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Multilateral Treaties and the Environment: A Case Study in the Formation of Customary International Law

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MULTILATERAL TREATIES AND THE ENVIRONMENT: A CASE STUDY IN THE FORMATION OF CUSTOMARY INTERNATIONAL LAW*

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I. INTRODUCTION

Although the question of whether multilateral treaties create customary international law upon coming into force remains controversial, there is good reason to suppose that they do.[1] Pressing global problems demand cooperative solutions, and cooperative solutions are best achieved by means of the treaty process. Yet treaties bind only those states that are parties to the treaty, and often the critical number of parties is not great enough to assure an effective international response to global problems like environmental degradation. So it is tempting to assert that multilateral treaties generate an "instant custom"[2] that ob-

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1. *See e.g.*, R.R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y. B. INT'L L. 275,(1965-66) [hereinafter *Multilateral Treaties*]; ANTHONY D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971) [hereinafter CONCEPT OF CUSTOM]. *But see*, Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L. L. 1 (1988). For a cogent debate on the subject of customary law formation from treaties see, Anthony D'Amato, *Custom and Treaty: A Response to Professor Weisburd*, 21 VAND. J. OF TRANSNAT'L L. 459 (1988); Anthony D'Amato, *A Brief Rejoinder*, 21 VAND. J. TRANSNAT'L L. 489 (1988); A.M. Weisburd, *A Reply to Professor D'Amato*, 21 VAND. J. TRANS. L. 473 (1988). *See also* Hiram E. Chodosh, *An Interpretive Theory of International Law: The Distinction Between Treaty and Customary Law*, 28 VAND. J. TRANSNAT'L L. 973 (1995). For a specific discussion of the law-creating abilities of environmental multilateral treaties see Oscar Schachter, *The Emergence of International Environmental Law*, 44 J. INT'L AFF. 457 (1991); Daniel Bodansky, *Customary (and Not so Customary) International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 105 (1995).

2. *See supra* note 1 for sources discussing the meaning of "instant custom" and how multilateral treaties may create instant custom under international law.

ligates even non-parties to adhere to their terms.

In an earlier article in the Denver Journal of International Law and Policy we argued that multilateral treaties can in fact generate customary international law upon coming into force when three basic conditions are met:

1) A sufficient number of states in the international system accept the treaty.

2) A significant number of those states whose interests are substantially affected by the treaty (hereinafter "pertinent states") are parties to the treaty.

3) The treaty does not allow reservations on the part of the parties.[3]

We do not intend to repeat our argument here. Instead, we shall examine the universe of environmental treaties to see which treaties, if any, qualify as customary international law under our standards. We do so for two reasons. First, our prospective case study will enable us to sharpen and refine the standards themselves, thus demonstrating with some degree of precision how they structure the reach of customary international law in one particularly important policy area. Second, the study should aid a state in understanding its legal obligations to other states regarding the environment.

We will begin in Part II with a brief review of our three conditions and a discussion of why we think them necessary for the formation of customary international law. In Part III we briefly discuss some preliminary matters regarding the formation of instant custom. Then in Part IV we will arrange the existent multilateral treaties on the environment into three categories, viz., those treaties that establish customary international law according to our standards, those treaties that do not, and those troubling cases that remain too close to call from the standpoint provided by our three conditions.

II. MULTILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW

The reasons for thinking that multilateral treaties establish customary international law upon coming into force derive from the principle of customary international law itself. Customary practices reach the status of international law when a large number of the states within the international system suppose these practices establish appropriate guidelines for the relations of states.[4] Presumably, a treaty

3. Gary L. Scott & Craig L. Carr, *Multilateral Treaties and the Formation of Customary International Law*, 25 DENV. J. INT'L L. & POL'Y 71 (1996).

4. *See, e.g.*, G. SCHWARZEWNBERGER, A MANUAL OF INTERNATIONAL LAW 32-33 (5th ed. 1967). For the most influential treatise on the formation of customary law see D'AMATO, *supra* note 1.

relation between a large number of states could be based upon the same conviction. When this is the case, there is no need to suppose that treaty requirements must "harden" or "ripen into" customary international law.[5] The significance which a large segment of the international community attaches to the provisions of the treaty is evidenced by the treaty itself. There is, so to speak, nothing that needs to harden; things are hard enough already.

Nevertheless, one cannot decide abstractly which multilateral treaties qualify as sufficiently "hard"; this requires the establishment of some criteria capable of guiding judgment on the matter. The three conditions introduced at the outset are designed to meet this objective with some degree of specificity. As we shall see, however, these conditions contain an inescapable generality and this means that we cannot hope to achieve perfect clarity on the question of which multilateral environmental treaties actually create customary international law. This problem, however, can be overcome by appeal to the obligatory nature of international law. We take it as a principle of law that its obligatory character must be clear. That is, if Treaty X creates a legal obligation, those subject to Treaty X must be able to understand that they have an obligation to obey it. If there is some question about Treaty X's status as law, there is also some question about whether it is obligatory. Where we cannot say with surety that an obligation exists, there is no such obligation. So, hard or troublesome cases, we will conclude, do not make customary international law under our conditions.

The three conditions introduced above are relatively straightforward. For a multilateral treaty to generate customary international law upon coming into force, a sufficient number of states must accept it, a significant number of pertinent states must accept it, and it must not allow reservations.[6] Perhaps the best way to make these conditions clear is to apply them to a specific area of international concern, like the environment, with a reasonable number of multilateral treaties that establish a foundation for international law. Before we turn to the more applied discussion, however, a few general remarks about our three conditions are in order.

A. The Number of Parties to the Treaty

The notion of customary international law derives from the general belief that the shared customary practices of numerous states provide

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5. D'AMATO, CONCEPT OF CUSTOM, *supra* note 1, at 139.

6. Article 2 of The Vienna Convention on the Law of Treaties defines "reservation" in the following manner: " 'reservation' means a unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state. . . ." Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, U.N. Doc. A/CONF. 39/27, May 23, 1969 *reprinted in* 63 AM. J. INT'L L. 875 (1969).

reason to suppose that such widely accepted practices deserve to be respected as lawful.[7] They meet the criterion of general propriety since they already regulate the relations of a great many states. Presumably, the officials of those states adhering to these customary practices have found them to be appropriate regulations. The condition of general propriety can also be met, however, by numerous states accepting a particular treaty regulation. Here, too, it is possible to conclude that a large number of states—in this case the parties to the treaty—consider the regulations associated with the treaty appropriate for the governance of inter-state relations. The numerical condition, then, seems a necessary requirement for any inter-state practice to qualify as customary international law.[8]

Nevertheless, the condition is obviously imprecise; how many states must ratify a multilateral treaty before it can be said to establish customary international law?[9] It hardly seems reasonable to think that a modest number of states should be able to bring into force a treaty that would then obligate the remaining states of the world. On the other hand, if the number of required states is too large, there is little point to thinking that multilateral treaties can generate customary international law. Few such treaties could hope to receive the general support required to establish instant custom, and the point would quickly become moot.

