stark reality that private investments will not generate the funds needed to cover the estimated start up costs of REDD, while solely a fund approach would

be unsustainable. This apprehension is illustrated by the 2008 Eliasch Review.

The Eliasch Review estimates that the annual costs of halving emissions in the global forestry sector range between $17 to $33 billion USD up until 2030.[27] The review divides the costs of mitigation activities into two categories according to the timeframe in which they will need to be incurred. The first category includes the up-front capacity building costs such as building, measuring, and monitoring capacity, as well as governance capacity to enable forest nations to adopt and implement effective policies to reduce forest emissions. The second category includes the ongoing costs of emissions reductions such as the opportunity cost and income forfeited and the implementation costs of REDD.[28] The review concludes that privately sourced finance would still fall $11 to $19 billion USD short of the required funding each year to halve deforestation emissions by 2020 even if REDD were initially integrated into carbon markets.[29] This has led many authors to conclude that even if a market approach would be preferable, public finance will be needed for at least the preliminary stages of REDD activities.[30] Further, the market approach raises concerns such as whether private investments will flow to areas of weak governance, namely Sub-Saharan African States, where a substantial amount of deforestation is occurring.[31]

2. *An ODA Supported Hybrid Approach*

Faced with this reality and on-going debate between the differences of the fund and market approaches Norway proposed a hybrid-phased approach to REDD financing in 2009.[32] This approach bridges the fund-market dichotomy while responding to the market-based financing gap. The hybrid approach consists of a three-staged transition for REDD finance from a fund based approach to a market mechanism. In the first phase, developed countries would make voluntary bilateral or multilateral contributions to REDD. These ad hoc contributions would simply respond to the urgency in which climate mitigation actions are needed. It would provide quick start financing for REDD projects to get up and running as soon as possible. In this respect, the UK has given 50 million pounds to the Congo Basin Forest, Norway has pledged $2.5 billion over five years through its Climate Change and Forestry Mechanism, Australia has pledged $75 million, and Germany has committed to $800 million over four years and a further $500 million a year after 2013 to protect forests.[33] The second phase would establish a fund based instrument creating a predictable stream of REDD financing for developing countries. As noted above, some of this funding is likely to come in the form of ODA and would be in addition to the $500 million a year averaged over 2001 to

2006 that was put into the forestry sector.[34] However, the Norwegian proposal specifically states that any ODA funding for REDD should be additional to the current levels of ODA.[35] Lastly, in the third phase, a transition would be made from a global fund into a market-based mechanism.[36] As stated in this proposal this market transition should be made as soon as it is feasible, limiting the amount of ODA funds given to REDD.[37] As a result of the financing gap, the hybrid-phased approach seems most likely to be chosen as the financing mechanism for the operationalization of REDD.

III. ODA LAW AND POLICY

As a result of the strong call for ODA as a REDD financing instrument, it is pertinent to look at the law and policy relating to ODA. The international and domestic law and policy frameworks relating to ODA dictate how ODA can be spent, and prioritizes development goals. Hence, for REDD ODA finance to move beyond capacity building projects, or into the second category of ongoing financing as mentioned in the Eliash Report, REDD ODA spending must qualify as ODA within the domestic and international ODA law and policy frameworks. This section will review the law and policy on ODA of a selected group of donors, namely, the U.K., Canada, the U.S., Norway and Germany as well as the international legal framework.

1. *Domestic Law and Policy*

The UK, Canada, and the US all have ODA legislation while in other countries ODA is governed solely by policy. In the countries with legislation, this legislation governs what qualifies for ODA, the quality of ODA, and development priorities.

In the U.K., ODA is governed by the *International Development Act 2002*[38] and the *International Development (Reporting and Transparency) Act 2006*.[39] Article 1(2) of the 2002 Act states that the U.K.'s development assistance is "provided for the purpose furthering sustainable development in one or more countries outside of the United Kingdom" for the purpose of "improving the welfare of the population of one or more such countries."[40] Sustainable development is defined as "any development that [...] generat[es] lasting benefits for the population of the country ...."[41] Further, the UK's 2006 Act refers to the 0.7% of GDP expenditure target for ODA,[42] as well as the Millennium Development Goals (MDG) as forms of policy guidance.[43] The 2006 Act does not add anything to the 2002 Act's definition of development assistance. Based

on the broad definition of development assistance in article 1(2) of the Act, the brevity of the Act, and the lack of other guiding principles to direct ODA, REDD is likely to be considered ODA-eligible. REDD will provide long-term benefits to developing countries as it will help stabilize climate change and provides financial compensation to developing countries in exchange for protecting their forests. Furthermore, as it will be detailed below, REDD is in line with goal 7 of the MDGs entitled "Environmental Sustainability." Thus, under U.K. law on ODA REDD will most likely be considered ODA eligible.

Similarly, the 2008 Canadian *Development Assistance Accountability Act* is also framed in broad terms, with little guidance as to what may be excluded from ODA. Article 2 of that Act states that the Act's purpose is to ensure that Canadian ODA is focused on poverty reduction, and aligned with "Canadian values, Canadian foreign policy, the principles of the Paris Declaration on Aid Effectiveness [...], sustainable development and [...] human rights.[44] The Canadian Act adopts the OECD DAC definition of ODA which states that ODA "is administered with the principal objective of promoting the economic development and welfare of developing countries, that is concessional in character, that conveys a grant element of at least 25%"[45] and "that is provided for the purpose of alleviating the effects of a natural or artificial disaster or other emergency occurring outside Canada."[46] Further, article 4 of the Act states that ODA "may be provided only if the competent minister is of the opinion that it (a) contributes to poverty reduction; (b) takes into account the perspectives of the poor; and (c) is consistent with international human rights standards."[47] Although the Canadian Act places an emphasis on poverty reduction, as a general legislative framework, it defines ODA eligibility in very broad terms. In this sense although the primary purpose of REDD is poverty reduction, as noted above in relation to the U.K. legislation, REDD will provide long term development benefits. Furthermore, the criteria stated in article 4 of the Act are not objective, but are simply subject to the Minister's approval. While it can be argued that these criteria need to be considered, and that ODA should not directly support projects that are contrary to these criteria, these criteria are still very broad. Thus, REDD projects are also unlikely to be excluded as ODA eligible under the Canadian legislation.

In the United States ODA is governed by the *Foreign Assistance Act of 1961*.[48] Section 101 of this Act details the five policy goals of US ODA. These goals include the alleviation of the worst physical manifestations of poverty among the world's poor, the promotion of conditions enabling developing countries to achieve self-sustaining economic growth with equitable distribution of benefits, and the encouragement of development

processes in which individual civil and economic rights are respected and enhanced.[49] These goals are further reinforced in section 102, which outlines the U.S. Development Assistance Policy. This section places further emphasis on poverty reduction in the context of both bilateral and multilateral aid.[50] Thus, the US Act is based on wide ranging policy goals, which like the legislation in Canada and the U.K., most likely mean that REDD will not be excluded based on black letter law. Moreover, the U.S. legislation also contains a specific section related to foreign assistance and tropical forests. Section 118 of the Act, entitled "Tropical Forests," notes concern for deforestation and support for conservation and sustainable management.[51] This section mandates assistance for projects and activities that offer employment and income alternatives to local populations who would otherwise cause deforestation.[52] In addition to that section the *Tropical Forest Conservation Act* of 1998 also provides a debt for nature swap mechanism for developing countries with tropical forests.[53] Thus, ODA funds for avoided deforestation are specifically provided for in the US legislation and therefore, REDD projects are eligible to receive US ODA.

Other major donor countries such as Germany and Norway do not have ODA legislation and rely on policy to guide their ODA expenditures.[54] Currently, German ODA policy is set by the cabinet-level Ministry of Economic Cooperation and Development (BMZ). German ODA policy is based on six priority areas, one of which is sustainable poverty reduction.[55] Within these areas, German development policy examines eight cross-cutting issues. These issues attempt to "identify positive spin-offs of projects and programmes and also to help avert conceivable negative impacts" of German development projects.[56] The cross cutting issues also ensure that all German ODA is aligned with their overall development strategy. Notably, tropical forests are mentioned as a cross-cutting issue to be considered when implementing development projects.[57] Further, a recent joint BMZ and Environment, Nature Conservation, and Nuclear Safety position paper on climate change states that Germany has made mitigation a development priority, and supports REDD as a development tool.[58] Thus, between including tropical forests as a cross-cutting consideration and the recent joint policy paper on climate change German ODA policy appears to support REDD eligibility.

Lastly, Norwegian ODA is also based solely on policy.[59] Norwegian development assistance is governed by various policy position papers among other documents. Norwegian development policy stresses the achievement of the MDG's, attaining the 1% ODA/GNI target, aid effectiveness, governance reform, and results and quality

assurance.[60] In a recent 2007 policy document on Norwegian development assistance, Proposition No. 1, climate change was noted as the greatest threat facing the world.[61] In this position paper Norway affirmed its commitments to funding climate mitigation, pledging funds to "support new multilateral climate change and clean energy initiatives", using, for example, the UN system and the development banks, including carbon partnerships to combat deforestation.[62] Furthermore, as noted above, Norway commissioned the work proposing a phased financing approach and they have since pledged funds towards REDD. Thus, REDD is eligible for Norwegian ODA funding.

Based on this brief review of selected major donors' domestic ODA law and policy, it would be reasonable to find REDD, or climate mitigation activities which would include REDD, eligible for ODA funds.

2. *International ODA Law and Policy*

From an international perspective there are also law and and policy instruments that govern ODA. The international framework defines ODA empirically and in relation to its quality, and outlines its priorities.

Although there exists no universal custom or multilateral treaty that defines ODA in the international system, the OECD's definition is commonly used. The OECD defines ODA as "flows of official financing administered with the promotion of the economic development and welfare of developing countries as the main objective, and which are concessional in character with a grant element of at least 25 percent (using a fixed 10 percent rate of discount)."[63] Notably, Canada has adopted this definition of ODA in its domestic legislation. Based on this definition of ODA, it appears that REDD would fulfill the qualifying provisions of economic development and welfare. More specifically, the OECD has also defined climate change mitigation related aid. Mitigation-related aid is defined as "activities that contribute to the objective of stabilization of greenhouse gas (GHG) concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system by promoting efforts to reduce or limit GHG emissions or to enhance GHG sequestration."[64]This is a clear recognition that aid may be given for mitigation purposes. Thus, on an international scale, mitigation activities including REDD are also ODA eligible.

Further, deforestation is also mentioned as an international development priority.

The MDG's are a set of eight development goals agreed upon by the

international community in 2000 which have set the global development priorities. Goal 7 of the MDG's is dedicated to ensuring environmental sustainability. To achieve this goal, specific targets related to environmental sustainability have been developed. Notably, target 7.A focuses on "integrat[ing] the principles of sustainable development into country policies and programmes and revers[ing] the loss of environmental resources." [65] In relation to this target, reducing high levels of deforestation is specifically mentioned.[66] Thus, avoided deforestation has been specifically placed on the international development priority agenda.

Finally, international instruments also dictate the quality of ODA. The 2005 *Paris Declaration on Aid Effectiveness* is an international agreement to which over one hundred ministers, heads of agencies and other senior officials agreed upon. [67] These parties agreed to continue to increase efforts in harmonization, alignment and managing aid for results and mutual accountability. This was followed up with the 2008 *Accra Agenda for Action*.[68] This agenda reinforces the need for country ownership over development, effective and inclusive partnerships, and development results that are accountable. While these two agreements may only be considered soft law, they should guide ODA. Thus, if REDD is financed using ODA funds it should be aligned and integrated with domestic development goals.

In summary, both domestic and international ODA law and policy frameworks appear to support REDD ODA eligibility.

IV. Policy Perspectives on a Legal Framework for REDD ODA

On its face, REDD ODA eligibility offers several potential benefits to developed countries. Developed countries have the opportunity to move closer to the long elusive 0.7% of GDP to ODA expenditures promise while concurrently fulfilling their Kyoto Protocol obligations, or other obligations under a post-2012 legally binding climate change agreement. However, with simultaneous investments in rural forest dependent communities, REDD also has an enormous potential to bring development benefits to developing countries. While to a large extent the development benefits derived from REDD are dependent on how individual countries operationalize REDD, the decisions made throughout 2011 on the international level with respect to REDD finance will dictate whether or not development issues should be taken into account when financing REDD. In this respect, the question of whether REDD, a mitigation activity, should be financed by ODA where there exists no concrete law or

policy requiring tangible development benefits requires further analysis.

1. *REDD Development?*

There are three commonly made policy arguments with respect to REDD ODA: a strict mitigation approach, a co-benefits approach, and additionality.

A Strict Mitigation Approach

The strict mitigation approach is one of two schools that has developed in relation to using existing ODA as REDD financing. The strict mitigation approach centers around REDD being primarily a mitigation and not a development activity. While advocates of the strict approach note that climate mitigation brings inherent development benefits to developing countries vis-a-vis lower emissions and a more stable climate, they state that financing climate mitigation activity may compromise ODA spending on other development goals such as poverty reduction and education. In short, they argue that financing REDD with pre-existing ODA funds without knowing how REDD will be operationalized risks diverting scarce ODA resources to an activity that may not produce any tangible local or community development benefits. Here, with respect to climate related ODA, it is pertinent to distinguish climate mitigation and adaptation activities.

Adaptation, as defined by the IPCC, is the "adjustment in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities."[69] Thus, adaptation is fundamentally in line with poverty reduction and other development goals. Further, the link between the development benefits and adaptation activities is well established.[70] By contrast, the development benefits of mitigation are more ambiguous. Unlike adaptation, mitigation actions are not primarily targeted at the human aspects of climate change or development. The primary purpose of mitigation actions is mitigation. Hence, the strict approach is not adverse to all climate related ODA. Further, if REDD policy or legislation ensured that tangible development benefits could be considered, then there would be no policy questions as to whether ODA should be used as a REDD finance tool. However, as there is not yet a legal or strong policy basis that ensures that REDD will deliver development benefits to the poor, advocates for the strict mitigation approach argue that it would be a mistake to reallocate current ODA away from purposes such as poverty reduction, health, and education to finance REDD.

A Co-benefits Approach

Conversely, advocates of the co-benefits approach argue that the operationalization of REDD provides an important opportunity to address poverty and climate change in developing countries insisting that as a secondary objective REDD may also address development issues. They argue that ODA can and should be used for REDD finance as REDD has the potential to deliver benefits to rural forest dependent communities through programs targeted at these communities and financed by REDD revenues. For example, the operationalization of REDD could also lead to education, training, and employment opportunities in monitoring and verification of avoided deforestation on a local scale.[71]

The Noel Kempff Mercado Climate Action Project in Bolivia, although not a project under the UNFCCC, was the first and one of the best known examples of REDD in practice. While the objective of the project was not to implement a co-benefits approach, numerous development benefits were derived by the communities neighboring the Noel Kempff forest through targeted programs. While there was an initial negative impact on employment in the communities as a result of the newly imposed conservation areas which closed local timber concessions and sawmills, alternative employment was created.[72] The implementation of the Program for the Sustainable Development of Local Communities improved access to basic services such as health, education, and communication. This was a step towards community development that would not have been possible without the REDD project. Further, the Community Development Program emphasized community development by securing land titles, assisting self-organization, and supporting income-generating activities such as community forestry and micro enterprise.[73] For example, local people worked in surveying positions, as park guards, and as tourist guides.[74] Thus, the co-benefits approach can provide tangible development benefits. While other REDD projects are getting under way, as noted by Wertz-Kanounnikof and Kongphan-apira, a thorough analysis of the development benefits of REDD is currently challenging due to a lack of public information on this topic and the new activities which are rapidly developing.[75]

Moreover, in legal terms, the co-benefits approach is consistent with various provisions of the UNFCCC. The preamble of the UNFCCC affirms:

> that responses to climate change should be coordinated with social and economic development in an integrated manner with a view to avoiding adverse impacts on the latter, taking into full account the legitimate priority needs of developing countries for the

> achievement of sustained economic growth and the eradication of poverty[76]

This is further echoed in article 4(7) of the UNFCCC that states:

> The extent to which developing country Parties will effectively implement their commitments [...] will take fully into account that *economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties*.[77]

More recently, the preamble in a 2007 UNFCCC Conference of the Parties decision on REDD explicitly states that REDD "can promote co-benefits and may compliment the aims and objectives of other relevant international conventions and agreements."[78] A co-benefits approach is also consistent with the REDD guidelines in the Cancun Agreement. [79] Article 1(g) of these guidelines states that "activities [...] should: be implemented in the context of sustainable development and reducing poverty, while responding to climate change."[80] From a quality of aid perspective, the co-benefits approach would also be supported by the *Paris Declaration on Aid Effectiveness* and the *Accra Agenda for Action*.

While the co-benefits argument is optimistic about the benefits of a sophisticated participatory REDD model, currently there are significant shortcomings to REDD development. Notably, there is a lack of policy coordination on a domestic level. A recent World Bank study found that only 12 out of 43 Poverty Reduction Strategy Papers reviewed in the study offered a coherent strategy for policy reform to improve forest management within the context of broader development objectives.[81] This lack of policy coordination could be exacerbated by a potential lack of access to markets by rural communities as REDD develops from a fund to a market based mechanism. Thus, the financial benefits derived from REDD may never make it to rural communities. Notwithstanding these issues, the co-benefits approach would satisfy the traditional purpose ODA by focusing on poverty reduction while simultaneously achieving the goals of the climate change framework.

Additionality

A third line of thinking states that ODA should be used for mitigation finance; however, these funds should come solely from additional ODA. In this respect it should be noted that additionality will not subtract current ODA funds from other development goals. However, it would also be possible to finance REDD with additional ODA while not achieving development co-benefits; this is an issue that has been raised by advocates

of a strict approach. While the discussion on additionality is more prevalent with respect to adaptation funding, it is equally applicable to mitigation actions in developing countries. With respect to adaptation actions, it has been noted that distinguishing the additional costs of climate change impacts from baseline development needs would become extraordinary difficult, if not impossible.[82] However, mitigation actions are much easier to distinguish from traditional development activities. Thus, the additional funds should be able to be more easily tracked. Here, it is pertinent to note that ODA funds that are used for REDD and subsequent development activities should be flagged so as to not double count these expenditures as both ODA and climate finance.[83] Thus, additional funds must actually be "additional" and not just funds that are re-allocated or double counted.

In supporting their arguments for additional mitigation funding, many authors rely upon article 4(3) of the UNFCCC.[84] However, this argument does not stand up against scrutiny. While article 4(3) of the UNFCCC does mention "new and additional" funds, this is specifically in relation to article 12 of the Convention, a provision on national communications. The second sentence of article 4(3) of the Convention then goes on to state that developed States "shall also provide such financial resources" for their commitments under article 4(1) of the Convention.[85] Based on the terminology of article 4(3), it is clear that this provision only calls for additional funds with respect to national communications, and not for mitigation and adaptation. Similarly, article 11(2)(a) of the Kyoto Protocol echoes article 4(3) of the UNFCCC, stating that "new and additional" funding shall be provided for "existing commitments under Article 4, paragraph 1 (a), of the Convention." Article 4(1)(a) of the Convention states that all parties to the Convention must submit national emissions inventories.[86] Thus, support for additional funding is also not found in the Kyoto Protocol. However, more recently both the Copenhagen Accord and the Cancun Agreements have included provisions to increase mitigation funding through new and additional funding.

Article 8 of the Copenhagen Accord provides for "scaled up, new and additional, predictable and adequate funding" for mitigation "including, substantial finance to reduce emissions from deforestation and forest degradation."[87] Here, developed State parties agreed to new and additional resources "approaching" $30 billion balanced between adaption and mitigation actions for the 2010-2012 period.[88] Further, developed States agreed to mobilize 100 billion dollars by the year 2020 for mitigation actions in developing countries. This commitment to additional funds was reaffirmed in the Cancun Agreements. Notably, article 2(d) of

these Agreements states that the "mobilization and provision of scaled up, new, additional, adequate and predictable financial resources" will "address [the] adaptation and mitigation needs of developing countries.[89] Article 95 of the Agreements takes note of the $30 billion promised over the 2010-2012 period and article 97, under the heading of Long-Term Finance, "decides"that "scaled up, new and additional, predictable and adequate funding shall be provided to developing countries."[90] However, with respect to REDD, it should be noted that article 71 of the Agreements, the provision detailing REDD finance, solely calls for "adequate and predictable support, including financial resources."[91] This somewhat puts "additional" funding for REDD into question. However, there is still a substantial amount of legal authority that may be used to support additional REDD funds. This additional funding could come in the form of ODA. However, for ODA to qualify or be termed "new and additional," it must actually be new ODA funds and not simply the re-allocation of existing ODA. Such additional ODA for REDD is supported by Norway's REDD finance proposal which states that any ODA used should be additional to current ODA levels.[92]

Thus, while additionality now seems clearly established within the UNFCCC the debate on additionality is now shifting to defining the exact nature of additionality under the Copenhagen Accord and Cancun Agreements. In this respect, the European Union (EU) is currently seeking to clarify this concept having set the goal of having a unified definition of additionally by 2013. Currently, in the EU, there are four prominent definitions:

(i) Climate finance classified as aid, but additional to (over and above) the 0.7% ODA target.
(ii) Increase on 2009 levels spent on climate actions.
(iii) Rising ODA levels that include climate change finance but where it is limited to a specified percentage.
(iv) Increase in climate finance not connected to ODA.

Thus, while additional funds have been promised, the extent of these funds still remains somewhat unclear.

In summary, it seems that a compromise may be struck between the strict and co-benefits approach. If REDD is operationalized utilizing a co-benefits approach, ODA would be contributing to both development and climate goals. From a policy perspective, this creates the potential for a win-win-win situation where developed countries may fulfill their obligations under the international climate change regime, while simultaneously progressing towards their 0.7% of GDP commitment and providing development benefits to developing countries. This would be a

situation where advocates from both approaches are likely to agree. This is a preferable position from a policy stand-point. Further, while the concept of additionality remains unclear, it has been adopted in the UNFCCC framework. Although not diverting current ODA funds, it leaves the strict versus co-benefits debate open-ended. Thus, depending on the definition of additionality, an additionality-co-benefits approach would also be a preferable option.

2. *Building Blocks for a Legal Framework on REDD ODA*

Based on the above noted law and policy frameworks for ODA, the policy arguments regarding the operationalization of REDD, and the current legal best practices for ODA distribution, it is possible to draw some conclusions about a potential international legal framework regarding REDD ODA finance. The following section will outline current legal best practices that ensure an equitable distribution of REDD benefits and it will conclude with a review of building blocks for a legal framework on REDD finance.

The human rights approach stands to ensure development benefits throughout the operationalization of REDD. Human rights were mentioned in the preamble to the Cancun Agreement, which specifically addresses the effect of climate change on vulnerable groups such as indigenous peoples. Article 8 of the Agreement emphasizes, "that Parties should, in all climate change related actions, fully respect human rights."[93] Notably, as the majority of the world's forests are now concentrated in areas occupied by indigenous peoples the right to free prior and informed consent (FPIC) should be taken into account by the international REDD framework.[94] The right to FPIC is recognized in a myriad of international instruments, which include the *United Nations Declaration on the Rights of Indigenous Peoples*, the OAS *Draft American Declaration on the Rights of Indigenous Peoples* and the *ILO Convention 169 on Indigenous and Tribal Peoples*.[95] The importance of FPIC relating to environmental law and policy has also been recognized in international jurisprudence.[96] As defined in these instruments, the right to FPIC requires consultation prior to any action where indigenous interests may be at stake. With respect to consultation, all potential harms need to be disclosed to the full understanding of indigenous peoples. Further, indigenous groups may also withhold consent.[97] Thus, FPIC effectively gives indigenous peoples a seat at any bargaining table. In this sense, if the operationalization of REDD effects indigenous interests they should be entitled to consultation and must consent to the projects. Article 72 of the Cancun Agreements is a step towards recognizing the importance of FPIC as it notes the importance of stakeholder participation. Stakeholder

participation is further emphasized by the REDD guidelines which directly refers to the *United Nations Declaration on the Rights of Indigenous Peoples*.[98] Thus, through FPIC, indigenous groups stand to benefit from REDD.

Secondly, best legal practices from other countries may be used to effectively operationalize REDD and to distribute its development benefits. For example, Parkinson and Wardell note that Cambodia, Indonesia and Vietnam are developing innovative legal best practices with respect to REDD's operationalization. For example, Cambodia's 2005 *Sub-Decree on Community Forestry Management* ensures that locally elected community members will govern forest rights and forest management.[99] These ensure that local communities have a voice in how REDD is operationalized on the ground. REDD development goals are also seen in Indonesia's pioneering REDD regulations. [100] Article 2 of Indonesia's regulations state that the purpose of REDD is to "achieve sustainable management of the forest management and to improve the welfare of the community."[101] To operationalize this goal, the *Guidelines for REDD Implementation Recommentdation[s] by Regional Government* provide that prior to local governments giving consent to REDD operations there must be "conformity between the implementation of the REDD plan with the development priorities including poverty reduction program."[102] Further, Vietnam is currently seeking to implement a REDD Compliant Benefit Distribution System (BDS).[103] The BDS will be a legal system based on equity, efficiency, and effectiveness, and it will focus on ensuring the distribution REDD revenues.[104] This framework will comply with human rights and deal with issues such as carbon rights, land rights, the legal status of beneficiaries and the entitlements to REDD benefits.[105] These types of domestic country plans are specifically called for in Art. 71 of the Cancun Agreements.[106]

Lastly, pro-development market mechanisms are available to ensure that long-term benefits may be derived from REDD. The Climate, Community and Biodiversity Aliance (CCBA) has developed draft standards for the validation of avoided deforestation and forest degradation projects which consist of eight principles broken down to 31 criteria and 81 indicators which among, other things, require demonstration that a project respect property rights, and that the prior free and informed consent of those affected by the project be obtained.[107] Similarly, the Gold Standard Rules and Procedure for CDM provide a robust standard allowing for verifiable and sustainable development practices.[108] Both of these market mechanisms are sold as "premium credits" or special commodities, allowing them to be sold at higher prices because of their rigorous criteria

and focus on co-benefits. Thus, as REDD moves from ODA to a market approach, these standards should be considered.

Assuming a phased approach as the financing mechanism, based on the above discussion on REDD ODA and legal best practices, it is possible to roughly sketch five elements that should be included in the legal framework for REDD finance. The elements are the following: ODA as a short term solution, a co-benefits approach, human rights, coherent domestic plans, and the use of progressive market tools. This framework should be put in place by the AWG-LCA, the body mandated by the UNFCCC to deal with these decisions and, eventually it should be adopted by the Conference of the Parties. These elements will now be further elaborated.

1. It must be recognized by the AWG-LCA that ODA is only a short-term solution.[109] This was explicitly noted in the Eliasch Review. Although ODA as REDD finance is permissible under domestic and international law and policies, its role should be limited and used only for a short period to build market capacity. Thus, ODA should be used to cover upfront REDD readiness costs and to ensure that REDD programs are initiated in numerous developing countries around world. Particular focus should be placed on countries with weak governance structures, notably countries in Sub-Saharan Africa. Once a transition to a market system becomes feasible, ODA financing of REDD should be phased out.

1. ODA should only be used to finance REDD if REDD is conducive to the co-benefits approach. As noted above, there is a strong link between forests and poverty. A co-benefits approach will bridge the gap between REDD and rural community development. Further, the international climate framework and the international soft law regarding development finance support the co-benefits approach. Here, it should be noted that the international community has endorsed the additionality principle in both the Copenhagen Accord and Cancun Agreements. Thus, the co-benefits approach could be financed primarily through additional ODA funds. While the co-benefits approach will create additional expenses, it will have a continued focus on poverty reduction. Thus, it should be specifically stated by the AWG-LCA that a co-benefits approach is necessary.

2. A specific reference to human rights should be included in the REDD finance provisions by the AWG-LCA. Specifically, FPIC should be integrated into the international framework and be used to guide domestic REDD plans. This will be key for indigenous people to derive lasting benefits from a co-benefits approach as REDD moves from a fund to a

market-based system.

3. The international framework should ensure domestic policy coherence between REDD and poverty consideration. As noted above, many domestic poverty plans do not make the connection between forestry and poverty. Thus, before international funds flow into a developing country, a review process of the domestic legislation with respect to REDD and poverty should occur. Such a review should ensure that a legal framework for a benefits distribution system is in place. In this respect, the work completed by Vietnam can be considered the basis for an initial model. Thus, a mechanism to ensure domestic policy coherence of a co-benefits approach should be included in the REDD finance framework by the AWG-LCA.

4. Voluntary standards such as those produced by the Climate, Community and Biodiversity Alliance, or the Gold Standard Rules, need to be supplemented by an international framework as the transition from a fund to a market occurs. As REDD finance moves from a fund to a market, these voluntary standards, or standards that are similar to them, should be required market standards. These market tools will ensure that the co-benefits system started under a fund will be continued in the marketplace. Thus, communities will continue to benefit. Therefore, the international framework should state that these market standards become law.

V. Conclusions

In summary, REDD, as a new element of international environmental law stands to be a dynamic and economic force under the UNFCCC. REDD may significantly reduce international emissions while providing development benefits if it is operationalized properly. However, many decisions relating to REDD have yet to be made. One of these decisions is the REDD financing mechanism.

In this respect, the phased approach appears to be the most probable financing mechanism. The phased approach will necessarily require public start up funds, most likely in the form of ODA. The international and domestic legal and policy frameworks surrounding ODA either explicitly consider climate mitigation projects, or more particularly REDD as ODA eligible, or based on their broad nature and purpose of long term benefits to developing countries appear to endorse climate mitigation actions. After the financing mechanism is chosen, a second decision will have to be made on whether pro-development provisions should be included in the financing mechanism. This decision will be based of one of three policy

arguments set out above. If REDD is implemented based on a co-benefits approach, it may bridge the gap between the forest-poverty link, and help avoid further deforestation. Such an approach would be consistent with the purpose of ODA and would be the preferable outcome for which the international community should push.

All of these factors should be considered by the AWG-LCA when developing a legal framework on REDD finance. On the basis of this analysis of REDD finance, and based on the current best legal practices, five building blocks for an international framework on REDD finance have been developed. These building blocks are outlined above. They can be considered a starting point for the AWG-LCA. While a significant amount of work needs to done with respect to REDD finance, if the proper decisions are made, REDD stands to provide an enormous benefit in terms of climate mitigation and development. However, these decisions will be left in the hands of the international community.

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BIOFUELS: A THREAT TO THE ENVIRONMENT AND HUMAN RIGHTS?

AN ANALYSIS OF THE IMPACT OF THE PRODUCTION OF FEEDSTOCK FOR AGROFUELS ON THE RIGHTS TO WATER, LAND AND FOOD

María León-Moreta*

This article critically appraises the biofuels regimes from the perspective of their effects on the environment and human rights. It concentrates on agrofuels production in particular, and examines the risks associated with such production for local populations and regions. The article introduces biofuels and its associated problems to the reader and then proceeds to consider the specific cases of the human rights to water, to land and to food in the context of bioenergy. It argues that any biofuel or agrofuel production must take into account sustainability issues, including human rights, and that beyond the commercial risks inherent in failure to do so, greater international regulation of biofuels is necessary and desirable.

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I. INTRODUCTION: BIOFUELS – THE LINK BETWEEN ENERGY SECURITY, CLIMATE CHANGE AND HUMAN RIGHTS

Over the past 50 years, economic growth has been based on the generation

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of non-renewable energy. Indeed, about 80% of the global primary energy still derives from fossil fuels.[1] In developed and developing countries, the growing demand of energy sources for the production, distribution and commercialization of goods and services is putting enormous pressure on energy sector.[2] For instance, the International Energy Agency projected that world primary energy demand will increase by almost 60% between 2002 and 2030, reaching 16.5 billion tonnes of oil equivalent. Two-thirds of the increase will come from developing countries.[3] The growing demand for energy on the one hand, the reduction of the availability of non-renewable energy sources on the other hand, as well as the emergence of other serious influencing drivers such as climate change and population growth, have prompted the international community to explore new efficient and environmentally friendly energy sources.

In this scenario, climate change constitutes, in particular, one of the main elements of consideration on the international energy agenda because of its linkage with energy production and consumption patterns. Compelling evidence has shown that the rising global average temperature at the surface of the earth stems from the increasing consumption of fossil fuels since they give rise to the release of greenhouse gases (GHG) into the atmosphere.[4] This complex phenomenon adversely affects ecosystems and the ecological interrelations which support, in turn, the economic and social development of individuals. To face the negative consequences of climate change, two important response measures have been developed at the international level: mitigation and adaptation. While mitigation encompasses all measures which tend to avoid or reduce GHG emissions, adaptation measures target the prevention of risk and the application of economic and social opportunities under the conditions of the now unavoidable impacts of change of climate.[5] The production of biomass[6] for the generation of bioenergy has been perceived as potential mitigation measure for the reduction of GHG emissions from the energy sector, in particular from the transport sector. In this connection, international forums such as the World Summit on Sustainable Development in Johannesburg have urged nations, in which the generation and consumption of energy depends on systems which are sources of GHG, to reform their energy regimes with the aim to reduce the impact of climate change. According to the International Energy Agency, fossil fuels remain the principal source of primary energy, amounting to 84% of the total increase of the energy demand between 2005 and 2030.[7] Taking into account the contribution of energy sources to sustainable development, to the creation of other important goods and services and to the mitigation of poverty, the Johannesburg Plan of Implementation therefore encourages access to modern biomass technologies and fuelwood sources and supplies and the

commercialization of biomass operations, including the use of agricultural residues, in rural areas and places where such practices are sustainable.[8]

In the context of energy and climate governance, bioenergy addresses two specific issues. On the one hand, the production of biofuels ensures energy security through the diversification of energy supplies, so that the dependence of oil-importing countries on fluctuating commodity prices reduces considerably. For Example, the Brazilian government has developed programs and policies which support the creation and implementation of its own biofuels industry to assure the energy security of the country by reducing its dependence on fossil fuels.[9] On the other hand, the development of new renewable energies, such as bioenergy, may contribute to enhanced climate resilience since it contributes to the mitigation of the effects of climate change and reduces, as a consequence, potential conflicts and security risks caused by the competition for natural resources (soil, water and biodiversity). However, the production of bioenergy raises an important question: what extend does the production of bioenergy have a negative effect on the environment and human rights? Water, soil and biodiversity are decisive elements not only for the cultivation of feedstock for biofuels such as maize, sugar cane and soya beans but also for the fulfilment of several human rights. Therefore, shifts in the use of these resources, scarcity, and negative environmental impacts caused during biofuel production can compromise the access of vulnerable groups to these natural resources and restrict for example their rights to water, land and food. In order to understand the environmental and social connotations of the production of feedstock biofuels, this paper will first explain the concepts around biofuels and its role in the energy sector. There will then be an analysis of the effects of the production of feedstock for biofuels on the environment and on people, in the light of the human right to water, to land and to food.

II. BIOFUELS: AN ENERGY STRATEGY IN THE TRANSPORT SECTOR FOR THE MITIGATION OF THE EFFECTS OF CLIMATE CHANGE

Before discussing the impact of the generation of biofuels on the environment and on human rights, it is important to determine the origin, concept and classification of biofuels as well as their role in the transport sector.Bioenergy can be defined as energy derived from biomass, non-fossil material of biological origin including forest and agricultural plants, wild or cultivated crops, and used for heat, electricity or transport.[10] To obtainbioenergy, biomass can be transformed into so-called biofuels. Depending on the raw material from which these energy sources derive, biofuels can be categorized under three groups. First

generation biofuels includeagrofuels, all types of fuels derived from agriculture and livestock products, which are mainly extracted from food and feed crops, animal and agricultural by-products[11] and transformed in fuels through well-established processing technologies.[12] Agrofuels can take the form either of solid, liquid or gaseous fuels. Second generation biofuels encompass, in turn, fuels obtained by the conversion of cellulosic materials (e.g. switchgrass and agricultural waste) by thermo-chemical or bio-chemical processes.[13] Finally, third generation biofuels are planned to be produced from 'energy-designed' feedstock and processed by more efficient technologies than what is used for the current production of biofuels. These are the biofuels of the future.[14] Taking account the complex interrelations and different questions that each generation of biofuel faces, the scope of this paper will address to the impacts of the production of agrofuels on the environment and human rights. In this paper, the terms agrofuels and biofuels will both refer to liquid biofuels (bioethanol and biodiesel) used for transport.

The transport sector is the principal driver of oil demand in most regions of the world. Globally, it is expected that the share of total primary oil used for transport will rise from 47% in 2005 to 52% in 2030.[15] In recent years, developed countries and emerging countries have made efforts to stimulate the production of agrofuels within their domestic policies in order to increase the demand of such energy sources in the market for road-transport fuels and to reduce, consequently, their dependence on oil imports. In fact, the International Energy Agency (IEA) projected in a conservative scenario that the demand for biofuels will increase from 2.3 % in 2015 to 3.2 % in 2030 in the transport sector.[16] At the time of writing, the European Union and the United States are not only the main consumers of biofuels but they are also, together with Brazil, leaders in global biofuelsproduction.[17] Nevertheless, these tendencies can significantly change in the next years due to the accelerated process of industrialization in emerging countries, such as China and India, and the opportunity for developing countries to attract investments for the production of biofuels. Although the demand for biofuels represents a small component of the total energy demand, producers and consumers of agrofuels face each other in a play of market forces that puts enormous pressure on the environment and on the natural resources from which biomass is obtained.

III. THE IMPACT OF THE PRODUCTION OF AGROFUELS ON THE ENVIRONMENT AND HUMAN RIGHTS

Developing countries in Asia, Eastern Europe, Latin America and sub-Saharan Africa are showing an increasing interest in creating favourable conditions for investment projects aiming the production of feedstock foragrofuels. Many of the countries in these regions possess significant comparative advantages for the generation of biomass owing to their climate conditions, geographical position and abundant land resources.[18] In this context, the development of agrofuel has emerged in the view of international organizations as a formidable sustainable development strategy which can have an effect at two different levels.[19] At the national level, this strategy can address social problems in rural areas in developing countries by improving people's conditions of life through the creation of employment and the improvement of social infrastructure.[20] At the international level, the generation of agrofuels as a sustainable development strategy can ensure the global transportation fuel supply by reducing the dependence of oil imports from political unstable countries and the reduction of GHG emissions as well.[21] However, all these arguments in favour the production of agrofuels can be overshadowed by environmental and social externalities caused by the cultivation of feedstock for this purpose.

The production of feedstock for agrofuels has a significant impact on the environment and on the people's conditions of life. Water and soil are key natural resources for the cultivation of bionergy crops, but they face critical environmental impacts such as pollution or the reduction of their quality and quantity because of the unsustainable exploitation of the resources and biofuel process of production. Indeed, the use of pesticides and fertilizers inbiofuels crops, the replacement of natural forest by monoculture biomass forests, the use of genetic modified organisms, or the proliferation of 'invasive alien species' are factors that lead to soil erosion, water run-off and the loss of biodiversity.[22] These, in turn, may have important implications for the rights of individuals and communities that live in the areas where such projects take place. In fact, the realisation of several human rights depends on the availability and quality of resources as well as the quality of the environment. To understand the complex interrelations between negative environmental impacts caused by the production of feedstock foragrofuels and the violation of human rights, this paper will address the question: What complex interrelations exist between the negative environmental impacts caused by the production of feedstock for agrofuels and the violation of human rights, such as the right to access to water, the right to land and the right to food?

1. *The right to access to water in the context of bioenergy*

The right to access to safe drinking water has been recognized either implicitly or explicitly in several international instruments.[23] However, access to water has not been categorized as a human right until recently when the majority of members of the United Nations General Assembly voted in favour of Resolution 10967 on July 2010. This Resolution urges States and international organizations 'to provide financial resources, build capacity and transfer technology, particularly to developing countries, in scaling up efforts to provide safe, clean, accessible and affordable drinking water and sanitation for all.' Although this Resolution has a non-binding character, it strengthens the acknowledgment of the access to water as a human right at the international level.

In relation to the legal framework of the human right to access to safe, clean, accessible and affordable drinking water, the Committee on Economic Social and Cultural Rights outlined its content and scope of applicability in General Comment No. 15. According to the Committee, the right to water 'entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses'.[24] Two constituent elements of the human right to access to water derive from this definition: first the idea of 'safe drinking water' and second the notion of 'access to water'.[25] The first element, 'safe drinking water', establishes on the one hand the scope of protection of the human right to access to water which is the use of water for personal and domestic needs. On the other hand, the term 'safe' refers to the quality of water. This means that water for personal and domestic consumption must be free of microbial or chemical hazards. Regarding the second element, the 'access to water' refers to the availability of water as well as to the promotion of equitable, physical and economic accessibility to water. In this sense, people are not only entitled to the equal and non-discriminatory provision of water, which must be affordable for all, but water should be available as close as possible to each house, to educational institutions or to the workplace. Water quality, availability and accessibility constitute preconditions for the fulfilment of the human right to water; nevertheless, these factors play also an important role in the development of other activities in other economic sectors. In fact, water is an essential resource in agriculture, the energy generation and industry.

Water has been defined by Committee on Economic, Social and Cultural Rights as a 'limited natural resource and a public good fundamental for life and health'.[26] This definition points out the significance of the access to water for the fulfilment of other human rights, such as the right to life and to health. However, the scope of protection of the right to water is

limited to the use of water for personal and domestic uses. Agriculture, industry, energy generation constitute other spheres of human development which strongly depend on water and compete for the access to this resource. In addition to the wide scope of the use of water and the competing interest linked to its access, there are other factors which are putting a significant pressure on the availability and quality of water source and could give rise to a global water crisis, such as population growth, rising food requirements, industrialization processes in emerging countries and an increasing energy demand linked to a biofuels development strategy.[27]

In the context of bioenergy, water is one of the most important elements for the production of feedstock for biofuels. Water plays an important role in two different stages of biofuel production: for growing the feedstock and for the production process of biofuels plants.[28] The environmental impacts of the production of biofuels tend to be more perceptible on the quality and quantity of water where these projects are performed. The type of crop, the methods of irrigation and cultivation as well as the amount of water located in a specific region (e.g. semi-arid or water abundant regions)[29] are factors which influence the competition for access to water and ultimately the fulfilment of the human right to access to water. Therefore, the impact of these drivers on the availability and quality of water will analyzed in this paper in the light of the realization of the right to access to water.

The availability of water is one of the fundamental conditions not only for the fulfilment of the right to access to water but also for the production of feedstock for biofuels. During the production of agrofuels, factors that influence water availability are the type of crop, the uses of water, the efficiency of the methods of irrigation, and the geographical distribution of water. The average requirements of water necessary for the production of one litre of agrofuels are 2,500 l of crop evapotranspiration[30] and 850 l of irrigation water are need for this purpose. However, this average varies from region to region. While the volume of water needed for irrigation of rain-fed rapeseed crops in Europe is negligible, the amount of water required for the production of maize for a litre of ethanol in China requires on average 2,400 l of water for irrigation.[31] In that context, the inefficient use of water during the cultivation of biofuels and the type of crop cultivated can give rise to water depletion in regions where water is scarce. In addition to these factors, the geographical distribution of water and population pressure exert an additional pressure on the availability of water in a specific geographic area. China and India, for instance, already suffer from water scarcity problems. At the same time, however, both countries are

experiencing strong economic growth supported by an energy-intensive process of industrialization. In this scenario, the production of biofuels has been perceived as a strategy to secure energy supplies and to reduce the dependency on oil-imports. However, the generation of agrofuels and the increasing demand for food are already causing extreme competition for the access to water resources and are putting significant pressure on the already highly-exploited or overexploited water sources.[32] As a consequence, the production of biofuels in regions which are suffering from water stress can trigger conflicts between competitive uses of water. This could lead to the violation of human rights whenever the State is not in the position to reconcile opposing interests in water and to enforce the fulfillment of the right to access to water.

