A Framework for Achieving Consistently Effective Protection of the Global Environment

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Abstract

The responsibility for the legal protection of the global environment has fallen to international environmental law. Since The Stockholm Conference of 1972, which arguably represented the birth of contemporary environmental protection efforts, an expansive body of laws in the form of treaties directed at regulating various aspects of the environment have been agreed to by states. While these have achieved some measure of success in protecting the global environment the only development to rival this ever-increasing body of laws has been the continuing decline of the environment. The fact that environmental decline persists despite such an extensive and intricate body of international environmental law suggests that there is a substantial gap between law and the environment. However, the accompanying fact that effective environmental protection is also achieved through law also suggests that this gap is not a consistent feature of environmental protection. The thesis explores how effective environmental protection can be achieved through bridging this gap between law and the environment in a manner that would facilitate consistent effective environmental protection. It commences from the observation that the gap between law and the environment and thus, lack of consistently effective environmental protection, is widely attributed to flawed law-making, implementation of laws and the enforcement of international environmental law. As such, in existing perspectives, bridging the gap between law and the environment has been pursued through piecemeal arguments that seek to address flawed law-making, implementation of laws and the enforcement of international environmental law individually. The inability of these piecemeal approaches to offer convincing frameworks for bridging the gap between law and the environment has led to alternative arguments that have highlighted that the difficulties in law-making, implementation and enforcement are merely symptomatic of the more systemic difficulties that the concept of sovereignty poses to effective regulation. Thus, it is argued that addressing sovereignty would bridge the gap between law and the environment. In light of these latter approaches' inability to offer frameworks that have effectively bridged the gap between law and the environment, the thesis offers a constitutionalism-based framework that would bridge the gap between law and the environment thus securing consistently effective environmental protection.

Declaration

I declare that I have composed this thesis, that it is my own work and that it has not been submitted for any other degree

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'We did that often, asking each other questions whose answers we already knew. Perhaps it was so that we would not ask the other questions, the ones whose answers we did not want to know.'[1]

[1] CN Adichie *Purple Hibiscus* (2003) 23.

Chapter One

Introduction

'Just as constitutional lawyers study political theory and political theorists inquire into the nature and substance of constitutions, so too should two disciplines that study the laws of behaviour seek to learn from one another. At the very least, they should aspire to a common vocabulary and framework of analysis that would allow the sharing of insights and information.'[2]

1.1. The international environment and international law

International environmental law is the legal framework that has been dedicated to environmental protection.[3] More than 900 international and regional environmental agreements covering diverse environmental issues have been developed nearly forty years since the first landmark United Nations Conference on the Human Environment in Stockholm in 1972 that, arguably, signified the commencement of contemporary international environmental law.[4]

Despite the ever-expanding legal landscape, the global environment has been in distress for a long time, having already scaled 'pre-crisis' levels in the 1990s.[5] Since then, the triple processes, population growth, rapid industrialization and increased fossil fuel

[2] AM Burley 'International Law and International Relations Theory' (1993) 87 *American Journal of International Law* 205.

[3] P Birnie, A Boyle and C Redgwell (3ed) *International law and the Environment* (2009) 2-3.

[4] JL Dunoff 'From Green to Global: Toward the Transformation of International Environmental Law' (1995) 19 *Harvard Environmental Law Review* 241, 243. RN Gardner 'The Role of the United Nations in Environmental Problems' (1972) 26 *International Organization* 237. EB Weiss 'International Environmental Law: Contemporary Issues and the Emergence of a New World Order' (1993) 81 *Georgetown Law Journal* 675. AS Timoshenko 'Ecological Security: Global Change Paradigm' (1990) 1 *Colorado Journal of International Environmental* 127, 127-129. K Nowrot 'Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law' (1999) 6 *Indian Journal of Global Legal Studies* 579, 588.

[5] AS Timoshenko, *supra* n.4, at 129. G Palmer 'New Ways to Make International Environmental Law' (1991) 86 *American Journal of International Law* 259, 260. J Vogler *The Global Commons* (2000) 10.

consumption have led to the escalation of environmental problems such as transboundary industrial pollution, water pollution, loss of biological diversity, pollution of the atmosphere, ocean degradation and deforestation.[6] Writing in 1992, Sir Geoffrey Palmer noted that forests had been stripped, stressed and burned, natural habitats are vanishing, deserts are advancing and croplands suffer from water logging in some regions, overgrazing and salinization in others. In addition, the atmosphere and ozone shield are under assault. The oceans have been loaded with pollutants and swept of marine life. Polar Regions are sullying, the rate of climate change is perturbing and species are being eradicated.[7] This trend has persisted and in modern times the environment continues to deteriorate at an unprecedented rate.[8]

For instance, in a detailed account of the state of the environment, the most recent, and fourth, *Global Environmental Outlook Report*, published in 2007 noted, with regard to climate change that 'there is confirmation that the Earth's average temperature has increased by approximately 0.74°C over the past century. The impacts of this warming include sea-level rise and increasing frequency and intensity of heat waves, storms, floods and droughts.'[9] In 2012, the *OECD Environmental Outlook to 2050* noted that 'global greenhouse gas emissions continue to increase, and in 2010 global energy-related carbon dioxide (CO2) emissions reached an all-time high of 30.6 gigatonnes despite the recent economic crisis. Without more ambitious policies than those in force today, greenhouse gas emissions will increase by another 50% by 2050, primarily driven by a projected 70% growth in carbon dioxide emissions from energy use.'[10]

Alternatively, the *Global Environmental Outlook Report* notes that 'during the last 20 years, the exponential expansion of cropland has slackened, but land is now used much more

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[6] A Hurrell and B Kingsbury *The International Politics of the Environment* (1992) 2. PS Thatcher 'The Role of the United Nations' in A Hurrell and B Kingsbury (eds) *The International Law of the Environment* (1992) 183, 184-185.

[7] G Palmer, *supra* n.5, at 263. SC Schreck 'The Role of Nongovernmental Organizations in International Environmental Law' (2006) 10 *Gonzaga Journal of International Law* 252, 254. AS Timoshenko, *supra* n.4, at 129. CD Stone 'Defending the Global Commons' in P Sands *Greening International Law* (1993) 34.

[8] D Leary and B Pisupati 'Introduction' in D Leary and B Pisupati *The Future of International Environmental Law* (2010) 1-3. T Crossen 'Multilateral Environmental Agreements and the Compliance Continuum' (2004) 16 *The Georgetown International Environmental Law Review* 1, 2. United Nations Environment Programme 'Global Environment Outlook: GEO4, Environment for Development' (2007) available at: http://www.unep.org/geo/GEO4/report/GEO-4_Report_Full_en.pdf

[9] Global Environment Outlook, *supra* n7, at 40.

[10] V Marchal *et al* 'Climate Change' in OECD (2012) *OECD Environmental Outlook to 2050 : The Consequences of Inaction*, 72, available at: http://www.oecd-ilibrary.org/docserver/download/fulltext/9712011e.pdf?expires=1338146460&id=id&accname=ocid177542&checksum=016CA146B8CF2F71F2EB2ADD244C3CB7

intensively. This has led to unsustainable land use leading to land degradation. In addition, harmful and persistent pollutants, such as heavy metals and organic chemicals, are still being released to the land, air and water from mining, manufacturing, sewage, energy and transport emissions; from the use of agrochemicals and from leaking stockpiles of obsolete chemicals. Importantly, demands on land resources and the risks to sustainability are likely to intensify.'[11]

With respect to water quality, the *Global Environmental Outlook Report* notes that 'degradation of water quality from human activities continues to harm human and ecosystem health. Three million people die from water-borne diseases each year in developing countries. Despite this, aquatic ecosystems continue to be heavily degraded, putting many ecosystem services at risk, including the sustainability of food supplies and biodiversity.'[12] Addressing the same issue, the *OECD Environmental Outlook to 2050* notes that 'the quality of surface water outside the OECD is expected to deteriorate in the coming decades, through nutrient flows from agriculture and poor wastewater treatment. The consequences will be increased eutrophication, biodiversity loss and disease. For example, the number of lakes at risk of harmful algal blooms will increase by 20% in the first half of this century.'[13]

Lastly, discussing biodiversity, the *Global Environmental Outlook Report* notes that 'current losses of biodiversity are restricting future development options. Such loss continues because current policies and economic systems do not incorporate the values of biodiversity effectively in either the political or the market systems, and many current policies are not fully implemented.[14] Similarly, and in 2012, the *OECD Environmental Outlook to 2050* 'projects biodiversity to decline by about 10% between 2010 and 2050 globally, with especially high losses in parts of Asia, Europe and Southern Africa. These losses will be driven mainly by land use change and management, commercial forestry, infrastructure development, habitat encroachment and fragmentation pollution.'[15]

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[11] Global Environment Outlook, *supra* n.7, at 86

[12] *Ibid*, at 116-117.

[13] K Karousakis *et al* 'Biodiversity' in OECD (2012) *OECD Environmental Outlook to 2050 : The Consequences of Inaction*, 155, available at: http://www.oecd-ilibrary.org/docserver/download/fulltext/9712011e.pdf?expires=1338146460&id=id&accname=ocid177542&checksum=016CA146B8CF2F71F2EB2ADD244C3CB7

[14] Global Environment Outlook, *supra* n.7, at 160.

[15] X Leflaive *et al* 'Water' in OECD (2012) *OECD Environmental Outlook to 2050 : The Consequences of Inaction*, 207, available at: http://www.oecd-

These are observations that have been confirmed by other internationally recognised outlets of information on the state of the environment such as the International Panel on Climate Change and the International Union for the Conservation of Nature Red List of Threatened Species.'[16] Importantly, the fact that environmental deterioration persists in the different ways noted above despite an expanding body of law dedicated to environmental protection suggests that international environmental law has been unable to deliver consistently effective environmental protection.

1.2. Motivations and objectives

The motivation for the thesis stems from curiosity over international environmental law's often unsuccessful attempts at halting, containing and remedying environmental deterioration in a consistently effective manner. This is apparent in the manner in which environmental deterioration, as detailed above, persists despite the extensive and ever-growing legal commitment to international environmental protection of each of these fields.[17] What is particularly curious is that, accompanying the gap between law and the environment are numerous instances of effective environmental protection through the modus of international environmental law.[18] Perhaps this is best exemplified by the success of international environmental law in the form of the 1985 Vienna Convention on the Protection of the Ozone Layer and its 1987 Montreal Protocol on Substances that Deplete the Ozone Layer to effectively address the dangers posed by ozone depletion.[19]

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ilibrary.org/docserver/download/fulltext/9712011e.pdf?expires=1338146460&id=id&accname=ocid177542&checksum=016CA146B8CF2F71F2EB2ADD244C3CB7

[16] Intergovernmental Panel on Climate Change, Climate Change 2007-Synthesis Report: Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, (2007). J Vie, C Hilton-Taylor and S Stuart 'Wildlife in a Changing World: An Analysis of the 2008 IUCN Red List of Endangered Species' (2008) 16, available at: http://data.iucn.org/dbtw-wpd/edocs/RL-2009-001.pdf

[17] M Koskenniemi 'Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol' in G Handl (ed) (1992) 3 *Yearbook of International Environmental Law* 123. EJ Ringquist and T Kostadinova 'Assessing the Effectiveness of International Environmental Agreements: The Case of the 1985 Helsinki Protocol' (2005) 49 *American Journal of Political Science* 86. KW Danish 'International Relations Theory' in D Bodansky, J Brunnee and E Hey (eds) *The Oxford Handbook of International Law* (2007) 205, 206.

[18] D Leary and B Pisupati, *supra* n.8, at 1. P Birnie, A Boyle and C Redgwell, *supra* n.3, at 11-12.

[19] Convention for the Protection of the Ozone Layer (Vienna), *UKTS* 1 (1990) Cm. 910. Protocol on Substances that Deplete the Ozone Layer, (Montreal) *UKTS* 19 (1990) Cm. 977. P Birnie, A Boyle and C Redgwell, *supra* n.3, at 39.

In this context, it would seem that Susskind and Ozawa's argument, made in 1992, that international environmental law has only arguably prompted some states to forestall actions that would have accelerated the process of environmental deterioration remains true.[20] Similarly, in light of developments that have occurred in international environmental law which have not been accompanied by the transition to consistently effective environmental protection, Koskenniemi's 1992 argument that 'the gap between the burgeoning hundreds of international environmental laws and the actual condition of the environment is perhaps one of the largest contradictions of our time' still holds true.[21]

In light of these issues, the objective of the thesis is to consider why attempts to bridge the gap between law and the environment have been unable to achieve consistently effective environmental protection. Pursuant to this, the thesis explores how bridging the gap between the law and the environment might be achieved in a manner that would secure consistently effective environmental protection.

1.3. Some background

The issue of how to bridge the gap between law and the environment thereby securing consistent environmental protection has extensively been explored previously. Much progress has been made and it is instructive in seeking to add to the body of knowledge in this field to first consider some of the more seminal arguments that have been posited for bridging this gap.

For ease of reference the available arguments will be discussed under five broad categories, compliance based perspectives, law-making based perspectives, implementation based perspectives, enforcement based perspectives and lastly a category that discusses what is best described as a systemic based perspective. Importantly, such categorization is only to facilitate a more accessible discussion. In reality, it is very often the case that arguments posited with regard to how the gap between law and the environment could be bridged reflect perspectives that fall into more than one category.

[20] L Susskind and C Ozawa 'Negotiating More Effective International Environmental Agreements' in A Hurrell and B Kingsbury (eds) *The International Law of the Environment* (1992) 142, 143.
[21] M Koskenniemi, *supra* n.17, at 123. EJ Ringquist and T Kostadinova, *supra* n.17, at 86. KW Danish, *supra* n.17, at 206.

1.3.1. Compliance based perspectives

Arguably the most commonly explored approaches to bridging the gap between law and the environment are what can be referred to as compliance based perspectives. This is a reference to perspectives that consider that bridging the gap between law and the environment is a compliance issue.[22]

Compliance refers to whether state behaviour conforms to legal rules.[23] This perspective is based on the rationale that international environmental law is part of the established international law regulatory framework. 'International Law governs relations between independent states. The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.'[24] In this context therefore, any gap between law and the environment is attributable to states not complying with laws.

The rationale behind this compliance based perspective means it often relies on seminal views on compliance with international law.[25] For instance, much of this perspective mirrors the arguments posited in the work of Professors Abram Chayes and Antonia Handler Chayes who argued that instances of ineffective regulation in international law were a compliance issue.[26] To remedy this, they argued that compliance was attainable through

[22] S Barrett 'International Cooperation and the International Commons' (2000) 10 *Duke Environmental Law and Policy* 131, 138-139. W Bradnee Chambers 'Towards an Improved Understanding of Legal Effectiveness of International Environmental Treaties' (2003) 16 *Georgetown International Environmental Law Review* 501, 505-508. HH Koh 'Why Do Nations Obey International Law' (1997) 106 *Yale Law Journal* 2599, 2611, 2613, 2618. DG Victor 'Enforcing International Law: Implications for an Effective Global Warming Regime' (1999) 10 *Duke Environmental Law and Policy* 147, 164.

[23] T Crossen, *supra* n.8, at 6. CE Bruch and E Mrema *Manual on compliance with and enforcement of Multilateral Environmental Agreements* (2006) 59.

[24] *The Case of SS Lotus (France v Turkey)* 1927 PCIJ Rep, Series A, No.9 at 18.

[25] M Ehrmann 'Procedures of Compliance Control in International Environmental Treaties' (2002) 13 *Colorado Journal of International Environmental Law* 377, 386-388. J Brunnee 'Promoting Compliance with Multilateral Environmental Agreements' in J Brunnee, M Doelle and L Rajamani *Promoting Compliance in an Evolving Climate Regime* (2012) 38, 41-45.

[26] A Chayes and A Chayes 'Compliance Without Enforcement: State Regulatory Behaviour Under Regulatory Treaties' (1991) 7 *Negotiation Journal* 311. A Chayes and A Chayes *The New Sovereignty: Compliance with International Regulatory Agreements* (1995) 25. W Bradnee Chambers, *supra* n.22, at 509-510. OA Hathaway 'Do Human Rights Treaties Make a Difference' (2002) 111 *Yale Law Journal* 1935, 1955-1958. A Perez 'Who

adopting managerialism based approaches that focused on 'an iterative process of discourse among the parties, the treaty organization and the wider public.'[27] This compliance based perspective also draws from Thomas Franck's arguments on effective international regulation.[28] Franck argued that the gap between international law and its objectives could be closed by ensuring fairness of the rules.[29] To Franck, fairness was attainable through an emphasis on legitimacy and distributive justice in the law. This would cultivate fairness in a manner that would compel state compliance with laws.[30]

Broadly considered, this compliance-based perspective certainly makes sense.[31] It stands to reason that compliance with effective laws would culminate in effective environmental protection. However, the viability of this compliance based perspective is threatened by the reality that in international environmental law, as in all forms of international law, most states comply with the law most of the time for varying reasons.[32]

For instance, Kline and Raustiala note that 'many international agreements reflect a lowest-common-denominator dynamic that makes compliance easy but influence on behaviour negligible.'[33] In this context, it is the inability to achieve behavioural change,

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Killed Sovereignty? Or Changing Norms Concerning Sovereignty in International Law' (1993) 14 *Wisconsin International Law Journal* 463, 472-477.

