Negotiation as Diplomatic Rule-Making

Abstract

Diplomatic methods contribute to the making of rules (both hard law and soft law), once legal and political conditions prevailing at the domestic and international level are appropriate for take-off. The point of departure is a consensus among involved countries and relevant non-state stakeholders that a new transboundary regulation is needed because the matter cannot be adequately managed in die domestic arena or the problem to be settled concerns a plurality of states. This diplomatic rule-making process is viewed as a metaphor of international negotiation. Lawyer-negotiators, steeped in their professional culture, are a key factor in this negotiating process; they are experts in law, procedure and institution-building. Their main concern is the linkage between new rules being made and existing law, as well as the future implementation of these rules. Important tools for rule-making are leadership, precedents, flexibility and draftsmanship. A major constraint is sovereignty which is at the basis of all intergovernmental activities. However, as a consequence of growing interdependence, more and more states accept the intrusion of international regulation in their hitherto domestic affairs. Thus, the metaphor of negotiation as diplomatic rule-making has become well established.

Key words: customary law, diplomatic methods, rule-making, draftsmanship, flexibility, hard law, implementation and compliance, lawyer-negotiator, leadership, negotiating environment, precedents, professional culture, rule-making, soft-law, sovereignty, time-factor

I. Concepts

States would not exist if they were not continuously engaged in negotiations. This lesson was taught by Richelieu in his political testament: "I dare say emphatically that it is absolutely necessary to the well-being of the state to negotiate ceaselessly, either openly or secretly, and in all places, even in those from which no present fruits are reaped and still more in those for which no future prospects as yet seem likely" (Watson, 1991: 225). In teaching his master, the king of France, and indirectly most leaders of modern Europe, Richelieu used a new definition of negotiation, whereas the classical literal meaning of the term was much narrower. In Latin, "negotium" simply means business, occupation, employment, or the absence of leisure. Sometimes, this word was used to identify public business, money transactions and even the management of a household.

Present day writings use the following definition: "Negotiation is defined as a joint decision-making process in which parties, with initially incompatible positions, arrive at an agreement through the exchange of concessions and/or problem-solving. It normally includes both dialogue with discussion on merits, and bargaining with the use of competitive tactics such as promises or threats" (Albin, 1995: 816). The modern definition is the one used in this article, which is devoted to the role of law in international negotiations (Lang, 1995: 835). A long-time legal adviser of the United Nations used the following language: "Negotiation serves the purpose of achieving agreed solutions and is thus more than mere

deliberation between states or governments. It is the normal means of transacting business between sovereign states" (Fleischhauer, 1992: 152).

The metaphor of negotiation as *rule-making* has been chosen for a variety of reasons. First, it should be made clear that negotiations are not only undertaken to settle conflicts. Their political purpose in the international arena is much more oriented to conflict prevention or conflict avoidance by establishing rules according to which states envisage to manage their future conduct. Most states do "in fact conform to the rules and operate the institutions which they have evolved through their diplomatic dialogue" (Watson, 1991: 214).

Second, qualifying the concept of "rule-making" with the word "diplomatic" indicates that diplomatic methods are applied in this activity, which implies methods of persuasion, accommodation and compromise. This does not mean that diplomats exclusively or even principally are at work. Specialization and the growing complexity of issues have led to a situation where experts from different sectors of government are often the movers of a negotiating process. Modern negotiations cover broad fields such as trade, migration, disarmament, environment, and science. In these negotiations highly specialized experts are the indispensable ingredient of any effort to promote respective national interests and attain jointly developed solutions. In each and every of these negotiations, a lawyer is needed, simply because somebody has to draft the rules on which the sectoral experts have agreed in substance.

