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New Trends in International Lawmaking – International 'Legislation' in the Public Interest

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Foreword

After the collapse of the Soviet Union and the end of the Cold War hopes ran highly that the international community was set for a less conflict and problem ridden future, indeed, that the time had come for the creation of a New World Order which will be characterized by a new sense of cooperation and – above all – the respect for the rule of law in international relations. As we have soon realized, these hopes for at least the dawn of the millenium were premature. It is true that the end of the Cold War has brought about a considerable increase of political cooperation within the organs of the United Nations, namely among the permanent members of the Security Council, which enabled the United Nations to function more effectively in coping with breaches and threats to international peace and security. The very fact, however, that the Organization has been faced with a growing number of serious international – and more significantly *domestic* – conflicts involving heavy use of military force and bringing about the most serious violations of basic human rights, has made it clear that the present international system is not less but even more conflict ridden than in the preceding era. Ethnic and new nationalist divisions which were artificially covered up by the overarching East-West conflict formation were unleashed after the end of the Cold War. But even more importantly, the disappearance of the dominant East-West conflict served as an eye-opener for the international community for other formidable challenges which are no less serious than the former military and ideological confrontation between East and West: the new – or rather now clearly perceived – threat scenarios include global environmental hazards, poverty generated mass migrations, and international terrorism which in view of the still not satisfactorily solved problem of containing the proliferation of weapons of mass destruction has taken on a new dimension. Although undeniably the task of meeting these challenges is an intrinsically political one, there can be no serious doubt that respective political steps to cope with these global threats to the well-being of humankind cannot be effectively taken without an adequate and enforceable legal framework. And it is quite evident, as well, that such international or global legal framework cannot be designed on the basis of a traditional sovereignty-oriented international law. And indeed, one can observe that international law has begun to react to the new environment

The International Commons, the International Public Interest and New Modes of International Lawmaking

Bernard H. Oxman*

We owe a debt of gratitude to those who, by posing the question of public interest norms and globalization as a normative idea, have invited a richly textured debate about the nature of global common interests, the means for identifying and promoting those interests, and the extent to which those interests may be served by accepting or restraining conflicting claims for autonomy, be they by individuals, groups, states, or supranational bodies.

How we think and talk about these issues can make a difference. *H. L. Mencken* defined conscience as the inner voice which warns us that someone may be looking.

When Professor *Delbrück* honored me with an invitation to present this paper, I hesitated. Influenced as I am by concerns such as those expressed in *Propser Weil's* seminal work on relative normativity, I was not entirely certain of the extent to which I found it helpful to think in terms of some of the concepts outlined. He suggested that I express those doubts.

I. Public Interest Norms

Those positing the idea of public interest norms presumably intend to distinguish them from other norms. But they presumably do not intend to suggest that other norms of international law are not in the public interest. Yet they cannot escape the possible consequences not only of being taken literally, but of suggesting a hierarchical relationship between some obligations and others.

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To the extent it is rooted in an epistemological rather than functional concept of obligations *erga omnes*, discussion of so-called public interest norms, such as the duty to respect human rights or to protect the environment, can begin to take on the quality of discussions of public law, and very subtly begin to introduce the public/private distinction into international law. That again may not be the intent, but it could well be the effect.

International law norms are traditionally regarded as strangers to the distinction between public law and private law. Today many of us use the terms "international law" and "public international law" interchangeably to describe the source of norms external to and legally binding upon states. We distinguish international law from the rules of municipal law dealing with the international aspects of private transactions and private disputes: those rules of municipal law are variously referred to as conflict of laws or "private international law."[1]

To be sure, not only the analysis but the development of international law is and should be influenced by the rich and sophisticated sources available in municipal law.[2] The distinction between public law and private law is no stranger to many legal systems. But it is a mistake for international lawyers to treat the distinction as an immutable foundation for the analysis of municipal law, if not law itself. The distinction is more central to the structure of some systems than others, at least in terms of traditional explications of the system.[3] Arguments about the