[27] A Chayes and A Chayes (1995), *supra* n.26, at 2. T Crossen, *supra* n.8, at 12-14. KW Danish, *supra* n.17, at 226-227. J Brunnee 'Enforcement Mechanisms in International Environmental Law' in U Beyerlin, P Stoll, R Wolfrum *Ensuring compliance with Multilateral Environmental Agreements: A Dialogue Between Practitioners and Academia* (2006) 1, 10-11.

[28] TM Franck *The Power of Legitimacy Among Nations* (1990). TM Franck *Fairness in International Law and Institutions* (1995). W Bradnee Chambers, *supra* n.22, at 510-511. T Crossen, *supra* n.8, at 14-18.

[29] TM Franck (1990), *supra* n.28, at 17-20, 24-26. TM Franck (1995), *supra* n.28. TM Franck 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium' (2006) *American Journal of International Law* 88, 91. HH Koh, *supra* n.22, at 2599. OA Hathaway, *supra* n.26, at 1958-1960.

[30] TM Franck (1990), *supra* n.28, at 93. T Crossen, *supra* n.8, at 14-18, 19-21. HH Koh, *supra* n.22, at 2602. OA Hathaway, *supra* n.26, at 1960-1962. J Brunnee, *supra* n.27, at 8.

[31] EJ Ringquist and T Kostadinova, *supra* n.17, at 87.

[32] L Henkin (2ed) *How Nations Behave* (1979) 47. A Chayes and A Chayes 'On Compliance' (1993) 47 *International Organization* 175, 176. S Barrett, *supra* n.22, at 138. HH Koh 'How is International Human Rights Law Enforced?' (1999) 74 *Indiana Law Journal* 1397, 1400-1401. A Cassesse 'The Role of Legal Advisers in Ensuring that Foreign Policy Conforms to International Legal Standards' (1992) 14 *Michigan International Law Journal* 139, 156. DG Victor, *supra* n.22, at 151. TM Franck (1990), *supra* n.28, at 3.

[33] K Kline and K Raustiala 'International Environmental Agreements and Remote Sensing Technologies' (2000) 11 available at: http://sedac.ciesin.columbia.edu/rs-treaties/rs-treaties_bckgnd.pdf

rather than compliance which accounts for the persistence of the gap between law and the environment.[34]

In any respect, as Mitchell argues, greater compliance with environmental protection obligations is neither a necessary nor a sufficient condition for effectiveness of the law.[35] First, high compliance is not necessary. For instance, non-compliance with an ambitious goal may still produce considerable positive behavioural change that may significantly mitigate, if not solve, an environmental problem. Second, high compliance is not sufficient to the extent that such compliance with rules that merely reflect political rather than scientific realities will prove inadequate to achieve the desired environmental improvement. This is rooted in the fact that environmental problems typically stem from three types of sources: the regulated human behaviour, other non-regulated human behaviours and non-human sources. Thus, a treaty that successfully brought a halt to an environmentally harmful behaviour may not preserve the resource if other human behaviours and natural factors influencing environmental quality caused the resource to be depleted.[36]

This does not necessarily discount the legitimacy of this compliance-based perspective. However, it does establish that lack of compliance does not exclusively account for the gap between law and the environment.[37] Indeed, Brunnee argues that 'compliance strategies must be sensitive to the features of the underlying environmental problem and tailored to the features of each regime.'[38] Thus, while improving compliance may be important, it would not necessarily yield effectiveness in a manner that would bridge the gap between law and the environment.[39]

Perhaps it is these difficulties encountered under the compliance-based perspective that have prompted alternative analyses of the reasons for the gap between law and the environment. Such analyses have focused on more specific reasons that explain the gap

[34] T Crossen, *supra* n.8, at 8. OA Hathaway, *supra* n.26, at 1963-1968. K Kline and K Raustiala, *supra* n.33, at 10-11.
[35] RB Mitchell 'Compliance Theory: An Overview' in J Cameron, J Werksman and P Roderick *Improving Compliance with International Environmental Law* (1996) 3, 25.
[36] *Ibid*, at 25.
[37] W Bradnee Chambers, *supra* n.22, at 515. Y von Schirnding, W Onzivu and AO Adede 'International Environmental Law and Global Public Health' (2002) 80 *Bulletin of the World Health Organization* 970, 972. DG Victor, *supra* n.22, at 152. RB Mitchell, *supra* n.35, at 895.
[38] J Brunnee, *supra* n.25, at 47.
[39] P Birnie, A Boyle and C Redgwell, *supra* n.3, at 239.

between law and the environment such as law-making, implementation of laws and enforcement of the law.

1.3.2. Law-making-based perspectives

Law-making-based perspectives are based on recognition of the difficulties that attach to law-making in environmental protection. For instance, Poustie notes that 'there are no standard methods for making international environmental law treaties. Consequently, existing law-making processes are often wasteful, expensive for poorer nations to participate in and lead to a lack of clarity in terms of the relationship of treaties to each other. In addition, the law-making process usually involves identification of an issue, the identification of a forum to serve as the law-making body and thereafter a negotiating process. Controversy can attach to all of these stages.'[40]

A consequence of the difficulties that attach to law-making is the argument, in law-making based perspectives, that the gap between law and the environment can be attributed to international environmental law being limited and weak when judged from an ecocentric perspective.[41] Weak laws are a result of the fact that the drive to secure environmental protection must be pursued in a state-centric world based on sovereignty.[42] For instance, Biermann and Dingwerth argue that:

> "it seems imperative that nation states make every possible effort to mitigate and adapt to global environmental change. Two ways of responding to these challenges are possible: states can either react on their own, that is, by devising or adapting

[40] M Poustie 'Environment' in E Moran *et al* (eds) *Stair Memorial Encyclopaedia Reissue* (2007) para 13.

[41] A Chayes and A Chayes, *supra* n.26, at 311. DG Victor, *supra* n.22, at 153. DW Drezner 'Bargaining, Enforcement and Multilateral Sanctions: When Is Cooperation Counterproductive?' (2000) 54 *International Organization* 73, 83. D Freestone 'The Road from Rio: International Environmental Law after the Earth Summit' (1994) 6 *Journal of International Environmental Law* 193, 201.

[42] WJ Aceves 'Relative Normativity: Challenging the Sovereignty Norm Through Human Rights Litigation' (2002) 25 *Hastings International and Comparative Law Review* 261, 261-264. AM Burley 'Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine' (1992) 92 *Columbia Law Review* 1907, 1923-1926. KW Danish, *supra* n.17, at 223. A Hurrell and B Kingsbury, *supra* n.6, at 22. J Brunnee 'Coping with Consent: Law-Making Under Multilateral Environmental Agreement' (2002) 15 *Leiden Journal of International Law* 1, 7.

national environmental policies; or they can coordinate their efforts and design bilateral or multilateral environmental policies."[43]

In environmental protection, it is often the case that coordinated efforts are needed to effectively address global problems. As such, effective regulation is predicated on achieving consensus among states. Freestone argues that such an approach means that 'where issues are controversial, a minimalist approach to obligations is virtually inevitable, after all the horse trading and package deals have been settled, the text will still reflect what the most reluctant participant will accept.'[44] Thus, laws very often reflect political compromise rather than ecocentric needs.[45] Such laws are unable to secure consistently effective environmental protection.[46]

The law-making-based perspective is certainly a viable argument. Indeed, it is the weakness of some international environmental laws that accounts for ongoing environmental deterioration. However, the argument fails to acknowledge that in the movement to secure global environmental protection, even when attempts have been made to construct laws that are decidedly ecocentric such as the 1997 Kyoto Protocol to the Framework Convention on Climate Change such laws are the result of state compromise and must therefore reflect political compromise.[47] Accommodating this, for instance through differentiating responsibility among states based on their capacities to meet obligations imposed, as has been attempted under the Kyoto Protocol, has often accounted for the persistence of the gap

[43] F Biermann and K Dingwerth 'Global Environmental Change and the Nation State' (2004) 4 *Global Environmental Politics* 1, 6.
[44] D Freestone, *supra* n.41, at 201.
[45] RR Churchill and G Ulfstein 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law' (2000) 94 *American Journal of International Law* 623, 628. A Dan Tarlock 'The Role of Non-Governmental Organizations in the Development of International Environmental Law' (1992) 68 *Chicago-Kent Law Review* 61, 62. T Scovazzi 'State Responsibility for Environmental Harm' in G Ulfstein and J Werksman (eds) (2001) 12 *Yearbook of International Environmental Law* 43. G Handl 'Environmental Security and Global Change: The Challenge to International Law' in G Handl (ed) (1990) 1 *Yearbook of International Environmental Law* 3, 5-6.
[46] DG Victor, *supra* n.22, at 152-157. S Barrett, *supra* n.22, at 139. GW Downs, KW Danish and PN Barsoom 'Is the Good News about Compliance Good News anout Cooperation?' (1996) 50 *International Organization* 379, 382.
[47] Protocol to the Framework Convention on Climate Change (Kyoto), 37 *ILM* (1998J) 22. RR Churchill and G Ulfstein, *supra* n.45, at 628. A Dan Tarlock, *supra* n.45, at 62. G Handl, *supra* n.45, at 5-6.

between law and the state of the environment. This is because allowances for states' capacity to meet the legal standards sought to be imposed must be made.[48]

Importantly, the fact that some compromise is inevitable in law-making suggests that the reason for the gap between law and the environment is not exclusively one of weak laws that lack potency. As Schneider once noted, 'few problems in international law can be viewed realistically without the context of underlying political, economic, sociological, scientific, technical, and other factors.'[49] Improving law-making in isolation would therefore not bridge the gap between law and the environment.

1.3.3. Implementation-based perspectives

The limitations of the law-making-based perspective have contributed to the development of the perspective that the gap between law and the environment can be attributed to a very loose and uncoordinated system of implementing laws.[50] Implementation refers to all relevant laws, regulations, policies, and other measures and initiatives, adopted or taken by states to meet obligations under an environmental agreement.[51]

For instance, this perspective contends that as environmental treaties proliferate, so do the challenges of implementing them.[52] Rose argues that

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[48] MJ Kelly 'Overcoming Obstacles to the Effective Implementation of International Environmental Agreements' (1997) 9 *Georgetown International Environmental Law Review* 448, 452, 462.

[49] J Schneider *World Public Order of the Environment: Towards an International Ecological Law and Organization* (1979) 110.

[50] W Bradnee Chambers, *supra* n.22, at 515. G Handl 'Controlling Implementation of and Compliance with International Environmental Commitments: The Rocky Road from Rio' (1994) 5 *Colorado Journal of International Environmental Law and Policy* 305, 307. A Nollkaemper 'Compliance Control in International Environmental Law: Traversing the Limits of the National Legal Order' in G Ulfstein and J Werksman (eds) (2002) 13 *Yearbook of International Environmental Law* 165, 166-168-169. K Sachariew 'Promoting Compliance with International Environmental Legal Standards: Reflections on Monitoring and Reporting Mechanisms' in G Handl (ed) (1991) 2 *Yearbook of International Environmental Law* 31, 50. L Susskind and C Ozawa, *supra* n.20, at 143. D Esty and MH Ivanova 'Revitalizing Global Environmental Governance: A Function-Driven Approach' in D Esty and MH Ivanova *Global Environmental Governance: Options and Opportunities* (2002) 181, 187. M Anderson 'Transnational Corporations and Environmental Damage: Is Tort Law the Answer?' (2002) 41 *Washburn Law Journal* 399. P Birnie, A Boyle and C Redgwell, *supra* n.3, at 257-258.

[51] G Rose 'UNEP: Gaps in the Implementation of Environmental Law at the National, Regional and Global Level' (2011) 6, available at: http://www.unep.org/dec/worldcongress/docs/FormatedGapsEL.pdf

[52] *Ibid*, at 6.

> "environmental treaties often articulate specific obligations that are negotiated without a clear plan for their national implementation, due to the difficulty of making concrete assessments of the financial, human, technical and social requirements of implementation. Therefore, the anticipated requirements for national implementation by a particular country might be only loosely approximated at the time of negotiation. Some agreements may even seem to be aspirational or educative, lacking in specific commitments or ways of forming concrete assessments of the requirements for their practical implementability."[53]

These difficulties are partially rooted in the dualistic tradition of international environmental law.[54] In terms of this approach, laws are made and states subsequently charged with implementing these laws.[55] In implementing laws states have extensive discretion based on sovereignty.[56] The limitation of this approach is that many national administrations, especially in developing economies, lack the capacity necessary to effectively implement international environmental law.[57] Thus, implementation-based perspectives highlight that the dualistic approach which allows states to implement laws based on a consideration of their own circumstances accounts for the gap between law and the environment.[58] Victor, Raustiala and Skolnikoff point out that:

> 'differences in national circumstances abound, suggesting that there is no single way for a country to put its international environmental commitments into practice. National efforts are sometimes non-existent or fail; yet the international mechanisms for identifying and responding to implementation failures are few and often weak.'[59]

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[53] *Ibid*, at 9.

[54] A Hurrell and B Kingsbury, *supra* n.6, at 23.

[55] P Sands (2ed) *Principles of International Environmental Law* (2003) 174. P Sands 'Enforcing Environmental Security' in P Sands *Greening International Law* (1993) 50, 53. P Birnie, A Boyle and C Redgwell, *supra* n.3, at 174.

[56] EB Weiss, *supra* n.4, at 695. A Nollkaemper, *supra* n.50, at 172-173. CE Bruch and E Mrema, *supra* n.23, at 75.

[57] G Rose, *supra* n.51, at 6.

[58] IFI Shihata 'Implementation, Enforcement and Compliance with International Environmental Agreements-Practical Suggestions in the Light of the World Bank's Experience' (1996) 9 *Georgetown International Environmental Law Review* 37, 39.

[59] DG Victor, K Raustiala and EB Skolnikoff *The Implementation and Effectiveness of International Environmental Commitments* (1998) *ix*.

The overall result is that the dualistic approach culminates in uncoordinated implementation of international environmental law. Offering a perspective drawn from practical experience, Driesen argues that

> "Anybody who has worked on implementing environmental law appreciates its multilayered nature. In practice, a huge number of things have to go right in order for law to have favourable physical effects upon the environment. At the international level, this problem becomes compounded. The Framework Approach requires 1) agreement upon principles and procedures, 2) agreement about specific measures, 3) national legislation (frequently), 4) administrative elaboration (frequently), 5) private implementation (which depends upon national enforcement). In practice, some countries' efforts will depend on yet another intervening step, local or state implementation. If something goes seriously wrong in even one of these steps, little or nothing happens to improve the environment. And the world repeats its efforts to negotiate this multi-step gauntlet every time a fresh international environmental problem requiring global cooperation arises. Under these circumstances, it's a miracle that international environmental law has accomplished anything at all."[60]

There is certainly merit to this implementation-based perspective. However, it must be considered that in many instances, forces that stem from international socialization ensure that laws are effectively implemented by states.[61] Despite this, the gap between law and the environment persists.[62] This suggests that the gap between law and the environment is not exclusively the result of flawed implementation of laws. As such, improving implementation of laws in isolation would not necessarily bridge the gap between law and the environment.

[60] DM Driesen 'Thirty Years of International Environmental Law: A Retrospective and Plea for Reinvigoration' (2003) 30 *Syracuse Journal of International Law and Commerce* 353, 364-365.
[61] K Kline and K Raustiala, *supra* n.33, at 11. RB Mitchell, *supra* n.35, at 902. P Birnie 'International Environmental Law: Its Adequacy for Present and Future Needs' in A Hurrell and B Kingsbury, *supra* n.6, at 53, 73. P Birnie, A Boyle and C Redgwell, *supra* n.3, at 213. J Gupta 'Legitimacy in the Real World: A Case Study of the Developing Countries, Non-Governmental Organizations and Climate Change' in JM Coicaud and V Heiskanen *The Legitimacy of International Organizations* (2001) 482, 486. S Barrett *Environment and Statecraft*: *The Strategy of Environmental Treaty-Making* (2003) 110.
[62] J Gupta, *supra* n.61, at 486.

1.3.4. Enforcement-based perspectives

A consequence of the flaws in the implementation arguments has been the emergence of arguments that the reason for the gap between law and the environment is rooted in flawed enforcement of international environmental law. Enforcement is 'the range of procedures and actions employed by a State, its competent authorities and agencies to ensure that organisations or persons, potentially failing to comply with environmental laws or regulations implementing multilateral environmental agreements, can be brought or returned into compliance and,or, punished through civil administrative or criminal action.'[63]

The enforcement based perspectives argue that the persistence of the gap between law and the environment is due to the fact that once laws are agreed to, ratified and implemented, there is no effective way to enforce them should states choose not to abide by these laws.[64] This accounts for the gap between law and the environment. Addressing this issue, Crossen opines:

> "My answer to the question do we need stronger enforcement mechanisms to secure compliance with Multilateral Environmental Agreements, is yes, when there are strong incentives to defect. Moreover, increasing the effectiveness of the international response to global environmental problems calls for more onerous obligations, thereby creating stronger incentives to defect, and the depth of cooperation. To be effective, however, stronger enforcement mechanisms must possess legitimacy. Creating legitimate enforcement mechanisms to secure compliance with Multilateral Environmental Agreements exhibiting deeper cooperation is the key to reconciling the disparate ends of the compliance continuum, and address global environmental degradation."[65]

[63] G Rose, *supra* n.51, at 9.