The notion of rule-making is preferred over concepts such as "law-making" or "treaty-making" for the following reason.[1] Rules are the broader concept and include non-legally binding commitments. Certainly, rules are first and foremost a legal concept. The International Court of Justice is expected to apply "international conventions, whether general or particular, establishing rules expressly recognized by the contesting states" (Art 38, para 1a of its Statute). But rules have also been identified by regime theory in a much broader fashion. "Rules are specific prescriptions or prescriptions for action;" they are considered as part and parcel of regimes the latter being defined as "sets of implicit or explicit principles, norms, rules and decision-making procedures around which actor's expectations converge in a given area of international relations." In that theoretical framework, rules are considered as a much broader and less legal concept than norms, which are restricted to "standards of behaviour defined in terms of rights and obligations" (Krasner, 1989: 2-3). Legal theory has tried to develop a number of different types of rules (for example, tacit rules, explicit rules, and precepts), thus implying that rules need not always be "legal rules," that rules are "a type of directive that simplify choice-situations by drawing attention to factors which an actor has to take into account" (Kratochwil, 1989: 72-92).

Not pursuing further this inquiry into the nature of rules, it should be made clear that the term "rule-making" has been chosen to circumscribe an activity which does not only produce *legal* commitments but also *political* or *moral* commitments. There are differences between these two types of commitments. A state which does not comply with a legal commitment incurs "state responsibility" (it has to remedy the wrongful situation, it has to pay compensation, it has to repair damage). A state, which does not comply with a political or moral commitment primarily risks blame by public opinion and, at worst, retaliation in kind from

1 On various processes of law-making, see *Szasz* (1995) and *Kirgas* (1995).

its peers who may consider such deviant behaviour as an "unfriendly act." To put it into lawyers' language, legal commitments are contained in so-called "hard law" sources, of which treaties are the most common type. Treaties are defined as "an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation" (Art 2, para 1a, Vienna Convention on the Law of Treaties).[2] Political or moral commitments are contained in so-called "soft law" texts which bear many different titles, such as declaration and conclusions. An easy way to distinguish between texts of different legal standing is to look at their concluding section; as a rule, legally binding treaties contain so-called "final clauses," which determine issues such as entry into force, withdrawal and amendment (Riedel, 1991: 58-84). Sometimes, the use of "should" instead of "shall" is an indicator that negotiators aimed at a less compulsory obligation.

Furthermore, it should be noted that rule-making in the sense of this article does not include the creation of *customary law rules*, because these rules are not "made" by the willful action of negotiators. Customary international law is also "made," but only through the concurrent *practice* of states. It emerges as law to the extent that a broad consensus develops that concurrent practice constitutes law. Sometimes pre-existing customary law is codified later on in treaties, but it is not created by those treaties. Examples of such codification treaties are the conventions on diplomatic law and consular activities.[3]

One consideration should be added. The major activity of "making" any kind of international "hard law" or "soft law" takes place at the negotiating table or in the context of the drafting committee of a diplomatic conference. This effort has to be complemented by action at the domestic level as well. There, the negotiated texts need to be approved by the competent political bodies. In the case of "hard law" treaties, the "consent to be bound" may be expressed in a variety of ways (Article 11, Vienna Convention), but it usually has to be approved by a decision of the respective national parliament. In the case of "soft law" texts, if the executive branch of government gives its approval, it is often considered sufficient.

International rule-making is a process by which governments, sometimes assisted by international organizations, *negotiate* through mandated persons in light of their respective interests and various requirements, in particular those of international law. Through this process, new rules of "hard law" or "soft law" are born. They, in return, direct the future international and national performance of governments, as well as of persons and groups under their jurisdiction. Such rules, which cover areas of potential cooperation as well as conflict, also contribute to the prevention of disputes, as they may facilitate an ex-ante accommodation of competing and/or conflicting interests.

