Protected Areas in International Nature Conservation Law: Can States Obtain Compensation for their Establishment?

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I. Introduction

This article considers questions concerning the establishment of protected areas according to international environmental agreements and, particularly, the issue of compensatory mechanisms allocating financial resources in exchange for the establishment and protection of such areas. When asking whether and to what extent States can obtain compensation for the establishment of protected areas for biodiversity conservation, a very closely related question is: "Why should they?" Why should States, from a legal perspective, obtain financial compensation for complying with obligations derived from international environmental treaties they have ratified? Other questions, not necessarily of a primarily legal nature, follow: What are the basis and content of compensation in this context? Is financial compensation for the establishment of protected areas a viable tool to enhance biodiversity conservation? How, in regard to the replenishment of resources, allocation criteria and institutional design, must a mechanism for compensation be organised to be effective?

In general, compensation in this context does not refer to compensation for damages in a legal sense but to the international transfer of financial resources to compensate States for economic losses or extra costs arising from measures these States have adopted to comply with environmental standards. Concerning potential compensation for the establishment of protected areas the term is used to describe the concept of a trade-off: a State sets aside land consisting of valuable ecosystems or habitats and in return for the non-use and strict conservation of this area it receives financial compensation.

This article intends to deal in some depths with the questions if, why and under what circumstances international environmental law recognises financial compensation for compliance with treaty obligations and whether this also refers to the establishment of protected areas according to nature conservation agreements. In its section II. this article discusses different concepts of area protection in international law in general and, more specifically, by examining the scope of the most important global and regional instruments providing for the establishment of protected areas. The focus of the relevant section is on the allowed utilisation of the respective protected areas and the natural resources located therein, since the question of compensation for the establishment of protected areas is closely tied to the degree of utilisation allowed international instruments. Section III. reviews the background and the different concepts of financial compensation in international

environmental law to give the background against which section IV. examines to what extent the notion of compensation for the compliance with international nature conservation instruments applies to the establishment of protected areas. In this regard the discussion moves on to those financial mechanisms established by treaties dealing with the conservation of biodiversity in protected areas that can be considered to contain at least some compensatory elements. Section V. concludes the article by summarising the findings and giving an outlook on the potential further development of the issue.

II. Concept and Scope of Multilateral Environmental Instruments Concerning Protected Areas

Before discussing different concepts of area conservation the term "protected area" as used throughout this article deserves some definition. In a second step this section considers concepts of area protection in regard to the potential scope and objectives of international instruments and, in particular, with respect to different degrees of utilisation allowed in protected areas are given a closer look. The discussion of the development of area protection concepts and general approaches to achieve different degrees of biodiversity conservation assists to understand the feasibility of current instruments providing for the establishment of protected areas as well as the reasons why or why not those instruments include compensatory financial mechanisms. Following these general considerations this article, in sub-sections 5. and 6,. considers the most important global and regional treaties with a view to their characterisation in accordance with the different approaches to area protection in international law.

1. Protected Areas in International Law

The expression "protected area" in the context of this study functions as a shorthand for potentially highly diverse instruments established mainly for the conservation of biological diversity but also with a view to the preservation of cultural, aesthetic, geological, scientific and related values.[1] International and domestic legal

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This article is a slightly modified version of a paper that the author has written as part of her participation in one of the BIOLOG research projects: "An analysis of prevailing economic and political strategies for the protection of biodiversity", sub-project 2: "Protection from commercial use – mechanisms of financial transfer and regulation for the total protection of natural areas", funded by the German Federal Ministry for Education and Research. The author is grateful to Prof. Gernot Klepper, Ph.D. and Prof. Dr. Peter-Tobias Stoll for their invitation to participate in the project.

[1] For an even further reaching description see C. Shine/C. de Klemm, Wetlands, Water and the Law – Using Law to Advance Wetland Conservation and Wise Use, 1999, 115.

terminology include a variety of terms for protected areas with differing degrees of protection e.g. national parks, nature reserves, wilderness reserves or biosphere reserves to name but a few. Although international environmental law knows both the establishment of protected areas on land as well as in the seas,[2] this article only refers to terrestrial protected areas.[3]

Issues associated with a concept of protected areas in international nature conservation law concern the scope of international legal agreements concerning the creation of protected areas as a means of nature conservation and, particularly, the rights and duties of States Parties concerning the use or non-use of resources in these areas. The main aspects in this context are (1) the scope of an agreement in regard to its objectives, i.e. the criteria relevant for the protection of sites as either ecosystems or habitats for certain species, and (2) the extent to which States Parties according to international law have to establish protected areas, in which the use of natural resources or other human activities are either restricted or completely prohibited.

While the establishment of protected areas can be a particularly viable instrument to fight the depletion of the Earth's ecological and biological resources,[4] the provision in an international agreement that States Parties shall or should establish protected areas does, as such, not give any indication concerning the scope of the treaty, the degree of protection, the approach to conservation in regard to the use or non-use of resources or the effectiveness of the instrument. It depends upon the concept and the definitions of each international agreement in this field what particular aims it pursues by the establishment of protected areas, what resources it covers by what kind of protected area and which anthropogenic activities it considers admissible.

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[2] See for example the 1995 revised Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean to the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona Convention), 16 February 1976, the texts of these agreements can be accessed online at <http://www.unep.ch/seas/main/hconlist.html>, last visited 19 February 2003.

[3] The restriction to terrestrial protected areas results from the scope of the BIOLOG project this study has originally been designed to meet. Concerning the question of marine protected areas for biodiversity conservation and tensions concerning the degree of protection in regard to the Convention on Biological Diversity on the one hand and the UN Convention on the Law of the Sea, 21 ILM, 1982, 261 et seq., on the other hand see R. Wolfrum/N. Matz, The Interplay of the United Nations Convention on the Law of the Sea and the Convention on Biological Diversity, 4 UNYB, 2000, 445 (466 et seq.).

[4] WBGU, Welt im Wandel – Erhaltung und nachhaltige Nutzung der Biosphäre, Jahresgutachten 1999, 2000, para. 3.3.2.1.

2. General Scope and Objectives of Treaties Providing for the Establishment of Protected Areas

A variety of international environmental agreements aim at the conservation of protected areas, mainly as habitats for certain species. In general, some different approaches to the establishment of protected areas in regard to their scope and the treaties' objectives can be distinguished. Older agreements primarily focused on the protection of species against certain activities e.g. hunting or capture, and, in a second step, provided for the conservation of species in their natural surroundings, i.e. in their habitats. International nature conservation law has experienced a gradual shift from the focus on the protection of species against specific activities, to the protection of habitats and to some extent to the protection of other areas e.g. for their scientific or geological value to the conservation of ecosystems as part of the conservation of biological diversity. The notion of biodiversity conservation is by its definition broader than the conservation of species and their habitats. According to the definition in article 2 CBD the term biological diversity covers "the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems." In particular the reference to the diversity of ecosystems reaches considerably further than approaches by earlier convention in the field of nature conservation.

