

ENVIRONMENTAL COOPERATION IN THE BALTIC REGION

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I.	THE CONCEPT OF THE "BALTIC REGION" IN AN ENVIRONMENTAL SENSE	

The concept of a Baltic Region is, of course, elusive.¹ At its narrowest, the concept may be taken to denote only the Baltic Sea and its immediate coasts, approximately 415,000 square kilometers of water surface and a coastline of

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1. It is doubtful whether the attempts to (re)construct a specific "Baltic identity," in the wake of recent political events in Eastern Europe, have much historical support. In fact, from a historic perspective, Baltic regionalism has never existed. Historical and cultural research may be used to support a wide variety of distinct and overlapping Baltic "identities." Thus, each identity is more a matter of political will than authentic discovery. See generally Ole Waever, *Culture and Identity in the Baltic Sea Region*, in CO-OPERATION IN THE BALTIC SEA REGION: NEEDS AND PROSPECTS 79, 79-111 (Joenniemi ed., 1991).

some 7,200 kilometers, which provide a home for about twenty million people.² In terms of human, economic and political geography, however, the immediate cohesive area of the Baltic is significantly larger. At present nine countries classify as littoral states of the Baltic Sea: Denmark, Estonia, Finland, Germany, Latvia, Lithuania, Poland, Russia and Sweden.

Merely listing Baltic coastal states, however, gives a distorted picture of the Baltic community, especially in an environmental sense. While Finland, Sweden, Poland, Estonia, Latvia and Lithuania are almost wholly situated in the Baltic "catchment area," only five percent of Germany, roughly twenty percent of Russia, and fifty percent of Denmark are situated in this area.³ As a biospheric unit, that is to say, as an "ecogeographical" whole,⁴ the Baltic is both less extensive than its corresponding political units and more extensive -- some of the largest polluters of the Baltic Sea are situated outside the region, in the Czech and Slovak Federal Republics and in the European Community.

The Baltic catchment area (drainage basin) denotes an area containing over one hundred rivers that flow into the Baltic and their dependent territories.⁵ The catchment area is about four times as large as the Baltic Sea proper and is inhabited by roughly 80 million people.⁶ Since the most significant source of pollution in the Baltic Sea is land-based pollution (pollution originating in inland sources and transmitted into the sea via rivers),⁷ it is evident that the catchment area must be treated as a whole to ensure successful protection of the Baltic environment.⁸

2. Arthur H. Westing, *Environmental Approaches to Regional Security*, in *COMPREHENSIVE SECURITY FOR THE BALTIC: AN ENVIRONMENTAL APPROACH* 1, 3-4 (Arthur H. Westing ed., 1989).

3. *Id.* at 3. See also *infra* note 5.

4. Westing, *supra* note 2, at 2-4.

5. Tynis O. Kassik, *The Geography of the Baltic Region*, in *COMPREHENSIVE SECURITY FOR THE BALTIC: AN ENVIRONMENTAL APPROACH* 15, 18 (Arthur H. Westing ed., 1989).

6. *Id.* at 16.

7. Holger Rotkirsch, *Ten Years of Environmental Co-operation in the Baltic Sea: An Evaluation and a Look Ahead*, 14 *AQUA FINNICA* 3, 8 (1984) (stating that land-based pollution constitutes 80 percent of total pollution load of Baltic).

8. Ludwik Zmudzinski, *Environmental Quality in the Baltic Region*, in *COMPREHENSIVE SECURITY FOR THE BALTIC: AN ENVIRONMENTAL APPROACH* 46, 51 (Arthur H. Westing ed., 1989).

II. THE CHARACTER OF THE ENVIRONMENTAL PROBLEM IN THE BALTIC

Since the Stockholm Conference of 1972, diplomats and international lawyers have debated the existence of internationally-shared resources, and disagreed as to whether states have a legal obligation to protect these resources.⁹ A thornier issue still is the determination of which of several sovereign states should bear the burden of repairing damaged shared resources. These difficulties are inherent in the Baltic situation. On the one hand, almost all of the Baltic Sea is within the maritime zones of its littoral states. On the other hand, any activity within these maritime zones is bound to affect areas beyond them. The international problem of pollution in the Baltic is thus crystallized in the fate of the Baltic Sea.

The Baltic Sea is now heavily polluted, depleted of oxygen, and overly rich in nutrients.¹⁰ As recently as the early 1960's, the Baltic Sea was still characterized by high transparency and low levels of biomass of phytoplankton and fish production. During the period of rapid industrialization in the 1960's and 1970's, however, the Baltic's water quality underwent a dramatic change for the worse.¹¹ About one fourth of the sea floor is currently in a "dead bottom" state, completely devoid of oxygen.¹² The root of the present situation is the environmental devastation prevailing in Eastern Europe or, put somewhat simplistically, the municipal wastes of St. Petersburg and the rivers of Poland.¹³

9. Martti Koskeniemi, *International Pollution in the System of International Law*, XVII OIKEUSTIETE-JURISPRUDENTIA 109, 109-13 (1984).

10. See generally *The Second Periodic Assessment of the State of the Marine Environment of the Baltic Sea 1984-1988: General Conclusion*, Baltic Marine Environmental Commission, Baltic Sea Env. Proc. No. 35 A (1990). For a partially differing assessment, cf. Zmudzinski, *supra* note 8, at 46-53.

11. Rotkirch, *supra* note 7, at 4 (stating that the level of pollution in Baltic was nearing "alarming state" by 1970). See also Bertil Lindwall, *The Ecological Situation of the Baltic Sea*, in POLLUTION OF THE BALTIC SEA: A TWO DAY SEMINAR ON LEGAL PROBLEMS CONCERNED WITH POLLUTION, UTÖ 14-15 SEPTEMBER 1985 4, 8 (1988).

12. Lindwall, *supra* note 11, at 7-11.

13. Timo Mäkelä, *Ympäristöyhdistyö Venäjän kanssa täynnä mahdollisuuksia*, 1 ULKOPOLITTIKKA (Finnish Journal of Foreign Affairs) 38 (1992). The problems in Eastern Europe are grave; chemical plants are situated in the middle of human settlements and radioactive substances have been routinely dumped into the neighboring sea areas. For instance, in Poland 33% of the population live in what could be designated as environmental catastrophe areas. Marlies Simons, *Upheaval in the East: Rising Iron Curtain Exposes Haunting Veil of Polluted Air*, N.Y. TIMES, Apr. 8, 1990, at A1. Over 50% of the children in Katowice suffer from chronic lung diseases. The average life expectancy in

The environmental vulnerability of the Baltic Sea can be attributed to certain unusual characteristics, two of which are noteworthy. First, the replacement time of Baltic waters is very slow. It takes approximately twenty-five years for ninety percent of the Baltic waters to be replaced via evaporation and eflux through the narrow channels formed by the Danish straits to the North Sea.¹⁴ Second, the Baltic is a very shallow sea: its median depth is only 55 meters, and its deepest point is 459 meters.¹⁵ Due to these factors, any amount of pollutant released into the Baltic water mass will have an unusually long-lasting and severe effect.

