*Asian Journal of International Law* (2024), **14**, 293–323
doi:10.1017/S2044251323000425

CAMBRIDGE UNIVERSITY PRESS

ARTICLE

# Enhanced *De Facto* Constraints Imposed by Non-legally Binding Instruments and Interactions with Normative Environment: An Analysis of the Joint Statements for the Conservation and Management of Japanese Eel Stock

Kazuki HAGIWARA

Lecturer, Fukuoka University, Fukuoka, Japan; Visiting Researcher, University of Ottawa, Ontario, Canada
khagiwara@fukuoka-u.ac.jp

(First published online 2 October 2023)

## Abstract

Since 2012, Japan, China, South Korea, and Chinese Taipei have consecutively held informal consultation meetings to discuss the conservation of Japanese eel stock. As a conservation and management measure, these participants adopted the Joint Statement in 2014 to regulate the initial input of Japanese eel seeds into aquaculture ponds. Despite the fact that the input limits were *de facto* constraints, these measures were implemented as domestic legal regulations in each participant's jurisdiction. This study examines the nature of the *de facto* constraints imposed by the Joint Statement for conserving and managing Japanese eel stock as a case study of stock regulations. This study further explores the possibilities of strengthening the *de facto* constraints through interactions with the normative environment; that is, the principle of sustainable development, domestic laws, and the relevant provisions in the United Nations Convention on the Law of the Sea (UNCLOS).

**Keywords:** non-legally binding instruments; soft law; sustainable development; UNCLOS; Japanese eel

Nowadays, it seems to be acknowledged that non-legally binding instruments[1] play important functions in the process of international law.[2] However, there are uncertainties over the legal status of *de facto* constraints imposed by these instruments.[3] Employing

[1] The term "binding" or "bindingness" means that the entities (States and state organs, such as ministries and agencies, sub-national territorial units, etc.) are in a relationship based on legally created rights and obligations under international law. Although the term non-legally binding "agreement(s)" seems to be generally accepted in the literature, this paper uses the term non-legally binding "instrument(s)" so as not to prejudice the participants reached an agreement. Usually, participants to non-legally binding instruments carefully avoid using the term "agreed" or "reached an agreement" in the text; thus, they intend not to give a legal form and legal effects to those documents.

[2] Andreas J. ZIMMERMAN and Nora JAUER, "Possible Indirect Legal Effects under International Law of Non-Legally Binding Instruments" KFG Working Paper Series, No. 48, May 2021, Berlin Potsdam Research Group "The International Rule of Law – Rise or Decline?" online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3840767.

[3] The meaning of the phrase "*de facto*" in the dictionary is described as "existing in fact, although perhaps not intended, legal, or accepted" (see online: Cambridge Dictionary: https://dictionary.cambridge.org/ja/dictionary/english/de-facto). The term "*de facto*" in this paper refers to the nature of any conservation and management measures (constraints/ standards) and joint programmes (cooperation) that are established, as

non-legally binding instruments to deal with issues between states is not a novel phenomenon.[4] Nonetheless, the recent increase in the use of these instruments has attracted the attention of scholars regarding their legal relevance.[5] The increasing tendency to use informal lawmaking outcomes suggests that the proposition that legally binding instruments restrict a State's discretion does not elucidate "the complex way rules exert impact on states".[6] This paper focuses on a specific case concerning Japanese eel conservation and management measures, where non-binding factual limitations (*de facto* constraints or standards) formed at international level became legally binding criteria when transplanted into the domestic plane. The interest of this paper lies in elucidating the process by which such non-binding limitations acquire legal relevance under international law through interaction with both international and domestic law.

This article provides a case study of the regulations managing Japanese eel stock. It examines the non-legal bindingness of the Joint Statement[7] and the *de facto* nature of the constraints – namely, the initial input limits of glass eel[8] – imposed to facilitate the conservation and management of that eel species. The paper also explores the expectations of these *de facto* constraints being enhanced by interactions with their normative environment:[9] the accumulation and crystallization of the principle of sustainable development (Section III), the incorporation into domestic regulations through the relevant

intended, to be non-legally binding by informal instruments. Once the participants of the non-legally binding instrument have incorporated these constraints, standards, or cooperative frameworks are incorporated into their domestic legal system, their contents are "de jure" and are legally binding in their domestic legal system. However, this fact does not change the "de facto" nature of constraints, standards, and joint programmes established by the non-legally binding instruments at the international level between the participants. In short, this paper uses the term "*de facto*" in terms of the non-legally binding nature of the constraints or standards at the international level, irrespective of the fact that these constraints and standards are incorporated into domestic legal regulations so that they possess a legally binding nature at the domestic level.

[4] Philippe GAUTIER, "Non-Binding Agreements" in Rüdiger Wolfrum, ed., Max Planck Encyclopedia of Public International Law (https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1469?rskey=YvPFcw&result=1&prd=MPIL).

[5] Zimmerman and Jauer, *supra note* 2 at 5.

[6] André NOLLKAEMPER, *The Legal Regime for Transboundary Water Pollution: Between Discretion and Constraint* (Norwell, Massachusetts: Kluwer Academic Publishers, 1993) at 252. See also Anne PETERS, "The Global Compact for Migration: to sign or not to sign?" (21 November 2018) online: *EJIL:Talk!* https://www.ejiltalk.org/the-global-compact-for-migration-to-sign-or-not-to-sign/. Peters mentions that "a strictly dichotomous view of law versus non-law pushes out of the picture many interesting and important normative phenomena and would make it more difficult to understand what is really going on in global governance."

[7] *Joint statement of the Bureau of Fisheries of People's Republic of China, the Fisheries Agency of Japan, the Ministry of Oceans and Fisheries of the Republic of Korea and the Fisheries Agency of [the]Chinese Taipei on International Cooperation for Conservation and Management of Japanese Eel Stock and Other Relevant Eel Species*, 17 September 2014, online: Japan Ministry of Agriculture, Forestry and Fisheries https://www.jfa.maff.go.jp/j/saibai/pdf/140917jointstatement.pdf [*Joint statement*].

[8] For the production cycle of Japanese eels, see Figure 1 in Appendix.

[9] It seems that the term "normative environment" is not defined in the literature of international law. The term in the Koskenniemi's report on the problem of fragmentation of international law meant the system of international law which includes "not only whatever general law there may be on that very topic, but also principles that determine the relevant legal subjects, their basic rights and duties, and the means by which those rights and duties may be supplemented, modified or extinguished." *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law,* Report of the Study Group of the International Law Commission (ILC), finalized by Martti KOSKENNIEMI, UN Doc.A/CN.4/L/682 (2006), online: https://legal.un.org/docs/?symbol=A/CN.4/L.682 [*ILC Study Group Report*]. Thus, "customary law, general principles of law and general treaty provisions" constitute the normative environment, see para 421. For the present article, because it examines not only the interaction with international law but also the process creating domestic regulations, the term "normative environment" includes not only international law but also municipal laws and procedures.

municipal laws and procedures (Section IV),[10] and the merger with the cooperation process envisaged by Article 67 of the United Nations Convention on the Law of the Sea (UNCLOS)[11] (Section V). It is also important to note that the word "enhanced", as used in this paper, does not mean that the effectiveness of conservation and management measures for Japanese eel species has improved statistical data justification. Instead, this paper aims to show that non-legally binding instruments "may give rise to legal implications indirectly, interacting with other instruments that are formal sources of international [and domestic] law".[12] If the legal relevance of the Joint Statement dealt with in this paper is proven, it is expected that awareness of the importance of conservation and management of the Japanese eel stock will increase, and this cognizance will trigger the installation of more effective measures.

The reference model for this study is the legal status of "IWC resolutions and Guidelines" adopted by the International Whaling Commission (IWC) and the Scientific Committee, which has been enhanced by the reasoning submitted by the International Court of Justice (the Court) in the case concerning *Whaling in the Antarctic* (*Whaling Case*).[13] Both the Joint Statement for the conservation and management of the Japanese eel stock and the "IWC resolutions and Guidelines" are non-legally binding instruments; however, the difference between them lies in the degree of institutionalization of the forum in which they were adopted. Nevertheless, through their interaction with respective external normative environments, both non-binding documents have been enhanced and have acquired a certain degree of legal relevance regarding their content.

Inquiring into the reasoning behind the *Whaling Case* judgment, the Court relied on Japan's Counter-Memorial statement to elicit a duty to cooperate in the judgment.[14] Japan, by using the term "soft law" (in its Counter-Memorial), emphasized that the "resolutions and Guidelines" have no binding effect and "carry less political weight" when compared to UN General Assembly resolutions.[15] On the other hand, Japan accepted that "even in the absence of binding effect, there is a duty on the part of the Contracting Governments to consider a recommendation in good faith and, if requested, to explain their action or inaction".[16] Japan, quoting Amerasinghe's statement, insisted that "[t]his cooperation should not be confused with cooperation in *carrying out* the recommendations, which is not an obligation".[17] Nevertheless, the Court found that "the States parties to the [International Convention for the Regulation of Whaling (ICRW)] have a duty to cooperate with the IWC and the Scientific Committee and thus should give due regard to recommendations calling for an assessment of the feasibility of non-lethal alternatives".[18] The Court was, therefore, interested in examining how the Second Phase of Japan's Whale Research Program under Special Permit in the Antarctic (JARPA II) implemented the non-lethal methods recommended by the "IWC resolutions and Guidelines".[19] When the Court investigated how non-lethal alternatives were used

[10] For analysing the process of incorporating the initial input limits into the domestic regulations, this paper focuses on the Japan's municipal process.

[11] *United Nations Convention on the Law of the Sea, 10 December 1982,* 1833 U.N.T.S 3, 424 (entered into force 16 November 1994) [*UNCLOS*].

[12] Zimmerman and Jauer, *supra* note 2, at 8.

[13] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)* [2014] I.C.J. Rep. 226.

[14] *Ibid.,* at paras 80, 83.

[15] *Whaling in the Antarctic*, Counter Memorial of Japan, vol. 1, 373, at para 8.62.

[16] *Ibid.,* at para 8.63.

[17] *Ibid.,* at para 8.64 (emphasis in original).

[18] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, *supra* note 13 at para 83.

[19] *Ibid.,* at para 137.

in the JARPA II programme, it derived "an obligation to give due regard to IWC resolutions and Guidelines" from the duty to cooperate.[20] After reviewing the documents filed by Japan to substantiate their claims that the lethal method employed in the JARPA II was reasonable and justified, the Court concluded:[21]

> [T]he papers to which Japan directed it reveal little analysis of the feasibility of using non-lethal methods to achieve the JARPA II research objectives. Nor do they point to consideration of the possibility of making more extensive use of non-lethal methods in order to reduce or eliminate the need for lethal sampling, either when JARPA II was proposed or in subsequent years. Given the expanded use of lethal methods in JARPA II, as compared to JARPA, this is difficult to reconcile with Japan's obligation to give due regard to IWC resolutions and Guidelines and its statement that JARPA II uses lethal methods only to the extent necessary to meet its scientific objectives.

Therefore, the Court considered the recommendation to use non-lethal methods as an applicable law for evaluating whether the scientific character of JARPA II was subject to Article VIII(1) under the term "for purposes of scientific research".[22] This transition from a duty to cooperate to an obligation to give due respect to recommendations enhanced the status of the *de facto* constraints, thus giving them a certain legal effect that provided a standard of review in adjudication.

However, the Court did not fully address the issues of how this enhancement occurred and how it was justified. According to the Court, "IWC resolutions and Guidelines" were approved by consensus and urged "States parties to take into account whether research objectives can practically and scientifically be achieved by using non-lethal research methods, but they do not establish a requirement that lethal methods be used only when other methods are not available".[23] In the next paragraph, the Court declared that "the States parties to the ICRW have a duty to cooperate with the IWC and the Scientific Committee and thus should give due regard to recommendations calling for an assessment of the feasibility of non-lethal alternatives".[24] No explanation was provided regarding the latter statement. Under the "IWC resolutions and Guidelines", the adoption of non-lethal alternatives was not obligatory; however, it became mandatory when combined with an obligation to respect recommendations under a duty of cooperation. In addition, the Court adopted the obligation to give due regard to recommendations derived from the duty to cooperate with the IWC and the Scientific Committee in the judgment's reasoning because Japan expressed its acceptance of such an obligation in its written proceedings, albeit as a non-legally binding one.[25] Therefore, the enhancement elevating the recommendatory use of non-lethal alternatives to legally required alternatives is based on Japan's acceptance of the duty of cooperation with the IWC and the Scientific Committee. Thus, the acceptance might underpin that derivation of the obligation to give due regard to recommendations from the duty to cooperate as an application of estoppel.