[1] Of course, just as the instruments of municipal public law, including constitutions and statutes, may be used to prescribe rules of private law, so the instruments of public international law may be used to prescribe rules of private law. Thus, for example, the various Hague Conventions on private law become legally operative and binding upon states by virtue of public international law, but the rules they set forth are addressed largely to matters that are frequently, although not invariably, regarded as coming within the domain of private law in municipal legal systems. The same would be true, for example, of the 1980 UN Convention on Contracts for the International Sale of Goods, UN doc. A/CONF.97/18, Annex I. The legal authority of the Convention is determined by public international law; its legal content, under the rules of public international law regarding treaty interpretation, is informed by the commercial law and commercial customs of the various municipal legal systems whose concepts it may incorporate, harmonize, modify, or even avoid. I would not expect a commercial law expert necessarily to be the best person to decide whether the Convention is legally binding on a particular state (or self-executing under the municipal law of that state), and I would not expect an expert in public international law necessarily to be the best person to interpret the Convention's effect on letters of credit.

[2] This is expressly recognized by the reference to general principles of law recognized by civilized nations in article 38 of the Statute of the International Court of Justice.

[3] This writer was educated in an American legal environment where formal classification is itself suspect and where very little is explicitly described by a distinction between public law and private law.

Nevertheless, many individual rights protected by the federal constitution are often treated as rights under public law in the sense that they may be invoked only against the state and its agents. That in turn provides a rich source for debate among American scholars about the validity and utility of the distinction between the public and the private.

precise nature of the public/private distinction define a vast area of contention. Some may maintain that the distinction serves to obscure the public policy functions of private law as well as the private interests served by public law. Others may dismiss the distinction as wholly problematic.

It has not been established that the traditional distinction in municipal law between public law and private law is helpful to the comprehension or development of international law. Since international law is traditionally regarded as public law, the effect of introducing the distinction would be to re-characterize some, perhaps much, of international law as an international analog of private law, or worse still as not in the public interest in some sense. To what end?

Other kinds of terminology and analysis may have the same hierarchical effect. Thus, for example, Professor *Delbrück* believes that "internationalization serves as a supplement to the nation-state's efforts to satisfy the needs of its people, i.e., the *national interest*," but that "globalization as distinct from internationalization denotes a process of *denationalization* of clusters of political, economic and social activities," and that, when understood as a normative concept, "globalization is to serve the *common good of humankind*, e.g., the preservation of a viable environment or the provision of general economic and social welfare."[4]

The Vienna Convention on the Law of Treaties unleashed a cottage industry with its references to peremptory norms or *jus cogens*.[5] Some have found it useful to seek to expand the scope of the abstract concept of peremptory norms to further various praiseworthy agendas. But in doing so, they seem to have increased the divide between international law as discussed in the academy and as applied by states and tribunals. The well-understood distinction in the law of agreements between the right of the parties to alter their duties *inter se* and their inability to alter their duties to third parties or the community as a whole shows unsettling signs of mutating under the lofty banner of peremptory norms into a classification of the obligations of states under international law generally. In other words, the idea of

[4] *Jost Delbrück*, Globalization of Law, Politics, and Markets – Implications for Domestic Law – A European Perspective, Indiana Journal of Global Legal Studies, vol. 1 (1994), 9, 10 - 11.

[5] Vienna Convention on the Law of Treaties, 23 May 1969, art. 53, UNTS, vol. 1155, 331.

peremptory norms, taken literally and unleashed from its role in the law of agreements, tends to delegitimate the other norms, implying that somehow they are less binding or less worthy of respect than peremptory norms, indeed that they are not necessarily peremptory of municipal law or state policy. This is a dangerous road.

There is reason to question the utility of classifying the norms of international law in a manner that implies a legal or moral hierarchy. Whatever the intent, the classifications may have the same effect as what one might call the "I really mean it" style of legal drafting. If anything is accomplished by specifying that a particular rule is to be respected in all cases without any exception whatsoever, it might well be an implication *a contrario* with respect to rules that do not carry this appendage.

On the surface, it is ironic that a significant motive for the critique of the public/private distinction in municipal law may also be a significant motive for attempting to incorporate the distinction into international law through the intermediation of the concept of public interest norms. Critics of the distinction may decry the lack of emphasis in municipal private law on public law values such as participation and solidarity. It is the perceived lack of emphasis on such values in international law that stimulates attempts to import the idea of public interest norms into international law. Egoism is the evil to be remedied: of the individual in municipal private law, and of the state in international law. In both cases the object is to make the system more responsive to public law values: in the former case by collapsing the idea of a separate public law, and in the latter case by celebrating the emergence of a genuine public law in the form of public interest norms in which the state is assimilated to, if not dismissed as, a private actor.

