2. Sovereignty, conservation and sustainable use

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Abstract

The Convention on Biological Diversity approach to conservation and sustainable use is rooted in sovereignty. This chapter explores the limitations of such an approach and the opportunities it provides for contextualised approaches. It explores the role of regional agreements and the gradual movement from approaches based upon acceptance of sovereignty to challenges to national sovereignty over natural resources. It considers the extent to which the current international rules on conservation and on sustainable use are constraining national sovereignty or providing a protected space for national action.

Key words

sovereignty, sustainable use, common concern, co-operation, mercantilism.

Contents

2.1 Sovereignty and its tensions

The approach to conservation and sustainable use in the Convention on Biological Diversity (CBD) is rooted in sovereignty. This chapter explores the limitations of such an approach and the opportunities it provides for contextualised approaches. It explores the gradual movement from approaches based upon acceptance of sovereignty to challenges to national sovereignty over natural resources. It considers the extent to which current international rules on conservation and on sustainable use

constrain national sovereignty or provide protected space for national action. The chapter looks at CBD governance, but it must be recognised that much global governance lies outside of such an analysis, and that the powers and influences excluded from this discussion can be more significant than those included.

International legal instruments addressing conservation and sustainable use are firmly rooted in the Westphalian model of sovereign states as geopolitical entities entering mutual agreements. The CBD is exception, with a focus upon seeking to achieve responsible exercise of state sovereignty rather than overriding it. Its success depends upon the internal action of states and international support to facilitate that. This emphasis upon sovereignty in relation to the management of the ecosphere has a long history,[1] and whilst sovereignty does not connote ownership, it authorises control over resources lying within the jurisdiction of the State. In 1962, a UN General Assembly Resolution[2] asserted 'The right of peoples and nations to permanent sovereignty over their natural wealth and resources' including their disposal in accordance with their national interest. This only has declaratory force, but is often seen as stating existing law,[3] and has been repeated in subsequent declarations.[4]

Whilst some global concerns have permeated sovereignty so as to undermine its absolutist elements, in relation to biodiversity the choice has been to harness sovereignty in the pursuit of biodiversity protection rather than to subvert it – but stressing cooperation in how sovereign powers are exercised. Some writers argue that the emphasis upon cooperation goes so far as to redefine sovereignty,[5] but the light touch associated with cooperation in the CBD is consistent with a traditional sovereignty approach linked to self-interest derived (or financial incentive-based[6]) collaboration.

However, increasingly sovereignty must be seen as part of a complexity of fragmented jurisdictions and power networks. Non-state actors [7] such as multinationals and global NGOs, as well as a multiplicity of regional agreements

[1] *Behring Sea Fur Seals Arbitration*, 1 Moore's Int Arb Awards (1898) 755; *Norweigian Fisheries Case*, ICJ Reports (1951) 116; *Icelandic Fisheries Case*, ICJ Reports (1974) 3, 175.
[2] Resolution 1803 XVII (1962); Schrijver (2008).
[3] Schrijver (2008).
[4] E.g. Charter of Economic Rights and Duties of States, Art 2, UNGA Res 3281 XXIX (1974)
[5] Handl (1990); Brownlie (1979).
[6] Emerton (2000). See chapters 29 and 35 in this volume.
[7] See chapter 28 in this volume.

create a complex network of relationships, further affected by the interplay between different areas of global activity in particular the exercise of economic power. These create a contested and complex network through which 'sovereignty', conservation and sustainable use are promoted and resisted. However, the presence of 'sovereignty' as a central feature of the CBD recognises the symbolic importance of the concept, as the starting point for action.

2.2 Sovereignty as framework: facilitating complexity

Perez[8] has stressed the importance of complexity and diversity in biodiversity action – and the limitations on being able to make any generalised statements. The relationship between localities, institutions, and regulatory discourses makes the articulation of the role of sovereignty in biodiversity protection a highly contingent issue. Indeed, Perez goes as far as to argue that the relationships can only be studied using a contextual strategy and cautions against generalised statements. This same complexity and diversity has led some to argue that in some sectors regional and other agreements may be more important that the Convention in framing obligations and actions.[9] The sovereignty approach in the CBD may have emerged for other reasons, but it can be seen as a positive approach to empowering a contextualised response.