The enhancement of non-legally binding "IWC resolutions and Guidelines" was brought about against the backdrop of the duty to cooperate with the IWC and of the institutional framework in which these recommendations were adopted through the consensus of the Member States. Thus, from a comparative perspective, this paper poses the question of

[20] *Ibid.*, at paras 137, 144.
[21] *Ibid.*, at para 144.
[22] *Ibid.*, at para 127.
[23] *Ibid.*, at para 83.
[24] *Ibid*.
[25] *Ibid.*, at paras 80, 137, and 144.

whether non-legally binding instruments and *de facto* constraints set forth therein can be enhanced by an external normative environment without such an institutional framework.

To tackle this question against the backdrop of the increasing tendency of utilization of non-legally binding instruments, this study examining the Joint Statement and the *de facto* initial input limits of glass eel is structured as follows: Section I outlines the current state of the Japanese eel stock and traces activities through "the Informal Consultation on International Cooperation for Conservation and Management of Japanese Eel Stock and Other Relevant Eel Species" (Informal Consultation); Section II clarifies the nature of non-legal bindingness of the Joint Statement and the Joint Press Releases; Section III explores the parallel interaction with the principle of sustainable development, which gives rise to *de facto* constraints addressing a function of policy shaping directed to policy makers; Section IV examines the interaction with municipal laws and sheds light on how the initial input limits of glass eel, the *de facto* constraints imposed by the Joint Statement, were incorporated into the domestic regulations in Japan; Section V explores the interaction between the Joint Statement and Article 67 of UNCLOS, which may enhance the *de facto* constraints by merging the Joint Statement with the cooperative framework envisaged by that treaty provision; Section VI provides concluding remarks of the analysis conducted.

## I. An informal framework of the conservation and management of Japanese eel stock

The framework for conserving and managing Japanese eel stock was established on an informal basis. Japan, the People's Republic of China (China), the Republic of Korea (ROK), the Philippines, and Chinese Taipei are located around the area of the Japanese eel's migration route (see Figure 3 in Appendix) and are interested in the Japanese eel trade. As the eel catch continues to decline (see Figure 2 in Appendix), these participants launched the Informal Consultation between their fishery authorities, and have held meetings since 2012. Except for the Philippines, the remaining four participants[26] adopted the Joint Statement for the conservation and management of Japanese eel stock in 2014 and set the initial input limits that are currently administrated as their domestic regulations.[27] The initial input limits have been maintained at the same level as initially installed in 2014 by each Joint Press Release adopted as an outcome of the meetings thereafter.

The following paragraphs in this Section trace the change in the Japanese eel catch trend and the actions taken by the Informal Consultation to shed light on the background of the current conservation and management measures for Japanese eel stock.

Figure 2 shows Japan's annual domestic haul of glass eel from 1957 to 2021. The first two decades (from 1957 to 1978) show a sharp decline in the eel catch, which had declined to less than one-quarter, from over 232t in 1963 to 42t in 1978. However, this discrepancy is partly because data until the 1960s may have included juvenile eels.[28] After this drop, the long-term low eel catch periods continued for almost half a century. While the annual haul of the amount of glass eel has been steadily low for a long period, it is only recently,

[26] Although the Philippines was not included in the "four Participants" of the Joint Statement or the Joint Press Releases, it occasionally attended the Informal Consultation in the following years.

[27] Joint statement, *supra* note 7, at para 1.

[28] "Unagi wo meguru jokyo to taisaku ni tsuite" (On the state of affairs on eel and countermeasures) (The title was translated from Japanese translation by the current author) (July 2023), online: Japan Ministry of Agriculture, Forestry and Fisheries https://www.jfa.maff.go.jp/j/saibai/attach/pdf/unagi-17, [JFA Eels].

in 2012, that the abovementioned concerned participants held a series of meetings for Informal Consultation. One of the reasons why stakeholders have delayed taking conservation and management actions is probably because the life cycle of the Japanese eel was not well-determined. As early as 1992, a Japanese researcher published the discovery of the spawning area of the Japanese eel species around the Mariana Islands,[29] and subsequent research confirmed the area around the West Mariana Ridge as the spawning area.[30] According to the Japan Fisheries Agency (JFA), this spawning area of Japanese eel was identified in 2011.[31] Coincidentally, with this new scientific discovery, Informal Consultation was initiated.

However, the participants of the Informal Consultation did not take any restrictive measures towards the conservation and management of Japanese eel stock until 2014, when the Japanese eel was included in the Red List published by the International Union for Conservation of Nature (IUCN).[32] The registration of Japanese eel on the Red List accelerated the process of establishing conservation and management measures. The four participants held the 7th Meeting of the Informal Consultation (16–17 September 2014) and adopted the Joint Statement setting the initial input limits as conservation measures.[33] According to the Joint Statement, the participants restricted the initial input of glass eel into aquaculture ponds for the 2014–15 input season to no more than 80% of the amount of the 2013–14 input season.[34] The input amounts for Japan were restricted to 21.7t for Japanese eels and 3.5t for other eel species.[35] The Joint Statement also proposed installing a monitoring system to comply with the agreed amount of the annual initial input of glass eel by reporting the input data to all participants (Paragraph 1). To implement these conservation and management measures, the participants encouraged eel aquaculture farmers to establish one domestic non-governmental association (Paragraph 2) and one international non-governmental organization (Paragraph 3). Moreover, for future work, the participants will establish a legally binding framework (Paragraph 4).

In the next two years, the participants held the 8th (2 June 2015) and 9th (6 September 2016) Meetings of the Informal Consultation but did not publish the outcomes in a form of Joint Press Release.[36] The JFA's press release confirmed that the participants fulfilled the input limits specified by the Joint Statement and decided to continue imposing the same limitations in the subsequent input seasons.[37]

From the 10th Meeting, the participants released the outcomes of the meetings as a Joint Press Release. Up until the latest meeting in 2023, the Joint Press Release repeatedly stated that "to restrict [the] initial input of glass eels and eel fries of Japanese eel taken

[29] Katsumi TSUKAMOTO, "Discovery of the spawning area for Japanese eel" (1992) 356 Nature at 789.

[30] Aya TAKEUCHI, Takatoshi HIGUCHI, and Shun WATANABE *et al.*, "Several possible spawning sites of the Japanese eel determined from collections of their eggs and preleptocephali" (2021) 87 Fisheries Science 339.

[31] JFA Eels, *supra* note 28 at 1.

[32] "Japanese Eel - *Anguilla japonica*", *IUCN Red List of Threatened Species* (2020), online: IUCN Red List https://www.iucnredlist.org/species/166184/176493270.

[33] Joint statement, *supra* note 7, at Paragraph 1.

[34] *Ibid.*

[35] Hiroshi HAKOYAMA, Leanne FAULKS, Sakie KODAMA, Chiaki OKAMOTO, Hiroka FUJIMORI, Ayu DARYANI, and Masashi SEKINO, "Japanese Eel, *Anguilla japonica*" in Fisheries Agency of Japan & Japan Fisheries Research and Education Agency, Current Status of International Fishery Stocks in 2021 (31 March 2022), online: Fisheries Agency of Japan & Japan Fisheries Research and Education Agency https://kokushi.fra.go.jp/R03/R03_82_ELJ_English.pdf, at 6; JFA Eels, *supra* note 28 at 3.

[36] In the reply to the author's inquiry the JFA explained that for these two meetings the participants did not anticipate issuing the outcomes jointly, therefore there was no unified press release.

[37] JFA, "Press Release of the Outcomes of the 8th Meeting" (2015), online: JFA https://www.jfa.maff.go.jp/j/saibai/attach/pdf/unagi-95.pdf; "Press Release of the Outcomes of the 9th Meeting" (2016), online: JFA https://www.jfa.maff.go.jp/j/press/sigen/attach/pdf/180608-10.pdf (available only in Japanese).

from the wild, [the total amount of the input in the input season in questionis limited] up to 80% of that of the 2013–14 input season".[38] In addition, a series of Joint Press Releases have referred to the relevant Convention on International Trade in Endangered Species of Wild Fauna and Flora Conference of the Parties (CITES COP) decisions. For instance, the 14th Meeting Joint Press Release referred to decisions 18.197–18.202, particularly Decision 18.198 of COP-18, which encourages the range of countries to, *inter alia*, take conservation and management measures.[39] However, it should be noted that China has been absent from the 8th Meeting (2015) onwards. The Joint Press Release of the 14th Meeting (2021) added a commitment for the participants "to take every effort to request China to reinstall in the Informal Consultation and to positively collaborate with other members in conducting relevant activities [mentioned in the Joint Press Release]".[40] As if these efforts were successful, from the 15th Meeting in 2022, China has returned to the Informal Consultation and has continued discussions with other participants on the conservation and management of Japanese eel.[41]

## II. Non-legal bindingness of the Joint Statement and Joint Press Release and their potential

### *A. Non-Legal Bindingness of the Joint Statement and the Joint Press Release*

First and foremost, the negotiation forum is called the Informal Consultation. The title suggests that the participants do not intend to consider their negotiation outcomes as having any formal effects, at least ostensibly. The outcome instruments' designation may also corroborate this inference; namely the Joint Statement and the Joint Press Release. As described below, these elements constitute "the particular circumstances", indicating the intention of the participants not to introduce any legally binding obligations; however, it is not sufficient to look at the appearance of their informal activities when evaluating the nature of the Joint Statement and Joint Press Release. The general perception is that "joint statement" or "joint communiqué" imply a non-binding instrument.[42] However, such a categorization is not always immutable in practice: the irrelevance of designation with legal bindingness is generally acknowledged. For instance, the Senate Committee Print 107–61 describes the irrelevance as follows:[43]

[38] JFA, "Joint Press Releases of the 14th Meeting" (2021), online: JFA https://www.jfa.maff.go.jp/j/press/sigen/attach/pdf/210727-3.pdf [*2021 Joint Press Release*]; JFA, "Joint Press Release of the 13th Meeting" (2020) [*2020 Joint Press Release*] (as the link to this press release has been removed from the JFA website, please contact the author through the email provided to receive a copy of this meeting); JFA, "Joint Press Release of the 12th Meeting" (2019), online: JFA https://www.jfa.maff.go.jp/j/press/sigen/attach/pdf/190531_21-6.pdf [*2019 Joint Press Release*]; JFA, "Joint Press Release of the 11th Meeting" (2018), online: JFA https://www.jfa.maff.go.jp/j/press/sigen/attach/pdf/180713-4.pdf [*2018 Joint Press Release*], JFA, "Joint Press Release of the 10th Meeting" (2017), online: JFA https://www.jfa.maff.go.jp/j/press/sigen/170711.html [*2017 Joint Press Release*].

[39] 2021 Joint Press Release, *supra* note 38. On the significance of this reference, see Section IV below.

[40] *Ibid*., at para 2.

[41] See JFA, "Joint Press Release of the 15th Meeting" (2022), online: JFA https://www.jfa.maff.go.jp/j/press/sigen/env-inv/attach/pdf/210727-8.pdf; "Joint Press Release of the 16th Meeting" (2023), online: JFA https://www.jfa.maff.go.jp/j/press/sigen/attach/pdf/230727-1.pdf.

[42] Yasuaki ŌNUMA, *International Law in a Transcivilizational World* (Cambridge: Cambridge University Press, 2017) at 136.

[43] U.S. Government Publishing Office, "Senate Committee Print 106-71-Treaties and Other International Agreements: The Role of the United States Senate" (January 2001), online: Library of Congress https://www.congress.gov/committee-print/106th-congress/senate-committee-print/66922, at 60.

> joint statements of intent are not binding agreements unless they meet the requirements of legally binding agreements, that is, that the parties intend to be legally bound. As in the case with all agreements, the substance and not the title is dispositive. Thus, whether or not a joint statement is titled a "joint statement" or "joint communique" or "declaration" has no effect on whatever legal standing it may hold independent of its title.[85]
>
> [85] The way an instrument is dealt with after its conclusion may be an indication of whether it is intended to have legal effect. For example, it may be published in a national treaty collection, or it may be registered under Art. 102 of the U.N. Charter, or it may be described as a treaty during submission to a national parliament.

Such irrelevance between designations and their legal bindingness is also partly reflected in the definition of a "treaty" in the Vienna Convention on the Law of Treaties (VCLT).[44] In the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain,* the Court also confirmed that international agreements may take different forms and be given various names.[45] This means that the appearance of an instrument cannot provide a definitive basis for determining the nature of the instrument. The Court has upheld the irrelevance between designations and their effects on several occasions. For example, in the *Aegean Sea Case*, the Court stated that no rule precludes a joint communiqué from being an international agreement as referred to in the VCLT. [46]

Recently, in the *Pulp Mills Case*, the Court considered two "agreements" between the parties, namely "understanding" and "press release" as binding instruments.[47] The Court emphasized that even the parties differ as to the content and scope, "this 'understanding' is binding on the parties to the extent that they have consented to it and must be observed by them in good faith".[48] The parties' intentions engulfed by the term "consent" are essential for creating a legally binding agreement.[49] Where the legality of a document is challenged, the existence of the common intention of the parties is

[44] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980) [*VCLT*], art. 2, 3 and 11.