[64] GH Aldrich and CM Chinkin 'A Century of Achievement and Unfinished Work' (2000) 94 *American Journal of International Law* 90, 92. S Barrett, *supra* n.22. A Chayes and A Chayes, *supra* n.26, at 312. RR Churchill and G Ulfstein, *supra* n.45, at 629. T Crossen, *supra* n.8, at 7. G Palmer, *supra* n.5, at 269. DG Victor, *supra* n.22, at 150, 152. T Yang 'International Treaty Enforcement as A Public Good: Institutional Deterrent Sanctions in International Environmental Agreements' (2007) 27 *Michigan Journal of International Law* 1131, 1132. D Esty and MH Ivanova, *supra* n.50, at 185.

[65] T Crossen 'Multilateral Environmental Agreements and the Compliance Continuum' (2004) 16 *The Georgetown International Environmental Law Review* 1, 40-41.

The rationale behind this perspective is often that sovereignty means that enforcement is often overlooked in international environmental law. For instance, Barrett referencing the Kyoto Protocol to the United Nations Framework Convention on Climate Change notes:

> "The negotiators in Kyoto, for example, should have started by asking what kind of agreement on climate change mitigation could be enforced. Only after this question was answered should they have negotiated allocations or other policy actions. In this way, they could be sure that the obligations in the treaty could be enforced and that the required level of participation would be reached. Instead, the Kyoto negotiators lavished more attention on the setting of emission limits with little thought given to participation and enforcement. The unfortunate consequence may be an agreement that fails to enter into force or that fails to be sustained after having entered into force."[66]

A central feature of enforcement based perspectives is also the argument that the gap between law and the environment is rooted in the fact that international environmental law is often lacking to the extent that it is very often intended to be initiated by states.[67] Indeed, this perspective notes that in the enforcement of international environmental law much is often left to processes and concepts such as state responsibility and liability, traditional dispute settlement, and countermeasures such as reprisals, retorsions, and sanctions.[68] Importantly, this approach means that political considerations often make it undesirable for one state to pursue enforcement proceedings against another.[69] For instance, Ehrmann notes that:

> "state responsibility has in practice not been used frequently to enforce international environmental obligations. Although it may be asserted that state responsibility is one of the starting points of international environmental law, even in the most serious cases of international environmental damage, such as the disastrous accident in a nuclear power plant

[66] S Barrett, *supra* n.22, at 144-145.
[67] P Sands (2003), *supra* n.55, at 182. P Sands (1993), *supra* n. 55, at 54. L Susskind and C Ozawa, supra n.20, at 153.
[68] M Ehrmann, *supra* n.25, at 379. J Brunnee, *supra* n.25, at 39-40.
[69] GH Aldrich and CM Chinkin, *supra* n.64, at 92. A Chayes and A Chayes, *supra* n.26, at 312. Y von Schirnding, *supra* n.37, at 972. T Yang, *supra* n.64, at 1135. A Hurrell and B Kingsbury, *supra* n.6, at 30. P Birnie, *supra* n.61, at 73. P Sands (2003), *supra* n.55, at 887. J Gupta, *supra* n.61, at 487.

> in Chernobyl and the serious pollution of the river Rhine by Sandoz, no use of this concept was made."[70]

This is a view echoed by Bulmer, who notes that 'the settlement of dispute provisions, which were included within multilateral environmental agreements to resolve disputes through formal and frequently adversarial and judicial means, have been largely unused by parties for various reasons.'[71] Thus, there is consensus across this perspective on the fact that weak enforcement accounts for the persistence of the gap between law and the environment.[72]

The difficulty encountered by this enforcement perspective however, is that there are examples of instances of effective enforcement in international environmental law.[73] For instance, to combat state reluctance to pursue enforcement against other states, provision has increasingly been made in international environmental law for enforcement to be initiated by non state parties.[74] In any respect, in enforcing international law generally and in environmental protection, much reliance is placed on self-enforcement pursuant to implementation as discussed earlier, through national enforcement frameworks. This often achieves positive results.[75]

Despite this somewhat effective approach to enforcement, the gap between law and the environment persists. This suggests that while enforcement of international environmental law may be problematic it is not the exclusive reason for the gap between law and the environment. Improving enforcement would therefore not necessarily bridge the gap between law and the environment.

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[70] M Ehrmann, *supra* n.25, at 381.

[71] J Bulmer 'Compliance Regimes in Multilateral Environmental Agreements' in J Brunnee, M Doelle and L Rajamani *Promoting Compliance in an Evolving Climate Regime* (2012) 55, 56.

[72] A Boyle 'Saving the World? Implementation and Enforcement of International Environmental Law Through International Institutions' (1991) 3 *Journal of Environmental Law* 229, 234-235. GW Downs, KW Danish and PN Barsoom, *supra* n.46, at 383. DG Victor, *supra* n.22, at 149-153.

[73] T Yang, *supra* n.64, at 1133-1134.

[74] P Sands (1993), *supra* n. 55, at 55.

[75] J Brunnee, *supra* n.27, at 3-7. A Chayes and A Chayes, *supra* n.32, at 176. S Barrett, *supra* n.22, at 138. HH Koh, *supra* n.32, at 1400-1401. A Cassesse, *supra* n.32, at 156. RR Churchill and G Ulfstein, *supra* n.45, at 629. DG Victor, *supra* n.22, at 163. A Hurrell and B Kingsbury, *supra* n.6, at 29.

1.3.5. A systemic approach

The perspectives above have highlighted that international environmental law exhibits flaws in compliance, law-making, implementation and enforcement but that bridging the gap between law and the environment cannot be achieved through addressing these issues in a piecemeal manner. Indeed, Boyle argues that 'the development of rules of international law concerning protection of the environment is of little significance unless accompanied by effective means for ensuring enforcement and compliance.'[76] Importantly, acknowledgment of the need to look beyond a piecemeal approach has led to alternative analyses of why the gap between law and the environment persists.[77] Such analyses have regarded deficiencies in compliance, law-making, implementation and enforcement as being symptomatic of a more systemic flaw with regulating environmental protection.[78]

To establish this systemic flaw, these analyses have considered that each of the areas, law-making, implementation and enforcement, have been adversely affected by the concept of sovereignty. For instance, Boyle notes that a state-centric focus on injured states rather than the environment leads to an approach that much resembles the law of tort. This does not coincide with objectives of environmental protection which often are based on common concern issues and feature a necessary focus on preventing harm.[79] This, and similar views, have informed the perspective that the systemic flaw in the regulation of environmental protection, culminating in the gap between law and the environment, is the centrality of the role played by sovereignty in regulating environmental protection.[80]

Sovereignty has a long history and tradition well beyond the scope of the discussion here.[81] Suffice it to note that sovereignty recognizes the right of states to be free of interference from other states.[82] Inevitable state interactions are addressed primarily by

[76] A Boyle, *supra* n.72, at 229.
[77] P Birnie, A Boyle and C Redgwell, *supra* n.3, at 40. A Hurrell and B Kingsbury 'Introduction' in A Hurrell and B Kingsbury *The International Politics of the Environment* (1992) 6.
[78] D Freestone, *supra* n.41, at 195.
[79] A Boyle, *supra* n.72, at 229-230.
[80] T Crossen, *supra* n.8, at 2-3. T Marauhn 'Changing Role of the State' in D Bodansky, J Brunnee and E Hey *The Oxford Handbook of International Environmental Law* (2007) 727, 728.
[81] HH Koh, *supra* n.25, at 2608.
[82] JW Dacyl 'Sovereignty versus Human Rights: From Past Discourses to Contemporary Dilemmas' (1996) 9 *Journal of Refugee Studies* 136, 136-137. E Engle 'Beyond Sovereignty? The State After The Failure of Sovereignty' (2008) 15 *ILSA Journal of International and Comparative Law* 33, 34-35. D Held 'Law of States, Law of Peoples: Three Models of Sovereignty' (2002) 8 *Legal Theory* 1, 3-5. MC Tsai 'Globalization and

agreement from a rights and duties perspective.[83] In environmental protection a series of these agreements form the body of international environmental law.[84] This body of law also includes general customary international law.[85] This has been defined as the customary practice of states followed from a sense of obligation.[86] Thus, it is often binding without the need for agreement or consent.[87] However, it suffers from the deficiency that, unless it has already crystallized, states that prioritise developmental and other policies for instance, can persistently object to the laws preventing the crystallization and application of particular customary rules to the objecting states.[88] The exception to this is a more potent version of customary international law in the form of peremptory norms or *ius cogens*.[89] These are non-derogable obligations that bind all states regardless of agreement.[90]

Dunoff notes that sovereignty means international environmental law merely delimits the respective competences of states which voluntarily bind themselves to abide by certain codes of conduct.[91] Similarly, Brunnee notes that state consent is treated, by the majority of

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Conditionality: Two Sides of the Sovereignty Coin' (2001) 31 *Law and Policy in International Business* 1317, 1317-1318. I Brownlie *Principles of Public International Law* (7ed) (2008) 105.

[83] W Bradnee Chambers, *supra* n.22 at 501-502. OA Hathaway, *supra* n.26, at 1950.

[84] CE Bruch and E Mrema, *supra* n.23, at 51.

[85] P Birnie, *supra* n.61, at 57. E Louka *International Environmental Law: Fairness, Effectiveness and World Order* (2006) 23-24.

[86] JL Goldsmith and A Posner 'A Theory of Customary International Law' (1999) 66 *University of Chicago Law Review* 1113.

[87] EJ Criddle and E Fox-Decent 'A Fiduciary Theory of Jus Cogens' (2009) 34 *Yale Journal of International Law* 331, 341-342. D Freestone, *supra* n.41, at 195. BL Benson 'Customary Law as a Social Contract' (1992) 1 *Constitutional Political Economy* 1, 4. JH Jackson 'The Perils of Globalization and the World Trading System' (2000) 24 *Fordham International Law Journal* 371, 372-373. D Shelton 'Normative Hierarchy in International Law' (2006) 2 *American Society of International Law* 291. L Rajamani *Differential Treatment in International Environmental Law* (2006) 2.

[88] P Birnie, A Boyle and C Redgwell, *supra* n.3, at 22. J Brunee, *supra* n.42, at 7. S Hall 'The Persistent Spectre: Natural Law, International Order and Limits of Legal Positivism' (2001) 12 *European Jurnal of International Law* 269, 286. P Weil 'Towards Relative Normativity in International Law?' (1983) 77 *American Journal of International Law* 413, 434.

[89] A Etzioni 'Social Norms: Internalization, Persuasion and History' (2000) 34 *Law and Society Review* 157, 159. S Hall, *supra* n.88, at 286. LR Helfer 'Constitutional Analogies in the International Legal System' (2003) 37 *Loyola of Los Angeles Law Review* 193, 213. M Mason 'Citizenship Entitlements Beyond Borders? Identifying Mechanisms of Access and Redress for Affected Publics in International Environmental Law' (2006) 12 *Global Governance* 283, 289. D Shelton, *supra* n.87, at 292, 297. U Beyerlin 'Different Types of Norms in International Environmental Law: Policies, Principles and Rules' in D Bodansky, J Brunnee and E Hey (eds) *The Oxford Handbook of International Law* (2007) 425. MC Tsai, *supra* n.82, at 1318.

[90] WJ Aceves, *supra* n.42, at 262-264. M Byers 'Conceptualising the Relationship Between *Jus Cogens* and *Erga Omnes* Rules' (1997) 66 *Nordic Journal of International Law* 211. EJ Criddle and E Fox-Decent, *supra* n.87, at 331-332. G Goertz and PF Diehl 'Toward a Theory of International Norms: Some Conceptual and Measurement Issues' (1992) 36 *The Journal of Conflict Resolution* 634, 636-637. D Held, *supra* n.82, at 5.

[91] JL Dunoff, *supra* n.4, at 248. E Louka, *supra* n.85, at 20-21.

government lawyers and academic commentators, as the decisive moment in the creation of legal commitments.[92] A consequence of this approach, as Ecovitality have argued, is that international environmental law is typically non-prescriptive, non-intrusive and oriented toward the unfettered freedom of states. Its fundamental unit is the state, not the ecosystem. Its fundamental principle is national sovereignty, not the conservation of nature.[93]

Arguments that see sovereignty as the systemic flaw that accounts for the gap between law and the environment point out that sovereignty places states at the centre of regulatory efforts under international environmental law. Barrett argues that this leads to necessary state driven compromises that ultimately prevent the achievement of effective environmental protection. In addition, he notes that since sovereignty means that participation in an international treaty is voluntary, agreements that seek to sustain cooperation must be self-enforcing.[94]

This sovereignty-based perspective is certainly a much more compelling argument to explain the persistence of the gap between law and the environment. Aside from highlighting the problem as being the ineffectiveness of regulation it also incorporates the views of the other perspectives to reach what is certainly an agreeable conclusion. Importantly, it establishes that the reason for the gap between law and the environment is traceable to the regulatory framework under which global environmental protection is currently pursued. It is sovereignty's influence in this framework that leads to weak laws, allows for discretionary implementation, compromises the potency of enforcement and consequently, compromises compliance. As such, it is only through addressing flaws with the regulatory framework that the gap between law and the environment can be successfully bridged.

While this systemic approach is certainly useful to explaining why the gap persists between law and the environment, the difficulty with available perspectives that have tackled this issue can be found in how they addresses the sovereignty hurdle. Beyond highlighting that sovereignty's influence on regulation accounts for the gap between law and the environment perspectives under this systemic approach offer no frameworks for dealing with the sovereignty hurdle. Often, concessions are made to the fact that sovereignty is an unchangeable part of international regulation.[95] The result has been sweeping arguments for

[92] J Brunee, *supra* n.42, at 2.
[93] Ecovitality 'Causes of Environmental Law Failures' (2012) available at: http://ecovitality.org/badlaw.htm
[94] S Barrett, *supra* n.22, at 131-132.
[95] L Rajamani, *supra* n.87, at 251.

states to limit the detrimental effects of sovereignty through greater collaboration and coordination. This approach to addressing the influence of sovereignty is unconvincing. For instance, examples of greater coordination and collaboration in environmental protection abound. These are most percptible in negotiation and commitment to an increasing number of multilateral environmental agreements as noted above.[96] In addition, clear goals based on collaboration such as sustainable development have been established.[97] Despite this, the gap between law and the environment persists.

This seems to suggest that addressing the regulatory issue that lies at the root of the gap between law and the environment requires more than mere advocacy for greater collaboration which, as yet, has not led to successfully bridging the gap between law and the environment. In adopting any alternative approaches however, care must be taken to fully account for the importance attached to sovereignty in international relations. Thus, bridging the gap between law and the environment requires a regulatory-based approach that accounts for those characteristics of sovereignty that negatively impact on regulation while still maintaining the capacity of the framework to secure consistently effective environmental protection.

Importantly, this is an area that has previously been explored in the available literature. In light of the argument in the thesis sharing similarities with this body of literature, it is instructive to review some of these arguments.

1.4. Literature review

The perspective that addressing the role of sovereignty can be achieved through adoption of regulatory frameworks in which the doctrine does not play a central role has been extensively discussed in the literature. However, most arguments are often modifications of a few seminal arguments which previously adopted this perspective. It is only to some of these seminal arguments that attention is drawn. To highlight the progression and justifications for such arguments, the discussion is presented in chronological fashion. This is followed by a brief analysis of these arguments.

[96] RR Churchill and G Ulfstein, *supra* n.45, at 623. M Mason, *supra* n.89, at 287.

[97] FFL Kirgis 'Editorial Comment: Standing to Challenge Human Endeavours that Could Change the Climate (1990) 84 *American Journal of International Law* 525, 525-526. A Cassesse, *supra* n.32, at 159. JL Dunoff, *supra* n.4, at 273, 274. D Held, *supra* n.82, at 15. L Rajamani, *supra* n.87, at 251.

One of the first arguments to include the perspective that effective environmental protection was contingent on effective regulation which was not sovereignty-centric was presented by Kennan.[98] His argument was written in 1970 when the movement toward the landmark United Nations Conference on the Human Environment of 1972 was intensifying. Kennan saw effective environmental protection as being dependent on more than the individual actions of states. In addition, he saw the need for a body fortified with scientific expertise to guide the progress.[99] Thus, he argued for centralisation of international environmental protection efforts in an organization which would perform a watchdog function.[100] Ultimately, he proposed the creation of an International Environmental Agency as a first step toward the establishment of International Environmental Authority that would autonomously oversee environmental protection.[101]

Two years later in 1972, but prior to the United Nations Conference on the Human Environment, Levien highlighted the weaknesses of autonomous efforts at environmental protection.[102] In his assessment of how the influence of sovereignty could be limited, he drew much inspiration from what he argued was the success of the International Labour Organization. Thus, he argued for the creation of a World Environmental Organization modelled on the practice of the International Labour Organization.[103] This World Environmental Organization would oversee international environmental protection efforts.[104]

These early perspectives are pertinent to the extent that, at a very early stage, they foresaw a potential rift between law and the environment in the absence of centralised regulation which was not compromised by sovereignty. In retrospect, it now seems both approaches were driven by the optimistic belief in states' amenability to cession of their sovereignty to external authorities empowered to oversee environmental protection. Developments which followed The United Nations Conference on the Human Environment established that states would not be open to cession of their sovereignty to an external

[98] GF Kennan 'To Prevent a World Wasteland: A Proposal' (1970) 48 *Foreign Affairs* 401.
[99] *Ibid*, at 401-402.
[100] *Ibid*, at 408-410.
[101] *Ibid*, at 412.
[102] LD Levien 'Structural Model for a World Environmental Organization: The ILO Experience' (1972) 40 *George Washington Law Review* 464, 465.
[103] *Ibid*, at 470.
[104] *Ibid*, at 466.

supervisory body.[105] The emerging body of newly independent states, at the time, was more focused on development than environmental protection.[106] Environmental protection was simply not the priority it had been projected to be and environmental concerns were simply not responded to with the alacrity demanded by environmentalists.[107] In a world in which environmental concern was only emerging and still regarded as a transboundary issue, this was not regarded as problematic.[108] Thus, what emerged from the United Nations Conference on the Human Environment was a sovereignty-centric regulatory framework that would, as had been anticipated, lead to a gap between law and the environment.[109]

Importantly for present purposes, the developments at Stockholm led to perspectives in the literature that mirrored this sovereignty-centric approach. This would persist until the late 1970s. This shift was largely due to increasing international concern over the transnationally harmful international effects of acid rain.[110] This placed pressure on states to pursue a more nuanced balance between sovereignty-based individualism, on which the pursuit of development was based, and the need to preserve the environment as a collective effort.[111] This would eventually lead to greater amenability to limitation of sovereignty by states evidenced through agreement to multilateral environmental agreements. Most related to particular forms of pollution or activity with notable examples being the 1978 Protocol to the

[105] JL Dunoff, *supra* n.4, at 243-244. ME Keck and K Sikkink *Activists Beyond Borders: Advocacy Networks in International Politics* (1998) 123.