Another substantial condition for the realization of the human right to access to water is the quality of water. The use of fertilizers or pesticides in the production of agrofuels has significant environmental impacts not only on the surface water and ground water but also on soil productivity as well as ecological systems and services depending on water. This, in turn, restricts the access of people to safe and clean water. According to a report of the United States National Research Council (NRC), the impacts of the increasing use of fertilizers in biofuels crops on large scale constitute an important concern. Fertilizers and pesticides are chemicals which can be washed into bodies of water and affect the quality of water. However, the magnitude of the environmental impacts depends on the amount of fertilizers and pesticides required for each type of crop.[33] For example, in the United States, corn crops require more fertilizers and pesticides per hectare than any other agrofuels feedstock, so that a higher concentration of nitrogen contaminates groundwater and streams provoking oxygen-starved 'dead zones'.[34] In this case, the increasing use of chemicals in agrofuels production is causing environmental impacts, such as erosion, sedimentation, lower oxygen in ecosystems and higher concentrations of chemicals in the water for drinking and irrigation, which trigger the access of population to 'clean' and 'safe' water and the realization of other human rights, such as the right to food or health.

In these scenarios, the production of biofuels represents a particular challenge for States. On the one side, States are called upon to ensure energy supplies and economic development; however, States have, on the other side, the international obligation to respect, protect and fulfil human rights.[35] A State's compliance of both duties can be ensured to the extent that the right to access to water is anchored in national legislation and the implementation of projects for the production of biofuels are subject to social and ecological impact assessments. Many countries and international instances have been taking steps to ensure access to water to

citizens. International human rights instruments and several national constitutions[36] already contain provisions relating to the right of access to water. This legal basis, in turn, enables individuals and communities to submit claims to national and international courts in case of violation to the right to access to water, especially when large scale projects are negatively impacting the environment and causing detriment to peoples' conditions of life. For instance, in the Ogoni case, the military government of Nigeria was accused of causing environmental degradation and health problems amongst the Ogoni people because of the work of oil companies. The complainants alleged that the Nigerian government had violated the right to health and the right to a clean environment as recognized under Articles 16 and 24 of the African Charter by directly participating in the contamination of the air, water and soil and thereby harming the health of the Ogoni people, and by failing to provide or allow studies to evaluate the potential or actual environmental and health risks caused by the oil operations.[37]

Despite the non-binding character of Resolution 10967, the recognition of the access to safe, clean, accessible and affordable drinking water implies a moral obligation for States to ensure the realization of this human right, especially for those States that voted in favour this resolution. On this basis, States and all the stakeholders involved in the production of biofuels are called upon to guarantee the access of the population to water by avoiding or reducing the negative impacts – depletion and contamination – during the production of biofuels. Therefore, the content of national legislation, the access to effective judicial mechanisms and the implementation of social and environmental impact assessments are important preconditions to ensure the availability and quality of water.

2. *The right to land*

A precondition to guarantee the long-term profitability of biofuels in the global market is a structural transformation of agriculture and land holdings. This means that the production process of feedstock for bioenergy should be based on the promotion of large-scale plantations and an 'extreme degree of monoculture production'.[38] This, in turn, implies the concentration of large tracts of land. Hence, smallholders and farmers in developing countries have little chance to compete in the bioenergy market which is characterized by production processes at an industrial scale and presupposes, as a consequence, large investment funding. Furthermore, this imbalance of power is being exacerbated by the fact that governments in developing countries prefer to encourage large scale national and foreign investments by facilitating the access to land for investors.[39] In this context, the right to land and the

right to property as a human right constitute additional considerations in the decision-making process for designing and implementing bioenergy production projects.

The term 'land grabbing' characterizes a system of land acquisition and concentration in developing countries. Domestic or transnational enterprises in the agro-business sector may buy or lease large extensions of arable land to the host-state or even force farmers off their land with the aim to produce food or feedstock for biofuels.[40] The consequences of this phenomenon are one the one hand, competition over land either for the generation of energy or to grow food crops[41] and on the other hand, the concentration of land in the hands of very few landowners. This may lead to the expropriation of farmers and indigenous communities, and condemn these groups to marginalization, forced eviction and poverty.[42] For instance, forced evictions in Brazil, Colombia, Paraguay and Indonesia has been documented by the non-governmental organization FIAN International. In Colombia, in the region of Chocó, palm oil growing companies occupied the land of indigenous people and people of African descendants after evicting them from their land.[43] In many of these cases, agribusiness corporations, large landowners or security forces compelled farmers to abandon their lands whether through legal or illegal means. In that sense, landownership patterns and the phenomenon of landlessness can give rise to several violations of human rights since these are linked to problems such as inadequate housing, lack of livelihoods options, poor health, food insecurity and hunger, scarce access to water and poverty.[44] In case Magna indigenous Communities of *Toledo v. Belize*, the Inter-American Commission of Human Rights determined that the right to life, the right to religious freedom and worship, the right to a family and to protection, the right to preservation of health and well-being, the 'right to consultation', and the principle of self-determination are compromised by the violation of the right to property.[45] In this connection, vulnerable groups – indigenous people, and communities, minorities, women and farmers – are mainly affected by forced eviction since these groups do not possess formal property titles and their ownership over their land is generally based on customary law.

A key point in the protection of the human right to property is the recognition of the individual and collective right to land of vulnerable groups when energy or development projects are planned to take place in their land or territories. In several national legislations and in international law, indigenous people enjoy a special protection because of the systematic racial discrimination they suffered from in history. Therefore, the international recognition of the collective right of indigenous people to property protects the right to access to, use and control over land,

property and natural resources. This collective right to property derives from the special relation of these groups to the land[46] since the social development, culture, world view and the political and economic systems of indigenous people are linked with and depend on the territory and the natural resources. States thus have the international obligation[47] to protect the right of indigenous people to property and access to the natural resources within their territories. In fact, the Inter-American Commission of Human Rights developed in the case of *Marry and Carrie Dann v United States*, three principles of law in order to fulfill the right of indigenous people to property. According to the Commission, these principles are:

> The right of indigenous people to legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property;
>
> the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied;
>
> where property and user rights of indigenous peoples arise from rights existing prior to the creation of a state, recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and to have such title changed only by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property. This also implies the right to fair compensation in the event that such property and user rights are irrevocably lost.[48]

Other vulnerable groups in developing countries beyond indigenous people do not possess formal and legal titles over the land. They also lack access to appropriate legal mechanisms or other protection to ensure their right to property and land. Under this legal uncertainty, domestic or transnational companies sometimes urge farmers to sell their land at low prices. In other cases, they even take *de facto* possession of and control over the land gradually displacing these communities.[49] Under these circumstances, the legal basis to guarantee the right of vulnerable groups to land constitutes the protection against forced evictions and displacement founded on the right to housing.[50] In its General Comment No. 4, the Committee of Economic Social and Cultural Rights determined that an important aspect of the right to housing is the legal security tenure. In accordance with the Committee, the term 'tenure' encompasses a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal

settlements, as well as occupation of land or property. In this sense, the Committee highlighted that independently from the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.[51]

The Commission on Human Settlements catalogued forced evictions as 'gross violations of human rights'.[52] By the virtue of article 11 (1) in connection with article 2 (1) of the International Covenant of Economic, Social and Cultural Rights (ICESCR), States have the international obligation to take all appropriate means, including legislative measurements, to progressively promote the rights protected under the Covenant. Therefore, legislation against forced eviction is, according to General Comment 7, an essential basis to ensure the protection of the human right to housing and therefore to ensure the right to land of vulnerable groups.[53] Furthermore, States are also called upon to develop appropriate mechanisms and institutions to ensure the enforcement of national legislation. Opportunities for genuine consultation with the parties concerned, adequate and effective compensation for lost property and access to justice constitute effective procedural protections against forced evictions.[54]

There are also many collateral consequences which derive from the concentration of land for the production of feedstock for biofuels. Shifts in land and monoculture production have environmental and social effects. From an environmental perspective, the cultivation of feedstock for biofuels can exacerbate the release of carbon dioxide into the atmosphere as a result of biomass combustion or the chopping down of the forest with the aim of obtaining more agricultural land.[55] Furthermore, depending on the type and the area of the crop, the concentration of land can put additional pressure on water resources affecting the enjoyment of the access of many vulnerable groups to water. In relation to the social implications of the production of feedstock for biofuels, factors linked to the concentration of land, such as the restrictive access to resources, the diminution of the quality of land and forced eviction threaten the good labor conditions of small farmers in many developing countries. The impacts of the concentration of land are felt in particular by women who play a special role in agriculture. Women are mostly considered as being responsible for the nourishment of their families.[56] Without land, women and their families are condemned to marginalization and discrimination. According to the General Comment No. 7, the Committee observed:

Women in all groups are especially vulnerable given the extent of statutory and other forms of discrimination which often apply in relation to

property rights (including home ownership) or rights of access to property or accommodation, and their particular vulnerability to acts of violence and sexual abuse when they are rendered homeless. The non-discrimination provisions of articles 2.2 and 3 of the Covenant impose an additional obligation upon Governments to ensure that, where evictions do occur, and appropriate measures are taken to ensure that no form of discrimination is involved.[57]

Given the growing concentration of land for the production of food or feedstock for biofuels in developing countries, States are urged not only to develop legal frameworks, mechanisms and institutions to protect the right of vulnerable groups to access to land, but also to protect vulnerable groups from the intervention of domestic and transnational agribusiness companies. Although transnational operating enterprises are not internationally accountable for human rights violations, they are obliged to act in accordance with the national law of the host state. Public participation in the decision-making process related to biofuels projects, the implementation of environmental and social impact assessments and consultation with the affected parties constitute important mechanisms to ensure the right to land and access to natural resources. In fact, the Inter-American Court of Human Rights concluded in the case of *Saramaka v. Surinam* that regarding large-scale developments or investment projects that would have a major impact within the Saramaka territory, the State had a duty not only to consult with the Saramakas but also to obtain their free, prior, and informed consent according to their customs and traditions.[58] Hence, the fulfillment of the human right to land and other human rights linked to land and its resources is only possible with the participation of all stakeholders.

3. *The right to food*

The impact of biofuels production on the right to food has been approached from two different perspectives. On the one hand, the Special Rapporteur on the Right to Food, Jean Ziegler, referred the rising use of crops to produce biofuels as a replacement for petrol as a 'crime against humanity' since the growing production of this energy source has contributed to push the prices of some crops to record levels.[59] On the other hand, there are voices which have questioned the causal link between biofuel production and the rising of food prices. According to Brazil's President Luiz Inacio Lula da Silva, such arguments are an excuse of industrialized countries for preventing Brazil from becoming one of the leaders in the global agricultural sector. Moreover, he argues that limiting the development of biofuels a priori is the 'real crime against humanity' since such fuels are essential for ensuring

wealth, food and energy security of nations.[60] Likewise, the European Commission responsible for Energy concluded that biofuels production in Europe had little impact on current global food prices. Therefore, according to the Commission, many statements made on the relation between biofuels and food prices had been 'out of proportion'.[61] Beyond these statements, the concerns of the international community about the dramatic increase of global hunger and food insecurity due to the growing world population and the increasing stress on natural resources found their expression in the 1996 Rome Declaration on World Food Security. These apprehensions have arisen since several drivers are putting significant pressure not only on the access of vulnerable groups to food but also on the natural resources necessary for its production.

In relation to the access to food, the competition between biofuels and food production, the increasing cost of its production and the growing demand for food are causing a substantial impact on food prices. According to David Mitchell, Lead Economist at the Development Prospects Group of the World Bank, the IMF's index of international traded food commodities prices had increased 130 percent from to 2002 to 2008 and 56 percent from 2007 to 2008. Furthermore, in many studies which have dealt with the estimates of the contribution of biofuels production to food price increases, biofuels production has been considered as a major driver of food prices. For instance, in accordance with the International Monetary Fund (IMF), the increased demand for biofuels accounted for 70 percent of the increase in maize prices and 40 percent of the increase in soybean prices.[62] In addition, water, soil and biodiversity are natural resources which are also being affected by the stress caused by the competition for the production of food and biofuels. Soil erosion due to mono-cropped commodity agricultural systems, deterioration of the quality of water and reduction of its availability as well as the loss or reduction of biodiversity are also triggering the access of poor people to food in developing countries. Taking this panorama into account, it is important to understand the interrelations between the production of feedstock for biofuels and the realization of the right to adequate food.

The legal foundations of the right to adequate food can be found in article 55 (1) of the Charter of the United Nations and the legal basis of the right to an adequate standard of living is anchored in article 11 of ICESCR. In its General Comment No. 12, the Committee of Economic Social and Cultural Rights defined the right to adequate food as the physical and economic access at all times to adequate food or means for its procurement.[63]In fact, the right to adequate food has been considered as

a fundamental human right in international law. Therefore, this right, like any other human right, imposes because of its significance for human life four levels of duties for States: the obligations to respect, to protect, promote and to fulfil.[64] Relating the obligation to promote, the African Commission on Human and Peoples' Rights determined in the case of *Ogoni v. Nigeria* that States have the duty to promote the enjoyment of all human rights by ensuring that individuals are able to exercise their rights and freedoms through promotion of tolerance, raising awareness, and building infrastructures. In that sense, this duty constitutes 'a positive expectation on the part of the State to move its machinery towards the actual realisation of the rights', so that it could comprise the direct provision of basic needs such as food or resources that could be used for food.[65] Furthermore, the Committee of Economic Social and Cultural Rights delineated the scope of obligations to respect, protect and fulfil related to the right to food by stating:

> '(...) the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide. The obligation to respect existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food.' [66]

The right to adequate food and the obligations on the State should be understood in two ways. The right to food ensures, on the one hand, that people have access to sufficient, safe and nutritious food to satisfy their dietary needs. On the other hand, this right guarantees also the access, especially of vulnerable groups, to resources for food production. The Committee validates this approach in its General Comment No. 12 by declaring that an obligation of the State is to strengthen people's access to and their use of resources in order to ensure their livelihood, including food security.[67] The production of biofuels puts into question the capacity of States to fulfil their international obligations, especially in relation to the obligation to respect and to protect. For instance, lack of legal safeguards to protect the right of vulnerable groups to land can be considered a violation of a State's obligation to respect since the State can be held accountable for preventing access to food by limiting access to important natural resources for the production of food. Moreover, the use of illegal mechanisms applied by third parties to take *de facto* possession of and control over land by displacing vulnerable groups can also constitute a violation of the obligation of the State to protect individuals or groups against the deprivation of food. Therefore, States are called upon to take all adequate measures at the national level to effectively achieve the

fulfilment of the right to food. However, the obligations of the State also have an international character because of international cooperation.

International and regional cooperation play a fundamental role in the fulfilment of the right to adequate food. According to the Special Rapporteur on the Right to Food, the obligations of States regarding the right to food are not only to be fulfilled, protected and respected at the national level,[68] but on the basis of article 56 of the Charter of the United Nations and article 23 of ICESCR, States are also called upon to contribute to the realization of the right to food in other countries and to shape an international environment enabling national Governments to realize the right to food under their jurisdiction.[69] In the view of the Special Rapporteur on the Right to Food, the scope of international cooperation is by virtue of article 23 of the ICESCR not simply restricted to financial assistance. It encompasses three additional obligations. [70] Firstly, States have the obligation not to pursue and review policies which have negative consequences on the implementation of the right to food. Therefore, States in collaboration with multilateral organizations and other relevant stakeholders (e.g. transnational enterprises) are called upon to take all necessary measures to ensure the realization of the right to food and to consider reviewing any policy or measure which could have a negative impact on the fulfilment of this human right, before instituting such policy or measure.[71] As a second obligation, States are urged to protect the enjoyment of the right to food from interference with third parties, including private actors, by controlling the chain of production and distribution of food. In this connection, States are accountable for land concentration through illegal acts and for the pollution of soil and water during the production of biofuels since it fails to adopt the adequate provisions and controls to avoid such negative impacts caused by third parties on decisive natural resources. Finally, the contribution of international cooperation to the fulfilment of the right to food constitutes also a State obligation. Technology transfer, the strengthening of local production and the development of an agricultural commodity value chain from production to commercialization are instruments of international cooperation to achieve the social and environmental sustainability in the production of food and biofuels.[72]

The right to adequate food as a fundamental human right poses significant challenges to the bioenergy sector. The decision to change the use of crops and land for the generation of biofuels rather than for the production food and could have significant impacts on the storage and supply of food which can, as a consequence, give rise to an increase in food prices in the global market. In order to avoid food insecurity, international

organizations, such as the FAO Council, developed voluntary guidelines to support the progressive implementation of the right to adequate food in the context of national food security. Such international initiatives enable and support cooperation between States, international organizations and relevant stakeholders in the decision-making process towards a bioenergy project.

IV. TOWARDS THE SUSTAINABLE PRODUCTION OF BIOFUELS

Biofuels have been conceived as a climate and energy strategy for the mitigation of the serious effects of global warming and the reduction of dependence on fossil fuels whose emissions are, in turn, responsible for climate change. However, the production of feedstock for these energy sources can lead to significant environmental impacts and to the violations of human rights. In order to prevent or reduce such negative effects and to promote the sustainable production of biofuels, several safeguards and measures have been developed at the international level.[73] Some mechanisms, such as environmental and social impact assessments, public participation and consultation, redress and restoration, are implemented in the planning, decision-making and implementation process. Other measures which are part of the international obligations of States and constitute a framework for the designing and implementation of biofuels projects, for example, the development of national legislation. Developing biofuels on a large scale needs to be strictly regulated to ensure that they minimise GHG emissions and do not pose threats to other issues; therefore, the regulation of biofuels and the policies surrounding their production are decisive in this sector.

Although there is so far no international agreement on renewable energy, different binding and non-binding instruments and mechanism have been developed and taken at international and regional level. Voluntary initiatives and standards – voluntary guidelines, best practices and certifications – are non-binding instruments that represent a significant contribution to ruling the production of biofuels at the international level. In the area of biofuels, the Roundtable on Sustainable Biofuels (RSB) under the auspices of the École Polytechnique Fédérale de Lausanne developed the so-called 'RSB Principles' which are maxims and criteria for sustainable biofuelsstandards. These principles contain procedural safeguards such as the need for participation and consultation processes (Principle 2). Furthermore, the 'RSB Principles' recognize and highlight the contribution of biofuels to the mitigation of the effects of climate change (Principle 3). In relation to the respect of human rights, the principles promote the protection of labour rights (Principle 4) and land

rights (Principle 12). Finally, these principles work towards ensuring that biofuels do not jeopardize food security. These soft-law instruments aim to ensure the sustainable production of biofuels until a treaty that addresses bioenergy generation and its consequences on the environment and on people could be drafted, negotiated and agreed on. Relating binding instrument, the European Union as one of the principal supporters of the development of biofuels set within the European Council a '10% binding minimum target to be achieved by all Members States for the share of biofuels in overall EU transport petrol and diesel consumption to 2020'.[74] In January 2008, the European Commission reaffirmed this goal in its Proposal for a Directive on the promotion of the use of energy from renewable sources. Furthermore, the Commission highlighted in this document the contribution of third countries to the promotion of renewablesin the EU; however, it made clear that the supply of biofuels and other bioliquids from these countries should meet sustainability criteria.[75] Since April 2009, the EU's biofuels policy is underpinned by the directive 2009/28/EC on the promotion of the use of energy from renewable sources which reasserts the 10% target and establishes that the Community should take appropriate steps for the promotion of sustainability criteria forbiofuels production.[76]

Environmental responsibility and respect of human rights are important considerations to be taken into account when designing and implementing sustainable energy and climate strategies. The balance between profitable investments in large-scale energy projects and the protection of substantial legal interests should take place on the basis of internationally recognized principles and the participation of all relevant stakeholders. In this sense, States and investors should be aware that investments are only profitable on the long-run if they obtain the legitimacy of the population involved through mechanisms for participation and consultation, and when they are implemented in accordance with national and international law. Human rights violations and negative environmental impacts reduce the economic value of an investment in the long run since vulnerable groups are able to claim their rights and for indemnity sums in large amounts of money not only before national courts but also before regional and international instances Therefore, States are called upon to respect, protect and fulfil human rights and to protect the environment in order to achieve sustainable economic growth.

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[45] *Maya indigenous community of Toledo v Belize,* Report no 40/04 (Inter-American Commission of Human Rights, 12 October 2004) para 154.
[46] *Mayagna (Sumo) Awas Tingni v Nicaragua* (2001) Serie C no 79 para 149; *Marry and Carrie Dann v United States* Report no 75/02 (Inter-American Commission of Human Rights, 27 December 2004) para 130.
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[52] Commission on Human Settlements, *Report of the Commission on Human Settlements on the work of its eleventh session* (A/43/8/Add.1) para 13.
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[65] African Commission on Human and Peoples' Rights, The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria (2002) no 155/96 paras 46-47.
[66] *General Comment No. 12 The right to adequate food (Article 11)* (E/C.12/1999/5) para 15.
[67] *General Comment No. 12 The right to adequate food (Article 11)* (E/C.12/1999/5) para 15.
[68] *UN Conference on Trade and Development, Sao Paulo Consensus* (2004) para 5:
'The Heads of State and Government gathered at the International Conference on Financing for Development in Monterrey in 2002 agreed that globalization should be fully inclusive and equitable. To achieve this, efforts should be strengthened at the national level to respond effectively to challenges and opportunities through the implementation of appropriate trade and macroeconomic policies and the design of development strategies that take account of the possibilities offered by globalization and interdependence in a forward-looking and proactive manner. While each country has primary responsibility for its own economic and social development, national efforts need to be complemented and supported by an enabling global environment, strong growth of the world economy, and international efforts to enhance the coherence and consistency of the international monetary, financial and trading systems in support of development.'
[69] Human Rights Council, *Building resilience: a human rights framework for world food and nutrition security* (A/HRC/9/23) para 24.
[70] Human Rights Council, *Building resilience: a human rights framework for world food and nutrition security* (A/HRC/9/23) para 24.
[71] Human Rights Council, *The negative impact of the worsening of the world food crisis on the realization of the right to food for all* (Resolution S-7/I) para 3.
[72] Carol Markwei and others, *International Assessment of Agricultural Knowledge, Science and Technology for Development: Summary for Decision Makers of the Sub-Saharan Africa Report* (FAO 2010) 7.
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EXPANDING LAW'S EMPIRE: INTERPRETIVISM, MORALITY AND THE VALUE OF LEGALITY

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For interpretivist theories of law it is the value of legality that informs what counts as true legal propositions. The leading theory of legality in the interpretivist school is Ronald Dworkin's 'Law as Integrity'. This paper suggests that Dworkin's view fails to account for several features of modern legal practices, particularly those that deal with international and comparative legal standards. It also highlights some inconsistencies in law as integrity as a conception of the value of legality and suggests an alternative conception to correct for them. The result of this conception of legality provides the major thesis of this paper. This is that under an interpretivist theory, true propositions of law never conflict with what morality demands.

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I. INTRODUCTION

In this paper my thesis is that, under the legal-philosophical school of interpretivism, true propositions of law never conflict with what morality demands. Under interpretivism one understands law as a social phenomenon by engaging in interpretation, which is a type of reflective reasoning. Broken down into stages, the interpretive method is as follows:

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(i) The social phenomenon 'law' is capable of pre-interpretive identification. Before interpretation, however, we know nothing about it other than it exists and where to look in order to begin an investigation about it.[1]
(ii) When we begin looking we will discover that certain legal practices (activities, attitudes or propositions that we can justify as 'legal') will be considered paradigms. These paradigms form the starting point of interpretation.[2]
(iii) One interprets these paradigms as a complete doctrine, producing a theory of 'legality' or 'the point of law'.[3]
(iv) This theory allows one to reach conclusions about the content of other laws that expand (or otherwise alter) the list of paradigms (the 'post-interpretive stage').[4]
(v) This, in turn, allows one to modify one's theory of law (by returning to stage three).[5]

As a result of this process the concept of law continually evolves over time, giving rise to a richer theory of the original social practice.[6] I criticise Dworkin's approach to the second and third stages in my fifth section but take the overall methodology to be correct throughout.

My argument proceeds in four stages. In the first section of this paper I briefly address the question of moral objectivity as a preliminary issue. The importance placed on purpose and value by interpretivism means that it depends on moral truth and the character of normal moral argument. My defence of both therefore serves as the first half of a methodological introduction as well. In my second section I place my discussion of legality in context by outlining the interpretivist position that legal reasoning involves moral reasoning and that moral principles form the 'grounds' of law. This is the thesis that true legal propositions depend on morality *in some way*. This forms the second half of my methodological introduction.

In my third, fourth and fifth sections I discuss the dominant interpretivist theory of legality, "law as integrity", which proposes one theory of this relationship. Given that a large part of this essay is devoted to understanding integrity, defining it at this stage is a difficult task. Putatively, law as integrity could be defined as making the best moral sense of the legal practices of a particular community by attributing coherent conceptions of justice and fairness to them.

My third section discusses the relationship between integrity and equality of respect and the fourth evaluates law as integrity's emphasis on

community. In my fifth section I discuss the adjudicative principle of integrity and conclude that legality is better understood as a union of moral accuracy and equality of respect. This amended theory of legality facilitates my ultimate conclusion because it relies on universal moral principles rather than those of a particular community. This allows me to conclude that what is valuable about legality is ultimately getting the correct moral answer in everyday political and legal decisions. To use Dworkin's terminology, this is both the 'jurisprudential' and 'doctrinal' part of my argument.[7]

Understanding the value of legality is essential for an interpretivist because a theory of legality is a theory of what makes a statement 'legal' or, in other words, what makes a proposition of law true. In the sixth section of this paper I explain more fully what the implications of adopting my theory of legality are. Because 'the point' of law is to produce correct moral answers to political and inter-personal problems in the real world, I conclude that any true proposition of law must conform to this standard. In other words, true propositions of law must conform to what morality demands given the same set of facts.

II. A Preliminary Issue: Moral Objectivity from Moral Argument

Whether moral truth can be discovered by normal moral argument is highly contested. In order to engage in an analysis of interpretivism I first need to establish the case for the soundness of moral reasoning, upon which it depends. The metaphysical and epistemological soundness of moral argument have been frequently challenged. These challenges fall into three broad categories. Firstly, how do we prove that moral principles actually exist? Secondly, if they do exist, how can we become aware of them? Thirdly, does moral disagreement pose a problem for claims of moral objectivity?[8]

The first challenge, of whether moral principles 'exist', is a difficult one to discern. When dealing with practical morality we scarcely rest our convictions on the basis that there are physical 'things' 'out there' that somehow causally govern what is moral. I certainly do not argue for this view. Even if we do believe this, it is hard to see what it adds, as there is no way of examining the effects of this 'moral field' other than by engaging in moral argument in the normal way. However, much skepticism about moral right answers is based on the assumption that *unless* there is a moral field, there is no basis upon which to found moral truth.[9] This rests on a general epistemological assumption: a belief is only true if the thing that it is held about causes it to be held. This may work in the

natural sciences. I believe that water boils at one hundred degrees centigrade because water boiling at one hundred degrees centigrade causes me to. This clearly is not the case for a moral belief; there is no perceivable quality of 'wrongness' that jumps out of the act of murder for example. However, we have no reason to rule out moral objectivity on the basis that we cannot discover a causal relationship of this kind. For one thing this general epistemological position fails its own test.[10] There is no perceptible cause of the belief that beliefs are only true if the thing that they are held about caused them to be held.

It seems to me that the project of seeking to found moral principles in some non-moral metaphysics is a misconceived one. It is relatively common ground in philosophy that no statement about what *is* infers anything about what *should be*.[11] Morality is the domain of what should be. As a result, any statement about what should be must be a statement of morality itself.[12] The only meaningful question that one can ask about moral principles is therefore whether they should, morally speaking, be taken to exist. To ask anything else is to assume that bare facts can answer moral questions. Any assertion that correct moral answers are impossible because moral principles do not exist must therefore be taken to be a moral assertion. Such theories therefore self-destruct.

Some philosophers argue that theories of this sort are in fact statements *about* morality rather than *of* morality. This, it is claimed, protects metaphysical refutations of morality from self-destruction. Dworkin argues, quite rightly in my opinion, that this cannot be true. He uses the following example of a four way disagreement, which I adapt slightly to fit better this particular limb of the argument:

> "A: Abortion is morally wicked: we always in all circumstances have a categorical reason – a reason that does not depend on what anyone wants or thinks – to prevent and condemn it.
> B: On the contrary. In some circumstances abortion is morally required. Single teenage mothers with no resources have a categorical reason to abort.
> C: You are both wrong. Abortion is never either morally required or morally forbidden. No one has a categorical reason either way. It is always permissible and never mandatory, like cutting your fingernails.
> D: You are all three wrong. Abortion is never either morally forbidden or morally required *or* morally permissible [because moral principles do not exist]."[13]

It is clear that A-C are posing moral opinions but what about D? One

point can be made relatively quickly. D is clearly forwarding a *conclusion* that falls within the moral domain. D is expressing an opinion about what*should* be. She is essentially saying that if moral principles are not 'out there', everything is permitted. Justifying permissibility by claiming the absence of 'a moral reason' nevertheless rests on a reason *of some sort*. It seems appropriate to ask, given the principle that no bare fact can necessitate a moral conclusion, what sort of reason could this be? Let us consider an analogous conversation, this time between lawyers rather than moral philosophers:

> A: This contract is void because there is no consideration.
> B: This contract is not void because there is consideration.
> C: This contract is not void because consideration is not part of the English law of contract.
> D: This contract is neither void nor is it not void because there is no English law of contract.

Clearly persons A-C are adopting legal positions. Person D is also doing this. Although they seek to express their view of the contract as 'neither void nor...not void', the fact still remains that they think it non-binding. This is because the implication of there being no English law of contract is that no contracts in England can bind. The assumption that rests behind this is that only a law of contract could justify English contracts being of binding force. Theories such as this are substantive legal positions.

Returning to the moral disagreement considered by Dworkin, it becomes clear by analogy that position D is a moral position in that argument. To adopt a normative conclusion within the moral domain on the basis of a justifying reason is to forward a moral argument. The moral element of that reason here is that in arguing against moral truth, D is forwarding an argument that in order to adopt a valid moral position, moral truth must be possible. This is a particular example of a very common moral argument; that 'ought' implies 'can'. There is nothing purely factual about such arguments; they cannot be considered 'non-moral'. When one justifies a conclusion about what ought to be the case with a reason that purports to uphold that claim, one is making a moral argument. Once we accept the impossibility of making statements *about* morality that are not moral statements in themselves, it is clear that this sort of scepticism cannot escape self-destruction.

A further argument follows from this. If all forms of moral scepticism are themselves moral arguments then it follows that they are arguments for the proposition that it is morally good that there are no objective moral answers. Putting aside the self-contradiction in this statement, it seems

highly unlikely that the best available moral interpretation of morality is one in which answers cannot be reached. Therefore a powerful moral argument exists in favour of the moral objectivity I argue for in this section. It is *morally good* that a method of investigation exists that allows us to discover moral truth.

The second challenge is by far the more interesting. On the fairly safe assumption that morally correct answers can exist, we have to ask how we may reach those answers. The response to this epistemological question is implied in my analysis of the metaphysical objection I have just addressed. One proves that one has reached the correct moral answer through adducing an argument as to why that is the case. If I want to justify my views on same sex marriage for example, I provide a case for a particular application of certain moral principles. If these principles are themselves questioned, I must justify why I believe they are sound in themselves. If I can defeat any possible objection that may be raised with reasons that I honestly believe in, rather than obfuscating rhetoric, I have defended my claim and proved that my beliefs about same sex marriage are sound, or if you prefer, that they are 'true'.

Those who wanted some logically complex 'box-ticking' or criterial answer to this epistemological question will no doubt be disappointed. Yet it is difficult to see why they should be so. Outside the realm of pure mathematics and formal logic, we require no such stringent proof of the truth of our assertions. In the natural sciences I assert the truth that water boils at one hundred degrees centigrade by presenting evidence of that fact. If there suddenly emerges new evidence that water does not boil at that temperature, but rather at one hundred degrees Fahrenheit, then my conclusion is sensibly taken to be false. It seems to me that the principle that a conclusion is only sound in the natural sciences when supported by irrefutable evidence is not so different from the moral principle that a conclusion is only true when supported by an irrefutable argument. Both questions require a type of investigative process uniquely suited to pursuing truth within the field that they are raised.

It is admittedly true that an epistemology of morals rests on the conviction that sound argument is the appropriate method of determining moral truth. However, an epistemology of natural science likewise relies on the conviction that sensory perception of the natural world forms an effective basis for claiming truth about that world. The strength these convictions share is that they are integrated into the domains in which they are made. It is empirically supported that sensory perception of external events forms a sufficient basis for claims of truth about the natural world, through the understanding of phenomena such as light and

neurological activity. Likewise, it is a sound moral argument that sound argument forms sufficient grounds to believe a conviction to be true. Both these epistemological theories are theories *about* truth in the domains to which they pertain, but they are also theories *of* those domains. This is a type of circularity of course, but a circularity that is more indicative of soundness by virtue of its all encompassing consistency, than of fallacy.

Next we need to consider whether disagreement poses a theoretical bar to this epistemology. The assertion goes something like this: we might accept that irrefutable arguments render a moral position true, but doesn't moral disagreement indicate that this is never in fact possible? Before answering this question we need to make two distinctions. The first is between good faith and bad faith disagreements. The second is between uncertainty over an issue and the indeterminacy of that issue.

In the event that the disagreement is in bad faith, it should come as no surprise that moral objectivity is not threatened. I can argue fiercely that abortion is categorically wrong even if I believe it to be permissible. All I am doing is producing words, much the same as a scientist who swears that water boils at one hundred degrees Fahrenheit despite evidence to the contrary. In much the same way we can discount all those moral opinions that are manifestly stupid, unthinkingly held, or self-contradictory.

Firstly if a moral opinion is deeply counter intuitive and seemingly baseless, such as the belief that human suffering is morally irrelevant, then the mere fact that it is posed offers no threat to objectivity in morals. One might as well claim that science is under serious epistemological threat from creationism. One of course needs some criterion for determining whether something is ridiculous in that way. The one that recommends itself immediately is asking whether a right minded person could be convinced of the proposition, even if it formed part of a consistent moral theory. In any event, such beliefs are uncommon to say the least and so do not go to the core of the disagreement challenge.

A much more interesting type of bad faith moral opinion is that which is unthinkingly held. My father has the fervent belief that people with expensive tastes should not have those tastes supplemented under a morally correct system of distributed justice. This *conclusion* may well turn out to be correct upon examination. However, as a moral claim it is epistemologically worthless without critical examination of the reasons behind it.[14] In a recent discussion over dinner my father confessed to having failed to consider an analogy between those with parentally nurtured and inescapable expensive tastes and those with physical disabilities. [15] He refused to examine the soundness of the proposition

however on the basis of a gut reaction. This can scarcely claim to be an epistemologically thorough stab at moral truth. This is so because moral propositions are true only by virtue of the argument that supports them. Unlike a bare fact, which could be sensibly understood to be independent of a method designed to investigate it, a moral proposition is metaphysically intertwined with the argument that proves it. To put this in crudely metaphorical terms, the moral proposition *is* the argument that justifies it. In the domain of morality the line between epistemology and metaphysics is blurred, if indeed it exists at all.[16]

This sort of bad faith argument also falls foul of the straightforward moral argument for moral objectivity I outlined above. If we abdicate our moral responsibility to pursue the truth by justifying our beliefs, then we can no longer attest to the positive metaphysical claim that accessible moral truth exists for good moral reasons. In this way the epistemological is linked again to the metaphysical. The existence of morals and our capacity to understand them form part of an inter-dependent web of conviction.

This leads on to the final type of bad faith moral opinion: the self-contradictory conviction. This can take two forms. The first is where a belief contradicts itself in a simple sense. An example of this is a rejection of human dignity. I cannot consistently maintain the proposition that my life is objectively important because it is mine, but that yours is not because it is not mine. In order to justify the objective importance of my life with any reason other than the mere fact of personal preference, which is a purely subjective reason, I will have to appeal to the valuable characteristics of my life. These include concepts such as autonomy, dignity and uniqueness. Once I have done this however, my failure to identify the same qualities in your life opens me to self-contradiction.

The second type of self-contradiction is where a moral belief is internally consistent but is inconsistent with some other conviction that an individual purports to hold alongside it.[17] For example, I cannot consistently maintain that even if racism is biologically pre-determined it is still wrong and at the same time view homosexuality as wrong on the basis that it is 'unnatural'.[18] This is because the premise of one argument rests on the priority the moral dignity of autonomous individuals holds over bare fact, which is exactly what the other argument opposes.

Contradiction invalidates moral opinions for two reasons. Firstly it is indicative of bad faith belief in the second sense; it exposes a failure on behalf of the individual to examine their views. This abdication of moral responsibility constitutes an immoral (or at the very least amoral) approach to moral argument and therefore is a non-starter epistemologically

speaking. One cannot justify moral truth if one is not aiming to. Secondly, the contradiction alone demonstrates that the understanding of principle that such a moral opinion is based on is an incomplete understanding. If an account of principle contradicts itself, then it is illogical. To claim that 'A therefore B' and 'A therefore not B' renders one of those statements false by definition. This holds whether the contradiction is express or implied. I have given several examples of contradicting moral claims already, both of the 'lower level' (such as the egoism and homosexuality examples) and of the 'higher level' of the moral epistemological claim that 'no moral opinions can be true (except that one)'. Both fall foul of the same logical principle and are invalid as a result.

That covers bad faith disagreements. If disagreement on a particular issue still exists even after all these thresholds have been passed, we are faced with a situation where two individuals (or perhaps one individual within themselves) have reached an argumentative deadlock. There are two explanations of such a possibility. On the one hand the issue is uncertain; on the other it is indeterminate.[19] Uncertainty is relatively easy to understand. Anyone who takes moral problems seriously will have encountered uncertainty at some stage. We may be unsure, for example, whether euthanasia is justified as an assisted autonomous act, or morally forbidden as an act of murder. However, such uncertainty cannot be taken to disprove the epistemological soundness of moral argument. That would be analogous to arguing that uncertainty over the existence of Higgs Boson particles serves as a disproof of the investigative methods of physics.[20] Uncertainty alone cannot amount to a positive case against an investigative method that otherwise seems to fit a domain well. Indeed, if uncertainty never existed, there would be no need for investigation in the first place.

Indeterminacy purports to be a somewhat more serious claim. If a moral issue is indeterminate then there is no answer one way or the other. One example raised by Joseph Raz is the ethical choice between a life dedicated to music and a life dedicated to the law.[21] It is a relatively popular view that these two lives cannot be compared in any meaningful way. This cannot, however, disprove moral objectivity. If a situation arises where no argument can be made to show why option A is better than option B, the moral answer is highly likely to be: 'Do either A or B'. This is not a disproof of moral objectivity, rather it assumes it.[22] As a result a positive argument for moral indeterminacy must be made in each case. Such an argument will likely be very difficult to make in hard cases because they already suffer from uncertainty. Where there is genuine uncertainty, something that requires a positive moral argument cannot be merely assumed.[23] This therefore creates no problems for the account of moral

truth I have developed.

III. Setting out Interpretivism: Moral Reasoning as Part of Law

In this section I set out the interpretivist position on how one discovers the law of a particular legal system. I will present Dworkin's argument that we need to identify the moral principles that justify our political practices rather than simply looking to agreed sources of law. I also set out the exact role principles hold in legal argument under interpretivism as an argumentative precursor to my discussion of legality.

Dworkin famously argued that principles play an important role in legal argument. Firstly he presented doctrinal evidence, citing a number of cases in which we can observe principles being used.[24] Secondly he argued that such principles are logically distinct from rules on the basis that they have a dimension of 'weight' rather than requiring 'all-or-nothing' application.[25] By this he meant that a rule provides an answer for every situation in which it is engaged. For example, 'in chess bishops must move along diagonals' leaves no room for exceptions. One either does or does not apply it. Exceptions are included in the rule itself: a rule with exceptions is merely complex.[26] This is because what constitutes a rule is a matter of form. A rule is a rule if it sets out when it applies, how it applies and what the result of its application should be. The content of the rule is irrelevant to identifying it as a rule. Principles are different; their application is dependent on their substance.[27] A principle will only apply if it contains something of value, morally relevant to the particular problem being faced.[28] The result of this dependence on substance is that a principle does not direct action in the same way a rule does, but instead suggests a potential outcome based on the merit of its substance.[29] A good way to unpack this is to think of a principle, such as 'people who do wrong should be told why', as including a 'but for' clause. This might be written as: 'people who do wrong should be told why; *unless* any other relevant moral considerations should prevent it'. The element of weight comes in when two principles interact. Imagine our example principle comes up against a competing principle, that of 'ignorance is bliss'. In deciding whether to tell my child that shaking the bag with his goldfish in is wrong because he will kill the goldfish, I have to 'weigh' the respective merit of maintaining my child's bliss against the value of his moral education. This is a question that can only be answered by considering what I find valuable about these principles and, as a result, what the outcome should be. There is nothing about the form or substance of these two principles that directs me one way or the other without such consideration. However, when I have made the decision we might be

tempted to phrase my conclusion in the form of a rule so that, if the same problem comes up again, I can quickly determine the solution.[30]It should come as no surprise to the discerning reader that this reasoning process is more or less identical to the moral reasoning method I defended in the previous section.[31]

Dworkin suggested that we have to engage in principled argument in hard cases because only by considering what is valuable about the law can judges apply it to new sets of facts. In other words, when the rules 'run out' one must look to why those rules are there in the first place to determine how they should be extended. However, the truly innovative element of his argument was to say that this was not an act of law making, but rather one of application. We are applying the law, he says, when we draw moral conclusions based on the principles that justify the law. This means that 'the law' is the underlying moral theory that justifies legal practices.[32]

H.L.A. Hart disputes this analysis of principles in his famous *Postscript*. Hart's contention was that a principle is merely a rule that has not had all its exceptions accounted for. In other words, when we rely on principles, we are merely applying unspecific rules.[33] He argues so in response to an inconsistency in Dworkin's early work in which the latter argues that whilst rules are all-or-nothing, the *rule* in *Riggs v Palmer* was outweighed by the principle that no one should profit from their own wrongdoing.[34] The reason Hart saw inconsistency here was admittedly a failure of Dworkin's, but a failure of expression rather than reason. What Dworkin should be taken as arguing is that the principle supporting the rule in *Riggs*, not the rule itself, was being weighed against the principle that no one should profit from their own wrongdoing. The statutory rule was an expression of that principle, which presupposed the superiority of its substance. The rule was not applied at all in *Riggs* because that assumption was false. Hart fails to answer this. He claims instead that *some* principles are identified by their pedigree rather than their worth.[35] This is of course an avoidance of, rather than an answer to, the interpretivist challenge. Furthermore, Hart fails to provide a reason for why pedigree matters in some cases but not others. If we are to require obedience to particular legal decisions based on their pedigree, we must provide a moral justification for the importance of pedigree. When it comes to deciding whether we depart from precedent or restrain ourselves, we must engage in this moral debate. This is exactly what interpretivism asks us to do in the first place: find out what is valuable about the law in order to make a judgement about what the law requires. We gain nothing by framing this question as whether adhering to the doctrine of precedent is good or bad, because asking whether the law requires us to adhere to it involves exactly the same questions. Since legal practice includes this sort

of argument all the time, why would we over-complicate things by considering such matters to be extra-legal?

Responses to this have been few and far between. Joseph Raz has argued that principles are not included or excluded from the law but rather 'non-incorporated'.[36] The meaning behind this is puzzling. Clearly Raz cannot mean that there is some half-way point between inclusion and exclusion; 'non-incorporation' cannot be a third logical option. A principle is either part of the law or it is not. To argue otherwise would be to commit to a view whereby even the most obvious hypothetical conclusion about the easiest case would not be law, even if it was patently obvious that any judge would rule that way. If a legal principle explains legal paradigms and sits well with one's legal theory then it is simply part of the law. If it does not, then it is not. Alternatively, Raz might be taken to claim, as Dworkin seems to think, that a judge can make decisions in accordance with the law but not about the law.[37] An example he uses is the First Amendment of the United States Constitution which requires judges to make moral judgements about free speech without giving those judgements legal status.[38] I find this distinction unhelpful. Judges are part of a social system designed to regulate human behaviour. There is nothing qualitatively, in terms of a judgement's normative force, to be distinguished by holding the moral elements to be non-legal. Perhaps Raz postulates that moral judgements of this kind do not have the same precedential value or do not command the same duty to obey. Given Raz's normal justification thesis I find this difficult to believe: he is genuinely concerned with the moral substance of the law.[39] This seems to reduce his objection to one of terminology. He has decided what counts as 'law' before taking account of the intricacies of practice and applies this *a priori* taxonomy to it. This might be instrumentally useful, but this is not an essay about the instrumental value of legal positivism.[40] However, we can conclude that given that moral principles form a core part of our legal practices, such taxonomy cannot help us understand those practices, and merely serves as common terminology for discussing them. Perhaps this is a worthwhile pursuit, but it is not the one we are engaged in here. When examining interpretivism we are concerned with whether moral reasons are determinative in legal *reasoning*.