The central environmental problem facing the Baltic Sea is oxygen depletion and the eutrophication connected with that depletion.¹⁶ This process is caused mainly by the flows of nitrogen and phosphorus that enter the Baltic from dispersed municipal, industrial and agricultural sources.¹⁷ Of these sources, the agricultural inputs are the single most important factor, but unfortunately are also the most difficult to regulate.¹⁸ Approximately 300,000 metric tons of nitrogen and 50,000 metric tons of phosphorus enter the Baltic Sea annually.¹⁹ Poland's Vistula River alone accounts for approximately forty

Bohemia, in former Czechoslovakia, is 52 years, which is ten years less than the Czech average. Charles Clover, *West Declares War on East's Industrial Legacy of Death*, THE DAILY TELEGRAPH, Jun. 18, 1990, at 8. In the areas of Montshegosk and Nickel in the Kola Peninsula in Russia, the life expectancy may be as low as 44 years. *This Would Scare Anybody*, SUNDAY TIMES (London), Apr. 17, 1990, Features Section, at 1.

Though there are no pan-Baltic programs to "clean up Eastern Europe," several national assistance programs to this effect have been initiated. Tamara R. Crockett and Cynthia B. Schultz, *Environmental Protection Issues in Eastern Europe*, 13 INT'L ENVTL. REP. (BNA) No. 6, at 258 (Jun. 13, 1990). Finland, for example, despite the serious economic recession it is facing, has budgeted around 200 million FIM for bilateral environment protection in Eastern Europe during 1990-1992. In areas neighboring Finland (Carelia, St. Petersburg, Estonia) sixteen projects have been commenced to aim at 10-20% emission reductions in Finland and a 50% reduction in the emission of phosphates into the Gulf of Finland.

14. Kassik, *supra* note 5, at 19.

15. *Id.* at 16.

16. Zmudzinski, *supra* note 8, at 50-51.

17. *Id.* at 50.

18. *Id.* at 32.

19. See *Airborne Pollution Load to the Baltic Sea 1986-1990*, Baltic Marine Environment Protection Commission, Baltic Sea Environment Proceedings No. 39 (1990) [hereinafter HELCOM Proceedings No. 39]. About 90% of the phosphorus and 50% of the nitrogen enters the Baltic through land-based sources (primarily rivers). Most of the rest is long-range air pollution.

percent of the nitrogen pollution.²⁰

In addition to nitrogen and phosphorous, the Baltic is being polluted by DDT and PCB's, although the amounts of these pollutants have decreased since 1974 (with the exception of some local areas).²¹ Loads of heavy metals, such as copper, zinc, lead, cadmium, mercury and their compounds, are present in the Baltic and generally show an upward trend.²² Discharges of oil in the region are approximately 50,000 metric tons per year, but are steadily decreasing.²³

Beyond the problems of pollution in the Baltic Sea, the Baltic region suffers from environmental dilemmas not directly connected with management of the marine environment. Three areas are especially significant with regard to intergovernmental attempts to control pollution. First, the Baltic states are particularly concerned with pollution of frontier waters and boundary rivers. For example, the boundary rivers between Finland and Sweden, Finland and Norway, and Finland and Russia have at times been subjected to heavy pollution. The use of many frontier rivers is now managed by international river commissions that enjoy wide power to regulate the non-navigational uses of rivers, and even limited power to enforce their decrees by penalties (particularly the Finnish-Swedish Commission).²⁴ Unfortunately, central European rivers flowing into the Baltic are not similarly controlled.

A second area of concern and intergovernmental negotiation is protection from actual or potential nuclear pollution in the region. Several nuclear facilities in the area of the former Soviet Union are situated within or close to the Baltic region, both in the Baltic republics and in the vicinity of St. Petersburg in Russia. The Chernobyl incident of April 1986 demonstrated that fall-out resulting from a reactor incident in the Ukraine could have consequences as far north as Lapland and, of course, throughout the Baltic region. This danger was clearly demonstrated to a high-level international audience when the Sosnovi Bor reactor, near St. Petersburg, underwent an operating failure during the first days of the on-going Conference on Security and Cooperation in Europe (CSCE) follow-up meeting in Helsinki in March of 1992.

20. MALOOSIA FITZMAURICE, *INTERNATIONAL LEGAL PROBLEMS OF THE ENVIRONMENTAL PROTECTION OF THE BALTIC SEA* xxvi (1992).

21. Zmudzinsky, *supra* note 8, at 49.

22. *Id.*

23. *Id.*

24. For a discussion of the Finnish-Swedish Frontier Rivers Agreement, see Pierre Dupuy, *The Joint Management of International Hydrographic Basins and Positive International Law*, in OECD, *ENVIRONMENTAL PROTECTION IN FRONTIER REGIONS* 191, 191-3 (1979).

Two international conventions adopted in 1986 by the International Atomic Energy Agency²⁵ (to which all the "old" -- i.e. not counting Estonia, Latvia, and Lithuania -- Baltic countries are parties) regulate state action during a nuclear emergency. Contracting parties are required to give early notification and to lend assistance in the event of a nuclear accident. Given well-publicized concerns regarding the safety of reactors in former Soviet bloc countries, grave uncertainties about the effectiveness of these conventions still persist. Proposals to strengthen the systems of emergency notification, with an eye on these potentially dangerous Eastern European power plants, have not yet led to concrete action.

Finally, acid rain and other long-range transboundary air pollution have also led governments to attempt intergovernmental controls. Many air pollutants capable of long-range transport via wind currents, such as sulphur and nitrogen oxides, originate outside the Baltic Region.²⁶ All of the old Baltic states are parties to the 1979 Geneva Convention on Long-Range Transboundary Air Pollution, and all but Poland are parties to both of its emission reduction protocols.²⁷ The states have thus committed themselves, at a minimum, to reducing the levels of their sulphur emissions and to stabilizing their nitrogen emissions by 1994. Some states have made individual pledges requiring more far-reaching reductions. In addition, the Economic Commission for Europe (ECE) monitoring program measures the emissions and their sources that are relevant to the Baltic. Nevertheless, it is uncertain whether the effectiveness of these multilateral arrangements is sufficient to protect the vulnerable Baltic environment and particularly its most vulnerable part, the Arctic. Acid rain from the nickel production and smelting facilities in the Kola Peninsula in Russia is rapidly destroying the area; emissions from that area equal the emissions of the whole of Finland.

Pollution control is not the only environmental concern of the Baltic states that has led to interstate cooperation. As a result of heavy overfishing, the total amount of fish in the Baltic is declining rapidly. From a total of 6.9 million metric tons in 1970, the annual fish catch dropped to 5.0 million metric tons in

25. See Convention on Early Notification of Nuclear Accidents, opened for signature Sept. 26, 1986, 25 I.L.M. 1370 (entered into force Oct. 27, 1986); Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, Sept. 26, 1986, 25 I.L.M. 1377 (1986).

26. See HELCOM Proceedings No. 39, *supra* note 19.

27. For a list of international environmental treaties joined by Baltic states, see *infra* note 35.

1985, and is now possibly lower.²⁸ This represents a thirty percent decline in fifteen years. Herring and sprat comprise the largest part of the annual catch with Polish and former Soviet fishermen catching a majority of the total (67% of the total herring catch and 79% of the total sprat catch).²⁹ Sea trout and cod are also overfished.

The Gdansk Commission, an interstate regulatory body, was created to address the problem of overfishing in the Baltic Sea. The Commission makes annual recommendations on the total allowable catches of herring, sprat, cod and salmon. Although objecting parties are not bound by the its recommendations, the Commission has worked "reasonably well."³⁰ However, to ensure compliance, the Commission determines its recommendations more with an eye toward the capacities of national fishing fleets than toward the long-term sustainability of fishing in the Baltic Sea.³¹

Despite the wide variety of environmental issues facing the Baltic region, the most important environmental problem remains the pollution of the Baltic Sea. As a result, until recently, the bulk of multilateral Baltic cooperation has been directed at controlling Baltic pollution.