Perhaps it is worth noting that the numerical condition raises problems even in more traditional areas of customary international law formation. Here, too, we need to consider how many states must adhere to a custom before it receives the general allegiance required to create international law. For its part, the International Court of Justice (ICJ) has demonstrated an inclination to measure state involvement as pertinent to the formation of customary international law without any further need to identify a magic number that brings such law into being.[10] If, however, we are to use our conditions as a guide to thinking about when multilateral treaties form customary international law, we must do better than this.

Nevertheless, the abstract assertion of a specific number is sure to seem arbitrary. Moreover, the number of states that are parties to a particular treaty may not indicate either efficacy or pertinent support. For example, at this writing only eighty-three states have ratified the Vienna Convention on the Law of Treaties (Treaty Convention).[11] Al-

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7. D'AMATO, CONCEPT OF CUSTOM, supra note 1, at 99 passim. *See also,* Michael Byers, *Custom, Power, and the Power of Rules: Customary International Law from an Interdisciplinary Perspective,* 17 MICH. J. INT'L L. 109 (1995).

8. For additional discussion of this point, *see* Baxter, *supra* note 1, at 285; D'AMATO, CONCEPT OF CUSTOM, *passim.*

9. *See* Scott & Carr, *supra* note 3, at 86-87.

10. *See, e.g.,* North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.) 1969 I.C.J. 3, Nos. 51 & 52, at 42 (Feb. 20).

11. *See* Vienna Convention on the Law of Treaties, *supra* note 6..

though this is a sizeable number, it remains less than half of the states of the world.[12] However, this may be less important than the fact that the world's major treaty making states (including the United States which accounts for 7% of the world's treaties) are not included in this number.[13] When it comes to the identification of a magic number demonstrating significant support for certain treaty provisions, then, the question of how many parties there are to the treaty may be less important than the question of who these parties are. If all the major treaty making states ratified the Treaty Convention, the case for thinking it establishes customary international law would presumably be greater than it now is.

B. Pertinent States

This point suggests that treaty ratification by certain pertinent states is a more significant determiner of instant custom than the sheer number of ratifications. We understand pertinent states to be those states whose participation in a treaty is required if the treaty is to have real meaning and a real chance of achieving its intended objective.[14] In the case of the Treaty Convention, for example, pertinent states would be the major treaty making states. Absent their involvement, it seems pointless to insist that the Treaty Convention establishes customary international law governing the treaty process.

Another apt illustration of the pertinent state requirement is the International Convention for the Prevention of Pollution from Ships (MARPOL).[15] By 1990, parties to MARPOL accounted for 85% of gross merchant tonnage.[16] At present, however, fewer than half of the world's states have ratified MARPOL, and yet 85% of the world's significant shipping states are included among those parties.[17] The number of pertinent state parties thus looks more than sufficient to conclude that MARPOL establishes customary international law.

The number of identifiable pertinent states will vary according to the treaty and the issue in question. Depending upon the issue, some multilateral treaties may have few pertinent state parties, but if the number is sufficient to demonstrate a clear consensus among pertinent states, and if our first condition is satisfied, then there is reason to

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12. POLITICAL HANDBOOK OF THE WORLD (Arthur S. Banks & Thomas C. Muller eds., 1998) (listing 193 sovereign states currently in existence).

13. 1 PETER H. ROHN, WORLD TREATY INDEX 111-17 (2d ed. 1984).

14. *See* Scott & Carr, *supra* note 3, at 90.

15. International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, I.M.C.O. Doc. MP/CONF/WP.35, *reprinted* in 12 I.L.M. 1319 (1973) [hereinafter MARPOL].

16. THE EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL AGREEMENTS: A SURVEY OF EXISTING LEGAL INSTRUMENTS 161 (Peter H. Sand ed. 1992).

17. U.S. DEP'T OF TRANSP., MARITIME ADMINISTRATION, MERCHANT FLEETS OF THE WORLD: OCEANGOING STEAM AND MOTOR SHIPS OR 1,000 GROSS TONS AND OVER AS OF JANUARY 1, 1987 (1988).

think the treaty establishes customary international law. In other cases, of course, there may be a great many pertinent states, and this raises another numbers problem. How many pertinent states are required to ratify a multilateral treaty before it establishes customary international law? Once again, it seems foolish to suppose we can identify a magic number. One must examine individual treaties to get some sense of the significance of the involvement of pertinent states. In certain instances we may be unable to make a clear determination of that involvement. In those situations we can only say that multilateral treaty formation of instant custom is presently doubtful. However, doubtfulness is a form of exactness; such treaties cannot be said to create instant custom.

One might object that, by placing such great weight on pertinent states in determining whether multilateral treaties create instant custom, we turn efficacy into a condition of lawfulness. If enough pertinent states adhere to some regulation, by virtue of treaty agreement, then the fact that the treaty proves efficacious determines its lawfulness. One might wonder, however, about the significance of thinking that an efficacious treaty should obligate states whose people have less at stake with regard to the regulations in question. One might also wonder why efficacy should count as a condition of lawfulness.

We are not arguing, however, that efficacy does imply lawfulness. Efficacy is a test of the viability of a particular multilateral treaty. In the event a significant number of pertinent states regulate themselves by means of a common treaty agreement, we can suppose that the regulation demonstrates established practice among those states commonly involved in such matters. That is, we can suppose that the treaty indicates what has become the perceived proper mode of association in the area in question. It is in this sense that the treaty generates customary international law. For it is now easy to see that the treaty provisions codify, so to speak, the regulations that the most relevant states think appropriate for the inter-state system. The treaty yields the same results that would be achieved by the evolution of custom under more traditional standards of customary international law.

Efficacy, then, is an indication of significant general acceptance. And it escapes the danger of inter-state tyranny by establishing that a majority of uninterested states cannot legally impose unwanted regulations on states with a stake in some regulatory field. Moreover, since not all pertinent states may be parties to the treaty making instant custom, the force of the law remains significant. In the event a pertinent state refused to ratify a multilateral treaty that managed, nevertheless, to create instant custom, this state would still be obligated under international law to adhere to the terms of the treaty. The multilateral treaty process thus becomes an important mechanism for the self-regulation of pertinent states in issue areas that matter to them.

C. *Reservations*

Our third condition will be familiar enough to those who have considered the question of whether multilateral treaties create instant custom. It has been noted by Richard Baxter, and subsequently formalized by the ICJ in the *North Sea Continental Shelf* cases. There, the Court stated that any treaty provision subject to state reservations could not create customary international law.[18]

Of the three conditions, the reservation condition is by far the most stringent and will no doubt severely limit the number of multilateral treaties that generate instant custom. However, the reason for insisting upon this condition is clear. Treaties allowing reservations permit parties to exempt themselves from those provisions they prefer not to accept. Any provision that a party to the treaty can treat as not applying to itself can hardly become customary international law that obligates states which do not have a similar opportunity to reject. It is hardly appropriate to suppose that non-parties should be obligated to adhere to provisions of a treaty that the parties themselves are not obligated to obey. It is also unreasonable to suppose that a party to a treaty incurs an obligation to obey a provision that it exempts itself from through the reservation process because the treaty has created instant custom. To insist that multilateral treaties that allow reservations can still make instant custom, then, seems both unfair to non-parties and contradictory. It is contradictory because it encourages us to assert that a party to a treaty may have an obligation to obey a treaty provision from which it has formally and permissibly exempted itself.