The line between agreements focusing on species protection by regulating their harvest or killing and those that relate to habitat or other area conservation is not always easy to draw. While generally three different approaches concerning (1) the regulation of harvest; (2) the regulation of trade; and (3) the protection of habitat can be distinguished in international nature conservation law,[5] international treaties cannot be categorised accordingly, since a number of them follow two or all three approaches. Many early agreements that due to their centre of attention might be considered species conservation agreements, focussing on the regulation of harvest or wilful killing, to some extent also provide for the establishment of nature reserves or other protected areas.

In general, habitat conservation remains the most important reason for the request to provide for protected areas in international environmental agreements. The protection of the habitat of endangered species is crucial and a common practice in modern agreements aiming at the protection of species. The underlying philosophy for habitat conservation results from the fact that the isolated protection of species against taking and killing cannot safeguard the survival of viable populations if the natural surroundings decline due to human induced activities and disturbances. Despite the fact that the Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[6] is considered a particu-

[5] See Wm. C. Muffet, International Protection of Wildlife, in: F.L. Morrison/R. Wolfrum (eds.), International, Regional and National Environmental Law, 2000, 343 (347).

[6] 3 March 1973, 12 ILM, 1973, 1088 et seq.

larly viable example of an international environmental agreement, the protection against illegal trade of protected species alone cannot safeguard their survival.

Yet, agreements concerned with habitat conservation do not protect the diversity of ecosystems as such, since the starting point for the protection is a specific species considered to be endangered. The approach to consider ecosystems and the variety of ecosystems' parts of biological diversity and as such worth protecting is relatively new. As a consequence, although the protection of habitat for the benefit of a certain species also has the result of providing protection to all the other components and features of the particular ecosystem, the choice of the areas to be protected is not based upon the diversity of ecosystems as such, but on the occurrence of a certain species in that area. This approach, consequently, is not as far reaching as one that considers the diversity of ecosystems valuable as such, i.e. regardless of whether a specific species is a part of that ecosystem.

The protection of ecosystems, regardless of the existence of a certain species therein, is rare in international law. Examples of this approach to nature conservation include the UNESCO Convention for the Protection of the World Cultural and Natural Heritage (World Heritage Convention)[7] and, to some extent, the Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar Convention).[8]

Mainly, however, instruments focus on the habitats associated with specific species of fauna and flora, such as the Berne Convention on the Conservation of European Wildlife and Natural Habitats (Berne Convention)[9] or, as an example for supranational legislation in this field, the European Community Directive on the Conservation of Natural Habitats and of Wild Flora and Fauna (FFH-Directive).[10] The greater the number of species and different habitats that a convention considers worth protecting, the greater is the resulting diversity of the ecosystems it protects and the closer the agreement comes to a more comprehensive approach to the protection of biological diversity. The Convention on Biological Diversity, in accordance with its definition of biological diversity, is the widest in scope, since it covers all species, habitats and ecosystems world-wide.

Other concepts for the conservation of areas may focus upon criteria different from those relevant for habitats or ecosystems such as aesthetic, scientific or amenity values. The Convention on the Protection of the Alps,[11] for example, is an agreement focusing upon the protection and management of areas for other reasons than biodiversity conservation. While the conservation of species of flora and fauna are included as reasons for the conservation of alpine areas, this is only one element of the concept pursued by the convention. Other treaties that provide for forms of

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[7] 23 November 1972, 11 ILM, 1972, 1358 et seq.

[8] 2 February 1971, 11 ILM, 1972, 969 et seq. The convention refers to wetlands, particularly as waterfowl habitat, and is, as a result, closely linked to habitats as well. It does, however, oblige States Parties to provide for the protection and wise use of all wetlands.

[9] 19 September 1979, XXIII IEP, 40 et seq.

[10] Council Directive 92/43/EEC, OJ (1992), L206/7.

[11] 7 November 1991, BGBl. II, 1994, 2539 et seq.

area protection and do not focus on habitats or ecosystems include the European Landscape Convention.[12] The approach of this agreement differs considerably from those nature conservation approaches sketched out in the paragraphs above, because of its lack of reference to habitats or ecosystems. From a biodiversity conservation perspective, while being included in the broader category of nature conservation agreements, such instruments establish a distinct category of area protection agreements that cannot be compared with the approaches pursued by treaties concerned with habitat or ecosystem conservation.

3. The Degree of Utilisation of Protected Areas

Even if treaties provide for either the conservation of habitats or of ecosystems this does not necessarily mean that areas protected according to these treaties have to be free from any anthropogenic use. Generally, one can distinguish three categories of protected areas concerning the relation between protection and use of these areas: strictly protected nature conservation areas ("protection against use"), protected areas where a wider economic use is admissible ("protection despite use") and protected areas with average protection needs ("protection by use").[13] Whether existing international agreements that provide for the establishment of protected areas can in all cases be categorised accordingly remains to be seen.

Concerning the use of protected areas one has to further distinguish between activities that include economic development in the area or the exploitation of natural resources and other forms of more sustainable use of the area, e.g. small-scale agriculture or forestry activities. While large-scale development projects and forms of intensive use that involve the exploitation of resources are usually excluded from any protected areas, including those that promote "protection by use", it depends upon each instrument as to what forms of utilisation are compatible with the agreed criteria for the sustainable management of a protected area or whether any human use is strictly prohibited. Whether stricter domestic legislation applies to a protected area excluding anthropogenic utilisation, i.e. if national legislation provides for stricter standards than the international agreement upon which the protection of an area is based, is a distinct question. Generally, stricter national standards are not excluded by international agreements. However, this paper only deals with the examination of the scope and approach to conservation pursued by international agreements and not with the standards of national legislation implementing obligations derived from international agreements.

In general, due to different reasons, international agreements on the conservation of areas follow approaches that provide for protection against anthropogenic use to a limited extent, e.g. only against some forms of utilisation. The early agreements concerning the conservation of flora and fauna mainly followed a clear utilitarian

[12] 19 July 2000, ETS No. 176.

[13] For such a categorisation see WBGU (note 4), para. 3.3.1.

approach and did not even try to exclude human use from protected areas. This utilitarian approach was followed by the conviction that only strict protection against any human utilisation could lead to the effective conservation of protected areas.[14] In contrast thereto, modern treaties like the Convention on Biological Diversity, for example, rather understand sustainable forms of use as an incentive for conservation and not as a threat.

