THE GLOBAL CLIMATE REGIME: WITHER COMMON CONCERN?

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A. Introduction

Throughout his distinguished career, Rüdiger Wolfrum has been interested in the role that international law plays in governing the global commons and in promoting cooperation and solidarity in international efforts to protect the commons. The global climate may not be a “commons” in quite the same way as the oceans or Antarctica, on both of which Professor Wolfrum has been a leading authority. But it poses many of the conceptual and treaty-making challenges that have been prominent in Rüdiger Wolfrum’s work. Hence, I take my contribution to this Festschrift as an opportunity to reflect on some key strands of global climate law and on the main trends in the efforts to develop a legal regime on global climate change. Specifically, I explore the legal implications of the proposition that global climate change is a common concern of humankind. I then consider the evolution of the treaty-based regime anchored in the United Nations Framework Convention on Climate Change (UNFCCC) and its core principle of common but differentiated responsibilities. Finally, I reflect on the implications of an apparent turn away from centralized law-making and compliance control in relation to global climate change. My goal in this contribution is not to undertake exhaustive legal analysis or to reach definite conclusions. Rather, my aim is to adopt something of a bird’s eye perspective and to highlight broad themes and developments.

B. Global Climate Change as Common Concern of Humankind

The preamble of the UNFCCC begins by acknowledging that “change in the Earth’s climate and its adverse effects are a common concern of
humankind”.¹ This statement is an appropriate opening for a global treaty that has as its objective to avert “dangerous anthropogenic interference with the climate system”.² But before turning to the UN climate regime itself, it is worth exploring what if any status the concept of common concern has in international law, and what its legal implications may be in the context of climate change. In particular, do states have an obligation to address climate change, and what if any are the legal consequences of failures to do so? Answering these questions helps appreciate the role and approach of the UN climate regime.

The conceptual framework of international environmental law remains firmly rooted in the balancing of sovereign interests. The proposition that underpins the foundational “no harm” principle is that states may use their territories and resources as they see fit, provided that no serious harm is caused to the territories of other states or areas beyond national jurisdiction.³ In this framework, environmental concerns are legally relevant only when they entail an interference with states’ sovereign rights. It is readily apparent that this conceptual framework is not well suited to a global issue like climate change. While some states’ contributions to the problem may be larger than others, it is the cumulative effect of states’ actions that produces global climate change. It would be difficult to demonstrate that an individual state’s emissions, for example, are causing harm to a particular state.

Climate change, then, is not the kind of transboundary pollution contemplated by the no harm rule. Furthermore, while the effects of climate change are felt by individual states, states also have a collective interest in protecting the global climate system. But given the emphasis of the legal framework on interferences with sovereign rights, do states have a legal interest in climate protection? This question ties into the broader question whether states, in addition to their individual rights, have legal rights in relation to certain collective concerns of the international community.⁴ Since the obiter dictum of the International Court of Justice (ICJ) in the Barcelona Traction case, it has been generally accepted that some obligations are owed to the “international community as a whole”. According to the ICJ, these obligations are “the

² Id., Article 2.
⁴ See e.g. B. Simma, From Bilateralism to Community Interest in International Law, 250 Recueil des Cours 217 (1994).