We have seen that under interpretivism principles play a justificatory role in legal argument, telling us what is valuable about the law. We have also seen that they are part of the law, in that recourse to principles is necessary to answer difficult legal questions. We must now ask whether certain moral reasons have a monopoly on legal reasoning. If that is the case then legal systems can only be reasonably viewed as a truncated version of morality. What we are interested in is not whether there are

certain moral problems that the law will never deal with, as this is a factual, rather than conceptual question. What concerns us is whether certain moral reasons have such a monopoly on legal reasoning that they operate to exclude others that should be taken into account under normal moral reasoning. In order to do this I will examine the prevalent interpretivist theory of legality, law as integrity, in the sections that follow.

IV. Integrity and Equality of Concern and Respect

Law as integrity is a value, rather than a truth conditional rule or positivistic test, and as a result can be the subject of reasonable disagreement. A very basic definition of political integrity is that it is the value of a community personified treating its members as being worthy of equal concern and respect through consistently applying its own conceptions of justice and fairness to them. In this section I will analyse "equality of concern and respect" (hereafter equality of respect) and examine the relationship between that value and the general principle of consistency developed above. This exercise will allow us to pinpoint what is valuable about integrity and make some conclusions about its alleged status as a value. This, in turn, will further our understanding of legality.

Equality of respect can sensibly be seen as a moral value. It is the notion that people should treat each other as being of the same value as human beings without discriminating on the basis of irrelevant characteristics.[41] To use Dworkin's example, whether the year in which someone was born was an odd or even number should have nothing to do with whether or not that person's choices should be respected.[42] Respect itself is a complex concept that includes taking into account someone's best interests, opinions and autonomy. It is rooted in reciprocity and requires one to treat another as one would wish to be treated in their position with their characteristics. A relationship based on mutual respect is not reciprocatory in the way an agreement to further mutual interests or benefit is. The parties do not do so out of desire for personal gain. Equality of respect is an altruistic value because it requires one to respect others because they deserve to be respected. Historically the value is deeply rooted in the Kantian notion of the 'kingdom of ends'.[43]

Equality of respect is formal only at the level of the respect afforded; it is a deeply substantive theory of equality at the applied level, requiring treatment to suit the individual needs of the object of respect. Dworkin's argument that the disabled enjoy fewer personal resources as a result of their disability and that such inequality is worthy of compensation is an excellent example of this.[44] The equality arises from applying a

consistent network of correct moral values to all people so that they receive the treatment they deserve.

Integrity flows directly from equality of respect in conjunction with interpretive methodology. Given the facts of a particular legal system, integrity requires a reading of those facts that best complies with equality of respect.[45] I will discuss the notion of 'the facts of a particular legal system' later but for now it serves to note that all the moral work of integrity is done by the separate value of equal respect. This has a particular manifestation in the requirement of consistency. Integrity's insistence on interpreting the law consistently comes from the requirement that people should not have different principles applied to them, or the same principles applied differently, for arbitrary reasons. Of course, the upshot of this must be that if departing from past practice actually furthers equality of respect then integrity requires it.[46] To argue otherwise is argue on a basis other than equality of respect and thereby rob integrity of its basic moral force. The conclusion that consistency is important only because substantive moral reasons make it so adds a further dimension to its epistemological function and is of paramount importance for us. As Gerald Postema puts it, we might be 'morally required to follow immoral principles'.[47] I will examine this seeming dichotomy in my final section but it suffices to conclude at this stage that moral reasoning is engaged at all levels of this theory of legality. Furthermore, any argument against law as integrity's moral justification must be an argument that shows true propositions of morality sometimes conflict with equality of respect. Given the deeply abstract and altruistic nature of this value, such an argument will be very difficult to make.

Dworkin defines integrity as a distinct political value that 'sits between' fairness (defined as the correct method of organising a political system) and justice (defined as the correct outcomes of political decisions).[48] Stephen Guest disputes this clear separation by arguing that equality of respect is the foundational value of justice, fairness and integrity, which serves to tie all three together.[49] He claims that we can only understand justice in particular by appealing to the idea that we should afford equal respect to individuals.[50] Whether this is all that justice rests on, or whether notions like punishment play a role on a similar level of abstraction, doesn't matter for our present discussion. Certainly it seems very difficult to conceive of a workable conception of justice that isn't committed to some conception of equality of respect. This suggests that integrity itself is either indistinct from justice in all essentials or is merely a theory of applied justice and fairness.[51] This bodes well for the ultimate conclusion of this paper, as applied morality is still morality.

V. INTEGRITY AND COMMUNITY

Integrity as I have discussed it so far has been reducible to a moral justification for consistency based on equality of respect. For Dworkin, however, an important aspect of integrity is its relation to the political community, which he takes to be the nation state. This is where law as integrity starts getting complex, because we move from talking about the values of equality, justice and fairness to talking about a particular community's conceptions of them. Law as integrity argues that in discovering the content of the law one must look to the principles that best justify the particular practices of an actual community. These principles, when considered together, indicate a particular conception of justice and fairness held by that community personified.[52] Integrity demands a uniform application of that conception.[53] Dworkin argues that law as integrity so defined is the best justification going for political legitimacy.[54] In this section I consider what, if any, moral weight is generated by the fact that such principles belong to the community. This is important because if the fact that the principles we apply come from our community is determinative of their legal validity, my thesis would appear to be a non-starter.

Dworkin describes a 'true' political community as generating political obligations in the same way that more familiar associative communities such as families or friendship groups do. These latter groups are held to produce *pro tanto* moral obligations on the basis of being a member of that group rather than for reasons of consent or general duties of justice.[55] For Dworkin only 'true' communities create obligations of this kind and in order to be considered such they must first be 'bare' communities in some identifiable social sense.[56] The conditions for a 'true' community are that the relationship is *special* in that it is distinguishable by its particular value from background duties, *personal* in that all members consider the obligations to bind individual members to each of their fellows and for an *equal concern and respect* to exist between the members. This is not a psychological state but a moral proposition; it doesn't matter whether the members of the group feel like this but rather that they should.[57] Dworkin claims that such a community goes hand in hand with obligations to adhere to the principles of the community taken as a whole.[58]

There are several things about this that are not clear. Firstly, as Leslie Green points out, Dworkin fails to provide a detailed definition of a 'bare' community.[59] This might seem a relatively trivial point to an interpretivist, who is concerned with theorising about our normal social practices. However, in the present instant to trivialise this point would be

a mistake. In Europe this is particularly so given the importance of regional legal systems such as the European Union and the Council of Europe's treaty bodies. In the UK, for example, are principles derived from national legal practices, the practices of all of Europe and/or the practices of the Union? Should this be on economic issues alone or on fundamental rights as well? Furthermore in political communities that have more than one legal system due to federalism or devolution, should we be concerned with the principles of the whole or of its parts? The model of community Dworkin uses seems too simplistic to account for the inter-percolating systems that comprise modern legal practice. In addition, it is becoming increasingly popular in political philosophy to reject the moral relevance of the nation state.[60] Surely we should be making moral arguments about what should count as a community rather than relying on a 'bare' factual filter to shut us off from considering certain possibilities.

The next issue is that there seems to be tension between the requirements that a community be considered 'special' and that its members must have equal concern and respect for members of that community.[61]Presumably a community's members must have concern as a result of their special relationship in order to create any meaningful distinction between the community and the rest of the world. However, can any understanding of equality of respect be commensurate with such partiality? Isn't the very core of equality of respect vested in universality and impartiality? This seems to lend support to Guest's argument that the core of justice is equality of respect and that integrity seems to be justice diluted.[62] This in turn suggests that legality based on equality in that way should be a universal moral principle and should not take parochial conceptions of justice and fairness as the grounds of law.

This criticism is all the more forceful in light of the importance of moral responsibility to moral truth.[63] It seems difficult to imagine a good faith moral justification of equality of respect that allows differentiation between persons based on their membership of a particular nation. How can I claim to respect people as valuable in themselves if this respect only extends to those who share my nationality? This seems to be a moral argument of bad faith in the ways I describe above. In any event, it seems more appropriate to ground moral justifications of partiality in some other *ethical* thesis, such as the importance of partiality in developing a human's capacity to love deeply and emotionally engage. Of course, such a thesis sits very poorly with the anonymous nature of a political community.

The final problem is that even if we take political communities to be associative in the way that Dworkin conceives of them, that would not give

rise to a general obligation to obey their commands. Leslie Green points out the initial difficulty Dworkin faces: the moral force of an association depends on the substance of the association itself, rather than the form, because association in abstract has no moral point or purpose like concrete associations such as family or friendship do.[64] It cannot be the case that any associative community so defined generates moral obligations. Dworkin concedes this in his reply, commenting that wicked communities can generate no such obligations.[65] That objection cannot take us far however because Dworkin's definition of a 'true' community has a substantive moral element, that of equality of respect. As Stephen Perry notes, this value is the most plausible candidate for providing the intrinsic worth of a political community, a worth that would seem necessary to generate even *prima facie* moral obligations.[66] Nonetheless, given the tension between that concept and the necessary partiality of an association, we cannot use it to defend associative communities as obligation generating in themselves. This is because if the moral force of associative communities rests on a value that, properly understood, requires those outside the community to be treated the same way, then the community adds nothing of moral relevance. We have no moral reason to hold the moral views of our own community as worthy of more respect than those of other groups. As such we have no reason to base our legal system on those principles exclusively.

Green then goes on to dispute Dworkin's example of a community that is otherwise egalitarian but demands that daughters defer to the wishes of their fathers regarding marriage. In this example the requirement is itself unjust but nonetheless well meaning: it stems from an incorrect conception of equality of respect, rather than a failure to hold that value.[67] Dworkin accepts that this would be a case of injustice but still maintains that the community's expectations generate moral force.[68] He concludes that though reasons of justice might require disobedience, the existence of a *prima facie* obligation is evidenced by the regret we would expect the daughter to feel for disobeying her father and the apology he could legitimately expect.[69] Green points out, rightly I think, that this is not evidence of a violated duty of obedience, but rather of a separate obligation to respect the father's wishes or even to respect the community itself. [70] The crucial point is that it does not contribute to the normative force of the community's decrees because it is overridden the instant a countervailing moral reason of any force is provided. It fails, in other words, to contribute to the overall project of Dworkin's theory of law as integrity, which is to demonstrate the value of legality as the justification of domestic law's coercive power. Dworkin acknowledges this in his reply, going so far as to say that integrity (understood as principled consistency alone) cannot justify a duty to obey

the law regardless of its content.[71] Associative communities can perhaps justify a moral duty to adopt certain attitudes, but not one of obedience. Only genuine moral authority can do that. Indeed attitudes just shy of obedience might be best understood as justified by the universal duty to respect all persons equally, which as we have seen cannot be tied to particular communities anyway.

A final position remains to be considered. Does community produce some sort of non-moral normativity that justifies the binding of people to a partially moral code? Some philosophers, such as Korsgaard, have discussed what 'founds' normativity.[72] Certainly, on the model of moral truth that I have argued for, morality as a normative system needs no further foundation. Given that true moral beliefs *are* the arguments that support them, it would seem to be a tautology to speak of justifying morality; it is like speaking of the need to justify justification.[73] What one has to ask is whether any non-moral justification of normative propositions is possible.

Jules Coleman suggests that we may have 'content-independent moral reasons' to obey the law.[74] I find this assertion highly bemusing. Coleman indicates that considerations such as fair play justify obedience to law regardless of content. This displays a fundamental misunderstanding of justification. Treating any old moral reason as justificatory on the basis that it has some applicability to a situation is not how justification works. When examining whether fair play justifies obedience to the law we must consider the countervailing moral effect of the legal proposition we are asked to obey. If we do not then we are guilty of bad faith by explicitly choosing not to assess principles that may be (and to make this an interesting problem in first place) probably are, contradictory to the position we adopt. As I showed in Section I, this has the paradoxical quality of being a morally irresponsible moral position. I doubt, however, that Coleman is committed to such a view. Indeed, he accepts that law can normatively 'misfire' by virtue of failing to deliver the proper moral 'point of view'.[75] This strikes me merely as a somewhat over-complicated way of saying that normativity rests on moral justification. There seems to be no basis for non-moral normativity in an argument such as this.

Korsgaard's discussion of justifications for normativity highlights one interesting theory in the shape of the 'volunteerism' of philosophers such as Thomas Hobbes. This is the familiar claim that normativity can be grounded in the special authority held by a particular body or person over others.[76] Authority of this sort is gained through the capacity to enforce. Legal philosophy threw command theory out with the ark, but as a justification for normativity such theories purport to justify, rather than

describe, obedience. I can see no prospect of success here. Unless we are to reject the idea that no 'is' directly leads to an 'ought', an additional and plainly *moral*reason is required to tell us why such authority holds normative force. There is no non-moral normativity to be had here either. It seems best to abandon the search altogether. The need to justify any normative claim will invariably lead one back to morality at some stage and as we have seen, there are no good moral reasons going for the intrinsic force of community.

If we are still convinced that legality is intrinsically tied up with community values then we are left in a tricky position. As we have seen so far, hard cases of law are solved by appealing to the moral principles that justify the law in order to discover what the answer should be. This, interpretivism dictates, is what applying 'the law' actually means. However, if we are to assume that our principles are generated by the community, and not by what morality actually demands, then there is nothing of moral value in our principles (because a community generates no serious moral weight) and our task becomes impossible.[77] Law as integrity shoots itself in the interpretivist foot.

This situation arises because Dworkin claims two things that, on closer consideration, are actually inconsistent. Firstly he says that we can reach a sceptical conclusion that the law is of no value and that our project should be abandoned.[78] Secondly he says that we can still count integrity (defined as principled consistency) as sovereign over what the law is in an unjust but consistently principled system.[79] How can we interpret with principles, whose argumentative force is determined by their moral substance, when those principles are devoid of such substance? Stephen Guest suggests that we can do this by making an interpretation from the point of view of a judge who believes that these principles hold value.[80] He distinguishes, as Dworkin does, between the grounds (or truth conditions) and the (moral) force of law. It is supposedly possible under law as integrity to understand the law of an immoral legal system to be law whilst condemning it as unjustifiable, because our language is 'flexible' enough to describe it as such.[81] This cannot be though, for interpretivism requires us to discover what the law is by enquiring into its moral force.[82]

Dworkin accepts that we make correct moral judgements by developing a network of interconnected and mutually supportive values.[83] He is also committed to the view that we reach correct moral answers by adopting an attitude of moral responsibility and reflecting upon the soundness of the arguments for our conviction.[84] It is hard to see, given this methodology, how we would go about interpreting the practices of an

unjust system in such a way that we could consider its evil principles as grounds of law. How does one understand the principle of racial superiority when one engages in reflective reasoning and has to commensurate it with values such as moral responsibility? Could a Nazi judge actually make a consistent justification of legal practice if the principles he is applying are deeply irrational? This seems unlikely. In order to construct a coherent body of principles on this basis we would have to commit to some principles that were so blatantly absurd that they would fail to stand up to the most simple moral examination. A principle that cannot stand on its own merits can scarcely be held to justify legal practice, even if it is perfectly consistent with it. After all (and it bears repeating) it is the *substance* of the principle that gives it the role it has in legal interpretation. In the case of an evil legal system wouldn't a more natural conclusion be that, because its legal practices were incapable of meaningful interpretation, it has no law at all? Wouldn't it make more sense to conclude that it merely has coercive force being applied on an inconsistent, unexamined and unintelligible basis?

How can we save integrity from this mess? I believe that we can do so by eliminating the element of community that distinguishes integrity from equality of respect. We can use commonly held views of what counts as equality of respect *as a starting point*, but would have to assess them as moral arguments, rather than considering them established canon. If we have a prevalent or traditional conception of this idea and country X has one that stands up to moral scrutiny better, we should prefer their conception when considering what our law demands.[85] This is very similar to Stephen Guest's notion of law as justice.[86] If we make a general justification of our legal practices through the value of equality of respect directly, then we don't need to struggle with the problem of obeying a particular community's principles as definitive grounds of law. Instead we can argue for the use of genuine principles: that is, principles that stand up to normal moral scrutiny. Such an account of principles fits well with legal practices such as appealing to foreign precedents because it explains why we think substantively correct moral conclusions matter in hard cases.[87] As such, this theory has the benefit of explaining some common legal practices in addition to avoiding the problems engendered by attempting to argue, as Dworkin does, for the importance of moral reasoning on the one hand and community values on the other. Appealing to universal, as opposed to community based, moral principles affords us the luxury of not being tied to tradition when considering what conception of those principles makes sense. Such freedom to speculate means that we can engage in moral reasoning in a far more responsible way. As lawyers we can proceed on the basis that we are applying principles we believe to be true, rather than those we don't.

Of course, this once again reduces integrity to a theory of *which* moral standards legal propositions have to satisfy. It is a theory of legal morality and cannot be used to dispute my thesis that true legal propositions never conflict with what morality requires under an interpretivist model. We are back where we were at the beginning of this section: if you want to dispute the morality of legality you have to dispute the morality of equal concern and respect.

VI. INTEGRITY AND THE DIMENSION OF FIT

In this section I turn from abstract discussions of the moral value of integrity to see whether this moral value in fact justifies legal practice (as a theory of legality must). I ask whether integrity explains our adherence to precedent and whether alternative explanations might suit that phenomenon better. I end this section by suggesting that law as integrity leaves out an important element of legal practice: that of moral progress.

The adjudicative principle of integrity is famously composed of an element of fit (making sure that one's theory in fact explains legal practices) and one of justification (ensuring that the theory explains what is valuable about the practices). These two elements are not separable but form part of a single interpretive exercise.[88] The element of fit is not one of mechanical consistency but rather one of interpretive consistency. This means that it doesn't demand us to fit a judicial decision with past practice but to make a decision fit with the principles that justify past practice.[89] My discussion of integrity so far has highlighted the problems with viewing the (possibly unsound) principles of a particular community as the grounds of law. The adjudicative principle of integrity is designed to reflect this conclusion that I so hotly dispute. Nevertheless there is something intuitively appealing about it. We paradigmatically argue from the past political decisions of our own community rather than those of others. Indeed the whole system of arguing from authority, rather than on the basis of sound moral argument, suggests that our legal practices value something about such sources. A major task for my thesis is therefore to explain this practice in such a way that justifies my previous conclusion that it is morality, and not a moral reading of past practice alone, that gives legal propositions their truth.

First I want to make a methodological point. The idea of 'fit' and 'justification' is actually one common to all interpretive methodology and not unique to legal reasoning. Dworkin's analogy of the chain novel demonstrates this.[90] In normal interpretive methodology one assumes there is a substance one 'fits' one's interpretation to. Interestingly in all of

Dworkin's examples this is a settled matter. In his chain novel example his authors fit their interpretation to the existing text. Hercules fits his legal interpretation to the collection of political decisions presented to him by his fictional variant of the American legal system.[91] The problem with this is that in real life there is no such thing as a fixed list of legal sources. In the UK we accept that among our legal sources are things such as statues and case law. However we also refer to academic commentary, international standards and comparative jurisprudence. The latter are taken to be non-binding of course, but this is only a feature of Anglo-American legal systems. In Germany for example, courts often treat past decisions and academic commentary as equally persuasive.[92] In countries with a written constitution it would seem easier to locate the definitive list of legal sources that we may 'fit' our interpretation to. However legal practice almost always expands on such documents. The case of *Marbury v Madison* in the US is a key example of this.[93] The Supreme Court actually increased (or at least pointed out the logical extent of) the power of its own decisions through legal interpretation. *Marbury* is instructive because it illustrates that what we ultimately need to 'fit' as interpreters is not legal sources but rather legal practice. Legal practice is, unfortunately, not something that we can refer to in written format because it comprises more than official decisions. It includes methods of reasoning and substantive moral convictions. For example, in the UK Parliament is considered sovereign by many. Whilst we could provide a historical account of how this came to be, we would have no *reason* to accept this tradition as part of our legal practices, only an *explanation* of how we became aware of the possibility of counting it as such. We must hold a substantive moral conviction that Parliament *should* be sovereign in order to justify why we consider obedience to it as part of our legal practices. Even fidelity to a written constitution requires an underlying moral theory. If not, one could not proceed with moral-principle-based legal reasoning, as judges can so obviously be seen to be doing. Without independent justifications of their existence, legal practices cannot be interpreted. Legal interpretation requires the interpreter to identify the practices that count. Making the best sense of legal practice cannot be the same as interpreting a novel or a collection of official decisions.

Note that I am not repeating the 'Hercules is a myth' objection.[94] For Dworkin, Hercules is an ideal that illustrates how a real judge should reason. My objection is that a real judge simply cannot reason this way. This is because in order to have a concept of fit one requires a positive moral theory of what should count as the sources of law one is interpreting. Ask yourself the following question: why do statutes count as sources of law? An American lawyer might respond by citing his nation's

constitution. He faces exactly the same problem there though. Ultimately all that one can ever do is to provide a substantive moral reason why a particular source counts as an appropriate target of interpretation. Law as integrity fails to do this because it assumes that the question of what counts as legal practice is a settled matter. Take the example of international law and the creation of *jus cogens* norms. Traditional theories of international law suggest that it develops from different varieties of state action or consent.[95] We could adopt a Dworkinian approach to this and argue that the global community of states is what we draw our legal practice from and that the grounds of law are the principles that best justify that state practice. However state practice can purportedly create norms that then exist regardless of whether state practice conforms to them. Do we accept the application of these norms as part of our legal practice or do we reject them as inconsistent with our practices thus far? Whatever we decide, we will have to provide a reason for including or excluding them other than the fact that they exist. To use another example, official decisions of a political community include arrests made by the police. Do we count these as part of our legal practice and require a theory of legality to account for the reason why more young black males end up being arrested for the same offences than young white females? Of course we do not, for we have good moral reasons not to count these actions as part of our legal practices. So why do we place so much weight on the opinions of a judge writing one hundred years ago and not on a modern academic at the height of his powers? It seems difficult to answer this question other than by providing a moral answer.[96] Legality therefore requires moral justifications for every aspect of legal practice. If a legal practice has none, then there is no reason for considering it to be a worthy object of interpretation.[97]

This conclusion has less of an impact upon our current legal practices than one might think. As previously stated, we can already provide positive moral reasons for why statutes and case law 'count' and prosecution demographics do not. By forwarding the conclusion I have, I am not suggesting that all our present sources of law are invalid, merely that everything treated as a source of law must have a moral justification. Nine times out of ten leading cases provide a wholly justifiable moral basis for a legal decision. Every now and again however, such as in the case of *R v R*, authority should be and is overturned for moral reasons.[98] A theory of legality that places justification at the heart of 'fit' accounts very well for this. That a positive moral value can change our approach to interpretation should be no surprise, as a theory of interpretation is itself a moral theory.

I can now move on to discuss the substance of the doctrinal stage of law as integrity. It provides us with a very good reason why we should accept

statutes as valid sources of law regardless of their content. Equality of respect, it is argued, requires us to respect the moral value of the moral beliefs of others even when they are wrong.[99] We can justify enforcing a statute in some circumstances if the result of doing so demonstrates a greater equality of respect than not doing so. The explanation is not as obvious for law as integrity's treatment of judicial decisions. As Fred Schauer points out, "only when past wrong decisions can [allegedly] provide reasons for decision despite their wrongness, and therefore precisely because of their pastness", do we cast about for some content-independent moral weight.[100] Dworkin's answer to this problem is that past judicial decisions create "embedded mistakes", which if not propagated, would violate equality of respect by causing people's expectations to be frustrated.[101] Such a mistake loses its "gravitational force" and cannot contribute to the interpretation of other propositions of law but retains its "specific authority" to govern its particular circumstances. Leaving aside the question of where to draw the line between a decision's gravitational force and specific authority, it is morally questionable why one should enforce a wrong decision of a past judge when there is no democratic force behind it. To put the question another way, does equality of respect really require us to maintain embedded mistakes because respect implies satisfying a person's expectations of authority?

There is certainly a principle of legitimate expectations in public law that might be given as evidence for this.[102] However, it seems odd to justify a doctrinal error, no matter how deeply embedded, as worthy of being upheld on the basis of respect. Surely it would demonstrate greater respect to apply correct moral reasoning to an individual rather than bind them by morally inappropriate standards, even if these standards benefit them? After all, as I commented in my third section, equality of respect requires action appropriate to the object of respect and not necessarily the treatment such a person either expects or desires. Furthermore the adjudicative principle of integrity is concerned with "horizontal consistency...amongst the principles a community *now* enforces" (emphasis added).[103] To count the age of a precedent as relevant implies that maintaining a particular set of principles is in fact important, which might be counted as an internal inconsistency of law as integrity.

Indeed, a drawn line between "principles now enforced" and 'old' principles needs must be blurred. If we take every new judicial decision in a hard case as altering the interpretation integrity requires, at least in part, then all attempts to justify precedent with equal treatment must fail. This is because every time a new decision is reached, and legal practice alters, the principles we adopt will alter in their application even if not

immediately in their substance. New legal possibilities will suggest themselves and a certain amount of follow-up litigation will result. Time passing is obviously important and just because change is incremental we should not be tempted to deny that it is change.

If, on the other hand, we accept that the correct standards for determining true propositions of law are moral standards, rather than the best moral interpretations of a changing set of legal practices, we can re-establish Dworkin's claim that judges reasoning morally are applying the law rather than changing it.[104] Since principles enforced by a community change over time and judicial decisions form a large part of the interpretive basis of such principles, it seems hard to avoid the charge that judges change the law if the grounds of law are the principles adopted by the community. If the principles used are true moral principles, rather than principles that depend for their weight in part on emanating from an associative community, then the judges really do apply, rather than make, the law. That is because what counts as a true moral principle is metaphysically restricted to those supported by an unassailable moral argument. When we appeal to moral principles in the normal way we seek to establish a case for all places at all times. If law is based on such a case then it cannot *be* changed, only progressively realised.

Some might object at this stage that such a theory of legality sits very badly with the practice of precedent and that judges are hardly infallible when it comes to determining correct moral principles anyway. I fully accept the latter point and it is for that very reason that I reject the former. Given the problems law as integrity seems to encounter in explaining precedent I propose an alternative conception of legality. Dworkin comments in his discussion of legality that 'accuracy', the value of implementing the correct moral answer, was favoured by the ancient natural lawyers because it enables the law to instantiate God's will.[105] I propose that accuracy is an important aspect of legality, and one that law as integrity neglects, because it instantiates, not God's will, but correct moral reasoning. If we view precedent, not as a collection of definitive conclusions on matters of principle, but as an ongoing project of investigation into the nature of an ideal set of social relations, then we can develop a view of legality that promotes the importance of moral development. Since the early days of moral philosophy scholars have used moral arguments to enquire into the meaning of important concepts and to develop theories of virtue and state. It is widely accepted that we develop our moral theories best when many minds engage on important issues and understanding flourishes in academic debates when critics emerge and theories are put to the test.[106] Even more progress is made with ideas when philosophers apply them to new problems and seek coherence across broader ranges of

examples.[107] Precedent can be seen as fulfilling an analogous role.

I am not suggesting that what counts as a true proposition of law changes as moral progress is made, but rather that getting the law right is aided by developing a corpus of discussion of various issues because that corpus itself aids moral investigation. Under such a model, precedent would only be worth following if it was morally correct but it would still be a valuable contribution to an ongoing project even if it were wrong. This model of the value of precedent accounts very easily for instances where established precedent is overturned. Any contentious decision that overturned established precedent, such as *R v R* in the UK or *Brown v Board of Education of Topeka* in the US, can be seen as justified because it got the law right not just in terms of consistency but in terms of content.[108] Adherence to past practice when in doubt also has the established merit of ensuring that fewer mistakes are made.[109]

Such a theory of legality might be 'forward looking' in a sense, but should not be confused with theories such as legal pragmatism, which are forward looking because they require judges to consider what rules might be instrumentally useful for the future.[110] Instead this conception of legality is one that recognises law's momentum as an evolving system of principles based on moral investigation. It always aims, however, to get matters of principle correct in the present. It is the past that is questioned – the future is not speculated about.

Under a theory of legality that emphasises the importance of moral investigation, equality of respect could still be the fundamental value of a legal system. Indeed the two seem to sit very well together as both equality of respect and accuracy require in-depth moral justification of legal decisions in order to prove why the solution adopted justifies the way the parties are treated. Furthermore, the value of precedent would be maintained under such a conception of legality: judges would be pushed to emphasise why reaching a different decision in the present case was required. The emphasis would be on why a different solution was reached, rather than why a previous decision should be repeated. The result of this is that the equality of respect that law as integrity promotes, that of ensuring that consistent principles are applied to all, would be better served by adopting this less stringent adherence to precedent. For after all, how could we describe a person as being of integrity if they failed to question their own beliefs? Surely the consistency of integrity comes from reflective concern for others rather than dogmatism or arrogant belief in one's moral perfection? Perhaps this 'new' theory of legality I am arguing for is in fact a variety of integrity itself. It doesn't matter what I call it. The important point is that it describes the value of legality as one that

actively aims to transcend parochial conceptions of value rather than being held back by them. Accepting this theory of legality requires one to accept my overall thesis as well. This is because legality (for interpretivists) is what gives rise to the truth conditions of law and this theory of legality requires the best possible moral answer to any legal question.

This theory of legality might seem counter-intuitive to some but only if one focuses on the legal practice of *stare decisis* alone. It is important to bear in mind that we are seeking a justification of legality that captures the value of all our legal practices taken together. I believe that this union of accuracy and equality best justifies legal practices such as judicial use of academic writings, comparative doctrine and international standards in formally dualist systems. It also helps explain the increased importance of dialogue between national and international courts, in addition to that between courts and legislatures.[111] These practices are easily understandable through a theory of progressive accuracy. Furthermore, whilst it might have serious implications for the nature of the value of past precedent, it could very easily leave the duty of lower courts to obey higher courts untouched. We might seek to justify the latter with arguments of efficiency, claiming that it would just be practically unworkable to have an appeal system without vertical precedent of this kind. After all, to a theory of legality that places emphasis upon accuracy, quality of reasoning is of paramount importance. If the courts have no time to reason at length because of flooded dockets then the whole legal project goes down the drain. Vertical precedent might be an entirely justifiable solution to this problem.[112]

It should also be remembered that whilst the common law world agonizes over *stare decisis*, very many legal systems who also prize legality have no formal system of precedent and treat past cases as persuasive only. There is also no strict doctrine of precedent in international law and judicial decisions are only 'subsidiary means' of interpreting other sources under Article 38 of the Statute of the International Court of Justice. Incidentally, the same weight is given in that statute to academic opinion. Furthermore, in the UK, the Supreme Court has the power to override any of its previous decisions following the judgement of the House of Lords in the Practice Statement so as not to 'unduly restrict the proper development of the law'. [113] The UK Court of Appeal also has the power to override its own decisions in criminal cases due to concern for individual justice. In civil cases whilst it is formally bound to its past interpretations of the law it can override its own previous decisions in the event of mistaken views about the existence of legal decisions or when there is a conflict in the doctrine.[114] A union of accuracy and equality explains this more flexible approach to precedent and reflects the current state of legal practice

better than law as integrity.

VII. Law: Morality in Context

In this section I expand upon the conclusion that, for interpretivists, true propositions of law depend upon what morality demands. I adopt an understanding of morality that reflects the both the theory of moral truth advocated above and the theory of legality that I have developed. This is that 'what morality requires' must be answers to specific questions given the context in which they are asked and not what those answers would be, were it not for that context. This is both because of the correct standards of moral reasoning described in Section I and because legal questions deal with real problems, not simple thought experiments. It is important, as a result, to root moral questions in the choices that people have to make. As Dworkin puts it in the context of the allocation of resources:

"...we should begin in ethics...The mix of personal ambitions, attitudes, and preferences that I find in...the overall state of the world's resources, is not in itself either fair or unfair to me; on the contrary,*that mix is among the facts that fix what it is fair or unfair* for me to do or to have." (Emphasis added.)[115]

It should be clear from my discussion of legality so far that I consider it to promote correct moral decisions of this nature. I argue that it does so through an equal commitment to both accuracy and equality of respect. Even if my previous criticisms of law as integrity are not convincing, I have at least demonstrated that morality underpins every aspect of *that* conception of legality.[116] As a result of legality requiring moral justification all the way down, legal propositions must be morally sound.[117] The interesting question is what legal reasoning based on moral soundness alone might look like.

Practical moral judgements are highly contextual. It might be acceptable for the law to allow something to happen that might be considered wrong in isolation. The moral question addressed to a legal decision-maker is not whether the outcome contains only aspects that are right in themselves but whether the overall outcome is the best possible or not. This is exactly the same as the moral question that we would ask in the same circumstances. The only difference is that the legal question is asked as part of our legal practices.

One example of this might be judicial review of a hypothetical American income tax statute.[118] Raising income tax to 99% would be immoral and as a result unlawful under the theory of legality I have proposed. It

would have crippling effects on individual economic autonomy and would frustrate the 'Blessings of Liberty' that should be protected for each individual as well as arguably being against 'the general welfare of the United States'.[119] Such an argument would rest on a theory of liberty that included economic autonomy and a theory of general welfare that required protecting such liberty. Not only might such principles be identified in current views about American legal practices but (more importantly for the value of accuracy) might stand as an independent moral theory of taxation. Here the correct legal solution would be to strike down the statute on the basis that the injustice it would create outweighs all countervailing considerations.

If income tax was set at a less obviously wrong level, say 12%, the court would have no obvious moral reason to overturn it. Even if the ideal level of income tax for promoting liberty and welfare in the U.S.A. is 11.5% the Supreme Court might refuse to review the statute on moral grounds, even if it had the relevant expertise. It might cite reasons such as upholding the separation of powers or the democratic force of the statute.[120] Note that political values, such as democracy, are engaged here: the Supreme Court is not simply being pragmatic, but is engaging in matters of principle. Here the correct moral solution would be to uphold a taxation level, which considered in isolation of the legal practices it is implemented by, would be less than ideal.

It is of course useful to think of how the problem should be answered if the institution applying it didn't exist. This promotes the very accuracy that I have argued is so important to legality. Imagining a world in which no one held incorrect moral views and no genuine mistakes were made is important for promoting individual justice. However, as our discussion of legality indicates, morality is not reducible to the right outcomes to particular problems in isolation of their place in a wider social system. In order to find out what morality truly requires in a particular case we have to take everything into account - including our institutional framework, differences in opinion and collective fallibility. Dworkin makes the distinction between pure (dealing only with justice) and inclusive (dealing with fairness and due process as well) integrity for that reason.[121] For him the value of legality is found in inclusive integrity, which requires this all-things-considered, practical moral reasoning. This understanding of what morality demands is the same for my theory of legality. I maintain that sometimes, such as when a statute is passed by a democratic process, it is morally required to uphold something that seems to flout justice (in the sense that Dworkin defines it).[122] This is because justice so defined, is not all there is to morality.

So, the short answer to the question of how my theory of legality changes legal reasoning is 'not much'. But this makes sense. After all, I have attempted to propose a theory that fits, as well as justifies, current legal practice. The difference is one of attitude and degree: we should be prepared to defend and question everything on substantive moral grounds. We do this to a great extent already. I am merely arguing that it is time to acknowledge and exemplify it.

Assuming that my conceptions of legality and moral reasoning are correct, then my thesis that (for an interpretivist) legal propositions never conflict with what morality demands is also correct. If law requires moral justification and moral justification proceeds on the basis of providing the best possible answer, then any proposition of law that fails to satisfy that standard is false. After all why should we be so modest – sensibly in my view – about our ability to discover the best moral answer, and yet so bold as to assume that any of our legal propositions are easier to justify? Given the total dependence of law on morality, it seems only such self-assurance stands in the way of my thesis. Surely that is not reason enough to deny it?

8. Conclusion

I entitled this essay 'Expanding Law's Empire' because that is exactly what I have attempted to do. I have developed an interpretivist theory of legality that is not community based but universal and promotes pursuit of the perfect legal order. I have attempted throughout to remain true to interpretivist methodology whilst arguing for a 'natural law' conclusion. The notion of law as 'right reason...[which is] unchanging and everlasting' might seem outmoded but can be amended through the modern school of interpretivism to provide a sound justification of legality.[123] This theory of legality takes law's purpose to be providing the correct moral answer to a particular problem given a specific set of facts. In many ways, moving from Dworkinian interpretivism to natural law interpretivism is a matter of degree more than anything else. My arguments have, for the most part, constituted a positive moral case for a universalist conception of legality. I am not proposing a new theory of analytical jurisprudence, merely asserting what I feel to be a better interpretation of legal practice.

As we have seen, legal reasoning so conceived is identical to moral reasoning and both reasoning processes demand us to consider the same material. It seems logical that if two phenomena (in this case legal reasoning and moral reasoning) share identical characteristics, then they are the same. We might be ambitious enough to conclude that not only does a true legal proposition never conflict and/or depends on the answer to an identical moral question, but that they are the *same* proposition metaphysically. [124] I leave open the question of whether this is

correct, as practically it doesn't seem to matter. The results of my conclusions are that courts need to take moral arguments more seriously and be prepared to question the moral basis of established authorities. It is better to realise the gravity of the task facing our judges than to simply ignore the importance of morality to law.

REFERENCES

[1] Ronald Dworkin, *Law's Empire* (Hart Publishing, 1986) 65.
[2] Ibid. at 72; Ronald Dworkin, *Justice for Hedgehogs* (Belknap Havard, 2011) 160-163 I take 'paradigm' to mean a legal proposition, attitude or activity that is taken to be appropriate or true by the majority. An example is opinion that in criminal trials the burden of proof is on the prosecution. Such 'common knowledge' is not unshakeable, as every proposition has to satisfy law's truth conditions, whatever these may turn out to be. (See Mark Greenberg, 'How Facts Make Law' in Scott Hershovitz (ed) *Exploring Law's Empire: the Jurisprudence of Ronald Dworkin* (Oxford University Press, 2006) 226.) A paradigm might be dismissed as incorrect after one's legal theory develops an account of such truth conditions.
[3] Dworkin, *Law's Empire* at 87.
[4] Ibid at 48.
[5] Ibid at 89.
[6] Ibid at 48-49.
[7] Ronald Dworkin, *Justice in Robes* (Belknap Harvard, 2006) 12-13.
[8] Dworkin, *Justice for Hedgehogs*, 23-96. Dworkin goes into these challenges in far more detail than I can and I broadly agree with the position he takes. In particular, he discusses a variety of different types of skepticism in some detail in relation to the first challenge. In this paper I restrict myself to what he describes as 'global external skepticism'; theories that attack moral objectivity wholesale and at the conceptual level.
[9] Graham Harman, *The Nature of Morality: An Introduction to Ethics* (Oxford University Press, 1977), 3-21; Nicholas Sturgeon, 'Moral Explanations' in Russ Shafer-Landau & Terence Cuneo (eds), *Foundations of Ethics* (Blackwell, 2007), 337-352.
[10] Dworkin, *Justice for Hedgehogs*, 76.
[11] See for example: David Hume, *Treaties on Human Nature*, Book I, Part I, Section I; Richard Hare, *The Language of Morals* (Oxford University Press, 1952) 29, 44; Dworkin, *Justice for Hedgehogs,* 44-46; Arthur Prior, *Logic and the Basis of Ethics* (Oxford University Press, 1949) 32-33. However, this principle has been disputed by those subscribing to 'ethical naturalism': Rosalind Hursthouse, *On Virtue Ethics* (Oxford University Press, 2001) 192-238.
[12] Even the logical principle that 'ought implies can' is a moral assertion.
[13] Dworkin, *Justice for Hedgehogs*, 42.
[14] Dworkin, *Justice for Hedgehogs*, 114-117.
[15] Gerry Cohen, 'On the Currency of Egalitarian Justice', (1989) 99 Ethics 906.
[16] Dworkin, *Justice for Hedgehogs*, 116.
[17] A debate currently rages between 'value holists' and 'value pluralists' as to whether global coherence at the level of values is a necessary condition for moral truth. I do not have the space to go into that debate here, but discuss the matter in Alexander Green 'An Absolute Theory of Convention Rights: Why the ECHR Gives

Rise to Legal Rights that Cannot Conflict with Each Other', (2010) 16 UCLJR 75. In any event this does not matter. The global consistency that concerns us here is that of concrete moral opinion. One could accept that values can conflict and still demand a consistent theory of appropriate resolution.

[18] It scarcely needs to be said, but I do not believe that racism is biologically inherent, nor do I believe that homosexuality is unnatural, never mind immoral.

[19] Dworkin, *Justice for Hedgehogs*, 90-96.

[20] W.-M. Yao *et al.* 'Searches for Higgs Bosons', (2006) *G* 33 Journal of Physics 1.

[21] Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986) 332.

[22] As a result arguments from indeterminacy are best understood as a form of 'internal' moral skepticism. See Dworkin, *Justice for Hedgehogs*, 89-96.

[23] Ibid.

[24] Dworkin, *Taking Rights Seriously* (Duckworth, 1977) 23.

[25] Ibid at 24-8.

[26] Ibid at 25.

[27] Ibid at 26.

[28] Nicos Stavropolous, 'Why Principles?' *University of Oxford Faculty of Law Legal Studies Research Paper Series*, Working Paper No 28/2007, 5.

[29] Dworkin, *Taking Rights Seriously*, 26-27.

[30] Ibid at 28.

[31] Dworkin has recently clarified his own position as a result of this similarity. He is anxious to dismiss what he calls a 'two-systems' picture of law and morality (Dworkin, *Justice for Hedgehogs*, 402-409). I broadly agree with this characterisation of his work but will not pursue the matter further.

[32] Ronald Dworkin, *Justice in Robes* (Belknap Harvard, 2006) 14.

[33] Herbert Hart, *The Concept of Law* (Oxford University Press, 1997) 260-263.

[34] 115 N.Y. 506 (1889).

[35] Hart, *The Concept of Law*, 264.

[36] Joseph Raz, 'Incorporation by Law' (2004) 10 Legal Theory 1, 12.

[37] Dworkin, *Justice in Robes*, 235-236.

[38] Raz, 'Incorporation by Law', 10.

[39] Raz, *The Morality of Freedom*, 53.

[40] Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999) 167.

[41] Ronald Dworkin, *Sovereign Virtue* (Harvard University Press, 2000) 6.

[42] Dworkin, *Law's Empire*, 179.

[43] Immanuel Kant, *Groundwork of the Metaphysics of Morals*, Mary Gregor (ed) (Cambridge University Press, 1997) 41-42.

[44] Dworkin, *Sovereign Virtue*, 80-81; Stephen Guest, 'Integrity, Equality and Justice' in Allard & Frydman (eds) *Dworkin with his replies.* Revue. Internationale de Philosphie series (Bruxelles: Diffusion: Presses Universitaires de France) 341.Dworkin links responsibility to equality, which allows him to differentiate between handicaps and preferences on the basis of whether choice was involved (*Sovereign Virtue*, 293-298). This is, admittedly, contentious (see generally Cohen, 'On the Currency of Egalitarian Justice').

[45] Dworkin, *Law's Empire*, 400.

[46] Guest, 'Integrity, Equality and Justice', 349.

[47] Gerald Postema, 'Integrity: Justice in Workclothes' in Justin Burley (ed) *Dworkin and His Critics* (Blackwell, 2004) 291.

[48] Dworkin, *Law's Empire*, 179-180.

[49] Guest, 'Integrity, Equality and Justice', 342.