II. Persons

It is a widely held view that "law-making is a political act, the work of politicians; lawyers, qua lawyers, contribute to that process only peripherally and interstitially

2 For an introduction to treaty law, see Chapter 14 (Treaties) of *Jennings* and *Watts*.

3 On the development of new sources of international law see also *Danilenko* (1993).

– when they advise and provide technical assistance to policy-makers engaged in law-making" (Henkin, 1979: 32). To reduce the role of lawyers to that of a legal assistant to the almighty politician is certainly an exaggeration. These persons play complementary roles, even if the more preponderant task is carried out by the ultimate decision-maker, who bears political responsibility and is directly accountable to the "sovereign," which is usually the people represented by their legislators.

The lawyer-negotiator or the lawyer-diplomat, is a key factor in the negotiating process (Kremenyuk and Lang, 1993: 11). The first term is preferred over the second, because the position of diplomats has weakened in recent decades. It is not only the legal adviser of the foreign ministry who performs the task of lawyer-negotiator. This function may well be assumed by lawyer-civil servants, who handle legal, and, in particular, international legal questions in one of the specialized ministries. They may apply their drafting skills to a new treaty, construct obligations to further the specific interests of their country and negotiate compromises. But their role goes well beyond confirming a political compromise; they are called upon to strike a balance between stability and the necessity for change (Chen, 1989: 268).

Lawyers as negotiators have a distinct professional culture (Lang, 1993: 38-46). The seeds of this culture are planted and nurtured in professional schools. Students are exposed to a standard body of scholarship and encouraged to master and apply a standardized analytical approach. Once in practice, their common values and perspectives are reinforced by membership in national or international professional societies, by keeping up with professional literature, and by daily on-the-job interaction with colleagues from the same discipline.

A profile of lawyers as negotiators has been developed in a handbook addressed primarily to Third World negotiators (Sunshine, 1990: 85-86). According to this presentation, lawyers are supposed to believe in statutory laws and have respect for authority, precedent, the "sanctity of contract," and rules in general. Lawyers see themselves as defenders of justice as well as partisan advocates. They are supposed to express themselves largely through technical words and documents. Their communication style is described as precise and logical, but argumentative. On questions of trust and reliance, lawyer-negotiators are typically suspicious of the other parties' good intentions and pledges. Lawyer-negotiators are often the leader and/or the spokesperson of delegations, but may be reduced to the function of technical adviser or totally excluded. Total exclusion may occur in national cultures that dislike lawyers in negotiations for various reasons. For example, they may be considered a risk to harmony or they may be viewed as unnecessarily complicating straightforward and simple deals. Lawyers are expected to focus on the rights and duties of the parties to a treaty in order to avoid the occurrence of future conflicts between the parties. This list of features, although stereotypic, reflects fairly well the behaviour of many lawyers in international negotiations.

Lawyer-negotiators who belong to different national delegations usually share this common professional background. This can facilitate mutual understanding and a readiness to negotiate on the basis of common knowledge and similar negotiating styles. They are likely to use their own legal jargon, which can distinguish them even from other non-lawyer members of *their own* negotiating team (Lang, 1993: 45).

Lawyer-negotiators must have sound legal training in addition to broad experience acquired either through their personal presence at the negotiating table or through collaboration with senior colleagues and the reading of treaty-maker handbooks. Having available formulae and wordings from previous negotiations that can stimulate successful agreement and consensus on similar issues constitutes an important asset.

Lawyer-negotiators need to be aware of their limitations. They are experts on law, procedure and institution-building, but they should not infringe upon the competence of other experts. They should be aware of the well-known saying of Sir Harold Nicolson: "The worst kinds of diplomats are missionaries, fanatics and lawyers" (Thompson, 1992: 173). Such hostility toward lawyers should teach the lawyer-negotiator modesty, realism and flexibility. Flexibility is the greatest gift. Lawyers are trained from the very outset of their career to represent and defend the interests of someone else. This should make it easier for them to be able to adjust their positions. Inflexible behaviour is likely to block progress and lead to isolation.