Whilst sovereignty has its limitations, it has the benefit of facilitating diverse responses to complexity. The CBD affirms, 'States have, in accordance with the Charter of the United Nations and the principle of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies,'[10] but circumscribes that by the assertion they are also 'responsible for conserving their biological diversity and for using their biological resources in a sustainable manner'.[11] This places responsibility firmly in the hands of individual states for that part of the global totality that lies within the territorial boundary. The extent to which the CBD limits sovereignty depends upon the articulation of this responsibility.

The three key aims set out in Article 1 are conservation, sustainable use, and fair and equitable sharing of the benefits arising from using genetic resources. Both by

[8] Perez (2004).
[9] Boardman (2010).
[10] Convention on Biological Diversity (adopted, 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 (CBD) art 3.
[11] Ibid.

reason of its complex gestation and its conceptualization as a framework convention, the obligations that follow are phrased with a high level of generality and are qualified by phrases such as 'as appropriate' or 'so far as possible,' which reinforce the context-specific nature of the expectations.

There are substantial differences between jurisdictions in their construction of ownership of biological resources, conceptualisation of 'ownership' and the role of the state in its regulation, let alone the fundamental differences in the ecosphere, and economic, cultural and geopolitical contexts. The one commonality is that the right to control the allocation and exploitation of property rights in natural resources within a state is consistently accorded to the sovereign state.[12] Control over the exercise of property rights is crucial to the CBD's reach and effectiveness, but the CBD does not prescribe exactly how a state should exercise that control, in relation to biodiversity, traditional knowledge or genetic materials. The wording of the CBD itself makes clear the importance of contextualised solutions. With its general and often qualified obligations, the CBD leaves considerable space for states to construct wholly different approaches.

There are some limitations upon sovereignty, particular in Articles 8-10 relating to conservation and sustainable use.[13] Aside from the responsibility to cooperate, and the duties upon some nations to contribute financially, the strongest obligations in the CBD are contained in Articles 6-8. Parties are required to develop national strategies for conservation and sustainable use, and identify and monitor components of biodiversity specified in the Convention and identify activities likely to have significant adverse impacts.

The CBD requires[14] states to integrate conservation and sustainable use into national decision-making, and to adopt measures to avoid or minimize adverse impacts on biodiversity, protect and encourage customary use and support local populations, to develop and implement remedial action and encourage cooperation between public and private sectors.

[12] E.g. 1992 Rio Declaration of the UN Conference on Environment and Development, Principle 2.
[13] See chapters 7-9 in this volume.
[14] CBD art 8 and 10.

Parties commit to using their sovereignty for in situ conservation, to define and protect areas, manage biological resource, promote ecosystem protection and help finance in situ conservation in poorer states. States are required to complement these in situ measures for holistic ecosystem conservation with measures to preserve specific biodiversity components (preferably in situ) and adopt measures for recovery and rehabilitation.[15] These provisions articulate processes, but do not prescribe rigorous inputs or outcomes. The presence of processes and strategies - not their content or substantive outcome - suffices to deliver compliance. This contrasts, for instance, to the approach in relation to the Antarctic, where the applicable treaty explicitly limits state exercise of sovereignty with states agreeing to manage the exercise of their sovereignty in a particular manner, effectively placing significant limitations upon sovereign territorial action.[16]

CBD Articles 11-14 create further obligations for parties, but these are highly qualified. Without extensive monitoring and a mechanism for ensuring consistency in interpretation of these terms, they leave states considerable scope for local determination of what is 'appropriate' or 'reasonable'. At best, state party reports to the Conference of the Parties (COP) and to technical groups, enable a sharing of state approaches and some shared understanding of the meaning of these qualifier terms. However, given the lack of any dispute mechanism to adjudicate upon whether particular approaches are reasonable or appropriate, states are not effectively obliged to do anything specific. As such CBD provisions may facilitate those states wanting to take action, but allow others to take the minimum action appropriate and reasonable (with no mechanism for defining this lower limit). As such the provisions facilitate the willing, whilst not sanctioning the less willing.

The risk is that contextualisation conjoined with an open-textured Convention, can produce little practical change on the ground. The extent to which the sovereign state model can provide an opportunity to protect biological resources depends upon the values attributed to those resources by the state concerned, the effectiveness of the state in asserting the practical consequences of those value statements and the scope for states to assert distinctive values in light of international economic pressures.