[50] Ibid at 349.
[51] Ibid. at 335; Postema, 'Integrity: Justice in Workclothes', 299.
[52] Had I the scope, I would dispute the appropriateness of discussing 'personified communities'. Dworkin (*Law's Empire*, 170-175) fails to prove that the community *can* act as a moral agent. This is important for arguing that we *should* recognise it as such. I suspect that personification is only a form of shorthand and that official impartiality is better explained by seeing private sphere partiality as the exception, rather than the rule, as a matter of *personal* morality. Such shorthand is problematic, because it removes subtleties. A point of importance for my thesis is that if a community cannot be personified then it cannot act from its own conceptions of justice or fairness. This might indicate that an ongoing investigation into justice and fairness' true meaning is morally required by the law (see section four).
[53] Dworkin, *Law's Empire*, 213.
[54] Ibid at 411.
[55] Ibid at 199.
[56] Dworkin, *Law's Empire*, 207-208. It is worth noting that in Dworkin's moral philosophy, the idea of 'community' is used to refer to a group of people who share moral concepts for the purpose of arguing over various interpretations of those concepts. (See *Justice for Hedgehogs*, 159-163, 170-171.) It seems a fair conclusion that associative communities within Dworkin's legal philosophy are a type of 'community' in that broader sense. However, it pays to distinguish an associative community from an interpretive community, because in the latter there is no personification or coercion.
[57] Dworkin, *Law's Empire*, 209.
[58] Ibid at 190.
[59] Leslie Green, 'Associative Obligations and the State' in Justin Burley (ed) *Dworkin and His Critics*, 283.
[60] Peter Singer, 'Famine, Affluence, and Morality' (1972) 1 Philosophy and Public Affairs 229.
[61] Trevor Allan fails to recognise the independent value of equality of respect in his recent article on integrity. Trevor Allan, 'Law, Justice and Integrity: The Paradox of Wicked Legal Systems' (2009) 29 OJLS 711.
[62] Supra n 49.
[63] Dworkin, *Justice for Hedgehogs*, 99-122, 179-180.
[64] Green, 'Associative Obligations and the State', 271.
[65] Ronald Dworkin, 'Replies to Critics' in Justin Burley (ed) *Dworkin and His Critics* (Blackwell, 2004) 378.
[66] Perry, 'Associative Obligations and the Obligation to Obey the Law', 201. Note that Dworkin's response to this, that such a community need not have intrinsic value to generate obligations, seems out of synch with his writing on political values. Compare: Dworkin, 'Response' in *Exploring Law's Empire,* 304 to Dworkin, *Justice in Robes*, 158-159. The value of friendship is cited as having intrinsic value in the latter whilst the intrinsic value of associative communities (of which friendship is a paradigm) is denied in the former. This suggests that 'community' might not be a political value for Dworkin. If that is the case, then it is hard to see what a community can add by way of obligatory force to a legal proposition.
[67] Dworkin, *Law's Empire*, 205.
[68] Ibid at 202.
[69] Ibid at 205.
[70] Green, 'Associative Obligations and the State', 273.

[71] Dworkin, 'Replies to Critics', 378.
[72] Christine Korsgaard, 'The Sources of Normativity', (1992) 12 *Tanner Lectures on Human Values* 19-112.
[73] It is worth noting however that Korsgaard herself seems to think the question is better understood as what grounds morality (Ibid at 23).
[74] Jules Coleman, 'Beyond the Separability Thesis: Moral Semantics and the Methodology of Jurisprudence', (2007) 27 OJLS 581.
[75] Ibid.
[76] Korsgaard, 'Sources of Normativity', 26-30.
[77] Ironically, Dworkin makes this point himself, albeit in a very different context. See Dworkin, *Justice for Hedgehogs*, 34.
[78] Dworkin, *Law's Empire*, 203.
[79] Ibid at 218.
[80] Stephen Guest, *Ronald Dworkin* (Stanford, 1991) 84.
[81] Ibid at 83-84.
[82] Perry, 'Associative Obligations and the Obligation to Obey the Law', 186.
[83] Dworkin, *Justice for Hedgehogs,* 107-109, 117-122; Dworkin, *Justice in Robes*, 160.
[84] Dworkin, *Justice in Robes*, 162; Dworkin, *Justice for Hedgehogs*, 99-120, 179-180.
[85] In any event I find it difficult to believe that many legal systems have a settled conceptions of equality of respect anyway. The point is that we should not shy away from moral reasons just because we cannot find them in our traditionally accepted sources.
[86] Stephen Guest, 'Why the Law is Just', *Current Legal Problems* (Oxford University Press, 2000) 35.
[87] Guest, 'Integrity, Equality and Justice', 349.
[88] Dworkin, *Justice in Robes*, 15.
[89] Dworkin, *Law's Empire*, 219; See also Dworkin, *Justice for Hedgehogs*, 123-156 where the examples are mostly of art and poetry.
[90] Ibid at 228.
[91] Ibid at 245.
[92] David Gerber, 'Authority, Community and the Civil Law Commentary: An Example from German Competition Law' (1994) 42 AJCL 531.
[93] 5 U.S. (1 Cranch) 137 (1803).
[94] Dworkin, *Law's Empire*, 264-5.
[95] Samantha Besson, 'Theorising the Sources of International Law' in Samantha Besson & John Tassioulas (eds) *The Philosophy of International Law* (Oxford University Press, 2010) 175.
[96] Guest, 'Integrity, Equality and Justice', 347.
[97] Allan refers to this as "sources of law...grounded in conviction". Allan, 'Law, Justice and Integrity', 726.
[98] **[1992] 1 AC 599.**
[99] Guest, 'Integrity, Equality and Justice', 348.
[100] Frederick Schauer, 'Precedent and the Necessary Externality of Constitutional Norms' (1994) 17 Harv. J.L. & Pub. Pol'y 48.
[101] Dworkin, *Taking Rights Seriously*, 121-122; Guest, 'Integrity, Equality and Justice', 349.
[102] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, per Lord Diplock at 408. Note that the paradigm of such a principle is when an administrative authority makes representations to, or consistently treats a particular

individual a particular way. This is loosely analogous to precedent but could just as easily be justified by a theory of promising.

[103] Dworkin, *Law's Empire*, 227.

[104] Ibid.

[105] Dworkin, *Justice in Robes*, 173-174.

[106] See generally Plato, *The Republic*, Desmond Lee trans. (Penguin, 2003).

[107] For example: Rosalind Hursthouse, 'Virtue Theory and Abortion', (1991) 20 Philosophy and Public Affairs 223-246.

[108] [1991] 1 WLR 767; 347 U.S. 483 (1954).

[109] Dworkin, *Justice in Robes*, 173.

[110] Dworkin, *Law's Empire*, 226.

[111] Tom Hickman, 'Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998' [2005] Public Law 306.

[112] Scott Hershovitz, 'Integrity and Stare Decisis', in Scott Hershovitz (ed) *Exploring Law's Empire* (Oxford University Press, 2006) 107-108.

[113] [1966] 3 All ER 77 Note that the Supreme Court is technically a separate entity from the House of Lords and so this decision can only be considered to apply to them*pro tanto*.

[114] *Young v Bristol Aeroplane Co*. [1944] 1 KB 718; *R (on the application of Kadhim) v Brent London Borough Housing Benefit Review Board* [2001] 2 WLR 1674.

[115] Dworkin, *Sovereign Virtue*, 298.

[116] Indeed, Dworkin has recently declared this to be the case in *Justice for Hedgehogs*, 405-407.

[117] As stated above, for interpretivists, all legal propositions must be morally justified. However, this does not imply that all morally justifiable propositions are legal. The moral justification required is one that provides a reason why a proposition should be treated *with the force of law*. There are other aspects of morality that might not achieve this status, for example virtue based ethics or supererogatory commitments. See Lon Fuller, *The Morality of Law* (Yale University Press, 1969) 3-30.

[118] I am not suggesting that this is correct legal or moral reasoning but merely offer it as a sketch of the sort of considerations that will be involved.

[119] United States Constitution, Preamble and Article 1, Section 8, Clause 1.

[120] My thesis is a jurisprudential, not constitutional. I leave open exactly what sort of body should be making adjudicative decisions and where the correct separation of powers lies.

[121] Dworkin, *Law's Empire*, 405-7.

[122] Ibid at 178-81.

[123] Cicero, De Republica, III, xxii, 33, quoted in A.P. D'Entreves, Natural Law (Hutchison, 1951) 20.

[124] Whilst this seems commonsensical, it has been disputed: Ian Hacking, 'The Identity of Indiscernibles' (1975) 72(9) The Journal of Philosophy 249-256. As mentioned above, Dworkin has now committed himself to this view (supra nt. 31).

HARMONIZING TRENDS VS DOMESTIC REGULATORY FRAMEWORKS LOOKING FOR THE EUROPEAN LAW ON CROSS-BORDER COOPERATION

Davide Strazzari*

The European law of cross-border cooperation is the legal product of the interplay of different legal orders, namely the international public legal order (Madrid Outline Convention, following Protocols and international agreements enforcing it), the European Union and the national one. To this extent, the European law of CBC is a dynamic process where each of the three components plays a role but none is prevailing from a normative point of view.

The paper examines the components of this European law of CBC by looking first at the way CBC is currently conceived by the supranational legal drivers (Council of Europe and EU). It emerges that CBC is not more a matter of dealing with the problems of proximity between communities and territories laying on either side of borders, but of putting together genuine projects for CBC area and implementing a real CBC policy. This implies some consequences. First, CBC as a policy tends to involve territorial units enjoying influential political capacity, such as: federal state, legislative regions or at least inter-municipal association. Even national state may have an interest in participating. The second feature is the institutionalization of CBC as a way to promote coordination of policies, even according to a multilevel governance concept, rather than as an instrument to solve specific cross-border problems.

However, this conception of CBC and its consequences must be put into relation with the attitude national states have showed towards CBC. By taking into consideration some factors – namely, the type of decentralization, the intergovernmental relations, the ethnic minorities presence, the influence exerted by supranational actors in countries of democratic transition – we will investigate the potential degree of the national states' acceptability of the common regulatory solution advanced at the supranational level. To this extent, some specific references will be made to the national enforcement process of the EGTC Regulation in order to enlighten and understand why the EGTC application across Europe is likely to vary.

TABLE OF CONTENTS

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I. INTRODUCTION

Currently, one of the most prominent features of the European legal landscape is the interaction between national, European Union and international-regional legal orders. While the interrelations between national and EU legal orders are a well-established phenomenon, the influence played by the Council of Europe legal interventions on both national and EU legal orders is becoming more and more relevant, mostly due to the European Convention for the Protection of Human Rights and Fundamental Freedoms and the increased judicial activity of the European Court of Human Rights.

Cross-border cooperation (CBC) [1] is another field, certainly less sensitive than the protection of human rights, where a similar interaction between legal orders emerges in such a way that it is possible to speak of a European law of CBC.

To this extent, it is difficult to define what the European law of CBC is in positive legal terms since the notion aims more to highlight the idea of CBC as a dynamic process where all the three mentioned legal orders – namely the international, the EU and the national one – have a normative role but none of them is prevailing.

In fact, CBC is not international, in the sense it is not an exercise of the international treaty-making power[2] but certainly, it is a matter that has been developed and is increasingly being developed by international law instruments.[3]

Nor is CBC a purely domestic legal issue. As a matter of fact, whereas in the past the legal capacity for the subnational units to perform CBC or to set a CBC body was dealt with by the national state, by means of domestic provisions or international agreements the state decided to agree upon, today the increasing regulatory role of the EU in the CBC field with the adoption of Regulation 1082/2006[4] – which sets common provisions concerning the European Grouping of Territorial Cooperation (EGTC) – seems to undermine this finding. The EGTC Regulation has allowed subnational units to conclude a cross-border convention with homologous foreign counterparts for a CBC body establishment, no matter if such a possibility was previously granted according to the relevant domestic legal order. This is the case of Italy, where, until the EGTC Regulation adoption, the subnational units were not allowed to set a CBC body.[5]

Thus, the paper argues that the key factor for explaining the legal nature of the CBC "European law" is exactly the interaction amongst supranational and national legal orders, a feature that makes it particularly difficult to settle disputes when they arise before the judiciary. [6]

To this extent, it may be noted that although the CoE and the EU legal instruments concerning CBC are deeply different in their nature and function (with the CoE aimed to provide a minimal common regulation, according to international law standards, and the EU aimed to provide substantial legal harmonisation of EU Member States legislations),[7] they share nonetheless the common goal of harmonising European national legislation and they highlight common legal developments.[8]

The idea we will develop in the first part of the paper is that this common supranational trend is based on the favouring of CBC institutionalisation. CBC is no longer conceived in terms of focus-tailored transfrontier action but rather in terms of transfrontier policy. Within this context, CBC bodies are increasingly considered as policy coordination tools where large

and influential subnational territorial players take part.

At the same time, however, it would be a mistake to overestimate the harmonising role played by the above-mentioned supranational forces. In fact, in both the EU and CoE legal instruments the references to the domestic legal orders are still important and meaningful. Despite the "common core" provisions on the setting of a CBC body, both the EGTC Regulation and the Protocol No. 3 of the European Outline Convention on Transfrontier Cooperation concerning Euroregional Co-operation Groupings remit to the domestic law where the CBC body has its headquarters as a subsidiary source to be applied in the case substantial rules are lacking.[9]

This is not the only case. Probably, the most important example of the still decisive role played by the national state as a regulator of the CBC is the fact that both the EGTC Regulation and the Protocol no. 3 grant national states wide power in deciding on the setting of a CBC body by referring to concepts such as national public interest or public policy. [10]

The enforcement of these notions mostly relies on political evaluations that are likely to be influenced by the approach the relevant state has progressively showed towards CBC. Because of that, in the second part the paper will draw attention to the different existing national attitudes in order to see how they can influence the acceptability, both at a formal and informal level, of the common regulatory solutions put forward by the international and the European legal orders.

To this extent, the research assumes that CBC may take on different forms or be differently regulated according to some variables, such as the degree of regionalisation of the national legal order, the usual pattern of relations between the national state and the subnational territorial level, the relevant national constitutional case law, the existence of national minorities across the borders.

The paper is divided in two parts. The first will deal with the international and European harmonising trends we may currently find in Europe. The second will focus on exploring the above-mentioned factors influencing the national policies concerning CBC. Finally, some considerations will be made concerning the implications derived by this interplay between harmonising trends and national regulations. To that extent some references will be made with regard to the domestic enforcement process of the EGTC Regulation.

II. The Harmonizing Trends: Council of Europe and EU Involvement in CBC

The original idea of CBC, as it has been set out by the European Outline Convention on Transfrontier Cooperation between Territorial Communities and Authorities (EOC), provided that it was mainly directed at solving local tailored problems between homologous territorial units. The current trend emerging both at the CoE and at the EU levels is towards a more dynamic form of CBC.

The dynamic nature of the CBC has to be put into relation with the fact that CBC is not just a matter of dealing with the problems of proximity between communities and territories lying on either side of borders but of putting together genuine projects for CBC areas and implementing real CBC policy. [11]

In this part of the paper we will single out this emerging new conception of CBC by referring to the supranational instruments currently influencing the European legal landscape, namely the *CoE acquis*, the bi- or plurilateral international agreements adopted to enforce the EOC, the EU legal framework.

The first element suggesting such an evolution is the trend favoring public nature CBC institutionalization by means of supranational document setting "hard core" rules.

The second element is the involvement of territorial players with the greatest "political capacity", that is, with the ability to intervene in public matters and use their political standing to change the results.[12] This means that CBC conceived as a policy demands the involvement both of sufficiently large territorial units and at the same time of the state, which is called to perform a more proactive role in CBC, not merely a regulatory one.[13]

1. *The Council of Europe Acquis on CBC*

Certainly, the first contribution to the so-called European law of CBC was given by the entry into force on 22 December 1981 of the European Outline Convention on Transfrontier Cooperation between Territorial Communities and Authorities (EOC), signed under the Umbrella of the Council of Europe.

It took quite a long time before the text of the EOC was agreed upon. This clearly reflects the still persisting suspicions of the Contracting Parties towards CBC, considered as an instrument potentially affecting

state sovereignty. As a consequence, the EOC is deprived of any direct legal effect,[14] and it does not confer to subnational units any power to conclude cross-border legal agreements. Such a power can be conferred provided that the Contacting Parties decide to do so, having regard for their different constitutional provisions. In any case, the states maintain a supervision power in order to ensure that the general policy or the international relations of the state as a whole might not be affected.[15] Moreover, the EOC explicitly permits the Contracting Parties to subject CBC to the previous conclusion of international bilateral agreements between the Contracting Parties themselves, with the aim to set the context, forms and limits within which territorial communities and authorities may cooperate.[16]

Thus, it is difficult to say that the aim of the EOC was that of providing even a low degree of standardization concerning the regulation of CBC. In fact, the EOC merely places upon the Contracting Parties a duty "to facilitate and foster transfrontier cooperation between territorial communities or authorities within the jurisdiction of two or more Contracting Parties" (Art. 1), and it leaves the Contracting Parties the task of regulating CBC by means either of national legislation or international bilateral agreements.

The strategic importance of the EOC does not rely on the practical and effective solutions it puts forward for enacting CBC. Rather, its relevance is due to the fact of transforming CBC "from an activity at best tolerated into an explicitly mentioned 'legal' activity, which the Contracting states have agreed to promote".[17] The EOC set out the idea that the cooperation between subnational units belonging to two different national jurisdictions does not involve any use of international law,[18] but rather it is a way of exercising, according to an "external dimension", the powers that a national legal order grants to the subnational units.

It is, nonetheless, particularly interesting to investigate the idea of CBC, which emerges in the EOC and to see how it has changed. With regard to this, some issues must be highlighted.

First, if we take into account Article 2 of the EOC,[19] we note that the Contracting Parties adopted a narrow idea of transfrontier cooperation, essentially limited to "neighbourly relations".[20]

Moreover, it has been noted that the neighbourly agreements of subnational units usually present a common material object. They do not have great political importance, and they consist of the management of local public services on a transborder area, such as waste collecting, water

canalization, firefighters, etc.[21]

Finally, it is worth considering that the EOC specifies that for its purposes the terms 'territorial communities' or 'authorities' "shall mean communities, authorities or bodies exercising *local* and *regiona*l functions".[22] According to the explanatory report, this wording was used as a general category, which could cover any form of existing subnational unit.[23] However, it could also suggests the idea that CBC and its legal regulation may vary depending on the scale—regional rather than local—of the subnational units involved. The EOC, though, did not provide such a distinction, implicitly suggesting they are the same phenomenon.[24]

Thus, in the light of these remarks, we may observe that the EOC text conceives CBC in a very limited way.

It is mainly seen as an instrument to solve technical or administrative problems of neighbouring local subnational units.[25] The EOC failure to empower the subnational units with the setting of a CBC body reveals that the transborder relations are considered inherently episodic and sectorial. Probably at that time, the CBC institutionalization was considered premature and potentially too dangerous in respect of the national general interest and of the national foreign policy. As a matter of fact, for a state, it is easier to scrutinize a single CBC agreement than the institutional activity of a CBC body, which is very often vaguely defined in the institutive documents.

The EOC was much criticized. At least three general problems have been identified with it: the lack of any real recognition of the right of territorial communities or authorities to conclude transfrontier cooperation agreements; the legal force of the acts taken in the context of transfrontier cooperation; and the setting of a transfrontier body.[26]

It is in this scenario that an Additional Protocol to the EOC was elaborated. Signed in 1995 and entered into force in 1998, the Additional Protocol marks a meaningful step towards the strengthening of the CBC, by addressing the main shortcomings identified with the EOC.[27]

First, it explicitly grants to territorial communities or authorities the right to conclude transfrontier-cooperation agreements.[28]
Second, it also clarifies the problem concerning the legal nature of these agreements and their legal effect.[29]
A third issue addressed by the Protocol is the legal possibility of setting up a CBC body with legal capacity.[30]

The Additional Protocol introduced many improvements in order to effectively develop CBC. However, it did not repeal an important restriction to CBC contained in the EOC, namely the limitation of it to neighbourly relations and the consequent idea of a CBC essentially limited to solve problems of bordering territories.

It was only with the signature and the entry into force of the Protocol No. 2 on inter-territorial cooperation that the legal instruments and the regulatory framework of the EOC and of the Additional Protocol have been extended to external cooperation not involving any neighbourly relations.[31]

Another problem with the Additional Protocol is that the provisions enabling the subnational units to set a cross-border body do not provide a common legal framework, rather they refer to the national domestic legal system. This has caused many problems in the effective implementation of CBC. In some cases, the conclusion of interstate agreements, providing a common regulatory framework for such a body, has proven to be a solution. Despite the need for a text establishing a clear and effective legal framework for institutionalised cooperation between territorial communities or authorities, it was only in 2009 that the CoE adopts Protocol No. 3 to the EOC concerning Euroregional Co-operation Groupings[32], a text offering basic uniform rules for the setting of a cross-border body.

Thus, the CoE *acquis* on transfrontier cooperation seems at first a story of legal breaches and turning points, with the three Protocols progressively expanding CBC.

It should be noted, however, that it was the EOC itself that made CBC legal regulation an evolving issue. Article 8.2 of the EOC explicitly mentions the procedure the Contracting Parties should follow in order to add or extend the convention itself. This reflects the idea of the 'evolutive nature' of the EOC, in which it may be perfected and expanded in light of experience acquired when implementing the provisions of the convention.[33]

Moreover, it should be noted that the EOC's drafters put the regulatory framework of the CBC in appended models and outline agreements, deprived of legal force, rather than in the text itself of the convention. According to the explanatory report this was due to a need for flexibility. The Contracting Parties and the territorial communities were therefore provided with a wide range of possible solutions to meet the various cooperation needs.[34]

However, a different explanation may be suggested. Because, among the Contracting Parties there were different policies towards CBC, the EOC was meant to provide a minimal common legal framework. The diplomatic compromise reached or needed to agree with the EOC on did not allow the possible legal developments of CBC – already put in place in some Member States - to be included in the EOC text at the time of its signature.

According to this view, the attached models can be read as a possible prelude of the legal developments of CBC at the CoE level, once the Contracting Parties would have agreed to consider them as common legal solutions. Their analysis is important, then, to the extent it reveals an idea of CBC much more complex than that effectively delineated in the EOC text.

Among the interstate model agreements attached at the moment of the EOC signature, we want to focus on those listed as n 1.2 and 1.5, dealing with, respectively, a model of interstate agreement on *regional* transfrontier cooperation and a model of interstate agreement dealing with the setting of a transfrontier body.

Focusing on the first of them, it is interesting to note that although the EOC text treats regional and local CBC as the same phenomenon, the above-mentioned model of interstate agreement on *regional* transfrontier cooperation suggests a different conclusion. In fact, this model agreement recommends the establishment of both an intergovernmental commission—comprising national and regional delegates of both national contracting parties—and of regional committees—made up of representatives of regional and local authorities. The main task of the regional committee is to investigate, in different areas, with the aim to make proposals and recommendation to the intergovernmental commission. Thus, the role of the regions here is not operative. The regions, rather, are called upon to perform a coordinating role, bringing together the relevant territorial players, included the state itself and the local authorities.

As far as the second model, appended to the EOC, it deals with the possibility for State to regulate by international agreement the establishment of a CBC body. Thus, this reveals that the EOC drafters were aware of the need to provide a regulatory framework for CBC body, an issue formally addressed only at a later stage, with the Additional Protocol signature.

2. *Interstate international agreements on CBC in Europe*

Several interstate agreements concerning CBC among subnational units have been signed in Europe, mainly for developing and regulating the principles contained in the EOC. The purpose of this section is to analyze them according to some common key points.[35]

a. Why Concluding bi- or multilateral treaties on CBC?

A good starting point to deal with our issue is to wonder whether there is a need to sign interstates agreements regulating CBC among subnational units. To this extent, it is important to refer to Article 3.2 of the EOC. This provision gives the national Contracting Parties the option to subject the EOC application to the previous conclusion of an interstate agreement with the other Party concerned.

Article 3.2 can be considered a sign of the Contracting Parties' mistrust of CBC. The idea that every external relation should pertain to the central level was still dominant in the 1980s. Therefore, the previous conclusion of an international agreement, as a precondition to permit CBC to develop, meant that the power of subnational units to perform external actions could be neither implicitly derived from their internal competences nor from the EOC itself. The foreign-relations power was considered as a matter reserved for the national level. As such, the power of the subnational units to conduct foreign contacts or relations had to be explicitly recognized and it was in any case considered as a derogation to the general rule that foreign relations pertain in principle to the national state.

Moreover, the previous conclusion of an international agreement gave the national government a powerful instrument to control and limit the scope of transfrontier cooperation.

However, it should be noted that only a few Contracting Parties made use of the possibility created by Article 3.2. This is the case of Italy and Spain, whereas France, which originally made use of this declaration, withdrew it at a later stage.

This finding reveals that the interstate agreements in the field of subnational CBC are to be conceived only to a very limited extent as a means to legitimize and to put under strict control a practice very often developed beyond the law. Rather, they are very often instruments necessary to provide a clearer legal framework, permitting cross-border actors to solve the practical problems they encounter in cooperation among them. This is so especially considering that the EOC and its

subsequent Additional Protocol failed to provide a common legal framework.

To this regard, the case of France is particularly interesting.[36] At the time of the signature of the EOC, France, as noted above, issued a declaration in pursuance of Article 3.2 of the EOC, thus limiting CBC subnational units to the previous conclusion of an international agreement. Later, the French government changed its policy towards CBC. In 1992, the French subnational units were granted general power to conclude administrative agreements with their foreign counterparts and to set public bodies for transborder cooperation.[37] In 1995 they were allowed to take part in CBC public bodies ruled by a foreign law.[38] As a consequence of this legislative and political evolution, the declaration to the EOC was withdrawn. However, even the most permissive national regulation towards transborder cooperation is useless if the other national counterparts do not provide a similar pattern. That may explain why France concluded international agreements with almost all of its neighbouring states. In some cases, such as the Bayonne[39] and the Rome[40] treaties, respectively, with Spain and Italy, the international agreements did not add anything to the legal possibilities already offered by the domestic legislation. However, these international agreements were nonetheless necessary for permitting transborder cooperation to develop along these borders. CBC is a mutual relation: lacking an EU harmonizing legislative intervention, an international agreement with the bordering national counterpart was the only way to provide the common legal framework necessary to deal with relations having a transnational character.

An international agreement on CBC may also have the goal of strengthening CBC, offering more instruments for its development. This is the case with various international treaties concluded with the aim of providing a legal regulation for public law–based CBC, in areas in which CBC practices, grounded in private law, were already well developed.[41]

Thus, international agreements regulating CBC among local bodies can serve different goals: they may be a legitimizing source of a practice otherwise deemed illegitimate; they may be a necessary way to solve practical problems raised as a consequence of the transnational nature of the cross-border relations; and they may provide instruments to deepen transborder cooperation.

b. The Setting Up of a CBC Body: from Episodic to Systemic CBC

Many issues can be considered when assessing the goals pursued by a state

in concluding an interstate international agreement on CBC among subnational units. However, one of the most important is certainly whether the treaty regulates or not, and to what extent and powers, a public body for CBC. In fact, a cross-border body permits the subnational units to develop with their homologous foreign counterparts more-systematic cooperation and to establish a permanent arena for discussion and policy-making coordination[42]. It is clear that a national legal order that grants such a legal possibility to its subnational units implicitly considers CBC an instrument of development, rather than as a threat to its general and foreign policy.

Keeping in mind these remarks, we can now class the relevant international agreements as follows:

A first group includes the international agreements signed by Italy with France, Austria and Switzerland. The agreements all reveal a suspicious attitude towards CBC. In fact, they permit the subnational units to conclude agreements with their foreign counterparts, but they do not allow the establishment of cross-border bodies. Moreover, the material scope of the cooperation agreements is limited to those matters specifically listed in each treaty. The reason for that is clear: by allowing territorial communities to conclude only specific agreements on previously established matters, the supervision power of the national state is more effective and the risk for the coherence of the national foreign policy is reduced.

A second group regards those international treaties that empower subnational units to set up public cross-border bodies. However, the treaty itself does not provide a common legal regulation for it. Rather, it refers to already existing administrative institutions regulated by the relevant national legislations, usually for inter-municipal cooperation. Moreover, the task of the cross-border body is mainly that of providing transborder public services, rather than being a organisation for policy coordination. We may include in this second group the Bayonne Treaty, signed between France and Spain,[43] and the recent treaty signed between Spain and Portugal in Valencia.[44]

A third group to be considered is represented by the Karlsruhe Accord.[45] Unlike the other above-mentioned international treaties, the Karlsruhe Accord provides substantial common rules for the setting up and functioning of a cross-border body, not merely a reference to the national inter-municipal legislations. The model is represented by the so-called *groupement local de cooperation transfrontaliére* (GLCT). This is a body whose legal regulation is to be found partly in the Karlsruhe Accord and

partly in the constituting documents of the body itself that the parties have to adopt. For what is not explicitly regulated by the above-mentioned sources, the national law regulating inter-municipal associations of the state in which the organ has its headquarters applies.

The GLCT has been a legal model for following international treaties concerning CBC,[46] for national law dealing with transborder organs (the French *district européen*) and even for EGTC Regulation. The success the GLCT model has encountered may be explained when considering that the subnational units pertaining to different domestic legal orders prefer to adopt an instrument whose regulation is common to the parties, rather than being subject to the national law of one of them.

The fourth model of public cross-border bodies that we should consider is represented by the Benelux Convention, which is certainly the most sophisticated, although not necessarily the most effective one.

This public transfrontier institution may enact regulatory acts which are directly binding to member parties and third parties.[47] The acts passed by the body produce legal effects with no need for domestic implementation in all the territories pertaining to the constituent parties. This makes the organ a real cross-border territorial authority.

Because of the meaningful powers that the body may exert, the Benelux Convention provides that the institutive documents of the cross-border public body must not be in conflict with the national laws of each country involved.[48] Moreover, the decisions made must respect the national laws of the parties concerned, with it being otherwise possible for the national authority to suspend the act itself. A special commissioner position has been created whose task it is to solve the legal problems that may arise during the cooperation.[49] In case of the intervention's failure, the commissioner refers the case to a special intergovernmental commission.

The strong model of cross-border public bodies delineated by the Benelux Convention has not been followed by other national legal orders, even if territorially contiguous. This is especially the case of the German–Dutch agreement of May 1991 signed in Isselburg-Anholt. During the rounds of negotiations between, on the one hand, the Dutch government and, on the other hand, the German federal government, the Land of Lower Saxony and that of the North Rhine–Westphalia, the problem arose of the German constitution not permitting citizens to be directly bound by the decisions of a cross-border body.[50] This might explain why the agreement explicitly excludes the cross-border public body being able to enact administrative acts affecting third parties and why it states that

decisions passed by the cross-border body need to be implemented by the parties concerned.[51]

The discussions raised during the negotiations of the Isselburg-Anholt agreement concerning the constitutional legitimacy for Länder to transfer sovereignty powers probably led to the addition in 1994 of a new paragraph to Article 24 of the German constitution. The new paragraph permits Länder to transfer sovereignty powers to transborder territorial organizations provided the federal government gives its assent.

However, when, in 1996, the Mainz agreement was signed between, on the one hand, the Land of North Rhine–Westphalia and the Land of Rhineland-Palatinate and, on the other hand, the Walloon Region, the German Länder did not make use of Article 24.1 of the German constitution.[52]

Thus, the interstate treaties have progressively provided common substantial regulation of public cross-border bodies. However, with the exception of the Benelux Convention, they do not allow public cross-border bodies to make and pass general regulations directly applicable to the territorial parties involved. As the few applications of Article 5 of the Additional Protocol to the EOC reveal,[53] the trends are still in favour of a 'dualist' approach: the public body may make general decisions, but they have no legal effect unless the subnational units, parties to the cross-border body, enforce it autonomously in their legal system. To this extent, it may be noted that even the EGTC Regulation does not alter this scheme, because the EGTC is not empowered to make general decisions.[54] Most likely, the issuing of general binding acts by a cross-border public body is still considered a threat to the national sovereignty principle.

c. New actors for CBC?

A third issue that emerges from the examination of the interstate agreements concerning CBC regards the type of subnational actors involved in it. More precisely, we want to focus here, on the attitude that federate units of federal states have shown in relation to CBC.

Usually, these subnational units are vested, according to their domestic constitutional provisions, with treaty-making power, a fact that highlights their political relevance and their strong degree of autonomy. Precisely for that reason, they may feel uneasy with the idea of collaborating with foreign subnational units enjoying only limited powers. At the same time, however, it may be disadvantageous for them to not collaborate with their

foreign counterparts even if they enjoy only limited powers.

This ambivalent attitude of the federate states clearly emerges in the text of some interstate agreements.

In the first wave of these international agreements, we may note that federate units are not listed among the subnational units to which the treaties' provisions apply. The Benelux Convention (1986), the Isselburg-Anholt agreement (1991) and the Mainz agreement (1996) follow this scheme, although the latter two have also been signed by the relevant federate units in the exercise of their treaty-making power because of their power of regulating local territorial units.

The more recent wave of interstate international agreement (the Karlsruhe Accord, 1996, the Bruxelles Agreement, 2002) marks a rupture because the federate units, although being excluded from the territorial units to which the agreements formally apply, are nonetheless allowed to make use of the provisions contained in them.

The Karlsruhe Accord is a good example. It was signed by national states, although Switzerland acted on behalf of the relevant Swiss Cantons. Article 2 lists the subnational units to which the treaty applies. Neither the Swiss Cantons nor the German Länder are included in it. However, Article 2.3 provides the Länder and Cantons with the possibility of concluding agreements among themselves and with the other subnational local units.[55]

The Bruxelles Agreement, signed between France, on the one hand, and the Belgian government, the Flemish and the Walloon Regions and the French-speaking community, on the other hand, is more contradictory. In fact, Article 2.5 explicitly excludes the signatory parties from being covered by the provisions of the agreement. However, Article 17 states that the agreement is also applicable to the accords concluded or participated in by the signatory parties, a wording that could even permit France and Belgium to participate in CBC projects.

The involvement in CBC of subnational units, enjoying legislative powers or even treaty-making power, can turn out to be a problem for those countries whose subnational units are merely entitled to administrative powers. In these cases, intervention at the national political level can become convenient, at least when the cooperation concerns matters beyond the competences conferred to the domestic subnational units[56]. The "political backing-up" of the central government can also be necessary to avoid any potential infringements of the national foreign

policy.[57] CBC may become a highly sensible political issue when it involves subnational units with significant economic resources and powers.

Again, the Karlsruhe Accord offers an important example. Article 2(3) gives the French prefects the duty of ensuring the cooperation between, on the one hand, German Länder and/or Swiss Cantons and, on the other hand, the French territorial communities whenever the effectiveness of the transfrontier projects might be undermined because of the different powers enjoyed by the parties.[58] An analogous provision is set out in the Bruxelles Agreement.[59]

Finally, we may recall the Valencia Treaty between Portugal and Spain.[60] It permits Spanish and Portuguese subnational units to create cross-border bodies. It is interesting to note, however, that there is a clear division between cross-border bodies entrusted with public services which enjoy legal capacity, and those institutions deprived of legal capacity whose primary aim is the coordination of decision making.[61]

In relation to the latter type of cross-border body, the treaty enables the Spanish *Comunidades Autónomas* (CC.AA.) to establish such a body only with the Portuguese *Commissões de Coordinação Regionais*, which are decentralized organs of the state.[62] This is remarkable. Since the Spanish CC.AA. enjoy meaningful powers with no correspondence in respect of the Portuguese subnational units, the only level of government that can effectively cooperate with the Spanish CC.AA. is the Portuguese state itself, even if by means of decentralized organs.
Thus, two concluding remarks can be made. At a certain point the federate units started to consider CBC not only as an instrument used by local bordering subnational units to solve their practical administrative problems, but also as an important instrument for their regional economic, social and territorial development. Moreover, they understand that CBC, instead of the treaty-making power which their constitutions grant to them, was an easier way to develop their external action policy.

The involvement of the federate units, enjoying powers, resources and political capacity, determined the tendency to develop more-strategic cross-border projects. However, this evolution towards a more strategic CBC can be hindered by the fact that the foreign counterparts did not enjoy similar powers. This in turn calls for a more active participation of the national state whenever their subnational units are too weak. The cases of France and, to a certain extent, Portugal are good examples.

3. *The EU Role in CBC: from Financing to Legal Regulation*

For a long time, the two driving European supranational forces concerning CBC, namely the CoE and the EU, had maintained distinct spheres of action. On the one hand, the CoE has been mainly called to set out the legal framework within which to develop CBC; on the other hand, the EU has leaned more towards the financing of it.[63]

The EU intervention in the field dates back to 1990 with the adoption of the INTERREG programme. Since its inception, INTERREG was a community initiative (CI) programme. This meant the European Commission had more power to define the areas of intervention financed by the European Union and the procedural rules to apply. The fact that INTERREG was created as a CI programme is important because it highlights the political relevance that the European Commission meant to give to the development of CBC in Europe.

In general terms, the European cohesion policy has generally been seen as an instrument for strengthening the regional dimension of the EU Member States and as a way to enhance multilevel governance.[64]

This general finding can certainly be applied to the case of INTERREG. Nonetheless, it must be pointed out that the national states have always been guaranteed a role in the INTERREG framework. To this extent, it may be recalled that according to the Commission guidelines for the implementation of the INTERREG programmes, the proposals, to be submitted to the Commission, had to be prepared by joint cross-border or transnational committees constituted by the relevant regional/local and *national* authorities and, where appropriate, by the relevant nongovernmental partners.[65]

The national state task was mainly that of providing a coordinating framework[66], but its involvement in the procedural framework for the enactment of the INTERREG programme can also be considered as a way to guarantee Member States a look at the external activities of their territorial communities, although conducted under the reassuring 'umbrella' of European Union law.

However, if we look more carefully at the INTERREG programme the impression is that the national state was called to play a more active role. With regard to this consideration, it should be noted that the INTERREG programme (at least the latest version of it in force during the 2000-2006 period) was structured in three strands: "cross border cooperation" between neighbouring authorities directed towards local

authorities; "transnational cooperation" regarding "cooperation between national, regional and local authorities [aimed] to promote a higher degree of territorial integration across large groupings of European regions"; and interregional cooperation, intended to create networks for improving development and the cohesion of regions not geographically contiguous.[67]

Whereas "cross-border cooperation" and "interregional cooperation" somehow reflected categories already elaborated within the CoE (respectively, transborder cooperation and inter-territorial cooperation), transnational cooperation was something new. In fact, this form of cooperation relied on an active involvement of both national states and subnational units.

Thus, it may be noted that the CBC promoted by the EU level was conceived differently in respect of CBC enhanced in the CoE framework. Whereas, in the latter, the role of state was conceived in term of exclusion[68](since the non involvement of the national-level organs was considered a precondition in order to exclude CBC from the realm of international relations), in the EU context a logic of inclusion prevailed, with the national state actively involved in CBC projects. In fact, besides a local-tailored CBC (the cross-border cooperation strand of the INTERREG programme) the EU supported a more strategic CBC – namely the transnational cooperation strand of INTERREG – , to be enforced within a greater territorial scale and based on projects involving matters reserved for the national state or the regional units of highly decentralised states.

These short remarks about the INTERREG programme can help us to clarify better the new regulatory framework dealt with by the new European structural funds programmes covering the 2007 to 2013 period.

The new programming period is aimed at the simplification and, at the same time, the concentration of financial resources as a consequence of the Central and Eastern Europe enlargement, which resulted in a substantial widening of the regional disparities, with the poorest parts concentrated in the new EU member states. This in turn led the Commission to reshape the structure of the structural funds and to abolish CI as the INTERREG programme was.

The interest of the European Union in CBC has not yet vanished. On the contrary, it gained strategic importance. In fact, the general EC Regulation on structural funds created three general objectives to be pursued. The third one—named European territorial cooperation—is the new label within which the three previous strands of the INTERREG

programme—i.e. cross-border cooperation, transnational cooperation and interregional cooperation—are revived.

Terms are always important, especially in law. The new territorial cooperation objective reflects a new focus of the European cohesion policy. According to the new Article 3.3 and Article 174.1 of the Lisbon Treaty, the cohesion policy is no longer limited to the economic and social dimension; it also includes the 'territorial' one. This change reflects the findings of some research showing that the cohesion policy, even in those cases in which it has been successfully conducted, has led to an uneven development, with an increased growth of the central regions in detriment to the most peripheral ones. A more balanced and sustainable development is then suggested. This development should benefit the most peripheral regions, called to develop, with their analogous counterparts of neighbouring European member states, functional Euroregions, according to a multipolar scheme of development.[69]

This is the background within which the enactment of EGTC Regulation 1082/2006 must be evaluated. This EGTC Regulation is a sort of break of the previously sketched out scheme concerning the respective CoE and EU tasks in CBC. In fact, with the adoption of the EGTC Regulation, the European Union played the role of legal regulator of CBC, a job that until recently was mainly for the CoE to carry out.

This change was mostly due to the ineffectiveness shown by the CoE's instruments. The Additional Protocol of the Madrid Convention did in fact provide the territorial authorities with the legal possibility to create cross-border bodies. However, it failed to provide a common legal framework regulating the creation, since it referred to applicable national rules and procedures. The conclusion of bi- or multilateral international agreements has solved only part the problem.

The adoption of Regulation 1082/2006 was meant to fill this gap by providing a common European legal framework for the setting up of cooperative groupings – invested with legal personality – between territorial authorities located on the territory of at least two Member States (3.2). The EU intervention, however, has gone a little further since the EGTC functioning is not limited to the implementation of territorial cooperation projects financed by the European Union, but rather could carry out other territorial initiatives not financed by it. This goal is framed by the Regulation itself in quite strict terms. To this extent it should be recalled that according to art. 7.3 the main objective of an EGTC is that of implementing territorial cooperation programmes, whereas the possibility to conduct *specific actions* – a wording suggesting a focus tailored

activity – other than implementing territorial cooperation programmes is perceived as a secondary goal. Moreover, the requirement suggesting that the matters in relation to which an EGTC can take action should be common to all the parties can be read as an obstacle for developing coordinating CBC of different territorial levels[70].

A first survey of the EGTCs set until now in Europe reveals that only few of them manage territorial cooperation programmes or projects co-financed by Community funds; most of them carry out other territorial cooperation actions without a financial contribution from the EU.[71] More precisely, by looking at the constitutive documents of many EGTCs set thus far, the impression is that the institution of a European grouping is a goal *per se*, as a means to permit future policy coordination, rather than being functional to develop a specific CBC project.[72]

In this context, where EGTCs are increasingly considered as policy-making institutions rather than (or at least less) operative instruments, it is not surprisingly that art. 3 of the EGTC Regulation includes Member States among the prospective members of an European grouping.

The involvement of the state, along with local and regional authorities, has been defined as a "Copernican revolution" in the field of CBC, since, as already noted, according to the CoE *acquis*, the state should have a role only as a regulator of CBC and not as an actor directly involved in it.[73]

However in the light of the previous experiences of the INTERREG programme, it comes as no surprise to see that the national state can play an active role in territorial cooperation.

Nonetheless, it is undeniable that the involvement of the state as a potential actor in CBC is becoming increasingly relevant. It is seen as necessary for developing cross-border projects on a larger territorial scale and having their focus on very strategic matters, usually reserved for the state. This is the case of the creation of the European transport corridors (particularly the cross-border section), protection and management of river basins or coastal zones, public health services, the strengthening of polycentric development, etc.

This kind of CBC—which entails the involvement of territorial actors having a 'strong' political capacity (national state but also regions)—is likely to be the focus of the EU strategy on territorial cooperation. Because of the decreasing amount of available resources, it is mandatory to concentrate them in very specific and strategic projects.

There is important evidence of this trend: the recent EU strategy for the Baltic Sea Region, which was the first application of the "macroregion" concept. Following a request advanced at the European Council of 14 December 2007, the European Commission adopted a communication in which it calls for a coordinating action by Member States, regions, the European Union, financing institutions and nongovernmental bodies, finalized to promote a more balanced development of the Baltic Sea Region.[74] The Commission intends to have a role that goes beyond the monitoring of the implementation of the funding programmes. For the practical implementation of the strategy, the Commission explicitly calls for the concentration of all available structural funds—including those meant for territorial cooperation—in order to implement actions foreseen in the strategy.

The Baltic Sea Region is considered by the Commission as an example of a "macroregion", i.e. "an area covering a number of administrative regions but with sufficient issues in common to justify a single strategy approach".[75] The emergence of the macroregion concept in the EU territorial cooperation policy highlights the necessity to develop an institutional and political strategy with the objective to produce a framework permitting interaction and participation of promoting members state, of various regions, together with EU institutions. The recent emergence of an EU strategy for the Danube Region reveals that that macroregion is going to be crucial for the European cohesion policy.

Thus, CBC in the European context is likely to be less spontaneous than it was previously. The bottom-up pushes for external actions will probably be canalized in a common frame defined by vertical political actors, mainly the EU and the States. The role of regions and other territorial actors will be proportionate to their political capacity to be influential in this established framework.

III. The Role of the National State in the European Law of CBC

In the previous section, we take into account the two harmonizing dynamics present today in Europe in the field of CBC: the CoE and the European Union.