III. THE HISTORY OF BALTIC COOPERATION IN ENVIRONMENTAL PROTECTION AND BALTIC RESOURCE CONSERVATION

Environmental pollution in the Baltic is essentially a post-war problem, and thus the history of efforts to control pollution is dominated by the post-war political antagonism so evident in this region. Of the seven post-war Baltic states, three belonged to the Warsaw Pact (East Germany, Poland and the Soviet Union), two were members of NATO (West Germany and Denmark) and two claimed to be neutral (Finland and Sweden).³² The problem of Western non-recognition of East Germany, in particular, posed an obstacle to multilateral cooperation in the environmental field.

Hence, until the *Ostpolitik* bore fruit through recognition of the German

28. Fritz Thurow, *Fishery Resources of the Baltic Region*, in *COMPREHENSIVE SECURITY FOR THE BALTIC: AN ENVIRONMENTAL APPROACH* 54, 55 (Arthur H. Westing ed., 1989).

29. *Id.* at 55.

30. Arthur H. Westing, *International Baltic Sea Fishery Commission*, in *COMPREHENSIVE SECURITY IN THE BALTIC: AN ENVIRONMENTAL APPROACH* 72, 73 (Arthur H. Westing ed., 1989).

31. FITZMAURICE, *supra* note 20, at 5, 21-24.

32. Westing, *supra* note 2, at 6-7.

status quo in the early 1970's, all environmental cooperation among Baltic Sea states was bilateral, sub-regional, or took place within a larger European or global context. Early bilateral cooperation concentrated on the protection of particular frontier areas (most commonly frontier rivers).³³ More recently, agreements have been concluded, in particular between Eastern European and Western European states, to create bilateral frameworks of cooperation between national environmental authorities.³⁴

Since the early 1970's, the Baltic states have participated in a number of non-regional international conventions on environmental protection.³⁵ Political changes in Eastern Europe, however, have modified Baltic nations' participation in these treaties. As the successor state to the Soviet Union, Russia is bound by Soviet treaty agreements.³⁶ However, the secessionist Baltic Republics are following a virtual "clean slate" policy, and participation seems to require the

33. See, e.g., Agreement on the Frontier Waters, Fin-USSR, Apr. 24, 1964, 537 U.N.T.S. 231; Frontier Rivers Agreement, Fin-Swed., Sept. 16, 1971, 825 U.N.T.S. 191.

34. See, e.g., Agreement on Cooperation in the Field of the Environment, Fin.-U.S.S.R., July 5, 1985 Finnish Treaty Series 1/1986; Agreement on Combatting the Accidental Pollution of the Baltic Sea by Oil and Other Harmful Substances, Fin.-U.S.S.R., Oct. 26, 1989 Finnish Treaty Series 54/1990.

35. See generally Bengt Broms, *Multilateral Agreements in their Baltic Region*, in *COMPREHENSIVE SECURITY IN THE BALTIC: AN ENVIRONMENTAL APPROACH* 62, 62-71 (Arthur H. Westing ed., 1989). All of the original seven states (Denmark, East and West Germany, Finland, Poland, Sweden, and the Soviet Union) were parties to: the 1971 Ramsar Convention on Wetlands of International Importance Especially of Waterfowl Habitat, Feb. 2, 1971, T.I.A.S. No. 11084; the 1972 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention for the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 1037 U.N.T.S. 151; the 1979 Economic Commission for Europe (ECE) Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, T.I.A.S. No. 10547, 18 I.L.M. 1442, and its related 1988 Sofia Protocol on Long-Range Transboundary Air Pollution Concerning Nitrogen Oxides, Oct. 31, 1988, 28 I.L.M. 214; the 1985 Helsinki Protocol on Long-Range Transboundary Air Pollution on Sulphur Emissions, July 8, 1985, 27 I.L.M. 707 (excluding Poland); and the 1985 Vienna Convention on the Protection of the Ozone Layer, Mar. 22, 1985, 26 I.L.M. 1529, and its related 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, Sep. 16, 1987, 26 I.L.M. 1550. All of the states are now parties to the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora, opened for signature Mar. 3, 1973, 993 U.N.T.S. 243 (joined by Poland on March 12, 1990). All have also signed the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Mar. 22, 1989, 28 I.L.M. 657, and the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, 30 I.L.M. 800.

36. On the notion of "continuation" in contrast to "succession" as the better characterization of Russia's legal position vis-a-vis the U.S.S.R. cf. Martti Koskenniemi - Marja Hehto, *La Succession d'Etat dans l'ex - URSS, en ce qui concerne particulièrement les relations avec la Finlande*, XXXVIII *Annuaire français de droit international* (1992).

republics to accede to each treaty individually. There is no reason to suppose such accessions will not be forthcoming, although the economic hardships resulting from these societies' political transformation may somewhat offset their commitment to environmentalism.

A number of additional environmental treaties link together sub-segments of the group of Baltic countries, particularly the Nordic countries. One significant example is the 1974 Nordic Convention on the Protection of the Environment,³⁷ which incorporates the principles of equal access and non-discrimination among Nordic citizens. According to the Nordic Convention: "...the nuisance which ...[polluting]...activities entail or may entail in another Contracting State shall be equated with a nuisance in the State where the activities are carried out."³⁸ The Convention gives *locus standi* before courts and administrative officials to all Nordic nationals affected by pollution originating in any of the Nordic states.³⁹

Recently, Bjorn Engholm, the Premier of Schleswig-Holstein, supported by Anatoly Sobtshak, the Mayor of St. Petersburg, and the Foreign Ministers of Finland and Denmark, proposed establishing a Baltic Council that would be a broad cooperative venture among nations of the region concentrating primarily on economic, cultural and traffic relations, but also on environmental concerns. This idea was made possible by the political changes in Eastern Europe, and has received some publicity. Subsequent to this proposal, the foreign ministers of the Baltic states met in Copenhagen on March 5-6, 1992 and established the Baltic Council, in the form of a rotating conference of foreign ministers without a secretariat, to be held once a year.⁴⁰ As far as environmental matters were concerned, less was decided upon than press reports might suggest: the meeting determined that the work of the Helsinki Commission would be given support while the Council's own focus would be on energy cooperation and nuclear safety. It is still too early to assess the prospects of this novel cooperative venture.

37. Convention on the Protection of the Environment, Feb. 19, 1974, 1092 U.N.T.S. 279, 15 I.L.M. 296 (entered into force Oct. 5, 1976).

38. *Id.* at 279.

39. Another agreement linking the Nordic nations is the Copenhagen Agreement Between the Nordic Countries on Joint Action to Combat the Pollution of the Sea by Oil, Sept. 16, 1971, 822 U.N.T.S. 311.