4. The Development of Concepts for Protected Areas in International Nature Conservation Law

The very early nature conservation agreements dating from the beginning until the first half of the last century only had a limited impact on the conservation of flora and fauna. Either they only concerned very few listed species, only applied to very limited geographic areas or few States ratified them.[15] Furthermore, the reasons for and consequently the approaches to conservation differed profoundly. As a result provisions concerning protected areas in the early agreements must not lead to the conclusion that such instruments were viable according to modern standards.

The Convention Designed to Ensure the Conservation of Various Species of Wild Animals in Africa, Which are Useful to Man or Inoffensive[16] one of the earliest nature conservation treaties, is far from being a comprehensive approach to conserve biological diversity, due to its focus on only some species considered valuable. Nevertheless Article II, no. 5 of this convention provides in its Article II, no. 5 for the establishment of protected areas in which the hunting, taking and killing of wild animals not subject to a special list of exemption is prohibited. As becomes clear from the exemptions made throughout the convention the main purpose was not to establish areas free from use, nor even free from hunting and killing, but to avoid uncontrolled massacres and to regulate hunting of some African game in a manner that was, according to modern day terms sustainable.

To demonstrate the development of international law in regard to nature conservation the International Convention for the Protection of Birds, (1950), should be compared with the Convention to Protect Birds Useful to Agriculture, (1902).[17] The latter is an example for a particularly early agreement that exclusively focused on the protection of some species without providing for protected areas. In contrast thereto, the International Convention on the Protection of Birds, while still focussing on species' protection by restricting mainly the hunting and killing of birds with a view to hunting seasons and the means of hunting, encourages in its

[14] The Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, 12 October 1940, IV IEP, 1729 et seq., is often named as an example to that extent.

[15] U. Beyerlin, Umweltvölkerrecht, 2001, para. 384.

[16] 19 May 1900, IV IEP, 1607 et seq.

[17] 19 March 1902, IV IEP, 1615 et seq.

article 11 the creation of reserves in which birds can nest and raise their broods safely. The promotion of the establishment of such reserves is not accompanied by any incentives. Neither does the article expressively prohibit the use of these reserves, although the purpose to provide for safe breeding grounds in fact limits the economic use of the area.

An agreement that was one of the first to recognise the need for a concept of more comprehensively protected areas of not only habitats but also of areas as scenery of extraordinary beauty and other formations, regions or natural objects of aesthetic, historic or scientific value is the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere.[18] While the agreement is still formally in force, nowadays its practical impact is little due to later conventions with further reaching provisions and stricter municipal legislation of the States Parties. By the definition of so called strict wilderness reserves the agreement develops a concept for the conservation of areas, in which according to article I, no. 4 the passage of motorized transportation and all commercial developments are prohibited. Such a provision does not exclude any anthropogenic use, however, it goes further than any of the earlier and many of the later approaches to establish protected areas that offer conditions for the viable conservation of ecosystems.

The definition of a "strict nature reserve" employed by the African Convention on the Conservation of Nature and Natural Resources[19] provides for the establishment of areas practically free from any use. Article 3, no. 4, lit. (a) does not only list activities such as *inter alia* hunting, agriculture, grazing and any acts likely to harm or disturb the fauna or flora but also prohibits residence, entry or camping. Consequently, the use of natural resources within that area, with the potential exemption of scientific research, provided that the competent authorities grant permission, is prohibited. However, despite the allegedly far-reaching approach reflected by the definition of strict nature reserves, the convention does not oblige States Parties to establish such strictly protected areas. It only refers to those already existing. Neither does it give any financial incentives to establish new protected areas.

5. Agreements and Instruments Providing for Habitat Conservation and Protected Areas with a Global Scope

Despite the large number of international treaties that concern habitat conservation or the establishment of other protected areas, those agreements considered to be of far reaching regional or even global importance are few. The following section gives an overview of the most important international instruments currently in force and in operation concerning the establishment of protected areas for nature conservation.

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[18] See above in note 14.

[19] 15 September 1968, V IEP, 2037 et seq.

a) Ramsar Convention on Wetlands of International Importance

Wetlands constitute one of the Earth's most important wildlife habitats and flood-control systems. According to article 1, para. 1 of the Ramsar Convention wetlands are "areas of marsh, fen, peatland, or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres."

The Ramsar Convention was the first global international instrument for the conservation of species of wild fauna that primarily focused upon habitat protection. At the time of its conclusion it reflected new international legal efforts that aimed rather at the conservation of certain types of habitat instead of focusing on specific species.[20] While the agreement emphasises the importance of waterfowl habitats, it is not limited to the conservation of wetlands that function as such.

Under article 2 the Secretariat establishes the List of Wetlands of International Importance. Each of the Contracting Parties nominates wetlands in areas under their jurisdiction to be included on the list. Listed wetlands are chosen for their international importance in regard to ecological, botanical, zoological, limnological and hydrological criteria. By early 2001, 1,060 wetland sites had been designated for inclusion in the Ramsar List of Wetlands, totalling 80.6 million hectares.[21]

The convention does not promote the absolute protection of sites prohibiting anthropogenic utilisation. While the use of wetlands is not regarded an incentive for the conservation, it is not prohibited either, as long as it conforms to a standard of sustainability. According to the Ramsar Convention each State party is responsible for the conservation and the wise use of wetlands. The concept of wise use, while not defined by the convention, shall be understood as the "sustainable utilisation for the benefit of mankind in a way compatible with the maintenance of the natural properties of the ecosystem".[22] By defining the "wise use" of wetlands in this manner, the term can be used as an equivalent to the "sustainable use" of areas or resources.[23]

b) Convention for the Protection of the World Cultural and Natural Heritage

Like the Ramsar Convention the World Heritage Convention is based upon lists of sites considered to be of special conservation value. While the World Heritage Convention explicitly provides for the listing of protected areas considered part of the world natural heritage, the majority of listed sites are those of cultural impor-

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[20] P. Sands, Principles of International Environmental Law, 1995, 404.

[21] See C. Shine, Nature Conservation: Natural Lands and Biological Diversity – General Report, 11 Y Int'l Env L, 2000, 268.

[22] Recommendation C.3.3 of the Third Meeting of the Conference of the Contracting Parties, Annex, see <http://www.ramsar.org/key_rec_3_annex.htm >, last visited 19 February 2003.

[23] Beyerlin (note 15), para. 395.

tance. The convention does not refer to habitats of particular species of flora or fauna or to types of habitats but to single natural objects defined by article 2 of the convention. According to article 2 the natural heritage can *inter alia* consist of "precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation".