Although the trend towards the creation of an harmonised European law on CBC is incontestable, we cannot underestimate the still-relevant influence that national legal orders play in the issue. As mentioned in the introduction, both the EGTC Regulation and the Protocol No. 3 to the

EOC emphasise the regulatory role of the national state not only by remitting to specific domestic legal provisions whenever common rules are lacking but also by granting national states wide discretionary power in relation to the setting of the EGTC and the ECG. They do so by mentioning concepts such as national public interest and public policy whose enforcement is almost entirely based on political evaluations which are in turn influenced by the general attitudes of the state towards CBC.

To this extent, the present and the next paragraphs are meant to provide an analysis of the different approaches national states have shown in regard to CBC.

The examination relies on the comparative method. The relevant national legal orders are not assessed case by case. Rather, it is preferred to enucleate some key points considered particularly influential in respect to the attitude a national state can assume towards CBC. These are: the type of decentralisation, the intergovernmental relation between the national state and the subnational territorial level, the presence of ethic minorities along the borders, the "conditionality" in countries of transition and, where relevant, the judicial cases. On the basis of this analysis and relying on empirical experiences of some national states, taken as paradigmatic, the next paragraph will suggest a classification of the model of the national attitudes towards CBC.

1. *Types of Decentralization*

One issue to take into consideration concerns the question of whether there is a direct relation between the type of decentralization and the power of subnational units to act 'externally'.[76] Because CBC is generally seen as a means of enhancing the self-government rights of the territorial units, one could assume that in those countries in which a 'strong' decentralization is enacted, with subnational units at the regional level enjoying legislative powers, the national state's attitude towards CBC should be favorable and in principle more encouraging than in those countries that apply more-limited forms of decentralization (i.e. administrative types).

However, even a quick look at the relevant domestic legal systems seems to seriously make us question the grounds of the assumption.

If, on the one hand, we consider the case of France—a state well known for its centralistic distribution of territorial powers (although recently eased by the 2003 constitutional reform[77])—we would probably be

surprised by the number of legislative acts passed with the aim of enhancing CBC[78]. Furthermore, if we look at the countries of Central and Eastern Europe—where local democracy is recent and uneven—we quite surprisingly find that the constitutions of both Poland and Hungary confer their territorial communities "the right to join international association of local and regional communities as well as cooperate with local and regional communities of other states".[79]

On the other hand, we can mention the cases of both Italy and Spain, two states which present a strong degree of decentralization but for whom the acceptance as legitimate of 'external' actions conducted at the regional level has been difficult.[80]

The case of Austria is also important. Despite the fact that Austria is usually classified as a federal system, it is often argued that it is structured as a strong regionalized system.[81] This is well reflected in the legal and political ability of the Länder to act internationally. Unlike in other federal legal systems, which usually grant the federate states the treaty making power, the Austrian constitution did not originally provide the Länder with this power. Following the Länder's push for a strengthening of their constitutional autonomy, a constitutional amendment was passed in 1988 that established their treaty-making power. Article 16 of the Austrian federal constitution establishes that the Länder, within their own sphere of competence, may conclude treaties with states or their constituent states bordering Austria. The provision, however, states that any agreement—including transfrontier cooperation agreements, according to the federal government[82]—must have prior expressed approval by the federal government. In particular the federal government must be informed before negotiations begin, and the authorization must be signed by the President of the Republic, following a recommendation from the Land government, and countersigned by the president of the Land.[83]

Until now, Article 16 of the Austrian constitution has never been enforced. This does not mean that the Austrian Länder have never been involved in CBC. When not based on the EC framework of INTERREG programmes, CBC has been developed by means of Article 17 of the Austrian constitution. This provision allows Länder to make use of all forms of private law, including financing projects, in all matters even of the national state, without being restricted by the distribution of competences. This constitutional provision—which serves as a safety valve against the severe centralization of competences in Austria[84]—has been the instrument that allows the Länder to develop external relations, bypassing the strict procedural rules set in Article 16.[85] It is worth noting that even though a same provision was meant to deal with both treaty-

making power and the other external relations of Länder (Art.16), the practice led to distinguishing the two categories, with CBC enacted by means of Article 17 of the constitution and with the treaty-making power not enforced by the Länder.

In the light of this scenario, shall we then assume that the type of decentralization is irrelevant when assessing the state's policy towards CBC? I do not believe so. The fact that CBC is being pursued by institutional subjects enjoying legislative powers, who are exercising influential political capacity with autonomous resources, creates a breach in respect to the traditional, locally tailored CBC. In fact, the external conduct of 'strong' regions may undermine the coherence of both the national general policy and the foreign policy. This may lead to a more cautious approach towards CBC from the national state.

To this extent, it is worth considering that in some countries in which the regional level enjoys legislative competences, the regional external action, including CBC, is very often treated (or has been originally treated) —by the constitution itself or by the interpretation currently given by the national-level administration—as if it were conduct comparable to the use of treaty-making power rather than as a way to promote their self-government rights, despite the fact that the Explanatory Report to the EOC (point 35a) excludes that CBC may entail any international liability of the state as a whole.

To give some examples, one can mention Article 117.9 of the Italian constitution, as amended in 2001, which grants the Regions the power to conclude, in the same provision, both international treaties and agreements with a foreign counterpart, though remitting to a statute that nonetheless regulates distinctively the two hypothesis.

In similar terms, according to the Austrian federal government interpretation and the current practice, Article 16 of the Constitution applies not only to international treaties, but even to transfrontier cooperation agreements signed by the Austrian Länder.
Finally, even in Germany, at least until the decision of the German Constitutional Tribunal on the Kehl Port,[86] the federal government argued that Article 32 of the German Basic law (GG)—a provision expressly dealing with the Länder's treaty-making power—applied even to the Länder's CBC agreements.[87]

A possible explanation for this is that any external relation of 'strong' subnational units, being it an exercise of their treaty making power or CBC agreements, may potentially undermine the consistency of the

foreign policy and the general policy of the national state.

Thus, both in regional and federal states, the external conduct of the regional subnational units is enforced according to procedures that, formally or informally, grant the national authorities some discretionary evaluation over the respect of the national foreign policies and general interests. However, it should be noted that the extent and the nature of this control is also deeply influenced by the type of intergovernmental relations among territorial units and the national state.

2. *Intergovernmental Relations*

Another issue we should keep in mind when evaluating the national-level attitude towards CBC is the type of relations between the national state and the subnational units of regional level.

In a context in which intergovernmental relations are based on a cooperative scheme, it is likely that CBC will be assessed according to the same paradigm and thus progressively being considered as a way for subnational units to exercise their self-government rights. On the contrary, where the intergovernmental relations are based on more-competitive terms, the policy of the national state towards CBC might be more cautious, and therefore stricter forms of national supervision are likely to occur.

As an example of cooperative intergovernmental relations, we can consider the cases of Germany[88] and Switzerland.[89] Both countries are, as is well known, federal states whose constitutions grant to Länder and Cantons treaty-making power. However, in both cases, the federal state retains the power of supervision in order to avoid a possible conflict with national foreign policy.[90] The current practice shows that both the Länder and Cantons rarely use their treaty-making power. In fact, according to the usual pattern of cooperative federalism, both the Länder and Cantons have agreed to renounce their use of treaty-making power, in favour of the national state, in exchange for a political commitment of the national state itself to consult and to take in due account the interests of regional units when defining and conducting foreign policy.[91] In Switzerland, the duty of involving the Cantons in the definition of the confederation's foreign policy was formalised in the 2000 constitutional text codifying a lasting and previous institutional practice.[92]

Thus, it is in a context highly characterised by a cooperative pattern that we should evaluate the policy of Switzerland[93] and Germany towards CBC.

The recognition of such power is based on Länder and Cantons' constitutional self-government rights. The ratification of the EOC and the subsequent Protocols gave it a further formal legal basis.[94] In both countries, there are no provisions concerning a supervision power of the central government in relation to CBC or other external relations not of an international nature conducted by the Länder and Cantons.[95] The external relations must, however, take place respecting the general principle of the loyal cooperation characterizing the intergovernmental relations between the central and the regional tier of government.

Thus, although at the beginning the CBC conducted by the Länder and Cantons were somehow assimilated to their international treaty making power, later on CBC was progressively considered more as an exercise of self-government rights - to be dealt with according to public internal law - rather than as an issue involving an international law dimension. In the case of Germany this evolution has certainly been favoured by the decision of the constitutional tribunal on the Kehl port.

However, the role of the two national states must not be underestimated. In fact, both states have always guaranteed their commitment to develop the CBC of their subnational units. This has been done especially by concluding international interstate agreements favouring CBC or by establishing intergovernmental commissions which permitted the connection of both national and regional levels.[96]

Let us now consider examples of highly decentralised states (both federal and regional) whose internal intergovernmental relations cannot be easily assessed according to the cooperative scheme characterising Germany and Switzerland.

The first case is Belgium. Here, treaty-making power for Regions and Communities was introduced in the 1980s, but it was formally enshrined in the constitution only in 1993.

The specificity of the Belgian case is shown by the fact that Belgian Regions and Communities tend to use the international-treaty instrument frequently. The reason for that is clear: they want to promote themselves as a quasi-formal state, somehow politically competing with the central government. The use of the foreign power by the Regions and Communities is often a way to highlight their political distinctiveness in respect to the federal state[97].

In this framework, some procedural mechanisms have been set to regulate

the treaty-making power of the Regions and the Communities. However, the established procedural mechanism is more an instrument of loose coordination, rather than that of effective cooperation, between territorial levels. In fact, Article 81 of the Special Law of Institutional Reforms gives the federal government the power to prevent a Region or a Community from signing an international treaty. However, this may only occur after the failure of the attempt to reach a compromise and in very specific circumstances,[98] such as the breaching of previous international treaties which could expose Belgium to international liability or the signing of a treaty with a state not internationally recognised by Belgium or with whom the diplomatic relations are suspended. Thus, by specifically listing the narrow circumstances that allow the national state to intervene, it is clear the intention is to avoid the national authorities enjoying a too wide discretion in establishing the limits of the Belgian Regions' and Communities' foreign power.[99]

As far as CBC is concerned the basic idea is that it is part of the self-government rights pertaining to regional or local subnational units and because of that no national authorisation is required. For a long time, Regions and Communities have considered CBC as something reserved for local units. This is reflected by the international agreements concerning transfrontier cooperation signed by Belgium, which, as we have seen, does not apply to the Regions and Communities (Benelux Convention, Mainz Agreement). According to some scholars the increasing interest of the Regions and the Communities in CBC emerged when the EC started to fund the INTERREG programme.[100] In fact, the more recent Bruxelles Agreement reveals a change of attitude with Belgian Regions and Communities explicitly entitled to conclude CBC agreements.

Thus, in Belgium, due to the fragile institutional equilibrium existing among the constituent units of the state, a procedural framework is set to the limited extent of regulating the treaty-making power, whereas the other external conducts, as CBC, are not regulated at all since they are considered an exercise of the self-government rights of the subnational units. Moreover, the cases justifying a barring intervention of the federal state are narrowly construed and do not include clauses such as general interest or foreign policy.

The cases of Italy and Spain present a common pattern. In both Italy and Spain[101] a highly formalized procedure applies in such a way that any external action is actually treated, from a substantial point of view, as if it were almost a use of the treaty-making power. The control exerted by the national state involves not only legal but political evaluation. The priority for the national state is to ensure that the national foreign policy and the

national interest are not affected by the external conducts of the regional subnational units. This attitude has been certainly favored by the fact that, unlikely federal states, whose constitution usually recognize the treaty making power to federate units, these legal system[102], though highly decentralized, do not, or at least did not originally, admit any rooms for the external action of the regional levels since the external relations were seen as an activity strictly pertaining to the national state.[103]. In both states, however, the claims of the regional territorial level for the entitlement of such a power have been successfully conducted before Constitutional Courts which have nonetheless considered their power to act externally as a derogation to the otherwise national competence in foreign affairs, thus to be narrowly construed.[104]

The competitive intergovernmental relations between national state and regional level,[105] the tendency of the regional level to put emphasis on CBC as a way to promote political distinctiveness, the burdensome procedures enforced by the national states in order to permit CBC of regional actors are all factors that have not favoured an easy recognition of CBC.

To this regard, a first important indicator is the enforcement of the CoE's *acquis*. Both countries ratified the EOC but not the Additional Protocol and Protocol No. 2. The failed ratification of the Additional Protocol, which deals with the creation of cross-border bodies, is meaningful because it shows the hostility of the two states to admitting a stable and lasting institutionalization of CBC.

Italy, when depositing the instruments of ratification of the EOC, issued two declarations revealing the severe policy of the national state in relation to CBC. First, the application of the EOC was subject to the conclusion of interstate agreements. Second, the Italian territorial authorities were empowered to conclude transfrontier agreements provided they were situated within 25 km of the border. Both these limitations are included in the national law enforcing the EOC, still in force.

The case of Spain is slightly different. At the time of the signature of the EOC, Spain issued a declaration according to which the EOC application was subject to the previous conclusion of an interstate agreement. However, lacking this international agreement, subnational units could nonetheless conclude transfrontier agreements provided that the express consent of the governments of both national parties involved was given.

In 1995, the Treaty of Bayonne, concerning transfrontier cooperation, was signed between Spain and France. In 1997 a decree (n. 1137) dealing with

the procedure to be followed for transfrontier agreements of subnational agreement was issued. The decree provides a different regulatory framework depending on the legal context within which the agreement is concluded. For those transfrontier agreements concluded under the umbrella of an international treaty (as was the case along the French–Spanish border but not along the Portuguese one), the express consent of the national state was replaced by a simple duty of communication in order to permit control of the legitimacy of the agreement with reference to both the EOC and the relevant bilateral treaty. The recent Treaty of Seville between Spain and Portugal has allowed for the extension of the above-mentioned procedure for transfrontier agreements concluded by Spanish and Portuguese subnational units, for which the express consent of the central government was previously required.

The Royal Decree, however, only applies to transfrontier cooperation.[106] No regulatory framework is set for the other external conduct of CC.AA., such as interregional agreements or the joining of European frontier-region associations. Nonetheless, these activities can be considered legitimate in the light of the tribunal constitutional's case law, which, however, requires a duty of loyal collaboration between the two territorial levels of government.

In Italy, following the constitutional reform in 2001, Article 117.9 of the constitution established that the Regions have the power to conclude international agreements (*accordi*) with a foreign state and understandings (*intese*) with constituent parts of a state. A statute (no. 131/2003) was passed to enforce the new constitutional provisions. The statute provides two different procedures for the conclusion respectively of the international agreements and of the understandings a Region can come down to with its territorial counterparts. As far as the latter, the procedure echoes a previous regulatory framework set in 1994.[107] These understandings, aimed at promoting the social, economic and cultural development of the Regions, require the previous communication to the national state, which may provide guidelines the Regions have to take into account. If the central government fails to communicate any observation within 30 days, the Region can act[108]. It is still unclear whether the CBC agreements concluded within the context of the EOC are dealt with by the above mentioned procedure or rather by the stricter rules set in the national law enforcing the Madrid Convention. The above-described extremely detailed procedure reveals the central government's fear concerning the regional external conduct.

3. *Ethnic Minorities*

The possible link between CBC and the protection of ethnic minorities has emerged quite recently in the legal and scholarly debate. Clear evidence of that is Art. 18 of the Council of Europe's Framework Convention for the Protection of National Minorities (FCPNM).[109]

At first, the connection between ethnic minorities protection and CBC can appear obvious. In fact, since the core of CBC is the very fact that populations and subnational units of two bordering national states cooperate jointly, "trans-border cooperation is *per se* a way to deal with ethnic diversity".[110]

However, ethnic diversity can actually be a problem for CBC. This may occur, as it has been convincingly pointed out, "when the cross-border activities affect a territory where the (majority of the) population is ethnically homogeneous with the (majority of the) population on the other side of the border and thus generally a minority in the state to which it belongs".[111] In such a situation, national governments can consider CBC as a potential threat to their national integrity. This fear can get even more accentuated when national minorities are concentrated in territorial areas enjoying special self-government rights.

This is the case of the Land Tyrol and of the two autonomous Italian Provinces of Trento and Bolzano.[112] In the latter is concentrated a German-speaking minority that is actually the majority in the territory concerned. Following an international interstate agreement on CBC signed between Austria and Italy in January 1993, the three territorial units established a roundtable of experts in order to explore legal ways to allow a strong institutionalized form of CBC. The draft proposal envisaged a common permanent organization, to be called Euroregion Tyrol, which was empowered to make decisions with binding force. Both national governments reacted firmly to this political initiative. The Austrian government, in an internal expert opinion, noted it had not been informed about the beginning of negotiations, as Article 16 of the Austrian constitution requires, and it further objected that no public law entities were admissible under both Austrian and Italian law.[113] A similar attitude was taken by the Italian government, whose Ministry of Interior defined the project as subversive. For a long time, the idea of a strong institutionalization of CBC in the Brenner area was put aside, although the recent approval of the EGTC Regulation reopened the political debate.

In some cases, the very fact that ethnic tensions are present in a given area is the main reason to develop CBC. However, CBC is driven by the

national governments, and it becomes part of a larger strategy for pacification. This scheme has been followed in the Northern Ireland context.

Both Ireland and the United Kingdom do not provide any legal ground for transfrontier or interregional cooperation. Neither of them signed the Madrid Outline Convention, and limited interregional cooperation practices took place only in the context of the INTERREG programme (such as Transmanche and Rives-Manche between Kent and the French Region Nord-Pas-de-Calais[114]).

According to the Good Friday Agreement between Ireland and the United Kingdom in 1998, a North-South Ministerial Council (NSMC) was established, a body that brings together ministers of the Northern Ireland government and the government of the Republic of Ireland. The agreement also provides for several joint bodies, with a clear operational remit, to operate in the field of transport, agriculture, education, health care, the environment and tourism. All bodies are responsible to the NSMC, whose policies they must implement.[115]

The ethnic issue can also be problematic for the development of CBC in the case of multinational states. In a multinational state, there are no, properly speaking, 'national minorities' since it is the state itself that is made of several distinct national groups, representing the constitutive units of the state.[116] This is reflected in the institutional framework which not only grants a high degree of autonomy to those territories where the various national groups are mainly settled, but which also adopts a governmental framework in which the power is shared among the different national groups.[117] Whereas in some cases, as in Switzerland, the multinational state is effectively cohesive, in others it is not, and the institutional equilibrium is more precarious. In this event, the territorial units often claim, or even act as if, they are quasi-autonomous states.

In this institutional pattern, the power to conduct external or foreign relations is seen as instrumental to claiming their political distinctiveness in respect to the state as a whole[118]. The already mentioned case of Belgium is eloquent to this regard but it could be applied to a certain extent to Spain as well.

In more recent years, there has been a resurgence of nationalistic parties in Catalonia, the Basque Country and Galicia claiming for more powers as a sign of their distinctiveness in respect to the other CCAA.[119] In 2004, the Basque parliament approved a proposal for a new *Estatuto de autonomia*[120] (so called *Plan Ibarretxe*) according to which sovereignty

would have been vested to the component nations, with Spain being reduced to a mere confederation. The plan was, however, rejected by the national parliament.[121]

The reforming procedure of the *Estatuto de Autonomia* took place in Catalonia as well, and it was approved by the national Parliament.[122] However the *Partido Popular* – the political party at the opposition in the national Parliament at the moment of enacting the *Estatuto* – took action before the constitutional tribunal, claiming the unconstitutionality of numerous provisions. In June 2010, the constitutional tribunal estimated illegitimate some articles of it.[123]

Although the *Catalonia Estatuto* does not contain references to independence as the Basque plan did, it nonetheless puts a strong emphasis on the 'distinctiveness' of Catalonia in the context of Spain.
In this regard, one of the key issues is exactly the power to act externally[124]. An entire chapter (Chapter 3) of the *Estatuto* is dedicated to the issue, with eight provisions specifically dealing with it. Although reaffirming the exclusive power of the national state to conduct foreign relations (in line with Art. 149.1.3 of the Spanish constitution), the *Estatuto* seems to formalize the previous case law of the constitutional tribunal in the field, in some cases going a little further.

Article 195 of the *Estatuto* establishes that Catalonia can conclude agreements within its powers for the promotion of the Catalonia general interests, somehow implicitly considering the power to act externally as a way to exercise internal powers. The provision does not say anything about the subjects—states or component units of a state—with whom to cooperate with. [125] Besides, it calls for the national state to provide support to the Catalonian power to act externally.

The following Article 196 of the *Estatuto* claims for an involvement of Catalonia whenever an international treaty, to be signed by the national state, impinges upon Catalonia's reserved matters. Moreover, the following Article 197 explicitly mentions transfrontier and interregional cooperation as a way for Catalonia to pursue its external power.

It is difficult to say at the moment what the practical consequences that the enactment of this *Estatuto* will have on the Spanish national policy towards the external conduct of the CCAA. However, since these provisions have been substantially agreed upon by the national government, they probably have to be seen as a part of the new institutional equilibrium among national groups composing Spain. It is then likely this will lead to a more supportive attitude of the national state

towards CBC of CCAA.

4. *Supranational conditionality and CBC in countries in Transition: the Case of Central Eastern Europe*

The title of this section may give rise to some criticisms. It considers under the category of "countries in transition" states that have experienced independence and democratic regimes for more than 20 years and that are now part of the EU, thus sharing the democratic values this institution underpins.

Moreover, it does not take into account that each of these countries presents a different legal regime concerning CBC. To this regard, we may note that there are national experiences, such as Poland and Hungary, that enshrined in their constitutions the power of subnational units to conclude cross-border agreements with foreign counterparts and the power to join associations of frontier European regions. In other cases, it is a statute (generally the law on municipality or, where relevant, on regions) that explicitly grants such a power.[126]

There are also important differences concerning the procedure and the material scope of the central government's supervision power.

In the Czech Republic, the agreements concluded by municipalities with their foreign counterparts are not subject to specific forms of control, whereas regional agreements or those instituting cross-border bodies require the previous consent of the Ministry of Interior.

In Poland, the regional level (*voivodat*), which enjoys administrative powers in the field of economic and social programming, is granted remarkable external power. However, before concluding a cooperative agreement with a foreign regional counterpart, it must obtain the consent of the Foreign Affairs Minister.[127]

In Romania, according to law 215/2001 on local public administration, before concluding any transfrontier agreement, the local government shall obtain advice from the Ministry of Foreign Affairs and inform the Ministry of the Public Administration.[128]

In Slovakia, the development of cross-border bodies, taking the form of Euroregion based on private law, was problematic until the ratification of the EOC[129].

Thus, the national CBC legal framework certainly varies from country to

country, although there are some similarities. These are, for instance, the preference for the setting up of private law–based cross-border bodies (often lacking any legal capacity) and the application of specific forms of national state supervision whenever the external conduct of the territorial community is likely to have more political relevance, as is the case for the setting up of a cross-border body or for agreements concluded by the regional territorial level (see Czech Republic, Poland).

However, despite these national disparities, it is undoubted that there exists a common background concerning CBC. All CEE countries have been equally and deeply affected by both European and international trends. The relevance of external factors in favouring the CEE countries' transition towards the Western legal tradition has been stressed by several scholars who have pointed out how the accession to first the CoE and then the European Union have favoured, if not required, the previous acceptance of democratic values.[130] CBC was considered as part of this process, and that is why I deem it appropriate to stress in the title of this section the link between CBC and the democratic transition that has occurred in the CEE countries.

All CEE countries ratified the EOC, thus accepting the idea that CBC is a legitimate practice. To a certain extent, this may seem surprising. In newly freed or independent states, as the CEE countries were, the priority was building a nation and preserving the national sovereignty that had been only recently been regained. In this framework CBC could be considered as a threat to their integrity. The picture was still further complicated by the interplay of other factors. Several state borders (Germany–Czech, Germany–Poland, Slovak–Hungary, Hungary–Romania) were and still are very sensitive from an ethnic point of view because of the ethnic cleansing that occurred during and immediately after World War II. Moreover, CEE countries had no previous history of truly democratic regional or local decentralization.[131]

Certainly, in some cases, these factors play a significant role in hindering the CBC, but in general terms it can be noted that the CEE countries took quite quickly a positive attitude towards CBC.

A primary important reason to explain this is certainly the commitment of the CEE states towards the protection of national minorities. This link between minority rights and CBC has been stressed in almost all bilateral treaties for the protection of national minorities or on good neighbourly and friendly cooperation concluded by practically all CEE countries.[132]

The second important factor has been the efforts for developing

democratic and autonomous local territorial communities.[133] The CoE institutions have played a pivotal role, especially in sustaining the strong connection between the right to self-government of territorial communities and their entitlement to act 'externally'. To this regard it should be noted that the EOC has not been the only CoE international document relevant for the topic. A larger impact on the CEE countries local democratisation has been determined by the European Charter of Local Self-Government, whose Articles 10.2 and 10.3 explicitly entitle local authorities, respectively, to belong to an international association of local authorities and the power to cooperate with their foreign counterparts under such conditions as may be provided for by law.[134]

The third important common driver, which may be the more influential one, has been the European Union and its PHARE Programme, which since 1994, has boosted in many cases the creation of Euroregions along the former EU border.[135]

The CEE countries faced and still are facing common internal challenges. One of them is certainly the decentralization issue, which is important for our topic since successful CBC requires effective local self-government. The local institutions in the CEE countries seem weak, especially considering that the local government finance is still dependent on central funding.[136] Moreover, the decentralization is of the administrative type. CEE countries have been reluctant to establish a powerful middle territorial level, either because of the countries' sizes or for fear that the creation of a regional power might compete with the central one. Where this institutional move has occurred (Poland, Czech Republic, Slovakia and, more recently, Slovenia), it was mainly in response to the requests of the European Commission for a more effective implementation of the EU structural funds.

The weak role of the intermediate level, which, even in those cases in which it has been settled, enjoys only administrative powers, can represent a serious obstacle in the development of a more strategic cross-border policy, according to the meaning I have outlined earlier in this chapter. The fact that the richest counterparts in the area are represented by 'strong' regions empowered with legislative competences (German and Austrian Länder) does not help too much. The risk is in fact that the CBC, or at least the more strategic cross-border projects, will be driven almost entirely by the central government, according to a top-down approach not sufficiently balanced by effective subnational-level participation.

IV. An attempt of classification of the national practices by looking at empirical cases of CBC

Taking into account the different factors influencing the national policies towards CBC outlined above, the purpose of this paragraph will be to suggest a classification of the national policies towards CBC within three groups. References to some CBC national empirical cases, considered as paradigmatic, will back up our attempt at classification.

1. *"Soft promotional" national states*

The first model can be labeled as a "soft promotional" national state. This is especially the case for Germany and Switzerland. It should be noted that CBC in both countries have been developed mainly according to a bottom-up approach which has especially interested the local tier of territorial government, though the latter acts in form of inter-municipal association.[137] To this extent, the upper territorial levels – the national state but even the Länder (which enjoy power on matters related to local self-government) – have played a role in accompanying this development by enforcing instruments when proved useful. To this regard, the already mentioned Isselburg-Anholt, Mainz, Karlsruhe international treaties are good evidence of that.

The regional level has increasingly showed an interest in developing CBC as the Karlsruhe agreement reveals, with Länder being specifically empowered to make use of the legal instruments provided by it. The inherent cooperative nature of the intergovernmental relations can probably explain why in the area CBC, though mainly developed according to a bottom approach, has nonetheless beneficiated of the national state attention.

To this extent, the analysis of CBC practices in the upper Rhine area may support this view.[138] From a legal point of view, the CBC in the Upper-Rhine area is grounded on an international agreement signed in Bonn in 1975 among the Federal Republic of Germany, France and Switzerland. The agreement set an intergovernmental Commission with representatives of the three states charged with the promotion of transfrontier cooperation between the territories concerned. The Bonn agreement represented the legal ground for the establishment of the Upper Rhine Euroregion - the larger territorial CBC body within which CBC practices have developed in the area – made up of the Haut et Bas Rhin French departments, the Swiss Cantons of Bale Ville and Bale Campagne, the German Länder of Baden Wuttemberg and Rhineland-Palatinate. Although the CBC cooperation in the area started originally according to an up-down approach, later on a bottom up approach prevailed. In fact, the Bonn Treaty provided for an Upper Rhine

conference made up of local territorial actors representatives, plus the involvement of the regional prefect for the French part. It was this institution that was (and still is) the real engine of the cooperation practices in the area.

A new agreement concluded in Basel in 2000 replaced the Bonn agreement. It recognized the important role the Upper Rhine conference had for the CBC. It is then up to this institution, which has a policy coordinating role, to smooth the cooperation and only in the case a solution cannot be found, it would refer to the intergovernmental commission.

Another reason of interest for the Upper-Rhine region is given by the fact that a sort of Russian doll structure has been put in place to institutionalize CBC, varying in scale depending on the level considered most appropriated to deal with each specific issue, thus applying a subsidiarity principle form to CBC.

Within the perimeter of the Euroregion of the Upper-Rhine conference, other three Euroregions have been established. They are Pamina, Centre-Harnolte and the TriRhena Region. Among the components of TriRhena, there is the *Regio Basiliensis*. This is an institutional actors and civil society association in the area of Bale which at the same time has been charged with the secretariat of the Swiss government delegation in the intergovernmental commission established by the Bonn treaty. Thus, the double role performed by the Region Basiliensis – both as a local player and as a permanent connector with the national state – has permitted this institution to play a decisive role.[139]

2. *"Strongly promotional" national states*

The second national attitude can be defined as "strongly promotional". France is particularly indicative of this approach.[140] By means of its decentralized territorial organ (the Prefect), the national state has often taken part in CBC projects, especially when they have a strategic territorial relevance, going beyond the local dimension.

The prefect (usually at the regional level) has the task not only of ensuring the legitimacy of the CBC agreements but also of coordinating CBC and distributing national resources. This role has been defined by a governmental document (*circulaire*) significantly named "*Coopération décentralisée et role des services déconcentrés de l'Etat*". After reminding the will of the national state to encourage CBC, the document states that it is up to the regional prefect to define a yearly program for CBC, in strict

cooperation with territorial units, which have to nonetheless respect the geographical and thematic priorities established by the Foreign Affairs Minister.[141]

Another feature to be highlighted is that many national administrative structures have been created in order to provide legal support and national coordination of French CBC subnational units.[142]

The involvement of the national state has almost transformed CBC from a practice functional to the development of self-government rights of local units to a sort of promotion of national interest, though applied locally. Another explanation for this move seems to rely on the fact that the bordering foreign counterparts of the French *collectivités* are usually strong subnational units enjoying economic resources and legislative powers. The role of the prefect may be that of supporting the project, both politically and legally, whenever the powers of the French regions are not enough when compared with their foreign counterparts.[143]

It is in the light of this scenario that we can consider some examples of CBC institutionalisation.

The first case we would like to consider is the CBC practices occurring along the French and Swiss borders surrounding Geneva.[144] From an historical point of view, it is important to recall that several CBC initiatives in the area – although favored by previous and lasting relations in the past – started with an international agreement signed between France and Switzerland, the latter acting on behalf of the Geneva Canton. With this agreement the Geneva Canton took the commitment to pay directly to the French bordering subnational units a part of the revenues paid by the French transfrontalier workers.

This top-down initiative led nonetheless to the setting of the *Comité Regional franco-genevois*, composed of representatives of the Swiss Cantons (Geneva and Vaud) and of French subnational units which effectively became the real CBC political engine in the area. It is important to note, however, that the prefect of the French Region Rhone-Alp is a constitutive party of the *Comité*, highlighting the role of the French state as an active CBC player.

The activist role in supporting CBC emerges more recently considering that France is a constitutive party of some of the first EGTCs set thus far in Europe.

To this extent, we may consider the case of the Eurométropole Lille–

Kortrijk-Tournai.

Unlike the above mentioned CBC case in the area of Geneva, here CBC started according to a bottom-up approach. It was thanks to an initiative of the urban community of Lille and of two associations of Belgian local units that in 1991 the *Conférence Permanente intercommunale transfrontalière* (Copit) was set as a non formalized body for CBC. The initiative was meant to establish new development opportunities for the area which was experiencing an economic decline.[145]

The CBC took a new emphasis at the end of '90, thanks to a project co-financed by INTERREG EU program. At the end of this experience, the political will for a more formalized form of cooperation which put together the major territorial actors, including the national states, emerged in order to develop a transborder governance for the economic and territorial development of the area. The Bruxelles international agreement was meant to provide the legal instruments to formalize this cooperation. However, the adoption of the EGTC Regulation pushed the institutional actors to pursue this route further on.

The Eurométropole Lille–Kortrijk-Tournai EGTC, constituted in January 2008, is made up of the two national state representatives, representatives at the regional level (Flemish Region, Walloon region and French speaking community and the Région Nord-Pas-de-Calais), representatives of the meso-territorial level (French Département du Nord and Provinces of Western Flanders and of Nainaut) and of local territorial units associations. The objectives of the EGTC are vaguely defined, confirming the nature of the EGTC as a policy coordination forum.[146]

3. *"Reluctant" national states*

Finally a third model is represented by Italy which displays a "reluctant" attitude toward CBC. The reasons for this approach relied on the fact that CBC is mostly seen as a regional rather than a local issue. Often, the regional players used CBC as a way to promote their political distinctiveness rather than to pursue clear-cut objectives. the presence of ethnic minorities along the national borders which are the majority of the population in the relevant regions further complicates the issue.

The case concerning the Euroregione Alpi Mediterraneo setting is quite indicative of this approach.

In the attempt to urge the national authorities to transpose the EGTC European Regulation into the national legal order, in February 2009, the

Region Liguria approved a statute stating that it shall participate in the so-called Euroregione Alpi-Mediterraneo, an EGTC the Liguria will constitute with other Italian and French regions. The regional statute, which enclosed the institutive acts of the above-mentioned EGTC, was sent to the national authorities two weeks before its enactment. Moreover, a provision specifies that the Liguria participation in the EGTC would be fully effective provided the consent of the Italian national state was given, in pursuance of the EC Regulation 1082/2006.

The reaction of the national state was sharp. The government itself took action before the constitutional court, claiming that by enacting the challenged statute before the national enforcement of Regulation 1082/2006, Liguria breached the constitutional principle of loyal collaboration. The national state went even further. It argued that the regional statute was also in breach of the EC Regulation—and, indirectly, of the Italian constitution. In fact, according to the government complaint, the EC Regulation limits the range of the activities an EGTC can carry out with regard to the strengthening of the economic and social cohesion of the parties involved. However, the Euroregione Alpi-Mediterraneo extended this material scope to political and cultural ties of the parties.[147] Following the reaction of the national authorities, Regione Liguria passed a new statute (n. 2, 15 February 2010), repealing the original reference to the strengthening of "political ties", as one of the aims pursued by the Euroregione Alpi-Mediterraneo. The regional intervention smoothed the procedure for authorising the establishment of the mentioned EGTC. In March 2010, the Italian constitutional court (decision 112/2010) rejected the claim by the national authorities noting that the challenged statute of Regione Liguria was meant to be fully effective only after the enactment of national law enforcing EGTC Regulation. Furthermore, the constitutional court observed that the repealing of the words "political ties" was enough to conclude that the statutory aims of the Euroregione were in line with the EC Regulation.

A more favourable approach arose when the CBC project presented a more focus tailored objective, as has been the case for the Brenner Corridor Platform. This is a cooperative agreement among the representatives of the three national states (Germany, Austria and Italy), of the regions involved (Bavaria, the Land Tirolo, the autonomous provinces of Trento and Bolzano and the Verona province) and the railway companies[148] whose setting is mainly due to the initiative of the European Coordinator.[149] The main goal of the Platform is the construction of a tunnel in the Brenner area, linking the territory of Austria and Italy, as part of the European Priority project 1[150], concerning the construction of a rail connecting Berlin and Palermo.[151]

The case of the Brenner Corridor Platform is interesting for at least two reasons. Despite that, initially, the focus of the project was on the construction of the tunnel—a matter that involved only national competences—a different approach subsequently emerged. The construction of such a rail infrastructure has deep consequences for the economic development and the territorial planning of the territories concerned. Since these matters are reserved for the regional territorial level, there was an interest in setting up a coordination policy arena linking together national and regional territorial levels as well. Moreover, such a regional involvement took place in national contexts (Italy and Austria), which have shown restrictive attitudes towards CBC, especially when conducted by the Brenner area regional actors. Most likely, the fact of being involved in the same project and the fact that the latter has a specific and clear focus, with no claims on political integration, has favoured a change of attitude in the national states.

V. Concluding Remarks

In the first part of this contribution, we have underlined some common legal developments that the two supranational driving forces in the field of CBC, namely the *CoE acquis* and the EU, are displaying.

Firstly, we have highlighted the increasing attention towards legal instruments for institutionalising CBC. In the CoE context, this feature emerged at the time of the signature of the Additional Protocol to the EOC, although the model agreements listed to the text of the EOC reveal this was an issue already present at the time of the Madrid Convention.

Currently, a move forward can be noted. The original model – somehow suggested by the Additional Protocol and further enforced by some of the interstate agreements (see for example the Valencia Treaty) – was in fact based on the remitting to the national law where the CBC body was located for the regulation of membership, powers, operations and so on. This is being replaced by a different framework where a "common core" of harmonized rules for the establishment of a CBC body is provided, since the subnational units are unwilling to subject themselves to the national law of one of them. Earlier evidence of this new approach has been seen during the signing of the Karlsruhe agreement which regulates the *Groupement locale de collectivités territoriale* (GLCT). The GLCT has been a legal model for following international treaties concerning CBC[152] and for the EU EGTC Regulation.

The second emerging feature of the CBC European is the increasing

relevance of institutionalised CBC as a means of developping policy coordination of different territorial players other than operative instruments aimed at solving specific cross-border issues. The setting of a CBC body means to conceive CBC as a stable and lasting relation in order to permit the development of a true systematic cross-border policy concerning a larger territory and entailing the coordination of more territorial levels, according to the multilevel governance concept.[153] This marks a departure from the idea of CBC as related only to neighbourly relations and having only a technical content, as was originally suggested by the EOC.

This evolution could be hindered by some textual elements contained in the EU EGTC Regulation.[154] However, the enforcement of the EGTC Regulation conducted thus far has showed that the potentiality of the EGTC to be used as a territorial multilevel forum has been generally accepted. Moreover, what according to the EGTC Regulation was conceived as an exception, (the carrying out of territorial cooperation tasks other than implementing EU financed territorial projects) is almost the rule.

There is however a strong argument favouring the hypothesis that the EU Regulation drafters (and now the CoE Protocol No. 3) had perfectly in mind that the EGTC could be developed according to a multi-territorial governance framework: the provision concerning the possibility for a Member State to participate in an EGTC.

In fact, CBC as a means of developing coordination policies determines consequences in relation both to the subjects and to the content of CBC.

As far as the first element is concerned, CBC conceived as a mechanism of coordination policy tends to involve territorial units enjoying influential political capacity, such as federate states or regions or inter-municipal associations since the larger territorial units are in a best position to perform programming tasks. Again, the mentioned interstate international agreements are important evidences to this regard (see the Karlsruhe Agreement or the Brussels agreement, both providing special provisions dealing with the CBC enacted by the components units of federal states) and the empirical cases of CBC at the German, French, Swiss borders support this view. At the same time, it may demand for the direct or indirect involvement of the national tier of government among the actors of the CBC. This is due to the fact that the CBC as a policy may encroach upon matters pertaining to different territorial levels, included the national one.

As far as the material content of CBC, since the main aim is on policy coordination, the attention is less on the matters of the cooperation and much more on the function of cooperating and coordinating. This can explain why the objectives of the EGTC thus far constituted are often expressed in vague terms, thus permitting to avoid strict control in the requirement of competences and their commonality among the EGTC participants.

This emerging strategic dimension of the CBC should nonetheless be put into relation with the national attitudes towards CBC, as outlined in the second part of the contribution, so as to understand to what extent the latter can influence and reshape domestically the "new" European CBC.

Although the measurability of this influence is certainly difficult to assess, two factors will be taken into account. The first consists in looking how Member States have enforced art. 4.3 and 13 of the EGTC Regulation. These provisions deal respectively with the decision of the Member State not to approve the prospective member's participation in case it considers such participation not justified for reasons of public interest or public policy (art. 4.3) and the possibility of a M. State authority to carry out specific control procedure in order to prohibit any activity of a EGTC in contravention of a Member State's provision on public policy, public security, public health or public morality, or in contravention of the public interest of a Member State (art. 13). [155]

Because of the inherent vagueness of the public interest/public policy notions, it is important to look at the way national states have enforced these clauses in order to establish whether a relation can be drawn between the national attitudes towards CBC and the national implementing measures of the EGTC Regulation.

If we consider the case of federal states as Germany and Belgium, there is no mention of possible barring intervention of the national state because of national interest interferences.

Such a broad limitation is also excluded in those national legal orders whose territorial units enjoy only administrative powers. For example, both the Portuguese and the French[156] national enforcement acts empower the national authorities to prohibit the participation of a Portuguese or a French subnational unit in an EGTC provided that it acts beyond its internal competences or against international agreements (not foreign policy) concluded by the national state.

In both Italian[157] and Spanish[158] acts of EGTC Regulation

enforcement the national authorities are provided with a wide margins of discretion in denying the authorisation for a prospective EGTC. A burdensome procedure is required in order to verify that the establishment of the EGTC does not produce any interference with the public national interest or foreign policy.

These findings seem to fit with the general remarks concerning the national attitudes towards CBC previously outlined.

In national legal orders based on administrative decentralisation, the external conducts of local units are considered *per se* as unsuitable to affect the general foreign policy or the general public interest of the state and thus they are not grounds to be scrutinised, at least not prior to the establishment of the EGTC. [159]

On the contrary, in those legal orders structured on a strong degree of decentralization, whose intergovernmental relations are based on a competitive scheme and ethnic minorities are present along the national borders, a more cautious approach towards CBC institutionalisation arises and as we have seen the control is more on discretionary grounds. The same does not occur in those federal legal orders where more cooperative intergovernmental relations apply.[160]

A second issue to explore concerns the involvement of the State in the EGTCs. As we have noted, although the involvement of the state is not *per se* a true novelty, it seems to be a crucial element in strengthening the idea of a strategic and political CBC.

By looking at the EGTCs thus far constituted, it can be noted that the national states which are, directly or by means of their decentralised organs, amongst the constitutive members of an EGTC are generally unitary states with a decentralisation of administrative type. This is the case of the Lille-Kortrijk-Tournai and West Vlanderen/Flandre-Dunkerque-Cote d'Opale where France (and Belgium)[161] are amongst the constitutive members; the Greater Region constituted amongst the others by France and Luxembourg, the Hospital de Cerdanya EGTC (France), the EGTC Galicia-Norte de Portugal (keeping in mind that the *Comissão de coordenação e Desenvolvimento regional do Norte* is a decentralised organ of Portugal).

Among the above-mentioned EGTCs, the Hospital de Cerdanya EGTC has the most focus tailored objective: to create a cross-border organisation for the constitution and subsequent management of an acute-care hospital for all patients in Cerdanya and Capcir areas. The specific task of this

ETGC is further highlighted by the limited number of participants (the French government and the Generalitat of Catalonia) and by the definite duration.

The other EGTCs are generally structures for integrating stakeholders from different territorial tiers of governments[162] and they are primarily aimed at being coordination policy instruments.[163]

We can infer that the direct involvement of the state in the EGTC structure is favoured when the relevant state is a unitary state with an administrative type of decentralisation, which has displayed in the past increasing attention towards CBC conducted by its territorial units. The national state assumes the role of political coordinator by means of its decentralised territorial organs. It participates in the EGTC when the latter has strategic importance both for the territorial scale concerned or the project itself. [164] An explanation for this may also rely on the fact that the bordering foreign counterparts are usually 'strong' subnational units, enjoying legislative powers and economic resources, and because of that they are likely to acquire a leading and influential position in the cooperation that needs to be counterbalanced.

Thus, the interplay between the supranational (notably EU) legal forces and the national regulatory dimension can lead to an uneven development of the CBC European law. In fact, the strategic political dimension of CBC – entailing multilevel territorial participation, CBC institutionalisation of unlimited duration, made up of large territorial units enjoying strong powers and which pursues general coordinating aims – is more likely to occur in those countries, where regional level play influential roles and the intergovernmental relations are framed according to cooperative scheme. Because of that, the bordering countries which are based on decentralisation of administrative type (France, relevant CEE countries) will probably play a more activist role by participating directly in the EGTC.