[45] The Court confirming the position taken in the *Greece v. Turkey* (*infra* note 45) judgment mentioned that "international agreements may take a number of forms and be given a diversity of names". See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (*Qatar v. Bahrain*), Question on Jurisdiction and Admissibility [1994] I.C.J. Rep. 112 at para 23 [*Qatar v. Bahrain*].

[46] *Aegean Sea Continental Shelf (Greece v. Turkey)*, Questions of Jurisdiction and/or Admissibility, [1978] I.C.J. Rep. 3 at para 96 [*Greece v. Turkey*]. See also *Qatar v. Bahrain, supra* note 44 at para 23.

[47] See *Pulp Mills on the River Uruguay* (*Argentina v. Uruguay*), Separate Opinion of Judge ad hoc Torres Bernárdez, [2010] I.C.J. Rep. 233, 245 at para 44. For the "understanding" the Court explicitly confirmed that it bound the parties, see para 128. For the "press release", Pauwelyn considered that the Court "applied a joint press communiqué as an 'agreement' between Argentina and Uruguay, even though the communiqué was neither a formal treaty nor formally signed by the respective ministers." See Joost PAUWELYN, "Is It International Law or Not, and Does It Even Matter?" in Joost PAUWELYN, Ramses WESSEL, and Jan WOUTERS, eds., *Informal International Lawmaking* (Oxford: Oxford University Press, 2012) 125, 132. The Court used the terms "press release" and "communiqué" interchangeably. See *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgment of 20 April 2010) [2010] I.C.J. Rep. 14 [*Pulp Mills*], at paras 132, 133, 135, and 138.

[48] *Pulps Mills, supra* note 47 *at* para 128.

[49] Replying to the author's inquiry, the JFA confirmed that it considered the joint statement and the following joint press releases as creating no legal rights or obligations between the participants; rather, it treated these documents as expressing joint commitments regarding the conservation and management measures that each participant should implement as part of its own responsibility.

contested. However, even though a subsequent statement expressing that the party did not intend to create legal rules was issued after the signature, such a statement could not overturn the intention implied by the signature when the document was drawn up.[50] Fitzmaurice & Merkouris opine that:[51]

> It can be said that a modern approach to the intention of the parties should be [analysed] from the objective point of view based on the apparent or external factors and facts, rather than as an insight into the subjective state of mind of the parties.

As to the factors ascertaining the intention of the parties and determining the nature of the instrument, the Court, pointing out the importance of probing the substance, stated the following: [52]

> [W]hether the Brussels Communiqué of 31 May 1975 does or does not constitute such an agreement essentially depends on the nature of the act or transaction to which the Communiqué gives expression; and it does not settle the question simply to refer to the form – a communiqué – in which that act or transaction is embodied. On the contrary, in determining what was indeed the nature of the act or transaction embodied in the Brussels Communiqué, the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up.

The Court specified that "actual terms" and "the particular circumstances in which the [Communiqué] was drawn up" are the two elements that make an instrument "an international agreement". In the *Qatar v. Bahrain*, the Court elaborated the "actual terms" element as an enumeration of commitments "to which the parties have consented".[53] In this sense, "actual terms" are to be considered "as the expression of their common intention".[54] The Court also inferred the "actual terms" element from "a provision addressing the entry into force".[55]

Concerning the substantial element of "actual terms", namely the enumeration of commitments, the Joint Statement clearly envisages how the participants can proceed to conserve and manage Japanese eel stock. In addition to the initial input limits, the Joint Statement set forth the monitoring process and the future tasks for establishing a legal framework.

[50] See Masahiko ASADA, "How to Determine the Legal Character of an International Instrument: The Case of a Note Accompanying the Japan-India Nuclear Cooperation Agreement" (2018) 20 International Community Law Review 192, 207–8; Malgosia FITZMAURICE and Panos MERKOURIS, "Treaty Genesis: Concept of a Treaty in International Law, Including Its Formation and Motion" in *Treaties in Motion: The Evolution of Treaties from Formation to Termination* (Cambridge: Cambridge University Press, 2020) 23, at 53–4

[51] Fitzmaurice & Merkouris, *supra* note 50 at 27.

[52] *Greece v. Turkey, supra* note 46 at para 96.

[53] *Qatar v. Bahrain,* supra note 45, at para 25.

[54] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Jurisdiction and Admissibility) [1995] I.C.J. Reports 6 at para 41. In this regard, Tamada analyzed that the Court emphasized to ascertain "actual terms" rather than the intention of the parties in comparison with the South China Sea Arbitration; see Dai TAMADA, "The Japan-ROK Comfort Women Agreement: Unfortunate Fate of a Non-Legally Binding Agreement" (2018) 20 International Community Law Review 220, at 228. However, Asada takes the view that the scrutiny of "actual terms" and the ascertainment of the parties' intention are not identical but are closely related to each other in the sense that the Court stressed the intention at the time of giving signatures. There was no need to *speculate retrospectively* what was intended in the statement presented later by the signatories; see Asada, *supra* note 50 at 208–9 (emphasis in the original).

[55] *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, [2017] I.C.J. Rep. 3 at para 42. At this point, see also Tamada, *supra* note 54 at 255.

Concerning the substantial aspect of the "actual terms", "[t]he subsequent conduct of the parties to an instrument may also assist in determining its nature".[56] As highlighted in Section IV below, the initial input limits set out in the Joint Statement were incorporated into domestic regulations by the participants through their municipal laws. Such unified subsequent conduct of the participants may underpin the view that the Joint Statement is legally binding. However, it must be borne in mind that the substantial element of the "actual terms" of the Joint Statement is less political and more technical; hence, there are fewer obstacles for the participants to embody concrete commitments in the Joint Statement. In addition, it seems that the participants were attempting to determine the practical and immediate effects of averting the anticipated severe trade regulations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[57] rather than creating legal rights and obligations for the regulation at stake.

As to the style of the "actual terms", the Joint Statement is structured in paragraphs, although they are numbered and layered (such as Paragraph 1, (1), (a)). This style is typically different from what treaties commonly adopt.[58] However, the paragraph structure does not provide decisive evidence that legal bindingness is precluded from a document. For instance, the 1990 Minutes also had a structure of numbered paragraphs that were found to be legally binding by the Court.[59] In addition, the terms used in the text of the Joint Statement evince that the participants did not intend to produce legally binding force. The participants refer to themselves as "participants" instead of "parties", use "will" instead of "shall", and have reached "common views" instead of "an agreement".[60] Moreover, no provision addresses entry into force. These carefully selected terms objectively reflect the participants' intention not to give legally binding effect to the Joint Statement.

For the second criterion, "the particular circumstances in which [the Joint Statement was] drawn up" cannot be verified by publicly available resources. It is not certain whether the participants signed these instruments. The available official resources show no field for signatures in these documents.[61] On the contrary, from the language perspective, the participants adopted the unified English version as the official text. Although the authenticity of the English version is not explicitly manifested in the text, the Japanese version was issued as a "tentative translation" on the JFA website. The participants could have chosen not to adopt a unified text for political considerations.[62] It is also plausible that English may have been the preferred language in seeking a common language among the participants, where each used different official languages.

While these individual elements seem to imply that the Joint Statement can be legally or non-legally binding, holistically, it is contemplated as a non-legally binding instrument. This is due to the lack of evidence that the participants intended to create a legally binding instrument at critical points, namely the terminology, lack of signatures, no entry provision, and an informal forum. Even though these elements are inconclusive, there is no evidence to prove otherwise.

[56] *South China Sea Arbitration (Philippines v China)*, Questions on Jurisdiction and Admissibility, [2015] P.C.A. Case No. 2013-19 at 213 [*South China Sea Arbitration*].

[57] Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, 993 U.N.T.S. 243 (entered into force 1 July 1975).

[58] Tamada, *supra* note 54 at 236.

[59] The English translations of the 1990 Minutes submitted by the parties were reproduced in the judgment. *Qatar v. Bahrain*, *supra* note 44 at para 19.

[60] *C.f. South China Sea Arbitration*, *supra* note 56 at para 214.

[61] See the case of the 2015 Comfort Women Agreement, Tamada, *supra* note 54 at 239, fn 39.

[62] For a unique example of the 2015 Comfort Women Agreement, see Tamada, *supra* note 54 at 220 ff.

In addition, another possible reason for us to view the Joint Statement and the Joint Press Release as non-legally binding instruments is that the participants include China and Chinese Taipei. It is unlikely that China would have intended to conclude a treaty with Chinese Taipei under their policy aiming to achieve a "reunification" with Taiwan.[63] This remark also suggests one of the benefits of taking the form of non-legally binding instruments for the participants. The statehood of Chinese Taipei is not recognized among the participants of the Informal Consultation, hence a prerequisit for concluding a treaty between the participants is not fulfilled.[64]

### *B. The Joint Statement as an Agreement Concluded between Government Agencies*

The classification of treaties may raise challenges concerning constitutional legitimacy. Regarding Japan's constitutional discussion, two categories of treaties depend on whether approval by the Diet (Parliament) is required.[65] Three criteria distinguish those requiring Diet approval from those concluded between executive branches without going through the Diet for approval (the so-called Ohira Three Principles). Treaties that call for a) supplementary legislation, b) additional budgetary measures for their implementation, and that are c) politically significant all require approval from the Diet.[66] Another type of treaty is called an "executive agreement" (Gyōsei-Torikime), which is legally binding in principle but does not necessitate the Diet's approval under the Ohira Three Principles.[67] Instead of the Diet's approval, executive agreements become effective and binding in Japan's domestic legal system when published as the Public Notice of the Ministry of Foreign Affairs (*Gaimushō Kokuji*) in the government's Official Gazette (*Kanpō*).[68] The Joint Statement neither gained the Diet's approval nor was it published in the Official Gazette for it to become effective in the domestic legal system. The Joint Statement is, therefore, a political arrangement without legally binding force.

Apart from the issue of treaty typology in Japan's domestic politics, the question of whether the Joint Statement qualifies as a treaty with legally binding force relates, in theory, to whether it constitutes an agreement regulated by international law and the legislative authority of the entities that created it.

According to Lord McNair, agreements concluded between agencies of governments are "arrangements which concern matters of private law rather than matters of an international legal character", namely commercial transactions between ministries or

[63] On the statement by President Xi Jinping regarding the "reunification", see "China-Taiwan tensions: Xi Jinping says 'reunification' must be fulfilled" *BBC* (9 October 2021), online: BBC <https://www.bbc.com/news/world-asia-china-58854081>.

[64] Despite China's non-participation after the adoption of the Joint Statement, the benefits of adopting the format of a non-binding instrument remain. This is due to the fact that Chinese Taipei remains a non-state actor in relation to other participants. It should be noted that this consideration does not negate the possibility of treaties being concluded between states and non-state actors.

[65] This distinction is corresponding to Paragraphs 2 and 3 of Article 73 of the *Constitution of Japan*, 3 November 1946, online: Japanese Law Translation https://www.japaneselawtranslation.go.jp/en/laws/view/174/tb#je_ch5at9, which pertains to the Cabinet's functions, reads: "(2) Manage foreign affairs; (3) Conclude treaties. However, it shall obtain prior or, depending on circumstances, subsequent approval of the Diet." Concluding "executive agreements" falls into the function "Manage foreign affairs".

[66] For the Ohira Three Principles, see Yusuke NAKANISHI, "Defining the Boundaries of Legally Binding Treaties – Some Aspects of Japan's Practice in Treaty-Making in Light of State Practice" (2018) 20 International Community Law Review 169, at 186.

[67] Nakanishi, *supra* note 66 at 186.

[68] See Tomonori MIZUSHIMA, "A Note on "Executive Agreements" in Japanese Law: A Modest Contribution of an International Law Scholar to Public Law Studies" (2018) 227 Nagoya University Journal of Law and Politics 3, at 17–18.

departments, which are not usually registered under Article 102 of the UN Charter.[69] McNair exemplifies a hypothetical trade transaction between the UK and the Argentine governments for purchasing 1000t of chilled beef based on a standard form of contract used in the meat trade as a non-treaty contract.[70] This characterization is owed to the fact that the contract is governed by the contract terms rather than international law.[71] In other words, it implies that a treaty is "operating within the sphere of international law".[72]

Since a Joint Statement is an arrangement formed as a result of an informal consultation between particular governmental agencies holding jurisdiction over fisheries, it can fall into the abovementioned classification given by McNair. However, the Joint Statement includes the initial input limits, which are not part of any transactions between the participants. It is an arrangement implemented through municipal laws and domestic regulations within each jurisdiction. In short, it is a matter of public law rather than private law. Insofar as the type of agreements concluded between agencies of governments are concerned, their "international legal character" depends on whether the agreement in question is governed by international law. Regarding this criterion, as discussed in Section V below, the interactions with other rules of international law may be considered as the element "governed by international law" and, if so, it can be inferred that the Joint Statement is "operating within the sphere of international law".