40. See Declaration of Conference of Foreign Ministers of the Baltic Sea States, March 5-6 1992.

In general, however, pan-Baltic inter-state cooperation has been rare.⁴¹ Its history begins with the 1973 Baltic Fisheries Convention (Gdansk Convention)⁴² and the 1974 Convention on the Protection of the Baltic Sea Area (Helsinki Convention).⁴³ This history is bound up with the détente in East-West relations in the early 1970's, and the so-called "Helsinki Process," the principles of which were laid down in the Helsinki Final Act of 1975.⁴⁴

In 1972, Finland offered to host a regional conference on the protection of the Baltic Sea. A preparatory conference was convened in Helsinki in 1973, and the Baltic Sea Conference adopted the Helsinki Convention on March 22, 1974.⁴⁵ The Helsinki Convention was not, however, the first environmental creation that arose out of the Nixon-Brezhnev détente; the Gdansk Convention had been signed six months earlier.⁴⁶

These two "sub-regional structures of détente"⁴⁷ are rather similar: both are framework treaties that establish a permanent commission and an international secretariat. At the creation of the two conventions, their

41. This applies to inter-State governmental cooperation. Forms of cooperation between Baltic scientists, concentrating on the shared marine environment, have existed since the beginning of the century. The International Council for the Exploration of the Seas (ICES) was established in 1902 and a Conference of Baltic Oceanographers (later Baltic Marine Biologists) in 1957.

42. 1973 Convention on Fishing and the Conservation of the Living Resources of the Baltic and the Belts, Sept. 13, 1973, 12 I.L.M. 1291 [hereinafter Gdansk Convention].

43. 1974 Convention on the Protection of the Marine Environment of the Baltic Sea Area, Mar. 22, 1974, 13 I.L.M. 544 (entered into force, May 3, 1980) [hereinafter Helsinki Convention].

44. The Final Act itself contained a section on environmental protection that set down the objectives, fields, and forms of European cooperation. See C.S.C.E. Final Act: Cooperation in the Field of Science, Technology and Environment Protection, Section Five. As a tangible result of initiatives within the CSCE, three international conventions have been recently adopted within the UN Economic Commission for Europe (ECE): the Espoo Convention on Environmental Impact Assessment in a Transboundary Context, *supra* note 35; the Convention on Transboundary Effects of Industrial Accidents, Mar. 17, 1992, ECE Doc. ENVWA/R.54, 31 I.L.M. 1330; and the Convention on the Use and Protection of Transboundary Watercourses, Mar. 18, 1992, 31 I.L.M. 1312.

45. Helsinki Convention, *supra* note 43.

46. See Gdansk Convention, *supra* note 42. See also Hans Danelius, *Ten years of Fishery Cooperation in the Baltic Sea*, in FINNISH BRANCH OF THE INTERNATIONAL LAW ASSOCIATION: ESSAYS IN HONOR OF BERNDT GODINSHJELM 42, 42-54 (E.J. Manner and Sigurd von Numers eds., 1984); see also J.E. Caroz, *The Management of Living Resources in the Baltic and the Belts*, 4 OCEAN DEVEL. & INT'L L.J. 213, 215 (1977).

47. Unto Vesa, *Political Security in the Baltic Region*, in COMPREHENSIVE SECURITY IN THE BALTIC: AN ENVIRONMENTAL APPROACH 35, 41 (Arthur H. Westing ed., 1989).

memberships were also identical. With more recent political developments, however, significant changes have occurred. The creation in 1977 of the Common Fisheries Policy (CFP) within the European Community (EC) gave the European Commission competence to regulate fishing activities within the EC, and externally between EC members and outsiders.⁴⁸ Thus, pressure arose to make the EC a party to the Gdansk Convention, which culminated in an 1982 agreement to allow EC entry into that Convention.⁴⁹

As the EC also had competence in the field of pollution regulation (and particularly regulation of land-based pollution), the question of whether Denmark and West Germany could become members in their own right of the Helsinki Commission became acute. No agreement could be reached to allow the EC direct membership in the Convention because the Soviet bloc countries refused to accept the international legal personality of the Community. The matter was resolved when Denmark and West Germany individually entered the Convention in 1977 and 1980, respectively. Upon entry, both nations made declarations advocating direct EC participation in the Helsinki Convention and the Helsinki Commission.⁵⁰ EC membership was not possible, however, until the adoption in 1992 of the new Helsinki Convention, which expressly provides for it.⁵¹

Today, environmental cooperation in the Baltic is organized principally around the Helsinki Commission, and the Gdansk Commission enjoys exclusive authority in the regulation of Baltic fisheries. The importance of the Nordic Council has diminished as the focus has shifted toward pan-Baltic cooperation, with increasing input from the CSCE and the EC. Initiated by Finland in 1989 to increase protection of the Arctic environment, the "Rovaniemi process" has also supported a new spirit of cooperation among Baltic countries, though the

48. Malgosia Fitzmaurice, *Common Market Participation in the Legal Regime of the Baltic Sea Fisheries*, 33 GERMAN Y.B. INT'L L. 214, 215-217 (1990).

49. See generally Fitzmaurice, *supra* note 48.

50. FITZMAURICE, *supra* note 20, at 26-27.

51. *Baltic Sea Environmental Declaration 1992*, Diplomatic Conference on the Protection of the Marine Environment of the Baltic Sea Area, Conf. Doc. No. 5/1 (Apr. 9, 1992) (The convention on the Protection of the Marine Environment of the Baltic Sea 1992 [hereinafter *New Helsinki Convention*]) was adopted together with the Declaration and the Final Act on Conf. Doc. No.4 (Apr. 9, 1992). A copy is on file with the *Journal*. Article 34 of the Convention expressly provides for EC membership.

aims of that process are beyond the scope of this article.⁵²

IV. THE HELSINKI CONVENTION

The most important all-Baltic multilateral cooperative framework is the 1974 Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area.⁵³ The political background of the Helsinki Convention is directly linked to the period of *détente* and the settlement of the German question. Once the *modus vivendi* of the existence of the two Germanies had been attained, multilateral cooperation aimed at formalized agreements between all the Baltic states became possible.⁵⁴ After the Finnish initiative and a short preparatory conference in 1973, seven countries signed the Helsinki Convention in 1974: Denmark, West Germany, Finland, East Germany, Poland, the Soviet Union and Sweden.⁵⁵ An interim commission began to implement the Convention virtually immediately after the Convention's signing.⁵⁶ West Germany deposited its ratification, the final instrument of ratification, in March 1980, and the Convention entered into force on May 3, 1980.

The Helsinki Convention is among the first regional conventions on environmental matters. It has served as an example to the relatively successful regional seas program carried out within the United Nations Environmental Program (UNEP), which now lists nine instruments on regional seas areas.⁵⁷ The Convention is also important because it takes a "total" approach, one that is not restricted to particular sources or substances of pollution, but instead may

52. As a result of a Finnish initiative in January 1989, a process started which culminated in a ministerial meeting in Rovaniemi in June 1991. This meeting led to signature of a Declaration on the Protection of the Arctic Environment, adoption of an Arctic Environmental Protection Strategy and adoption of a Joint Action Plan. For the background and objectives of the process, see David D. Caron, *Arctic*, 1 Y.B. INT'L ENVTL. L. 181, 181-185 (1990). Though the Baltic Sea is not a part of the Arctic environment as such, three Baltic Sea States, Finland, Sweden and Russia, are also members of this process. Any protective action under the Arctic Environmental Protection Strategy is also likely to have an impact on their Baltic coasts.

53. Helsinki Convention, *supra* note 43.

54. See Rotkirch, *supra* note 7, at 5-7. See also Boleslaw A. Boczek, *International Protection of the Baltic Sea Against Pollution*, 72 AM. J. INT'L L. 782, 782-814 (1978).