[106] G Therborn 'The World's Trader, the World's Lawyer: Europe and Global Processes' (2002) 5 *European Journal of Social Theory* 403, 405. A Tokar 'Something Happened. Sovereignty and European Integration' (2001) 11 *IWM Junior Visiting Fellows Conferences* 1, 2. E Louka, *supra* n.85, at 8-9. P Birnie 'International Law and Solving Conflicts' in JE Carroll (ed) *International Environmental Diplomacy* (1988) 95.

[107] P Birnie, *supra* n.106, at 100. R Falk 'Environmental Protection in an era of Globalization' in G Handl (ed) (1995) 6 *Yearbook of International Law* 3, 10-11. A Kiss *Survey of Current Developments in International Environmental Law* (1976) 10. ME Keck and K Sikkink, *supra* n.105, at 123.

[108] D Bodansky, J Brunnee and E Hey 'International Environmental Law: Mapping the Field' in D Bodansky, J Brunnee and E Hey *The Oxford Handbook of International Environmental Law* (2007) 1, 2-4. G Handl 'Transboundary Impacts' in D Bodansky, J Brunnee and E Hey *The Oxford Handbook of International Environmental Law* (2007) 531, 533.

[109] E Louka, *supra* n.85, at 30-31.

[110] JE Carroll 'Introduction' in JE Carroll (ed) *International Environmental Diplomacy* (1988) 1-3. MS McMahon 'Balancing the interests: An Essay on the Canadian-American Acid Rain Debate' in JE Carroll (ed) *International Environmental Diplomacy* (1988) 147. A Rosencranz 'The Acid Rain Controversy in Europe and North America: A Political Analysis' in JE Carroll (ed) *International Environmental Diplomacy* (1988) 173. G Persson 'Toward Resolution of the Acid Rain Controversy' in JE Carroll (ed) *International Environmental Diplomacy* (1988) 189.

[111] M Poustie, *supra* n.40, at para 9.

Convention for the Prevention of Pollution from Ships and the 1979 Convention on Long-Range Transboundary Air Pollution.[112]

The steady development by states toward collective action in regulating environmental protection, accompanied by acceptance of some limitation of sovereignty, led to perspectives that considered how environmental protection in a sovereignty-centric world could be improved from a regulatory perspective.

The most notable contribution to this end was John Carroll's *International Environmental Diplomacy*.[113] The text sought 'an understanding of the international policy aspects of environmental problems, while providing a *modus vivendi* for their management and resolution.'[114] To this end, it featured various important arguments that adopted or considered effective environmental protection from a regulatory perspective. Some of the most notable contributions in the text, for present purposes, came from Patricia Birnie, Linton Caldwell and Konrad von Moltke.

In Carroll's *International Environmental Diplomacy* Patricia Birnie argued that, in bridging the gap between law and the environment, all facets of regulation needed improvement.[115] However, she premised her argument on the concession that sovereignty meant that states remained central to pursuing effective environmental protection.[116] In light of this, she endorsed the approach that improving environmental protection depended on an approach that would resort to non-binding Declarations of Principles. These would take the form of effective laws couched in general 'framework' or 'umbrella' treaties.[117] The focus of such laws would be on encouraging greater state participation in the environmental protection movement. States would only be expected to adopt the principles in these treaties gradually.[118] Such an approach meant that implementation and enforcement would be sensitive to the internal economic, political and administrative difficulties encountered by states.

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[112] Protocol to the Convention for the Prevention of Pollution from Ships (Marpol) 17 *ILM* 1978 546. Convention on Long-Range Transboundary Air Pollution (Geneva) 18 *IILM* (1979) 1442. P Sands (2003), *supra* n. 55, at liv-lxxviii. M Poustie, *supra* n.40, at para 9.
[113] JE Carroll (ed) *International Environmental Diplomacy* (1988).
[114] JE Carroll 'Abstract' in JE Carroll (ed) *International Environmental Diplomacy* (1988).
[115] P Birnie, *supra* n.106, at 105-115.
[116] *Ibid*, at 99-100, 115.
[117] *Ibid*, at 101, 115-116.
[118] *Ibid*, at 101-102.

In a separate contribution to Carroll's *International Environmental Diplomacy*, Linton Caldwell conceived of the gap between law and the environment as being rooted in a sovereignty-centric regulatory framework.[119] Despite this, Caldwell conceded that only sovereign states could collectively establish the cooperative relationships necessary to resolve many transnational environmental problems. Thus, improving environmental protection was predicated on achieving requisite levels of cooperation between states.[120] However, Caldwell also acknowledged that leaving environmental protection to collaboration would likely yield unsatisfactory results. To overcome this, he argued that numerous and diverse non-governmental organizations operating across political and bureaucratic boundaries could be relied on to form networks of influence that would focus on pursuing environmental protection objectives in a manner uncompromised by sovereignty.[121]

In yet another contribution to Carroll's *International Environmental Diplomacy* volume, Von Moltke saw bridging the gap between law and the environment as a regulatory issue.[122] He argued that effective environmental protection was dependent on creating a state funded and state operated institutional framework to monitor and manage the environment at an international level.[123] This framework was attainable in two ways. First, existing institutions could be adapted to accommodate newly arising problems. The rationale was that, existing institutions had an established framework for manipulating sovereignty.[124] As such, they often had power which could be brought to bear in favour of environmental issues. Second, progression to this institutional regulatory framework could be based on the creation of new institutions. This allowed these new institutions to be specialised with a focus on environmental protection. However, new institutions carried the disadvantage that they would not have established frameworks for tackling sovereign exercises of power. They would also lack the influence of existing institutions.[125] However, Von Moltke noted that regardless of which institutions were relied on, the deficiency with the institutions was that they would be

[119] LK Caldwell 'Beyond Environmental Diplomacy: The Changing Institutional Structure of International Cooperation' in JE Carroll *International Environmental Diplomacy* (1988) 13.
[120] *Ibid*, at 13-24.
[121] *Ibid*, at 24-27.
[122] K von Moltke 'International Commissions and Implementation of Law' in JE Carroll (ed) *International Environmental Diplomacy* (1988) 87.
[123] *Ibid*, at 87, 90.
[124] A von Bogdandy 'Constitutionalism in International Law: Comment on a Proposal from Germany' (2006) 47 *Harvard International Law Journal* 223, 227-229. SD Krasner 'Compromising Westphalia' (1996) 20 *International Security* 115, 116.
[125] K von Moltke, *supra* n.119, at 88-89.

dependent on the resources of member states. Thus, for all the benefits they offered, institutions would still be very closely controlled by the states which set them up.

These post-United Nations Conference on the Human Environment approaches highlight recognition of the fact that effective environmental protection was a sovereignty-centric regulatory issue. However, reflective of the reality of the era in which they were formulated, several of these perspectives offered frameworks that were concessionary to sovereignty in a manner that compromised their capability to bridge the gap between law and the environment.

It was only around 1989 that the tenor of arguments for bridging the gap between law and the environment shifted. Such change seems to have been brought on by developments that would lead to The Hague Declaration which emerged from the 1989 International Summit on the Protection of Global Atmosphere.[126] The conclusion of the Summit saw twenty-four heads of state agree to the need for a new environmental protection institutional authority unfettered by the traditional sovereignty constrictions.[127] This institution would feature majority decision-making in the movement to combat global climate change. While the number of states that were party to this agreement may have been minimal, in literary perspectives, commentators took the agreement to imply states' future amenability to limitation of their sovereignty to facilitate the attainment of effective environmental protection.

For instance, in 1992, a couple of years after The Hague Declaration, Sir Geoffrey Palmer added his contribution to this field. He regarded the gap between law and the environment as being attributable to a flawed regulatory framework characterised by undesirable exercises of state sovereignty.[128] Thus, Palmer argued for the creation of an International Environmental Organization within the United Nations system.[129] This organization would be autonomous and could take decisions in setting international environmental standards by a two thirds majority. In addition, the organization could demand reports from member states. It would also have the capacity to take measures to secure compliance with the regime's provisions. With such legislative authority and the capacity to

[126] Hague Declaration on the Environment (Hague), 28 *ILM* (1989) 1308.
[127] J Brunee, *supra* n.39, at 1-2. G Palmer, *supra* n.5, at 276-278. D Zaelke and J Cameron 'Global Warming and Climate Change: An Overview of the International Legal Process' (1990) 5 *American University Journal of International Law and Policy* 249, 280.
[128] G Palmer, *supra* n.5, at 259.
[129] *Ibid*, at 278.

direct implementation of laws, this Organization would have what Palmer considered real power and authority.[130] The difficulty he foresaw with this framework was that states would possibly hold onto their sovereignty jealously.[131]

In the same year however, List and Rittberger adopted a less optimistic perspective.[132] They considered that the gap between the law and the environment was attributable to incongruence between the international legal boundaries of the state system and the boundaries of ecological causal networks. Therefore, bridging the gap between law and the environment required a move toward centralisation of the regulation of environmental protection. However, List and Rittberger saw such a move as unfeasible based on the previous unwavering attitude of states with regard to their sovereignty.[133] In addition, it would be too costly and the risks attaching to the necessary centralisation of power were not insignificant.[134] Ultimately, they argued that bridging the gap between law and the environment was better achieved through collective action by states, based on shared principles, norms, rules and decision-making procedures which would constrain the behaviour of individual states.[135]

Writing in 1994, Daniel Esty reconsidered the issue of bridging the gap between law and the environment through departure from sovereignty-centric regulation.[136] It is critical to note that by this time the 1992 United Nations Conference on Environment and Development culminating in the Rio Declaration had been completed.[137] Progress toward a World Trade Organization which would significantly limit sovereignty to give effect to the General Agreement on Tariffs and Trade was at an advanced stage.[138] In addition, linkages had been drawn between development and the environment that suggested that achieving a similar framework to the impending World Trade Organization, in environmental protection, was not

[130] *Ibid*, at 262.
[131] *Ibid*, at 282.
[132] M List and V Rittberger 'Regime Theory and International Environmental Management' in A Hurrell and B Kingsbury *The International Politics of the Environment* (1992) 85.
[133] G Palmer, *supra* n.5, at 282.
[134] *Ibid*, at 86-89.
[135] *Ibid*, at 108-109.
[136] D Esty *Greening the GATT* (1994) 75-83.
[137] Declaration of the United Nations Conference on Environment and Development, UN Doc.A/CONF.151/26/Rev.1, Report of the *UNCED*, vol. 1 (New York). E Louka, *supra* n.85, at 32-35.
[138] JE Alvarez 'How Not to Link: Institutional Conundrums of an Expanded Trade Regime' (2001) 7 *Widener Law Symposium Journal* 1.

outside the realm of reason.[139] In this context, Esty argued that a centralised hierarchical regulatory framework was essential to bridging the gap between law and the environment.[140] This could be achieved through a Global Environment Organization.[141] This Organization would be built on a set of cardinal principles that could be developed over time to incorporate legislative and adjudicative functions, to develop international environmental norms, settle environmental disputes, while harmonising environmental standards.[142]

The failure of The Hague Declaration and the continued unwillingness of states to cede sovereignty to an external authority empowered to regulate externally and in a hierarchical fashion meant these 'regulatory body' type of approaches did not persist.[143] Instead, commentators reverted to approaches that were not predicated on cession of sovereignty to autonomous external regulatory authorities.

The most notable contribution in this phase of the literature has been Steve Charnovitz's argument in 2002 that bridging the gap between law and the environment is a regulatory issue that can be overcome through coordinating international environmental governance.[144] This effort at coordination would be headed by a World Environmental Organization tasked with coordinating and streamlining international environmental governance efforts within a sovereignty-centric framework.[145] Since then, there have been no novel arguments developed in the field.

1.4.1. Analysis

This very brief review of much more intricate arguments suffers from the dangers that attach to generalization and categorization. However, it highlights that there has certainly been extensive argument that bridging the gap between law and the environment to facilitate the

[139] JL Dunoff, *supra* n.4, at 260.
[140] D Esty, *supra* n.122, at 78.
[141] D Esty, *supra* n.122, at 79. JL Dunoff, *supra* n.4, at 257-259. S Oberthur and T Gehring 'Reforming International Environmental Governance: An Institutionalist Critique of the Proposal for a World Environment Organisation' (2004) 4 *International Environmental Agreements: Politics, Law and Economics* 359, 360-362.
[142] D Esty, *supra* n.122, at 79-83.
[143] J Brunee, *supra* n.39, at 3.
[144] S Oberthur and T Gehring, *supra* n.128, at 360.
[145] S Charnovitz 'A World Environment Organization' (2002) 27 *Columbia Journal of Environmental Law* 324. S Oberthur and T Gehring, *supra* n.128, at 360.

achievement of effective environmental protection requires a regulatory framework in which sovereignty does not play a central role.[146]

Importantly, from this brief review, some important observations with regard to this approach can certainly be made. Perhaps the most important observation is that in all the approaches that followed the landmark Stockholm Declaration which established states' unwillingness to part with their sovereignty, extensive concessions are made to sovereignty. Thus, they often end in proposals for coordination and cooperation. Such concessions limit the value of these contributions as arguments for bridging the gap between law and the environment.

A corollary observation is that these contributions lack the sense of urgency that attaches to the need to bridge the gap between law and the environment. Admittedly, this is arguably due to the fact that, at the time of writing of most of these approaches, environmental concerns were not regarded as seriously as they are now. However, in the modern world, unrelenting environmental deterioration makes this an essential aspect of any proposed framework for achieving effective environmental protection.

These observations highlight important gaps in the available literature on how bridging the gap between law and the environment can be achieved from a regulatory perspective that the thesis will seek to address. For instance, the body of literature lacks an approach that is decidedly ecocentric and makes no concessions to sovereignty. This is arguably due to the fact that available perspectives are premised on implicit acceptance of the validity of the sovereignty-centric international law paradigm as the valid regulatory paradigm on which to base the pursuit of effective environmental protection. A corollary is that there is an absence of perspectives that challenge the implicitly accepted validity of the sovereignty-centric international law paradigm as the valid framework on which to base the pursuit of effective environmental protection.

1.5. Methodology and scope

The multifaceted nature of the objective of the thesis necessitates an interdisciplinary approach to the research. A doctrinal analysis approach is relied on in some of the discussion

[146] E Engle, *supra* n.82, at 42.

with reference to both primary and secondary sources of international law. However, where recourse is had to primary sources of law, the broad and general nature of the thesis means that this is only done in an illustrative capacity. This is because such sources provide the best evidence of the impact of the sovereignty-centric approach and the shift away from that approach.

Much more reliance is placed on secondary legal sources, particularly the literature that has tackled the issue of bridging the gap between law and the environment.[147] The difficulty encountered with this approach however is that most of the available sources tacitly and explicitly accept the validity of the sovereignty-centric international law paradigm. As such, to the extent that the thesis questions the validity of continued reliance on this framework, they suffer notable limitations that necessitate reliance on alternative methodological approaches.

These limitations of doctrinal analysis have been overcome through reliance on comparative analysis between specific fields of law. The main sources of comparative inspiration are the regulatory frameworks in human rights and international trade. The reason for reliance on these two fields is that they share extensive similarities with environmental protection.[148] Notably, these fields, like environmental protection, relate to matters in which effective regulation of state activities has to be pursued at a centralised and global level. This is particularly important to ensuring consistency in the standards applied in regulation. Based on this, another similarity with environmental protection is that in these fields, there is necessary limitation of the influence of sovereignty in order to facilitate the achievement of centralised regulation.[149] However, a critical aspect of ensuring effective regulation in all three fields is the retention of states as units of accountability that carve up the globe into more manageable regulatory units. This necessitates regulatory measures that make allowances for capacity differences among states.

Importantly, the thesis excludes reliance on the European Union as a source of comparative inspiration.[150] This is based on the argument that while effective regulation

[147] A Hurrell and B Kingsbury, *supra* n.6, at 6.

[148] P Birnie, A Boyle and C Redgwell, *supra* n.3, at 1.

[149] DM Bodansky 'The Legitimacy of International Environmental Governance: A Coming Challenge for International Environmental Law?' (1999) 93 *American Journal of International Law* 596, 610. LR Helfer, *supra* n.89, at 205. JG Merrills 'Environmental Rights' in D Bodansky, J Brunnee and E Hey *The Oxford Handbook of International Environmental Law* (2007) 663, 644.