Another perspective relates to the capability of agency in lawmaking. In this respect, identifying the nature of an agreement entails complex considerations such as the agency's legal personality, capacity, its relationship with central government, and the particular circumstances of the case in question.[73]

The issue of whether agreements concluded between agencies of governments are part of international law was previously examined by McNair and, more recently, has been revisited by Pauwelyn. Pauwelyn notes that the key factor is whether the agencies in question have the capacity or authority to make law.[74] As the VCLT specifies, those agencies can be qualified, or the state can recognize the agreement *ex-post*.[75] However, the practices in the European Court of Justice and in France regarding *arrangements administratifs* indicate different possibilities, which seem to signify that agreements concluded between state agencies might be taken either as formal or informal.[76] Regarding these contradicting perceptions, Pauwelyn concluded that:[77]

> The fact that informal international law-making processes include non-State actors (the actor informality of IN-LAW) does not preclude IN-LAW from being international law. However, for IN-LAW to be international law, its makers must at least include some recognized law-makers such as States or [international organizations].

[69] Lord MCNAIR, *The Law of Treaties* (Oxford: Clarendon Press, 1961) 15. McNair points out that the agreement between governments "is now becoming increasingly common, as a perusal of the United Nations Treaty Series will show. It is in keeping with the general tendency towards informality".

[70] *Ibid.*, at 4.

[71] *Ibid.*, at 5.

[72] *Ibid.*, at 4.

[73] *Ibid.*, at 21.

[74] Pauwelyn, *supra* note 47 at 142.

[75] VCLT, arts. 7 and 8.

[76] Pauwelyn, *supra* note 47 at 142–3.

[77] Pauwelyn, *supra* note 47 at 144. In his term, "IN-LAW" means "informal international lawmaking", see Pauwelyn, *supra* note 47, at 126.

The issue regarding the capability of an agency in lawmaking requires examining the status of the agency apropos the relevant municipal laws and rules. Section IV partly examines this task, which deals with the process of incorporation of *de facto* constraints into domestic regulations. The investigation in Section IV evinces that the attached council to the JFA, established by Cabinet Order, is authorized to deal with the assigned issues as a form of deliberation for the Minister of Agriculture, Forestry and Fishery (Minister of AFF); that is, for our case, to approve the draft public notice for the implementation of input limits as restrictive measures taken by the Minister of AFF.[78] Such administrative processes suggest that the relevant agencies committed to the execution of relevant municipal law, not legislation, through creating domestic regulations, namely setting initial input limits, pursuant to the Joint Statement. However, this does not exclude the possibility that the Joint Statement may interact with domestic and international law.

### C. Soft Law Potentials

The strict dichotomy between law and non-law may ignore the important normative phenomena contributing to the understanding of global governance.[79] Employing soft law, including non-legally binding instruments, has certain strategic advantages due to its flexibility in forming and adopting the instruments without giving rise to legal responsibility.[80] Considering these normative phenomena, scholars have highlighted some legal functions of non-legally binding instruments. Peters pins down three legal functions of soft law.[81] Although the subject of her analysis is a document adopted under the auspices of the UN, the Global Compact for Safe, Orderly and Regular Migration (final draft of 13 July 2018), according to her definition, this document is a non-legally binding instrument that is also captured as soft law.[82] Peters identified three legal functions of soft law: "pre-law", which includes functions that make a non-legally binding text "a forerunner of hard law, paving the way for a formal treaty"; "para-law", which includes functions that make non-legally binding instruments "substitute missing hard law"; and "law-plus", which is a scenario whereby a non-legally binding text "can serve as a guideline for the interpretation of hard law, [and] can flesh out hard law commitments and make them more concrete".[83] These functions mostly overlap with the five possible legal effects of informal lawmaking categorized by Pauwelyn in his project. Informal lawmaking, capable of having legal effect, is considered a legal fact rather than a legal act that produces the legal effects the capable subjects intended.[84] This doctrinal distinction is described as follows:[85]

> Yet, the difference is that with a legal act these effects stem directly and independently from the legal act. In contrast, the legal effects of a legal fact stem not from the fact as such but from the application of a separate legal act whose application is triggered by this fact.

[78] See Sections V(2) and (3) of the paper.

[79] See Peters, *supra* note 6. For an overview of the comparison between "the bright line school" and "the grey zone school", see Pauwelyn, *supra* note 47 at 127–30. Pauwelyn observes that "The key to resolving this debate is this: being law and having legal effect must be distinguished. The mere fact that something falls on the non-law side does not mean that it has no legal effect." For the cross-fertilization school, which takes the view that "non-law may have a whole range of possible effects on what is law and how it should be interpreted and applied", see 152–3.

[80] Peters, *supra* note 6 at 6; Gautier, *supra* note 4 at para. 19.

[81] Peters, *supra* note 6.

[82] *Ibid.*

[83] *Ibid.*

[84] Pauwelyn, *supra* note 47 at 153–4.

[85] *Ibid.*, at 154 (footnote omitted).

Such indirect legal effects derive from the five different types of legal facts. Among others, Pauwelyn specifies the explicit incorporation in formal law (treaties or domestic statutes) that gives informal lawmaking legal status or implements it as legally binding by reference.[86] This explicit incorporation is illustrated in Sections IV and V of this paper.

## III. Interaction with the principle of sustainable development

Before embarking on the analysis of the process in which *de facto* constraints are incorporated into domestic regulations and emerge into a requirement for cooperation under Article 67 of UNCLOS, this Section describes the *de facto* constraints placed by the principle of sustainable development upon policy makers. The *de facto* constraints arising out of the principle of sustainable development present a framework in which policy makers are encouraged to engage in a process that creates politically agreed *de facto* constraints and incorporates them into domestic or international regulations:[87]

> Irrespective of the concept's international normative weakness at the moment, it is evident that "sustainable development" is shaping environmental policy debates in a fundamental way. More significantly, it has begun to act as a de facto constraint on environmental decision-makers, both internationally as well as domestically.

Handl addresses the policy-shaping function of sustainable development as "a *conditio sine qua non* for human life on this planet in the long run".[88] Nollkaemper, in the context of the regime of transboundary water pollution, elaborates on Handl's concept, observing that:[89]

> the principle of sustainable development has induced expectations as to the conduct of States [and] can be used to claim from other States that they adopt their policies and indeed had begun to act as a *de facto* constraint on policy-makers.

Using the term "principle" instead of "concept", Nollkaemper somehow elevates the status of sustainable development but still maintains that it only produces *de facto* constraints that constitute certain social pressures toward policy makers.

The *de facto* constraints arising from the principle of sustainable development provide motivation and impetus for policy makers moving towards sustainability, although the *de facto* constraints that emanate from individual non-legally binding instruments can set forth concrete targets for a specific sustainable objective to be achieved, such as the initial input limits of Japanese eels. Thus, the Joint Press Releases, adhering to the *de facto* initial input limits set forth by the Joint Statement, refer to CITES COP decisions: CITES COP-18 decisions 18.197 to 18.202, in particular Decision 18.198, in the 2021 and 2020 Joint Press Releases and CITES COP-17 decisions 17.186 to 17.189 in the 2019 and 2018 Joint Press Releases.[90] Among others, Decision 18.198, through the latest Joint Press Releases, specifically encourages the range of States of non-CITES that may trade in *Anguilla spp*. as follows:[91]

[86] *Ibid.*, at 155–7.

[87] Günther HANDL, "Environmental Security and Global Change: The Challenge to International Law" (1990) 1:1 Yearbook of International Environmental Law 3, at 27.

[88] *Ibid.*, at 25.

[89] Nollkaemper, *supra* note 6 at 234, 252.

[90] 2021 Joint Press Release, *supra* note 38; 2020 Joint Press Release, *supra* note 38; 2019 Joint Press Release, *supra* note 38; 2018 Joint Press Release, *supra* note 38.

[91] Decision 18.198, *CITES*, online: CITES < https://cites.org/eng/node/56008 >.

> where appropriate, implement conservation and management measures, such as adaptive eel management plans, enhanced collaboration within countries, between authorities and other stakeholders with responsibilities for eel management, and related legislation to ensure the sustainability of harvests and international trade in *Anguilla* spp. and make these widely available.

Given that *de facto* constraints arising from sustainable development provide the impetus for shaping a policy alongside the concept of sustainability, these constraints may function in two ways. One aspect encourages States to participate in international fora and take part in forming an agreement or a common understanding, either political or legal, such as holding an informal consultation and adopting a Joint Statement and a series of Joint Press Releases apropos Japanese eels. The other facet encourages States to incorporate the agreed *de facto* conservation and management measures into domestic regulations. The latter function is contemporaneous with but independent of the estoppel principle, triggering an incorporation process whereby the *de facto* constraints are assimilated into domestic law. Hence, the reference to Decision 18.198 implies that the Decision functions as a *de facto* constraint that encourages the participants' policy makers to maintain the initial input amount as their agreed conservation and management measures for Japanese eel stock and incorporate them into their domestic regulations.

Considering the accumulation of the universal recognition of sustainable development since the 1970s in international documents, both legally and non-legally binding, and in international jurisprudence,[92] sustainable development is considered a guiding motivation of modern international law.[93] A series of UN conferences and their outcome documents have adopted the concept of sustainable development. Although these documents are not legally binding, they "reflect in any event an international understanding of what conduct should be pursued by States to reach the universally approved goals".[94] This accumulation and acceptance in the international community increases the thrust towards having a definite ground for policy shaping and inducing expectations as to the conduct of States towards sustainability.

However, a fundamental question remains whether sustainable development exists as a legal principle.[95] There are different views among jurists regarding the legal status of sustainable development. In the *Gabčíkovo-Nagymaros Project*, the Court decreed that "[t]his need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development".[96] The concept of sustainable

[92] Returning to the earliest appearance of the idea of sustainable development in the international context in 1893, the *Behring Sea Fur Seals Fisheries Arbitration* between the US and the UK addressed the issue regarding the preservation of the fur seal stock. See John Bassett MOORE, *History and Digest of the International Arbitrations to Which the United States Has Been a Party: Together with Appendices* (Washington: Government printing Office, 1898) at 755.

[93] Thomas. A. MENSAH, "Using Judicial Bodies for the Implementation and Enforcement of International Environmental Law" in Isabelle BUFFARD *et al*., eds., *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Leiden, The Netherlands: Brill/Nijhoff, 2008) 797, at 789.

[94] Christian TOMUSCHAT, "The Concluding Documents of World Order Conferences" in Jerzy MAKARCZYK ed., *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (The Hague: Kluwer Law International, 1996) 563, at 563.

[95] Even though the concept of sustainable development as such has not possessed a legal status, this does not mean that it does not have any legal relevance, especially when the concept is embodied in a treaty text or its preamble. For example, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, W.T.O., Appellate Body Report adopted on 6 November 1998, WT/DS58/AB/RWT/DS58/AB/R, at paras 127–34, especially paras 129 and 130.

[96] *Case concerning Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* (Judgment of 25 September 1997) [1997] I.C.J. Rep. 7, at 77–8, para 140 [*Gabčíkovo-Nagymaros Project*].

development also represents the awareness that human activities cumulatively threaten and harm the natural environment.[97] While the majority of the Court deemed it a social demand for reconciling economic development and environmental protection, Vice-President Weeramantry considered sustainable development "a principle with normative value".[98] In his understanding, sustainable development is a legal principle that harmonizes conflicting rules and regulations, such as the right to develop and protect the environment. He mentions that "[e]ach principle cannot be given free rein, regardless of the other. The law necessarily contains within itself the principle of reconciliation. That principle is the principle of sustainable development."[99] As Simma pointed out, against such advocacy of sustainable development as a legal principle, there is controversy as to whether "the principle of 'sustainable development' is amply supported and reinforced by numerous instances of 'practice' [that justify] its elevation into the pantheon of international law".[100]

It may be possible to take into account the behaviour of countries that incorporate sustainable development objectives from non-legally binding instruments into domestic legal regulations as part of the "general practice" under Article 38(1)(b) of the Statute of the International Court of Justice. Although the Joint Statement is merely a regional endeavour that does not encompass a sufficient number of States to constitute general practice, it references the CITES decisions adopted in a universal forum. Moreover, it is unclear whether the relevant conduct taken, in accordance with the non-legally binding standards, is "settled practice" together with *opinio juris*[101] since States consider such non-legally binding instruments as non-law. In this context, Peters stated:[102]

> [the crystallization of customary international law] would, of course, need an *opinio iuris* and concomitant practice over some time. When signing states – as here – explicitly say that the commitments are not legally binding, it is difficult to deduce any legal opinion from this.