55. Rotkirch, *supra* note 7, at 6.

56. Helsinki Convention, *supra* note 43, at Annex B, Resolution 7.

57. Rotkirch, *supra* note 7, at 7 n.2, 8.

regulate any of them.⁵⁸

A. *The Structure of the Helsinki Convention*

The Convention's geographical scope of application includes the Baltic Sea proper, together with the Gulf of Finland, Gulf of Bothnia, and the Danish straits up to the Skaw in the Skagerrak.⁵⁹ It applies to the few high seas areas still existing in the Baltic and also to the territorial seas and the exclusive economic and fishery zones of the Contracting Parties.⁶⁰ One significant weakness, however, is that internal waters, waters inward of the baseline measuring the beginning of the territorial sea, are not covered by the Convention.⁶¹ In fact, this excludes many of the areas where land-based pollution enters the sea: roadsteads, mouths of rivers, bays and activities in estuarine areas.⁶² This defect has been corrected in the new draft Convention adopted in 1992. In addition, the Convention does not apply to warships or other state-owned vessels used for non-commercial purposes.⁶³

The bulk of the Convention consists of substantive and organizational provisions, in addition to which a number of special provisions are of interest. The substantive provisions deal with particular sources of pollution and particular polluting substances. These provisions establish general obligations and fundamental principles,⁶⁴ define hazardous substances,⁶⁵ land-based pollution,⁶⁶ pollution from ships,⁶⁷ dumping⁶⁸ and seabed activities.⁶⁹

58. *Id.* at 8.

59. *Id.*

60. *Id.*

61. *Id.*

62. Helsinki Convention, *supra* note 43, at 548, art. 4, para. 3 (stating that the parties should ensure "without prejudice to their sovereign rights" that the purposes of the Helsinki Convention are attained also in these areas).

63. *Id.* at 548, art. 4, para. 4 (stating that contracting parties have pledged to follow, insofar as "reasonable and practicable," the provisions of the Helsinki Convention in operating state-owned vessels).

64. *Id.* at 547, art. 3.

65. *Id.* at 548, art. 5.

66. *Id.* at 548-9, art. 6.

67. *Id.* at 549, arts. 7, 8.

68. *Id.* at 549-50, art. 9.

The legislative technique used by the Convention is to adopt so-called blacklists of prohibited substances and greylists of regulated substances. In other words, the introduction of certain substances into the Baltic Sea, listed in Annex I of the Convention ("hazardous substances"), is simply prohibited. Examples of these blacklisted substances are DDT, PCB and PCT.⁷⁰

The introduction of certain other substances into the marine environment requires a prior special permit issued by the competent national authority, theoretically in accordance with the various recommendations given by the Helsinki Commission (HELCOM). The national authority is then required to notify HELCOM of the issuance of the permit. These greylisted substances (Annex II) include heavy metals such as mercury, cadmium, copper, zinc, lead, phosphorus, and most herbicides, pesticides, and radioactive materials.⁷¹ It should be noted that the greylist concerns only substances that might reach the Baltic through land-based sources.⁷² Intentional dumping of all substances into the Baltic Sea is categorically prohibited by Article 9 of the Convention, with the single exception of dredged spoils, dealt with in Annex V of the Convention.

The organizational and cooperative provisions of the Convention deal principally with the establishment of the Helsinki Commission and its administrative and financial roles.⁷³ In addition, there are rules regarding cooperation in combatting environmental difficulties and in scientific and technological research and monitoring of the state of the Baltic.⁷⁴

Finally, a series of residual provisions deal with legally interesting subjects such as responsibility and liability for pollution,⁷⁵ dispute settlement,⁷⁶ and the adoption and amendment of annexes to the Convention. A special provision reserves several rights presently enjoyed by all states, such as freedom of navigation and fishing, marine scientific research, and innocent passage.⁷⁷

The Convention failed to establish new rules regarding liability for

69. *Id.* at 550, art. 10.

70. *Id.* at 555, Annex I.

71. *Id.* at 556, Annex II.

72. *Id.*

73. *Id.* at 550-1, arts. 12-15.

74. *Id.* at 552, art. 16.

75. *Id.* at 552, art. 17.

76. *Id.* at 552, art. 18.

77. *Id.* at 552, art. 19.

pollution. It merely refers back to the general rules of international law (rules on which there is much uncertainty today) and directs the Contracting States to develop more specific mechanisms "as soon as possible" in the future.⁷⁸ In fact, since 1980, five informal legal workshops have met to consider the development of rules on liability for pollution. These workshops have dealt both with the private polluter's liability in connection with compulsory insurance or funding schemes and the source state's international liability. A study was prepared on national measures of liability and compensation. No normative action has, however, been attained in this very difficult field, and the workshops have been discontinued since 1988.⁷⁹ The new 1992 draft Convention makes no progress in this respect. The only amendment was the deletion of the words "as soon as possible" from the commitment to develop new rules on liability and compensation.⁸⁰

The Convention also contains six annexes: two specifying black and greylisted substances (Annexes I-II), one specifying goals and criteria for eliminating land-based pollution (Annex III), one on prevention of pollution from ships (Annex IV, which builds on provisions in the 1974/78 MARPOL), one defining an exception for dumping of dredged spoils (Annex V), and finally, one requiring cooperation in combatting marine pollution (Annex VI).

B. *The Helsinki Convention in Practice*

Implementation of the Helsinki Convention began immediately after signature and well before its entry into force through the interim commission.⁸¹ The interim commission met annually between 1975 and 1980, using the services

78. *Id.* at 552, art. 17.

79. Cf. Maatti Koskenniemi, *Peaceful Settlement of Environmental Disputes*, 60 N.J. INT'L L., 70, 89-90 (1991). See generally Zdzislaw Brodecki, *Damage to the Baltic: the Future of International Liability*, in POLLUTION OF THE BALTIC SEA: A TWO-DAY SEMINAR ON LEGAL PROBLEMS CONCERNED WITH POLLUTION, UTÖ 14-15 SEPTEMBER 1985 16, 16-44 (1988).

80. New Helsinki Convention, *supra* note 51, art. 25.

81. Provisional application is often necessary to guarantee the effectiveness of a convention because the signature process required for multilateral conventions to enter into force frequently takes a number of years (the Helsinki Convention took six years). See generally Peter H. Sand, *Lessons Learned in Global Environmental Governance*, 18 B.C. ENVTL. AFF. REV. 213, 237-239 (1991) (discussing the necessity for provisional application of multilateral conventions in order to facilitate their effectiveness). Foundation for provisional application of treaties is provided in Article 25 of the Vienna Convention on the Law of Treaties. See Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 U.N.T.S. 331, 338, art. 25 [hereinafter Vienna Convention].

of the Finnish Ministry for Foreign Affairs. It was organized in a way that foreshadowed the organization of the Helsinki Commission (HELCOM or the Commission) itself and adopted fifteen recommendations on the implementation of the Convention. All of these interim commission recommendations were endorsed by the Commission as it began its work in 1980.

The present HELCOM is an intergovernmental organization with headquarters and a permanent secretariat based in Helsinki, Finland. The Commission meets once a year and has four standing committees which carry out relevant preparatory work. The four committees are the Environmental, Technological, Maritime and Combatting Committees.

C. *The Powers of the Helsinki Commission*

To judge the effectiveness of the Helsinki Commission, one must question its legal authority. Can it make binding decisions? Are its decisions, in fact, implemented by the members? Can it enforce its decisions?