III. TREATY PROVISIONS AND THE FORMATION OF INSTANT CUSTOM

Before we begin to measure instant customary environmental law by our standards, two preliminary comments are in order. First, it is important to be clear about what kinds of customary international law can be derived from multilateral treaty provisions. There are several hundred multilateral treaties in force that are relevant to the international environmental legal regime. These treaties are both global and regional in scope. However, by our count only forty-one of these environmental treaties, presently in force, are global in scope; the remainder are regional. For purposes of our analysis then, we will focus only on these forty-one global multilateral treaties that have the potential of sufficiently wide participation to become part of customary international law. We will not address, at this time, the ancillary question of whether regional treaties can create regional customary international law.

Admittedly this omits many important regional multilateral trea-

18. Baxter, *supra* note 1, at 284; North Sea Continental Shelf, *supra* note 10, at 42.

ties and overlooks the possibility of the formation of a regional customary international law. It also overlooks the possibility of groupings of similar bilateral treaties forming the basis for customary international law, particularly on a regional basis.[19] The question of regional customary law formation, however, involves the necessity of a theoretical discussion of a different sort and is beyond the purview of the present research.[20]

Secondly, it is necessary to emphasize that before a treaty provision can become part of customary international law, it must be of a generalizable nature.[21] Thus, for example, a treaty provision generally designed to protect endangered species by discouraging trade would be generalizable,[22] while a specific provision, say, to require an import permit for *Loxodonta Africana* may not.[23]

Treaty provisions may also be part of the process[24] of the formation of customary international law by providing further evidence for the existence of certain provisions which may qualify as customary international law, but which have, prior to their incorporation into a general multilateral treaty, not had much supporting evidence as proof of their existence. Provisions, such as the *sic utere tuo, ut alienum non laedus* principle and the precautionary principle in environmental law,[25] may require the backing of multilateral treaties to further solidify their basis as accepted customary international law. These questions, however, are also beyond the scope of this paper. Instead, we examine the issue of customary international law formation or "instant custom" as a result of a multilateral treaty coming into force.

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19. D'Amato points out that by sheer numbers alone bilateral treaties must be taken as evidence of customary international law. He states, "[y]et, as I argued in my book on custom in 1971, if we look at the matter mathematically, a multilateral convention among ten states is the equivalent of forty-five similarly worded bilateral treaties among the same ten states." D'AMATO, CONCEPT OF CUSTOM, *supra* note 1, at 99. On regional or "special custom," *see, e.g.*, Anthony D'Amato, *Special Custom, in* INTERNATIONAL LAW ANTHOLOGY 157-61 (Anthony D'Amato ed., 1994).

20. For a discussion on regional law in the Americas see, Donna Lee Van Cott, *Regional Environmental Law in the Americas: Assessing the Contractual Environment*, 26 U. MIAMI INT'L AM. L. REV. 489 (1995).

21. *See, e.g.*, Baxter, *Multilateral Treaties, supra* note 1; D'AMATO, *supra* note 1.

22. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 1976 UNTS 244, 27 U.S.T. 1087, T.I.A.S 8249, U.K.T.S. No. 101 (1976), *reprinted in* 12 I.L.M. 1085 (1973); [hereinafter CITES].

23. *Id.* at Appendix I.

24. While it is traditional to view customary international law and treaties as "sources" of international law, we think it more useful for our discussion to adopt George Schwarzenberger's terminology of "law creating processes." *See* SCHWARZENBERGER, *supra* note 4, at 28-35.

25. The precautionary principle requires states to act with caution toward potentially environmentally damaging practices, *i.e.* to err on the side of caution.

We are interested, then, in the extent to which certain multilateral treaties can be said to be formative of customary international law on their own, rather than through a contribution to the normal processes of *opinio juris* and state practice.

IV. THE FORMATION OF INSTANT CUSTOM: A CLASSIFICATION SCHEME

For purposes of our analysis we will divide the relevant universe of global multilateral treaties into three categories. Category I will be those treaties that definitely do not meet our three part test for the formation of customary international law. Category II will include those treaties that seem quite clearly to meet our test and Category III will consist of those treaties about which some doubt may still remain even after applying our test. This latter category is the most interesting because it illustrates the difficulty, even with the application of a strict test, of being certain that a treaty creates customary international law.

A. Category I

Most of the treaties in our Category I have failed to meet the most onerous condition of our three conditions set out above, that the treaty not allow reservations to its substantive provisions. We consider that all treaties not specifically *prohibiting* reservations allow them to take place. In this line of reasoning we are following the stipulations of Article 19 of the Treaty Convention.[26] Moreover, the ICJ in its advisory opinion in, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*,[27] upheld the notion that reservations, not specifically prohibited, are allowable so long as the reservation is compatible with the object and purpose of the treaty.[28]

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26. Vienna Convention, *supra* note 6. Article 19 states,

> A state may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Id.

27. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15 (May 28). For a similar opinion directly relevant to the Americas see, Advisory Opinion No. OC-2/82 of Sept. 24, 1982, The Effect of Reservations on the Entry into Force of the American Convention on Human Rights, *reprinted in* 22 I.L.M. 37 (1983). For a discussion of reservations to multilateral treaties *see generally*, Catherine Redgwell, *Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties*, 64 BRIT. Y. B. INT'L. L. 245 (1994).

28. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 27, at 29.

Although the "no reservations provision" is quite restrictive,[29] the Court has indicated that the derivation of customary law from treaty law is a result, "not lightly to be regarded as having been attained."[30] Even so, some may object that we have excluded treaties that many think have become part of customary international law, but, for reasons to be discussed below, we think that most of this customary law may have come about, not through the treaty process itself, but rather through the more traditional formative processes of customary international law, i.e., *opinio juris* and state practice.