Such a theoretical approach may exist in symbiosis with specific universal agendas, playing both a normative and a descriptive role. Most if not all universal agendas sooner or later claim hegemony over assertions of autonomy. Precisely because public law is understood to give a high priority to values of participation and solidarity, a theory that accords supremacy to public interest norms may provide the jurisprudential foundation for the advancement of a particular universal agenda; in that case the theory is playing an obvious normative role. The supremacy of public law also may be derived from an examination of specific instances in which universal agendas have prevailed over assertions of autonomy; in that case the theory is playing a descriptive role. But this may be deceiving. The descriptive accuracy of the theory with respect to questions resolved may well strengthen its normative force with respect to questions unresolved. Imperceptibly, theory becomes doctrine.

Environmental protection is an example of the public interest and a universal agenda. It is a good example because the appeal of environmentalism rests not only on faith in its universal prophecy but on empirical observation and scientific projection whose acceptance transcends cultural divides. On the level of municipal law, the state is the public interest ally of environmentalism, seeking to restrain the autonomy of individuals and "private" organizations that emerges from various private law regimes, including property and contract, and to redirect the energies of private actors in ways that further environmental goals.[6] On the level of international law, however, state autonomy becomes an obstacle to the achievement of certain universal goals of environmentalism: while the state remains the enforcement mechanism, on normative questions an alliance is sought with supranational substitutes, be they institutional such as international organizations and tribunals, or doctrinal such as expansive notions of customary international law or *jus cogens* or obligations *erga omnes* or benign "objective regimes."

No one doubts the importance of achieving widespread acceptance and enforcement by states of environmental restraints. While some progress already has been made, very much more remains to be done. Is it helpful or harmful to characterize the progress that has been made as evidence of the emergence of special public interest norms in international law?

Apart from essentially symbolic events, advancing the values we associate with public law and the public interest, such as participation and solidarity, will require the active cooperation of the state and its organs both in international institutions and in enforcing the decisions of those institutions. This requires widely accepted treaties. No matter how elegant or cogent, legal arguments rooted in customary law or first principles, including *jus cogens*, obligations *erga omnes*, and "objective regimes," are simply not equal to the task. International law has long recognized this fact. That is why it requires express consent to subject a state to the jurisdiction of an international organization or an international tribunal.

Functionalism is the most plausible policy for advancing either universal agendas or general "public law" values. In each functional context, the case for restricting autonomy is made on the merits. Two basic arguments may be used to promote acceptance of specific restraints in a particular functional context. First, the benefits of imposing the specific restraints on others outweigh the costs of accepting the restraints. Second, the particular goal (e.g., protecting the ozone layer)

[6] An example would be the elaborate environmental provisions to be found in a standard contract form used by American banks for commercial loans for the development of real property.

can be achieved only by widespread if not universal acceptance of the specific restraints.

Acceptance of a treaty containing specific functional normative or institutional restraints may be opposed by those who regard the treaty as a dangerous precedent. They may see it as part of an evolving general sacrifice of national autonomy, effectively if imprecisely portrayed as an abandonment of sovereignty. Such individuals believe strongly that a comprehensive transfer of sovereign functions to global institutions is not desirable. They are unlikely to be alone in that view.

To persuade these individuals to accept ratification of treaties containing specific functional normative or institutional restraints, one must seek to allay their concerns about precedent. Put simply, the classic response to their concerns is that precedents are precedents only when we later choose to accept and use them as precedents. That response will be scrutinized not only for its predictive accuracy but for its honesty.

Characterizing functional restraints as part of an evolving "public interest law" may excite a nationalist backlash. What nationalists fear is what those engaged in the "public interest law" project seem to desire. Thus, the issue is no longer merely whether the specific restraints may evolve into a broader abandonment of autonomy and sovereignty, but whether that is in fact the intention of an internationalist elite operating outside the ordinary constraints of democratic (or any other) political control.