Consequently, under the World Heritage Convention States can also establish protected areas for nature conservation when they consider the habitats to have outstanding universal value. Sites considered to be part of the world heritage remain under the sole sovereignty of the State on which's territory they are located, however, the importance for present and future generations also leads to responsibility of the world community. This is reflected by efforts such as financial assistance by the convention's World Heritage Fund to protect and preserve sites. The means of protection and conservation also in regard to the use or non-use of protected areas that are part of the world's natural heritage is left to the discretion of the contracting parties. The absolute protection against any anthropogenic use of natural heritage sites is not envisaged by the agreement. Nevertheless, this might in special cases be the only viable conservation measure. As a result, when a site cannot be protected by other means, States may be obliged to exclude human activities from the area to fulfil their obligations to provide for effective protection and conservation.[24]

c) Bonn Convention on the Conservation of Migratory Species of Wild Animals

The main feature of the Bonn Convention on the Conservation of Migratory Species of Wild Animals[25] is its double nature: animals listed in Appendix I are protected, including habitat protection; whereas species listed in Appendix II are protected under special agreements[26] to be separately concluded. While the Bonn Convention is one of the global agreements that refers to habitat conservation in regard to Appendix I species, instruments agreed upon between States Parties to provide for the conservation of specific migratory species considered to have an unfavourable conservation status and listed in Appendix II are of a regional scope.[27]

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[24] However, like other agreements, e.g. the Convention on Biological Diversity, the World Heritage Convention obliges States Parties only "in so far as possible, and as appropriate for each country". This may lead to a preference of economic and developmental interest over conservation and protection considerations.

[25] 23 June 1979, 19 ILM, 1980, 15 et seq.

[26] These agreements are either of a legally binding nature or non-binding Memoranda of Understanding (MOU).

[27] The instruments so far agreed upon between CMS-States Parties are the following (in chronological order): Agreement on the Conservation of Seals in the Wadden Sea, 16 October 1990; Agreement on the Conservation of Bats in Europe, 10 September 1991; Agreement on the Conservation of

Appendix I includes those migratory species that are in danger of extinction throughout all or a significant portion of their range of migration. In regard to these species States shall "endeavour" to conserve and even restore habitats. While the establishment of protected areas is a potentially viable tool to achieve the conservation or restoration of habitats, protected areas are not explicitly mentioned by the Bonn Convention. The same applies to the agreements on Appendix II species concluded between States Parties.[28] The degree of use or non-use of habitats is left to the States' discretion. However, the objectives of the convention or the agreement respectively concerning the status of the migratory species must be met. In the case of endangered species under Appendix I this can require stricter protection than for Appendix II species on the conservation of which States have concluded a regional agreement.

d) Convention on Biological Diversity

The international agreement with the widest scope concerning the conservation of biological diversity, of which the establishment of protected areas is one potential means, is the Convention on Biological Diversity. The concept of protected areas is central to the *in situ* conservation under the Convention on Biological Diversity.

According to article 8, lit. (a) CBD on the *in situ* conservation of biodiversity, States Parties shall establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity. Article 2 CBD defines the term "protected areas" to mean "a geographically defined area which is designated or regulated and managed to achieve specific conservation objectives". The other term used throughout article 8 CBD "areas where special measures need to be taken" is not defined by the agreement.

Small Cetaceans of the Baltic and North Seas, 12-13 September 1991; MOU Concerning Conservation Measures for the Siberian Crane, in effect since 1 July 1993, revised version in effect since 1 January 1999; MOU Concerning Conservation Measures for the Slender-Billed Curlew, in effect since 10 September 1994; Agreement on the Conservation of African-Eurasian Migratory Waterbirds, 16 June 1995; Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area, 24 November 1996; MOU Concerning Conservation Measures for Marine Turtles of the Atlantic Coast of Africa, in effect since 1 July 1999; MOU on the Conservation and Management of the Middle-European Population of the Great Bustard, in effect since 1 June 2001; Agreement on the Conservation of Albatrosses and Petrels, 19 June 2001; MOU on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asia, in effect since 1 September 2001; MOU Concerning Conservation and Restoration of the Bukhara Deer, in effect since 16 May 2002. The texts of the agreements and memoranda of understanding can be accessed via the CMS-Internet-Homepage at <http://www.wcmc.org.uk/cms/>, last visited 19 February 2003.

[28] Some of the agreements, like the MOU Concerning Conservation Measures for the Siberian Crane or the MOU Concerning Conservation Measures for the Slender-Billed Curlew, call for strict protection of the species and in this realm refer to measures to protect the traditional breeding areas, yet again without explicitly calling for the establishment of protected areas.

Article 8, lit. (b) CBD requests that States Parties develop, where necessary, guidelines for the selection, establishment and management of protected areas. The conservation of ecosystems, included by definition in article 8 CBD, by the establishment of protected areas can go further than mere habitat conservation, since it does not focus on specific species and those directly connected with their survival only, but on the interaction of all living resources within the non-living surroundings. In this regard the Convention on Biological Diversity could reach further than any other global agreements that require the establishment on protected areas. The actual scope is limited by the restriction that States Parties shall only take the *in-situ* conservation measures "as far as possible and appropriate".

Concerning the approach and degree of conservation in regard to the use or non-use of resources in protected areas the Convention on Biological Diversity generally follows the concept to provide for incentives for conservation by allowing the sustainable use of resources. However, the general approach to aim at "protection by use" in contrast to "protection against use" must not lead to the conclusion that States can under no circumstances establish protected areas in which human activities are prohibited. Even when adhering to a concept of sustainable use, some habitats or ecosystems might be too sensitive to allow any use at all. In this case the sustainable use would in fact be a "non-use". Due to its elaborate financial mechanism the Convention on Biological Diversity is the only agreement discussed in this context that could provide for substantial compensation for the establishment of protected areas.

e) The UNESCO World Network of Biosphere Reserves

The designation of Biosphere Reserves is part of the UNESCO Man and the Biosphere Programme. The establishment of Biosphere Reserves unlike the other protected areas discussed throughout this paper is not governed by an international agreement. Yet, in fact the scopes of different agreements on protected areas often overlap. Many of the areas designated Biosphere Reserves are also Ramsar Wetland sites or World (Natural) Heritage sites or both.