[15] CBD art 9.
[16] Convention on the Conservation of Antarctic Marine Living Resources (adopted 20 May1980, entered into force 7 April 1982) 1329 UNTS 47. Contested Antarctic sovereignty claims are frozen under the Antarctic Treaty (adopted 1 December 1959, entered into force 23 June 1961) 402 UNTS 71.

The extent to which a state promotes values which align to the CBD objectives in its decisions is at least in part a product of the economic wellbeing of the country.[17] It affects the scope of the state to regulate the incidents of ownership, in the context of conflicting pressure from multinationals and the needs of poor and indigenous communities. The CBD offers no solutions when conserving biodiversity would mean keeping a group of people at existing levels of poverty, and in particular does not address the application of 'sustainable use' in such contexts.[18]

The differentiated economic ability of states to play their role is recognised in the CBD, with Article 20 requiring developed parties to provide additional finance to enable developing state parties to meet their obligations.[19] The effectiveness of this depends upon whether such funding exceeds the value to a state of exploiting a particular resource unsustainably. The COP recognises the centrality of economic policies which ascribe economic value to biodiversity and develop investment strategies,[20] to create a space for financial support to positive biodiversity activity.

2.3 Sustainable utilisation

A core feature of the CBD is the notion of 'sustainable use'. The CBD requires parties to 'integrate consideration of the conservation and sustainable use of biological resources into national decision-making'.[21] This has been finessed as requiring 'more efficient, ethical and humane use' of biodiversity components.[22] Alongside economic and financial approaches, this enables the CBD to engage with key extractive industries.

'Sustainable use' relates to the notion of sustainable development.[23] In the CBD, it is defined as 'the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations,'[24] and

[17] Grossman and Krueger (1993).
[18] E.g. Chappell, Wittman, Bacon and others (2013).
[19] See CBD art 21 mechanism. For a review of the implementation of arts 20 and 21: UNEP/CBD/COP/9/INF/5 (2013).
[20] CBD art 11.
[21] CBD art10.
[22] 2004 Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity, adopted by CBD Decision VII/12.
[23] WCED (1987). See chapter 4 in this volume.
[24] CBD art 2.

has led to several COP decisions.[25] 'Sustainable use' has been used in a number of agreements apart from the CBD, with varying formulations.[26] It is defined in the World Conservation Strategy as 'management of human use of the biosphere so that it may yield the greatest sustainable benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations,'[27] and similarly defined in the Ramsar Convention.[28]

Whilst conservation and sustainable use are compatible in principle, their relationship is not fully articulated in the CBD.[29] It is easy to elide 'sustainable use' and 'conservation', but the terms cannot be equated as 'sustainable use' is predicated upon some exploitation and most importantly has a different focus – anthropocentric concerns about human use as opposed to biocentric thinking.

The presence of 'sustainable use' in the body of the Convention elevates it to an international legal obligation, but that articulation has not led to precise legal formulation in domestic measures, possibly because the CBD sets few parameters for this. Jurisdictions have avoided defining 'sustainable use', although many have adopted controls over particular biological resources that are of significance in the particular jurisdiction without reliance on the phrase.

Strategically, the inclusion of 'sustainable use' extends the scope of the Convention to economic activities including forestry, [30] agriculture, [31] fisheries, [32] and biotechnology.[33] So the strength of sustainable use is that it brings the management of key industries within the purview of the CBD's state reporting mechanisms[34] as a space in which to share and promote more sustainable trade practices,[35] and to use the financial mechanisms under the CBD to support those practices. The extent to which sustainable use potentially limits the power to bring biodiversity products to market,

[25] E.g. CBD Decisions V/24, VI/13, and VII/12.
[26] E.g. the troubled 'sustainable yield' definition re fish stocks; UN Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).
[27] World Conservation Strategy, (IUCN, 1980) Section 1.4.
[28] Convention on Wetlands of International Importance especially as Waterfowl Habitat (adopted 2 February 1971, entered into force 21 December 1975) 996 UNTS 245 (Ramsar Convention) art 2. See chapters 8 and 13 in this volume.
[29] Bennett (2004) explores the models used for reconciling these.
[30] e.g. CBD Decision VII/11. See chapter 14 in this volume.
[31] e.g. CBD Decision III/11. See chapter 18 in this volume.
[32] e.g. CBD Decision XI/8. See chapter 9 in this volume.
[33] e.g. CBD Decision IV/3; McGraw (2002). See chapters 16 and 32 in this volume.
[34] See chapter 33 in this volume.
[35] See chapter 23 in this volume.

challenging the mercantilist[36] priorities within the World Trade Organization (WTO), remains to be clarified, though.