Then there is an ultimate problem of substance. What is the "public interest"? Who defines it? The question of whether the public interest is furthered by promoting autonomy or restraint, and if so at what level, is one of the most difficult and persistent policy problems of our times. To cite but one example, some human rights advocates may wish to promote the values of individual autonomy with respect to certain civil and political rights, but may be more skeptical of individual autonomy when it comes to certain economic and social rights.

The fact that certain "public interest" advocates are employed by non-profit organizations may help to persuade us of the good faith of their prescriptions for the public interest. But it does not guarantee that they are right. And it does not mean that those who have an interest in the outcome are necessarily wrong. Courts discern the public interest every day on the basis of arguments presented on behalf of individuals who have a financial or other stake in the outcome.

Advocates for different agendas are expected to see the public interest from different perspectives with different priorities and a different sense of the appropriate balance of countervailing values. They should believe and argue that their

vision of the public interest is the correct one. But it is both inaccurate and destructive to treat their prescriptions as necessarily correct. Were they to be anointed official arbiters of the public interest, they would be subject to ordinary public law requirements of participation. And this would force them to abandon their essential role as advocates, modulating articulation with ambiguity and moderating commitment with caution.

No subject and no instrument is inherently more deserving than any other of being characterized as in the public interest or as serving the values of the public law. Each must be examined on the merits in its own context. There is no *a priori* catalog of public interest agreements or norms. The construction of a fence between neighbors may serve the public interest and, in context, may even represent welcome cooperation. A trade treaty may help to improve nutrition. A pipeline accord may help to protect the environment from less desirable alternatives.

As used in the *Barcelona Traction* case itself, the idea of an obligation *erga omnes* arises not from an inherent distinction between public interest norms and other norms but in the context of standing: an obligation whose breach gives rise to a legal right to complain by any state is an obligation owed *erga omnes*. This is not a new idea. Obstructing the high seas or a strait used for international navigation for an indefinite period of time would be an example of an act whose legality any state might have standing to contest, whether or not it could show specific losses or claim reparations.[7] This is so because every state has a right of use impaired by such obstruction.

If individuals are to have certain fundamental rights under international law as against their state of nationality whether or not they have contacts with any other state, and if individuals are not afforded access to international tribunals in which they may vindicate those rights directly, then those rights can be vindicated only if states other than the state of nationality have standing to complain. Universal standing is the appropriate solution to the procedural problem. For purposes of establishing universal standing we postulate an obligation *erga omnes*. If we had effective universal human rights courts to which all individuals had free access *de jure* and *de facto*, we might not need to accord standing to all states, and in that procedural sense we might forego imposing an obligation *erga omnes* notwithstanding any philosophical views we had about the inherently universal nature of human rights obligations.[8]

[7] At least to the extent the *omnes* is understood to consist of states.

[8] Thus, for example, the Fourteenth Amendment to the Constitution of the United States establishes the duties of the individual states of the United States to respect fundamental

In sum, I approach the ideas of a separate emerging international public interest law and an *a priori* determination of the international public interest with considerable caution. Some may choose nevertheless to regard the remainder of these remarks as support for their less reserved views on these matters.

II. International Legislation

It is not clear to me what purpose it serves to use a strong term such as "international legislation." Analytical purposes could be served by using terminology less evocative of sovereignty. Although many of us may consider both legislative and lesser forms of regulatory power to be the result of and subject to a delegation of power, highly circumscribed delegations dealing only with one type of activity are typically associated with administrative regulation rather than legislation. True enough, we may wish to define "legislation" to embrace all forms of rule-making, and there may be useful analytical reasons for doing so. By why that word? Depending on how one defines "legislation," those who call the "common law" a system of "judicial legislation" may be right, but the political effect of such a description may be provocative.

Far from reassuring those skeptical about the delegation of powers to international organizations, the term *international legislation* is more likely to arouse their suspicions. And far from convincing those who believe international law is not law because there is no supranational state to legislate, enforce, and adjudicate its norms, the rebuttal that there *is* international legislation tends to concede a faulty major premise regarding the nature of "law" and then offer a less-than-overwhelming case for the minor premise.

This being said, I do not propose to rewrite the agenda of this symposium. Rather, I proffer a working hypothesis as to what is meant by "international legislation" not as a fixed definition, but rather as an analytical tool for distinguishing legislation from other sources of binding rules for purposes of this paper.