Biosphere Reserves are areas of terrestrial and coastal ecosystems aiming to reconcile the conservation of biodiversity with its sustainable use. Protected areas designated as Biosphere Reserves shall perform three basic functions: (1) a conservation function, i.e. a contribution to the conservation of landscapes, ecosystems, species and genetic variation; (2) a development function, i.e. promotion of economic and human development which is socio-culturally and ecologically sustainable; (3) a logistic function, i.e. support for research, monitoring, education and information exchange related to local, national and global issues of conservation and development. Biosphere reserves are organised into three interrelated zones, known as the core area, the buffer zone and the transition area and only the core area requires legal protection. According to the basic functions, legal protection does not require national legislation that prohibits the utilisation of biosphere reserves. However,

domestic legislation must safeguard the sustainability of use. The programme does not include a financial mechanism to compensate for costs related to the establishment of Biosphere Reserves.

6. Regional Instruments on Protected Areas

a) Council of Europe Activities

The Council of Europe is particularly active in the promotion of protected areas in Europe via the Berne Convention and as part of the Pan-European Biological and Landscape Diversity Strategy (PEBLDS). One element of the Pan-European Biological and Landscape Diversity Strategy concerning the establishment of nature conservation networks is the award and renewal of the European Diploma on protected areas. The award and renewal of sites is first examined by a Group of Specialists for the European Diploma for protected areas and latter formally decided by the Council of Europe Committee of Ministers. The award of the Diploma to sites is not accompanied by financial assistance for their protection.

The main legal instrument for the conservation of habitat is the Berne Convention. According to this agreement States must not only take specific measures to protect listed species according to their classification as Appendix I, II or III,[29] but must also take steps to protect natural habitats with respect to all species. Furthermore, the States Parties in accordance with article 4, para. 1 must take steps to protect natural habitats that are themselves in danger.

b) Other agreements with a regional scope

Of the instruments with a regional scope the agreements under the Bonn Convention on certain migratory species have already been mentioned. There are a variety of other bilateral or multilateral agreements that refer to the conservation of species in their habitats[30] or a specific area by the establishment of protected areas on land as well as in the sea.[31] It would be outside of the scope of this paper to closely examine these instruments in any detail.[32]

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[29] According to this classification species listed as Appendix I or II enjoy the highest level of protection, leading to a prohibition of all deliberate capture, killing or destruction and the prohibition of trade, whereas species listed on Appendix III only enjoy a lesser degree of protection.

[30] An example to that extent is the Oslo Agreement on the Conservation of Polar Bears, 15 November 1973, 13 ILM, 1973, 13 et seq., that, although not explicitly providing for the establishment of protected areas, at least refers to the protection of ecosystems of which polar bears are a part in its article 2.

[31] See for example the Protocol Concerning Specially Protected Areas and Wildlife in the Wider Caribbean Region, 18 January 1990, Doc. UNEP (OCA)/CAR.5/5.

[32] This is furthermore so as only some of the global agreements, namely the Ramsar Convention, the World Heritage Convention and the Convention on Biological Diversity offer financial mechanisms that could provide for compensation for the establishment of protected areas.

III. Compensatory Elements in International Environmental Financing

As mentioned in the introduction international environmental law recognises different concepts of financial mechanisms. Distinctions have to be made in regard to the reasons why compensatory mechanisms are established as well as to their more specific functions and legal and institutional designs. Not all concepts are by their nature applicable to compensatory strategies for the establishment of protected areas and the relevant international instruments.

Concerning a compensatory function of financial mechanisms, international environmental law distinguishes two elements: the compensation for the over-exploitation of natural resources by the industrialised world on the one hand and the compensation for internationally agreed restrictions that interfere with developmental aims on the other hand. However, the first element of compensation refers rather to the underlying philosophical consideration why a transfer of financial resources to, generally, developing States Parties[33] is envisaged by an agreement and does not relate to a compensatory buy-off of protected areas. Compensation for the overexploitation of natural resources by industrialised States refers to an at least moral – and to some extent legal[34] – obligation of developed countries to provide for financial assistance for developing countries that have not participated in the industrial development that has led to a depletion of resources, but who now suffer the consequences.

The second element relates to the restrictions developing countries have to face, although they have not to the same degree as developed countries contributed to the depletion and destruction of resources in the first place. Developing States now consider themselves deprived of the same chances for economic development as the industrialised countries. While compensation in this context usually refers to restrictions and prohibitions like those decided upon in the context of ozone depletion, particularly those restrictions imposed upon States by the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol)[35] concerning the

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[33] Generally, the developed States Parties to an agreement provide for financial resources allocated to developing countries under a treaty-specific financial mechanism. It shall already be noted here that there is no general concept of financial assistance or compensation for all States Parties to an environmental agreement. Although the allocation criteria may be worded differently in the respective treaty texts, it is the developing States Parties or States Parties with economies in transition that can apply for the allocation of financial resources, if an agreement provides for a financial mechanism to assist States Parties with the implementation of or compliance with their obligations. For further details on eligibility of States and modes of funding see N. Matz, Environmental Financing: Function and Coherence of Financial Mechanisms in International Environmental Agreements, 6 UNYB, 2002, 473 et seq.

[34] A legal obligation to provide for financial assistance could be based upon the principle of common but differentiated responsibilities, however, the legal content of this principle and an alleged right to development remains subject arguments between developing and developed countries in international relations.

[35] 16 September 1987, 26 ILM, 1987, 1550 et seq.

production and use of certain ozone-depleting substances,[36] the idea can to some extent be transferred to compensation for protected areas. In this regard developing countries could theoretically be compensated for developmental restrictions they suffer from setting aside areas of their territory for protected areas for the conservation of biodiversity considered to be of global value. This is particularly so, if States aim at a high degree of protection by restricting human use of these areas to either a sustainable minimum or by prohibiting any anthropogenic utilisation.

In fact, the centre of attention when asking if and why States could or should obtain compensation for the establishment of protected areas is whether and to what degree protected areas are excluded from anthropogenic utilisation. If protected areas have to be free from economic development and other forms of utilisation with a potentially adverse impact on biodiversity, particularly the exploitation of natural resources but also other forms of intensive use such as agriculture or forestry, the allocation of financial resources to States could function as an incentive to protect areas despite the economic disadvantages. In this respect financial assistance for the establishment and maintenance of such protected areas would also include a compensatory element. The economic disadvantages and potential obstacles to development of developing countries associated with the non-use or restrictions to the utilisation of protected areas would be compensated by the transfer of financial resources.

Two further important questions attached to a compensatory objective of financial assistance are: "For which costs are countries compensated?" and "Why are they compensated for these costs?" The first question relates to the issue of incremental costs, while the second leads to the discussion of the principle of common but differentiated responsibilities, i.e. the underlying reasons why developing countries should receive compensation for developmental restrictions in the name of the environment. The principle of common but differentiated responsibilities is an outcome of the United Nations Conference on Environment and Development (UNCED) held in Rio in 1992.[37] The principle has changed the approach to the provision of financial resources dedicated to environmental protection. According to the concept of common but differentiated responsibilities the developed States are now under an obligation to recognise the consequences of their contribution to present environmental degradation. The acknowledgement of specific responsibility is a major underlying principle of the industrialised worlds' recent commitments to financial transfers earmarked for sustainable development and environmental capacity building.