At its annual meetings, the majority of the Commission's actions are termed "recommendations" on any of the varied subjects within its extensive sphere of competence. To date, the total number of such recommendations exceeds one hundred. For example, in 1990, the Commission passed eleven recommendations establishing guidelines on reception facilities in ports, investigating violations of discharge regulations on ships, amending some of the technical provisions of the Annexes to the Convention and minimization of pollution from offshore installations. The following year, the Commission passed thirteen recommendations on items such as reduction of discharges from urban areas, the kraft pulp industry, and the iron and steel industries, national regulations regarding discharge of sewage into national waters, the reduction of air pollution from ships, and amendments to certain annexes to the Convention. In other words, the Commission routinely makes recommendations on the implementation of the Convention's broad obligations.⁸²

The Convention itself does not specify the legal character of the decisions of the HELCOM or its subsidiary bodies. As is customary with international organizations, HELCOM can, under the express terms of the Convention, undertake binding decisions in matters related to its internal administration (decisions that relate to Commission rules, procedure or financial matters),⁸³ but the Commission has no general power to bind the Member States.

82. Cf. FITZMAURICE, *supra* note 20, at 72-82. See also Boczek, *supra* note 54, at 808-810.

83. Helsinki Convention, *supra* note 43, at 551, arts. 14, 15.

Despite HELCOM's inability to bind Member States, all of its decisions must be taken through a lengthy consensual process in which unanimity is required on draft proposals at preparatory stages. Therefore, a draft recommendation that survives until the annual HELCOM session is bound to encounter no objection. Member States are free to accept or reject recommendations regardless of whether their representatives participated in their adoption, and perhaps even regardless of whether their representatives were behind the very initiative leading to the recommendation. The only obligation of Member States is to consider recommendations in good faith.

The Convention can only be amended by unanimous, positive decision of the parties.⁸⁴ In contrast, the Commission may suggest the adoption and amendment of Annexes, considered to be integral parts of the Convention and thus formally binding. The parties may object to any amendment proposal within a time period fixed by the Commission. If no objection is received, the annex or the amendment is deemed to have been accepted.⁸⁵

Recommendations are a flexible way of implementing the Convention. They allow consideration of particular situations and economic capabilities of the contracting parties. Thus, for example, the adoption of a recommendation on the establishment of reception facilities in ports does not have to wait until all the parties have the technical ability to introduce such facilities (a problem that delayed the early ratification of the Convention by some countries).⁸⁶ Providing for exceptions and individualized time-tables may often be a necessary precondition for the attainment of any international action at all.⁸⁷

Article 13 of the Convention does give the HELCOM the power to survey implementation of the Convention.⁸⁸ However, this has not been interpreted as power to enforce the provisions of the Convention, but instead merely as power to adopt measures to monitor the state of the Baltic Sea. No procedures have been adopted granting the Commission the power to enforce its recommendations or Convention provisions on recalcitrant states. Compliance observation remains a national matter. For example, Article 9 of the Convention provides that states must ensure that ships within their jurisdiction or control act

84. *Id.* at 553, art. 22.

85. *Id.* at 553-4, art. 24.

86. *Cf.* Boczek, *supra* note 54, at 807.

87. *See* Sand, *supra* note 81, at 236-248.

88. *Id.* at 550-1, art. 13.

in accordance with the prohibition against dumping.⁸⁹ However, there is no provision ensuring that the state actually fulfills this task.

In fact, the binding character of the Convention itself is in some doubt. Of course, as a treaty, duly ratified by the contracting parties, it is formally in force between them. Nevertheless, three problems emerge regarding the Convention's ability to bind the Contracting States.

First, it is unclear to what extent the many of its standards succeed in establishing obligations of conduct. The fundamental obligation in Article 3, for example, says that the parties "...shall individually or jointly take all appropriate legislative, administrative or other relevant measures in order to prevent and abate pollution and to protect and enhance the marine environment of the Baltic Sea Area."⁹⁰ What are appropriate measures? As a statement of the policy and objectives of the parties, this formulation is clear; however, it is doubtful whether this policy statement permits a definitive determination of a state's obligations or breach thereof.⁹¹ The state's international obligations likewise are formulated throughout the Convention in terms of taking appropriate legislative, administrative and other action.⁹² The Convention's provisions are not self-executing:⁹³ they do not oblige the state to prevent pollution, but instead oblige the Contracting Party to have legislative and administrative machinery available to combat pollution within its jurisdiction or control. The state's obligations are those of a *paterfamilias*, a duty of care, a standard that varies locally and is intrinsically linked with appreciation of the state's economic and

89. *Id.* at 549, art. 9.

90. *Id.* at 547, art. 3.

91. The problems surrounding the "soft law" character of the provisions of environmental framework conventions have often been discussed. See Guenther Handl, *Environmental Security and Global Change: The Challenge to International Law*, 1 Y.B. INT'L ENVTL. L. 3, 15-16 (1990). The advantages of flexibility must in each case be weighed against the "... significant degree of indeterminacy of the normative landscape thus being created..." *Id.* at 6.

92. See generally Helsinki Convention, *supra* note 43, at 555-590, Annexes I-VI. Even the technical annexes are so formulated as to cast doubt on whether they are any more than statements of objectives. Annex III, for example, lists the goals, criteria and means of reducing land-based pollution. *Id.* at 557, Annex III, para. 3. The significant issue of municipal wastes is treated by a single provision which requires that wastes "shall be minimized in an appropriate way in order to reduce the amount of harmful substances." *Id.* at 557, Annex III. Such a provision, without reference to calculations of cost, time-tables or means of measuring reductions, cannot be expected to create a strong incentive for dramatic reductions.

93. ALEXANDRE KISS, *DROIT INTERNATIONAL DE L'ENVIRONNEMENT* 52 (1990).

other capacities.⁹⁴

Second, international lawyers are well aware that there is no objective standard of environmental liability for parties. Thus, the various detailed "ecostandards" relating to particular substances or applicable technologies included in the Annexes of the Convention do not specify the states' obligations. Instead, these provisions act as guidelines for measuring the extent of states' legislative duties.

Third, as has been pointed out, the question of liability for breaches of the Convention remains open. Popular theories of environmental liability in international law would link liability with wrongfulness of conduct.⁹⁵ Yet, despite a twelve year effort by the United Nation's International Law Commission, the international community has not yet succeeded in clarifying whether liability for conduct not prohibited by law actually exists. Can liability be linked with beneficial, yet intrinsically dangerous or environmentally harmful activities?⁹⁶ As the Convention imposes no enforcement obligations and the state only has a duty of *paterfamilias* to the environment, it follows that liability be linked only with a breach of the standard of care. This standard may have become more concrete and tangible by the provisions of the Helsinki Convention, but has not succeeded thus far in supporting any Baltic state's accountability for an act of pollution (accidental or industrial).⁹⁷

D. *Revision of the Helsinki Convention*

Throughout the years, the extent and use of HELCOM's powers have been debated. Many people active within HELCOM have been frustrated by the failure of a number of contracting states to implement Commission recommendations. Ludwik Zmudzinski notes that the levels of PCB loads in the

94. Koskenniemi, *supra* note 9, at 152-164.

95. Of course, the states are free to make an agreement providing for non-fault-related liability. For a comprehensive study on the subject of a state's liability to other states for environmental pollution, see PIERRE-MARIE DUPUY, *LA RESPONSABILITE INTERNATIONALE DES ETATS POUR LES DOMMAGES D'ORIGINE TECHNOLOGIQUE ET INDUSTRIELLE* (1976). For a more recent restatement, cf. KISS, *supra* note 93, at 111-112.