To perform their tasks well, lawyer-negotiators need the cooperation and understanding of their political superiors and the other members of the negotiating team. Benign neglect in respect to legal issues (so called "legal niceties") is certainly the wrong attitude. Politicians need to recognize that the lawyer-negotiator has to fulfill a function that cuts across various disciplines and issue areas. The main responsibility of the lawyer-negotiator, beyond the task of seeking outcome compatibility with existing law, is to facilitate the future implementation of and compliance with the outcome of the rule-making exercise. This is accomplished primarily by using clear and precise language in the rules to avoid the uncertainties of treaty interpretation. Lawyer-negotiators must also be concerned with the operational applicability of the negotiated outcome: To what extent do the new rules fit into the existing legal order? To what extent does the legal order require modification or adaptation? Will new institutions meet the expectations of the parties to the agreement? Have similar institutions functioned well in related contexts?

III. Conditions

Lawyer-negotiators do not act in a vacuum. They must take into account a number of conditions and specific domestic and international frameworks of rules in order to facilitate not only rule-making as such, but to make those rules operational at the domestic and international levels. These conditions constitute the negotiating environment. They may also be interpreted as constraints imposed upon lawyer-negotiators that limit their freedom of action. Domestic and international conditions have both legal and political aspects. The impact of such conditions on rule-making depends to some extent on the nature of the rules to be produced, whether they are of a legally binding character ("hard law") or rules of a politically or morally binding character ("soft law"). As regards the latter, these external conditions may play a less stringent role, which means that the freedom of action of the lawyer-negotiator is somewhat broader.

Among the *domestic conditions* of diplomatic rule-making, regulations of a procedural or institutional nature determine who is entitled to negotiate on behalf of the state, who is entitled to conclude a treaty on behalf of the state, who has to

be consulted (for example, by referendum) before a treaty is concluded, and which constitutional principles have to be obeyed or should remain unaffected by the negotiated outcome. In addition, regulations of a substantive character have to be taken into account, especially if these regulations are likely to be directly affected by the outcome of the negotiation or will have to be modified as a consequence of the negotiated treaty. If a treaty deals with intellectual property rights, for instance, it is likely that national legislation will have to be amended. If a treaty provides for the reduction or elimination of customs tariffs, fiscal and trade regulations of national origin may have to be amended. If a treaty creates certain human rights standards, not only the basic laws of a country may be affected but also the functioning of its judiciary and police system. Negotiators usually aim for an outcome that requires minimal adaptation and change in the domestic legal order.

In addition to the legal conditions that have to be respected by the negotiator, domestic political conditions also must be taken into account (Putnam, 1988: 427-453). Political constraints usually do not directly affect the person sitting at the negotiating table, but rather the policy- and decision-makers. Political interests are part and parcel of the instructions received by negotiators from their superiors. These more or less vital interests may be promoted by political parties, lobbyists, non-governmental organizations, and grass-root movements. For instance, if a government is to be involved in an environmental negotiation, it is likely that "green" movements and "green" parties will take a special interest in the negotiating position of their government. They may request to be briefed regularly on the progress of the negotiation and may wish to participate in the final evaluation of the outcome. Public opinion is also likely to play a certain role in this process of policy-making and policy assessment.[4]

Rule-making at the international level must attend to a plurality of domestically articulated and sometimes competing interests, for example, environmentalists versus businesses. As well, different ministries may have their say when instructions are drafted for the negotiating team. The government as such needs to strike a balance between the interests of various governmental agencies; it will have to undertake the arduous task of coordinating the viewpoints of different branches of the administration. Although accommodating various positions occurs primarily in the pre-negotiating phase, this internal process of balancing and coordinating may continue until the very end of the negotiation. This process may even take place *within* a negotiating team, if it is composed of members belonging to different ministries and representatives of various nongovernmental interest groups. Internal coordination at the negotiating site sometimes may be easier to accomplish than back home, because all the participants are more intensely involved in the development of the negotiation, the give and take, the submission of new proposals, and the introduction of compromise formulae, and less exposed to domestic political factors.