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[36] See article 2 Montreal Protocol.

[37] See principle 7, Declaration of the UNCED (Rio de Janeiro), 3-14 June 1992, 31 ILM, 1992, 874 et seq.: "[...] In view of the different contributions to global environmental degradation, states have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command."

However, financial mechanisms that are based upon the notion of common but differentiated responsibilities rather relate to damage and protection measures to the global commons. The instruments on climate change and the ozone layer are good examples to that extent. As far as protected areas are concerned, reasons for degradation and loss of diversity are more likely to find their reasons in particular activities of the State having jurisdiction over the respective territory. Insofar the situation differs from harm to e.g. the atmosphere that has been polluted by the industrialised worlds' economic activities over the past decades. Nevertheless, it has to be acknowledged that the developed States have to a great extent sacrificed biological diversity in the process of industrial development and now try to conserve resources and safeguard the protection of biodiversity in developing States by trying to reach consensus on restrictions on harmful development activities in these countries e.g. as far as biodiversity-rich rain forests are concerned. Consequently, the notion of common but differentiated responsibilities is by no means alien to international efforts to conserve biodiversity by the establishment of protected areas and potential means of compensatory financing.

While the issue of common but differentiated responsibilities is hence an important element when discussing reasons and scope of financial mechanisms in international environmental law, in regard to potential means of compensation for the establishment of protected areas the focus is on the question for which costs compensation can be obtained. In short, most of those environmental treaties that provide for compensatory financial mechanisms for State Parties relate to the compensation for incremental costs. This leads to the question what costs are covered by that term in general and in regard to specific multilateral agreements.

Simplified, international law understands incremental costs to be those extra costs that arise from the implementation of and compliance with an agreement. Once an agreement is being implemented, the costs arising from restrictions or the adaptation to new technologies create difficulties for many countries lacking expertise as well as financial and technological resources. In this regard compensation for these extra costs is part of the rather modern trend to financially assist States Parties with the implementation of and compliance with their obligations. In the case of protected areas incremental costs would be any costs arising from identifying and creating a site in need and worth of conservation, their effective establishment and the development of long-term management tools and effective protection mechanisms for the area. To make the issue of compensation for incremental costs more difficult, there is no commonly recognised interpretation as to what particular extra costs can be referred to as "incremental costs".[38] It generally follows that the question whether extra costs in fact lead to compensatory payments under a financial mechanism to an environmental agreement depends upon the wording of the treaty and the relevant decisions by treaty organs. Many conventions, such as

[38] This failure becomes especially apparent in the relationship between the Global Environment Facility (GEF) and environmental conventions, because the GEF's and the respective opinions of the Conferences of the Parties might differ. On this issue see Matz (note 33), 506 et seq.

the Convention on Biological Diversity in its article 20, para. 2, relate to "agreed full incremental" costs and not to any extra costs arising from the implementation of or compliance with treaty obligations.

However, even if States can obtain financial assistance for the establishment and management of protected areas as incremental costs one has to distinguish between potential compensation for the non-use of this area and financial assistance for the establishment and management of the protected area. In the latter case financial assistance must not lead to the conclusion that protected areas must be free from any use. Rather, in accordance with the provisions of the respective agreement, financial resources might be used to allow a long-term sustainable use of the area. Yet, financial assistance for the management of protected areas, even if the use of the area was not excluded, would contain a compensatory element concerning the incremental costs arising from the establishment of the area.

Extra costs, for which a State can be reimbursed, in the first place arise from the establishment and management of a site not from the prohibition of economic activity in that area. As a result, financial assistance for meeting incremental costs does by its concept not compensate States for mere non-use of an area. Strictly speaking, potential losses from not performing economic activities in an area are no extra costs arising from the implementation of e.g. the Convention on Biological Diversity (CBD).[39] Whether such a distinction between extra management costs and compensation for potential losses from the protection of an area can or should be made in practice is questionable. In regard to the issue of protected areas for the conservation of biological diversity the costs for establishing and managing protected areas must be considered incremental costs for which, if the States Parties agree on these costs, resources could be allocated to the respective countries that qualify for financial assistance. In practice, financial resources for the establishment and management of sites will have a compensatory effect in regard to the restriction of potential economic activities within the area. The funding of sustainable management strategies functions as a reimbursement for not performing other destructive forms of development.

IV. Compensation for the Establishment of Protected Areas

Many international environmental agreements, at least those concluded in the realm of the Rio-process but also some earlier treaties, provide for regulations on funding, financial mechanisms and technology transfer. Over the last three decades international law, particularly international environmental law, has experienced a shift from sanctions and other confrontational means towards incentives and financial assistance to safeguard the implementation of and compliance with duties established by international agreements.[40]

[39] 5 June 1992, 31 ILM, 1992, 818 et seq.

The lack of incentives in conventions adopted as early as the African Convention on the Conservation of Nature and Natural Resources for example can be explained by the time of the negotiation and adoption of the agreement. The same applies to most of those agreements negotiated before the preparations for the Rio Earth Summit. Would CITES, for example, which lacks a substantial financial mechanism,[41] be negotiated today, it would most probably provide for a financial mechanism to provide for incentives and compliance assistance, enabling developing world countries to comply with the necessities to establish legislation and enforcement mechanisms to observe their obligations under the convention.[42]

The concept of compliance assistance and incentives for effective implementation by funds and other financial mechanisms, while it cannot be fixed to a certain year, is a notion that is usually connected with the negotiations of agreements during the preparations for the Earth Summit in Rio in 1992. The development of mechanisms designed for compliance assistance earmarks a shift from confrontational means of implementation and compliance control, i.e. sanctions, to non-confrontational mechanisms. Environmental law has recognised the unfeasibility of enforcement by confrontational means in relation to States lacking capability to comply with obligations. Consequently, rather recently, a non-confrontational economic approach based upon compliance assistance and control has evolved that has contributed to the modern focus on systematic financial and technological transfers.

However, the notion of compliance assistance as such as well as the reasons for the consideration of granting assistance to developing States Parties for the implementation of and compliance with treaty obligations does not necessarily involve compensatory elements. Yet, in many cases compliance assistance is not only based upon the consideration of the feasibility of non-confrontational means but also to some extent on the concept of common but differentiated responsibilities. In many cases a clear line between these underlying considerations is difficult to draw and it depends upon each financial mechanisms whether it intends to offer compensation for restrictions or whether it aims to promote different objectives.