The case is different in those countries where vertical relations are more competitive based and the presence of ethnic minorities located along the borders may render CBC an issue of national concern (Spain, Italy, Austria – in this case as an indirect consequence of the German speaking minority set in Italy along the border with Austria). In such a situation, it is likely that a more suspicious attitude of the national state towards regional CBC and its institutionalisation will emerge. From a normative point of view this means the authorisation procedures will be based on political evaluations of concepts such as public policy or public interest and the requirements concerning the competences can be more strictly scrutinised

in order to avoid the risk of a too political form of CBC institutionalisation (the case of Euroregione Alpi Mediterraneo well illustrates the case). At the same time, in these contexts the direct involvement of the state in an EGTC is more difficult to put in place: such a move might be seen as a threat to the regional self-government rights. A third approach is likely to emerge: it consists in favouring CBC institutionalization when this is functional to pursue clear objectives rather than being conceived as a too vague form of political cooperation. The mentioned cases of the Hospital de Cerdanya and of the Brenner Corridor Platform seem to support the view.

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[1] In this contribution, the term 'crossborder cooperation' will be used as an overarching concept referring to any concerted action conducted mainly by subnational authorities (and occasionally by national states with other subnational units) belonging to different countries, aimed at establishing or fostering their cooperation. The preference for the mentioned terms relies on the wishing to avoid the terminology in use in specific institutions, namely the CoE and the EU. According to the Council of Europe legal instruments, 'transfrontier cooperation' refers to cooperation between neighbouring territories. The signing and entry into force of Protocol No. 2 of the Madrid Outline Convention introduced the notion of 'interterritorial' cooperation, referring to cooperation among territorial authorities not sharing a common border. In the EU INTERREG framework, transborder and interterritorial types of cooperation were labelled respectively cross-border and interregional cooperation. A third concept was also developed within the EU: the 'transnational cooperation', referring to cooperation among national, regional and local units of at least two Member States. Starting with the 2007-2013 EU structural funds programming period, the three previous strands of INTERREG were renamed "territorial cooperation".
Thus, CBC, as it is used in this contribution, is comparable to the "territorial cooperation" notion, as it is currently applied in the EU framework. However, the EU territorial cooperation concept, by avoiding any reference to the extra-territorial effect (as all the previous terms did, by means of prefixes such as trans-, inter-, cross-), seems to convey the idea that cooperation between subnational units pertaining to different EU Member States is almost an internal form of cooperation within the EU territory. Because of that, it seems a notion deeply-rooted in the EU conceptual framework. Cross-border cooperation seems more neutral and it maintains the idea of a cooperation having an extra-territorial character.
In the literature, the cross-border cooperation notion has been used to define "a more or less institutionalised collaboration between contiguous subnational authorities across national borders" (see Markus Perkmann, 'Cross-Border Regions in Europe – Significance and Drivers of Regional Cross-border Co-operation', in (2003) *European Urban and Regional studies*, 10(2), 153-171, 156). According to the further criteria mentioned by the Author, in order to better define the use of the concept, CBC involves public actors and it lacks any international character due to the fact the players are not legal subjects for the international law. This notion is

different to CBC as it is used in the present contribution, since it refers to contiguous subnational cooperation and it suggests that CBC always implies a certain territorial institutionalisation, which, according to us, is only a potential development of CBC.

[2] There is a general consensus that CBC has not any international law dimension. This opinion is generally based on the premise that CBC is conducted by territorial players which are not legal subjects according to the international law, although this finding might be questioned in the light of the provisions, set in the EGTC Regulation and Protocol No. 3, foreseeing the participation of the national states in the EGTC and ECG.

According to some international scholars, the fact the players of CBC are not legal subjects according to the international legal order is not a decisive argument, though it can be an indicator of the non international nature of the cross-border agreements along with the material content and the will of the parties concerned. See L. Mura, *Gli accordi delle regioni con soggetti esteri e il diritto internazionale*, (Giappichelli, Torino, 2007). In fact, it is argued that according to international law the state is to be considered as an overall subject which can be represented internationally by any internal organ. This principle is today enshrined in art. 27 of the Vienna Convention on the Law of Treaties. The Vienna Convention itself has introduced a derogation to the principle. According to art. 46 (which at present can not be considered as a codification of a general customary international rule) a state may not invoke a violation of its internal law as a ground of illegitimacy of the Treaty "unless the violation was manifest and concerned a rule of its internal law of fundamental importance". It should be also mentioned that in the light of art. 7 of the Vienna Convention – a provision which enumerates the conditions or the situations according to which a person is considered as representing the state for the purpose of adopting the text of a treaty – there seems to be a strong presumption against the fact a subnational units, when it concludes a CBC agreement, could be considered as representing the state for the purposing of adopting an international treaty. The situation would be different and it should be assessed case by case when the CBC players enjoy the treaty making power according to their domestic constitutional provisions. See Luigi Condorelli, Francesco Salerno, 'Le relazioni transfrontaliere tra comunità locali in Europa nel diritto internazionale ed europeo', (1986) 36(2) *Rivista Trimestrale Diritto Pubbl*ico, 381-423.

[3] See P.M. Dupuy, "La coopération régionale transfrontalière et le droit international", in (1977) *Annuaire Française de droit international*, 1977, 854 : « loin d'apparaître un obstacle, [le droit international public] serait alors au service de la coopération régionale transfrontalière ».

[4] European Parliament and Council Regulation (EC) 1082/2006 of 5 July 2006 on a European Grouping of Territorial Cooperation [2006], OJ, L 210/19.

[5] It must be noted, however, that, as we will point out later in the text, the national state still retain wide discretion in denying the setting of an EGTC. Nonetheless, this is not unrestrained since the state has to give a statement of its reason for the denial which can be judicially reviewed.

[6] For an interesting example, see decision 258 of 22 July 2004 of the Italian constitutional court, where the constitutional judges rejected the thesis of the central government according to which the national law enforcing the Madrid convention on CBC – a statute requiring the subnational units to obtain the agreement with the government before concluding a CBC agreement – was applicable to a CBC convention concluded within the framework of an INTERREG program. According to the court, the above mentioned CBC convention has to be

considered as EU law. Moreover, the court considered the creation of a CBC body legitimate, if occurred within the INTERREG program context. The reasoning followed by the court seems to suggest that CBC occurring and regulated according to EU law is inherently different from other forms of CBC, as those regulated by the EOC or bilateral international agreements, and because of that requires a more lenient scrutiny by the national authorities.

[7] For an useful comparison of the CoE and EU interventions in the field, see Alice Engl, 'Future Perspectives on Territorial Cooperation in Europe: The EC Regulation on a European Grouping of Territorial Cooperation and the Planned Council of Europe Third Protocol to the Madrid Outline Convention concerning Euroregional Co-operation Groupings', (2007) 3 *European Diversity and Autonomy Papers-EDAP*, at <www.eurac.edu/edap>.

[8] On this issue, see the contributions edited by Henry Labayle (ed.), *Vers un droit commun de la coopération transfrontalière?* (Bruylant, Bruxelles, 2006).

[9] See art. 2.1.c) of the Regulation 1082/2006; art. 2.2 e 2.3. Protocol No. 3 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities concerning Euroregional Cooperation Groupings, signed in Utrecht on 16 November 2009. Text available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/206.htm>.

[10] See art. 4.3 of the Regulation 1082/2006; art. 4.5 Protocol No. 3 to the Madrid Outline Convention. It should be noted that these concepts, though remitting to the national legal orders and practices for their enforcement, for the very fact of being inserted respectively in an European Union and Coe legal document also become international and EU notions. Needless to say, in relation to the EU, that as a consequence it would be possible to refer the Court of justice for indirectly reviewing the domestic enforcement of the above-mentioned concepts when they should contradict the *effet utile* of the EGTC Regulation.

[11] See Henry Comte, 'Les acteurs et la légitimité des projets stratégiques transfrontaliers', in Henry Comte, Nicolas Levrat (ed.s), *Aux coutures de l'Europe – Défis et enjeux juridiques de la coopération transfrontalière*, (L'Harmattan, Paris, 2006), 185-208 ; at 185-186: "Il ne s'agit plus seulement de traiter des problèmes de proximités entre des communautés et des territoire séparés par une frontière mais bel et bien de fonder de véritables projets de territoires transfrontaliers."

[12] The concept of "political capacity" has been developed by Michael Keating, *The New Regionalism in Western Europe: Territorial Restructuring and Political Change*, (Cheltenham, Northampton Mass. Elgar, 1998) at 135.

[13] On the role of the state in dealing with CBC, see the contributions edited by Carlos Fernandez de Casadevante Romani (ed.), *L'Etat et la coopération transfrontalière*, (Bruylant, Bruxelles, 2007).

[14] See Emmanuel Decaux, 'La convention-cadre sur la coopération transfrontalière des collectivités ou des autorités locales', (1984) 88(3) *RGDIP*, 557-620, at 557; Manlio Frigo, 'La cooperazione regionale nella convenzione del Consiglio d'Europa del 1980 e i limiti della sua attuazione in Italia', in Angelo Mattioni, Giorgio Sacerdoti (eds.), *Regioni, costituzione e rapporti internazionali. Relazioni con la Comunità europea e cooperazione transfrontaliera* (Franco Angeli, Milano, 1995), 71-96; Nicolas Levrat, "L'émergence des instruments juridiques de la coopération transfrontalière au sein du Conseil de l'Europe", in Yves Lejeune (ed.), *Le droit des relations transfrontalières entre autorités régionales ou locales relevant d'Etats distincts* (Bruylant, Bruxelles, 2005), 17-35.

[15] See Articles 2 and 3.4 of the EOC. The EOC text is available at <http://conventions.coe.int/treaty/en/Treaties/html/106.htm>.

[16] See Article 3.2 of the EOC. For a closer examination of the main interstate agreements concluded with the aim of enforcing the EOC, see the further paragraph in the text.
[17] Francesco Palermo, Jens Woelk, 'Cross-Border Cooperation as an Indicator for Institutional Evolution of Autonomy: The Case of Trentino-South Tyrol', in Zelim A. Skurbaty, *Beyond a One-Dimensional State: an Emerging Right to Autonomy*(Martinus Nijhoff, Leiden-Boston, 2005), 277-304, at 283.
[18] Explanatory report on the European Outline Convention on Transfrontier cooperation, available at <http://conventions.coe.int/Treaty/en/Reports/html/106.htm>, point 35: "In no event are the central government's powers in general policy-making or the conduct of international relations affected by the Convention. The Convention does not have the effect of conferring an 'international' character on transfrontier relations".
[19] Article 2 of the EOC: "For the purpose of the Convention, transfrontier cooperation shall mean any concerted action designed to reinforce and foster neighbourly relation between territorial communities or authorities within the jurisdiction of other contracting parties".
[20] See the explanatory report on the EOC, at 18, according to which 'neighbourhood' implies a certain proximity that should make possible, even in cases in which no territorial strip has been designated by the relevant State, the ruling out of unjustified requests.
[21] See Nicolas Levrat, *Le droit applicable aux accords de coopération transfrontière entre collectivités publiques infra-étatique* (PUF, Paris, 1994) at 54-55.
[22] See Article 2.2 of the EOC.
[23] See the EOC explanatory report at point 24.
[24] As I will point out later in the text, I am persuaded that CBC must be distinguished by whether it is conducted by local subnational units or by regional units enjoying meaningful powers, such as the legislative ones. In his book, Nicolas Levrat (*Le droit applicable ... op. cit.*, note 21) notes that a differentiation between local and regional transfrontier cooperation was used in some CoE documents and by some legal scholarship (140) but he does not draw from this any consequences.. He argues that there does not exist a common notion of 'region' and that the CBC legal instruments are the same, independent by the territorial scale of the subnational units involved (144). Though many of these findings are true, I still believe important to take into account that the national regulatory framework of CBC is substantially influenced by the 'political' weight the subnational units enjoy according to their domestic legal systems. The more influential they are, the more the general interests, included those of foreign policy, of the states could be undermined.
[25] See Roberto Toniatti, 'La bozza di statuto della regione europea', in Peter Pernthaler and Sergio Ortino (eds.), *Europaregion Tirol, Euregio Tirolo. Rechtliche Voraussetzungen und Scharken der Institutionalisierung/ Le basi giuridiche ed i limiti della sua istituzionalizzazione* (Autonome Region Trentino-Südtirol/Regione Autonoma Trentino-Alto Adige, Trento, 1997), 17-38, at 27.
[26] See the explanatory report on the Additional Protocol to the European Outline Convention on Transfrontiers Co-operation between Territorial communities or Authorities, point 5, at <http://conventions.coe.int/Treaty/en/reports/html/159.htm>.
[27] See Bernard Dolez, 'Le Protocole Additionnel à la Convention Cadre Européenne sur la coopération transfrontalière des collectivités ou autorités territoriales', (1996) 100(4) *RGDIP*, 1005-1022.
[28] See Article 1 of the Additional Protocol to the EOC.

[29] See Article 2 of the Additional Protocol to the EOC and the explanatory report on the Additional Protocol to the EOC, at points 16-18.
[30] Articles 3 to 5 of the Additional Protocol to the EOC. Further details are provided in footnote 53.
[31] See Protocol No. 2 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities concerning interterritorial cooperation, Strasbourg, 5 May 1998. Text available at <http://conventions.coe.int/Treaty/EN/Html/169.htm>. Interterritorial cooperation is defined in Article 1 of Protocol No. 2 as "any concerted action designed to establish relations between territorial communities or authorities [...] other than relations on trans-frontier cooperation of neighbouring authorities".
[32] See Protocol No. 3 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities concerning Euroregional Cooperation Groupings, signed in Utrecht on 16 November 2009. Text available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/206.htm>.
[33] See the explanatory report on the EOC text, at point 14.
[34] See the explanatory report on the EOC text, at point 30.
[35] For a general overview of the issue, see Carlos Férnandez de Casadevante Romani, 'Les traites internationaux, outils indispensables de la coopération transfrontalière entre collectivités ou autorités territoriales', in Henry Labayle (ed.), *Vers un droit commun de la coopération transfrontalière*?, op. cit. note 8, 89-118. See also Carlos Férnandez de Casadevante Romani, 'Le Traité de Bayonne et l'Accord de Bruxelles sur la coopération transfrontalière entre collectivités territoriales', in Yves Lejeune (ed.), *Les droits des relations transfrontalières entre autorités régionales ou locales relevant d'états distincts*, *op. cit.* note 14, 37-50.
[36] For a general overview of the French legal framework concerning CBC, see Christian Autexier, 'De la coopération décentralisée (commentaire du titre IV de la loi d'orientation du 6 février 1992, relative à l'administration de la République)', in (1993) 9 (3) *Revue Française de Droit Administratif*, 411-423; Conseil d'Etat (ed.), *Le Cadre juridique de l'action extérieure des collectivités locales* (La documentation française-Collection les études du Conseil d'Etat, Paris, 2006); Daniel Dürr, "La création des organismes de coopération transfrontalière", 235-249, and Patrick Janin, "Le statut et le régime juridique des organismes de coopération transfrontalière en droit français", 251-261, both in Comte and Levrat, *Aux coutures de l'Europe*, *op. cit*. note 11.
[37] See *Loi d'orientation relative à l'adminitsration territoriale de la Répubblique*, No.92-125, 6 February 1992, in *Journal Officiel République Française* (*JORF*), 8 February 1992, 2064-2083.
[38] See *Loi d'orientation pour l'aménagement et le développement*, No.95-115, 4 February 1995 in *JORF* 5 February 1995.
[39] The Bayonne Treaty was signed in 1995 and entered into force in 1997. The French text is available in *JORF* No. 59, 10 March 1995.
[40] The Rome Treaty was signed between France and Italy on 26 November 1993. The French text is published in *JORF* No. 5 of 6 January 1996.
[41] See, for example, the preamble of the Benelux Convention on Transfrontier Cooperation between Territorial Communities or Authorities signed 1986 by Belgium, Luxembourg and the Netherlands in 1986. French version: "Constatant avec satisfaction que les collectivités ou autorités territoriales collaborent déjà souvent entre elles de part et d'autre des frontières intra-Benelux sur base du droit privé, Souhaitant créer pour celle-ci la possibilité de coopérer également sur la base de droit public." The French text of the treaty is available in (247) *Moniteur Belge* (1991). See also the Isselburg-Anholt Agreement on transfrontier cooperation

among territorial units, signed in 1991 between Germany, Rhine-Westphalia, Lower Saxony, and the Netherlands, published in *BGBI*, 1993, Teil II, 842. (French translation): "Souhaitant donner à ces collectivités ou autorités et à d'autre organismes publics la possibilités de coopérer sur la base du droit public."

[42] In general terms on the institutionalization of the CBC, see Noralv Veggeland, 'Regional Governance, Euroregions, Flexibility, Power and Rights', 46-52, Joseph Marko, 'Beyond the Nation State: Problems of Regionalisation in Western and East Central Europe', 65-77, and Thomas Christiansen, 'Borders and territorial Governance in New Europe', 78-106, all contributions in Renate Kicker, Joseph Marko, Michael Steiner (ed.s), *Changing Borders: Legal and Economic Aspects of European Enlargement* (Peter Lang, Frankfurter am Mein, 1998); Markus Perkmann, Ngai-Ling Sum (eds.), *Globalization, Regionalization and Cross-Border Regions* (Macmillan, Palgrave, 2002); Markus Perkman, 'Construction of New Territorial Scales: A Framework and Case Study of the EUREGIO Cross-border Region', (2007) 41(2) *Regional Studies*, 253-266.

[43] See Article 5 of the Bayonne Treaty: "Les collectivités territoriales espagnoles et françaises peuvent créer conjointement, en France, des groupements d'intérêt public de coopération transfrontalière ou des sociétés mixte locale dont l'objet est d'exploiter les services publics d'intérêt commun et, en Espagne, des groupement 'consorcios'." On the Bayonne Treaty see, Carlos Fernandez de Casadevante Romani, 'Le traité de Bayonne du 10 mars 1995 relatif à la coopération transfrontalière entre collectivités territoriales: un cadre juridique complet', (1998) 102(2) *Revue générale de droit international public*, 306-325.

[44] The Valencia Treaty was signed between Portugal and Spain 3 October 2002, and it entered into force in 2004. See the Spanish text in *Boletin Oficial del Estado* (*BOE*) n. 219, 12 September 2003 The treaty enables the Portuguese and the Spanish subnational units to set a public crossborder body with a legal entity. This may take the form of *associações de direito publico* or *empresas municipais* if the Portuguese law applies or *consorcios* if Spanish law applies. However, some organizing rules are set in the treaty itself.

[45] On the Karlsruhe Agreement see Bernard Perrin, 'Coopération transfrontalière des collectivités locales contenu et limites de l'Accord quadrilatéral de Karlsruhe', (1996) 289 *Revue Administrative*, 81-89. This agreement, concluded among Luxembourg, Germany, France and Switzerland (the last acting on behalf of the Soleure, Bâle-Ville, Bâle-Campagne, Argovie and Jura cantons), was signed in 1996 and entered into force 1 September 1997. The French text is published in *JORF* of 29 August 1997. The Karlsruhe Agreement reproduces many aspect set in the German-Dutch agreement signed at Isselburg-Anholt, which also allows the subnational units to establish an *öffentlich-rechtlichen Zweckverband*, a public law association with legal personality which is entitled to act on behalf of its members.

[46] See especially the Bruxelles Agreement signed in 2002 and entered into force in 2004. It was concluded by France, Belgium, the Flemish Region, the Wallonia Region and the French-speaking community. French text available at the *Moniteur Belge*, 16 January 2004.

[47] See Article 3.1 of the Benelux Convention: "Si les collectivités ou autorités territoriales [...] peuvent attribuer [au organisme public] des compétences de réglementation et d'administration". It should be stressed this is only a possibility left to the subnational units.

[48] See Article 3.5 of the Benelux Convention.

[49] Articles 5 and 6 of the Benelux Convention.

[50] See, K.J. Kraan, 'The Dutch-German Treaty on cross-border cooperation', in Euregio Rhine-Waal (ed.), *Administrative Organisation of Cross-Border Cooperation* conference book (Euregio Rhein Waal, Kleve, 1994), at 25.
[51] See Articles 5.1 and 5.2 of the Isselburg-Anholt Agreement (French translation): (1) "L'association intercommunale n'est pas autorisée à imposer des obligation à des tiers au moyen de règles de droit ou d'actes administratifs", (2) "les membres de l'association intercommunale sont tenus de prendre à l'égard de l'association, dans le cadre des attributions conférées par le droit interne, les mesures nécessaire à l'exécution de ses taches".
[52] For the French text, see Decret 99-1051, 2 July 1998, 8 "portant assentiment à l'accord entre le Land de Rhénanie du Nord-Westphalie, le Land de Rhénanie-Palatinat, la Région Wallonne et la Communauté germanophone de Belgique sur la coopération transfrontalière entre les collectivités territoriales et d'autres instances publiques, signé à Mayence, 8 mars 1996", in *Moniteur Belge*, 13 April 1999.
[53] The Additional Protocol to the EOC provides, in Articles 4 and 5, two different concepts of the functioning of the cooperative body entrusted with legal personality. Article 4 follows, according to the Explanatory Report (at 23), a 'double' legal logic: if such a body wants to take measures which apply generally, it must adopt a decision, which in itself has no legal force, and then each party has to enforce it by transposing it in the national legal system to which the party belongs. Article 5.1 follows a different model, re-echoing the Benelux Convention. The public law transfrontier cooperation body may take action under public law. The act is directly applicable in all territorial communities party to the agreement. It should be noted that the Additional Protocol leaves for the national contracting parties the possibility of opting for applying Articles 4 or 5 or both.
[54] EGTC Regulation art. 7.4.
[55] Article 2.2 of the Karlsruhe Accord: "Les Länder [...] et les Cantons [...] peuvent aussi [...] conclure entre eux ainsi qu'avec les collectivités territoriales et organismes public locaux [...] des conventions dépourvues de caractère de droit international et relatives à des projets de coopération transfrontalière, dans la mesure où ces projets relèvent de leurs compétences selon le droit interne et où ils ne contreviennent pas à la politique étrangère et en particulier aux engagements internationaux."
[56] See Henry Comte, "Les acteurs et la légitimité des projets stratégiques transfrontaliers", in Comte, Levrat, *Aux coutures de l'Europe*, *op. cit.* note 11, at 186: "La reconnaissance du caractère stratégique de tels projets transfrontalières soulève, selon noud des question spécifiques. [...] D'une part, les collectivités locales concernées ne peuvent prétendre accéder à un véritable capacité d'action stratégique transfrontalière que sur la base d'une action collective, d'autre part il parait à tout me moins contre-productif de mésestimer la nécessaire implication d'Etats, à travers leur instances locales ou centrales, dans la conception et la mise en œuvre de tels projets."
[57] It is interesting to note the different wording used by the Karlsruhe Accord distinguishing by whether CBC is conducted by local units or by regional units. Article 1 of the Karlsruhe Accord empowers the local territorial units of the Contracting Parties to pursue transfrontier cooperation, provided they respect their internal competences and they do not impinge upon the international treaties of the Contracting Parties. Article 2.2 (see text at note 45), which deals specifically with Länder and Cantons, refers more generally to the *politique étrangere*, a broader concept that, supposedly, only these territorial units can undermine.
[58] Article 2.3 of the Karlsruhe Accord: "Les représentants de l'Etat dans les départements et régions français sont habilités à étudier avec les autorités compétente des Länder et des Cantons concernés, sans porter atteinte au libre

exercice de leurs compétences par les collectivités territoriales, les moyens de faciliter les initiatives entre les collectivités territoriales françaises d'une part et les Länder et les cantons d'autre part, lorsque les différence de droit interne entre les Etats concernés en compromettent l'efficacité."

[59] Article 2.3 of the Bruxelles Agreement: "Les représentant de l'Etat dans les département et régions français et les autorités de l'Etat fédéral, des communautés et des Régions belges concernées suivent la mise en œuvre du présent Accord. Les représentant de l'Etat dans les départements et régions français peuvent également étudier avec ces mêmes autorités les questions de coopération transfrontalière qui relèvent en France de la compétence de l'Etat."

[60] See Marta Sobrido Prieto, 'El Tratado Hispano-Portugués sobre la cooperación transfronteriza territorial', in (2004) 8 *Revista Electrónica de Estudios Internacionales*, at <http://www.reei.org/reei8/reei8.htm>.

[61] See respectively art. 11 and 10.6 of the Valencia Treaty.

[62] See Article 10.2 of the Valencia Treaty.

[63] For this approach, see Nicolas Levrat, 'La coopération territoriale: adaptation de la coopération transfrontalière aux nouveaux territoires du projet européen' (2006), 3 *Revue des affaires européennes*, 495-509. For a general overview of the EU interventions in the field of CBC see : Michel Casteigts, 'Cadre juridique et enjeux politiques du financement de la coopération transfrontalière en Europe', in Yves Lejeune (ed.), *Le droit des relations transfrontalières*, *op. cit.* note 14, 165-181 ; Committee of the Regions, *Trans-European Cooperation between Territorial Authorities* (CoR Studies, 2/2002).

[64] On the EU cohesion policy and the role of the regions see L. Hooghe and G. Marks, *Multi-level governance and European Integration* (Rowman & Littlefield, Lanham, Maryland, 2001); S. Leclerc (ed.), *L'Europe et les régions: quinze ans de cohésion économique et sociale* (Bruylant, Bruxelles 2003);

[65] See Communication of the Commission on INTERREG III of 2 September 2004, laying down guidelines for a Community initiative concerning trans-European cooperation, INTERREG III, in *OJ*, 10 September 2004, C 226, 2 *et seq*. point 21.

[66] This applies even today in relation to the new objective 3 of the cohesion policy, named "territorial cooperation" (see further in this paragraph). See art. 32, c. 2 of the Regulation n. 1083/2006 laying down general provisions on the ERDF, ESF and cohesion funds, in O.J. L.210, 25, according to which the operational programme – the document setting out a development strategy to be carried out with the aid of a fund – is drawn up by the Member States, though in cooperation with, among others, the relevant subnational units.

[67] See Communication from the Commission to the Member States of 2 September 2004, laying down guidelines for a Community initiative concerning trans-European cooperation intended to encourage harmonious and balanced development of the European territory, INTERREG III, in *OJ*, 10 September 2004, C 226, 2 *et seq*.

[68] It is interesting to note that the signature of Protocol No. 3 of the EOC, which expressly admits member states among the potential constituent members of the Euroregional Co-operation Groupings (see art. 3 of Protocol No. 3) has changed the original conception of CBC in the CoE context. To this extent, it is patent the influence played on this specific issue by the enactment of the EGTC EU Regulation.

[69] See Study Group for European Policies (ed.), *Territorial Cohesion in Europe* (Committee of Regions, Office for official publications of European Commission, Luxembourg, 2003).

[70] Art 7.2. "An EGTC shall act within the confines of the tasks given to it which shall [...] be determined by its members on the basis that they all fall within the competence of every member under its national law". The point is addressed by the study conducted by Nicolas Levrat financed by the Committee of the Regions (CoR), *The European grouping on territorial cooperation* (2008) at 88. The text is available at the CoR website.

[71] See the own initiative opinion of the Committee of the regions on the new perspectives for the revision of the EGTC Regulation, CdR 100/2010 fin, p. 17718/19: «notes, however, that although the EGTC is an institution under Community law created for the express purpose of facilitating territorial cooperation within the Union, and it would appear a priori that the regulations governing the Community funds favour their use under the objective of European territorial cooperation, the actual facts are quite different to the logical and desirable expectations that prompted the Community legislator to take a step of such legal significance; confirms, following the wide-reaching prior consultations carried out with representatives of the European parliament, the Council and the Commission, and in meeting open not only to Committee members, but also to the different European regional organisations and specialists in the field, that only a small number of existing EGTCs manage territorial cooperation programmes or projects that are cofinanced by Community funds; avers that most of the existing EGTCs carry out other specific territorial cooperation actions without a financial contribution from the Union, in keeping with the second paragraph of art. 7(3) of Regulation 8EC) No 1082/2006». The document is available at <http://portal.cor.europa.eu/egtc/SiteCollectionDocuments/opinion%20nunez/cdr100-2010_fin_ac_en.pdf>.

[72] See for example art. 3 of the West Vlaanderen/Fiandre-Dunkerque-Côte d'Opale EGTC convention according to which: «Le G.E.C.T. a pour mission principale de promouvoir et de soutenir une coopération transfrotalière efficace et cohérente au sein de son territoire et à ce titre exerce les missions suivantes: à l'intérieur du périmètre de référence : 1. assurer la coordination et favoriser la mise en réseau de tous les membres du GECT et, d'une manière générale, de tout organisme dont l'intervention est de nature à rendre pertinente, cohérente et efficace la coopération transfrontalière sur le périmètre du Gect ; 2. assurer la représentation et la concertation politique du territoire, 3. définir des stratégies et des programmes d'action communs pour répondre aux besoins des habitants du territoire, 4 définir et réaliser des projets communs ; 5. développer toutes formes d'actions qui concourent au développement de la coopération transfrontalière entre les acteurs de ce territoire, avec une attention particulière pour la coopération transfrontalière dans la région frontalière de proximité. A l'échelle régionale, nationale et européenne. 6. assurer la représentation du territoire vis-à-vis des instance tierces». Given the vague wording used and the mention, among the objectives, of the political coordination of the territorial units concerned it is not by chance that among the constitutive members there are also the national states.

See also the instituting convention of the Pyrénées-Méditerranée EGTC (made up of the Spanish CCAA of Balers islands and Catalonia, French region Midi Pyrénées and Languedoc Rossilon): «Le Gect "Pyrénées –Méditeranée a comme object d'assurer la realisation des projet de cooperation territoriale qui seront approuvés par les members de l'Euroregion. Le Gect a pour objectif de réaliser et de gérer, dans une

perspective de développement durable, les projets et actions de coopération territoriale approuvès par ses membres agissant dans le cadre de leurs compétences»

[73] See Committee of the Regions (CoR), *The European grouping on territorial cooperation* (2008) study conducted by Nicolas Levrat et al, at 100.

[74] Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, concerning the European Strategy for the Baltic Sea Region, Brussels, 10 June 2009, COM (2009) 248 final.

[75] *Ibid.*, at 6.

[76] See Renaud Dehousse, *Fédéralisme et relations internationales* (Bruylant, 1991) at 116: "Dans une large mesure l'action internationale des régions sera fonction de la manière dont elles se définissent par rapport à l'Etat dans son ensemble et de leur perception des liens qui les unissent aux autorités nationales."

[77] See Michael Vepeaux, *Les collectivités territoriales en France* (Dalloz, 2004); Olivier Gohin, 'La nouvelle décentralisation et la réforme de l'Etat en France', in (2003) 3 *Actualité Juridique de Droit Administratif* , 522-528.

[78] For more details on the French legal interventions on the matter see part II, lett. A, 1.

[79] See Article 171 of the Polish constitution and Article 44(a) of the Hungarian constitution.

[80] See later in the text.

[81] Peter Pernthaler, Anna Gamper, 'National federalism within the EU: the Austrian experience', in Sergio Ortino, Mitja Žagar, Vojtech Mastny, *The Changing Faces of Federalism* (Manchester University Press, 2005), 132-155.

[82] See Council of Europe, Transfront (2005/2), Report on the current state of the administrative and legal framework of transfrontier cooperation in Europe (updated 15 March 2005), 22. "The law [Art. 16 Cost. N.A.] does, however, state that any agreement—including, therefore, transfrontier agreement—must have the prior express approval of the federal government [...] The Lander feel that such a complicated procedure somewhat limits their ability to enter into transfrontier cooperation agreements." The data concerning the Austrian case have been provided by the federal chancellery. The report is available at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1324633&SecMode=1&DocId=1342918&Usage=2>.

[83] See Wolfang Burtscher, 'La acción exterior de los Länder austríacos y su participación en la celebración de tratados internacionales', in Manuel Perez Gonzales (ed.), *La acción exterior de los Lander, Regiones, Cantones y Comunidades Autonomas* (IVAP, 1994), 147-170.; Theo Öhlinger, 'Le competenze dei Länder e dei comuni austriaci in tema di attività internazionali', in Andrea de Guttry, Natalino Ronzitti, *I rapporti di vicinato tra Italia e Austria* (Giuffrè, 1987), 71-94.

[84] Pernthaler and Gamper, *National federalism, op. cit.* note 81, at 140.

[85] Peter Pernthaler, *Lo stato federale differenziato* (Il Mulino, 1998), 68 -73.

[86] BVerfGE 2, 347 (374). In 1951, the Land Baden and the Strasbourg Port Authority signed an agreement concerning the joint administration of the Kehl Port. The German federal government gave its consent to the agreement, assuming that Article 32 of the German constitution (Grundgesetz GG) applied. However the national Parliament deemed the whole procedure void because, according to Article 59 of the GG, the signing of an international treaty is subject to the consent of both Bundestag and Bundesrat. The Constitutional Tribunal took a different view. The agreement was not an international agreement since it was concluded with a non state subject. Thus, Article 32 of GG did not apply. This meant that not only did the

Parliament not have a say in the procedure, but also that the previous consent of the central government was not needed. Thus, when the Länder engage in agreements with foreign counterparts, they may freely act without even the previous consent of the central government, although the principle of federal loyal collaboration should be respected. The Decision of the German Constitutional Court is analysed by : Nicolas Schmitt, *L'émergence du régionalisme cooperative en Europe*, (edit. Universitaire Fribourg, 2002), at 172- 182.

[87] Article 32.3 of the German constitution: "In so far as the Lander have power to legislate, they may conclude treaties with foreign states, with the consent of the federal government".

[88] The concept of cooperative federalism is explored by Constance Grewe, *Le fédéralisme coopérative en République Fédérale d'Allemagne* (Economica, Paris, 1981); Raffaele Bifulco, *La cooperazione nello stato unitario composto* (Cedam, Padova, 1995).

[89] See René Rhinow, "Le fédéralisme Suisse: l'approche juridique", in René L. Frey, Georg Kreis, Gian Reto Plattner, René Rhinow (eds.), *Le fédéralisme suisse. La réforme engagée. Ce qui reste à faire* (Presse Politechniques et Universitaires, Lausanne, 2006), 64 *et seq.*

[90] See Article 32 of German Basic Law. As far as Switzerland is concerned, Article 56 of the Swiss constitution (2000) establishes that the Cantons can conclude treaties in areas falling under their jurisdiction, provided they are not in breach of federal law and of the interest of the confederation and of the rights of the other cantons. The Cantons are required to inform federal authorities before concluding international treaties. The federal government or another Canton may oppose this agreement. In such a case, it is up to the national parliament to decide. Finally, the Cantons can directly deal with lower-ranking foreign authorities, whereas it is up to the confederation to conduct relations with foreign states on behalf of the Cantons.

[91] In Germany, the issue is still regulated by a gentlemen's agreement (so-called Lindau Agreement), which dates back to 1957, between the Länder and the federal government. In 1993, an attempt to formalize the agreement in the text of the federal constitution failed because of the Länders' disagreement. See Uwe Leonardy, 'Federation and Länder in German Foreign Relations: Power-Sharing in Treaty-Making and European Affairs', in *Foreign Relations and Federal States*, (Londres/New York 1993), 236.

[92] Art 55 of the Constitution states: "Les Cantons sont associés à la préparation des décisions de politique extérieure affectant leurs compétences ou leurs intérêts essentiels. La Confédération informe les Cantons en temps utile et de manière détaillée et elle les consulte. L'avis des Cantons revêt un poids particulier lorsque leurs compétences sont affectées. Dans ces cas, les Cantons sont associés de manière appropriée aux négociations internationales". See also *Loi fédérale du 22 décembre 1999 sur la participation des cantons à la politique extérieure de la Confédération*.

[93] To this regard, Yves Lejeune, 'La surveillance des relations internationales conventionnelles des collectivités fédérées (Les exemples de la Belgique et de la Suisse)', in Carlos Fernandez de Casadevante Romani (ed.), *L'Etat et la coopération transfrontalière, op. cit.* note 13, 105-129, at 121, notes : « l'assemblée fédérale n'a jamais eu à approuver un traité cantonal dont le conseil fédéral ne voulait pas. Eu égard à la grande courtoise dont sont empreintes les relations entre la Confédération et les Cantons, l'opinion di Conseil fédéral est toujours prise en considération ». On this issue see also Sergio Gerotto, 'Il potere estero dei cantoni svizzeri: un giusto equilibrio tra autonomia e partecipazione?' (2004) *Diritto pubblico comparato ed europeo*, 2, 701-716.

[94] It should be noted that in both Germany and Switzerland the regional levels have jurisdiction in dealing with municipalities. This means that forms and limits of municipal CBC are set in regional law. However, since both Switzerland and Germany signed the EOC and the following Protocols—and other relevant international treaties as well—the primacy of international law over domestic law means the municipalities could not be prevented from taking part in CBC.

[95] In Switzerland, however, according to the information provided by the Swiss Confederation, the conclusion of cantonal transfrontier agreements should follow the same procedure set in relation to the cantonal international treaties. This means the Cantons are required to inform federal authorities before concluding transfrontier agreements. In case the confederation or another canton disagree, the agreement is submitted to the national parliament. See Council of Europe, *Report on the current state of the administrative and legal framework of transfrontier cooperation*, *op. cit.* note 82, at 93. See also art. 61c and 62 of the "Loi sur l'organisation du gouvernemnt et de l'administration" as emended in 2005, according to which the procedure above described applies to the agreements concluded by Cantons "*avec l'étranger*", a wording broad enough to include CBC agreement. According to some scholars, however, the procedure—now set in Article 56 of the federal constitution—applies only to the international treaties concluded by the Cantons, and not to the transfrontier agreements with no international value. See Nicolas Michel, *La acción exterior de los Cantones suizos y su participation en la celebración de tratados internacionales*, in Perez Gonzales, *La acciòn exterior*, *op. cit.* note 83, at 201.

[96] See paragraph IV for practical examples.

[97] A recent indicator of this trend is the Benelux Treaty of Economic Union signed in 2008. In 1958 a first treaty between the Benelux countries was signed, establishing a Benelux Economic Union for a 50-year period. In June 2008, a new Benelux treaty was signed, with the objective, *inter alia*, to strengthen CBC at any level. However, this reference has to be read as referring to local territorial authorities. In fact, all Belgian Regions and Communities are signatories parties of the new Benelux treaty, thus showing how Belgian Regions and Communities prefer to utilize international law instruments in order to cooperate with their neighbours.

[98] See Bart Kerremans, Jan Beyers, 'The Belgian sub-national entities in the European Union: second or third level players', *Regional and Federal Studies*, 6 (2), 41-55, at 43.

[99] See Yves Lejeune, 'La surveillance des relations internationales conventionnelles des collectivités fédérées (Les exemples de la Belgique et de la Suisse)', in C. de Casadevante Romani, *L'Etat et la coopération transfrontalière*, *op. cit.*, note 13, at 126-127, "La Belgique n'a pas instauré un contrôle central contraignant de l'opportunité de l'activité internationale de ses collectivités composantes. C'est d'ailleurs le seul Etat fédéral qui s'y soit refusé. Le conseil des ministres belge ne peut décider la suspension de la négociation ou de l'exécution d'un traité d'une Communauté ou d'une Région qu'en invoquant l'excès de pouvoir, c'est-à-dire la violations des règles fixant le conditions précises de constitutionalité ou de légalité de pareil traité". The Author further remarks (126): "L'autonomie internationale des Communautés et des Régions belges apparaît beaucoup plus grande que celles des Cantons suisses. Elle résulte du système de gestion consensuelle de la politique extérieure sur un pied de stricte égalité entre l'Autorité fédérale et les autorités fédérées".

[100] Yves Lejeune, "L'action extérieure des régions et des communautés belges et leur participation à la conclusion de traités internationaux", in Perez Gonzales, *La acción exterior*, *op. cit.* note 83, at 514.

[101] For a detailed analysis of the Spanish case concerning CBC, see Susana Beltrán García, *Los acuerdos exteriores de las comunidades autónomas españolas* (Universidat Autònoma de Barcelona, 2001) and Carlos Fernàndez de Casadevante Romani, *La acción exterior de las Comunidades Autónomas: Balance de una práctica consolidada* (editorial Dilex, 2001).

[102] This is also the case of Austria that although usually considered as a federal state did not provide, until the Constitutional Amendment in 1988 which inserts art. 16, any international making power to the Austrian Länder.

[103] See Antonio La Pergola, "Regionalismo, federalismo e potere estero dello Stato. Il caso italiano e il diritto comparato", in Antonio La Pergola, *Tecniche costituzionali e problemi delle autonomie «garantite»* (Cedam, 1987), 91-93.

[104] When they first faced cases concerning the legitimacy of external conduct of the regional level, both constitutional courts adopted a strict scrutiny of review, in fact reaffirming the national state as the sole institution able to legitimately conduct international actions. However, the increasing spread of CBC practice, the signature of the EOC, and the quite ambiguous policy of the national states towards such regional conduct are all reasons I believe explain why the two constitutional courts applied, at a later stage, a more lenient standard of review.

To this regard, as far as the Spanish Constitutional Tribunal is concerned, decision 165/1994 was a turning point. Somehow overruling the already mentioned previous 137/1989 decision, the Spanish Constitutional Tribunal held that, in consideration of their constitutional autonomy, the CC.AA. are empowered to conduct external activities, provided these activities do not imply any exercise of an international *jus contrahendi*, nor that they determine immediately enforceable obligations towards foreign public powers, and nor do they breach central government foreign policy. This means that the external activities should take place according to a procedural regulatory framework permitting the national state to avoid possible clashes with the national foreign policy.

In Italy, the landmark decision is 189/1987. The constitutional court started its reasoning by affirming that in principle the national state has the exclusive power in relation to foreign policy. The legislator can provide exceptions to this general rule, which must be constructed narrowly. Among the activities having an external character a Region could perform, the constitutional court distinguished between, on the one hand, the transfrontier promotional activities (*attività promozionali*) and, on the other hand, a broader category called *attività di mero rilievo internazionale*. The first group includes activities aimed at the social, economic and cultural development of the Regions. According to the constitutional court the *attività promozionali*—which also includes the crossborder agreements concluded under the umbrella of the EOC—require the previous consent of the central government (and the consistency with national guidelines) because they are to be considered, in any case, as binding agreements supposedly affecting the international liability of the state as a whole. The other category, the so-called *attività di mero rilievo internazionale,* includes a plurality of activities characterized by the fact they do not create legally binding obligations, but merely political commitments, and, therefore, because they are not able to affect the international liability of the state, they are subject to a less formalized authorization regime.

[105] To this extent, it is worth noting that both Italy and Spain lack a legislative chamber in which regional interests are effectively represented, as usually happens in

federal states. As far as Italy is concerned, this led to the creation, by statute, of the Conferenza Stato Regioni, a forum in which representatives of the central government and regions meet to even their relations. In Spain the need for cooperative relations led to the creation of intergovernmental commissions with a sector-tailored focus. However, the historical CC.AA. (Galicia, Catalonia, Pais Vascos) especially tend to favour direct relationships with the central government, rather than match up with the other CC.AA., in order to claim more powers and resources.

[106] See Javier A. Gonzáles Vega, 'El real decreto 1317/1997 de 1 de agosto sobre comunicación previa y publicación official de los convenios de cooperación transfronteriza. Via libre por fin a la cooperación transfronteriza?' (1997) *Revista Española Derecho International* 49 (2), 349-355.

[107] This was set in Decreto Presidente della Repubblica (31 marzo 1994), which provided a different procedure to be followed depending on the nature of the regional external conduct. If the latter implied the conclusion of binding agreements (*attività promozionali*), the previous explicit consent of the national state was required, to permit control over the respect of the national foreign policy. For other less relevant external conduct (*attività di mero rilievo internazionale*), such as visits, meetings, conferences, participation in cultural social, and economic activities, a simple duty of informing the central government was required. Such an act was passed in order to enforce a decision of the Italian Constitution Court (see later in the text). For comments on the Regulation of the Italian regional external power before the constitution amendment in 2001, see Francesco Palermo, *Il potere estero delle regioni*, (Cedam, Padova, 1999), 170-188; Isabella Pasini, '«Potere estero» delle regioni: il consolidamento degli indirizzi giurisprudenziali e dottrinali nel D.P.R. 31 marzo 1994', (1995) *Rivista italiana diritto pubblico comunitario*, 981

[108] On the current regulatory framework see: Maria Romana Allegri, 'Dalla cooperazione transfrontaliera alla cooperazione territoriale: problemi di ordine costituzionale', in Antonio Papisca (ed.), *Il gruppo europeo di cooperazione territoriale*(Marsilio, 2009), 63-93; Adele Anzon Demming, *I poteri delle Regioni*, (Giappichelli, 2008), 171-185; Antonio Ruggeri, "Riforma del Titolo V e «potere estero delle Regioni (notazioni di ordine metodico-ricostruttivo)", (2002) at <www.giurcost.org/studi>.