[150] DM Bodansky, *supra* n.149, at 597-599.

under the Union is based on a successful approach to addressing the implications of sovereignty, this was motivated and achieved based on factors that are unique to European states and the European continent.[151] This observation is supported by the fact that a similar model is yet to be achieved in other parts of the world.[152] Even though globalization has forced greater convergence on several issues mimicking many of the issues at the heart of European integration, significant differences persist that preclude reliance on the European Union as a source of comparative inspiration for global regulation of the environment.[153]

Like the doctrinal analysis however, the comparative analysis drawing inspiration from human rights and international trade also carries notable limitations. For instance, human rights and international trade individually, feature extensive divergences that preclude systematic assessment of processes that facilitate progression to effective regulatory frameworks in those fields. This creates the need for frameworks which explain how and why effective regulatory frameworks have been achieved. To gain such perspectives, the thesis relies on various arguments taken from an ever-expanding body of International Relations theory.[154]

Notable International Relations theories that are relied on include Slaughter's liberalism, Finnemore and Sikkink's norm life cycle and Brunnee and Toope's interactional theory of law.[155] A main reason for recourse to these varied theories is that individually, they carry some limitations. However, considered together, they can reasonably be relied on to

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[151] G Therborn, *supra* n.106, at 403. JL Dunoff 'Levels of Environmental Governance' in D Bodansky, J Brunnee and E Hey (eds) *The Oxford Handbook of International Law* (2007) 85, 87. A Hurrell and B Kingsbury, *supra* n.6, at 35-36. N Haigh 'The European Community and International Environmental Policy' in A Hurrell and B Kingsbury (eds) *The International Law of the Environment* (1992) 228. HH Koh, *supra* n.25, at 2617.

[152] JL Dunoff, *supra* n.4, at 87. JP Trachtman 'Constitutional Economics of the WTO' in JL Dunoff and P Trachtman *Ruling The World? Constitutionalism, International Law and Global Governance* (draft) (2008) 19: available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1243806

[153] DM Bodansky, *supra* n.149, at 598. LR Helfer, *supra* n.89, at 200-201. A von Bogdandy, *supra* n.124, at 232. A Tokar, *supra* n.106, at 4-15.

[154] JN Rosenau 'International Relations' in J Krieger *et al* (2ed) *Oxford Companion to World Politics* (2001) 424. KW Abbott 'International Relations Theory, International Law and the Regime Governing Atrocities in International Conflicts' (1999) 93 *American Journal of International Law* 361.

[155] M Finnemore and K Sikkink 'International norm dynamics and political change' (1998) 52 *International Organization* 887. AM Slaughter 'A Liberal Theory of International Law' (2000) 94 *American Society of International Law and Process* 240. AM Slaughter 'International Law in a World of Liberal States' (1995) 6 *European Journal of International Law* 503. J Brunnee and SJ Toope *Legitimacy and Legality in International Law* (2010). J Brunnee and SJ Toope 'International Law and Constructivism: Elements of an Interactional Theory of International Law' (2001) 39 *Columbia Journal of Transnational Law* 19.

construct a comprehensive construct detailing how progression to consistently effective international regulation could be achieved.

1.6. Structure

The thesis is presented in five remaining chapters divided into two sections. The first section commences with Chapter Two which highlights that the sovereignty-centric nature of the international law paradigm limits its capacity to achieve effective environmental protection from a law-making, implementation and enforcement perspective. However, the concession is made that in much of regulation under the sovereignty-centric international law paradigm, the breadth and general nature of the framework means such difficulties are to be expected. It is for this reason that normative frameworks have been established to address deficiencies with the sovereignty-centric international law paradigm while retaining the paradigm. Using a comparative approach which draws inspiration from human rights and international trade, the chapter argues that it is only when normative approaches fail to remedy flaws in law-making, implementation and enforcement that the validity of continued reliance on the sovereignty-centric international law paradigm can be challenged. Based on a consideration of all these factors, the chapter objectively considers the validity of the sovereignty-centric international law paradigm as the framework on which to base the pursuit of effective environmental protection. Ultimately, the argument is made that the achievement of effective environmental protection is predicated on departure from regulation under the general sovereignty-centric international law paradigm.

Chapter Three follows on the discussion in Chapter Two and seeks to fill the vacuum that would be created by departure from the sovereignty-centric international law paradigm. The chapter explores how an ideal regulatory framework could be achieved in environmental protection. In doing so, the chapter considers how this was achieved in human rights and international trade. That analysis highlights that persuading states to pursue effective regulation was a matter of getting states to pursue and apply constitutionalism ideals in international relations. Thus, the chapter argues that effective regulation that bridges the gap between law and the environment is predicated on progression to an international constitutionalism regulatory framework. Pursuant to this, it is critical to persuade states autonomously to pursue the ideal regulatory framework.

Given the freedom to construct an ideal regulatory framework, the chapter seeks to construct such a framework based on a consideration of environmental attributes, experience with instances of successful regulation under international environmental law, human rights and international trade and the fundamental tenets of constitutionalism. The chapter arrives at the conclusion that an ideal regulatory framework must exhibit three attributes. First, regulation must be centralised with an autonomous executive body. Second, regulation must be hierarchical with a universal environmental law from which all regulation draws authority. Third, the framework must feature effective enforcement directed by an adjudicatory branch.

Chapter Four commences the second section and it is devoted to an analysis of theoretical perspectives that have considered how consistently effective international regulation could be achieved. Identification of relevant theories is determined based on central aspects of the preceding discussion. For instance, it is considered that effective regulation is dependent on a transition from a state-centric approach to an approach that is cognisant of the importance of various actors in environmental protection such as individuals and groups within states. This is the basis for the analysis of Slaughter's theory of liberalism. The theory argues that effective international regulation is based on the efforts of individuals and groups that apply domestic pressure on states to pursue consistent international regulation. A consequence of this approach is that the theory does not regard international regulation as an important goal. Rather, it is domestic regulation that merits attention. This goes against the former argument, in Chapter Three of the thesis, that effective regulation demands a hierarchical and centralised approach. To accommodate this, the chapter considers other theoretical perspectives that see an international dimension to regulation as important. As such, reference is made to constructivism. This theory argues that regulation at international level is best understood in the context of social interactions among states. In the chapter, particular attention is paid to norm theory which argues that international regulatory efforts succeed where they are based on the prior establishment of norms that are regarded as imposing legitimate behavioural claims on states. Thus, the theory argues that it is through internal and external pressures, based on the dictates of norms that states are driven to feel compelled to pursue regulatory practices which are consistent with the norms. However, as with Slaughter's liberalism, the thesis notes that the theory suffers from a significant limitation. Specifically, it does not explain how effective regulatory frameworks emerge once norms are created and established. To address this deficiency, the chapter considers the interactional theory of law. The theory, like norm theory, regards effective regulation as

being dependent on norms. However, it argues further that once norms emerge, it is when they achieve legality and a community of practice around regulatory frameworks that effective regulation based on norms is achieved. The chapter argues however, that one difficulty with this approach is that it is best applied to the regulation of specific fields of international regulation, such as climate change, rather than overarching international regulation, such as general regulation of environmental protection, which is pursued in the thesis. By way of accommodating divergences and limitations of the separate theories while acknowledging their value, the chapter relies on all the theories to create a comprehensive four phase construct on how constistently effective environmental protection could be achieved. Importantly, the construct notes that an international constitutionalism regulatory framework falls in the third phase of the construct. This is taken as affirmation of the prior argument that such a framework is indeed the gateway to consistently effective regulation.

Chapter Five follows on Chapter Four and explores whether consistently effective environmental protection can be achieved using the proposed construct. The discussion commences with an analysis of where environmental protection currently sits within the context of the proposed four phase construct. The discussion reveals that environmental protection has stalled in its progression through the third phase of the construct, accounting for the inability to achieve consistently effective environmental protection. Consistent with the previous argument, it is highlighted that the third phase features progression to an international constitutionalism regulatory framework. This supports the earlier argument that progression to an international constitutionalism regulatory framework is the next step toward progression to consistently effective environmental protection. Importantly, the chapter considers why progression through the third phase of the construct which culminates in an international constitutionalism regulatory framework has stalled. This discussion reveals that this is largely due to the fact that individuals, groups and state institutions that have pursued advancement of environmental protection objectives are not unbiased and objective. This is largely a consequence of extensive state participation in this group. Ultimately, this has adversely affected their goal setting. Thus, environmental protection goals are not framed in a sufficiently objective manner to facilitate completion of the third phase of the construct. To this end, the chapter argues that from a practical perspective, the inability to achieve objectivity is apparent when problematic issues in environmental protection are considered. Attention is drawn to areas such as conflicting interests. This refers to the inability to secure consistent practice with respect to how conflicts between environmental objectives and other

goals, such as development goals will be handled should they arise. In addition, the inability to effectively regulate environmental protection while accommodating capacity differences among states is also noted as presenting difficulties that are rooted in an inability to achieve objectivity. Lastly, the problems that attach to accommodating justice considerations, such as those addressed under a common but differentiated responsibility approach are also highlighted as indicative of an inability to secure objectivity in framing environmental protection obligations.

Importantly, the chapter also draws linkages between these conclusions and the earlier conclusion that a state-centric approach is the reason for the inability to achieve effective objectivity in framing environmental protection obligations. This ultimately leads to an ineffective body of international environmental law. Indeed, it is this conclusion that is relied on as the basis for the argument that progression to an international constitutionalism regulatory framework would lead to consistently effective environmental protection.

Having noted the reasons for the failure to complete progression through the third phase, Chapter Six explores how these difficulties might be overcome. To this end, it proposes a strengthening of the role of science as useful to remedying lack of perceived and real objectivity in the group of parties that seek to advance environmental protection goals as well as in framing environmental protection objectives. The rationale is that objectivity would facilitate progression through the third phase of the proposed construct culminating in an international constitutionalism regulatory framework. However, the chapter acknowledges that for all the potential benefits that attach to such a turn to science, it is not without limitations. Particular attention is drawn to the limitations of science as a singular standard in framing environmental protection objectives. Similarly, it is considered that science is not immune from a form of politicization which would defeat the pursuit of objectivity. Lastly, it is considered that a turn to science may signal a turn to technocratic regulation in a manner that undesirably diminishes public participation in the regulation of environmental protection. Importantly, the chapter argues that these limitations of science are largely addressed through an inclusive approach to framing environmental protection objectives that relies on other considerations in addition to science. Ultimately, the chapter argues that a turn to science remains a viable method by which to achieve objectivity. Following this, the chapter explores whether a turn to science would actually lead to objectivity in a manner that would facilitate progression through the third phase of the proposed construct, culminating in an international constitutionalism regulatory framework and thus, effective environmental protection. That

discussion highlights that the success of such an approach is dependent on whether a turn to science can lead to solidarity among states in a manner that would lead to an effective international constitutionalism regulatory framework. Using a solidarity test which measures whether a turn to science can meet the requirements of central elements of solidarity, the chapter argues that such a turn to science would lead to an international constitutionalism regulatory framework and thus, consistently effective environmental protection.

Effectively, the discussion informed by theory arrives at the former conclusion that achieving consistently effective environmental protection requires a turn to an international constitutionalism regulatory framework. Importantly however, the theoretical perspectives considered offer justification for the need for such an international constitutionalism regulatory framework. In addition, the proposed construct derived from an analysis of theory offers a framework for persuading states to pursue an international constitutionalism regulatory framework.

Chapter Seven concludes the discussion in the thesis. It acknowledges the difference between the approach adopted in the thesis and existing approaches to pursuing effective environmental protection. In order to place the discussion in the thesis in the context of the broader area of study, the chapter critically assesses this progression to an international constitutionalism regulatory framework approach against current approaches. It concludes the discussion with an assessment of whether the findings in the thesis meet the objectives stated above.

Chapter Two

Tackling sovereignty in environmental protection

'The problem with overemphasizing the role of general international law when it comes to environment matters has been that 'the traditional legal order of the environment is essentially a laissez-faire system oriented toward the unfettered freedom of states. Such limitations on freedom of action as do exist have emerged in an ad hoc fashion and have been formulated from perspectives other than the specifically environmental'[1]

2.1. Introduction

The objective of the thesis is to explore how bridging the gap between law and the environment can be achieved through a regulatory framework which would secure consistently effective environmental protection. It has been argued that under international environmentantal law the attainment of consistently effective environmental protection has been complicated by the fact that the paradigm is sovereignty-centric and thus, honours core principles of sovereignty such as territoriality, equality and autonomy.[2] This approach is in

[1] P Birnie 'International Law and Solving Conflicts' in JE Carroll (ed) *International Environmental Diplomacy* (1988) 95, 99-100.

[2] P Sands (2ed) *Principles of International Environmental Law* (2003) 13. WJ Aceves 'Relative Normativity: Challenging the Sovereignty Norm Through Human Rights Litigation' (2002) 25 *Hastings International and Comparative Law Review* 261, 264. P Allott 'The Concept of International Law' (1999) 10 *European Journal of International Law* 31, 37. AM Burley 'Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine' (1992) 92 *Columbia Law Review* 1907, 1916. BB Ghali 'A Grotian Moment' (1995) 18 *Fordham International Law Journal* 1609. T Marauhn 'Changing Role of the State' in D Bodansky, J Brunnee and E Hey *The Oxford Handbook of International Environmental Law* (2007) 727, 729. A Hurrell and B Kingsbury *The International Politics of the Environment* (1992) 9. L Rajamani *Differential Treatment in International Environmental Law* (2006) 2. E Louka *International Environmental Law: Fairness, Effectiveness and World Order* (2006) 5-8.

conflict with the transboundary nature of the environment, common concern and common interest issues that are at the heart of most environmental protection efforts.[3]

It was argued in the previous chapter that achieving consistently effective environmental protection requires the transition to a regulatory framework that is uncompromised by sovereignty. However, the difficulty with this approach is that sovereignty is an inescapably central aspect of regulating international relations through the international law paradigm.[4] To address this, existing approaches that have adopted this regulatory framework perspective have often adopted a tentative approach to sovereignty. This has resulted in proposals that offer no guidance on how these frameworks could be achieved.[5] Instead, they posit the unconvincing, and deferential to sovereignty, argument that state collaboration remains the key to the proposed regulatory frameworks being realised as constituted. Considering the levels of collaboration and compromise that attach to securing the state consent and agreement required to facilitate attainment of these frameworks, it is unlikely that they could be realised in practice.[6] This is evident from the inability of the frameworks advanced in existing proposals to reach fruition.[7] Thus, while the argument for a regulatory framework in which sovereignty is not central may be sound, there remains a need for regulatory perspectives that explore how the detrimental effects of sovereignty could be tackled from a practical perspective.

Clearly, achieving consistently effective environmental protection requires extensive challenges to the centrality of the role played by sovereignty in regulation. As noted before, this is a need that arises from the centrality of the role played by sovereignty under the

[3] T Marauhn 'Changing Role of the State' in D Bodansky, J Brunnee and E Hey *The Oxford Handbook of International Environmental Law* (2007) 727, 729-732. A von Bogdandy 'Constitutionalism in International Law: Comment on a Proposal from Germany' (2006) 47 *Harvard International Law Journal* 223, 228.

[4] P Sands, *supra* n.2, at 70-71. DJ Scheffer 'Toward a Modern Doctrine of Humanitarian Intervention' (1992) 23 *University of Toledo Law Review* 253, 259-261. B Kingsbury 'Sovereignty and Inequality' (1998) 9 *European Journal of International Law* 599, 599-600. T Marauhn, *supra* n.3, at 728. CD Stone 'Defending the Global Commons' in P Sands *Greening International Law* (1993) 34-35. A Hurrell and B Kingsbury, *supra* n.2, at 7. N Walker 'Late Sovereignty in the European Union' in N Walker (ed) *Sovereignty in Transition: Essays in Eurpean Law* (2003) 1-9. M Loughlin 'The Tenets of Sovereignty' in N Walker (ed) *Sovereignty in Transition: Essays in Eurpean Law* (2003) 55, 57. I Brownlie *Principles of Public International Law* (7ed) (2008) 289. R Falk 'Sovereignty' in J Krieger *et al* (2ed) *Oxford Companion to World Politics* (2001) 789, 790. S Marks 'Democracy and International Governance' in JM Coicaud and V Heiskanen *The Legitimacy of International Organizations* (2001) 47, 49. MC Tsai 'Globalization and Conditionality: Two Sides of the Sovereignty Coin' (2001) 31 *Law and Policy in International Business* 1317, 1318.

[5] See Chapter One.

[6] E Miles *Environmental Regime Effectiveness: Confronting Theory with Evidence* (2001) xii.

[7] See Chapter One.

international law paradigm applied to environmental protection as international environmental law. Therefore, in seeking to address this issue it only makes sense to question whether the sovereignty-centric international law paradigm is suited to pursuing effective environmental protection.