Special provision is made in relation to the sustainable use of genetic resources.[37] Whereas elsewhere compromises with mercantilism happen outside of the CBD, in this case the CBD is explicitly influenced by mercantilist principles:

> Each Contracting Party shall endeavor to create conditions to facilitate access to genetic resources for environmentally sound uses by other Contracting Parties and not to impose restrictions that run counter to the objectives of this Convention.[38]

It preserves the position of the state to the extent that movement must be subject to the prior informed consent of the state of origin,[39] requires the benefits of exploitation to be shared[40] and enables state regulation of use to achieve CBD aims. This positive approach extends to duties to share access to and transfer of technology.[41]

2.4 Limits to sovereignty

A key limitation upon sovereignty is its territoriality. Three distinct issues give rise to desires by states to seek to influence biodiversity action beyond territorial boundaries:

- The mismatch between jurisdictional boundaries and key biodiversity areas;
- A desire to enhance protection of biodiversity in other states;
- A desire to act or influence conduct in areas that are not the territory of any individual state.

Each creates different pressures for the CBD approach, but they all result from states desiring to protect biodiversity beyond the level being generally afforded by other states. So it is primarily a tension faced by those states or organisations who are strong advocates of biodiversity protection.

[36] Mercantilism in this context refers to the extent to which WTO jurisprudence focuses upon protection of the seller's ability to sell products globally (as opposed to other aspects of economic activity).
[37] See chapter 17 in this volume.
[38] CBD art 15(2).
[39] CBD art 15(5).
[40] CBD art 15(7).
[41] CBD art 16. See chapter 26 in this volume.

Whilst it is not possible to assert sovereignty over species beyond territorial limits,[42] the CBD extends the obligations upon State parties to actions outside of their physical territory and carried out under its jurisdiction or control e.g. state registered vessels on the high seas.[43] In line with general principles of international law,[44] the CBD makes clear that States have 'the responsibility to ensure that [these] activities ... do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction'.[45] These limitations prohibit state-derived extraterritorial harmful action, but at the same time mean that positive action beyond territorial limits requires techniques of cooperation and persuasion, with or without economic incentives.

Of the three pressures for positive extraterritorial action, the first stems from the mismatch between territorial boundaries and ecosystems. This multiple sovereignties problem[46] is common in international law,[47] but particularly acute in relation to ecosystems.[48] The UN General Assembly has adopted a number of resolutions that encourage cooperation and multilateral approaches.[49] Principle 7 of the Rio Declaration requires states to cooperate to 'conserve protect and restore' ecosystems'. CBD Article 5 similarly requires cooperation in respect of areas beyond national jurisdiction, and on 'other matters of mutual interest'. These forms of cooperation can only be as strong as the weakest jurisdiction within the collaboration area and are vulnerable to non-participation by some states. The CBD does not offer any particular incentive for effective cooperation, other than financial ones. Indeed the Tuna-Dolphin dispute postscript suggests that WTO disputes may be a more effective vehicle in securing inter-state cooperation.[50] The role of trade regulation in delivering

[42] *Behring Sea Fur Seals Arbitration*, 1 Moore's Int Arb Awards (1898) 755
[43] CBD art 4.
[44] *Trail Smelter arbitration* (1941) 35 AJIL 716; *Corfu Channel case* (1949) ICJ Rep 4, 22.
[45] CBD art 3.
[46] McPherson and Boyer (2015).
[47] Ramsar Convention art 5; Convention on Migratory Species (adopted 23 June 1979, entered into force 1 November 1983) 1651 UNTS 333 arts 2(1), 4 and 5; Convention on the conservation of European wildlife and natural habitats (adopted 19 September 1979, entered into force 1 June 1982) 1284 UNTS 209 (Bern Convention) arts 1(1) 4(4), 10(1) and 11(1).
[48] See chapter 5 in this volume.
[49] Charter of Economic Rights and Duties of States (12 December 1974) A/RES/29/3281 Art 3; UNEP (1979).
[50] *GATT Dispute Settlement Panel Report on US Restrictions on Imports of Tuna* (*Tuna I)* 30 ILM 1594-1623 (1991); *GATT Dispute Settlement Panel Report on US Restrictions on Imports of Tuna* (*Tuna II)* 33 ILM 839-903 (1994); Agreement on the International Dolphin Conservation Program (adopted 15 May 1998, entered into force 15 February 1999) 37 ILM 1246 (1998) (International Dolphin Conservation Program).