However, it could be possible to view such conduct as coinciding with *opinio juris* if these States incorporated the relevant *de facto* constraints into domestic law. This procedure could resolve a logical inconsistency of *opinio juris*, in which a State feels obliged to

[97] *Ibid.*, at 18, para 17, which states that "[t]he cumulative effects on the river and on the environment of various human activities over the years have not all been favourable, particularly for the water régime". Although Judge Oda submitted his dissenting opinion, he supported the concept of sustainable development that the majority described. He mentioned that:

> [i]t is a great problem for the whole of mankind to strike a satisfactory balance between more or less contradictory issues of economic development on the one hand and preservation of the environment on the other, with a view to maintaining sustainable development. Any construction work relating to economic development would be bound to affect the existing environment to some extent, but modern technology would, I am sure, be able to provide some acceptable ways of balancing the two conflicting interests.

See *Case concerning Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Dissenting Opinion of Judge Oda [1997] I.C.J. Rep. 153, at 157–8, para 14.

[98] *Case concerning Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Separate Opinion of Vice-President Weeramantry 1997] I.C.J. Rep. 88, at 88.

[99] *Ibid.*, at 90.

[100] Bruno SIMMA, "Forward" in Nico J. SCHRIJVER, Friedl WEISS, eds., *International Law and Sustainable Development: Principles and Practice* (Leiden, The Netherlands: Brill/Nijhoff, 2004).

[101] *Jurisdictional Immunity* (Germany v. Italy: Greece intervening), Judgment, [2012] I.C.J. Rep. 99 at 122, para 55.

[102] Peters, *supra* note 6.

obey a legal rule still being in the process of formation. If so, such practice may contribute to crystallizing sustainable development as a legal principle of international law.[103]

Alternatively, instead of relying on the controversial concept of sustainable development, using specific clauses intended to protect endangered species reduces the uncertainty caused by the indeterminate legal status of sustainable development. It reinforces the basis of interaction between *de facto* constraints and their normative environment. In this context, Article 192 outlines a general obligation to protect and preserve the marine environment, while Article 194(5) specifically addresses protecting marine living resources.[104] These general obligations regarding the protection of marine species strengthen the motivation of States Parties to UNCLOS in complying with more specific obligations under the same convention, for instance, Article 67, as discussed in Section V below.

## IV. Interaction with municipal laws and procedures: incorporation of the de facto constraints into domestic regulations

There are two possibilities through which *de facto* constraints can be incorporated into domestic regulations. According to Thürer, the normative functions of soft law can be identified in two phases of municipal law: interpretation and lawmaking. For the first possibility:[105]

> Soft law may (...) intrude into the internal sphere of States and help to define the meaning of the principles and rules laid down in municipal law. Codes, memoranda, and similar soft law acts can thus become part of municipal legal orders.

For the second possibility, while examining the Final Act of Helsinki and its impact on Article 29 of the 1977 Constitution of the Soviet Union and the US immigration law, Thürer opines that soft law "can be used as a source of inspiration or as building blocks when creating new municipal law".[106] The concept of soft law encompasses broader normative forms, including non-legally binding instruments as a sub-category thereof.[107] Accepting this categorization, these two possible effects are analogously attached to non-legally binding instruments, including the Joint Statement. Therefore, the second possibility suggests a scenario where the *de facto* constraints imposed by the Joint Statement can be integrated into the domestic regulations provided by municipal laws and procedures. This process demonstrates similarities with the act of transformation by States, especially those countries with a common law tradition. This process transforms international law into municipal law to make it binding on State organs and, possibly, individuals.[108] Given that a bright line can be drawn

[103] See Jennifer MCKAY, "Some Australian Examples of the Integration of Environmental, Economic and Social Considerations into Decision Making – The Jurisprudence of facts and context" in Duncan FRENCH, ed., *Global Justice and Sustainable Development* (Leiden, The Netherlands: Brill/Nijhoff, 2010) 327, at 328.

[104] Article 192 stipulates that "States have the obligation to protect and preserve the marine environment". Article 194(5) provides that "The measures taken in accordance with [Part XII] shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life."

[105] Daniel Thürer, "Soft Law" in Rüdiger Wolfrum, ed., *Max Planck Encyclopaedia of International Law* (https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1444?rskey=ZKxEQ6&result=1&prd=MPIL) at para 30.

[106] *Ibid.*, at para 32.

[107] Gautier, *supra* note 4 at para. 1.

[108] See Pierre-Marie DUPUY, "International Law and Domestic (Municipal) Law" in *Max Planck Encyclopaedia of International Law* (Oxford University Press, 2015) at paras 48–52.

between non-legally binding instruments and law, the process of transformation based on the dualist doctrine[109] can provide a reasonable explanation of the process of incorporating *de facto* constraints into domestic regulations due to the similarity of these pairs of two systems that are said to have no overlap. This section explores how the initial input limits – the *de facto* constraints in the Joint Statement – are incorporated into Japan's domestic regulations.

### *A. An Overview of Japan's Domestic Regulations over the Input Limit of Glass Eels: Influence of the Joint Statement*

In 2014, as the participants adopted input limits, Cabinet Order No. 324 (1 October 2014) enacted the Order for Enforcement of the Act on the Promotion of Inland Fisheries (*Naisuimen no shinko ni kansuru hōritsu shikōrei*) (Order for Enforcement of APIF),[110] which designated the eel aquaculture business. Consequently, aquaculture owners "must notify the Minister of Agriculture, Forestry and Fisheries (Minister of AFF) under Article 28(1) of the [APIF] (*Naisuimen no shinkō ni kansuru hōritu*) of their business".[111] This Cabinet Order introduced a notification system for the registration of eel aquaculture farmers. On the same day, the Ministry of AFF amended the Ordinance for Enforcement of the Act on the Promotion of Inland Fisheries (*Naisuimen no shinkō ni kansuru hōritu shikō kisoku*) (Ordinance for Enforcement of APIF) and the Ordinance of the Ministry of AFF No. 53 (1 October 2014).[112] This amendment specified the information to be notified by the eel farmers, such as numbers, the area of aquaculture ponds, the input plan, and the monthly performance report. The JFA issued guidelines for limiting the amount of glass eel input at the provincial level on November 14.[113] The total allowable amount of the initial input of glass eels in the 2015 fishery season (1 November 2014 through 31 October 2015) was 21.7t, as agreed by the participants in the Informal Consultation.[114]

In 2015, the regulation imposed on eel aquaculture farmers shifted from a notification system to a licensing system. Cabinet Order No. 236 (20 May 2015) amended the Order for Enforcement of APIF. It designated eel aquaculture farming as an aquaculture business that had to obtain a license from the Ministry of Agriculture, Forestry and Fisheries (MAFF) under Article 26(1) of the Ordinance for Enforcement of APIF.[115] If a person was involved in eel aquaculture without obtaining the required permission, that person would violate Article 26(1) and would be "subject to imprisonment for not more than three years or a fine of not more than two million yen" under Article 36(1)(i) of the Ordinance for Enforcement of APIF.[116]

Moreover, to facilitate the efficiency of the restrictive measures of input limits, the catch, transportation, and trading of juvenile eels with a body length of 13cm or less were banned.[117] Illegal catch and other related activities violating this ban will render the offender liable to imprisonment for not more than three years or a fine of not

[109] *Ibid.*, at paras 48–9.

[110] *Cabinet Order No. 324, Kanpō, Honshi (Official Gazette) No. 6385*, Order of 1 October 2014, at 4.

[111] *Ibid.*

[112] *Ordinance of the MAFF No. 53, Kanpō, Gōgai* (Official Gazette, Extra) No. 218, Order of 1 October 2014, at 3.

[113] "Guidelines for 2015 Fishery Season Concerning the Quantity Allocation Related to the Input Limits of the Juvenile Japanese Eels for Eel Farming" *JFA* (14 November 2014), online: JFA http://www.jfa.maff.go.jp/j/press/saibai/pdf/141114_1-01.pdf.

[114] *Ibid.*, at para 2.

[115] *Cabinet Order No. 236, Kanpō Gōgai (Official Gazette, Extra) No. 111*, Order of 20 May 2015, at 16.

[116] *Ibid.*

[117] Article 132(1) of the *Fishery Act* (Act No. 267, 1949), online: Japanese Law Translation https://www.japaneselawtranslation.go.jp/ja/laws/view/3846/tb, stipulates as follows:

more than thirty million yen.[118] However, this prohibition will not apply until December 2023.[119]

The shift to the license system allows the Minister of AFF to determine the total amount of glass eel input as a legally restrictive measure under Article 30 of APIF. The total amount of the input is determined along the input limits agreed between the participants in the Informal Consultation and is published in the Ministry of AFF Public Notice under Article 42(1) of the Fishery Act. Since 2015, the Minister of AFF has introduced restrictive measures in the Public Notice issued every year, limiting the total amount of the glass eel input to 21.7t for Japanese eels.[120] This amount is based on the outcome of the Informal Consultation.[121] As discussed in the subsequent sections, the interaction between the *de facto* constraints of input limits and the relevant domestic laws is further evinced by the minutes of the Resource Management Division of the Fisheries Policy Council.

### *B. Resource Management Division (Shigen Kanri Bunkakai) in the Fisheries Policy Council*

The key decision maker that can facilitate the incorporation of input limits of glass eel as *de facto* constraints into domestic regulation is the Resource Management Division of the Fisheries Policy Council. The Fisheries Policy Council was established by Cabinet Order No. 230 (29 June 2001) under Articles 37(4) and 39 of the Fisheries Basic Act (Act No. 89 of 29 June 2001) within the JFA.[122] It consists of two internal divisions: Resource Management and Infrastructure Maintenance.[123] Article 11 of the Agenda Rules of the Fisheries Policy Council establishes the Planning Division.[124] The Resource Management Division consists of ten regular members and sixteen ad hoc members appointed by the Minister of Agriculture, Forestry and Fisheries.[125]

The scope of administrative affairs under the jurisdiction of the Resource Management Division includes the issues authorized under the APIF.[126] Under this jurisdiction, the Division's decision becomes the Council's decision in respect of these specified

> It is prohibited for any person to gather or catch specified aquatic animals and plants (referring to aquatic animals and plants that are likely to be gathered or caught for the purpose of acquiring unlawful economic benefit and which are specified by Order of the Ministry of Agriculture, Forestry and Fisheries as those [are] likely to have serious impacts on the growth of the aquatic animals and plants or on the production activities of the fisheries when they are gathered or caught for that purpose; hereinafter the same applies in item (iv) of the following paragraph and Article 189).

Relatedly, Article 41 of the *Ordinance for Enforcement of the Fishery Act* entered into force on 21 December 2020, online: https://elaws.e-gov.go.jp/document?lawid=502M60000200047 (available only in Japanese) (translation by the current author), reads: The aquatic animals and plants as specified by Order of the Ministry of Agriculture, Forestry and Fisheries set forth in Article 132, Paragraph (1) of the Fishery Act are following: Juvenile eel (referring to eel whose length is 13 centimetres or less).

[118] Article 189 of the Fishery Act, *supra* note 117.

[119] Provisions to the Ordinance for Enforcement of the Fishery Act, *supra* note 117, art. 2.

[120] For a list of relevant Public Notices since 2015, see *infra* note 132 below.

[121] "Reply to Public Comment on the Draft Announcement regarding the Licence of Eel Aquaculture", online: https://public-comment.e-gov.go.jp/servlet/PcmFileDownload?seqNo=0000221342.

[122] *Cabinet Order No. 230*, 29 June 2001, online: JFA https://www.jfa.maff.go.jp/j/council/attach/pdf/index-6.pdf.

[123] *Ibid*., art. 5.

[124] Agenda Rules of the Fisheries Policy Council, online: JFA https://www.jfa.maff.go.jp/j/council/attach/pdf/index-7.pdf [*Agenda Rules*], art. 11.