[109] According to which "the contracting parties shall endeavor to conclude, where necessary, bilateral and multilateral agreements with other states, in particular neighboring states, in order to ensure the protection of persons belonging to the national minorities concerned. Where relevant, the parties shall take measures to encourage transfrontier cooperation".

[110] See Francesco Palermo, 'Trans-border cooperation and ethnic diversity', in Jørgen Kühl, Marc Weller, *Minority Policy in Action: The Bonn-Copenaghen Declaration in a European Context 1955-2000* (European Centre for Minority Issues, Flensburg, and Institut for Graenseregionsforksning, Aabenraa, 2005), 161-185, at 161.

[111] *Ibid*., at 162

[112] *Ibid.*, at 166.

[113] See the official comments of the Federal Chancellor's Office and of the Ministry of Foreign Affairs in documents in Pernthaler and Ortino, *La bozza di statuto*, *op. cit.* note 25, at 278-289.

[114] See Andrew Church, Peter Reid, 'Cross-border Co-operation, Institutionalization and Political Space Across the English Channel', (1999) *Regional Studies* 33 (7), 643-655.

[115] For further details about and criticisms of the proper functioning of this institutional framework, see Palermo, in Kühl, Weller, *Minority Policy Action*, *op. cit.* note at 165, see also Francesco Gilioli, 'Cross-border cooperation in Ireland, its legal framework and Europe: a third party view', 3 Queen's papers on Europeanisation (2005), at http://www.qub.ac.uk/schools/SchoolofPoliticsInternationalStudiesandPhilosophy/Research/PaperSeries/EuropeanisationPapers/PublishedPapers/, 13.

[116] See Francesco Palermo and Jens Woelk, *Diritto costituzionale comparato dei gruppi e delle minoranze* (Cedam, 2008), at 53.

[117] See Marc Weller, Stefan Wolff (eds.), *Autonomy, Self-Governance and Conflict Resolution: Innovative Approaches to Institutional Design in Divided Societies* (Routledge, 2005).

[118] See Thomas Wilson, 'Sovereignty, Identity and Borders. Political Anthropology and European Integration', in Liam O'Dowd, Thomas Wilson (ed.), *Borders, Nations and States*, (Aldershot, 1996), 199-221; Marc Abeles, Werner Rossade (ed.s),*Politiques symboliques en Europe*, (Duncker and Humblot, 1993).

[119] See Eliseo Aja, *El Estado autonómico. Federalismo y hechos diferenciales*, (Alianza editorial, 2003); Roberto L. Blanco Valdes, *Nacionalidades históricas y regiones sin historia*, (Alianza editoral, 2005).

[120] The act containing the basic institutional norms, including the powers a CA is granted, is called *estatuto de autonomia*. The Assembly of the CCAA are called to propose a text of the Estatuto which, in order to become legal effective, must be approved by the National Parliament with a *ley organica*—a national statute whose legal rank is higher than ordinary statutes (Art. 147.3).

[121] In relation to the Plan Ibarretxe, see José Manuel Castells Arreche (ed.), *Estudios sobre la propuesta politica para la convivencia del lehendakari Ibarretxe* (IVAP, Oñate, 2003); Tomás Ramón Fernández Rodríguez, 'Sobre la viabilidad de la impugnación jurisdiccional de Plan Ibarretxe', (14) *Teoria y realidad constitucional* (2004), 117-132.

[122] The literature concerning the reform of the Catalonian *Estatuto* and of the others CC.AA. *Estatutos de Autonomia* is extensive: see Enoch Albertí Rovira, 'El blindaje de las competencias y la reforma estatutaria', (2005) *Revista catalana de dret public* (31), 109-136; G. Rico-Rico Ruiz (ed.), *La reforma de los Estatutos de Autonomia, Actas del IV Congreso Nacional de la Asociación de Constitutiocalistas de España* (Tirant lo Blanch, 2006).

[123] See decision n. 31/2010, 28 june 2010.

[124] On the regional external power as a symbolic way to highlights territorial identity of the Spanish CC.AA: see Stéphane Pacquin, 'La paradiplomatie identitaire et les relations Barcelone-Madrid', (2002) *Études internationals* 1 (33), 57-90; Margarita Ledo Andion, Josep Maria Sole I Sabate, 'Le droit à l'autodétermination. Un exemple des limites démocratiques de l'État espagnol à l'égard des nationalités', in Marc Abeles, Werner Rossade, *op. cit.* note 117, 377-381.

[125] Precisely for that reason, art. 195 was among the provisions whose constitutionality has been challenged before the constitutional tribunal. The Court rejected the claim stating that the provision is to be considered legitimate, provided that it is applied within the limits established by the constitutional tribunal itself in its previous case-law. This means that no agreements with subject of the international legal order are allowed.

[126] See the Czech Republic law on the regions 131/2000 and the law on municipalities (number 128/2000); Slovak Republic law 302/2001 on local self-

government in the autonomous regions and law 30272001 on municipalities as emended following ratification in 2000 of the Madrid Outline convention; Romania law 215/2001 on local public administration; and Bulgaria 1991 law on local autonomy. These data are based on the information collected by the Council of Europe in its report on the current state of cross-border cooperation, *op. cit.* note 82 at 93.

[127] Maja Kozlowska, 'Aspetti costituzionali ed amministrativi del decentramento dello stato unitario polacco', in *Istituto di studi sui Sistemi Regionali, federali e sulle Autonomie (ISSIRFA)*, at <http://www.issirfa.cnr.it/4759,949.html>.

[128] The case of Romania and Slovakia presents some inconsistencies. Although in both countries ordinary statutes appear to grant local and, in the case of Slovakia, regional units the general power to conclude CBC agreements, the Act of Ratification of the Madrid Outline Convention suggests a different conclusion. Both countries made a declaration according to which the enforcement of the Outline Convention is subject to the previous conclusion of an international agreement with the party concerned. Whereas in the case of Slovakia this is not any more of a limitation—since it has concluded international treaties with all border states—in the case of Romania, none of these international agreements have been concluded.

[129] For a very detailed analysis of the Slovak legal framework concerning CBC and of the main experiences concerning Euroregions set in Slovakia, see Ol'ga Marhulíková, 'Institutional Aspects of Transfrontier Co-operation in the Slovak Republic', study conducted and published by Council of Europe, in *The role of Euroregions in transfrontier co-operation. Three cases studies: the Slovak Republic, Lithuania, South-Eastern Europe* (2006), at <https://wcd.coe.int/com.instranet.InstraServlet?Index=no&command=com.instranet.CmdBlobGet&InstranetImage=1531231&SecMode=1&DocId=1343260&Usage=2>.

[130] See Dimitry Kochenov, 'Behind the Copenhagen Façade. The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law', (2004) 8(10) *EIOP*, at <http://eiop.or.at/eiop/texte/2004-010a.htm>.

[131] All these factors are highlighted by Emil J. Kirchner, 'Transnational Border Cooperation between Germany and The Czech Republic: Implications for Decentralization and European Integration', European University Institute, RSC Working Paper No 98/50, December 1998, at <http://www.iue.it/RSCAS/WP-Texts/98_50t.html>.

[132] See Aree Bloed and Pieter van Dijk (eds.), *Protection of Minority Rights Through Bilateral Treaties—The case of Central and Eastern Europe* (Kluwer Law International, 1999). See also the special focus on CBC and minorities in Eastern Europe in 6 *European Yearbooks of Minority Issues* (2006/7), 137 *et seq.*, with the contributions of Katrin Böttger, 'Transnational and Trans-regional Cooperation and Effects on the Situation of Minorities: A Case Study of the Polish–Ukrainian Border Region'; Nataliya Belitser, 'A Case Study on Crossborder Cooperation in the Ukrainian–Moldovan Border Region and Its Effects on the Respective Minorities'; Martin Klatt and Jørgen Kühl, 'National Minorities and Crossborder Cooperation between Hungary and Croatia. A Case Study of Baranya, Hungary and Osiječko-baranjska County, Croatia'; Karina Zabielska, 'Crossborder Cooperation in Mid-Eastern Europe and Its Influence on Minorities: the Case of the Lithuanian Minority in Poland'; and Alice Engl and Jens Woelk, 'Crossborder Cooperation and Minorities in Eastern Europe: Still Waiting for a Chance? A Summary and Evaluation of the Four Case Studies'.

[133] See Andrew Coulson, Adrian Campbell (eds.), *Local Government in Central and Eastern Europe: The Rebirth of Local Democracy* (Routledge, 2006); Harald Baldersheim

(ed.), *Local Democracy and the Processes of Transformation in East-Central Europe* (Westview Press, 1996).

[134] The European Charter of Local Self-Government was signed in Strasbourg on 15 October 1985. It entered into force 1 November 1988. Text available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/122.htm>.

[135] See Grzegorz Gorzelak, 'Normalizing Polish-German Relations: Cross-border cooperation in Regional Development', 195-205, and Hans-Joachim Bürkner, 'Regional Development in Times of Economic Crisis and Population Loss: the Case of Germany's Eastern Border Regionalism', 207-215, both contributions in James Wesley Scott, *EU Enlargement, Region Building and Shifting Borders of Inclusion and Exclusion* (Ashgate, 2006); Zoltán Pogátsa, 'Regionalisation, the Powers of Subnational Entities in Hungary and the Central European Region', (2002) *Diritto Pubblico Comparato ed Europeo* (2), 782-793.

[136] For a general overview of the legislation on local government in some CEE member states, see Michaela Salamun, 'The Laws on the Organization of the Administration in the Czech Republic, Hungary, Poland and Slovakia: a Comparative Analysis in the Context of European Integration', (2007) *Review of Central and East European Law* (32), 267-301.

[137] See Markus Perkmann, 'Cross-border regions in Europe', *op. cit*. in note 1.

[138] See, for further details, James Wesley Scott, 'Transborder Cooperation, Regional Initiatives, and Sovereignty Conflicts in Western Europe. The Case of the Upper Rhine Valley', (1989) *Publius: The Journal of Federalism* 19 (1), 139-156; Walter Ferrara, "La Regio Basiliensis e la cooperazione transfrontaliera nella regione del Reno superiore", in Walter Ferrara, Paolo Pasi, *Come funzionano le euroregioni.Esplorazione in sette casi* (Isig, 2000), 27-39 ; Jochen Sohnle, Françoise Schneider, "La coopération transfrontalière dans l'espace du Rhin supérieur et le cas particulier de l'agglomération trinationale de Bale", in Comte and Levrat, *Aux coutures de l'Europe*, *op. cit.* note 11, 35-59.

[139] See Alberto Gasparini, D. Del Bianco, *EUREGO Progetto di una Euroregione transfrontaliera*, (Isig, Gorizia, 2005), at 38 *seq.*

[140] See the rapport edited by the Conseil d'Etat, *Le Cadre juridique de l'action extérieure des collectivités locales*, (La documentation française, Paris, 2006), at 32 : «L'Etat conçoit son rôle comme celui d'intermédiaire encourageant et facilitant la mise en ouvre d'actions des coopération décentralisée [...] Il lui appartient également de veiller à la mise en cohérence et à l'efficacité de l'aide apportée en fonction des besoins locaux».

[141] Circulaire du Ministère des Affaires Etrangères, 26 February 2003, Coopération décentralisée et rôle des services déconcentrés de l'Etat : cofinancements du Ministère des Affaires étrangères, «Dans le cadre des enveloppes budgétaire annuelles qui sont notifiés aux préfets de région, et sur la base des dossiers établis par les collectivités territoriales, le Préfet de région proposera, après avis éventuels des préfets de départements et en concertation avec les autorités territoriales, un programme régional annuel de coopération décentralisée. Cette programmation devra veiller au maintien de l'équilibre entre les différents niveaux de collectivités territoriales (communes, départements, et régions) et leurs groupements dans le respect des priorités géographiques et thématiques communiquées par le ministère des Affaires étrangères ».

[142] See, for example, the*Delegué pour l'action extérieure des collectivités locales*, which is nominated by the Foreign Affair minister and which is called to support technically the regional prefects. In 1992 it was established the *Commission nationale de la coopération décentralisé*, made up of national and local representatives; more

recently it has been set the *Mission Operationnelle Transfrontalière*. For further details see the already mentioned rapport of the Conseil d'Etat, *op. cit.* at 36.

[143] See Alain Lamassoure, *Les relations transfrontalières des collectivités locales françaises*, rapport presented to the Foreign Affairs minister, (May 2005), available at <www.espaces-transfrontaliers.org/document/rapport_lamassoure.pdf>, p. 23: «La création d'une unité d'action [sur un territoire transfrontalier donné] nécessite aussi de repenser la place de l'Etat dans l'organisation politique et, si besoin est, juridique de ces projets. La présence de l'Etat dans les structures de Gouvernance doit être organisée de telle sorte que son représentant soit en mesure de prendre des engagements, ou, à défaut, de transmettre les demandes aux autorités centrales en étant entendu. Dans le même temps, l'éventail des outils juridique doit être adapté pour permettre à l'Etat, là ou cela est souhaité, de participer aux structure juridiques qui se mettront en place».

[144] See Nicolas Wismer, Christine Ricci, 'L'agglomération franco-valdo-genevoise', in H. Comte, N. Levrat (ed.s), *Aux coutures ...*, *op. cit.* note 11, 139-176.

[145] See, for further details, Valérie Biot, Pierre Got, 'Une strategie pour faire de l'aire métropolitaine franco-belge une métropole transfrontalière: le projet Grootstad', in H. Comte, N. Levrat (ed.s), *Aux coutures ...*, *op. cit.* note 11, 61-84.

[146] According to art. 2 of the Constitutive convention of the Eurometropole Lille-Kortrijk-Tournai EGTC : "L'Eurométropole Lille-Kortrijk-Tournai a pour mission principale de promouvoir et de soutenir une coopération transfrontalière efficace et cohérente au sein du territoire concerné. En rassemblant l'ensemble des institutions compétentes, l'Eurométropole Lille-Kortrijk-Tournai est un lieu permettant : d'assurer la concertation, le dialogue et de favoriser le débat politique ; de produire de la cohérence transfrontalière à l'échelle de l'ensemble du territoire ; de faciliter, de porter et de réaliser des projets traduisant la stratégie de développement à élaborer en commun, de faciliter la vie quotidienne des habitants de la métropole franco-belge".

[147] See complaint No. 30 of 5 May 2009 in GU, 3-6-2009.

[148] See Karel Van Miert, Annual Report 2007, priority project 1, p. 10. The full text of the report is available at <http://ec.europa.eu/transport/infrastructure/european_coordinators/2007_en.htm>.

[149] The European coordinator was set in pursuance of European decision 884/2004/CE, Art. 17-bis in *O.J.* L167, 30 April 2004. He has the task of easing the enforcement of those European transport projects that have a transfrontier dimension and thus require coordination between member states.

[150] See Debra Johnson, Colin Turner, *The Political Economy of Integrating European Infrastructure*s (Macmillan, Basingstoke, 1997); Jean Arnold Vinois, 'Les réseaux transeuropéens: une nouvelle dimension donnée au Marché Unique', (1993)*Revue du Marché Unique Européenne* (1), 95-125.

[151] See Giulia Bertazzolo, 'Il procedimento per l'individuazione dei progetti prioritari nel settore dei trasporti (art. 154-156 del Trattato): caratteri e limiti della pianificazione comunitaria', (2008) *Rivista italiana diritto pubblico comunitario*, 792-834.

[152] See especially the Bruxelles Agreement signed in 2002 and entered into force in 2004. It was concluded by France, Belgium, the Flemish Region, the Wallonia Region and the French-speaking community. French text available at the *Moniteur Belge*, 16 January 2004.

[153] See Nicolas Levrat, *L'Europe et ses collectivités territoriales – Réflexions sur l'organisation du pouvoir territorial dans un monde globalisé* (PIE-Peter Lang, 2005) 269-271.

[154] We are referring to the fact that the carrying out of tasks, other than those related to the implementation of the territorial cooperation programmes or projects within the structural funds, is construed in strict terms by art. 7. 3 of the EGTC Regulation. To this regard, it is also worth of mentioning the requirement, set by art. 7.2, according to which the EGTC could act only in common area of competences of the participating members. For further details see *supra* sect. 2.3 of the paper. This ambivalence also emerges by looking at the European Cooperation Grouping (ECG) legal framework as set in Protocol No. 3 to the EOC. On the one hand, art. 7 provides a great flexibility as regards the reasons why to conclude an ECG, thus admitting both operative and coordinating policies ECGs. Moreover, the explanatory report suggests that the very name of the ECG reflects the fact the ECG is meant "to create sustainable networks and not new territorial entities", an idea that is strengthened by the possible participation of a national state in an ECG, provided that one or more of its territorial authorities or communities are members. On the other hand, this move towards multilevel governance is contradicted by the requirement (art. 1) that transfrontier or interregional cooperation, promoted by the ECG, must only concern common areas of competences of the participating members.

[155] It should be noted that the two provisions are framed according to a different wordings. Art. 13 use the expression "may prohibit", thus making clear that it is a possibility not an obligation for M. States to prohibit EGTC activity in case this is in breach of public interest, public policy, etc. On the contrary, the wording of art. 4.3 ("M. State [...] shall approve") may suggest that the grounds for not approving members participation in an EGTC are required by the EGTC regulation itself and this applies even to public policy and public interest grounds, no matter if these conditions are explicitly mentioned by the national enforcement provisions. However, such a reading seems to contradict the *effet util* of the EU law since it might impose a more burdensome procedure than that usually applied by the relevant M. State. Moreover the last indent of art. 4.3, by stating that in deciding on the perspective member's participation in the EGTC M. States may apply national rules, it seems to suggest M. States may choose to "soften" the legal requirements for issuing the authorisation, as listed in the EU Regulation, but they could not add new ones. To this extent, it may be assumed that when the national enforcement acts does not mention public policy or public interest as grounds for not issuing the authorisation, there is a presumption that these factors cannot be taken into consideration in the relevant domestic authorisation procedure.

[156] See Loi 2008-352, du 16 avril 2008, in J.O.R.F. du 17 avril 2008, qui a modifié l'art. 1115.4 du Code général des Collectivités territoriales : «les collectivités territoriales [...] peuvent, dans les limites de leurs compétences et dans le respect des engagements internationaux de la France, adhérer à [...] un groupement de collectivités territoriales d'un état membre de l'UE [...]».

[157] See Legge n. 88, 7 July 2009, (legge comunitaria 2008) in G.U. n. 161 of 14 July 2009, art. 46-47.

[158] See Real Decreto 37/2008, 18 January 2008, in B.O.E. n. 17, 19 January 2008, p. 4156, art. 6, c. 4. The relevant provisions state that the national authorities, in issuing the authorisation for the setting of an EGTC, should take into account the suitability of the EGTC objectives for the strengthening of the economic and social cohesion. The member of the prospective EGTC must also respect the division of the internal competences. This must be related with the preamble of the decree according to which «La regulación contenida en el presente decreto se justifica de modo prevalente en la competencia estatal en materia de relaciones internacionales,

que habilita a las instituciones estatales – en este caso al gobierno de España – para ordenar y coordinar las actividades con relevancia externa de las Comunidades Autónomas – asì como de las restantes entitades territoriales – *de forma que no condicionen o perjudiquen la dirección de la política exterior*, de competencia exclusiva del Estado, de acuerdo con lo establecido por la jurisprudencia constitucional» (italics added by the author).

[159] Both Portuguese, Romanian and British national provisions provide the national authorities with the possibility to prohibit the activity of an EGTC established in the relevant state or to demand that its participating subnational entities withdraw from the EGTC whenever the activity conducted is in breach of national public policy or public interest. [Data provided by the Committee of Regions, *The European grouping of territorial cooperation: state of play and prospects*, (author: METIS GmbH), 2009 Luxembourg]. It should be noted that this possibility is framed by the EGTC Regulation according to a proportional and incremental framework, since before the prohibition is issued, the EGTC shall have the possibility to voluntarily cease the relevant activity. Moreover, the prohibition according to art. 13 occurs after the EGTC is established and in relation to a concrete hypothesis of breach on national interest or national policy. To this extent, art. 13 enforcement is less decisive than art. 3.4, in relation to which evaluations on the breaching of public policy or public interest by the national public authorities precede the establishment of the EGTC and they are not based on definite and concrete activities conducted by the EGTC.

[160] It is also interesting to consider what territorial level – national or regional – has been called to enforce domestically the EGTC Regulation. To this extent, we should recall that in those legal systems whose territorial units enjoy legislative competences the transposition of EU law can be a matter for both national and regional territorial levels, according to the division of powers dealt with by the Constitution.

To this extent, it may be noted that whereas Germany and Belgium did not enact any national provisions for the enforcement of the EGTC Regulation, leaving the regional level the task of setting the relevant regulatory framework, both Italy and Spain have retained the power to enact the enforcement measures of the EGTC Regulation. The reason for that has been that in both countries the enforcement of the EU Regulation has been considered as falling under the foreign relation national competence, whereas both in Belgium and in Germany the EGTC Regulation has been considered as a matter related with the self-government principle of the regional level and/or with the competence the regional level enjoy in order to regulate local units. The consequences of this different legal qualification are indeed important: whereas in Belgium and Germany there is no need for previous national authorisation for establishing a EGTC made up of regional authorities, in Italy and Spain such authorisation is required, in line with the idea that CBC of regional level can potentially undermine the national foreign policy.

[161] Obviously, the case of Belgium is different. Its participation in the two mentioned EGTC may be due as a consequence of the France participation, as a way to guarantee a sort of institutional equilibrium in the EGTCS themselves.

[162] The West Vlaanderen/Fiandre-Dunkerque-Côte d'Opale EGTC is made up of national states (France and Belgium), the Flemish Region and the French Région Nord-Pas-de-Calais; French and Belgian meso-territorial units (French department and Western Flemish province) and inter-municipal association; the EGTC Eurométropole – Lille – Kortrijk – Tournai, constituted in January 2008, is made up or representatives of the two national states, of representatives of the regional level

(Flemish Region, Walloon region and French speaking community and the Région Nord-Pas-de-Calais), representatives of the meso-territorial level (French Département du Nord and Provinces of Western Flanders and of Nainaut) and of associations of local territorial units; the EGTC –Interreg "Programme Grande Région" is made up with national states (Luxembourg, France – by means of the Préfet de la Région Lorraine), regional units enjoying legislative powers (the German Länder of the Sarre and Rhenanie Palatinat, the Belgian French and German speaking communities and the Walloon region), regional units enjoying administrative powers (the French Région Lorraine) and French meso-territorial units (Départements de la Meuse et de la Moselle). A different framework composition characterises the Galicia – Norte de Portugal EGTC which is a tightly-focused geographical cooperation with only two partner regions (C.A. de Galicia and Comissão de coordenação e Desenvolvimento regional do Norte). All data are available at the website of the Committee of Regions: http://portal.cor.europa.eu.

[163] The "Interreg Programme Grande Région" EGTC has been constituted with the sole aim of being the managing body of the Interreg IV A 2007-2013. Thus, its objective seems to be quite focus-tailored. However, in consideration of the long-established history of CBC in the region, according to a study conducted by the CoR, the EGTC "is above all considered as an instrument for the further institutionalisation of the cross-border cooperation of the members. The establishment of the EGTC of the Greater region is perceived as a step towards the macroregion's integration. The Greater Region has managed to successfully apply for EU funds, so the EGTC is expected to exert a stronger influence on the members themselves than on the third parties". See Committee of Regions, *The European grouping of territorial cooperation: state of play and prospects*, (author: METIS GmbH), 2009 Luxembourg, 100.

[164] See Laurent Malo, 'Le contrôle administratif de la coopération transfrontalière', in Carlos Fernandez de Casadevante Romani (ed.), *L'État et la coopération transfrontalière* (Bruylant, 2007), 131-168, at 136: "D'une logique de méfiance, caractérisée par des contrôles visant à empêcher, les autorités étatiques sont aujourd'hui passées à une logique d'encadrement, dans le bus de garantir la cohérence et la sécurité juridiques de l'action extérieure nationale, qu'elle soit le fait de l'Etat ou des collectivités territoriales".

LEVIATHANS WELCOME!

BOOK REVIEW:

'GROUP AGENCY: THE POSSIBILITY, DESIGN AND STATUS OF GROUP AGENTS' BY C. LIST & P. PETTIT

(OXFORD UNIVERSITY PRESS, 2011, ISBN: 9780199591565, £25)

Vesselin Paskalev*

I. THE INTRODUCTION OF GROUP AGENTS

The book under review offers a brave new theory of group agents: it maintains that some groups of individuals have one capacity which is usually attributed only to individual human beings, namely being an agent. This is a bold claim with potential repercussions in all social sciences (and which may be particularly disturbing for lawyers). To be adequate to that, the authors have developed a fully fledged account of group agents, and discuss what an agent is, why we need the concept of group agent, how to recognise one when we see it and how the group agent is different from participating members. The book builds upon the earlier work of both authors who have been exploring different aspects of collective decision-making separately or in collaboration for more than decade. On the background of these bits now they have developed a whole new theory which is fascinating. Unlike most of the earlier work of List, where his use of formal methods in philosophy makes them fascinating yet extremely difficult to grasp by the uninitiated, in this book the authors have gone a long way to make it sweat and readable: they even say "not-p" instead of "¬p" for instance and in many cases go straight to the bottom line told in plain words while referring to standalone articles for elaborate formalisations and proofs.

The authors' analytical claim is that in real life there are some groups which have the capacity of behaving as agents and that is why we need the concept of group agents, which allows us to better understand social realities. With a surprising twist of Occam's razor, they argue that postulating the existence of this new entity makes description of social world less, not more complex.[1] Beyond the analytical, they also claim

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that the existence or even the possibility of group agents warrants assigning certain responsibilities to them.

This bold account does not come out of the blue – there already is some thriving literature on shared intentions[2] and plural subjects.[3] Margaret Gilbert in particular has advocated since long that plural subjects exist, however her argument is based on ordinary language philosophy: analysing what do we mean by saying "Let's go" etc. List and Pettit also start with the observation that people often speak about what the Government, Greenpeace or the Church 'intend,' but have identified something much deeper than this: *because of the pattern* of arriving to some attitudes which count as attitudes of a whole group *they are bound to be distinct* from and independent of the attitudes of the individual group members. Demonstrating that there are group attitudes which are not function of the attitudes of the human members *in abstract*, i.e. regardless of specific context is significant, because for all their aptness all of the conclusions Gilbert draws from her many examples seem quite arbitrary to me – it may be the case that by expressing readiness to walk together we construct a plural subject distinct from the walking individuals but very well may be that we do not. How can we be certain that recognising a group agency is the only description that makes sense?

Authors' argument for the autonomy of group attitudes originates from a paradox that Kornhauser and Sager identified in the context of jury trial[4] and Pettit found to apply to any case of collective choice made on the basis of certain reasons.[5] Here the paradox seems to arise from the very structure of rationality (understood as a process of arriving from certain premises to certain conclusions). It is easy to notice that for any decision that a group of people has to take together, the aggregation of the individual decisions will often yield different result from the conclusion that would entail from aggregation of the individual beliefs the decision is supposedly premised on. Let us take an example of a family of three which has to decide whether to buy a car and the decision is premised on whether they need a car and whether they can afford the car. It is more often than not that the result will be different if they vote on each of the premises separately and then act upon the conclusion entailed from the result if they vote on the conclusion whether to buy directly. The great breakthrough of List and Pettit is to notice that this trivial observation has huge repercussions which in my view should affect thoroughly social sciences because it allows this family (if it decides by voting on the premises) to form autonomous attitudes, i.e. attitudes which are and not a function of the attitudes of its members. Thus the family becomes an agent of its own right even though it consists of nothing other than the individual human members. What distinguishes group agents from mere

collections of people is the pattern of decision-making.

It is not only by such voting on the premises that groups may form autonomous attitudes the other procedures authors mention are prioritisation of propositions[6] and sequential voting, straw vote, specialisation of members (distributed premise-wise based rule[7]), etc. In all these cases the group processes from certain representational to intentional attitudes (i.e. reasons for actions) and reaches more rational outcomes at group level (i.e.*collectivise reason*) while making them unexplainable at individual level.[8] The argument of the authors is that many actual groups do form attitudes by such procedures and therefore have agential capacity. I strongly support this result, yet I think they should have developed more the empirical basis for it and would wish to see analysis of examples of group who do behave as agents in that sense.

The existence of group agents with minds of their own may seem absurd for some or scary to others, depending on their scientific and political positions. Indeed, by postulating the existence of group agents, the authors find themselves in not very pleasant company and they haste to distinguish themselves from Hobbes and Hegel In contrast to the latter, List and Pettit emphasise that for a group agent to exist there is no need for "psychologically mysterious social forces."[9] Nor there is any need for a common purpose and mentality, common culture or sense of solidarity for a group agent to exist or function as modern nationalists may have it.[10] The suggested account is fully consistent with the methodological individualism that dominates contemporary social sciences and group agents must exist because they "relate to their members in such a complex manner that talk of them is not readily reducible to talk about the members."[11] Now this raises the question whether the group agents are something in the world or something in the eye of the beholder. Authors seem to believe the latter is the case: "The autonomy we ascribe to group agents under our approach is epistemological rather than ontological."[12] Keen on preserving the methodological individualism intact, they emphasise that the explanatory power warrants the introduction of the concept of group agents and often speak about the agency itself as something that we *ascribe* to systems. Yet on the other hand "the lack of an easy translation of group-level attitudes into individual-level ones requires us to recognise the existence of group agents in making an inventory of the social world."[13] Leviathans welcome.

The book under review has too many important contributions for a book review to even mention all, that is why here I shall limit myself only to discussion of the methodological and the political significance of the recognition of group agents mentioning briefly few concerns that I have

with the account of group agency.

II. Some repercussions from the leviathans coming

The methodological significance of the suggested account is huge first because it finally aligns the social theory with the common sense which has always recognised the existence of corporate agents as a matter of course. But academics also feel the need for group agents and recently Philippe Schmitter passionately argued that micro-foundations of political science should be reset because the main actors in politics are not individuals but the permanent organisations.[14] He also emphasised that the preferences and actions of individuals are often determined by the collectivities they are members of rather than vice versa as the orthodoxy goes.[15] In the light of this, the account under review appears not radical but perhaps too cautious in not recognising influence of the group agent's attitudes back to those of the members. I will revisit this issue soon.
Even more acute is the need for group agents in law. Legal theory has long struggled with the need to attribute responsibilities to corporations and so far this was achieved by a fiction – corporations are fictions established by law, and by virtue of that fiction we can consider certain assets as belonging to the corporations rather than individual members. Yet this becomes less than adequate when the issue of responsibility arises because legal responsibility is usually dependent on certain attitudes which so far were considered to be reducible to the attitudes of certain individuals. By showing that group attitudes are not a function of individual attitudes List and Pettit pave the way for robust corporate responsibility.

List and Pettit start the discussion on responsibility of the group agents with three conditions which they claim to be necessary and sufficient for an agent to be responsible for a choice and show that some group agents can meet them and therefore they "may display a guilty mind."[16] I have my doubts against the tradition which allows to the philosopher to postulate something to be necessary and sufficient condition[17] and I would prefer them to abstract the conditions for responsibility from actual legal rules, but because of the appreciation I have for their subsequent argument I should not have been fussy about that. So their conditions are (a) normative significance of the choice the agent makes, (b) her capacity to evaluate and judge the options available (c) and the control that she has over the choice. The authors argue that these conditions are stricter than the conditions for agency itself and only some agents can meet them. More precisely, the second condition is met if the group agent has not only the capacity to make *any* judgements but morally significant ones, i.e. its internal decision-making patterns must be able to take into account morally significant premises as well: "it would seem to be

a serious design fault, at least from the perspective of society as a whole, to allow any group agents to avoid making judgements of this kind."[18] The third condition raises different kind of problem – some actions seem to be in some sense controlled by both the group agent which gives instructions to the individual members to act and by the individual who remains an agent and therefore is responsible in his own right. Legal theory has long struggled with the question whether the control of the individual preempts that of the group or vice versa. A strict abidance to the methodological individualism would place the ultimate responsibility on the individual but there are compelling reasons to absolve him from that when he is forced to do so. The case in point is not only of the citizens of a fascist state forced to collaborate in certain atrocities; the ability of the group agents to direct actions is felt also in much more common cases when the action required is only a little beyond what the moral individual member called to implement it would endorse. Everyone sometimes does things required by his company, his family or his nation, which only slightly deviate from his principles even without being *forced* to because the deviation is small and because another member will do it anyway. Thus, given List and Pettit's observation that the attitudes of group agents are autonomous form the attitudes of its members,[19] it seems grotesque to place the responsibility only on the unlucky member who happens to be in the position to commit the blameworthy action while absolving the group agent from directing him. The authors develop a conceptual argument to justify this intuition. They note that a group agent controls the performance of the blameworthy action if it has the capacity to assign *some* individual member to perform it and it does so by maintaining procedures for the formation and *enactment* of its attitudes.[20] Thus, "the group agent is fit to be held responsible for ensuring that one or more of its members perform in the relevant manner [while] the enacting members of the group are not absolved of their own responsibility" for enacting group directions.[21] This multi-level responsibility is as fascinating as it is difficult to swallow for a lawyer.

They admit that not all group agents satisfy these conditions, nevertheless sometimes it makes sense to responsibilize them because of this capacity to direct members. This means that when a group has some, but not full agential capacity it may make sense to treat it *as if* it has full capacity so that the individual members are incentivised to redesign it to improve its capacity.[22] This argument I find brilliant. The commonsensical justification of such sweeping normative claim comes from the danger of allowing companies, as able to direct actual behaviour as they are, to avoid responsibility.[23] The authors try to squares a very important circle – as the conditions for a group to be responsible are stricter than the conditions for the group to be agent some group agents possess capacity to

form independent attitudes and direct their individual members to act upon them while still they have no capacity to bear responsibility. Half-baked agents can exist and can be dangerous because they form attitudes that direct individuals to act in certain ways but too conveniently do not have capacity to make *moral* judgements. The authors answer to this problem is the suggested "developmental rationale" by analogy with parents treating the adolescent as a mature person in order to lead her to maturity. This normative claim may appear as difficult to implement in practice as radical as it is in theory. Yet in certain sense responsibilization of companies already happens in practice, so again the normative claim is neither radical nor utopian; it strikingly adequate normative justification of some practices known as new forms of governance and especially with the government-ordered self-regulation. Governments routinely ask various industry groups to get organised and voluntarily regulate their practices in the shadow of potential governmental intervention. And of course, the international human rights or environmental regimes are ways to responsibilise the governments themselves. So let the Leviathans be responsible!

III. OF CHICKENS AND EGGS

The developmental rationale should have made obvious certain circularity that I felt throughout the book and I still wonder if it is vicious or virtuous. Behind the explicitly normative claim that agents should be responsibilized the authors seems to have a broader normative claim – to make the groups (at least some of them) more agential. From the very beginning of the book they argue that

> If a group agent is to display the rationality that agency requires, its attitudes cannot be a majoritarian or other equally simple function of its members. The group agent is to establish and evolve a mind that is not just a majoritarian or similar reflection of its members' minds; in effect it has to develop a mind of its own.[24]

This appears as descriptive statement yet one is left to wonder *why* a group is to display rationality and *why* is it to evolve a mind of its own? In the context of responsibility just discussed this makes a lot of sense, but responsibility is only one of the chapters in the book and by no means leitmotif of it. It makes sense within Pettit's republican concept of freedom as freedom from arbitrary interference in one's affairs, but this is hardly ever mentioned in the book under review either. The authors start the book by showing that groups can reason (i.e. can have agential capacity) and then they explore the question how to make them reason. There is appearance of circularity between the positive and the normative

claim and it is not obvious why groups *should* collectivise reason at all. A more empirically elaborated point of departure[25] probably would help me out of the circle but even in this case one may wonder if we should fight rather than foster group agency.

IV. Coping with the Leviathan

The explanatory value of the concept of group agency in my view is absolutely undisputable, yet the question for the normative consequences of their recognition remains open. It is also important one, as individual members are generally expected to act upon the *autonomous* directives of the relevant group agents and as was discussed above, the latter are capable of making them act. List and Pettit have argued persuasively that with regard to one particular issue – that of ascribing responsibilities for them – group agency should be developed rather than feared. In this final section I will discuss two other issues arising from the recognition of group agents – (a) that of the border between the spheres of control of group agents and of their members and (b) that of the control of individual members over the group agent acting in *its* sphere of control. Apparently both issues are well discussed in the political philosophy and constitutional law but the group agency account casts them in new light.

The authors discuss the first of these issues under the heading of 'control desideratum.'[26] By this they do not mean control of the agent over what the group agent does but respect of the rights and freedoms of their members, or the borders of their individual "spheres of control."[27] They seek to satisfy the control desideratum by giving the individual member certain set of propositions on the agenda of the group agent over which he alone has full control.[28] In plain language this means granting him a set of inviolable human rights. I find this the least satisfying part of the book.

The first problem with this is that the idea of protected sphere of individual control has been with us since at least 1789. It has always been applauded as principle but it has too often failed to provide guidance in practice, especially with the growing complexity of Western societies – try to think about demarcations of protected spheres in the Danish cartoons case for instance. The principle is so underdetermined that it provides no practical guidance for any non-trivial controversies.

List and Pettit adopt it conceptually only to show that (under certain minimal condition) there is no way to satisfy in the same time the requirement for group rationality and the control desideratum.[29] Then they offer various ways to relax the stated conditions and avoid the impossibility which seem plausible and conclude that "there are strategies

available for ensuring that a paradigmatically powerful group agent such as the state respects its members' rights and freedoms and that members retain certain spheres of control."[30] This is fine but the strategies they offer – suitable organisational culture and structure within the group agent, non-arbitrariness and accountability of its actions are actually solutions to the second problem (control over the group agent in its sphere); the promised sphere of control of the individual alone vanishes. I appreciate that there is little to do given the impossibility result they have reached, but once again it is not obvious to me if the personal sphere cannot be meaningfully demarcated, why that of the group agent should prevail. The answer may be obvious when the group agent is a state, but on their account many other, potentially more dangerous group agents come out of the dark.

The second problem that the autonomous group agents raise is that even in the sphere that is indisputably within their control (think of national defence) it is generally expected that the group agent should be responsive to the will of its members. This problem is not new, but the group agency account makes it particularly acute: as the existence of group agents is premised on its capacity to form attitudes (beliefs and desires) which are not function of the attitudes of their members, any actual group agent will have to cope with persistent contradiction between its autonomous attitudes and the individual will of most of its members. Indeed, Pettit himself had identified this problem earlier:

> Let a group individualise reason, and it will ensure responsiveness to individuals in its collective view on each issue but it will run the risk that the views will be irrational. Let a group collectivise reason, and it will ensure the rationality of the collective views maintained but run the risk of adopting a view on one or another issue that is unresponsive to the views of individuals on that issue.[31]

There he had argued for collectivisation of public reason at the expense of responsiveness to majority will for the sake of non-arbitrariness of political authority, yet he acknowledged that a difficult dilemma exists. The book under review notes that "a well-functioning group agent must therefore cope with the basic fact that individuals are themselves rational agents"[32] but does not discuss the dilemma any more. However, this unavoidable contradiction between the autonomous will of the group agent and the individual wills – let us call it rationality gap – is deeply disturbing. It is even more so with regard to the problems with the demarcation of spheres of control discussed above. Once again, isn't it better to prevent emergence of group agents rather than develop them?

One possible answer is that group agents are already here anyway, and the suggested account only takes due notice of them, but this leaves the authors' normative claims in the cold. The other way out is to seek to avoid collective reasoning and abandon the non-arbitrariness arguments. This is the response of classic liberal individualism. The third answer is to seek ways to 'convert' individual beliefs in line with what is already established as group agent beliefs. This will happen for example when an expert advisor determines certain premises, group agents endorse them and act upon them while individual members trust the expert and suspend their own prior beliefs on the issue. It will also happen when members share sufficient sense of common identity or solidarity so that they internalise the group decision to such an extent to abandon the beliefs that had lead them to the opposite conclusion earlier.[33] Finally, possible answer can be deliberation in the public sphere which forms a common opinion on all relevant premises on both individual and group level. The latter two suggestions may appear utopian or at best realisable only to certain degree, but the point I would like to make by them is that for a plausible account of group agents *perhaps* we should consider two-way relationship: allowing for influence not only from the individual attitudes towards the group agent's attitudes[34] but also from the attitudes established in group back to those of the members (as per Schmitter's quote above). If such relationship is recognised and taken into account, the group agents may appear less, not more monstrous.

References

[1] It is the explanatory power of the concept of agency is what warrants its introduction: "Any dog owner will be able to testify that the best way to make sense of what a dog does involves ascribing representations and motivations to it" (p. 23). Here and below all page indications refer to the book under review unless otherwise indicated.

[2] Michael Bratman, *Faces of intention: selected essays on intention and agency* (Cambridge University Press 1999).

[3] Margaret Gilbert, *A Theory of Political Obligation. Membership, Commitment, and the Bonds of Society* (Oxford University Press 2006).

[4] LA Kornhauser and LG Sager, 'Unpacking the Court' (1986) 96 Yale Law Journal 82.

[5] Philip Pettit and Wlodek Rabinowicz, 'Deliberative Democracy and the Discursive Dilemma' 35 Nous (Supplement: Philosophical Issues, 11, Social, Political, and Legal Philosophy) 268.

[6] This is a way to collectivise reason by "prioritizing some propositions over others and letting the group attitudes on the first set of propositions determine its attitudes on the second" (p. 56).

[7] "Here different group members are assigned to different premises and form attitudes only on these premises; they each 'specialise' on their assigned premises" (p 57).
[8] On the other hand "a majoritarian organisational structure does not generally ensure group agency .... since it may generate inconsistent group attitudes on logically interconnected propositions" (p 61).
[9] p 3.
[10] For example the former German foreign minister Joschka Fisher famously called for "forging a common destiny" of the EU. Fortunately, on List and Pettit's account this is not necessary for the EU to be an agent of its own right.
[11] p 5. Also "the difficulty of predicting from an individualistic base what a group agent does provides a justification for making sense of the group agent in terms that abstract from the way members perform" (p 78).
[12] p 76.
[13] p 5.
[14] Philippe C Schmitter, 'Micro-foundations for the Science(s) of Politics' [Blackwell Publishing Ltd] 33 Scandinavian Political Studies 316.
[15] The individual agent "is typically acting within a multilayered and polycentric 'nested' set of institutions capable of making binding collective decisions – some public and some private. I have been led to conclude that agent preferences are not fixed, but contingent on which policies are proposed and by whom, and probably will change during the course of political exchange between the various layers and centers of power." Ibid, 320.
[16] p 157.
[17] The authors casual reference to the Christian catechisms does not make the claim any more convincing either.
[18] p 159.
[19] In some cases of premisewise voting there group may reach a decision which *all* individual members oppose.
[20] See p 163.
[21] p 163. Note that members are responsible only for *enacting* group attitudes but not for participation of their formation as those attitudes are independent.
[22] "to develop routines for keeping their government ... in check", p 169.
[23] Authors' give an example of a disastrous ship-wreck due to organisational sloppiness where not a single individual could be held responsible, but it is a bit puzzling why they should look for examples in the 80s as if contemporary cases of disastrous corporate irresponsibility were lacking.
[24] p 8.
[25] As noted above it would be helpful if the authors analyse an actual group to show that it is an agent and that there are concrete advantages (for whom) from being one.
[26] They discuss three desiderata for good organisational design. The first two are the epistemic desideratum (chapter 4) and incentive-compatibility desideratum (chapter 5) which are by far more interesting than the control desideratum (chapter 6), but for reasons of space will not be addressed in this review.
[27] p 129.
[28] p 136.
[29] The formal statement of the impossibility result is that "there exists no aggregation function satisfying robust group rationality, proposition-wise unanimity preservation, and the control desideratum."
[30] p 149-150.