One such treaty is MARPOL.[31] MARPOL's 1978 revision has a total of 106 Parties.[32] While this represents only slightly fewer than half of the world's states, as noted above, it represents 85% of the world's significant shipping states and over 93% of the world's gross merchant tonnage.[33] This wide acceptance among shipping states has caused Birnie and Boyle to proclaim, "It is thus beyond question that it is now included in the 'generally accepted international rules and standards' prescribed by Article 211 of the 1982 UNCLOS as the minimum content of the flag state's duty to exercise diligent control of its vessels in the prevention of marine pollution."[34] In spite of such claims, we have included MARPOL in our Category I because it does not prohibit reservations to its provisions. While no reservations have been made to date, the treaty, nonetheless, offers the possibility of a state opting out of or modifying certain provisions through reservation. While we do not disagree that MARPOL's provisions may have come to be regarded as customary international law, they have done so because of the normal processes included in the creation of customary international law, state practice and *opinio juris*. As Birnie and Boyle point out, "Moreover, quite apart from their incorporation by treaty, such international standards may acquire customary force, if international support is sufficiently widespread and representative. The MARPOL Convention may be one example of this transformation process."[35]

Another environmental treaty that may have evolved into customary law, but which we also include in Category I because it does not prohibit reservations, is The International Convention for the Regulation of Whaling ("Whaling Convention"), done originally in 1946 and amended nine times between 1975 and 1992.[36] Since 1979, this conven-

29. The no reservations test eliminates 31 of the 41 global environmental treaties under consideration for this study.

30. North Sea Continental Shelf, *supra* note 10, at 41

31. MARPOL, *supra* note 15.

32. *See* Llloyd's Register of Shipping/World Fleet statistics, Dec.31, 1997 (noting 106 parties to MARPOL).

33. Sand, *supra* note 16, at 161.

34. PATRICIA W. BIRNIE & ALAN E. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 267 (1992).

35. *Id.* at 94.

36. International Convention for the Regulation of Whaling, Dec. 2, 1946, 161 U.N.T.S. 72, 62 STAT. 1716, T.I.A.S. 1849 [hereinafter Whaling Convention].

tion, which had only eight original parties, and which added only eight more in the succeeding three decades, has gained thirty additional parties in the past two decades.[37]

Participation in the Whaling Convention has certainly gained momentum during a period of heightened environmental consciousness. This momentum has caused some writers to assert that the generalizable provisions of this treaty, e.g., the protection of whales in general, have become part of customary international law.[38] D'Amato and Chopra argue that customary law regarding whales has evolved so far that whales can be seen as having an emerging "entitlement to life."[39]

We do not consider the Whaling Convention itself, however, to be formative of customary international law, because, as noted above, it does not prohibit reservations. Further, states may opt out of the regular amendments to the Schedule to the Convention which establish specific conservation regulations on whaling.[40] Moreover, it should be noted that participation in the Whaling Convention, while growing, still does not include nearly two-thirds of the world's coastal states.[41] To what extent this limits the treaty from constituting customary international law under our test is a moot point, since the treaty fails our no-reservations test. It would become an issue only if the treaty did prohibit reservations.

The Whaling Convention, then, may have evolved into customary international law through the normal practices of the expression of *opinio juris* and state practice. Indeed, D'Amato and Chopra argue that there has been, ". . . a broadening international consciousness about whaling amounting to an *opinio juris* - the psychological component of international customary law."[42] And further, "When this component is added to the evolving practices of states toward whaling, the combination of psychological and material elements arguably constitutes binding customary law."[43] We do not dispute this claim, nor would we argue that the Whaling Convention has not contributed to the formation of this law in subtle ways. Rather, we argue that the Whaling Convention itself did not create the customary law on the subject of whaling. Further evidence that the Whaling Convention and MARPOL became customary international law through non-treaty processes is the length of time that passed before these customary law principles gained their present widespread acceptance. The Whaling Convention, in particu-

37. Treaty data from the UNTS website (last modified November 10, 1997) <http://www.un.org/Depts/Treaty>.

38. Anthony D'Amato & Sudhir K. Chopra, *Whales, Their Emerging Right to Life*, 85 AM. J. INT'L L. 21, 49 (1991). *See also*, Sudhir K. Chopra, *Whales: Toward a Developing Right of Survival as Part of an Ecosystem*, 17 DENV. J. INT'L L. & POL'Y 255 (1989).

39. D'Amato & Chopra, *supra* note 38, at 49.

40. Whaling Convention, *supra* note 36, at art. V(3). *See also*, Sand, *supra* note 16.

41. Sand, *supra* note 16, at 258.

42. D'Amato & Chopra, *supra* note 38, at 22.

43. *Id.* at 22-23.

lar, languished in relative obscurity for nearly thirty years before the rise in environmental consciousness of the past two decades.

These are but two examples of environmental treaties often seen as having "hardened into" customary international law, even though they do not meet the requirements of our three part test. They illustrate the distinction between treaties which create customary international law and those which merely contribute to its formation by aiding the processes of *opinio juris* and state practice. Treaties in our next category are examples of the former, that is, they meet the standards of our three part test. Thus, we think that they are formative of customary international law in the form of "instant custom."

B. Category II

There are only ten global multilateral environmental treaties presently in force which do not allow reservations to their provisions, all of which are discussed below. Of these, eight belong to our second category, i.e., they seem rather clearly to meet our three part test. The following brief discussion of each of these treaties should make this clear.

The Convention on Biological Diversity came into force on December 29, 1993.[44] Its purpose is to slow the reduction of biological diversity caused by human activities.[45] The means to do this described in the Convention include ". . . the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, . . . transfer of relevant technologies, . . . and by appropriate funding."[46] There are 175 parties to the Convention on Biological Diversity.[47] Thus, 90% of the world's states subscribe to the principles contained therein. While biological diversity concerns all states of the world, the treaty provisions for sharing technology[48] and providing funding to the developing states[49] suggest that the pertinent states are the major industrialized and technologically developed states. All major developed states, except the United States, are parties to this convention.[50] The United States signed the treaty in 1993, but has yet to ratify it.[51] We do not consider the absence of a US ratification of this particular convention to constitute sufficient reason to deny the formation of customary international

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44. United Nations Conference on Environment and Development: Convention on Biological Diversity, June 5, 1992, U.N. Doc. UNEP/Bio.Div./N7-INC.5/4, *reprinted in* 31 I.L.M. 818 (1992) [hereinafter Biological Diversity Convention].

45. *Id.*

46. *Id.* at art. 1.

47. Multilateral Treaties Deposited with the Secretary-General, United Nations, New York, ST/LEG/SER.E (visited Feb. 25, 1999), <http://www.un.org/Depts/Treaty>.

48. Biological Diversity Convention, *supra* note 44, at art. 16.

49. *Id.* at art. 20.

50. *See* Multilateral Treaties Deposited with the Secretary-General, *supra* note 47. *See also* List of Signatories, *reprinted in* 31 I.L.M. 1004 (1992). (as of June 29, 1992, 157 states and the European Economic Community had signed the treaty).

51. *See* Multilateral Treaties Deposited with the Secretary-General, *supra* note 47.

law by this treaty on the basis of our pertinent states test. The US signature constitutes an interim acceptance of the principles contained in the treaty, so one could argue that the US is, in one sense, agreeable to laws formulated by this treaty. This line of reasoning, however, is probably unnecessary. The issue of biodiversity is sufficiently broad based so that the absence of a single large and wealthy state should not hinder customary law formation. With 170 parties, including most of the world's technologically developed states, and most of its developing states, this treaty meets both the sufficient numbers and pertinent states conditions. We believe this convention is an important step in the establishment of customary international law on the matter of biological diversity and that the remaining non-parties should consider its provisions as definitive in this area.