Among the *international conditions* of diplomatic rule-making, a similar set of pre-existing rules – this time international law – has to be respected. On the one hand, there are rules of a procedural or institutional nature. The Vienna Convention on the Law of Treaties is the principal yardstick and frame of reference for

4 On the role of the media and NGOs in environmental treaty-making, see also *Lang* (1994).

the lawyer-negotiator as regards the making, the conclusion, interpretation and termination of treaties.[5] If new institutions must be established, negotiators will look for existing institutions to serve as models; they will scrutinize the performance and the effectiveness of these institutions and may draw lessons from certain deficiencies discovered in those institutions.

On the other hand, there are rules of a substantive nature. As an example, rule-making in the field of intellectual property rights has to take into account already existing treaties covering the same ground and binding the same contracting parties. If earlier and later treaties conflict, if general treaties collide with more specific ones, the respective provisions of the Vienna Convention and/or customary law will have to be applied. It is among the tasks of the lawyer-negotiator to foresee potential cases of incompatibility and to avoid them to the extent possible. For instance, treaties aimed at environmental protection, such as the Montreal Protocol on Substances that Deplete the Ozone Layer, need to take into account international trade law, such as GATT, if they intend to use trade measures such as embargoes to achieve environmental goals.

Diplomatic rule-making must respect both legal and political conditions prevailing at the international level. Considerations of power, political weight, and economic influence cannot be neglected. Solutions are unlikely to be achieved against the will of some major players participating in a negotiation. In the multilateral context, rule-making makes little sense if the major stakeholders are not on board; concessions must be made and special advantages granted to lure them into a treaty. This can lead to a well-known dilemma that confronts many negotiators, namely to be satisfied with a relatively weak treaty or to have no treaty at all. "Soft law" and/or "soft provisions" in a legally binding treaty may be a way out of this dilemma, because they may serve as stepping-stones towards full legal commitments. Finally, it should be noted that non-governmental organizations also exert their influence on the international negotiating process directly or through the media. Their actions must also be counted among the political conditions prevailing at this level (Wirth, 1994: 769-802). In summary, rule-making is the result of competing pressures, conflicting interests, existing regulations (treaty law and customary law), as well as the respective political and economic weight of the actors involved.

IV. Tools

Diplomatic rule-making is considered to be more difficult and more complex than domestic rule-making. The most significant reason for this difference is the influence of "sovereignty." Although it is the basis of all governmental activities in a transboundary context, sovereignty is also their major constraint; it can be blamed as the principal cause of anarchy in international society. But, as the need for transboundary cooperation has grown throughout the last decades as a consequence of increasing interdependence, the principle of sovereignty has evolved in a more positive and less absolute way. In the European Union, for example, sovereignty has been complemented by a new concept, that of "subsidiarity." International rule-making that has a transboundary effect should only

5 A most helpful introduction to this convention is provided by *Sinclair* (1973).

occur to the extent that the matter to be regulated could not be managed adequately at the domestic level.

Another reason, why diplomatic rule-making is more difficult and complex than corresponding domestic activity is the relativity of all governmental action in the international arena. The absence of a central rule-maker and the absence of a central authority for compliance-control requires special care and flexibility when establishing certain standards of behaviour and providing for their implementation.

Tools for rule-making at the international level are all the more important as certain challenges to be met by rule-making in general pose themselves. Take, for instance, the economic feasibility of a new commitment in the field of environmental protection; countries at different levels of economic development refuse to join a specific environmental treaty unless the less developed among them obtain special treatment – lesser or later obligations. In another context, differing security perceptions in various regions may prevent certain countries from joining major disarmament treaties on nuclear non-proliferation or chemical weapons unless compliance can be monitored and verified. Other challenges, such as scientific uncertainty and dependence (for example, in the field of energy production) compound the aforementioned difficulties of rule-making at the international level.