[125] Cabinet Order No. 230, *supra* note 122, art. 2

[126] Fisheries Basic Act (Act No. 89, 2001), online: Japanese Law Translation https://www.japaneselawtranslation.go.jp/en/laws/view/4010, art. 36(3), 39; Cabinet Order No. 230, *supra* note 122, art. 5; Agenda Rules, *supra* note 124, art 10.

issues.[127] The Minister of Agriculture, Forestry and Fisheries is responsible for establishing various restrictive measures under Article 30 of the APIF as a *mutatis mutandis* application of Articles 42(1) and 46(2) (formerly Article 58(1) and (2)(4)) of the Fishery Act). One of these restrictive measures is specified as "the sum total of the quantity of aquatic animals and plants" under Article 5(1) of the Ordinance for Enforcement of the Act on the Promotion of Inland Fisheries (*Naisuimen no shinkō ni kansuru hōritu shikō kisoku*) (Ordinance for Enforcement of APIF).[128] Article 5 of the *Ordinance of the MAFF No. 54* (20 May 2015) suggests that the upper limit on the total amount of input can be modified through international negotiations.[129] When the Minister of AFF "intends to determine the contents of the restrictive measures" they "must seek the opinions of the Fisheries Policy Council".[130] Thus, the Resource Management Division deliberates the consultation brought by the Minister of AFF over the input limits of glass eel.

### C. Reference to the Joint Statement in the Minutes of the Resource Management Division

Pursuant to Article 42(1), the Minister of AFF must "publicly notify the contents of the restrictive measures".[131] The deliberation by the Resources Management Division is taken as a form of approval towards a proposed draft Public Notice specifying the input limits of glass eel submitted by the Minster of AFF. Consistent with the input limits set forth, reconfirmed by the four participants in the Joint Statement of 2014 and in the Joint Press Release thereafter, the Ministry of AFF issued a Public Notice regarding the input limits of glass eel as 21.7t for Japanese eel for every year since 2015.[132] The meetings were held every year to deliberate the proposed draft Public Notice over the input limits referring to the Joint Statement and/or the Joint Press Release. Some officers have emphasized the significance of the Joint Statement and the Joint Press Release in their comments, explaining the reasons for upholding the 21.7t input limit as if the limit were a legally binding restriction. For instance, Mr. Sakurai, Director of the Inland Waters Fishery Promotion Office, explained that the total amount of the input limits for Japan is "prescribed by the international framework".[133] The Director of Fish Ranching and Aquaculture Division noted that "there is a Joint Statement by four countries/regions regarding international resource conservation and management. Based on this, the quota for Japanese eel is set at 21.7t, and for eel species other than Japanese eel is set at 3.5t. This is the basis for the public notice."[134] All Public Notices concerning

[127] Agenda Rules, *supra* note 124, art. 10(1).

[128] Ordinance of the MAFF No. 53, *supra* note 112 at 3.

[129] Ordinance of the MAFF No. 54 *Kanpō, Gōgai* (Official Gazette, Extra) No. 111, Order of 20 May 2015, art. 5 at 19.

[130] Article 42(3) of the Fishery Act, *supra* note 117.

[131] Article 42(1) of the Fishery Act, *supra* note 117.

[132] Ministry of AFF Public Notice No. 1778 (*Kanpō Honshi* (Official Gazette) No. 6573 (Notice of 13 July 2015) 4); Ministry of AFF Public Notice No. 1495 (*Kanpō Honshi* (Official Gazette) No. 6821 (Notice of 21 July 2016) 5); Ministry of AFF Public Notice No. 952 (*Kanpō Honshi* (Official Gazette) No. 7040 (Notice of 15 June 2017) 2); Ministry of AFF Public Notice No. 1330 (*Kanpō Honshi* (Official Gazette) No. 7284 (Notice of 14 June 2018) 3); Ministry of AFF Public Notice No. 425 (*Kanpō Honshi* (Official Gazette) No. 30 (Notice of 17 June 2019) 6); Ministry of AFF Public Notice No. 1167 (*Kanpō Honshi* (Official Gazette) No. 270 (Notice of 15 June 2020) 5); Ministry of AFF Public Notice No. 1151 (*Kanpō Honshi* (Official Gazette) No. 530 (Notice of 8 July 2021) 7).

[133] "Comments by Mr. Sakurai, Director of Inland Waters Fishery Promotion Office, Minute of the 101st Meeting of the Resource Management Division" *JFA* (27 May 2020), online: JFA https://www.jfa.maff.go.jp/j/council/seisaku/kanri/attach/pdf/index-25.pdf, at 36.

[134] "Comments by Director of Fish Ranching and Aquaculture Division, Minute of the 110th Meeting of the Resource Management Division" *JFA* (21 June 2021), online: JFA https://www.jfa.maff.go.jp/j/council/seisaku/kanri/attach/pdf/index-35.pdf, at 10.

input limits since 2015 were adopted as proposed, including the restrictive measures of the 21.7t input limit. The minutes reveal that the 21.7t input limit in the Public Notices was determined in accordance with the Joint Statement and continued to apply the same limit, as evidenced by the Joint Press Releases published every year since 2015. Based on this reference to the Joint Statement and the Joint Press Releases in the minutes, when approving the input limits in the proposed draft Public Notice as a restrictive measure taken by the Minister of AFF, the *de facto* input limits were incorporated into domestic regulations in pursuance of relevant municipal laws.

According to the attached documents of the Informal Consultation, the ROK and Chinese Taipei also incorporated input limits into their domestic regulations.[135] Regarding the subsequent conduct of the other participants, some questions need to be scrutinized in other occasions: whether these established limits can be considered to be the incorporation of *de facto* constraints into domestic regulations, and if so, what element(s) should be identified to effect such incorporation, such as reference to the *de facto* constraints in the decision-making process; whether these incorporations by the participants can be considered as subsequent practice in the sense that they constitute an objective element of state practice or an interpretative element for treaty interpretation.

## V. Interaction with article 67 of UNCLOS: merging with implementation of duty to cooperate

The Joint Statement is non-legally binding: the conservation and management measures set by it are merely *de facto* constraints. As the judgment of the *Whaling Case* suggests, even non-legally binding recommendations and guidelines may have enhanced legal relevance to the case in question. However, can non-legally binding instruments be enhanced by the external normative environment without a particular institutional framework, such as IWC? This section investigates the interactions between the Joint Statement and Article 67 of UNCLOS.

As a general premise mentioned in Section III above, States Parties of UNCLOS should commit to protecting and preserving the marine environment under Articles 192 and 194 (5). These general obligations include "a due diligence obligation to prevent the harvesting of species that are recognized internationally as being at risk of extinction and requiring international protection".[136] To achieve the purposes of the general obligation, States Parties are obliged to cooperate on a global or regional basis, directly or through competent international organizations "in formulating and elaborating international rules, standards, and recommended practices and procedures consistent with [UNCLOS] for the protection and preservation of the marine environment, taking into account characteristic regional features."[137] The phrase "international rules, standards and recommended practices and procedures" found in Article 197 of UNCLOS encompasses not only legally

[135] However, the glass eel input regulation in the ROK is based on the farmers' self-regulation, although a license system is installed by the legislature. On the domestic regulations in the ROK and Chinese Taipei, see the attached documents of the 14th meeting. See "Summary Table of Conservation and Management Measures for Eels (Japan)" *JFA* (27 July 2021), online: JFA https://www.jfa.maff.go.jp/j/press/sigen/attach/pdf/210727-6.pdf.

[136] *In the Matter of the South China Sea Arbitration before an Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea (Philippines v. China)*, Award, P.C.A. Case No. 2013-19, 12 July 2016, online: PCA https://pcacases.com/web/sendAttach/2086, at para 956. See also Margaret A. YOUNG "Protection of the Marine Environment: Rights and Obligations in Trade Agreements" (2021) 9 Korean Journal of International and Comparative Law 196, at 198–9.

[137] *UNCLOS*, *supra* note 11, art. 197.

binding instruments but also non-legally binding ones.[138] Therefore, the latter norms are not legally binding but can be made mandatory upon States "through" the application of UNCLOS provisions.[139] This broader generality of the duty of States Parties to cooperate in the conservation and management of marine living resources implies that the relevant provisions of UNCLOS "merely [provide] for coordination and cooperation among states for conservation and management".[140]

Furthermore, UNCLOS leaves coastal States with wide discretion to determine the total allowable catches under the obligations concerning the conservation of living resources. This approach is reflected in Art. 297(3)(a), which explicitly refers to the coastal State's discretion to determine the total allowable catch and exempts any disputes concerning coastal State measures to manage living resources from the mandatory dispute settlement regime of UNCLOS.[141]

Japanese eel belongs to a catadromous fish species that spawn in the ocean and migrate to fresh water for most of their lives before returning to the ocean for reproduction.[142] According to the IUCN Red List, the spawning area for Japanese eel is located west of the Mariana Islands, and they spend their greater life cycle mainly in Japan, China, the ROK, and Chinese Taipei.[143] Japanese eel is a panmictic species, and any country that has waters within their distribution range, being part of the same spawning population in this sense, share and utilize "the same Japanese eel spawning population as a food resource".[144]

Article 67 of UNCLOS provides a legal framework for managing and harvesting catadromous species, including Japanese eel. Article 67 emphasizes that coastal States are in charge of managing that species.[145] Paragraph 1 of Article 67 provides that a coastal State is responsible for the management of catadromous species and for ensuring the ingress and egress of migrating fish. This differs from Article 66, which provides for the primary interest and responsibility of the State of origin for anadromous stocks. Given the distribution of Japanese eels, as indicated in Figure 3, the participants in the Joint Statement are qualified as a coastal State in the sense of Article 67(1), provided that Chinese Taipei is not a party to UNCLOS independently of China. Participant cooperation is essential for conserving and managing the Japanese eel stock.[146] To cover all ranges of migration routes, participants in the Joint Statement, the Philippines, and, probably, the United States as a country holding sovereignty over the

[138] United Nations, *Law of the Sea: Obligations of States Parties under the United Nations Convention on the Law of the Sea and Complementary Instruments* (New York: United Nations, 2004), online: UN https://www.un.org/depts/los/doalos_publications/publicationstexts/E.04.V.5.pdf, at 2 para 6.

[139] *Ibid.*

[140] Erik FRANCKX and Koen Van de BOSSCHE, "The Influence of Environmental Law on the Development of the Law of the Sea: CITES and the International Law of Fisheries" (2011) 54 Japanese Yearbook of International Law 218, at 237–8.

[141] See Johannes FUCHS, "Marine Living Resources, International Protection" in Rüdiger Wolfrum, ed., *Max Planck Encyclopedia of Public International Law,* at para 18. See also Franckx & Van de Bossche, *supra* note 140 at 238, fn 112.

[142] IUCN, "Japanese eel (Anguilla japonica)", online: IUCN Red List <https://www.iucnredlist.org/species/166184/176493270#geographic-range>.

[143] *Ibid.*

[144] Kenzo KAIFU, Kazuki YOKOUICHI, Michael J. MILLER, and Izumi WASHITANI, "Management of Glass Eel Fisheries Is Not a Sufficient Measure to Recover a Local Japanese Eel Population" (2021) 134 Marine Policy 1, at 2, 8, 9. However, there is a difference of views on whether the Japanese eel is a panmictic species. In this regard, see Hakoyama *et al.*, *supra* note 35 at 4.

[145] Article 67(1) reads: "A coastal State in whose waters catadromous species spend the greater part of their life cycle shall have responsibility for the management of those species and shall ensure the ingress and egress of migrating fish."

[146] Kaifu *et al.*, *supra* note 144, 8.

Northern Marian Islands where Japanese eel migrate through their Exclusive Economic Zones (EEZ) should be involved in that cooperation.

Although UNCLOS emphasizes the concept of optimum utilization within EEZs, Article 67 does not refer to the maximum sustainable yield (Article 61), the optimum utilization (Articles 62 and 64), or even the total allowable catches (Article 66). Moreover, Article 67 does not contain the term "conservation", despite it focusing on the management of catadromous "species" rather than "stocks". The single measure explicitly mentioned in Paragraph 1 is to secure "the ingress and egress of migrating fish" – there is no indication of any limitations on the catch amount.[147] The harvesting of catadromous species is dealt with in Paragraph 2, and the management of the species is implemented on the basis of agreement between the States concerned under Paragraph 3.