improved levels of protection for biodiversity in states owning critical biodiversity resources is well documented, indeed the Convention on International Trade in Endangered Species (CITES)[51] is fundamentally grounded in a trade response to the perceived limitations of sovereignty-based protection of biodiversity.[52]

One state cannot directly mandate action in another state, save insofar as it has global jurisdiction over its citizens.[53] However, sovereign units with sufficient relative market authority can implement trade incentives. Their legitimacy is of necessity framed within WTO discourses, and ultimately validity is determined by the WTO Dispute Settlement. The growing range of techniques being deployed to legitimise such measures within the WTO jurisprudence illustrates the tension felt by at least some states in relation to the progress in biodiversity protection within a sovereignty paradigm of biodiversity governance.[54]

The third distinct area of extraterritorial concern is in relation to those parts of the planet which are not within the jurisdiction of any one state: *res communis*. These cannot become part of the jurisdiction of any state,[55] or be subject to the control of any one state in terms of asserting rights to exploit or protect.[56] That does not preclude private ownership of specific ecological materials through capture or harvesting. Protection of biodiversity in those areas depends upon extraterritorial jurisdiction over state citizens, or express international agreement.

The CBD does not address this question. Its approach is to require states to cooperate with others concerning areas beyond national jurisdiction, but the provision is vague.[57] In practice, ad hoc pragmatism has dominated the development of biodiversity protection in non-sovereign space, for example the UN Convention on

[51] Convention on International Trade in Endangered Species of Wild Fauna and Flora (adopted 3 March 1973, entered into force 1 July 1975) 993 UNTS 243 (CITES). See chapter 7 in this volume.
[52] See chapter 23 in this volume.
[53] E.g. Boudreaux (2007).
[54] E,g, WTO, *US- Import Prohibition of Certain Shrimp and Shrimp Products* I WT/DS58/AB/R (1998); and II WT/DS58/AB/RW (2001) cp WTO, *Measures Affecting the Approval and Marketing of Biotech Products* WT/DS291/R, 292/R and 293/R (2006). Perez (2004) offers an extensive analysis of the trade – ecosphere relationship.
[55] Geneva Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 11; UNCLOS.
[56] *Behring Sea Fur Seals Arbitration*, 1 Moore's Int Arb Awards (1898) 755; *Norweigian Fisheries Case*, ICJ Reports (1951) 116; *Icelandic Fisheries Case*, ICJ Reports (1974) 3, 175.
[57] CBD Article 5.

the Law of the Sea (UNCLOS)[58] in relation to waters beyond the territorial limit gives states exclusive sovereign rights to explore, exploit, conserve and manage biodiversity for a further two hundred miles. The concept is one of exclusive rights but with duties in relation to conservation and sustainable utilisation.[59] Critics of the approach doubt the extent to which the sustainable use obligations are more than illusionary, [60] but the scheme at least puts this space on the same footing in relation to sustainable use obligations as territorial space. Beyond two hundred miles, UNCLOS adopts a quasi-sustainable use provision,[61] requiring that all high seas freedoms are exercised with due regard for the interests of other states in also using addressing intra- if not inter-generational equity. All states are made subject to a duty to conserve and manage the living resources of the seas. Whilst differently phrased, this parallels the CBD, although protective duties here are a corollary of use not an adjunct of sovereignty.[62]

An alternative approach is to centre the international agreement upon a species or ecosystem rather than a physical location. Where species spend time in places that are not sovereign territory, or the state's sovereign interest may well not deliver sustainable utilisation, such as the Arctic species, there are species-specific treaties, for example in relation to North Pacific seals[63] and polar bears.[64] In many cases the rationale underpinning these multilateral measures is a growing recognition that action on biodiversity is constrained by the failures of territorial conceptualisations inherent in sovereignty.