2.2. The sovereignty-centric international law paradigm

The need to limit sovereignty in regulating international relations generally and in the manner required to achieve consistently effective environmental protection is not a novel issue. Where sovereignty has posed similar problems to the effective regulation of other fields, exceptions to recourse to the sovereignty-centric international law paradigm have previously been established. Most notably, this has been pursued through formal agreements between states and through customary international law.[8]

Formal agreements to depart from the sovereignty-centric international law paradigm are traceable to The Congress of Vienna in 1815 and The Hague Peace Conferences of 1899 and 1907 tenets of which, shaped arguments for the League of Nations and later, the United Nations in 1945.[9] These events signified an important transition to the pursuit of regulation which challenged the sovereignty-centric approach.[10] However, with the exception of these events, successful challenges to the sovereignty-centric international law paradigm are few.[11] In addition, they share the quality that they relate to fields in which states share markedly similar policies and interests.[12] Notable examples of fields in which there has been departure

[8] GH Aldrich and CM Chinkin 'A Century of Achievement and Unfinished Work' (2000) 94 *American Journal of International Law* 90, 90-91.

[9] WJ Aceves, *supra* n.2, at 261-264. A Boyle 'Saving the World? Implementation and Enforcement of International Environmental Law Through International Institutions' (1991) 3 *Journal of Environmental Law* 229, 233-234. L Gross **'**The Peace of Westphalia: 1648-1948' (1948) 42 *American Journal of International Law* 20. GJ Ikenberry 'Constitutional Politics in International Relations' (1998) 4 *European Journal of International Relations* 147, 166. P Birnie, A Boyle and C Redgwell (3ed) *International law and the Environment* (2009) 44. WP Nagan and C Hammer 'The Changing Character of Sovereignty in International Law and International Relations' (2003) 18: available at: http://milestonesforlife.com/thetaxistand/sov.pdf

[10] GH Aldrich and CM Chinkin, *supra* n.8, at 90. D Held 'Law of States, Law of Peoples: Three Models of Sovereignty' (2002) 8 *Legal Theory* 1, 5-8.

[11] M Koskenniemi 'The Future of Statehood' (1991) 32 *Harvard International Law* 397, 401.

[12] R Falk 'Environmental Protection in an era of Globalization' in G Handl (1995) 6 *Yearbook of International Law* 3, 13-14. GH Aldrich and CM Chinkin, *supra* n.8, at 98. DL Blaney and N Inayatullah 'The Wesphalian Deferral' (2002) 2 *International Studies Review* 29, 29-31. L Rajamani, *supra* n.2, at 2.

from the sovereignty-centric international law paradigm include the areas of security, international trade and human rights.[13]

Alternatively, departure from the sovereignty-centric international law paradigm has been pursued through reliance on customary international law which was briefly discussed in the preceding chapter. Customary international law does not derive from explicit agreements. However, some customary international law norms are often binding without the need for explicit state consent.[14] Indeed, their status has been formally acknowledged under Article 53 of the 1969 Vienna Convention on the Law of Treaties which provides:

> "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[15]

Expectedly, customary international law that has achieved departure from the sovereignty-centric international law paradigm is most prominent in the same fields of security, international trade and human rights.

In the regulation of these fields, states are retained as critical units of accountability.[16] Thus, there is still recourse to international law in its most basic form as inter-state law. However, regulation is not sovereignty-centric. Instead, the international law paradigm applied is tailored to secure effective regulation of the fields with sovereignty often serving a merely functional purpose. Specifically, sovereignty is relied on to carve up the globe into

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[13] MC Tsai, *supra* n.4, at 1325, 1328-1329. M Koskenniemi, *supra* n.12, at 406. R Falk, *supra* n.4, at 790. E Louka, *supra* n.2, at 6. A Pellet 'State Sovereignty and the Protection of Fundamental Human Rights: An International Law Perspective' *Pugwash Occasional Papers* (2000) available at: http://www.pugwash.org/reports/rc/pellet.htm

[14] LR Helfer 'Constitutional Analogies in the International Legal System' (2003) 37 *Loyola of Los Angeles Law Review* 193, 213. G Palmer 'New Ways to Make International Environmental Law' (1991) 86 *American Journal of International Law* 259, 264. MC Tsai, *supra* n.4, at 1318.

[15] Vienna Convention on the Law of Treaties 8 *ILM* (1969) 679.

[16] D Galligan and D Sandler 'Implementing Human Rights' in S Halliday and P Schmidt *Human Rights Brought Home: Socio-legal Perspectives on Human Rights in the National Context* (2004) 48.

manageable units of accountability in order to facilitate effective dissemination of regulatory efforts. Importantly, outside of fields in which states share markedly similar policies and interests such as security, international trade and human rights and specifically, in environmental protection, regulation remains rooted in the traditional international law paradigm that is sovereignty-centric.[17]

These examples merely highlight the viability of progressing to an international law regulatory framework in which sovereignty is not central. In light of the need for similar progression in environmental protection, it is instructive to draw guidance from these fields on how and why departure from the sovereignty-centric international law paradigm was secured. The knowledge learnt from this process could then form the basis of an assessment of whether reliance on the sovereignty-centric international law paradigm in environmental protection is justified.

To this end, matters of security have set a particularly important and comprehensive precedent for the viability of departure from the sovereignty-centric international law paradigm. However, these matters share few commonalities with environmental protection to the extent that security matters often affect states in a manner so direct that it is not replicated in environmental protection on a wide-enough scale. Thus, it would be misleading to rely on developments in security matters as guiding factors in the enquiry into the validity of continued reliance on the sovereignty-centric international law paradigm in environmental protection. Alternatively, greater commonalities subsist between human rights, international trade and environmental protection for the reasons noted in Chapter One. This means that in advancing this enquiry, more can be learnt by drawing guidance from the manner in which human rights and international trade have achieved departure from the sovereignty-centric international law paradigm.

2.2.1. Lessons from human rights and international trade

'Human rights are a set of principled ideas about the treatment to which all individuals are entitled by virtue of being human. Over time, these ideas have gained widespread acceptance

[17] P Birnie, A Boyle and C Redgwell, *supra* n.9, at 2. P Sands, *supra* n.2, at 12. A Hurrell and B Kingsbury, *supra* n.2, at 9.

as international norms defining what is necessary for humans to thrive, both in terms of being protected from abuses and provided with the elements necessary for a life of dignity.'[18]

Importantly, the idea that states should respect the human rights of their citizens dates back to the struggles for religious freedom and the secular writings of Kant, Locke and Rousseau. At law, the United States Bill of Rights and the French Declaration of the Rights of Man are some of the more notable translations of the early efforts to give the individual special and inalienable protections.[19] However, these developments were not mirrored in international law. Instead, the recognition of the rights of individuals was the exclusive domain of states. This was based on the traditional conception that states were the principal subjects of the international legal order. Thus, states' treatment of individual persons was generally beyond the reach of international law. The exception was that states could enter into treaties and offer protection to groups or nationalities. Barring this, individual persons had no redress in the international forum. It was only once international obligations were incorporated into national law that usual procedures and remedies of the protection of rights would become available.[20]

The departure from this approach to human rights was rooted in the recognition that this framework was inadequate for purposes of protecting the citizens of states. However, this was not accompanied by departure from a sovereignty-centric approach to regulation. Instead, the early drive to regulate human rights internationally consisted of basic reciprocal agreements between states such as the The Congress of Vienna of 1815.[21] For instance Article XVI of the Final Act of the settlement stipulates that the difference between the Christian religions should cause no difference in the enjoyment by their adherents of their civil and political rights.[22] Following this, regulation progressed to extensive provisions for the protection of minorities in the Paris Peace Conference of 1919 which followed the First World War.[23]

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[18] HP Schmitz and K Sikkink 'International Human Rights' in W Carlsnaes, T Risse and BA Simmons (eds) *Handbook of International Relations* (2007) 517.
[19] *Ibid*, at 517.
[20] D Galligan and D Sandler, *supra* n.16, at 36.
[21] The Congress of Vienna (June 1815). HP Schmitz and K Sikkink, *supra* n.18, at 517.
[22] L Gross, *supra* n.9, at 22-24.
[23] A Tokar 'Something Happened. Sovereignty and European Integration' (2001) 11 *IWM Junior Visiting Fellows Conferences* 1, 3.

As concern for human rights violations grew, led by efforts of varied groups such as the Catholic Church, the American Institute of Law, and the International Labour Organization it was recognised that human rights needed to be regulated internationally, in a centralised, peremptory and non-sovereignty-centric manner.[24] However, it was not until the Holocaust and after the Second World War that widespread agreement as to the need to protect human rights in a centralised manner compelled departure from regulation under the sovereignty-centric international law paradigm.[25] Unfettered by the bounds of that paradigm, a new human rights regulatory framework emerged.[26] This was a movement begun by the United Nations Charter which, as part of its preamble, set out to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained. These developments were continued with agreement to the Universal Declaration of Human Rights in 1948.

Presently, there have been various international treaties to regulate human rights agreed to by states. Notable among these are the 1976 Covenants on Civil and Political Rights and on Economic Social and Cultural Rights; the 1981 Covenant on the Elimination of all forms of Discrimination Against Women and the 1990 United Nations Convention on the Rights of the Child. Oversight of the international arrangements is predominantly left to the United Nations Human Rights Council.

Importantly, regional treaties have also been dedicated to the protection of human rights. These include The African Charter on Human and People's Rights, The European Convention on the Protection of Human Rights and Fundamental Freedoms and The

[24] A Cassesse 'The Role of Legal Advisers in Ensuring that Foreign Policy Conforms to International Legal Standards' (1992) 14 *Michigan International Law Journal* 139, 157. EJ Criddle and E Fox-Decent 'A Fiduciary Theory of Jus Cogens' (2009) 34 *Yale Journal of International Law* 331, 336. OA Hathaway 'Do Human Rights Treaties Make a Difference' (2002) 111 *Yale Law Journal* 1935, 1945-1946. M Reisman 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 *American Journal of International Law* 866, 872-876. HP Schmitz and K Sikkink, *supra* n.18, at 522.

[25] HH Koh 'How is International Human Rights Law Enforced?' (1999) 74 *Indiana Law Journal* 1397, 1408-1409. EJ Criddle and E Fox-Decent, *supra* n.24, at 336. JW Dacyl 'Sovereignty versus Human Rights: From Past Discourses to Contemporary Dilemmas' (1996) 9 *Journal of Refugee Studies* 136, 138-140, 143. S Gardbaum 'Human Rights and International Constitutionalism' in JL Dunoff and P Trachtman *Ruling The World? Constitutionalism, International Law and Global Governance* (draft) (2007) 4: available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1088039

[26] K Sikkink 'Human Rights, Principled Issue-Networks and Sovereignty in Latin America' (1993) 47 *International Organization* 411, 413-415.

American Convention on Human Rights.[27] Furthermore, regional multilateral arrangements are often accompanied by the creation of institutions that are charged with generating policy and overseeing implementation of the treaties and courts that serve an adjudicatory role.[28] Examples include the Inter-American Commission on Human Rights and its accompanying Inter-American Court of Human Rights, the Council of Europe and its European Court of Human Rights and the African Commission on Human Rights and the African Court of Human and People's Rights. The rationale for these developments differs. For instance, the European system came into being as a natural reaction to gross human rights violations during the Second World War and a defence against all forms of totalitarianism. The Inter-American system was designed to be an ideological framework to make a coalition against communist threats. The Inter-American regional human rights system was thought to be a springboard to defend effective political democracy in this region. Alternatively, the African system was created to safeguard independence, collective security, territory integrity while promoting solidarity.[29]

Through these many avenues 'the idea of rights has exerted an increasingly powerful impact on world politics.'[30] There remain instances in which states might independently develop human rights standards in their own constitutional and legal orders. A pertinent example relates to the United Kingdom's position with regards to human rights prior to the coming into effect of the Human Rights Act in 1998.[31] It must be noted however that, due to European Union membership, the approach to human rights drew much guidance from The Convention on the Protection of Human Rights and Fundamental Freedoms. Thus, the incentive to develop human rights standards within states stems from international initiatives. In addition, and regardless of the motivation, the substance of human rights is often derived from internationally recognised principles. For instance, the South African Constitution's Bill

[27] African Charter on Human and Peoples' Rights, art. 21, OAU Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58 (June 27, 1981). Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 5, available at: http://www.unhcr.org/refworld/docid/3ae6b3b04.html. Organization of American States, *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, available at: http://www.unhcr.org/refworld/docid/3ae6b36510.html.

[28] D Galligan and D Sandler, *supra* n.16, at 36.

[29] J Kim 'Development of Regional Human Rights Regime: Prospects for and Implications to Asia' (2009) 59-60: available at: http://www.sylff.org/wordpress/wp-content/uploads/2009/03/sylff_p57-1022.pdf

[30] HP Schmitz and K Sikkink, *supra* n.18, at 517.

[31] S Gardbaum, *supra* n.25, at 8.

of Rights is largely representative of, and, in some ways, extends upon international and regional human rights standards and prescriptions.

The effect of this development of the human rights regime has been far-reaching. State actors now face growing formal and informal limits to the policy choices they have.[32] For instance, Article 16 of the African Charter on Human and Peoples' Rights protects both the right of peoples to the 'best attainable standard of health.' Furthermore, Article 24 grants people 'a general satisfactory environment favourable to their development.' For instance, in the *Ogoniland Case*, The African Commission on Human and Peoples Rights interpreted this to mean that the Charter places an obligation on states to take reasonable measures to prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources. In practical terms, states are under an obligation to 'order or at least permit independent scientific monitoring of threatened environments, require and publicise environmental and social impact studies prior to any major industrial development, undertake appropriate monitoring and provide information to those communities exposed to hazardous materials and activities and provide meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.'[33]

Perhaps a pertinent point to note with regard to the development of the human rights regime pertains to the fact that it has grown to be widely accepted that 'not only states, but individuals can be subjects in international law and that human rights should be an integral part of foreign policy and international relations.'[34] Consequently, various cases have been brought before regional courts dealing with individual claims that state conduct has adversely affected their fundamental rights. Thus, in *Oneryildiz v Turkey* the European Court drew focus to the public's right to information about dangerous activities posing a threat to life.[35] Similarly, the impact of recognition of the status of individuals was apparent in *Hatton v United Kingdom* where the applicants challenged the extension of night flights at Heathrow Airport. The court held that the United Kingdom had acted lawfully and done its best to mitigate the impact on the private lives of those affected. The court also considered that the

[32] HP Schmitz and K Sikkink, *supra* n.18, at 521.
[33] *Ogoniland* case, para 51. A Boyle 'Human Rights or Environmental Rights? A Reassessment' (2007) 3-5: available at: http://www.law.ed.ac.uk/file_download/publications/0_1221_humanrightsorenvironmentalrightsareasses.pdf
[34] HP Schmitz and K Sikkink, *supra* n.18, at 517.
[35] *Oneryildiz v Turkey* Application No. 48939/99, Judgement of 18 July 2002, at para 90.

state had found a balance between the economic benefit to the community and the rights of those living near the airport. Greater regulation was necessary only to the extent necessary to protect life, health, enjoyment of property, and family life from disproportionate interference.[36]

Separately, with respect to international trade, early-modern trading relationships were shaped by colonisation and the corresponding restriction of imports from sources other than the coloniser. The onset of industrialization brought with it better transportation capabilities with the effect that protectionism in trade was very gradually discarded, starting in the eighteenth century. Restrictions on international trade eased in the eighteenth century, when bilateral Friendship, Commerce and Navigation treaties included within their scope non-discrimination provisions calling for conditional 'most-favoured nation' status and national treatment. By the early 1840s protectionist measures were mainly confined to tariffs on imported grains. It must be noted however that international exchanges of goods and services at the beginning of the nineteenth century represented only about three percent of the value of world output.[37]

However, the resultant competition that was due to improved transportation capabilities led to departure from free trade in the late 1870s across much of Europe. Simultaneously, a new and more volatile kind of nationalism forced governments to collect more revenue to pay for armaments. Nationalism also promoted fears in such powers as the United States and Germany that it would be difficult to industrialize if competition from trade leaders such as Britain was not checked. This increased the popularity of the argument for protection.

An important characteristic of this phase of the development of international trade was reliance on the gold-standard under which 'currencies had a fixed gold value and payments imbalances among nations were settled through the transfer of a limited supply of gold reserves. A state could not keep its goods competitive by simply devaluing its currency, nor could it indefinitely sustain a payments deficit. Instead, each trading state had to keep its goods competitive by keeping an edge in production costs.'[38]

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[36] *Hatton and Others v. The United Kingdom* [GC], no. 36022/97, 98, ECHR 2003-VIII.

[37] The Global Library of Free Learning and Reading *History of International Trade* (2011) available at: http://www.englisharticles.info/2010/07/04/history-of-international-trade/

[38] *Ibid*.

Following the First World War the gold standard was undermined and replaced by the gold-exchange standard under which international settlements were made mainly in British pounds and United States dollars. This allowed the United States and Britain and any countries able to borrow recurrently from them to sustain recurrent payments deficits. Eventually this system collapsed, helping to bring about the Great Depression of 1929 that would continue into the 1930s.

Many states reacted to the Great Depression by subjecting foreign trade to new controls. They abolished fixed exchange rates, and sought, by devaluing their currencies and by imposing tariffs and quotas, to improve the competitiveness of their products while protecting them against international competition. The result was international disintegration and stagnating as well as decreasing world trade.[39] This would motivate further talks dedicated to tackling protectionism in international trade.

Pursuant to the Second World War, many Western states pursued liberalisation of trade believing this would be mutually advantageous for economic and security reasons, both to individual nations and the world in general. This would partially provide the impetus for the Bretton Woods Conference of 1944 to address monetary and banking issues. The conference yielded the Bretton Woods Agreement which facilitated the creation of the International Monetary Fund and the World Bank. However, matters of trade were not covered.