Because the harvesting of catadromous species does not occur on the high seas, Paragraph 2 provides that "[h]arvesting of catadromous species shall be conducted only in waters landward of the outer limits of exclusive economic zones".[148] The wording "in waters landward of the outer limits of exclusive economic zones" implies that "a coastal State could harvest catadromous species within its exclusive economic zone, territorial sea and internal waters".[149] This extension beyond EEZs toward landward waters seems to suggest that a coastal State is responsible for the management of this species not only within its EEZs but also in its landward waters. This requirement is reasonable and justified considering the life cycle of Japanese eels.[150]

The regulations on harvesting catadromous species constitute management measures and are subject to agreement between the States under Paragraph 3. Paragraph 3 of Article 67 provides a cooperative arrangement framework within which the management and harvesting of catadromous species "shall be regulated by agreement between the coastal State and the other State concerned" in cases where such fish migrate through the EEZs of another State.[151] Under the cooperative arrangement of this provision, unlike the one under Paragraph 1 of Article 63, the States concerned do not cooperate on the basis of equality but on the predominant responsibility of the coastal States in whose waters the species spend the greater part of their life cycle.[152]

[147] For the broad margin of discretion of Costal States, see Fuchs, *supra* note 141 and its accompanying text. *C.f. Potential for a New CMS Agreement on the European Eel*, Background Paper for the Workshop of European Eel Range States, prepared by Otto SPIJKERS and Alex Oude ELFERINK, (UNEP/CMS/Eels WS1/Doc.3), at 6. In terms of Articles 192 and 194(5), they interpreted Article 67(1) to mean that "[Costal States] must mitigate threats that impact the habitat of the eel, and regulate the harvesting of the species." Kaifu takes a view in favour of the interpretation submitted by Spijkers and Elferink: see also Kenzo KAIFU, "*Kokuren Kaiyo-ho-joyaku dai 67 jo wo nihon- unagi no hozen no kanten kara yondemiru*" (Interpreting Article 67 of UNCLOS from the perspectives of the conservation of Japanese eel (The title was translated from Japanese by the current author)) (2018) 70(3) Hakumon 25, at 31.

[148] "Part V—Article 67" in Myron H. NORDQUIST, Satya NANDAN, and Shabtai ROSENNE, eds., United Nations Convention on the Law of the Sea 1982 (Leiden, The Netherlands: Brill/Nijhoff, 2013) at 681, para 67.1.

[149] *Ibid.,* at para 67.6.

[150] Kaifu, *supra* note 147 at 30.

[151] Article 67(3) reads:

> In cases where catadromous fish migrate through the exclusive economic zone of another State, whether as juvenile or maturing fish, the management, including harvesting, of such fish shall be regulated by agreement between the State mentioned in Paragraph 1 and the other State concerned. Such agreement shall ensure the rational management of the species and take into account the responsibilities of the State mentioned in Paragraph 1 for the maintenance of these species.

[152] Ellen HEY, William T. BURKE, Doris PONZONI, and Kazuo SUMI, *The Regulation of Driftnet Fishing on the High Seas: Legal Issues* (Rome: Food and Agriculture Organization of the United Nations, 1991) 8.

Although Paragraph 3 provides that catadromous species "shall be regulated by agreement between the State mentioned in Paragraph 1 and the other State concerned", it does not provide a clear solution for instances where these States disagree on the harvesting and management regulations. It "does not require that the States concerned 'shall seek' agreement, as provided in Article 63 on shared stocks, but only that they agree".[153] This wording implies an obligation for "the States concerned to negotiate such agreements in good faith. This obligation is assumed under Article 300. However, the article does not deal with the consequences of failure to reach [an] agreement after such negotiations."[154] Notwithstanding the difference in the wording between Articles 63(1) and 67 (3), both articles stipulate the obligation to negotiate in good faith, which is confirmed under Article 300.[155] Concerning Article 61, under which coastal States are obliged to take measures for the conservation and management of living resources within their EEZs, the requirements for the management measures under Article 67 have only indirect relevance on the high seas through its interaction with Article 116.[156]

Turning to the question of whether the Joint Statement falls under Article 67(3), there are two issues to be addressed; whether the "agreement" encompasses both legally binding and non-legally binding instruments and whether the conservation and management measures – the initial input limits – can be considered as "the rational management".

For the convenience of the discussion, we shall deal with the latter issue regarding the quality of management measures. The term "rational measures" under Article 67(3) is not defined.[157] Compared to the compositive conservation and management scheme for the European eel stock,[158] the one for Japanese eel is based on an informal and voluntary basis that is remarkably lax and insufficient. In addition to the fragility of the foundation, there is a sceptical view over the effectiveness of the management measures, with some insisting that the decision-making process lacks a scientific review by experts.[159] Arguably, there is considerable room for the scheme to be improved through a scientific review. The recent development, the meetings of scientists gathered from the participant states and European eel experts, was expected to improve the lack of a scientific basis in the decision-making process.[160]

[153] Nordquist, Nandan, and Rosenne, *supra* note 148, at 685, para 67.8(b).

[154] *Ibid.,* at para 67.8(c).

[155] See *ibid.,* at 646 para 63.12(a). In this regard, see the *Request for an Advisory Opinion, submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal),* Advisory Opinion of 2 April 2015, at para 210, stating as follows:

> The Tribunal observes that the obligation to "seek to agree . . ." under article 63, Paragraph 1, and the obligation to cooperate under article 64, Paragraph 1, of the Convention are "due diligence" obligations which require the States concerned to consult with one another in good faith, pursuant to article 300 of the Convention. The consultations should be meaningful in the sense that substantial effort should be made by all States concerned, with a view to adopting effective measures necessary to coordinate and ensure the conservation and development of shared stocks.

[156] Nordquist, Nandan, and Rosenne, *supra* note 148, at para 61.1.

[157] Cecilia ENGLER-PALMA *et al*., "Sustaining American Eel: A Slippery Species for Science and Governance" (2013) 16 Journal of International Wildlife Law and Policy 128, at 143.

[158] On the European eel conservation and management scheme, see, for instance, European Commission, "Evaluation of the Eel Regulation: Final Report (June 2019)", *Directorate-General for Maritime Affairs and Fisheries*, online: Publications Office of the European Union https://www.fishsec.org/app/uploads/2021/05/2019-External-Evaluation-of-the-EU-eel-regulation-EC-1100-2007.pdf

[159] Kenzo KAIFU, *Unagi no Hozenseitaigaku* (Eel Conservation Ecology) (Tokyo: Kyoritsu Shuppan, 2016), at 102–5. (The title was translated from Japanese by the current author.)

[160] "Press Release on the Outcomes of the Second Meeting of Scientists" *JFA* (June 13 2023) online: JFA https://www.jfa.maff.go.jp/j/press/sigen/230613.html (available only in Japanese).

Regarding the former question, it is worth noting that Paragraph 3 uses the term "shall" twice in relation to the "agreement". Article 67(3) seems to assume that the "agreement" should be legally binding because the "agreement" "shall" regulate and ensure the rational management of catadromous fish. The European Commission, while interpreting Article 67, takes the view that "[c]oastal states/countries are responsible for management, but also states through the territory of which the species migrate are responsible for binding agreements concerning management measures."[161] However, does this understanding inevitably mean the use of the word "agreement" excludes non-legally binding instruments?

UNCLOS employs varied expressions to qualify the international standards, rules, and regulations that States Parties must comply with. As to the variation of the expressions:[162]

> [t]he lack of uniformity in terminology does not affect the obligation of States Parties to comply with these international standards, regulations, rules, procedures and practices. The source of this obligation is UNCLOS itself, and in implementing the Convention, States Parties are also expected to implement such standards, rules, regulations, procedures and practices, whether or not they are parties to the legal instruments establishing them. Although these norms may not be part of a State Party's conventional obligations or rules of customary international law, which are inherently binding upon individual States, they seem to form a separate category of law that is mandatory upon States not by its "own" force but solely "through" the application of the cited provisions of UNCLOS.

This approach implies that whether the "agreement" refers to a legally binding agreement or includes a non-legally binding instrument is not crusial. However, it is important to ensure that the States Parties fulfil their obligations under UNCLOS by complying with the relevant agreements, whether binding or not. The second half of the statement is particularly relevant to the interaction between non-legally binding instruments and UNCLOS provisions. Therefore, the *de facto* constraints agreed in a non-legally binding instrument do not have legal force, but they can obtain legal relevance "through" the application of UNCLOS.

Considering the contemporaneity when the term "agreement" was adopted in UNCLOS in 1982, the term's ordinary meaning might have referred to legally binding agreements. However, the term "agreement" in Article 31(3)(a) of the VCLT, which was adopted in 1969, is currently understood as being not necessarily legally binding.[163] In addition, the recent trend of treaty implementation indicates the diffusion or deformalization regarding the forms of agreement restricting the State's discretion.[164] Such deformalization in lawmaking suggests that the term "agreement" can encompass non-legally binding instruments.[165] To

[161] European Commission, *supra* note 158 at 48.

[162] United Nations, *supra* note 138, at para 6.

[163] The commentary to the Draft Conclusion 3[2] states that "The character of subsequent agreements (...) of the parties under article 31, Paragraph 3 (a) (...), as "authentic means of interpretation" does not, however, imply that these means necessarily possess a conclusive, or legally binding, effect." ILC, "Commentary to Conclusion 3 [2] Subsequent agreements and subsequent practice as authentic means of interpretation" in Report on the work of the sixty-eighth session (2016) (A/71/10) at [4]. Regarding this view, the commentary also recognizes that there is an opposite view that some scholars take on the effect and that this conclusion does not exclude the possibilities that the parties to reach legally binding agreement. See *ibid*., at para 5, fn 439.

[164] Nollkaemper, *supra* note 6 at 252.

[165] *Guidelines of the Inter-American Juridical Committee on Binding and Non-Binding Agreements*, "Binding and Non-Binding Agreements: Final Report" of the Inter-American Juridical Committee, presented by Duncan B. HOLLIS (1 November 2020), at 10–11 para 5.

promote the management of the catadromous species, the term "agreement" may not necessarily be legally binding. Since Article 67(3) obligates States Parties to negotiate in good faith but does not direct them to reach an agreement, requiring the quality of the agreement to become legally binding might raise the threshold for cooperation between States Parties. Therefore, it is not desirable to exclude non-legally binding instruments.

Concerning the meaning of "agreement", the development of elaboration as to the distinction between "agreements" under Article IV(3) and "AGREEMENTS" under Article IV (4) of the Convention on the Conservation of Migratory Species of Wild Animals (CMS) paves the way for an interesting discussion.[166] According to Wold, in practice, "nothing precludes AGREEMENTS and agreements from being legally binding or non-legally binding" and a bright line between these terms cannot be drawn; however, there is a tendency between them:[167] The instruments concluded under Article IV(4) as "agreements" are mostly non-legally binding and only a few are legally binding. Those concluded under Article IV(3) as AGREEMENTS are all legally binding.[168] In any event, Article IV(3) obligates the parties to "endeavour to conclude AGREEMENTS", while Article IV(4) encourages the parties to "take action with a view to concluding agreements". The linkage between "agreements" and "AGREEMENTS" provides that an "agreement" may be the "first step" towards establishing "AGREEMENTS".[169] Although this linkage is controversial, the process can be considered the "pre-law" function of non-legally binding instruments.[170]

Notably, non-legally binding instruments establishing *de facto* cooperation can provide a flexible basis for States with different domestic political and economic perspectives in the context of conservation and management of shared living resources. They can encourage the States concerned to participate in that cooperation. Therefore, non-legally binding instruments such as the Joint Statement should not be excluded from the scope of "agreement" in Article 67(3) of UNCLOS.

Even though the term "agreement" does not exclude non-legally binding instruments, the membership qualifications for an instrument to become an "agreement", as provided for under Article 67(3), should be considered. The "agreement" is supposed to be concluded "between the State mentioned in Paragraph 1 and the other State concerned".[171] UNCLOS contains the terms "State" and "State Party" as well as their plural forms. Specifically, Article 67 uses the terms "a coastal State" and "the other State concerned", which does not necessarily mean "a State Party". Among the participants of the Joint Statement, Chinese Taipei is not a State Party to UNCLOS, and the designation of "Chinese Taipei" in the Joint Statement indicates that it is not a state entity that can be subjected to recognition by the other sovereign States. However, some countries recognize Taiwan, represented by Chinese Taipei, as a sovereign state. For these reasons, the statehood of Chinese Taipei is recognized by some States Parties to UNCLOS so that, from the perspective of UNCLOS, the participants to the Joint Statement may fulfil the

[166] *Convention on the Conservation of Migratory Species of Wild Animals*, 6 November 1979, 1651 U.N.T.S. 333 (entered into force 1 November 1983).

[167] Chris WOLD, "A History of 'AGREEMENTS' under Article IV.3 and "agreements" under Article IV.4 in the Convention on Migratory Species" (UNEP/CMS/COP11/Inf.31), online: CMS https://www.cms.int/sites/default/files/document/COP11_Inf_31_History_of_Agreements_Eonly.pdf, at 11 para 34.

[168] *Ibid.*

[169] *Resolution 2.6 Implementation of Articles IV and V of the Convention*, online: CMS https://www.cms.int/gorilla/sites/default/files/document/Res2.6_E_0_0.pdf, at para 2. However, *c.f. Resolution 3.5 Implementation of Article IV, Paragraph 4, of the Convention Concerning agreements* [4], online: CMS https://www.cms.int/sites/default/files/document/Res3.5_E_0_0.pdf, at para 4. On this inconsistency, see Wold, *supra* note 167 at paras 27–32, 41.