What tools are available to facilitate rule-making? First and foremost, there must be a *minimum of consensus* among all countries involved and the respective non-state stakeholders (NGOs) that there is a need for transboundary regulation, either because the matter cannot be adequately managed in the domestic arena or because the problem to be settled concerns a plurality of states (for example, a threat to the global environment).[6] To this has to be added the need for a broad *awareness of the liabilities and assets* to be taken into account. While they may differ from one country to another, most countries are likely to suffer from global warming, though some may benefit from it. Each party must have the feeling that it will gain more than it will lose. Rule-making also requires *leadership*. A major player in the international field (US in the case of ozone depletion), a group of countries especially affected by a problem such as acid rain (Scandinavian countries), or an international organization devoted to problem-solving on a certain issue (UNEP on biological diversity) may take the lead and convince others of the need to make new rules.

As far as the legal dimension of rule-making is concerned, numerous tools are available. There is the *choice between hard law and soft law rules*. The soft law approach may be taken if the basic consensus is very weak and it is believed that a soft law rule may serve as a stepping stone toward a legally binding commitment. *Precedent* is also an important tool. If a certain regulation has already been accepted in a different context, it may serve as a model for the new rule. *Flexibility* may also be considered a tool in rule-making. Flexibility can mean tailor-making regulations for different groups of contracting parties (for example, developed and developing countries) or it can mean that a treaty or some parts of it can easily be modified in accordance with future developments in respect of scientific certainty or economic feasibility (for example, in the case of some environmental treaties). *Institutions and organizations* are yet another tool of rule-making. These bodies may look after the proper implementation of a treaty and the compliance of parties with their respective obligations.

6 This higher level political consensus has to be distinguished from consensus as a technique, see *Zemanek* (1983).

In addition to the above mentioned collective tools of rule-making, the tools available to the individual negotiator should not be neglected. In many instances, negotiations in their final phases can be viewed as a process of "editing" the test. *Draftsmanship* is, perhaps, the most important asset that a negotiator possesses in this phase. The lawyer-negotiator must master concepts, notions, words, and equivalents in various languages, as most modern treaties are written in several languages. Words are an important currency. They reflect substance and can take on special meaning based on their sequence and interrelationship. Words, as they are proposed or rejected, have to be scrutinized with respect to their vicinity to similar notions and the substitution of alternate words. Square brackets in a text have become an indicator of progress in multilateral negotiations. As they disappear, movement toward consensus may be discerned; as they increase, growing disharmony may be deduced. The lawyer-negotiator is responsible for settling problems of consistency, and the compatibility of all obligations of the contracting parties and of provisions within the same treaty or regime. Unless these intricacies are adequately managed, the operation of a treaty may be subject to frequent challenge.

V. Processes

Finally, we examine the role of time on rule-making and negotiation processes. The time factor affects not only these processes, but also the negotiators as actors and the negotiating conditions.

The time difference between national capitals and negotiation sites can have not only a short term impact on the physical condition of the negotiator (including jet-lag, for instance), but also a long-term influence on the quality and intensity of communications between the central government authorities and its negotiating team in a far-off place. The duration of many negotiations (sometimes many hours without a break) also can influence the physical and psychological condition of a negotiator, resulting in inflexibility or a loss of temper in the worst cases. Sometimes, negotiators have to abide by certain time limits that can build up considerable pressure during the final phases. This pressure can help to accelerate the conclusion of a negotiation or help it to achieve some interim result. Extensions of these limits sometimes may be necessary. However, if they are extended too frequently, they can lose much of their credibility and impact.

The aforementioned political, legal, domestic and international conditions can also change over time, especially if the negotiations last for many years, such as those of the Law of the Sea Convention and the Austrian State Treaty (1955). International law has taken care of the possibility of a "fundamental change of circumstances" (Art 62 Vienna Convention). Governments may invoke this so-called "clausula rebus sic stantibus" for terminating a treaty or withdrawing from it. But the use of this clause is severely restricted by a number of conditions. For instance, changed circumstances alter an essential basis of the consent of the parties or the change is so radical as to transform the remainder of obligations still to be performed under that treaty. This basic rule tries to strike a balance between the so-called "sanctity of contract" ("pacta sunt servanda") and the im-

pact of the time factor, the need for change and adaptation. In addition, equity requirements sometimes demand that the legal status quo be rewritten and renegotiated over time, because a consensus may have developed that certain regulations are no longer "just" *vis-à-vis* certain countries, for example, developing countries.