In order to address the trade issue, a proposal was brought in 1945 for the creation of the International Trade Organization. At a conference held in Havana in 1945, states sought to create a charter for the International Trade Organization, agree on reduced tariffs and draft provisions relating to tariff reductions. While agreement to the creation of the International Trade Organization was not achieved, agreement on the other issues would ultimately form the backbone of the 1947 General Agreement on Tariffs and Trade to which 23 states were signatories.[40]

Under that agreement, much progress was made toward reducing tariffs while eliminating various forms of sovereignty-based protectionism in international trade.[41] This

[39] *Ibid*.

[40] S Lester, B Mercurio with A Davies and K Leitner *World Trade Law: Text, Materials and Commentary* (2008) 66-70. The Global Library, *supra* n.36.

[41] HV Milner 'International Trade' in W Carlsnaes, T Risse and BA Simmons (eds) *Handbook of International Relations* (2007) 448, 448-453.

would provide the impetus for departure from the sovereignty-centric international law paradigm.[42] Such departure was arguably completed with the agreement on the establishment of the 1994 World Trade Organization. Since then, there has been far-reaching liberalization of trade barriers across the world highlighted by significant regionalization of trade.[43]

This is merely an abridged overview of markedly complex processes. However, it is instrumental in highlighting that in human rights and international trade as in environmental protection, the sovereignty-centric nature of the international law paradigm was established as compromising the attainment of regulatory objectives. As regulatory needs and power shifts from states to individuals highlighted the inadequacies of the sovereignty-centric international law paradigm, challenges to basing the pursuit of effective regulation on the paradigm were successfully brought.

In broad, general and abstracted terms, these challenges were arguably presented in a three tier fashion. First, human rights and international trade challenged reliance on the sovereignty-centric international law paradigm on the basis that the paradigm lacked capacity to provide effective law-making, implementation and enforcement in a manner that would secure intended objectives. For instance, the drive to secure protection of human rights in the multilateral agreements discussed above was reflective of recognition of the limitations attaching to reliance on state responsibility. Separately, in international trade, the limitations of a sovereignty-centric approach arguably led to reliance on common standards in the form of the gold and the gold-exchange standards in order to facilitate international trade.

Despite this, there was an inability to halt either, human rights violations, as evidenced by the holocaust, or, protectionism, as apparent following the two World Wars. This highlighted that the broad and general nature of the sovereignty-centric international law paradigm meant that effective regulation could not be achieved within the context of this paradigm. Importantly, this did not signal the need for departure from such approaches. Instead, the difficulties attaching to the sovereignty-centric regulatory paradigm were mostly tackled through recourse to normative means.

In human rights an example of these normative approaches has been extension of the international agreements to the more frequently referred to regional agreements. Another example of this has also been the trust placed in states to adopt and reflect human rights fundamentals. The example of the inclusion of a fundamental Bill of Rights in the South

[42] P Kathrani 'Social Contract Theory and the International Normative Order: A New Global Ethic' (2010) 119 *Jurisprudence* 97, 100.
[43] HV Milner, *supra* n.41, at 449.

African Constitution is a useful example. Separately, in international trade, transition to the International Monetary Fund, tasked with watching over currencies is an example of a normative approach that sought to ensure consistency in state practices. Furthermore, reliance on the General Agreement on Tarrifs and Trade as a de facto organisation to head world trade is also illustrative of reliance being placed on normative means to address deficiencies of the sovereignty-centric international law paradigm.

While recourse to these normative frameworks was successful to a marked extent, the realisation that such frameworks did not necessarily resolve the difficulties attaching to regulation within a sovereignty-centric international law paradigm prompted consideration of whether such framework was suitable to achieving effective regulation. This prompted consideration of normative techniques in overcoming the limitations of the sovereignty-centric paradigm.

For instance, in human rights it was well acknowledged that sovereign states were under no obligation to carry fundamental rights legislation directed by the international instruments. However, matters of practicality have often compelled a reconsideration of this position by separate states. To some extent, this is exemplified by the adoption of the Human Rights Act in the United Kingdom in order to formally reconcile the legistive position of the state with the international and regional position. Separately, in international trade, dissatisfaction with the position under General Agreement on Tarrifs and Trade and the realisation that disagreements under that arrangement could be resolved by transition to the World Trade Organization highlighted the difficulties with relying on the normative position.

It is apparent from the preceding discussion that the second aspect on which reliance of the sovereignty-centric international law paradigm in regulating these fields was challenged in human rights and international trade was that regulatory flaws of the paradigm were irremediable through normative means. However, it still needed to be established that the normative approaches were not intrinsically flawed. Thus, the third tier of the challenge to reliance on the sovereignty-centric international law paradigm was establishing that the normative approaches were not intrinsically flawed. Once this process was complete and it was established that normative approaches were flawed, successful challenges were brought to continued reliance on the sovereignty-centric international law paradigm culminating in departure from regulation under that paradigm and the pursuit of alternative effective regulatory frameworks.

Based on the precedent set by human rights and international trade, this three tier process is the test for assessing the validity of continued reliance on the sovereignty-centric international law paradigm in environmental protection. Put differently, whether continued reliance on that paradigm in environmental protection is justifiable is dependent on the outcome of the application of this test to the field. To this end, the ensuing discussion explores the capacity of international environmental law and some of the more notable normative approaches applied to the field to achieve consistently effective environmental protection.

2.3. Environmental protection using international environmental law

States have traditionally had the right to regulate their environmentally impactful activities at self-determined levels.[44] This was reflected in early international environmental law which consisted largely of voluntary agreements between states.[45] With regard to resources falling outside of their territories, in the absence of agreement to the contrary, states would claim the right to exploit resources on the basis of a first-come, first-served ethic. This method of exploiting resources is reflected in the initial allocations of geostationary orbits, the radio frequency spectrum, international waterways, fisheries, marine mammals, birds, and ocean mineral resources.[46] The main restriction to this approach was that states assumed responsibility and liability for environmental harm that resulted from their actions.[47] Where states did assume responsibility, they would, in the normal course, voluntarily agree to constraints on their operational behaviour affecting shared or common resources. [48]

With the progression of time, certain eventualities arose, for which this approach to international environmental law was not prepared. Most of these eventualities were tied to the growth of the 'common interest.'[49] This was a reference to matters that concerned all states equally. Effectively addressing such matters required uniformity of action and

[44] A D'Amato 'The Evolution of International Environmental Law' available at: http://anthonydamato.law.northwestern.edu/IELA/Intech01-2001-edited.pdf

[45] Convention Between France and Great Britain Relative to Fisheries (11 November 1867; 21 IPE 1). North Sea Fisheries (Overfishing) Convention (1882, UN Doc ST/LEG/SERB/6, 1957, 695. Convention to Protect Birds Useful to Agriculture, Paris (19 March 1902). Convention Between the United States and Great Britain for the Protection of Migratory Birds in the United States and Canada (Washington, 7 December 1916; 4 IPE 1638).

[46] A D'Amato *supra* n.44.

[47] *Ibid*.

[48] *Ibid*.

[49] A Hurrell and B Kingsbury, *supra* n.2, at 2.

standardization of state practices.[50] In addition, as living and non-living resources were depleted and life support systems such as air and water became increasingly polluted, it became necessary to assertively regulate environmentally harmful activities on a global level.[51]

To this end, the Stockholm Conference of 1972 signalled the commencement of the effort to create an empowered body of international environmental law to regulate environmental protection.[52] The Conference resulted in three main outputs: The Declaration on the Human Environment which laid down a series of Principles accepted by the participants, an Environmental Action Plan composed of 109 recommendations and a Resolution recommending institutional and financial implementation by the United Nations.[53] These would form the basis of an approach to environmental protection based on ecology and other sciences, which existed quite apart from the will of sovereign states.[54]

Since then, international environmental law has continued to grow exponentially. In the process, it has shed some of its restrictive ties to international law. Indeed, the discipline has increasingly transformed from an early focus on transboundary pollution control agreements to global agreements that focus on environmental harm; from control of direct emissions into lakes to comprehensive river basin system regimes; from preservation of certain species to conservation of ecosystems. In addition, there has been transition from agreements that take effect only at national borders to agreements that restrain resource use and control activities within national borders.[55] Notable examples include agreements for protection of world heritage areas, wetlands and biologically diverse areas.[56]

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[50] D Freestone 'The Road from Rio: International Environmental Law After the Earth Summit' (1994) 6 *Journal of International Environmental Law* 193, 196-197. A Hurrell and B Kingsbury, *supra* n.2, at 2.

[51] P Birnie 'International Environmental Law: Its Adequacy for Present and Future Needs' in A Hurrell and B Kingsbury *The International Politics of the Environment* (1992) 53.

[52] P Sands, *supra* n.2, at 25-39. A Kiss *Survey of Current Developments in International Environmental Law* (1976) 12. HE Judge CG Weeramantry *Foreword* in MC Cordonier Segger and A Khalfan *Sustainable Development Law* (2004) xi. A D'Amato, *supra* n.44.

[53] D Freestone, *supra* n.50, at 196-197.

[54] J Schneider *World Political Order of the Environment: Towards an Ecological Law and Organization* (1979) 230.

[55] JL Dunoff 'From Green to Global: Toward the Transformation of International Environmental Law' (1995) 19 *Harvard Environmental Law Review* 241, 247-248.

[56] EB Weiss 'International Environmental Law: Contemporary Issues and the Emergence of a New World Order' (1993) 81 *Georgetown Law Journal* 675, 680.

International environmental law even has its own characteristic structure, process, conceptual tools and methodologies.[57] The terminology of international environmental law speaks of 'commitments' rather than 'obligations,' 'non-compliance' rather than 'breach' and 'consequences' rather than 'remedies' or 'sanctions.'[58] Multilateral environmental agreements such as the Montreal Protocol, the Convention on Long-Range Transboundary Air Pollution, 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal and the Kyoto Protocol, have grown increasingly detailed, specific and operational.[59] Contemporary agreements have even begun to qualify sovereignty through flexible amendment procedures.[60]

Despite these significant developments, international environmental law is neither a separate nor a self-contained system or sub-system of law.[61] As most international litigation centred on environmental protection amply demonstrates, disputes will often require consideration of both specific international environmental law provisions and general international law.[62] Thus, to the extent that international environmental law remains a part of the sovereignty-centric international law paradigm, the regulation of environmental protection remains based, to a significant extent, on a restrictive reading of sovereignty.[63] Indeed, with regard to various aspects of the environment, natural resources are regarded as falling under the sovereign authority of states on the condition that whoever possesses a resource and exercises actual control over it, secures a legal title. Essentially, a single, complex and highly integrated ecosystem has to be managed within the constraints of a political system made up of over 170 states, each claiming sovereignty within its territory.[64]

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[57] D Bodansky, J Brunnee and E Hey 'International Environmental Law: Mapping the Field' in D Bodansky, J Brunnee and E Hey *The Oxford Handbook of International Environmental Law* (2007) 1, 5.

[58] D Bodansky 'Does One Need to be An International Lawyer to be An International Environmental Lawyer' (2006) 100 *American Society of International Law* 303, 306. D Bodansky, J Brunnee and E Hey, *supra* n.57, at 5-6.

[59] Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel), 28 *ILM* (1989) 657. RR Churchill and G Ulfstein 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law' (2000) 94 *American Journal of International Law* 623. T Yang 'International Treaty Enforcement as A Public Good: Institutional Deterrent Sanctions in International Environmental Agreements' (2007) 27 *Michigan Journal of International Law* 1131, 1176-1183.

[60] D Freestone, *supra* n.50, at 202-203.

[61] A Boyle 'Relationship Between International Environmental Law and other Branches of International Law' in D Bodansky, J Brunnee and E Hey *The Oxford Handbook of International Environmental Law* (2007) 125, 126-127.

[62] *Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia)* 37 *ILM (*1998). A Boyle, *supra* n.61, at 127.

[63] S Barrett *Environment and Statecraft* (2003) 107. A Hurrell and B Kingsbury, *supra* n.2, at 1-4.

[64] A Hurrell and B Kingsbury, *supra* n.2, at 4.

In this context, environmental protection is significantly more dependent on encouraging state collaboration than on addressing ecological needs.[65] The difficulty with such an approach is that,

> "states seek to collaborate in the international system either to gain benefits they define as important but cannot achieve through their own individual actions or to minimize or avoid negative consequences of their own or others' individual actions. But the mere *attempt* to collaborate does not guarantee any results, let alone optimal outcomes. Collaboration must be negotiated, state behaviour must be coordinated and costs must be shared. Furthermore, states normally insist that the benefits from collaboration must exceed the cost of collaboration, and if they do not, the incentive to collaborate declines and the amount of collective good produced becomes suboptimal."[66]

The negative effect of this collaboration-based approach is, perhaps, most apparent in law-making.[67] 'There are no standard methods for making international environmental law treaties. Consequently, existing law-making processes are often wasteful, expensive for poorer nations to participate in and lead to a lack of clarity in terms of the relationship of treaties to each other. In addition, the law-making process usually involves identification of an issue, the identification of a forum to serve as the law-making body and thereafter a negotiating process. Controversy can attach to all of these stages.'[68] Thus, achieving the levels of consensus among states necessary to create law is often difficult. Even where agreement to a treaty is reached, another difficulty encountered with law-making is rooted in the fact that laws often impose standards that states are willing, or able to meet. This is best exemplified under the 1988 Protocol to the Convention on Long-Range Transboundary Air Pollution Concerning the control of Emissions of Nitrogen Oxides or their Transboundary

[65] W Bradnee Chambers 'Towards an Improved Understanding of Legal Effectiveness of International Environmental Treaties' (2003) 16 *Georgetown International Environmental Law Review* 501, 501-502. RR Churchill and G Ulfstein, *supra* n.59, at 628. G Palmer, *supra* n.14, at 264. A Dan Tarlock 'The Role of Non-Governmental Organizations in the Development of International Environmental Law' (1992) 68 *Chicago-Kent Law Review* 61, 62.

[66] E Miles, *supra* n.6, at xii.

[67] G Handl 'Environmental Security and Global Change: The Challenge to International Law' in G Handl (ed) (1990) 1 *Yearbook of International Environmental Law* 3, 5-7.

[68] M Poustie 'Environment' in E Moran *et al* (eds) *Stair Memorial Encyclopaedia Reissue* (2007) para 13.

Fluxes.[69] While the commencement of negotiations pointed to a desire to achieve a 30 percent reduction in nitrogen oxides based on 1985 levels, the process of collaboration and securing consent among states yielded only a freeze of emissions at the 1987 baseline as from 1994.[70]

Yet another difficulty that attaches to law-making in environmental protection is that it is often an undesirably lengthy process. For instance, the 1982 United Nations Convention on the Law of the Sea took nearly twenty years to negotiate and a further twelve years to come into force.[71] Alternatively, the Kyoto Protocol took eight years to come into force. It must be noted that in some instances, most notably the regulation of ozone depletion, law-making has been relatively quick. Thus, the Vienna Convention on the Protection of the Ozone Layer was agreed within five years and its Montreal Protocol followed soon thereafter. However, this may be attributable to the immediate seriousness of the threat posed to human health and the relative ease with which substitutes for chlorofluorocarbons could be found.[72] In the normal course, law-making is typically a protracted process.

As a response to the many difficulties that attach to law-making related to the need for collaboration among states and the compromises that accompany the drive to achieve consensus in the context of a sovereignty-centric international law paradigm, efforts at regulating environmental protection have featured extensive reliance on 'soft law' approaches.[73] The term soft law has previously been referred to as a 'convenient description for a variety of non-binding instruments used in contemporary international relations.'[74]

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[69] Protocol to the Convention on Long-Range Transboundary Air Pollution Concerning the control of Emissions of Nitrogen Oxides or their Transboundary Fluxes (Sofia) 27 *ILM* (1988) 698.

[70] JB Skjaerseth, O Schram Stokke and J Wettestad 'Soft Law, Hard Law, and Effective Implementation of International Environmental Norms' (2006) 6 *Global Environmental Politics* 104, 109.

[71] United Nations Convention on the Law of the Sea (Montego Bay) Misc. 11 (1983) Cmnd. 8941.

[72] M Poustie, *supra* n.68, at para 13.

[73] P Birnie, A Boyle and C Redgwell, *supra* n.9, at 11, 17-18, 34-37. JL Dunoff, *supra* n.55, at 251. P Dupuy 'Soft Law and International Law of the Environment' (1991) 12 *Michigan International Law* 420, 422. M Fitzmaurice and C Redgewell 'Environmental Non-compliance Procedures and International Law' (2000) 31 *Yearbook of International Environmental Law* 35, 39. D Freestone, *supra* n.50, at 203. G Palmer, *supra* n.14, at 269. D Shelton 'Normative Hierarchy in International Law' (2006) 2 *American Society of International Law* 291, 319. KW Danish 'International Relations Theory' in D Bodansky, J Brunnee and E Hey (eds) *The Oxford Handbook of International Law* (2007) 205, 225. M Poustie, *supra* n.68, at para 14. MJ Kelly 'Overcoming Obstacles to the Effective Implementation of International Environmental Agreements' (1997) 9 *Georgetown International Environmental Law Review* 448, 452. E Louka, *supra* n.2, at 22. J Brunee 'Coping with Consent: Law-Making Under Multilateral Environmental Agreement' (2002) 15 *Leiden Journal of International Law* 1, 7.

[74] P Birnie, A Boyle and C Redgwell, *supra* n.9, at 35.