The working hypothesis is that international legislation has three characteristics. It is a:

human rights. Those duties may be enforced directly by the individuals concerned in state and federal courts and, in certain instances, by federal agencies. The states of the United States do not sue each other in the US Supreme Court to ensure respect for such duties. It is not clear that they would have standing to do so. See *Charles A. Wright*, Law of Federal Courts, 1994, 806-15.

- written articulation of rules
- that have legally binding effect as such
- promulgated by a process to which express authority has been delegated *a priori* to make binding rules without affirmative *a posteriori* assent to those rules by those bound.

This definition does not exclude so-called "tacit amendment" procedures, but it does otherwise exclude treaties, even global multilateral treaties, because they require affirmative *a posteriori* assent by those bound, be it by signature, ratification, or accession. Apart from the effect on the parties to the case, it excludes judicial opinions, at least in systems like the international law system that do not accord legally binding effect as such to articulations of rules in judicial precedent. It excludes influential nonbinding resolutions of international organizations, because they do not have legally binding effect as such.

Finally this definition excludes customary law, because there are no written articulations of the rules that have legally binding effect as such. One may find highly authoritative articulations of *opinio juris sive necessitatis* in the treaties, decisions, and resolutions adopted by international organizations and conferences and in the opinions of courts, but to change the law these written articulations must withstand the cauldron of state practice and be transformed from emerging norms or presumptive norms to (just plain) norms. Those who wish to accord such articulations binding effect as such are really seeking to convert them into some species of treaty formation or legislation, the former without express assent *a posteriori* and the latter without express delegation of authority *a priori*.

Even if regarded as narrow, this definition of international legislation highlights an important point. The absence of legislation does not mean the absence of law. The definition also focuses attention on when and why we might want to have legislation as opposed to other types of law. In this regard we might consider a variety of factors, including the relative determinacy of rules and their applicability, participation in the formation and application of the rules, and the time needed for a binding rule to emerge.

A word on participation: The most active affected states have substantial affirmative and negative influence over state practice on any given matter, and therefore over the content of customary law. As a group, but perhaps not *inter se*, they also may have substantial affirmative and negative influence over the content of treaties or the legislative decisions of international organizations if participation in the relevant negotiations is limited and determined functionally. In addition,

because they may refuse to become party, they may have decisive negative influence over the practical effect of globally negotiated treaties, including those containing delegations of legislative authority. If the relevant conference or organization is comprised globally, the most active affected states will to one degree or another share influence over the content of treaties or international legislation with states that are relatively less active or affected. This will depend on the decision-making procedures, both formal and informal.

III. Common Spaces

The term *common spaces* would seem to be a relatively easy one to understand. At first glance, it seems to refer to areas that are not subject to the territorial sovereignty of a state. But when we attempt to apply such a hypothesis, we encounter some difficulties.

1. Outer Space

The one area that this simple geographic definition seems to embrace without difficulty is outer space, including the moon and other celestial bodies.[9] True, there is some squabbling about the geostationary orbit.[10] The "Moon Treaty" is not universally celebrated. But for the moment the nonterritorial character of outer space, the moon and other celestial bodies under the Outer Space Treaty seems secure.[11]

[9] This is without prejudice, of course, to the law applicable to our relationship with nonterrestrial beings.

[10] Quite apart from the dormant territorial claims of equatorial states, there is an astonishing failure among some lawyers to distinguish between traditional functionally based "rules of the road" for common spaces that would afford operators of geostationary communication satellites protection from interference and privileges of repair and replacement, on the one hand, and ideologically charged demands for status-based private "property rights" in positions in the geostationary orbit, on the other hand. Those who iconize *John Locke* sometimes seem to forget that his was a property regime rooted in use, not speculation.

[11] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 27 January 1967, UNTS, vol. 610, 205.

2. Antarctica

On the other hand, when we consider Antarctica we encounter some problems. We must ask ourselves: Do we mean by *common spaces* areas that are not subject to the territorial sovereignty of a state because:

(1) none is exercised at present;

(2) none is claimed at present;

(3) existing claims of territorial sovereignty are not valid; or

(4) the area is not amenable to claims of territorial sovereignty in principle?