One approach is through a reformulation of the concept of sovereignty as including a duty to cooperate for the good of the international community. [65] The CBD does include a duty of cooperation: this is articulated as a reformulation of sovereignty rather than an exercise of sovereignty. The language of 'responsibility' to cooperate

[58] UNCLOS (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.
[59] UNCLOS art 61; International Court of Justice, *Libya/Malta Continental Shelf case* [1985] ICJ Rep.13R.
[60] Barnes (2006).
[61] UNCLOS Article 87.
[62] See chapter 9 in this volume.
[63] Agreement Between The Government Of The United States of America And The Government Of Her Britannic Majesty For A Modus Vivendi In Relation To Fur Seal Fisheries In Bering Sea (adopted 15 June 1891) 175 CTS 223; North Pacific Fur Seal Convention (adopted 7 July 1911) 214 CTS 80.
[64] Agreement on the Conservation of Polar Bears (adopted 15 November 1973, entered into force 26 May 1976) 13 ILM 13 (1974).
[65] Handl (1990).

not redefine sovereignty;[66] indeed there is an inherent problem in that the duty to cooperate itself assumes the state as an autonomous entity.

And whilst some progress can be made by states voluntarily agreeing to regulate the conduct of their nationals in these non-sovereign areas in relation to biodiversity, this carries no sanctions against citizens of other states. So various attempts have been made to try to conceptualise a shared duty not constrained by sovereignty. A number of different approaches have been offered as a transnational rationale for biodiversity action, variously using the language of common concern, heritage, inheritance or trust.[67]

The language of trust, whilst having domestic potential has not been successful internationally.[68] In contrast, the concept of 'common heritage'[69] has been used successfully in international law albeit to date limited to the non-living resources of deep-sea bed[70] and outer space.[71] It starts from the notion that resources are owned by the planet as a whole. It sees this as a prior limitation upon the capacity for states to assert sovereignty over these common resources. It focuses upon requiring the exploitation to be for the benefit of all.

The dominant discourse is of positive affirmation of utility of the 'common concern' language, arguing that the planetary environment is no longer perceived as being a matter of individual state sovereignty, but is a common concern.[72] This is the language most commonly seen in biodiversity instruments as a means of structuring the exercise of sovereignty, and offers an alternative to the more contentious 'common heritage' language. Baslar, writing in 1998, documented the early evolution of this concept[73] as designed to foster and justify international cooperation and shared responsibility.

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[66] CBD Article 5.
[67] Sarkar (2012); Gillespie (2014).
[68] See *Behring Sea Fur Seals Arbitration*, 1 Moore's Int Arb Awards (1898) 755 where the USA argued for quasi-trust obligations because of the seals' regular return to US territory for breeding.
[69] Baslar (1998).
[70] UNCLOS preamble and art 136.
[71] Agreement Concerning the Activities of States on the Moon and Other Celestial Bodies (adopted 5 December 1976, entered into force 11 July 1984) 1363 UNTS 3.
[72] Cottier and Matteotii-Berkutova (2009).
[73] Baslar (1998).

The CBD preamble reference to biodiversity conservation as 'a common concern of mankind,'[74] provides a rationale for action and has an interpretative function. This does not assert control over non-sovereign areas or limit sovereignty, but provides legitimacy for affirming that sovereignty should be exercised in a particular manner. However, the precise difference that the phrase makes, in terms of obligations or enforcement is not entirely articulated. The concept has thus generated debate about its substantive significance.[75] It has been described[76] as making biodiversity conservation a legitimate concern for the international community, and also imposing a common responsibility. A regime that asserted common heritage as its rationale would transfer jurisdiction over biodiversity asset stewardship from states to an international authority.[77] The concept of 'common concern' does not require that jurisdictional transfer, but does legitimate international engagement and may point towards the need to create new global structures. In doing so, it opens up a debate about the scope of the rights and obligations for states to address concerns beyond their own territorial jurisdiction and for some raises the fear of the globally powerful using it to justify interventions extraterritorially.[78]

Whilst the articulation of 'common concern', may in the future move from its current position as a shared understanding to a principle from which new structures of legal regulation could flow, its current use is to justify expressions of concern as opposed to direct legal intervention in state sovereignty.