The Framework Convention on Climate Change ("Climate Change Convention") came into force on March 21, 1994[52] and at present it has 177 members. As in many of the environmental treaties, the developed states are the pertinent states in the Climate Change Convention. Those states which contribute the most to anthropogenic emissions responsible for global climate change, must naturally be "on board" for any solutions to global climate change problems. In recognition of this there are several provisions in the Convention calling for special contributions from developed states. Article 3.1 calls for developed countries to ". . . take the lead in combating climate change and the adverse effects thereof."[53] Article 4.4 requires the developed countries to ". . . assist the developing country Parties that are particularly vulnerable to adverse effects of climate change in meeting costs of adaptation to those adverse effects."[54] Article 4.5 further requires developed states to " . . . take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how to other Parties, particularly developing country Parties. . . ."[55]

Most of the world's developed states are parties to the Climate Change Convention, including The United States, Japan, The Russian Federation and The European Union states.[56] It can be said then that the Framework Convention on Climate Change meets both our wide acceptance test and our pertinent states test and thus forms instant custom.

The Vienna Convention for the Protection of the Ozone Layer which entered into force in September of 1988[57] and the subsequent Montreal

52. United Nations Conference on Environment and Development: Framework Convention on Climate Change, May 9, 1992, U.N. Doc. A/AC. 237/18 (Part II) Add.1 and Corr.1, *reprinted in* 31 I.L.M. 849 (1992) [hereinafter Climate Change Convention].

53. *Id.* at art. 3.1

54. *Id.* at art. 4.4.

55. *Id.* at art. 4.5.

56. *See* Multilateral Treaties Deposited with the Secretary-General, *supra* note 47.

57. Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, 1513

Protocol on Substances that Deplete the Ozone Layer, which entered into force in January 1989,[58] both received widespread acceptance rather rapidly. This was probably due to the urgency felt on the part of most states once a hole was discovered in the ozone layer by British scientists.[59] The Vienna Convention presently has 169 parties[60] and the Montreal Protocol has 163 parties.[61] These parties include all of the major industrial states and the major producers and consumers of ozone depleting substances, primarily Chlorofluorocarbons (CFCs). Thus, the pertinent states are all parties to these two treaties that aim to limit the emissions of stratospheric ozone depleting chemicals. These two treaties on ozone depletion exemplify the theory that multilateral treaties can create instant customary international law.

The International Convention to combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa,[62] came into force on December 26, 1996.[63] While the focus is on African areas, primarily because of the severe problems experienced there, it is, nonetheless, of interest on a more global basis. There are a total of 146 parties to this convention,[64] giving it reasonably widespread acceptance. The pertinent states to this treaty are those states most experiencing desertification problems, and the developed states, because of the special provisions in the treaty calling for them to aid states experiencing desertification.[65] In regard to pertinent state participation, most of the states with drought or desertification problems are parties to the treaty. For example, the states of the Sahelian region of Africa, which consists mostly of drylands, are all parties to the treaty.[66] The developed states are well represented as parties to the Convention as well.[67] Given the relatively widespread participation in the Convention and the high percentage of participation of the perti-

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U.N.T.S. 293, 324, *reprinted in* 26 I.L.M. 1516 (1987) [hereinafter Vienna Convention].

58. Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, *reprinted in* 26 I.L.M. 1541 [hereinafter Montreal Protocol].

59. *See* Gary L. Scott et. Al., *Success and Failure Components of Global Environmental Cooperation: The Making of International Environmental Law*, 2 ILSA J. INT'L & COMP. L. 23, 46-58 (1995).

60. *See* Multilateral Treaties Deposited with the Secretary-General, *supra* note 47.

61. *See id.*

62. United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa, Oct. 14, 1994, U.N. Doc. A/AC. 241/15/Rev.7, *reprinted in* 33 I.L.M. 1328 (1994) [hereinafter The Desertification Convention].

63. U.N. Doc. A/AC.241/15/Rev.3 (Sept. 12, 1994).

64. *See* Multilateral Treaties Deposited with the Secretary-General, *supra* note 47.

65. The Desertification Convention, *supra* note 47, at art. 6.

66. *See* Kyle W. Danish, International Environmental Law and the "Bottom-Up" Approach: A Review of the Desertification Convention, 3 IND. J. GLOBAL LEGAL. STUD. 133, 136 (1995). The states are Cape Verde, Senegal, Mauritania, Mali, Burkina Faso, Niger, Chad, and Sudan. *See id.*

67. The authors note that most of the European Union States have ratified the Convention. Two notable absentees from the developed state parties are the United States and Japan. Both states, however, are signatories.

nent states, it can be said that the Desertification Convention meets each of our tests for becoming customary international law.

This brings us to The International Tropical Timber Agreement of 1983[68] and its successor agreement, the International Tropical Timber Agreement of 1994.[69] For purposes of our discussion, we will treat them as a single agreement, focusing primarily on the successor agreement. While these agreements are more commodities agreements than environmental agreements, they are, nonetheless, concerned with the preservation of tropical forests and thus can be classed as falling within the purview of the international environment. They have been generally treated as environmental treaties in the relevant literature.[70] Moreover, they are the only international agreements focused on forests, and the 1994 successor agreement does have more of an "environmental flavor" than the 1983 Agreement.[71] Presently there are 54 parties to the 1983 agreement and 54 parties to the 1994 agreement.[72]

While it may seem questionable whether these agreements have achieved sufficient participation worldwide such that they have created instant customary international law, they present a somewhat different problem in this area. Rather than taking the participation in the treaties as a percentage of all of the world's states, it should be noted that only a small percentage of the world's states are concerned with the export of tropical timber and only a slightly larger percentage with its import. Because most of the timber producing states and also a large percentage of the major timber consumers are parties,[73] the treaties contain sufficient breadth of participation and sufficient pertinent state participation to warrant consideration as formative of customary international law regarding the conservation of tropical forests. Therefore, since these treaties allow no reservations, have sufficient pertinent state participation, and arguably meet the breadth of participation requirement as well, these treaties must be considered as formative of customary international environmental law according to our three part

68. International Tropical Timber Agreement, Nov. 18, 1983, U.N. Doc. TD/TIMBER/11/Rev.1 (1984), *reprinted in* 1393 U.N.T.S. 67 (1985).

69. International Tropical Timber Agreement, Jan. 10, 1994, UNCTAD: Doc.TD/TIMBER. 2/Misc. 7/GE. 94_50830 *reprinted in* 33 I.L.M. 1014 (1994).

70. *See, e.g.*, Nicholas Guppy, *International Governance and Regimes Dealing with Land Resources from the Perspective of the North*, *in* GLOBAL ENVIRONMENTAL CHANGE AND INTERNATIONAL GOVERNANCE 169, 177-80 (Oran R. Young et. al. eds., 1992); Rodolfo Rendon, *Regimes Dealing with Biological Diversity from the Perspective of the South*, *in* GLOBAL ENVIRONMENTAL CHANGE AND INTERNATIONAL GOVERNANCE 141-42 (Oran R. Young et. al. eds., 1992); Ann Hooker, *The International Law of Forests*, 34 NAT. RESOURCES J. 823, 849 (1994).