96. See *Draft Articles on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law: Report of the International Law Commission*, International Law Commission, 42nd Sess., U.N. Doc. A/45/10 260-264 (1990).

97. See generally Martti Koskenniemi, *International Liability for Transfrontier Pollution Damage*, 2 INT'L ENVTL. AFF. 309, 309-317 (1990) (discussing difficulties of enforcing pollution liability against states).

Baltic have not decreased since the establishment of the full prohibition of PCB emissions, a fact which he believes suggests "... that restrictions on their use are not being observed by all of the littoral states or that their source is from beyond the Baltic basin."⁹⁸ Though the Commission's recommendations may have played a role in reducing the discharges of DDT and perhaps pollution from point sources more generally, it has had little effect on pollution by nutrients caused by basic industrial and agricultural patterns and treatment of municipal wastes in the Baltic region. In fact, the Convention's greatest success has been in organizing continuous monitoring of the state of the Baltic Sea, and establishing and implementing two environmental assessment programs.⁹⁹ Reduction of the levels of emissions of the most important pollutants has not been attained.

On September 3, 1990, the Baltic region prime ministers met in Ronneby, Sweden, to address concerns over the effectiveness of HELCOM and the Helsinki Convention. For the first time in all-Baltic environmental negotiations, representation was expanded to include the Czech and Slovak Federal Republic, Norway, and the European Community, as well as a number of international financial institutions including the World Bank.¹⁰⁰ The meeting established a high-level task force to prepare a comprehensive environmental action program for the Baltic. Parallel to the work of this task force, HELCOM initiated a revision of the Convention, creating a working group to consider, *inter alia*, the following issues:

- increasing legally binding provisions in the fields of prevention and control;
- application of the *precautionary principle*, which would lower required standards of proof of environmental damage that would precipitate state accountability;
- development of legal instruments to control pollution from diffuse sources; and

98. Zmudzinski, *supra* note 8, at 49.

99. The two environmental assessment programs ran from 1979 to 1983 and 1984 to 1988. A third assessment program is under way and due in 1994. See generally FITZMAURICE, *supra* note 20, at 99-103.

100. *Baltic Sea Declaration, Ronneby, Sweden Sept. 2-3*, Marine Environment Protection Committee (MEPC) 30/22/5, 1990 Conference Doc. No. 1, Oct. 12, 1990, reprinted in 1 Y.B. INT'L ENVTL. L. 423-428 (1990); see also FITZMAURICE, *supra* note 20, at 423-428.

- application of the Convention to the internal waters of the contracting parties.¹⁰¹

Finnish delegates proposed that several Commission decisions be made formally binding similar to OECD Council decisions.¹⁰² This suggestion appears to have been encouraged by the ongoing revision of the 1972 Oslo Dumping Convention and the 1974 Paris Land-Based Pollution Convention, both of which cover the region of the North East Atlantic. The Oslo/Paris revision seeks to combine the two Conventions, their respective commissions and to empower the new combined commission to adopt majority decisions, binding at least on those who vote for them.¹⁰³ The Finnish proposal received no support, however, and was soon dropped. Nor was there any support for a Swedish proposal to extend the Convention to cover the whole of the Baltic region, maritime as well as land territory.

The Working Group held three meetings during 1990-1991. In addition, a separate expert meeting convened to consider the Annexes to the Helsinki Convention. The revisions to the Convention were finalized by the end of 1991. A diplomatic conference, held in Helsinki on April 9, 1992, adopted the revisions as the Baltic Sea Environment Protection Convention (new Helsinki Convention). This agreement was complemented by the adoption of the 1992 Baltic Sea Environmental Declaration created through the process begun at the Ronneby ministerial conference.¹⁰⁴

The Declaration approved the strategies and principles contained in the preliminary version of the Comprehensive Action Program prepared by the High Level Task Force. The Action Program aims at concreteness and specific targets for emission reductions.¹⁰⁵ This twenty year program is estimated to cost at least eighteen billion ECU. The program will be implemented in two phases; the

101. Baltic Marine Environment Protection Commission (HELCOM), Mandate 1/14, Annex 28. See also *Activities of the Commission*, Baltic Marine Environment Protection Commission, Baltic Sea Environmental Proceedings No. 33, at 14 (1989).

102. Baltic Marine Environment Protection Commission (HELCOM) Doc. GRC 2/4/3, June 11, 1991.

103. *Report of the Fourth Joint Meeting of the Ad Hoc Working Groups on the Revision of the Oslo and Paris Conventions*, OSCOM/PARCOM Doc. OSPARREV 4/10/1-E, Jan. 13-17, 1992, art. 9.

104. New Helsinki Convention, *supra* note 51.

105. *Background Document for the Baltic Sea Environmental Declaration 1992*, Diplomatic Conference on the Protection of the Marine Environment of the Baltic Sea Area, Conf. Doc. No. 5/2, Apr. 9, 1992.

first (1993-1997) will cost five billion ECU and the second (1998-2012) thirteen billion ECU. The program focuses on 132 "hot spots," or individual sources of pollution, and lists curative measures for each. Of the "hot spots," 98 are in the former Eastern Europe, and the remaining thirty-four are in Germany, Denmark, Finland, and Sweden.¹⁰⁶

At present it is too early to analyze the effects of the new Helsinki Convention. Clearly the Convention "modernizes" the legislative background for cooperative measures through its use of new terminology and shifting of focus to reflect the accumulated experience of eighteen years of work in the international field. Still, beyond such "modernization," it is difficult to see fundamental changes. No new substances were included in the Annexes. The black lists/grey lists approach has been maintained. As for enhancing the powers of the Helsinki Commission to ensure compliance, the new text is clearly a disappointment. The Commission's powers remain unchanged apart from a new provision allowing the Commission to suggest changes in the Convention itself.¹⁰⁷ No new organs were established, though the Commission retains power to decide what bodies it will set up. Many provisions of the Convention remain unchanged by the new Convention.

Despite the new Convention's disappointments, five notable changes were made in the new document. First, the new Convention applies to the Contracting Party's internal waters, those on the landward side of the baseline measuring the beginning of the territorial sea.¹⁰⁸

Second, the new Convention expressly covers pollution by land-based

106. The details of the program regarding action concerning each "hot spot" are not fixed, but instead will be reviewed periodically. These reviews are to be held at a ministerial level; the first review meeting is planned in connection with the HELCOM meeting in 1994. Baltic Sea Environmental Declaration, *supra* note 51, para. 13. An Implementation Task Force has been established within the framework of the Helsinki Commission to carry out the preparatory work for the review meetings. *Final Act, Diplomatic Conference on the Protection of the Marine Environment of the Baltic Sea Area*, Conf. Doc. 6/5, Apr. 9, 1992.

107. New Helsinki Convention, *supra* note 51, art. 31(2). The Commission's recommendations remain unenforceable and the responsibility and liability of Contracting States likewise remains the same as in the original Convention.