Many international environmental agreements have established specific financial mechanisms to provide for the allocation of financial resources to those States Parties eligible according to the treaty provisions, while others employ existing financial mechanisms like the Global Environment Facility (GEF) to serve as a treaty-specific tool of compliance assistance.[43] The main objective of financial mechanisms is to enable developing States Parties to meet the costs of implementation of the agreement and subsequent compliance with the duties that the treaty imposes

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[40] On this issue see R. Wolfrum, Means of Ensuring Compliance with and Enforcement of International Environmental Law, 271 RdC, 1998, 7 et seq.

[41] The CITES Trust Fund provides financial support for the aims of the Convention, particularly, for its organs and partially for the COP. As a result the fund mainly meets administrative costs.

[42] P. Birnie, The Case of the Convention on Trade in Endangered Species, in: R. Wolfrum, (ed.), Enforcing Environmental Standards: Economic Mechanisms as Viable Means?, 1996, 233, 263.

[43] On the scope and function of treaty-specific funds and mechanisms like the GEF see Matz (note 33), 473 et seq.

upon its States Parties. In this regard financial mechanisms mainly function as an incentive as well as a potential means of compensation for restrictions.

1. Scope and Function of the World Heritage Fund and the Ramsar Small Grants Fund

Of those conventions providing for the establishment of protected areas only the World Heritage Convention, the Ramsar Convention on Wetlands of International Importance and the Convention on Biological Diversity have established financial mechanisms. In the case of the World Heritage Convention and the Ramsar Convention the financial mechanism consists of one treaty-specific fund respectively with a relatively small budget.[44] While the institutional setting of these two funds bears no exceptional features, the small budgets of the Ramsar Small Grants Fund (SGF) and the World Heritage Fund (WHF) make their roles a bit more specific, or rather limited, than general compliance assistance or compensation. The Ramsar Small Grants Fund was modelled after the equally small scale World Heritage Fund. Both mechanisms are targeted at the same funding categories.

As a consequence of its limited financial capacity the Small Grants Fund understands itself as having a catalytic role to enable countries to address relatively small-scale projects in order to make preparations to obtain funding for larger projects from other donors.[45] The compensation for the (agreed) incremental costs as envisaged under many new conventions is not an explicit undertaking of either the Ramsar Convention or the World Heritage Convention. Such an aim is not possible with the limited financial means. Yet under the World Heritage Convention the compensatory element for national efforts in the interest of the world community is acknowledged. The World Heritage Fund grants financial assistance to protect cultural or natural sites considered being of outstanding international importance in accordance with the substantive rules of the World Heritage Convention.

According to the Operational Guidelines of the Ramsar Small Grants Fund the financing of projects that contribute to the implementation of the Convention's triennial Work Plan is only one of its objectives. Another important factor is the so-called "preparatory assistance" that is exceptionally granted to those non-contracting parties that have clearly signalled their intention to progress towards adhesion to the Convention. The inclusion of non-contracting parties in the financial mechanisms as an incentive to promote global participation in the conservation of wetlands is an innovative approach that reflects the modern ways to achieve compliance with environmental objectives. However, even the oldest environmental

[44] However, the conventions try to also attract funding from different sources. Concerning the conservation of natural heritage sites a partnership with the United Nations Foundation has lead to a payment of $8.5 million in grants designated for projects of benefit to world natural heritage of global biodiversity significance, see Shine (note 21), 274.

[45] See Guidelines for the Operation of the Small Grants Fund for the Triennium 2000-2002, Introduction, <http://www.ramsar.org/key_sgf_guide.htm>, last visited 19 February 2003.

fund, the World Heritage Fund, engages in preservation of sites on the one and identification of sites on the other hand.

A compensation scheme for the setting aside of land for protected areas is not explicitly envisaged by the objectives of either of the funds. While compensation for national efforts in the global interest is an aspect of funding according to the World Heritage Fund and to some extent the Ramsar Small Grants Fund, this refers rather to the underlying rationale of financing than a *quid-pro-quo* exchange of financial resources for strict protection and non-use of certain areas.

2. The Potential of the GEF to Compensate for Protected Areas under the Convention on Biological Diversity

While many environmental agreements, not only those in the field of nature conservation, have established independent funds, the GEF is an important example for the employment of a mechanism by different agreements. The GEF was established to assist developing countries with the protection of the global environment and the promotion of environmentally sound and sustainable economic development.[46] It can be compared to a model of environmental subsidies that aims at internalising the external benefits of projects, new pollution abatement technologies for example, into the national budget.[47]

While the majority of GEF resources are used to improve the recipients' compliance with treaty regimes they are bound by, some projects also aim at capacity building in developing countries to enable them to meet the standards for entering environmental regimes.[48] The more specific functions of the GEF are twofold. On the one hand it provides for a treaty-specific financial tool for the protection of biodiversity and the prevention of climate change and on the other hand it promotes activities in defined areas of global environmental concern, i.e. international waters and ozone depletion. In regard to the establishment of protected area, the GEF's focal area of biodiversity is concerned. In this context the GEF functions as the financial mechanism of the Convention on Biological Diversity and is bound by the guidance of the Conference of the Parties. Access to funding concerning biodiversity projects is open to those States Parties to the Convention on Biological Diversity eligible according to the criteria established by the treaty's organs. Generally, the GEF can only allocate grants to projects that are of a global benefit and that compensate for the agreed incremental costs of the implementation of the convention.

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[46] On the background see J. Werksman, Consolidating Governance of the Global Commons: Insights from the GEF, 6 Y Int'l Env L, 1995, 27, 48; Sands (note 20), 736 et seq.

[47] S. Schuppert, Economic Incentives as Control Measures, in: Morrison/Wolfrum (note 5), 861, 872.

[48] P. Sand, Institution-Building to Assist Compliance with International Environmental Law: Perspectives, 56 ZaöRV, 1996, 774, 784.

In the context of projects financing the incremental costs of the implementation of the Convention on Biological Diversity the mechanism also finances projects relating to the establishment of protected areas for biodiversity conservation. However, while there is a compensatory element that is inherent to the concept of financing of incremental costs, as has already been mentioned above, the projects financed by the GEF do not cover trade-offs for setting aside land in exchange for the non-use. Rather costs for the long-term sustainable use are met by the grants allocated to States. In the following three projects approved in the last two years and concerning the establishment of protected areas in different regions shall be examined closely in order given a closer look to explain the activities of the GEF as the financial mechanism of the Convention on Biological Diversity in this context.