71. The 1983 Agreement contains only one paragraph among its "Objectives" which relates to environmental concerns. International Tropical Timber Agreement, *supra* note 53, ch. 1, art.1. The 1994 Agreement contains 6 paragraphs which refer to various environmental concerns such as sustainable development, conservation, and enhancement of resources. *Id.*.

72. *See* Multilateral Treaties Deposited with the Secretary-General, *supra* note 47.

73. *Id.*

test.

These agreements, however, offer an excellent example of why one should not be sanguine about an environmental issue, even though one can see that customary law has been formed regarding that issue. What is troublesome about these agreements is the way in which they have been structured and the results that this has had for the regulation of the destruction of tropical forests. Because of the weighted voting scheme within the International Tropical Timber Organization, which gives the most votes to the largest timber producing and consuming states,[74] the results have not been as many environmentalists had hoped. According to Nicholas Guppy, "In practice, therefore, the destruction of tropical forests is promoted by both sides, while the tropical timber market continues in a state of uncertainty and is manipulated by the main buyers - especially Japan - to keep prices low."[75] Therefore, while the clauses in these treaties relating to the conservation of tropical forests may have become part of customary international law, in practice the treaties and their parties are doing relatively little to preserve this resource that is so important to global environmental health. Simply knowing that customary international law has been created on this matter may breed false optimism concerning the future of tropical forests.[76]

The United Nations Convention on the Law of the Sea (UNCLOS)[77] presents another interesting study. While there is no doubt that UNCLOS incorporates many heretofore accepted principles of customary international law, such as the freedom of the high seas, coastal state sovereignty over territorial waters, etc., it also represents a significant departure from some of the older concepts of the traditional law of the sea. For example, UNCLOS was the first treaty to give legal credibility to the shift from *res nullius* to *res communis* regarding the resources of the seas.[78]

Many authors have proclaimed that UNCLOS is formative of cus-

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74. Guppy, *supra* note 70, at 141.

75. *Id.*

76. *Id. See also,* Hooker, *supra* note 70; Tom Rudel & Jill Roper, *The Paths to Rain Forest Destruction: Crossnational Patterns of Tropical Deforestation,* 1975-1990, 25 WORLD DEVELOPMENT 53 (1997); Emmanuel Kasimbazi, *Sustainable Development in International Tropical Timber Agreements,* 14 J. ENERGY & NAT. RESOURCES L. 137 (1997); Phillip E. Wilson Jr., *Barking up the Right Tree: Proposals for Enhancing the Effectiveness of the International Tropical Timber Agreement,* 10 Temp. INT'L & COMP. L.J. 229 (1996).

77. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982), *reprinted* in 21 I.L.M. 1261 (1982) [hereinafter UNCLOS].

78. *See, e.g.,* the Preamble to UNCLOS which states, *inter alia,* ". . . that the area of the sea-bed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as well as its resources, are the common heritage of mankind, the exploration and exploitation of which shall be carried out for the benefit of mankind as a whole . . . ." *Id. See also* UNCLOS, part XI, art. 140.

tomary international law and that *res communis* is now the accepted view of the international community.[79] When this question is viewed against the background supplied by our instant custom test, this understanding of UNCLOS seems justified. Let us explain.

It should be noted, first, that UNCLOS meets our "no reservations" test. Further, UNCLOS has gained rather widespread acceptance among the world's states. At present there are 130 parties to the Convention.[80]

The pertinent states test is the issue that may make UNCLOS somewhat questionable regarding its formation of customary international law. It seems reasonable to regard those states with the largest blue water navies and those states with the world's largest gross tonnage of shipping as our pertinent states. Though nearly all states have an interest in UNCLOS, particularly with its *res communis* principle regarding the high seas and the adjacent subsoil, those states most affected will be the major shipping and naval powers.

Considering UNCLOS as a candidate for the formation of customary law in 1994, the year of the Agreement on the implementation of Part XI of UNCLOS, the prospects were not good.[81] At that time only one of the top ten naval powers [82] and only three of the top ten merchant shipping states[83] had ratified the treaty. Part XI of UNCLOS became the most controversial part of the Convention. In an effort to make this part of the treaty more palatable to the major maritime states, and thus to achieve universal participation in UNCLOS, the

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79. For a discussion of the historical progress from *res nullius* to *res communis see, e.g.*, W. Frank Newton, *Inexhaustibility as a Law of the Sea Determinant*, 16 TEX. INT'L L.J. 369 (1981). *See also*, A. L. Morgan, *The New Law of the Sea: Rethinking the Implications for Sovereign Jurisdiction and Freedom of Action*, 27 OCEAN DEV. & INT'L. L. 5, 19 (1996); Christopher C. Joyner & Elizabeth A. Martell, *Looking Back to See Ahead: UNCLOS III and Lessons for Global Commons Law*, 27 OCEAN DEV. & INT'L L. 73 (1996); David L. Larson, *Conventional, Customary, and Consensual Law in the United Nations Convention on the Law of the Sea*, 25 OCEAN DEV. & INT'L L. 75 (1994), Philip Allott, *Mare Nostrum: A New International Law of the Sea*, 86 AM. J. INT'L L. 764 (1992).

80. *See* Multilateral Treaties Deposited with the Secretary-General, *supra* note 47.

81. Part XI of UNCLOS deals with the establishment of the deep seabed authority. Article 136 of Part XI establishes that the seabed and its resources are the "common heritage of mankind." UNCLOS, *supra* note, 77, at art. 136. Part XI was not well received among those states that had the seabed. The supplemental agreement which modified certain parts of Part XI seems to have assuaged most of the concerns of these states. *See* GERHARD VON LAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 399-403 (7th ed. 1996) (for a discussion of the particular objections and the modifications to Part XI).

82. The top ten naval powers are extrapolated from the INTERNATIONAL MILITARY AND DEFENSE ENCYCLOPEDIA, 1941 and *passim* (Trevor N. Dupuy ed., 1993). They are 1. USA, 2. Russia, 3. UK, 4. France, 5. Japan, 6. Argentina, 7. Brazil, 8. India, 9. Spain, 10. China. Only Brazil had ratified UNCLOS by 1994.

83. The top ten shipping states by gross tonnage are taken from Dupuy: These states are 1. Liberia, 2. Panama, 3. Japan, 4. Greece, 5. Cyprus, 6. USA, 7. Russia, 8. China, 9. Philippines, 10. Bahamas. Of these states only Cyprus, Philippines, and Bahamas had ratified UNCLOS. *Id.* at 1729.