[170] Peters, *supra* note 6.

[171] UNCLOS, *supra* note 11, art. 67(3).

membership qualifications to conclude an "agreement" under that provision. Nevertheless, it is not the case vis-à-vis the participants of the Joint Statement.

Thus, the general trend of implementing UNCLOS provisions related to the conservation and management of shared living resources suggests that non-legally binding instruments are not precluded from an "agreement" concluded between States.[172] Moreover, considering the scope of the rules of reference, it might be more agreeable to establish a reliable interpretation of the term "agreement" in Article 67(3) to include non-legally binding instruments. However, there is evidence to the contrary. Articles 74(1) and 83 (1) of UNCLOS are two examples where the term "agreement" is used in a clear manner as having legal bindingness.[173] In these provisions, the term "agreement" incorporates "two elements upon which agreement had been reached: that delimitation should be by agreement and on the basis of international law".[174] According to this interpretation, the term includes the procedure used to resolve the conflict and the nature of the agreement as legally binding. On the one hand, interpreting the term "agreement" as a legally binding instrument in these clauses is reinforced by a modifier "on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice".[175] On the other hand, inserting such a modifier may allow us to insist that the term "agreement" without such a modifier, as used in Article 67, may not be always meant to be legally binding. However, the contrasting structure of using the terms "agreement" and "arrangements" in these clauses suggests that the term "agreement" refers to a legally binding document that has conclusive effects, while the term "arrangements" bears upon non-legally binding instruments that only have interim or provisional effects.

Thus, there may still be an obstinate insistence that the term "agreement" should be understood as a legally binding one. Even if the prevailing construction is that the term "agreement" solely refers to legally binding instruments, the Joint Statement seems to provide a "pre-law" function as "a first step" towards establishing a legally binding "agreement".[176] Suppose the participants' incorporation of the *de facto* constraints

[172] Although Article 67 is not explicitly referred as a rule of reference, numerous non-legally binding instruments are enumerated for the implementation of the obligations under Articles 61(3) and 119(1)(a) by taking into account "any generally recommended international minimum standards, whether subregional, regional or global". See United Nations, *supra* note 137, at 63, 65 respectively.

[173] Article 74(1) reads as follows:

> The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

Article 83(1) reads as follows:

> The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

Moreover, it seems that the term "agreement(s)" used in Article 311 of UNCLOS also refers to legally binding agreement(s).

[174] Nordquist, Nandan, and Rosenne, *supra* note 148, 980 at para 83.17.

[175] *Ibid.*

[176] Paragraph 4(2) of the joint statement states that "Participants will continue to closely work together in order to strengthen conservation and management measures for eel stocks. For this purpose, participants will consider possible establishment of legally binding framework as appropriate."

adopted in the Joint Statement into their domestic regulations can be considered part of the compliance of the obligations of good faith under Articles 67(3) and 300. In that case, it may be possible to believe that the Joint Statement possessed a certain legal relevance in forming an "agreement".[177] If that is the case, the Joint Statement can be perceived as, at least, "a first step" toward concluding an "agreement". Given the political circumstances surrounding China and Chinese Taipei, the participants are not expected to engage in a formal "agreement" with each other. In this sense, the Joint Statement may, instead, fall into a category expressed by the term "arrangements" in Articles 74 (1) and 83(1), although that term is not employed in Article 67(3).

## VI. Conclusions

Several issues should be tackled regarding the conservation and management of the Japanese eel species, such as setting appropriate input limits and combatting illegal, unreported, and unregulated fishing. Although the Informal Consultation and the Joint Statement have not provided a sufficiently effective framework for tackling these issues, the instruments are certainly a first step towards ensuring cooperation between the participants in establishing a future framework. The present paper evaluated the Joint Statement and the *de facto* constraints prescribed in light of the increasing utilization of non-legally binding instruments in restricting the State's discretion and the recognition of certain legal effects indirectly arising from those instruments. This study examined the three possible interactions through which *de facto* constraints can be enhanced: that is, the accumulation and crystallization of the principle of sustainable development, the incorporation into domestic regulations through the application of municipal laws and procedures, and the embodiment of the cooperation process envisaged by Article 67 of UNCLOS. The following remarks can be drawn from the current analysis:

1. The Joint Statement is an outcome of the Informal Consultation and is a non-legally binding instrument. Thus, the initial input limits prescribed thereby are *de facto* constraints.
2. The principle of sustainable development can also provide *de facto* constraints that encourage policy makers to arrange sustainable policies between States and to incorporate them into their domestic regulations.
3. The initial input limits set forth by the Joint Statement were incorporated into the domestic regulations of the participants through the relevant municipal laws and procedures. The incorporation process in Japan reveals that the initial input limits in the Joint Statement were referred to in the decision-making process. The minutes of the Resource Management Division indicated that the 21.7t input limit in the Public Notice was determined because the four participants had prescribed the limit in the Joint Statement and continued to apply the same limitation, as evidenced by subsequent joint press releases since 2015. This reference shows how *de facto* constraints could be incorporated into domestic regulations.

[177] Although the statement concerns the UN Fish Stocks Agreement, Barnes expects a possibility where non-legally binding instruments evolve into binding law. Richard BARNES, "The Convention on the Law of the Sea: An Effective Framework for Domestic Fisheries Conservation?" in David FREESTONE, Richard BARNES, David ONG, eds., *The Law of the Sea: Progress and Prospects* (Oxford: Oxford University Press, 2006) 233, at 258.

> If the [UN Fish Stocks Agreement] can impact on fisheries management more generally, and if the "non-binding" instruments can evolve into binding law, then they will help rectify some of the substantive flaws of [UNCLOS]. The further development and implementation of the precautionary principle to fisheries is of central importance in this context.

4. The Joint Statement can also be enhanced through the interactions with the cooperation requirement under Article 67 of UNCLOS. Under Article 67 of UNCLOS, the management of catadromous species is assumed to be regulated by an agreement concluded between a coastal State and the other State concerned. Considering the current tendency of utilizing non-legally binding instruments in the management of shared natural resources and to supplement the roles of these instruments in implementing the obligations under UNCLOS, the term "agreement" can be interpreted as including non-legally binding instruments. If this is true, then the Joint Statement occupies an essential part of the implementation of cooperation under Article 67.

Considering the informal and voluntary basis of the current Japanese eel conservation and management scheme, strengthening the interactions with global and regional conservation and management frameworks is essential for the Japanese eel population. However, emphasizing that the *de facto* constraint can be enhanced and possess certain legal relevance and indirect legal effects should not discourage States from participating in informal lawmaking processes for setting *de facto* standards. The informal lawmaking process facilitates the creation of a cooperative scheme that can develop as a legal framework in unregulated fields.

**Acknowledgements.** This is a revised version of the paper submitted at the 13th Annual Conference, the Japan Chapter of the Asian Society of International Law, at Yokohama National University, 9 July 2022. The author would like to thank the conference participants for their comments. Thanks also to the anonymous reviewers for their helpful comments and suggestions.

**Funding Statement.** This work was supported by JSPS KAKENHI Grant Number JP17H02456.

**Competing Interests.** The author declares none.

**Kazuki HAGIWARA** is a Lecturer, Fukuoka University, Fukuoka, Japan; a Visiting Researcher, University of Ottawa, Ontario, Canada.

## Appendix

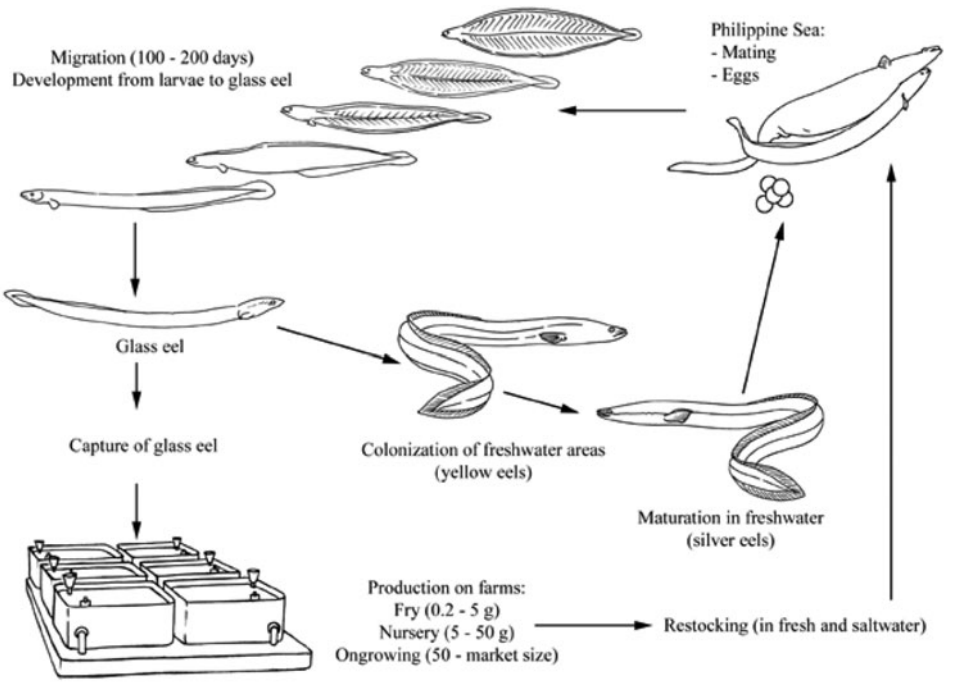


**Figure 1.** Production cycle of *Anguilla Japonica* <https://www.fao.org/fishery/en/culturedspecies/anguilla_japonica/en>

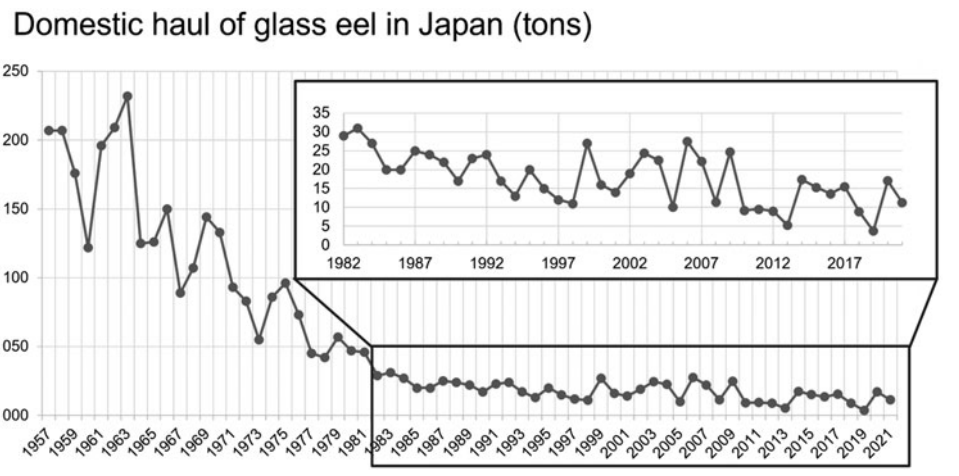


**Figure 2.** Domestic haul of glass eel in Japan
(The data was publicly released by the Japan Fisheries Agency (JFA) <https://www.jfa.maff.go.jp/j/saibai/unagi.html>. The Japanese era name in the original graph was converted to the Common Era.

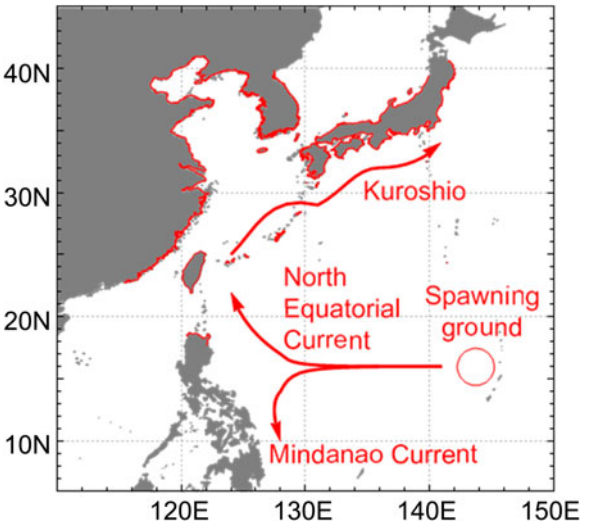


**Figure 3.** Distribution map of Japanese eels
(Cited from Hakoyama *et al.*, *supra* note 35 at 18.)

**Cite this article:** HAGIWARA K (2024). Enhanced *De Facto* Constraints Imposed by Non-legally Binding Instruments and Interactions with Normative Environment: An Analysis of the Joint Statements for the Conservation and Management of Japanese Eel Stock. *Asian Journal of International Law* **14**, 293–323. https://doi.org/10.1017/S2044251323000425