2.5 Scrutinising the exercise of sovereignty

The effectiveness of conventions depends on the 'effectiveness of the machinery for implementation and enforcement and the level of participation by states".[79] Whilst there is evidence of state action being constrained by trade laws,[80] and evidence of state action to seek to circumvent CITES,[81] there is little evidence of state action being constrained by the CBD. Indeed there is evidence that sovereignty over

[74] Early drafts of the CBD used 'common heritage'.
[75] Biermann (2014).
[76] UNEP (1990).
[77] As is seen with UNCLOS part XI in relation to the deep sea bed.
[78] Cottier (2012).
[79] Bowman (2000).
[80] *Tuna I*; *Tuna II*; International Dolphin Conservation Program.
[81] Whether through tolerance or evasion. Reeve (2002).

biodiversity encourages or facilitates overexploitation.[82] No direct compliance mechanism is specified in the CBD, compliance depending upon reporting[83] and implementation reviews. States report upon their own action. States themselves may lack data, may focus on limited parts of a remit or simply misreport.[84] It is difficult to adduce evidence to challenge a state's self assessment. Responses to this compliance gap have been suggestions of compliance review, via a body agreed by the Convention parties, or a global monitoring network that would rely upon a subset of indicator species, to avoid both the lack of data and the paralysis of too much data that affects the current debate.[85] But at present compliance depends upon self-reporting. Complaint procedures offer another potential vehicle for scrutiny– enabling states that consider others not to be taking sufficient action to raise concerns. Compliance is essentially through the soft mechanisms of critical comment upon reporting.[86]

The CBD depends on the implementation and enforcement of domestic legislation, but comparative review of legislation, let alone implementation, is a complex and highly contextualised matter and not one upon which the CBD embarks. The COP regularly sets priorities, and receives reports, but there continue to be wide differences between and within[87] jurisdictions in even the principles being applied to assess ecosystem and economic priorities. This difference in policy, but also in geography and ecosystems makes monitoring difficult.[88]

A key aspect of the rationale for the CBD, as indicated in its preamble, was the 'urgent need to develop scientific, technical and institutional capacities'. The core scientific advice to the CBD comes from its Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA).[89] Lack of evidence is thus not the problem – in addition to SBSTTA, IUCN and others produce much data of relevance to the CBD, but there is a need for a structural vehicle for engagement of scientific expertise, to deliver scientifically informed prioritisation and in particular a scientific basis for critique of state activity. SBSTTA reports regularly that biodiversity science is

[82] Schrijver (2008).
[83] CBD Article 26.
[84] Chayes and Handler (1995).
[85] Pereira and Cooper (2006).
[86] See chapter 33 in this volume.
[87] E.g. Boardman (2009).
[88] Cape and others (2005).
[89] Established under CBD Article 25.

essentially localist and its reporting highly dependent upon state specific outcomes. The limitations of the SBSTTA were recognised by the CBD COP in 2012.[90] In this connection, it can be noted that the Intergovernmental Platform on Biodiversity and Ecosystem Services (IPBES) was established to develop, *inter alia*, the next global assessment of biodiversity and ecosystems services in 2018.[91]

2.6 Conclusion

As long as biodiversity is seen as a question of sovereign state resource management, the CBD is dependent upon the persuasion of inter-governmental pressures. This is not a council of despair; it is simply to recognize the complexity of mapping the impact of the Convention upon sovereignty, and the exercise of sovereign powers in a diverse ecosystem context. Case studies of species, states or individual ecosystems provide insights, but there is only a limited ability to move from those to more general statements about the exercise of sovereignty.

This is essentially a soft system, which means states are largely able to move at their own pace. For states wishing to take strong action, it offers a degree of protected space to legitimise state action, but does not offer direct tools to ensure action by those whose economic or political context does not prioritise biodiversity action. Instead, the CBD's emphasis upon financial co-operation seeks to create an economic climate in which biodiversity action is prioritised by all. However, COP progress does not suggest the CBD is a vehicle for setting - let alone pushing - the pace of change. Without a redefinition of sovereignty, an articulation of a trans-sovereign justification or stronger enforcement mechanisms, the current approach will only produce limited progress.

Recognising the significance of context, three areas for future research stand out. Firstly, some progress could be made through a meta-study of existing case studies of species, states and individual ecosystems. Beyond that there is a need for comparative research into the impact of the CBD on state exercise of sovereignty in terms of both constraining sovereignty and preserving sovereign space for states to protect biodiversity (and in particular legislative responses). Secondly, a biodiversity focussed exploration of the exercise extra-territorial sovereignty by states. Finally, the

[90] CBD Decisions XI/13, VIII/10 and X/12.
[91] CBD Decisions XI/2 and XI/3.

relationship between conservation and sustainable use and the scope for using sustainable use to influence trade decisions would benefit from further study.

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