General Assembly adopted the Agreement on the implementation of Part XI and put it forward for signature and ratification.[84] That it has largely achieved its desired effect is evidenced by the fact that 63 states have become parties to UNCLOS since the implementation of this supplemental agreement in 1994.[85]

In the wake of the supplemental agreement, all of the naval powers with the exception of the United States, and all of the major shipping states with the exception of the United States and Liberia, have become parties to UNCLOS.[86] Does this constitute sufficient participation by the pertinent states to declare that UNCLOS formulates customary international law and that its provisions therefore govern all states with respect to the sea?

The significance of the non-participation of the United States and Liberia cannot be minimized in considering this question. The United States is, by a considerable degree, the largest naval presence in the world.[87] Further, Liberia is the number one shipping state in the world by a large margin.[88] Liberia's absence from UNCLOS, coupled with the absence of the United States (not only the largest naval power, but a significant shipping power as well) at least raises some doubt about the ultimate effectiveness of the treaty or the customary international law formulated by the treaty.

It is necessary to clarify, then, whether the point behind our second condition is efficacy or general consensus. There is little doubt that the participation of pertinent states in a multilateral treaty is necessary if the treaty is to prove effective. However, effectiveness is a poor condition of lawfulness. As UNCLOS demonstrates, even in the category of pertinent states, some states may be more pertinent than others. To conclude that it is doubtful that UNCLOS establishes instant custom is to allow the most pertinent states on a question of treaty law to have a *de facto* veto over the issue of instant custom. This seems inconsistent, however, with the traditional view that customary practice can harden into international law because it demonstrates a general consensus that some regulation ought to be respected by all states. After all, customary international law is supposed to hold against all states and not permit the claim of *res inter alios acta* by any single actor.

Our pertinent state category does not deviate from this view; instead, it effectuates this view by adding a degree requirement to the issue of customary practice. Consensus on the propriety of a regulation, among states with a heightened involvement in a particular practice, supports the regulation in ways relevant to the formation of customary

84. G.A. Res. 48/263, U.N. GAOR, 48th Sess., Supp. No. 49, at 36, U.N. Doc. A/RES/48/263 (1994).

85. *See* Multilateral Treaties Deposited with the Secretary-General, *supra* note 47.

86. *Id.*

87. Dupuy, *supra* note 82.

88. *Id. at 1729.*

international law. When it comes to instant custom, this means that a high degree of consensus among pertinent states is required for a finding of instant custom.

A high degree of consensus, however, can fall short of unanimity. If enough pertinent states participate in a multilateral treaty, the nonparticipation of one or two should not affect the formation of instant custom, regardless of what this might do to the treaty's efficacy. Given the involvement of other pertinent states, then, we think the nonparticipation of the United States and Liberia does not stop UNCLOS from formulating customary international law. The United States, however, has signed the Agreement relating to the implementation of Part XI of the Convention and continues to be a provisional member of the International Seabed Authority.[89]

C. *Category III*

We now turn to those treaties that present difficulty in determining their qualifications as customary international law makers, even when viewed through our three part test. We have included only two treaties in this category.

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal ("Basel Convention") came into force on May 5, 1992.[90] Presently there are 122 parties to this treaty,[91] a significant, but not overwhelming, percentage of the world's states. The purposes of the Basel Convention are first, to limit and control the transboundary movement of those materials set for disposal that are deemed by the convention to be of a hazardous nature, and second, to transfer technology to the lesser developed countries so that they may better be able to minimize the production of such hazardous waste and to minimize the handling and disposal problems of those wastes that are generated.[92]

Since most of these hazardous materials are the result of industrial and manufacturing processes, and since the technology transfers de-

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89. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, U.N. Doc. A/RES.48/263 (1994). The United States signed the Agreement on July 29, 1994. The effect of the initial signature was to become a provisional member of the ISBA until November 16, 1996. In accordance with Article 7, paragraph 1, of the Agreement and by its own request, the US provisional membership in the ISBA has been extended to November 16, 1998. (Doc. ISBA/C/9).

90. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Mar. 22, 1989, U.N. Doc. UNEP/WG.190/4, *reprinted in* 28 I.L.M. 657 (1989) [hereinafter Basel Convention]. For a discussion of the Basel Convention specific to Latin America *see*, Gonzalo Biggs, *Latin America and the Basel Convention on Hazardous Wastes*, 5 COLO. J. INT'L. ENVT'L L. & POL'Y 333 (1994).

91. *See* Multilateral Treaties Deposited with the Secretary-General, *supra* note 47.

92. Basel Convention, *supra* note 90, preamble.

pend upon the technologically developed states, it would seem that the pertinent states in this particular convention must be the most advanced industrial states of the world. The Basel Convention has been quite successful in attracting members from this category of states. All members of the EU, along with Japan, Peoples' Republic of China, the Russian Federation and several other highly industrialized states are parties to the treaty.[93]

The one notable absentee from the major industrialized parties to the treaty is the United States, which has signed, but not ratified the treaty.[94] (The US Senate consented to the ratification of the Basel Convention in August 1992; however, the Congress has not yet passed the domestic legislation necessary to comply with the treaty obligations.)[95] As noted already, the non-participation of a single pertinent state is not sufficient to conclude that a treaty fails to make instant custom. Once again, however, the absence of the United States raises questions of efficacy. The United States is the largest producer and one of the largest transporters of hazardous waste materials.[96] Of course, the signature of the United States on this document does indicate interim approval of its provisions, and given the often slow legislative process in the United States, ratification may yet be forthcoming. Still, the present status of this treaty with the US missing from the parties raises serious doubts about its general efficacy.

Nevertheless, the absence of the US alone does not disqualify the treaty from establishing instant custom, for the same reasons presented in our discussion of UNCLOS.[97] There is, however, another relevant issue here. With the participation of only about 60% of the world's states in the Basel Convention,[98] there is reason to question whether our first

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93. *See* Multilateral Treaties Deposited with the Secretary-General, *supra* note 47.

94. Presently, the United States is the only member of the Organization for Economic Cooperation and Development (hereinafter OECD) that has failed to become a party to the Basel Convention. *See, e.g.*, <http://www.un.org/Depts/Treaty/fin> (last modified Nov. 10, 1997).

95. Biggs, *supra* note 90, at 357.

96. *See*, ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, TRANSFRONTIER MOVEMENTS OF HAZARDOUS WASTES: 1992-93 STATISTICS 10-11 (1997). According to the OECD Report, "[d]ue to differences in national definitions of hazardous wastes, great caution should be exercised when using these figures." For example, "[t]he difference between the waste generation figures for US and Europe arises largely because the US defines large quantities of dilute wastewaters as hazardous wastes while in Europe, these materials are managed under water protection regulations." *Id.* A further difficulty in comparing the statistics is that the reporting year for the various OECD states varies considerably, with Austria reporting 1995 waste generation statistics and Spain reporting them from 1985. All other states fall somewhere in between. The United States waste generation statistics are for 1993. Even with all of the difficulties of comparison, however, the fact that the United States hazardous waste generation is nearly 80% of the total OECD waste generation surely makes the United States the largest producer of hazardous waste materials.