For the moment, we may ignore this question with respect to the unclaimed sector of Antarctica. The states active in Antarctica are party to the Antarctic Treaty. That Treaty prohibits new claims of sovereignty or enlargement of existing claims.[12]

Much of Antarctica, however, is subject to territorial claims. As a matter of legal status, the claimed areas of Antarctica are common spaces only from the perspective of states adhering to position (3) or (4). As a practical matter, however, without prejudice to their underlying claims, at least for some purposes and at least for the time being the claimants may behave in fact in the areas they claim as if those areas were common spaces under position (1); they may do so for political reasons or for legal reasons by virtue of their obligations to other states under the Antarctic Treaty, including their obligations to refrain from military and other activities, to respect freedom of scientific research and the right of inspection, and to refrain from exercising jurisdiction over persons engaged in such activities.

3. The Sea

The sea, including the subjacent seabed and the superjacent air space, poses the most complex problem. The classic high seas and the international seabed area seem to meet a geographic definition of common spaces simply enough. There is, nevertheless, continuing controversy regarding freedom of fishing on the high seas for straddling stocks and highly migratory stocks, controversy that one hopes will be resolved by new agreements on the subject.

[12] The Antarctic Treaty, 1 December 1959, art. IV, para. 2, UNTS, vol. 402, 71.

tional regulatory regimes. For this reason, and in no small measure because the state remains the basic instrument for enforcement, it is premature to predict a new era of direct regulation of private interests by global international organizations.

Conclusion

There are at least two factors that may be cited as evidence for the existence of a public interest norm. One is the existence of a universal obligation of a state. The other is the existence of universal or extraordinary jurisdiction of a state. The first, however, is also explicable as a pragmatic or functional response to the problem of standing that arises when the alleged violation is committed by or with the complicity of states that ordinarily would have standing to complain. And the second is also explicable as a pragmatic or functional response to the problem of ensuring that private conduct conforms to international standards when the state that ordinarily would have jurisdiction is unable or unwilling to enforce the standards.

Is there some vision of the public interest that causes us to modify ordinary concepts of standing or jurisdiction to solve these problems? Absolutely. Will our sense of its importance affect our willingness to experiment with standing and jurisdiction? Of course. Will this be particularly true of common spaces? Certainly.

But the specific circumstances requiring such modification do not begin to describe the full scope of the public interest. Conversely, the advancement of that public interest does not in itself necessarily suggest universal standing or universal jurisdiction where this is functionally unnecessary.

Much of the international public interest is furthered every day by the routine application of municipal law by states. International mechanisms are created to supplement that system when there are needs that are not being met, or cannot be met, by the routine application of autonomous municipal law. The presence or absence of such needs, in and of itself, says nothing about the underlying norms and their capacity to promote the common good.

International Environmental Law – A Law to Serve the Public Interest? – An Analysis of the Scope of the Binding Effect of Basic Principles (Public Interest Norms)

Eibe Riedel*

I. Introduction

Almost a third of a century ago, *Rachel Carson*'s bestseller "Silent Spring" stirred the imagination of the world in 1962 and enhanced the development of a completely new branch of the law: environment protection law. While at first everyone searched in vain for legal support in constitutional texts, other statutes, or in international legal documents and commentators rather tenuously looked for analogies in other fields of law to cope with the new challenges of environment pollution, much like poking for needles in a haystack, this situation changed dramatically since the beginning of the 70ies: An ever closer net of environment protection norms at the international, regional, bilateral, and domestic level descended upon the legal orders and seems to become ever more closely knit.

Even if the resulting normative richness of international and regional environment law would appear to be quite remarkable – and *Simma/Rüster's*[1] omnibus collection of treaties embraces more than 30 volumes –, the factual bases for these normative endeavours remain sobering, indeed. Increasing marine pollution, groundwater pollution and entropy of standing waters, the dying forests and soil acidification, acid rain and global climate changes, ozone layer holes at the poles, the disappearance of tropical rain forests with their capacity to purify the atmo-

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[1] *Bruno Simma/Bernd Rüster/Michael Bock* (eds.), International Protection of the Environment. Treaties and Related Documents, in all 33 volumes, 1970 *et seq.*; see also *Wolfgang E. Burhenne* (ed.), International Environmental Law, Multilateral Treaties, 6 volumes, 1974 *et seq.*