The first project considered in this context bears the title "Brazil - Amazon Region Protected Areas Program (ARPA)".[49] According to the project description the project supports the expansion and consolidation of strict protected areas in the Amazonian region. As the specific objectives of the projects the following three aspects have been identified: (1) the identification and creation of new strict protected areas; (2) the effective establishment of these new areas; and (3) the development of long-term sustainable management tools and mechanisms for the effective protection within all Amazonian strict protected areas. Despite the fact that costs associated with the project fulfil the criteria of being of global benefit on the one hand and being covered by the conditions for agreed incremental costs on the other hand, the GEF grant shall serve as seed capital to catalyse additional funds from other resources.

The second example for biodiversity projects focussing on protected areas is entitled "Philippines - Samar Island Biodiversity Project: Conservation and Sustainable Use of the Biodiversity of a Forested Protected Area".[50] This example shows clearly that meeting the incremental costs of establishing protected areas under the Convention on Biological Diversity must not lead to a non-use of the area. According to the project description the GEF finances the establishment of the Samar Island Natural Park (SINP) as a new protected area zoned for multiple uses mainly concerned with protection, but also providing for sustainable harvests of non-timber forest products.

The last example in this context is entitled "Sri Lanka - Protected Areas and Wildlife Conservation Project".[51] The project aims to address institutional and legal deficiencies in protected area management, and test pilot test participatory conservation activities in selected protected areas. The project is expected to contribute to the protection of the country's fauna and flora, stimulate nature based tourism and promote the development of a sustainable protected area management and

[49] GEF project ID: 771, date of approval 1 May 2000. Project descriptions and appraisal documents are accessible via the GEF project data-base at <http://www.gefonline.org/home.cfm>, last visited 19 February 2003.

[50] GEF project ID: 2, date of approval 1 December 1999.

[51] GEF project ID: 878, date of approval 1 November 2000.

wildlife conservation system for Sri Lanka. Via these objectives the project follows the approach of the Convention on Biological Diversity to regard the use of resources – in this case the use of the area for tourism – as an incentive for their conservation. In this regard the concept of protection by use has preference over a strict protection against use.

3. Debt-for-Nature Swaps as Compensatory Instruments

A mechanism that comes closest to the payment of compensation for the establishment of protected areas is the model of debt-for-nature swaps. According to the current practice of debt-for-nature swaps the external debt of a country is exchanged for local currency instruments that support a specific environmental project.[52] Debt-for-nature swaps are agreed upon on a mainly bilateral basis involving non-governmental actors. Since these instruments are not initiated by States assisting other States with establishing or conserving protected areas, but by non-governmental organisations, debt-for-nature swaps are not governed by international law.

While debt-for-nature swaps are not specifically tied to environmental projects that involve the establishment of protected areas, biodiversity related rain forest projects concerning the protection of certain areas of forest are the most common projects supported by Latin American debt-for-nature swaps.[53] Although the capacity building within the recipient country is significant and, particularly, in regard to rain forests projects debt-for-nature swaps seem to be viable tools of biodiversity protection, neither the Convention on Biological Diversity nor any of the other nature conservation agreements providing for the establishment of protected areas explicitly mention this mechanism.

V. Conclusions

Currently, compensation in the strict sense of meaning, i.e. the allocation of financial resources in exchange for the setting aside and strict non-use of land as a means to conserve biological diversity is not envisaged by international environmental agreements and their respective financial mechanisms. Nevertheless, international environmental law recognises a concept of financial incentives as well as compensatory elements for implementation and compliance with obligations arising from multilateral agreements. In particular the financing of incremental costs

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[52] See G. Gómez Minujín, Debt-for-Nature Swaps – A Financial Mechanism to Reduce Debt and Preserve the Environment, 21 Env. Policy & Law, 1991, 146.

[53] In fact, most of the Latin America swaps rewarded the recipients for conservation measures to safeguard rain forests and biodiversity in specific areas, see C. Jakobeit, Nonstate Actors Leading the Way: Debt-for-Nature Swaps, in: R.O. Keohane/M.A. Levy (eds.), Institutions for Environmental Aid, 1996, 127.

for conservation measures is related to compensation for the extra effort States have to make in order to conserve resources of global importance. While this is not a trade-off that exchanges money for the strict non-use of areas, the compensatory element and incentive for an only restricted and sustainable use must not be underestimated.

However, as far as agreements such as the Convention on Biological Diversity refer to compensation for the "agreed incremental costs" it depends upon the decisions of the conferences of States Parties whether costs arising from the establishment of protected areas can be met by the allocation of financial resources via the financial mechanism. Furthermore, even if the establishment and conservation of protected areas could be financed it would still be depend upon the general approach of the relevant agreement whether these areas had to be strictly protected against use. It follows, that the establishment of compensatory mechanisms for strictly protected biodiversity areas is met by a variety of obstacles and uncertainties.

Those modern instruments in the field of biodiversity conservation that provide for financial mechanisms that could cover those incremental costs potentially arising from the establishment of protected areas, hence containing a compensatory element, namely the Convention on Biological Diversity, are based upon concepts of sustainable use of resources and areas. This notion distinguishes post-Rio agreements from earlier treaties that aimed at the strict protection of areas against use, while not (yet) providing for financial instruments to assist States Parties in achieving these early agreements' objectives. The concept of sustainable use, whether allowed in the general realm of changed paradigms of international environmental law after the Rio Earth Summit or specifically incorporated as an incentive for enhanced conservation, is not compatible with compensation for the absolute protection against anthropocentric usage.

Only in those cases where the only possible means of achieving sustainability is the, at least temporary, non-use of resources would agreements based upon sustainable use in fact promote absolute protection against use. However, such cases must be considered exemptions to the general concept and cannot lead to the conclusion that current financial mechanisms of nature conservation agreements compensate States Parties for the setting aside and strict protection of areas.

New approaches to compensation for setting aside land as protected areas could in general be integrated into existing financial mechanisms, if and to the extent that protection against any use is considered a necessary and viable tool for biodiversity conservation. The approach of compensation for the establishment of protected areas that is pursued by the model of debt-for-nature swaps, as far as they concern the creation of protected areas in return for the buying of external debts of a country, is not governed by international agreements for habitat conservation and their respective financial mechanisms. However, this approach could serve as a model for future financial mechanisms in international biodiversity conservation. Yet again, the main focus in regard to criteria concerning the allowed utilisation of such protected areas is whether sustainable use as an incentive or absolute protec-

tion of areas against use are considered more viable to achieve the long-term conservation of biological diversity. At the moment the trend in international environmental law seems to point in the direction of incentives by allowing the sustainable use. As long as the strict protection of areas is not supported by considerations as to its viability for biodiversity conservation the establishment of compensatory buy-off mechanisms in international nature conservation law seems unlikely.