97. *See supra* notes 81-90 and accompanying text.

98. *See* Multilateral Treaties Deposited with the Secretary-General, *supra* note 47.

condition is satisfied. Unlike the Convention on Biological Diversity,[99] where 90% of the world's states are parties,[100] the 60% participation in the Basel Convention seems too slight to conclude that the treaty creates instant custom. Here too we might note that the absence of a major pertinent state may be considered more significant in cases where general participation involves only a modest majority of states. We cannot say, however, that the 60% participation is an insignificant number, particularly when a considerable percentage of pertinent states participate in the treaty.

This is a close call; if the United States does pass the necessary domestic legislation and become a party to the treaty, the strong stand taken by the pertinent states might then be sufficient to conclude that the Basel Convention formulates instant custom. Similarly, if the percentage of states ratifying the treaty increases, there would again be reason to suspect that the treaty formulates instant custom. At present, however, the issue seems too close to conclude safely that the consensus required to generate customary law is in evidence. Consequently, we will leave this treaty in the doubtful category. In any event, it is a relatively new treaty and seems to be well on its way to meeting our three part test for inclusion into Category II.

The Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") came into force on July 1, 1975.[101] There are 145 Parties worldwide to CITES.[102] We have not included CITES among those treaties not allowing reservations because while reservations to the general provisions of the Convention are prohibited, allowance is made for reservations pertaining to specific species of wild fauna and flora as listed in the Appendices to the Convention.[103] It is difficult to say if this provision should disqualify this treaty from being formative of customary international law, or whether the reservation provision is sufficiently specific to call for a relaxation of our no reservations test. One could argue for the latter, because it is highly unlikely that the specific species lists in the appendices are sufficiently generalizable to formulate customary international law.[104] On the other hand, states have made rather extensive use of the reservations to the

99. Biological Diversity Convention, *supra* note 44.

100. *See* Multilateral Treaties Deposited with the Secretary-General, *supra* note 47.

101. CITES, *supra* note 22.

102. *See* Multilateral Treaties Deposited with the Secretary-General, *supra* note 47.

103. CITES, *supra* note 22. Article XXIII, paragraph 1 of CITES states, *inter alia*, "[t]he provisions of the present Convention shall not be subject to general reservations. Specific reservations may be entered in accordance with the provisions of this Article and Articles XV and XVI." *Id.* at art. XXIII, para 1. Paragraph 3 goes on to state that "[u]ntil a Party withdraws its reservation entered under the provisions of this Article, it shall be treated as a State not a Party to the present Convention with respect to trade in the particular species or parts or derivatives specified in such reservation." *Id.* at para. 3.

104. According to Article XXIII, paragraph 3, a party having as reservation will be treated as not being a party to the treaty with respect to that particular species until such time as the reservation is withdrawn. *Id.* at art. XXIII, para. 3.

Appendices, and it could be argued that, therefore, the provision is sufficiently broad so as to possibly negate the effects of the entire treaty.[105]

As the name of the Convention indicates, its purpose is to insure that certain species are protected from exploitation as a result of their market value. Regulations throughout the Convention cover both the exporting states and importing states. That the Convention itself intends to develop customary international law on this subject is evidenced by the inclusion of regulations covering non-party states. Article X of CITES, "Trade with States Not Party to the Convention," requires that trade with non-party states ". . . substantially conform with the requirements of the present Convention. . . ."[106] With over 70% of the world's states as parties to CITES,[107] sufficient numbers are present to fulfill our criterion of widespread acceptance.

Analyzing the "pertinent states" condition under CITES is somewhat more difficult. Obviously in the case of trade in endangered species, both importing and exporting states fill the role of pertinent states. Although not all potential importing and exporting states are parties to the treaty there would seem to be sufficient numbers of both developing states and developed states to satisfy our pertinent states condition. Moreover, CITES continues to gain parties, perhaps partly because its provisions are extended even to non-parties and also because of global pressure regarding the trade in endangered species.[108] Between April 1996 and February 1999, an additional fifteen states became parties to CITES.[109] Thus the question regarding the no reservations test would seem to provide the greatest difficulty in determining with certainty if CITES qualifies as a treaty that is formative of customary international law.

V. CONCLUSION

An examination of the 41 global multilateral environmental treaties that are included in our study reveals that only ten of them meet our no-reservations test. Of these ten, we judged that eight definitely

105. By 1992, reservations had been made by 17 states regarding 17 taxa in Appendix I, by 4 states regarding 23 taxa in Appendix II, and by 11 states regarding 12 taxa in Appendix III. Sand, *supra* note 16, at 80.

106. CITES, *supra*, note 22, at 251.

107. *See* Multilateral Treaties Deposited with the Secretary-General, *supra* note 47.

108. "A major factor influencing the decision of many countries to become parties to CITES is the pressure that stems from adverse publicity about illegal or harmful wildlife trade and about the mortality of animals in the large-scale pet trade." Sand, *supra* note 16, at 81.

109. The sixteen states with their dates of ratification are: Mongolia, April 4, 1996; Saudi Arabia, June 10, 1996; Georgia, Dec. 12, 1996; Turkey, Dec. 22, 1996; Latvia, May 12, 1997; Swaziland, May 27, 1997; Jamaica, June 22, 1997; Yemen, Aug. 3, 1997; Myanmar, Sept. 11, 1997; Cambodia, Oct. 2, 1997; Antigua and Barbuda, Oct. 6, 1997; Uzbekistan, Oct. 8, 1997; Fiji, Dec. 29, 1997; Mauritania, June 11, 1998; Azerbaijan, Feb. 21, 1999.

satisfied our three part test. We determined that the remaining two treaties were in the doubtful category. This means, then, that only eight of the 41 relevant multilateral treaties can be considered to create instant customary international law binding on all states, regardless of their non-participation in them.[110]

It might be argued that the record of compliance with this instant customary international law is not good. Some of the treaties that we have included in our Category II do not have good records of compliance either from the parties or the non-parties. But, this is not the question that has concerned us here. Rather, we have explored the issue of obligations created for states on the basis of the formation of instant custom. Our three part test has taken a rather conservative view of the formation of customary international environmental law through the treaty process as evidenced by the exceedingly small number of treaties that we think qualify as customary law creating instruments. Our test merely points to those customary environmental law principles by which states should consider themselves bound. Whether they comply with these principles is a different question entirely. Attempting to add some certainty to the nature of customary legal obligations in international environmental law, nonetheless, should prove valuable in clarifying the network of binding legal obligations that exist in this issue area.

110. Oscar Schachter took an opposite view in 1991 when he wrote, "[e]nvironmental treaties, though numerous, are limited in scope and in participation. On the whole, they are not accepted as expressions of customary law and are regarded as binding for the parties alone." Schachter, *supra* note 1, at 462. Participation in certain of these treaties, however, has grown considerably since 1991 and, as our discussions above indicate, the scope covered by these environmental treaties has grown as well.