[31] Pettit and Rabinowicz (n 5) 277.
[32] p 104.
[33] A good albeit rare case in point was Britons' overall opposition to the Iraq war which within a week changed to overall support once the decision of *their* government became final (i.e. the war started).
[34] List and Pettit describe the relationship between the two as one of supervenience of the group attitudes on the individual ones, which goes only one way.

MUCH ADO ABOUT NOTHING?

BOOK REVIEW: 'THE IMPACT OF HUMAN RIGHTS LAW ON GENERAL INTERNATIONAL LAW' BY M. T. KAMMINGA & M. SCHEINEN

(OXFORD UNIVERSITY PRESS, 2009, ISBN: 978-0-19-956522-1, £73.95)

Axelle Reiter*

I. INTRODUCTION

The book under review is the result of the work of the Committee on International Human Rights Law and Practice of the International Law Association on the impact of international human rights law on general international law, during the four years separating the 2004 Conference in Berlin, which entrusted the Committee with the task of preparing a report on the question, and the 2008 Conference in Rio de Janeiro, where its final report was adopted.[1] It takes roots in the debate between tenants of the 'fragmentation' or 'unity' of the international legal order and sides squarely with the latter by endorsing what it calls the 'reconciliation' view of the question. It recognises that the bearing of human rights on general international law is a two-way process. Yet, it focuses specifically on the influence that the norms instituting individual rights and obligations entrenched in international human rights law, international humanitarian law and international criminal law have on general public international law, as it is less documented than the more traditional contrary approach. In the process, it attempts to uncover the structural and substantive effects of the growing role that individuals and other non-state actors play on the international scene.

II. COMPOSITION

The final report of the Committee was drafted on the basis of the various papers collected in the edited book under review and comments from other members of the Committee. Accordingly, the first chapter of the book includes a general introduction and background information to the report before presenting its main findings regarding the different aspects of general international law that it deems particularly affected by the

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human rights paradigm. The topics covered range from the structure of international obligations to an analysis of the traditional sources of international law -namely, international customs and treaties-, and from the relationship between international and domestic law and classical state prerogatives -like immunity, diplomatic protection and consular notification- to their responsibility for internationally wrongful acts. The following contributions deal in a more detailed fashion with each of these matters in turn.

1. *Structure and sources of international obligations*

After the general introduction of its mandate, the report delves first into the question of the evolution of the structure of international obligations. In this regard, it concentrates on the development of two crucial notions; obligations *erga omnes* and peremptory or *ius cogens* norms. On one hand, obligations *erga omnes* are closely tied to the recognition by the International Court of Justice and the International Law Commission of the emergence of an international community imbued with values and interests distinct from those of its member states. On the other hand, the International Law Commission relies on the concept of *ius cogens* in order to trump state consent and establish a normative hierarchy in the international legal order. According to the report, the practical effects of both notions remain scant and cannot be attributed to the influence of international human rights law, even if it constitutes its material core.

Then, the report moves to the recent break in the formation of customary international law away from the theory of the two elements. It highlights the progressive reliance on deduction from fundamental principles in lieu and place of induction from state practice, as well as the emphasis on states declarations and professed intentions or the pronouncements of international bodies rather than their actual deeds. Although the International Court of Justice actually initiated this revolution, the preponderant role of human rights supervisory organs and international criminal tribunals into the redefinition of the concept cannot be neglected. As a result, the new approach has not infiltrated all areas of international law to the same extent and mostly rules over those associated with community interests.

Next, the report tackles three issues related to the law of treaties; namely, treaty interpretation, reservations and state succession. It underlines the general inadequacy of the 1969 Vienna Convention on the Law of Treaties to deal with multilateral agreements, chiefly those assorted of specific monitoring mechanisms. Firstly, human rights bodies tend to assert an 'exceptionalist' position in relation to treaty interpretation; which is not

expressly foreseen in general international law. Then again, they have effectively applied methods listed in Article 31 of the Vienna Convention. In consequence, they have not shaped the field in any significant manner.

Secondly, international human rights law relies on the object and purpose test enshrined in the Vienna Convention to determine the permissibility of reservations. By opposition, it takes exception with the determination of their validity by states objections; a system which provides adequate guarantees for reciprocal engagements but cannot safeguard integral obligations. Instead, it entrusts supervisory organs with this task. The endorsement of this practice by the International Law Commission special rapporteur on reservations considerably affects the relevant international regime. Likewise, international human rights law departs from the usual regime governing the consequences of incompatible reservations by severing them from the bulk of the treaty. Subsequently, the instrument remains fully operative for the reserving party without the benefit of the contentious reservation. However, several states expressly opposed this trend and the International Law Commission has not pronounced itself on the matter yet; leaving the question somewhat unresolved.

Thirdly, the 'clean slate' doctrine applicable for state succession in respect of treaties, with the exception of boundaries and other territorial regimes, has been challenged by human rights organs. In contrast, they suggest that the specificity of human rights instruments mandates that their protection is left unaffected by state succession and transferred with the territory. Here again, their views have not been formally endorsed in general international law. Hence, the actual outcome produced on the field appears uncertain.

2. *State sovereignty and responsibility*

Traditionally, state sovereignty confers them several specific prerogatives and strongly weights over the interplay between international obligations and domestic law. Recently, international human rights law has mounted a systematic attack against each and every aspect of this principle, culminating in the idea of crimes of states. In general international law, states can choose the means by which they implement international norms domestically, provided that they comply with the duties they have undertaken. Conversely, the European and Inter-American Courts of Human Rights have assumed in several instances that their rulings have direct effect upon the national legal order and ordered the adoption of very precise measures; with variable results at the domestic level, depending on the countries involved. The sovereign immunity of states and foreign officials in front of municipal courts and tribunals has been

similarly assailed from a human rights perspective; yet, without much success. This being said, the ongoing debate and some contrary decisions and dissenting opinions foretell that the overall balance might lean in the opposite direction in the future. Besides, human rights law has only impacted marginally, if at all, on the development of general international norms regarding diplomatic protection, the right to consular notification and the attribution of state responsibility.

By opposition, the notion of positive obligations developed in international human rights and humanitarian law has strongly permeated the case law of the International Court of Justice concerning such questions. In addition, the concept has been recognised in secondary rules of general international law, like the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, in relation to the violation of *ius cogens* obligations. Finally, the United Nations General Assembly and Security Council have recently recognised a duty for states to protect individuals against international crimes, whereas the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts obliges them to use available lawful means to end serious breaches of peremptory norms. While the term 'state crimes' introduced in a previous draft of the Articles has been eliminated from the final document, this entails that some international offences generate graver consequences.

3. *Findings*

The conclusions of the report are introduced by a *caveat* on the ongoing process of evolution undertaken by general international law. The following observations concede the somewhat mixed outcome of the enterprise in seven distinct points.

First, the report identifies the causes of the partial alteration of the *status quo* with the necessity to account for the growing importance of non-state actors and the relevance of the international community as a whole. Second, it observes that the transforming impact of human rights is actually not so much the product of specific legal rules than of the endorsement of a human rights approach by the International Court of justice and the International Law Commission. Third, both organs have showed a marked reluctance to vindicate individual rights in cases of clashes with traditional state interests or prerogatives, leading to a rather patchy reception of the integration process. Fourth, the International Court of Justice, above all, merely acknowledges the emergence of concepts correlated to human rights without giving them a non-perfunctory role, in an attempt to circumvent hostile responses. Fifth, the

International Law Commission has likewise adopted a rather modest stance to the question. Sixth, the influence of human rights in general international law should be divorced from the broader debate on the unity or fragmentation of the international legal order. In particular, the International Law Commission tends to ground the unity of international law in the Vienna Convention on the Law of Treaties, a multilateral agreement that is not particularly 'friendly' towards human rights concerns. The authors of the present report suggest that, on the contrary, human rights might ultimately constitute the core component of a unified international legal order and the main guarantor of the system's internal coherence. Seventh, the silent legal revolution resulting from the increasing impact of human rights on general international law effectively challenges the paradigmatic statism of the regime.

III. CONTRIBUTIONS

The article by Scheinin contrasts five readings of the Vienna Convention on the Law of Treaties. First, under the textual positivist approach, the terms of the Vienna Convention would only apply to interactions between states parties and only in relation to the agreements signed after the entry into force of the Vienna Convention. Secondly, this non-retroactivity clause makes exception for the provisions that belong to general international law. In consequence, under the dogmatic approach, the Vienna Convention is considered as a codification of international customs by the International Law Commission, whose rules apply to all multilateral treaties, independent of its ratification. However, this leads to a dogmatic interpretation of the dispositions of the Vienna Convention and poses problems in cases of *lacunae*.

Thirdly, some assumptions in the Vienna Convention, like its focus on states interests and the delegation of the monitoring of treaty obligations to states rather than international supervisory bodies, fail to account for the non-reciprocal nature of law-making conventions; chiefly, including human rights treaties. A first way out of this conundrum consists in emphasising the *sui generis* character of such treaties, even if this results in a fragmentation of the international legal order. Fourthly, instead of identifying human rights treaties with a special regime, they can be granted a constitutional status. Accordingly, they would constitute an embryonic global constitution of a substantive type. Building upon the notion of *ius cogens* in the Vienna Convention, it entails a more coherent and unified vision of the international legal system and allows sidestepping its erosion through fragmentation.

Fifthly, a last approach aims at reconciling the Vienna Convention with

human rights treaties. It sees the Vienna Convention as a reflection of customary norms, an approximation of international customs that is subject to modification whenever the specificities of a treaty mandate it. Besides, some rules of the Vienna Convention allow for such exceptions. Scheinin favours the last two approaches and recommends using them complementarily, depending on the feasibility of the latter in the circumstances of the case in hand.

According to Christoffersen's contribution to the general principles of treaty interpretation, while it is generally assumed that the interpretation of human rights treaties is governed by specific rules, human rights supervisory bodies actually rely on accepted methods of interpretation. Focusing on the relevant case law of the European Court of Human Rights, the author puts forward that human rights law has not impacted substantially on general international law at the methodological level.

Following Boerefijn, the approach adopted by the United Nations treaty-bodies and the European Court of Human Rights has impacted on the ongoing work of the International Law Commission on treaty reservations, even if the International Law Commission seems most concerned with the interests of states parties than with those of the individual beneficiaries of the protected rights. This position of the International Law Commission clashes with its recognition of the non-reciprocal character of human rights conventions. In addition, the International Law Commission uses other avenues than the human rights supervisory bodies to invalidate reservations and mostly rely on the general rules of public international law rather than on the (in-)compatibility with the specific object and purpose of human rights instruments. As a result, it is difficult to determine the precise impact of human rights law on general international law regarding reservations, aside from the monitoring role of human rights supervisory bodies.

Kamminga explores the impact of human rights on state succession in respect of treaties. In contrast with the traditionally accepted clean slate doctrine, successor states are bound to respect the individual rights previously guaranteed under human rights treaties. Hence, the continuous applicability of rights devolves with the territory, even though confirmation by the succeeding state helps avoiding ambiguities. This constitutes a major exception to general international law rules on state succession, solely comparable to the exception concerning treaties establishing boundaries and other territorial regimes. It also implies that successor states cannot enter new reservations to human rights treaties.

Ryngaert and Wouters analyse the process of formation of customary

international law. In matters related to community interests, the International Court of Justice has put more emphasis on *opinio iuris* than actual state practice, at times even glossing over inconsistent practice; thereby, paving the way for an evolution of the customary formation process in the fields of international human rights and humanitarian law. The International Criminal Tribunal for the former Yugoslavia goes one step further down that road and considers that battlefield practice is methodologically irrelevant because inherently untrustworthy. Likewise, the study on customary international humanitarian law by the International Committee of the Red Cross attaches more importance to verbal acts and *opinio iuris*, as well as to its own official statements, than to actual operational practice.

On one hand, this 'modernist positivist' approach is informed by ideological considerations and value preferences, like any alternative methodology. In addition, the ensiung move towards iusnaturalism undermines legal certainty. On the other hand, the classical positivist approach is grounded in a similarly biaised vision and faces difficulties in accounting for the legal recognition of human rights. Incidentally, several sources of international law are divorced from state practice; chiefly, *ius cogens* norms and general principles of either international law or domestic constitutional law. Finally, emphasis on *opinio iuris* and states verbal commitments might entail a stronger attachment to consensualism than reference to inconsistent state practice.

The current tendency to focus on multilateralism and obligations towards the international community as a whole, *in lieu et place* of bilateralism and reciprocal obligations, involve relying on deduction and selective practice in order to bring forth moral conclusions, instead of inductively deriving customary rules from actual state actions. As a result of the intensification of the former process, the 'modernist positivist' conception will increasingly permeate other areas of international law; hence, largely impacting on the development of general international law.

The contribution of Sivakumaran on the structure of international obligations concludes that human rights norms have been central to the move away from bilateralism to community interests and the creation of a hierarchy of norms at the international level, respectively through the notions of obligations *erga omnes* and *ius cogens*. This shift totally restructures general international obligations. More specifically, it leads to such fundamental corolaries as the invalidity of inconsistent treaty provisions, or Security Council resolutions, and to specific consequences at the level of state responsibility.

Following Rensmann, whereas human rights breaches have not yet been entrenched as a general exception to the traditional immunity of states and their officials, international human rights law has contributed to the evolution from an absolute understanding to the current restrictive conception of immunity. In addition, contemporary attempts to further erode the traditional rules impact on the development of general international law in this direction.

The articles by Cerna and Pisillo Mazzeschi both deal with diplomatic protection and, more precisely, with the right to consular notification. The traditional conception that the law on diplomatic protection and the treatment of aliens only concerns interstate relations has been under attack from three fronts, by the widening of the scope and public nature of international law, as well as of the holders and addressees of international rights and obligations.

In this respect, the Inter-American Court and Commission of Human Rights consider the right to notification of the right to consular assistance an integral part of the minimum due process guaranties required for a fair trial and, in capital cases, of the right to life of foreign detainees. In the process, they create a new human right to consular notification. The International Court of Justice has adopted a more cautious attitude and has condemned offenders for violating the rights of the national states rather than those of individual foreign prisoners. On the other hand, the International Court of Justice and the International Law Commission seem to include human rights in the material scope of the law on diplomatic protection.

Accordingly, international norms on the treatment of aliens attribute rights simultaneously to individuals and national states. As a result, they regulate trilateral rather than bilateral relations; which constitutes an important change in the perception of these legal rules. Even if states are not obliged to protect their nationals abroad, the conception of diplomatic protection as a means to forward the respect of individual rights constitutes a decisive contribution to the evolution of general international law. Besides, the process is progressively developing and the Court of First instance of the European Communities has already consecrated the duty for member states to intervene in order to protect the rights of their citizens deprived of judicial remedies abroad.

In his study on state responsibility, McCorquodale suggests that the International Law Commission treats human rights as a special regime inside the frame of general international law. States are held responsible for the acts and omissions of their organs and officials. In addition, the

actions of private persons and entities are attributed to states whenever governments endorse them or their exercise basically amounts to public functions. In this respect, human rights supervisory bodies have confirmed and reinforced the general principles of state responsibility. The International Court of Justice has expressly rejected the lowering by the International Criminal Tribunal for the former Yugoslavia of the effective control threshold required for the purposes of attribution under general international law, although it acknowledges the possibility of a lower test of control under international human rights law. Still, the impact of human rights on general international law concerning the issue of attribution remains minimal. In contrast, in relation to the international obligations of states, the International Court of Justice and the International Law Commission have recognised the development of positive obligations in the human rights case law, both territorially and extra-territorially; considerably affecting the nature and extent of states' obligations under general international law. Likewise, states' obligations towards individuals have been extended to cover all persons under their jurisdiction, independently of their nationality.

IV. ASSESSMENT AND CONCLUSIONS

The actual challenge faced by the Committee on International Human Rights Law and Practice of the International Law Association in defining the actual impact of human rights norms on the development of general international law cannot be overestimated. The report explores nearly all aspects of general international law and tackles many, as yet, unresolved debates and controversies. Besides, the International Law Commission is still involved in the codification of several of the questions it investigates. As such, its task might justly appear Promethean, explaining some of the unavoidable shortcomings of the end product. In this view, the book under review provides a badly needed systematic general introduction to the many issues lying at the intersection between the two ensembles of norms. It usefully summarises and confronts the contrasted positions espoused by the International Court of Justice and the International Law Commission, on one hand, and human rights supervisory bodies and international criminal tribunals, on the other hand.

Unfortunately, the actual output of the report and the book under review does not fully meet the high standards set by its ambitions. While the seven points elaborated upon in the report's findings and relevant *caveat*encapsulate the essence of the phenomenon and provide an interesting explanation for the contemporary evolution of the international legal order, the more specific conclusions adopted in relation to the various topics of international law under examination are often too

modest; falling short of accounting for the actual impact of human rights *sensu largo* and community interests on general international law. There are at times discrepancies between the report's findings and the contributions that it is meant to distill and, albeit to a lesser extent, between overlapping contributions on similar subject matters. In addition, in spite of introductory claims to the contrary, the position it occupies in the discussion on the 'fragmentation' or 'unity' of the international legal order is far from obvious either. As a result, the general clarifying aim is all but attained. Moreover, the depth of the analysis and the significance of the ensuing findings vary widely from one contribution to the next. Also, they follow different approaches and methodologies; which further impedes an overall view of the question.

The divergence of views is especially noticeable in relation to the structure of international obligations, the process of formation of customary international law, the immunity of states and their officials, the law of diplomatic protection and the right to consular notification; where the individual underlying contributions go much farther in acknowledging a dominant role of human rights than the final report does. Subsequently, the report underestimates the function of obligations *erga omnes* and *ius cogens* as a unifying factor behind the evolution of the international system from bilateralism to multilateralism; which constitutes the main impact of human rights norms on general international law.[2] In contrast to the findings of the underlying paper and the views of the broader doctrine, it similarly minimises the effective revolution in the process of formation of customary international law. In this regard, the extent of the departure from the traditional theory of the two elements has led some authors to wonder whether one could speak of a new source of international law grounded in the preponderant role of the international judge in the definition of the substance of customs, on the basis of normative rather than strictly positivist premises.[3] Likewise, the report considerably plays down the progressive and ongoing erosion of the traditional prerogatives of state sovereignty.

Finally, the approach adopted by some of the underlying contributions also raises questions. In particular, the want of a systematic and thorough analysis of the position of international organs on the interpretation of treaties is striking. On one hand, Scheinin's exposition of the five possible readings of the Vienna Convention on the Law of Treaties has the merit to present a critical overview of the doctrinal debates. Yet, he mostly grounds his vision of the Convention on purely normative considerations and does not delve in any details into the positions of international organs on the question. On the other hand, Christoffersen' article on the general principles of treaty interpretation limits itself to a study of the case law of

the European Court of Human Rights and does not look at the methods used by other human rights supervisory bodies and international criminal tribunals, both of which are usually considered to rely on more proactive interpretative techniques. As a result, the conclusions drawn in this respect are necessarily incomplete.

At another level, the contribution by Ryngaert and Wouters on the process of transformation of customary international law departs from the classical positivist position that would be expected from a paper meant to describe the current state of the field. Unlike the final report, it recognises the amplitude of the ongoing shift towards natural law. However, the authors avowedly endorse the iusnaturalist turn towards what they somewhat ambiguously call the 'modernist positivist' approach, on account of the necessity to better protect and promote human rights, though at the cost of doctrinal rigor and legal certainty. Nonetheless, this move does not only entail innocent consequences in the framework of criminal trials, in which it was precisely developed. One cannot fail to notice the advantages of this type of casual approach to the identification of customary norms in the context of classical human rights litigation. By opposition, overtly progressive methods of interpretation produce truly problematical results when adopted in the frame of trials involving the determination of individual criminal responsibility for grave breaches of international law, likely to be sanctioned by extremely heavy sentences. In effect, so-called 'modernist positivism' actually clashes with the human rights paradigm instead of enhancing it:[4]it undermines the prohibition of retroactive offences, a fundamental right that cannot be derogated from even in times of war or public emergency, and impedes the development of the rule of law at the global level, by effectively canceling out the principle of legality.

To sum up, the book under review constitutes an interesting contribution to the analysis of the metamorphosis currently undergone by international law, from a fragmented set of bilateral and reciprocal primary obligations into a fully integrated legal order, based on a hierarchy of norms grounded in the interests of the international community as a whole. Besides, it correctly identifies this transformation with the process of substantive unification of international law. However, it does not always recognise the logical conclusions that obtain from these bold premises and often underplays actual developments that are already observable in the practice of international organs; ultimately leaving the reader with an impression of 'much ado about nothing'.

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BOOK REVIEW: THE EUROPEAN COURT OF HUMAN RIGHTS AND THE RIGHTS OF MARGINALISED INDIVIDUALS AND MINORITIES IN NATIONAL CONTEXT BY D. ANAGNOSTOU & E. PSYCHOGIOPOULOU (EDS.)

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In the extensive scholarship on the European Court of Human Rights (ECtHR), this book is the first to offer an encompassing assessment of the role of the Court on the protection of the rights of vulnerable and minority groups in member states. It stands out for the breath of its approach, covering from detailed case-law analysis, to the institutional and socio-legal factors that have contributed to define the influence of the Court in each national setting. The study covers eight countries -Austria, Bulgaria, France, Germany, Greece, Italy, Turkey and the United Kingdom- that differ in several structural dimensions as well as on their outcomes in terms of minority-rights litigation and consequent ECtHR jurisprudence.

The first chapter, by Dia Anagnostou, does an excellent job of providing a general analytical overview of the evolution of the work of the Court on the rights of marginalized individuals and groups, and of presenting the main theoretical problems and empirical findings that are raised throughout the volume. One of the central questions highlighted in this chapter, and explained across the country case-studies, is how since the 1990s the Court has become a significant venue for the protection of minority rights, even if resort of minority groups to the Court was not enabled or foreseen by the drafters of the European Convention of Human Rights (ECHR) in the late 1940s. In effect, there is no minority rights provision entrenched in the Convention, and the proposal for a new protocol to the Convention providing for these rights was hampered by lack of consensus among states in 1993. The only legal basis for such claims can be found in article 14, which precludes discrimination in the enforcement of Convention rights, and must be read together with other Convention provisions, and in article 34, which confers standing to groups, as well as to individuals and NGOs, to submit claims before the Court. How this transformation in the role and jurisprudence of the Court

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regarding minority rights has taken place is the matter of this book.

As Anagnostou explains, this development has been produced by the Court itself, through its interpretation of the scope of rights that can be claimed under the Convention, in a process triggered by claims and litigation by individuals "whose views, ethnic-national origins or way of life set them apart from –and potentially in conflict with- the majority". This process has implied, on the one hand, a doctrinal development by the Court on principles of interpretation and application of the ECHR, in particular the "living instrument" doctrine, which has enabled the Court to interpret the Convention according to present-day conditions. On the other hand, this process has been fueled by the increasing legal mobilization of social actors. The country studies explain in detail how the interaction between both developments, internal and external to the Court, has taken place. They also analyze the reception of the ECtHR's jurisprudence in each country, and the impact of its decisions on the constitutionalization of the rights of vulnerable groups at the national level, as well as on national courts' approaches to issues related to equality and discrimination. Through the combination of case-law analysis and a socio-legal approach, and through the assessment of the sources and implications of the Court's decisions on minority rights, each chapter offers an in-depth and situated perspective on the main jurisprudence of the ECtHR in this field, which allows to understand the significance and consequences of the work of Court in this area of rights.

Legal mobilization can be considered, in fact, the factor that most strongly links legal and social problems and developments at the national level with the supranational jurisdiction of the Court. It is logical, then, that a book devoted to analyze the role of the Court in national contexts focuses in this aspect. The country case-studies detail the role of rights advocacy NGOs as complaints in rights claims, as well as in offering legal advice and submitting amicus curiae briefs in cases before the Court, and show how legal mobilization has contributed to shape and expand the work of the Court in the area of minority rights. A key development in all country studies, although with varied intensity, has been the use of strategic litigation by actors in civil society, who have increasingly approached the ECtHR not only as a venue to resolve particular cases, but also as a relevant instance in their pursuit of broader legal and policy change. The cases approached through strategic litigation are also those in which, according to the country case-studies, the Court's decisions have been more consequential in terms of the impact on national policy and legal reforms. The main cases addressed by each country chapter in which there has been strategic litigation offer an overview of the scope and dynamics of claims before the Court in the field of minority rights.

The chapter on Austria, by Kerstin Buchinger, Barbara Liegl and Anstrid Steinkellner, shows that the groups that have been more represented by NGOs in cases before the Strasbourg Court are immigrants and asylum seekers, gays and lesbians and religious minorities. The authors observe that certain groups, such as the Muslim minority or the Carinthian Slovenes, have not been represented at the ECtHR. It would be interesting to know, through further studies, the reasons for this group, and other groups in different national contexts not to have recourse to the Court. The Bulgarian case, analyzed by Yonko Grozev, Daniel Smilov and Rashko Dorosiev, explains that human rights NGOs focused on the violation of basic rights and racist violence against Roma, as well as on the religious rights of minorities. The authors point out an interesting aspect related to the legal strategy developed by Jehovah Witnesses, whose leadership developed a strong legal strategy in favor of the group and not only of particular litigants, and were successful in negotiating with the government to settle cases if there was a commitment to legal reform, particularly regarding non-military service. Emmanuelle Bribosia, Isabelle Rorive and Amaya Úbeda interestingly explains how, in the case of France, reluctance to legally recognize minorities, as well as a historical preference of political over legal means by activist groups have implied that most cases that reached the ECtHR have been presented by individuals instead of NGOs; but they also point out that this situation has started to change, and rights advocacy organizations have represented marginalized groups, mostly immigrants and asylum seekers, and also in cases of discrimination based on gender or sexual orientation, and religious minorities. In Germany, as explained by Christoph Gusy and Sebastian Müller, specialized organizations have given advice mainly to asylum seekers, who otherwise generally don't appear before the Court. The chapter on Greece, by Evangelia Psychogiopoulou describes strategic litigation patterns in favor of religious and ethnic minorities, among them Jehovah Witnesses, who, as in the Bulgarian case, have developed a strong case-testing strategy before the ECtHR. In Italy, as explained by Serena Sileoni, there is an incipient development of strategic litigation before the Court, in cases concerning the rights of immigrants and asylum seekers. The chapter on Turkey, by Dilek Kurban, shows that activism before the Court was developed mainly by Kurdish lawyers for human rights abuses under the state of emergency in the 1990s, and also by non-Muslim minorities. In the case of the United Kindom, analyzed by Susan Millns, Christopher Rootes, Clare Saunders and Gabriel Swain, there has been extensive litigation supported by NGOs on diverse areas of rights concerning vulnerable individuals and minorities, for example in gender-related test cases, or in the defense of the human rights of Irish prisoners, immigrants and Roma.

Furthermore, in each case-study, the authors include an interesting and frequently overlooked aspect of the interaction between courts and external actors, i.e. the role played by the academic community and scholarship in each country in changing the public perception of the ECtHR, as well as in influencing the conceptualization of human rights in each national context. In the case of Austria, for example, it is observed how legal scholarship on rights protection under the ECHR has influenced the development of the concept of equality before the law in gender-discrimination cases, as well as on discrimination on grounds of ethnicity and race. On the other hand, the chapter on Bulgaria illustrates how the silence of the academic community regarding minority rights and minority representation, which has started to be broken, had become an obstacle for the incorporation of ECtHR's criteria on Bulgarian constitutionalism.

The country case-studies show that the Court has had a positive role in the protection and advancement of the rights of marginalized individuals and minorities. However, many of them also offer insights on the limitations of the Court to offer redress to the underprivileged. The main obstacle observed in most cases is that access to the Court is determined by access to material resources for litigation, which as a rule are less available for vulnerable and minority groups than for the majority population. As observed by the chapter on Austria, even in successful cases in which claimants obtain compensation, they have to devote a great part of it to pay for their lawyers. In the more extreme situations, some groups either are unaware of their legally recognized rights and the means for their protection, or they do not search for remedy because of their lack of legal residency status. This problem alludes to the paradoxical role of counter-majoritarian institutions, devoted to protect a system of rights that may go against majoritarian preferences, but whose functioning cannot be isolated from the structural social determinants of majoritarian political systems. This is even more striking in the case of human rights courts, which are more essentially linked to the protection of those members of society who are vulnerable or disadvantaged precisely for their lack of resources and-or for following different customs than the majority population. In many cases, the same situations that disadvantage vulnerable or minority groups also limit their access to justice. This makes it all the more important the existence of a material support structure in society to offer legal aid and allow for sustainable legal mobilization before the ECtHR, as observed throughout this book. A different important obstacle that strongly affects the possibilities of minorities such as immigrants or refugees to reach the Court is the long time it takes to exhaust the national proceedings in some countries until the ECtHR jurisdiction can be accessed. As observed in the chapter on the Austrian case, in order for the Court to be able to offer effective remedy in these situations, a more expedite protection system

would be necessary at least in some national settings.

Although in general the focus of this volume is on the impact of the Court on the national level and its main insights are on domestic processes triggered by appeal to the Court's jurisdiction in cases related to minority rights, the issues it deals with also contribute to understand the general working of the European system of rights protection. They also shed light on the recent evolution of the institutional role of the Court, after several developments that have affected its work. Among these changes are, in the first place, the accession of new countries to the Convention in the post-communist context, which expanded the Court´s jurisdiction to forty-seven member states; second, the restructuration of the European human rights system in 1998, through Protocol No. 11, which among other measures implied the conversion of the two-tiered system based on the Commission and the Court into a single Court, and introduced a mandatory right to individual petition by which individuals have direct access to the Court; thirdly, through the expansion of the scope of rights that the Court can deal with, among them the rights of minorities, as explained by this book. These developments have converged to produce an expansion of the Court's workload but also have consequences on how the Court's agenda is formed nowadays, based on individual petitions, and without the investigation and mediation role of the Commission. They pose new concerns and questions regarding, for example, efficiency in the work of the Court, and, more fundamentally, regarding the way in which it can select cases in order to set a jurisprudence in particular areas of rights under the Convention. In this sense, litigation strategies by social actors may function as a fundamental recourse for the Court in that they generally entail the preparation of cases that are representative of the main administrative and legal obstacles for the enforcement of human rights found at the national level, as shown in this book.

Overall, this volume offers a landmark analysis of processes and forces that have contributed to shape the mechanisms for human rights protection of minorities and disadvantaged individuals and groups in the interface between national contexts and Europe's supranational legal system. Moreover, the processes described and explained in this book also shed light more generally on the complex relationships between actors and institutions involved in the working of the European human rights regime, and provide elements to analyze the recent evolution of the ECtHR. A final consideration regards the impressive methodology that sustains the structure of this book. It is, in fact, an excellent example of how a wide collaborative project can result in a cohesive and well-integrated volume. The book is superbly well-edited, and one of its strengths is that the country studies are developed following a consistent methodological

layout, which makes this work an extraordinary resource as well as a solid base for further cross-country comparative studies in the European context, as well as for comparison with the role of human rights courts in other regional settings.

In Search of Consensus?

Book Review: 'Rough Consensus and Running Code – A Theory of Transnational Private Law' by G.-P. Calliess & P. Zumbansen

(Hart, 2010, ISBN: 9781841139746, £50)

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I. Introduction

"Rough Consensus and Running Code – A Theory of Transnational Private Law" is the title of this ambitious book by Professors Calliess and Zumbansen. The aim of their work is to offer an "explanatory and constructive tool to describe, assess and further develop the different law-making regimes that can be observed in the transnational arena"[1]. Starting from the the well known premise that the global scenario lacks an officially recognized authority for the making of globally valid law, they seek to explain the existence of numerous examples of *legal* normativity[2] in the transnational space through what they describe as a *methodological*approach. In their words: "we understand transnational law above all to demarcate a methodological position rather than to identify a perfectly map-able doctrinal field"[3]. This *method* is then confronted with two major case studies: consumer contracts and corporate governance.

It must be underlined how one of the most striking features of this work is its engagement with an impressive body of literature, from legal theory to sociology, economics and social sciences in general, in the attempt to embed the project in the broader debate of law in the global space. The result is an original, rich and highly complex book, which undoubtedly will, and in fact already is, stimulating debates and discussions over the nature and the making of transnational law (TL). This review briefly presents the structure and the major contents of the book and succinctly engages in a critique of some of its most controversial aspects.

II. Structure

Chapter I sets the scene and the *programme* of the project. Starting from

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Philip Jessup's idea of TL as a methodological position, the authors briefly describe law's "border crossing" tension in the literature, from Durkheim's "non-contractual conditions of contracts", to Polany's notion of "embeddedness", all the way to the *political* legal theory of Legal Realism vis-à-vis the "proliferation of norm creation outside of the nation-state"[4]. Against this background, the chapter presents the scopes of the work. After asserting that a theory of transnational private law is unimaginable without the help of other fields of study, and thus urges for a high if not extreme interdisciplinary approach, the authors clarify that they are not seeking to engage in the debate of the *legal nature* of transnational norms, as much as they propose an analysis of how these norms come to existence. In other words, the book "as much focuses on the ways by which norms of transnational law come into being as it hopes to further accentuate the challenges that arise from the question 'But is it law?'"[5], thus suggesting an approach that doesn't separate 'form' and 'substance' of TL, being the processes and institutions involved in the making of transnational norms an integral and crucial element in assessing their legal nature. Now, in this perspective, the authors introduce the idea of 'Rough Consensus and Running Code' (RCRC), suggesting that "a dynamic process of consensus building and code evolution can adequately capture the interdisciplinary, intricate nature of contemporary transnational law-making"[6].

Chapter II represents the heart of the book. It is structured in three parts, each one devoted to a specific task. A detailed account of all three will not be possible in a succinct review. In the first and the second parts of the chapter, the authors seek to situate their theoretical premises in the vast realm of cross-disciplinary contemporary projects dealing with law and globalization, and, as they put it themselves, "with such an orientation, the net is -admittedly- cast wide"[7]. Throughout the various sections, the chapter quite ambitiously attempts a comprehensive overview of an extended body of literature, from legal theory to legal sociology, law and economics, new institutional economics, systems theory and political theory. To put the debate in context, they use the example of *lex mercatoria*, which they define as "one of the most important laboratories to reflect on the elements of a legal order emerging at a critical distance from the state"[8]. The leading theme of a chapter that would be otherwise confusing due to its density and richness of references is the *methodological* approach. The authors look at *lex mercatoria* as a methodological problem which suggests a reflection on the possibility of law "which *can* be but *need not* be state-originating, which *can* be but *need not* be privately created or resulting from a complex interaction between official and unofficial norm-creation"[9], thus implying a *hybrid* nature for the law which will be one of the structural pillars of

their own theory as developed subsequently in the book. The authors' space between the public/private divide, the difference between co-ordinative (private law) and regulatory (public law) legal functions and, the substantive and procedural sides of the legal process[10], and in doing so they suggest how all these features are declined in TL in a way that is unknown or at least partially unknown in the nation-state.

The core of Chapter II is its third section, dedicated to the proper elaboration of a theory of transnational private law (TPL). The idea of RCRC allows the authors to "revisit the question 'Is it Law?' by binding the underlying *substantive* concern back into the *procedural* framework specific to transnational (private) law regimes"[11]. RCRC represents a bottom-up approach of law-making which constitutes, in the authors' minds, the way to overcome the impasse of the nation-state-dependent traditional law-making process. To illustrate their theory, Calliess and Zumbansen refer to the paradigmatic examples of Internet Governance and Private Law Harmonization projects. In brief, synthetic, and somehow over-simplified terms, the argument goes as follows, as inspired by the so-called *Request for Comments Procedure* (RFC) in place in the Internet Governance. Two major phases are described through the illustration of three implications for each phase. The first phase, *Rough Consensus*, implies at a *social dimension*, the identification of a "fairly prevailing opinion"[12] which on a *substantial dimension* points to the existence of a "common core"[13] which in a temporal dimension "suggests an interim character with regard to potential future improvement (i.e. learning aptitude notwithstanding)"[14]. The *Rough Consensus* becomes a *Running Code* through a *pilot phase* in which the content of the consensus acts as a proposed standard, followed by a *recognition phase* in which the standard becomes recommended, and eventually a *binding phase*[15]. In light of this proposal, principles arising from private codifications, recommendations and codes of conduct "must build on a *rough consensus* if they are to become a *running code* which is to prevail not only in practice but also to meet the requirements of legitimacy"[16] that the authors seem to link to the cosmopolitan democracy's notion of *affectedness*[17].

Based on the theoretical framework built up in Chapter II, Chapters III and IV are dedicated to two case studies: transnational consumer contracts and transnational corporate governance. In these case studies, the authors seek to demonstrate how private ordering can act as an alternative to traditional law-making exercise in "cross-bordering economic exchanges in a situation of constitutional uncertainty"[18] (consumer contracts), and the model of RCRC as described in Chapter II allows to "capture the particular dynamics of transnational corporate governance regulation through its structuring

capacities of distinguishing between the substantive and procedural dimensions of contemporary norm-creation"[19]. In their concluding Chapter (V), Calliess and Zumbansen put their model of RCRC in the context of three concepts, namely Law and Social Norms, Soft Law and Customary International Law. They conclude that all these concepts are in great need of further development as they fail to comprehensively address the issue of TL, an issue that RCRC, as a mixed public-private dynamic norm-creation process, is better fit to confront. In their words, RCRC can be described as "a particular form of societal self-governance at a time where domestic and transnational public and private law-makers compete over regulatory competence and authority"[20].

III. Critiques

After succinctly sketching the structure of the book and its major arguments, and in the spirit of engaging in a debate with the authors, there is room for a few critiques. And these can be summarized as follows: the book contains at the same time too much and too little.

Too much. As suggested along this review, the project engages with an impressive volume of literature in the attempt to cover all the major contemporary and parallel projects on law in the global space. In this perspective, two criticisms can be raised.

1) On the one hand, this effort towards comprehensiveness harms the originality of the venture, which basically results in a huge literature review that never truly engages in a debate with the relevant authors; it simply acknowledges generally accepted critiques, such as the non-normativity of systems theory, the insufficiently normative character and excessively neo-liberal orientation of reflexive law and the failure of new institutional economics to acknowledge the constitutive role of law[21]. So, if there is no real new challenge, one would look for a different goal. As the authors have suggested[22], there may be a "pedagogical" value in bringing together such a wide array of projects and approaches. But then it is unclear to what extent the task is accomplished, as all their references are structured and presented in a way that makes them accessible only to an already learned community of experts in the field.

2) On the other hand, it is unclear to what extent such an effort serves the purpose of building the theory of RCRC, which is drawn from practical examples more than from previous or parallel theoretical constructions. As a matter of fact, there is an almost abrupt shift in the book between the thorough review of parallel projects through which the authors situate their own theory and the theory itself. All of the theories and projects the

authors confront are characterized by different scopes, research questions and methodologies. Consequently there is a risk that, instead of situating the theory, the reader simply becomes lost. Moreover, while they attempt to meticulously "situate" their theory, the authors, in this reviewer's opinion, somehow neglect a few critical issues that will be now briefly discussed.

Too little. Calliess and Zumbansen claim that they are not addressing the question of the legal *nature* of TPL, as they rely on "an impressive set of arguments in support of the *legal* nature of transnational norms"[23]. Rather, they focus on the mechanisms of law-making in order to stimulate the debate around the question, "But is it Law?", proposing an approach that combines 'form' and 'substance'. Two observations can be made. It is rather surprising that, while they engage in the above mentioned massive amount of literature, the authors chose to dismiss this issue explicitly. But it is even more surprising given that they do subsequently engage in the debate over the *legal nature* of TL as they suggest themselves while they illustrate their ideas on form and substance. There seems to be a loop in the argument here.

Furthermore, the scope of the project is not entirely clear and neither is its methodology. The authors draw their theory from two phenomena, Internet Governance and Private Law Harmonization. They claim to be developing a *methodological* approach that would serve as an explanatory and constructive tool in the analysis of TL. What they mean by this is a little confusing. Methodologically, it is unclear whether the case studies serve as examples to demonstrate their theory's validity or if the theory is built-up to describe the case studies. Substantially, if the aim is explanatory and descriptive, the case studies they chose are a little surprising. As they put it themselves, in the field of consumer contracts, the mechanisms they describe have a rather low likelihood to become a *Running Code*. If the goal is to develop a theory that can better explain the case studies, there is room for disagreement that this is the case. If, on the other hand, the intent is normative (i.e. the theory is drawn from the recalled examples and proposed as model for the subsequent case studies), then it falls short of overtly confronting the issue of legitimacy. If the *RFC* procedure which is suggested as a paradigmatic example of the building of a *Rough Consensus* works in the specific architecture of internet governance, can that type of legitimacy simply be transposed to very different areas? While they refer to legitimacy as a necessary requirement for RCRC[24], they fail to properly develop and explain what legitimacy *is* in their view, applied to their framework. On this perspective a clarification is needed. What is exactly, in the authors' minds, the role of law in the global space? The issue of legitimacy, as raised in this review, might appear traditional and to some

extent "conservative". However, it is a corollary of the impression the authors give, as they seem to maintain a rather traditional vision of the law and its role. If on the other hand RCRC is conceived as a tool to explore the law as a new phenomenon, not only in its making and application, but also at a conceptual level in its role, this should be clarified and developed.

On a related note a more general question can legitimately be raised. Without a proper conceptual elaboration on the role of law in the global space, and thus maintaining a traditional stand on the issue, given the specificity and the number of domains that are affected by the TPL phenomenon, is 'A [general and comprehensive] Theory of Transnational Private Law', be it descriptive or normative, even possible?

A final observation on the role of courts. Little is said about this topic in the development of the theoretical framework, and it is somehow raised only during the case studies. This undermines the descriptive value of the theory, and, from a normative perspective, it excludes a whole set of crucial agents that come into play when there is a *Running Code*. Is a code *running* only after a court sanctions its validity? Is it 'law' independently? Can RCRC bring new elements to this debate?

IV. Conclusion

These issues above demonstrate some of the unanswered (or underdeveloped) questions that could provide a platform to inspire further research. The critiques raised are not intended to be misleading and must instead be read in a constructive way: RCRC has the potential to constitute a strong starting point to work towards a better understanding of the TL phenomenon, as it contains the germs of potentially far-reaching ideas with its model of bottom-up societal self-governance. It is the result of an impressive amount of work, and it provides a rare distillation of the debate on law in the global space. Its weaknesses, briefly explored above, leave rich ground for exploitation by other academics and by the authors themselves. Only by reading the book in its full length can one appreciate its true value, to which this review can hardly give justice. It is this reviewer's opinion that RCRC is a must read for whomever wrestles in (or whomever seeks to enter) the *rough* arena of transnational law!

References

[1] GP Calliess and P Zumbansen, *Rough Consensus and Running Code – A Theory of Transnational Private Law* (Hart Publishing, 2010) 1.

[2] A contentious assumption that will be further discussed in towards the end of the review.
[3] GP Calliess and P Zumbansen (n 1) 6.
[4]GP Calliess and P Zumbansen (n 1) 19.
[5] GP Calliess and P Zumbansen (n 1) 21.
[6] GP Calliess and P Zumbansen (n 1) 24.
[7] GP Calliess and P Zumbansen (n 1) 27.
[8]GP Calliess and P Zumbansen (n 1) 28.
[9]GP Calliess and P Zumbansen (n 1) 31.
[10]GP Calliess and P Zumbansen (n 1) 97 and ff.
[11]GP Calliess and P Zumbansen (n 1) 134.
[12] GP Calliess and P Zumbansen (n 1) 135.
[13] Ibid.
[14] Ibid.
[15] GP Calliess and P Zumbansen (n 1) 134-152.
[16] GP Calliess and P Zumbansen (n 1) 143.
[17] GP Calliess and P Zumbansen (n 1) 133-134.
[18] GP Calliess and P Zumbansen (n 1) 179.
[19] GP Calliess and P Zumbansen (n 1) 247.
[20] GP Calliess and P Zumbansen (n 1) 277.
[21] As argued by Guilherme V. Vilaça in "Ruminations on *Rough Consensus and Running Code*", presentation at the workshop *Rough Consensus and Running Code*, European University Institute, Law Department, 12 and 13 May 2011.
[22] During their replies at the workshop *Rough Consensus and Running Code* (n 21).
[23] GP Calliess and P Zumbansen (n 1) 20.
[24] GP Calliess and P Zumbansen (n 1) 144.