The temporal aspects of rule-making have been highlighted in the context of international environmental law by the principle of "intergenerational equity" (Brown-Weiss, 1989). Already more than one hundred years ago, Karl Marx focused attention on the environment and the time factor: "Even society as a whole, a nation, all existing societies put together, are not owners of the Earth. They are merely its occupants, its users, and like good caretakers they must hand it down improved to subsequent generations" (Sand, 1995: 184).

Rule-making and negotiations can be considered either as circular or linear processes. The *circular process* starts from the need for regulation felt at the domestic level but not achievable in that context because of factual, legal or political constraints. Therefore, governments undertake diplomatic rule-making by means of negotiations with other governments. These negotiations lead to hard law treaties or soft law instruments, both of which require that new domestic rules or some arrangements are enacted to implement them. In some treaty regimes, where sophisticated systems of compliance control have been instituted (for example, in the Chemical Weapons Convention and the Convention on Conventional Forces in Europe), the exercise of verifying the actual performance of a party may well amount to a new negotiation.

The *linear process* starts from a specific point in time: when the need for regulation is determined by a broad segment of the domestic or international society, when internal coordination in the respective countries has achieved viable negotiating positions, or when national positions of key players converge. Considering rule-making and negotiation as a linear process, one should be aware that such processes may have no formal beginning or end in spite of the scheduling of initial and final sessions or negotiation rounds. As regards the beginning, a rule-making process may build upon a previous exercise which has postponed dealing with certain issues because of the lack of political will, economic feasibility or scientific certainty.[7] As regards the ending, this may be determined by reference to ratification or entry into force. But modern law-making treaties in the fields of disarmament or environment are not immune to change after the conclusion of negotiations and the aforementioned formalities. For example, periodic review conferences typically give the contracting parties the chance to examine the adequacy of a disarmament treaty or to evaluate the need to further develop that treaty. Changes in the science of genetic engineering constitute a challenge to the adequacy of prohibitions under the Convention on Biological and Bacteriological Weapons (Lang, 1990: 37-45). Some environmental treaties explicitly provide for changes without formal amendment procedures (such as the Montreal Protocol). Due to this built-in possibility of rapid adaptation to new scientific or economic developments, such treaty regimes may well be compared to living organisms (Lang, 1991: 343-356). These developments have led to a new conception of international law: it is less an instrument to preserve the status quo but an instrument to facilitate social change.

7 On these early phases, see also *Stein* (1989).

VI. Conclusions

International relations are deepening. Making more and more sophisticated rules is part of this overall situation. Rule-making moves in both horizontal and vertical directions. As regards the former, an increasing number of issues is of international concern, such as human rights and the environment. As regards the latter, many states are ready to cross the sovereignty threshold, that is, they are willing to accept international rules that regulate matters that hitherto belonged to the national domain. Intrusion by international regulations into domestic affairs is no longer objectionable to a growing number of states, especially those involved in processes of regional integration (for example, the European Union). As a result of these two currents, the prospects for negotiation as diplomatic rule-making are good, because the scope of new regulations is growing and the possibilities for penetrating the traditional shield of sovereignty are increasing.

Viewing negotiation as rule-making in the international arena can be seen simultaneously as a forward-looking and precautionary approach. By means of diplomatic methods and negotiation processes, newly emerging issue areas that require international regulation are being identified and rules established. These rules aim at striking a balance between various stakeholder interests and, ultimately, are likely to contribute to the prevention of conflicts.

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III.
Ausgewählte Bereiche des Völkerrechts