108. Contracting Parties shall, at the time they ratify the new Convention, define their "internal waters" for the purposes of the Convention. New Helsinki Convention, *supra* note 51. The expectation is, however, that the designation will not conflict with the application of the term "internal waters" in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone (art. 5, para. 1) and of the method of drawing the baseline of the territorial sea in the same Convention (articles 5-7) and in customary law. *Convention on the Territorial Sea and the Contiguous Zone*, Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

sources throughout the entire catchment area of the Baltic Sea. Though this was not expressly stated in the original Convention, the principle was usually read implicitly into it. The revised Annex III to the new Convention contains standards and criteria for reducing pollution from land-based sources which, while still open-ended, are somewhat more detailed than those of the original Convention regarding greylist requirements.¹⁰⁹

Third, the new Convention requires Contracting Parties to notify the Commission and any potentially affected party whenever a duty exists for the Contracting Party to provide an environmental impact assessment.¹¹⁰ Contracting Parties must also engage in consultations "...whenever consultations are required by international law or supra-national regulation applicable to the Contracting Party of origin."¹¹¹ The new Convention sets down a duty to notify other potentially affected Contracting Parties whenever a pollution incident in the territory of a Contracting Party is likely to spread outside its territory and maritime areas.¹¹²

Fourth, the new Convention contains a number of provisions not included within the scope of the original Convention. The new Convention prohibits incineration at sea altogether.¹¹³ It also includes a new, abstract provision on nature conservation and biological diversity.¹¹⁴ This provision was added due in part to the successful lobbying activity of non-governmental organizations, particularly Greenpeace.

Fifth, the new Convention incorporates modernized language. Certain new terms were adopted by the Convention for the purpose of adopting the principles that these terms represent. These include the *Precautionary Principle*, *Best Environmental Practice* (BEP), and *Best Available Technology* (BAT).

The Contracting Parties have now agreed to take action for the protection of the Baltic Sea "...even when there is no conclusive evidence of a causal relationship between inputs and their alleged effects."¹¹⁵ This states the

109. New Helsinki Convention, *supra* note 51, Annex III.

110. *Id.* art. 7. This is an indirect reference to the 1991 Espoo Convention on Environmental Impact Assessments. *Supra* note 35.

111. *Id.* art. 7(2).

112. Consultations shall be undertaken "whenever deemed necessary by the Contracting Parties." *Id.* art. 13(2).

113. *Id.* art. 10.

114. *Id.* art. 15.

115. *Id.* art. 3(2).

Precautionary Principle, which lowers thresholds for action under the new treaty in an effort to strike early at environmental problems. It remains to be seen what effect the precautionary principle will have in the practice of the Convention. However, the precautionary principle is clearly not coextensive with lowering the threshold for state accountability. While this principle allows early action, it does not do away with the need of probabilistic calculations concerning the causality between the source and the damage necessary to determination of accountability.

In Article 3(3) of the new Convention, the Contracting Parties agree "...to promote the use of Best Environmental Practice and Best Available Technology." Article 6 of the Convention requires that Best Environmental Practice be used for all pollution sources and Best Available Technology for point pollution sources. For most scientists participating in the revision work, these principles were the most significant addition to the Convention, but the legal content of the terms is unclear.

The concept of *Best Environmental Practice*, used to clarify the content of the state's *paterfamilias* obligation, is defined as "... the most appropriate combination of measures," such as information to the public, development of codes for environmental practices, using labels of warning, availability of collection and disposal systems, saving of resources, recycling and other such methods.¹¹⁶ The notion of *Best Available Technology* is defined as the latest stage, or state of the art, of the development of processes, of facilities or of methods of operation, determined in conjunction with a number of considerations including economic feasibility, time limits for application and the nature and volume of the emissions concerned.¹¹⁷

It follows from the nature of the two concepts that they are defined by reference to rather general and subjective notions, and the new Convention itself concedes that their content "...will change with time in light of technological advances and economic and social factors as well as changes in scientific knowledge and understanding."¹¹⁸ Given today's economic circumstances in most of the former Eastern Europe, these countries may serve as a test to show how the relative factors of pollution and the economy will be balanced under the new Convention.

It is doubtful whether the original object of the revision, namely that the

116. *Id.* Annex II.

117. *Id.*

118. *Id.* Annex II, Regulation 4.

Convention be more legally binding, was attained to any significant degree. The problems with the excessive generality of some standards and the guideline character of other standards still remain. On the other hand, however, the modification of the language regarding blacklisted substances was a welcomed change. While the original Convention obliged parties merely to "counteract" the introduction of blacklisted substances into the sea, the new text obliges them to "prevent and eliminate pollution of the marine environment of the Baltic Sea Area caused by harmful substances,"¹¹⁹ a significantly more affirmative duty. Nevertheless, state obligations remain obligations of conduct and not of result; parties are still only required to take the appropriate legislative or administrative action, not to guarantee the reduction of environmental pollution. And, of course, there are no regulatory powers vested in the Commission which could be exercised to clarify, in an authoritative way, the precise obligations of the Contracting Parties.¹²⁰

V. CONCLUSION

Three conclusions are dictated by the Baltic experience in environmental protection during the past twenty years.

First, little in the Baltic experience supports the International Functionalist's view that the beneficial character of environmental cooperation brings about improvement in political relations. Environmental cooperation would not have brought about closer political relations between the East and the West. To the contrary, it seems that environmental cooperation between the rival blocs was made possible only by prior political détente. The initial successes of the environmental cooperation in the early 1970's can clearly be attributed to the *Ostpolitik*, but just as clearly the converse is not true. This does not, of course, make it impossible for environmental action, now that it exists, to deepen political integration. It cannot, however, be seen as the cause.

Second, traditional, permanent intergovernmental organizations, such as the Helsinki and Gdansk Commissions, are a useful means to conduct interstate cooperation, but only to an extent. At a certain point, the very working patterns of these organizations begin to have counterproductive effects: the organizations'

119. *Id.* art. 5.

120. As the Finnish Chairman of the Working Group on the Revision of the Convention, Mr. Pertti Harvola has remarked, the new Convention is rather like a highway with a number of speed limit signs in a country where there are no policemen and in which cars are not equipped with speedometers.

formality; their need to act on consensus; the bureaucratic character of their secretariats; and their wish to avoid confrontation. That point may have been attained and it is doubtful whether much more progress can be made by the classical intergovernmental organization. What is needed, instead, is to increase the decision making authority and independence of the regional environmental organizations, and thus to strengthen the supra-governmental aspects of these organizations. A beginning to this process would be to remove the requirements of state consensus and the restriction of decision making merely to state actors. One possible method of achieving this goal is the use of the precedent of the novel CSCE human rights procedure of "Consensus minus one" and the formal integration of environmental organizations into their decision-processes.

Finally, the Baltic process shows the importance of restraint and strictness in drafting the legislative bases of inter-state cooperation. Many of the bilateral environmental cooperation treaties between the Baltic States by their nature spell out only general objectives and principles. The goal of these treaties is to support inter-administrative cooperation, not to lay down pollution standards. The use of open-ended language in multilateral treaties such as the Helsinki Convention, however, poses two serious problems. First, it fails to establish real obligations of conduct. No real accountability emerges, yet the politicians signing these instruments may claim to have thereby demonstrated their environmental awareness. Second, by their very existence, the open-ended agreements make it more difficult to establish fixed obligations. States may refer to their existing generally formulated commitments and applaud the flexibility they allow in order to object to stricter standards and more effective means to ensure compliance.

In today's economic and political atmosphere, prospects for a rapidly improved structure of environmental cooperation within the Baltic Sea area appear to be small. New areas such as energy conservation and industrial cooperation spell out some hope for improvement in Eastern Europe. Much expectation will be directed at future ministerial meetings and the implementation of the Joint Comprehensive Program, the principles and strategies adopted in April 1992. The program will certainly provide some relief for the poorest of the Baltic States in their struggle with some of the most difficult environmental problems. Whether that is sufficient to reverse the trends in the pollution loads in the Baltic Sea remains, however, doubtful.