Reliance on soft law means that international environmental law seldom features sharp statements of environmental protection objectives.[75] This is exemplified in the Vienna Convention on the Protection of the Ozone Layer and the Convention on Long-Range Transboundary Air Pollution.[76] In addition, as exemplified by the United Nations Convention on the Law of the Sea, laws often delimit the respective competences of states that voluntarily bind themselves to abide by certain codes of conduct with an eye toward the adoption of various agreements on various matters.[77]

Consequently, between hard law and soft law, international environmental law largely consists of laws that either, reflect standards that states are able or willing to meet and often, these are lowest common denominator standards.[78] Regardless, the result is that from an ecocentric perspective, the process of law-making compromises the attainment of ecocentric objectives.

In addition to compromising law-making, the centrality of sovereignty within the context of the international law paradigm has also compromised the implementation of laws. Certainly, it must be acknowledged that a variety of legal techniques and institutional mechanisms designed to review and enhance the implementation of global and regional agreements have evolved in international environmental law.[79] For instance, in such diverse regimes as the 1992 Convention on the Transboundary Effects of Industrial Accidents, the Kyoto Protocol and the Basel Convention, there have been attempts to provide guidance on the role of national organs in implementation.[80] In addition, an important development has been increasing reliance on implementation committees. This approach was first established

[75] *Ibid*, at 34.

[76] Framework Convention on Climate Change, 31 *ILM* (1992) 851. P Birnie, A Boyle and C Redgwell, *supra* n.9, at 17.

[77] P Birnie, A Boyle and C Redgwell, *supra* n.9, at 17.

[78] DG Victor 'Enforcing international law: implications for an effective global warming regime' (1999) 10 *Duke Environmental Law and Policy* 147, 153. D Freestone, *supra* n.50, at 201. A Dan Tarlock, *supra* n.65, at 66. A Hurrell and B Kingsbury, *supra* n.2, at 22. M Poustie, *supra* n.68, at para 13. K Kline and K Raustiala 'International Environmental Agreements and Remote Sensing Technologies' (2000) 6 available at: http://sedac.ciesin.columbia.edu/rs-treaties/rs-treaties_bckgnd.pdf

[79] K Sachariew 'Promoting Compliance with International Environmental Legal Standards: Reflections on Monitoring and Reporting Mechanisms' in G Handl (ed) (1991) 2 *Yearbook of International Environmental Law* 31. J Brunee 'Enforcement Mechanisms in International Environmental Law' in U Beyerlin, P Stoll, R Wolfrum *Ensuring compliance with Multilateral Environmental Agreements: A Dialogue Between Practitioners and Academia* (2006) 1, 3. M Poustie, *supra* n.68, at para 10, 22.

[80] Articles 8, 18, 23, Convention on the Transboundary Effects of Industrial Accidents (Espoo) 31 *LLM* (1992) 1333. Article 10, Kyoto Protocol. Article 5, Basel Convention. P Sands, *supra* n.2, at 175. A Nollkaemper 'Compliance Control in International Environmental Law: Traversing the Limits of the National Legal Order' in G Ulfstein and J Werksman (eds) (2002) 13 *Yearbook of International Environmental Law* 165, 170-171.

based on Article 8 of the Montreal Protocol.[81] The functions of the implementation committee to emerge from the Protocol were to receive, consider and report on submissions made by any party regarding another party's implementation of its obligations. The committee could then assist, caution or suspend the non-complying state.[82]

Other developments in this regard include greater reliance on measures such as environmental impact assessment to ensure environmental considerations are built into projects. Similarly, there is greater recourse to strategic environmental assessment of plans and programmes. The rationale behind such an approach has been that it allows environmental considerations to be considered at an early stage allowing the public an opportunity to influence outcomes in a manner that ensures that genuine choices can be made, for instance, between modes of transport.[83]

While these developments are significant and noteworthy, the difficulty that remains in implementing international environmental law is that, within the confines of the sovereignty-centric international law paradigm, sovereignty grants each of the two orders, national and international, its own *autopoeisis*.[84] This means that even when they consent to international law, states still retain extensive discretion with regard to how they implement such law.[85] For instance, treaties such as the Basel Convention, the 1992 Convention on Biological Diversity and the 2000 Cartagena Protocol on Biosafety lack the requisite imperative character required to compel implementation in a manner that would guarantee the attainment of environmental protection objectives.[86] Thus, discretionary implementation by individual states can still play a role in limiting the impact of these treaties despite evolving mechanism to address instances of inefficacious implementation.[87]

To some extent, there have been efforts to address the difficulties posed by securing effective implementation under the sovereignty-centric international law paradigm through

[81] P Sands, *supra* n.2, at 205-210.
[82] *Ibid*.
[83] M Poustie, *supra* n.68, at para 22. KL Blackstock, EA Kirk and AD Reeves 'Sociology, Science and Sustainability: Developing Relationships in Scotland' (2005) 10 *Social Research Online*, 2.4, available at: http://www.socresonline.org.uk/10/2/blackstock.html
[84] P Sands, *supra* n.2, at 174. A Nollkaemper, *supra* n.80, at 172.
[85] M Ehrmann 'Procedures of Compliance Control in International Environmental Treaties' (2002) 13 *Colorado Journal of International Environmental Law* 377, 381.
[86] Convention on Biological Diversity, 31 *ILM* (1992) 818. Protocol on Biosafety (Cartagena) 39 *ILM* (2000) 1027. N Roht-Arriaza 'Private Voluntary Standard-Setting, the International Organization for Standardization and International Environmental Law-making' in G Handl (ed) (1995) 6 *Yearbook of International Environmental Law* 107, 108, 117-137. P Sands, *supra* n.2, at 176.
[87] J Brunee, *supra* n.73, at 1. P Weil 'Towards Relative Normativity in International Law?' (1983) 77 *American Journal of International Law* 413, 434. J Brunee, *supra* n.79, at 3-4.

enforcement.[88] This is a development that has always accompanied the evolution of international environmental law.[89] Thus, earlier international environmental law treaties often made no attempts to make provision for enforcement mechanisms.[90] In those treaties, procedures for enforcement were deferred to Article 33 in Chapter VI of the United Nations Charter which required settlement of disputes between states by peaceful means, including negotiation, inquiry, mediation, conciliation, arbitration or international courts.[91] More recently however, there has been increasing reliance placed on enforcement mechanisms included in the text of agreements to remedy the difficulties encountered with the sovereignty-centric international law paradigm.[92] These enforcement mechanisms assume various forms. For instance, they may focus on ensuring that non-compliance is met with some sort of sanctioning mechanism. Alternatively, they can be incentives to encourage compliance with international environmental law. Importantly, they do not work to the exclusion of each other. Indeed, an important development with regards to enforcement has been growing reliance on both sanctions and incentives simultaneously.

Recourse to enforcement mechanisms in this manner is a development that is traceable to the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora.[93] The treaty featured sanctions in the form of a total ban on commercial trade of identified species of fauna and flora. This was based on the rationale that such measures would compel states to carefully assess the opportunities and risks of complying with international environmental law.[94] While some success was achieved through this approach, notably in curbing the commercial trade of ivory leading to increased elephant

[88] A Boyle, *supra* n.9, at 229. DG Victor, *supra* n.78, at 153. P Birnie, A Boyle and C Redgwell, *supra* n.9, at 213, 252.

[89] R Axelrod and R Keohane 'Achieving Cooperation Under Anarchy: Strategies and Institutions' (1985) 38 *World Politics* 226, 235. RR Churchill and G Ulfstein, *supra* n.59, at 629.

[90] P Birnie, *supra* n.51, at 69.

[91] Charter of the United Nations (San Francisco) 1 *UNTS* xvi. GH Aldrich and CM Chinkin, *supra* n.8, at 91. P Sands 'Enforcing Environmental Security' in P Sands *Greening International Law* (1993) 50, 56. D Esty and MH Ivanova 'Revitalizing Global Environmental Governance: A Function-Driven Approach' in D Esty and MH Ivanova *Global Environmental Governance: Options and Opportunities* (2002) 181, 185.

[92] P Sands, *supra* n.2, at 200-212.

[93] Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington) 993 *UNTS* 243. PH Sand 'Sanctions in Case of Non-compliance and State Responsibility: Pacta Sunt Servanda-Or Else?' in U Beyerlin, P Stoll, R Wolfrum *Ensuring compliance with Multilateral Environmental Agreements: A Dialogue Between Practitioners and Academia* (2006) 259, 259-262.

[94] OA Hathaway, *supra* n.24, at 1944. A Chayes and A Chayes *The New Sovereignty: Compliance with International Regulatory Agreements* (1995). IFI Shihata 'Implementation, Enforcement and Compliance with International Environmental Agreements-Practical Suggestions in the Light of the World Bank's Experience' (1996) 9 *Georgetown International Environmental Law Review* 37.

populations in southern Africa, the general perception in other aspects of environmental protection was that such an approach threatened the autonomy that sovereignty secured for states.[95] This progressively limited and culminated in the departure from this approach in treaties.[96]

Recognition of the need to limit reliance on sanctions as an enforcement mechanism was accompanied by pursuing a balance between their use and greater emphasis on incentives as an enforcement mechanism.[97] This was perhaps best exemplified in the Montreal Protocol.[98] Article 2 of the Protocol established a framework of production, import, and export restrictions, to achieve worldwide reductions in ozone-depleting chemicals. In addition, it gave states discretion as to how best meet those restrictions. However, Article 7 required annual reporting to monitor each state's progress in meeting the restrictions.[99] Importantly, the Protocol made provision for withholding of funding for developing states if those states did not report their baseline data within one or two years of their first funded projects.[100] These measures are widely regarded as having played a central role in securing a 70 percent drop in the global consumption of chlorofluorocarbons, the main cause of ozone depletion, between 1987 and 1996.[101]

Despite some successes with this approach, as in the Montreal Protocol highlighted above, the difficulty encountered with reliance on incentives more generally has been the traditional argument that incentives are best applied from a position of power.[102] In the horizontal state system in which sovereignty secures equality among states, the value of incentives diminishes.[103] To address these difficulties, in more recent times, there have been

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[95] RR Churchill and G Ulfstein, *supra* n.59, at 628-629.

[96] A Chayes and A Chayes, *supra* n.94, at 320. M Ehrmann, *supra* n.85, at 385. EJ Ringquist and T Kostadinova 'Assessing the Effectiveness of International Environmental Agreements: The Case of the 1985 Helsinki Protocol' (2005) 49 *American Journal of Political Science* 86, 87.

[97] GW Downs, KW Danish and PN Barsoom 'Is the Good News about Compliance Good News anout Cooperation?' (1996) 50 *International Organization* 379, 395. EB Weiss, *supra* n.56, at 691-693. M Poustie, *supra* n.68, at para 23.

[98] JS Seitz and SD Mitoff 'Challenge of Enforcing The Montreal Protocol on Protection of Stratospheric Ozone' (2011) available at: http://www.inece.org/1stvol1/seitz.htm

[99] P Berardelli 'The Lessons of the Montreal Protocol' (2007) available at: http://lawprofessors.typepad.com/environmental_law/2007/03/thank_god_we_ra.html

[100] Funds are supplied by the Multilateral Fund established under Article 10 of the Montreal Protocol.

[101] Y von Schirnding, W Onzivu and AO Adede 'International Environmental Law and Global Public Health' (2002) 80 *Bulletin of the World Health Organization* 970, 972.

[102] RR Churchill and G Ulfstein, *supra* n.59, at 643-647. R Axelrod and R Keohane, *supra* n.89, at 235.

[103] J Brunnee and SJ Toope 'International Law and Constructivism: Elements of an Interactional Theory of International Law' (2000) 39 *Columbia Journal of Transnational Law* 19, 20-23. B Fassbender 'Sovereignty and Constitutionalism in International Law' in N Walker (ed) *Sovereignty in Transition: Essays in Eurpean Law* (2003) 115, 120.

efforts to merge sanctions with incentives in the enforcement of international environmental law.[104] This approach to enforcement is most apparent in agreements such as the Climate Change Convention and its Kyoto Protocol.[105] For instance, Article 18 of the Kyoto Protocol facilitates and promotes compliance with commitments. However, it also makes provision for sanctions. In practice, if a party fails to meet its first commitment-period targets, it must make up the difference together with a penalty of thirty percent, as well as losing its right to engage in emissions trading. This is a significant penalty given the potential economic benefits of emissions trading.[106]

This transition to merging sanctions with incentives has been accompanied by increasingly common reliance on non-compliance procedures which seek to make states comply with their obligations under treaties.[107] They are based on the rationale that wrongful acts are, most often, rooted in a lack of capacity or a lack of resources, or genuine differences of interpretation, rather than a case of bad faith. Thus, it makes little sense to punish states for what is, in effect, a good faith effort to comply.[108] As such, most non-compliance procedures are best understood as a form of 'dispute avoidance' or alternative dispute resolution to the extent that resort to binding third-party procedures is avoided.[109] In addition, these procedures are unlike litigation in several respects. For instance, they are inherently multilateral in character, the consent of the respondent state need not be obtained before the process can be initiated, standing is not required to make a complaint and procedures can often be activated by any party to the treaty or the treaty secretariat.[110] Furthermore, the outcome of non-compliance procedures can be the provision of assistance or other inducements to encourage future compliance. Importantly however, the threat of aggressive enforcement is retained when warranted. These range from the withholding of funds by the World Bank or the Global

[104] A Chayes and A Chayes, *supra* n.94, at 314-315, 316-320.

[105] T Yang, *supra* n.59, at 1136-1139. S Barrett 'International Cooperation and the International Commons' (2000) 10 *Duke Environmental Law and Policy* 131, 138. A Chayes and A Chayes 'Compliance Without Enforcement: State Regulatory Behaviour Under Regulatory Treaties' (1991) 7 *Negotiation Journal* 311, 314.

[106] M Poustie, *supra* n.68, at para 23. P Birnie, A Boyle and C Redgwell, *supra* n.9, at 250. J Brunee, *supra* n.79, at 20-21.

[107] J Brunee, *supra* n.79, at 17-20. U Beyerlin, P Stoll, R Wolfrum 'Conclusions drawn from the Conference on Ensuring Compliance with MEAs' in U Beyerlin, P Stoll, R Wolfrum (eds) *Ensuring Compliance with Multilateral Environmental Agreements: Academic Analysis and Views from Practice* (2006) 1 available at: https://www.ippc.int/file_uploaded/1182346189781_conclusionsfrom_MEA_Compliance_conf.pdf

[108] J Klabbers 'Compliance Procedures' in D Bodansky, J Brunnee and E Hey *Oxford Handbook of International Environmental Law* 1003.

[109] M Fitzmaurice and C Redgewell, *supra* n.73, at 35.

[110] Article 2 (5) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus), 38 *ILM* (1999) 517. P Birnie, A Boyle and C Redgwell, *supra* n.9, at 246.

Environmental Facility to the suspension of treaty rights and privileges pending full compliance. Notable treaties to have included these non-compliance procedures include the Montreal Protocol in Article 8 and the Kyoto Protocol in Articles 16 and 18.

While reliance on a combination of aggressive enforcement techniques and incentives as well as reliance on non-compliance procedures promises some success, the main difficulty encountered with these approaches is that within the context of the sovereignty-centric international law paradigm, enforcement largely remains subject to sovereignty considerations. For instance, while various states reserved the right to take action against the Soviet Union following the Chernobyl Disaster, none actually did so. The reasons for this included the fact that some states with a right of action also relied on nuclear power. The outcome of any actions they would take would therefore carry implications for their conduct that would potentially not be in their own interests.[111]

Ultimately, this means that states remain central to environmental protection in a manner that politicises the process. For instance, in the effort to curb climate change progress has been slow due to considerations that are hardly ecocentric. It has been noted that,

> 'states that are beginning to industrialize and trying to reach parity with more industrialized states do not want to be burdened with an early base line year, and those industrialized states that have already started controlling pollution want to receive appropriate credit in the selection of the base line year. Alternatively, difficulties attach to equitably allocating acceptable levels of pollution for those states that are still industrializing, but also with treating equitably those countries that have already reduced pollution levels significantly in advance of the target base year.'[112]

The effect of this has been that the manner in which obligations can be fairly differentiated among states has often garnered more attention than the climate change effort, negatively affecting achievement of progress in the ecocentric objective.

Thus, enforcement techniques, regardless of how comprehensive they may be, cannot fully overcome the difficulties that attach to reliance on a sovereignty-centric international law paradigm. This is arguably based on the fact that enforcement does not render the often indeterminate rules of international environmental law more specific nor does enforcement

[111] RR Churchill and G Ulfstein, *supra* n.59, at 629. M Poustie, *supra* n.68, at para 23.
[112] A D'Amato, *supra* n.44.

make such rules more ecocentric.[113] In many ways therefore, enforcement-based attempts at remedying some of the difficulties encountered with applying a sovereignty-centric international law paradigm have highlighted, rather than remedied, the difficulties that attach to reliance on the international law paradigm as the basis for pursuing consistently effective environmental protection.[114]

The foregoing discussion certainly paints a negative picture of the role of a sovereignty-centric approach to regulating environmental protection through international environmental law. While this may be so, it is important to note that the precedent set by human rights and international trade suggests that these difficulties do not necessarily render reliance on the sovereignty-centric international law paradigm unjustifiable in pursuing effective regulation. In the normal course, these difficulties are predictable and are a result of applying the broadly framed sovereignty-centric international law paradigm in the form of international environmental law. As such, difficulties such as those outlined above have previously been addressed through reliance on normative approaches tailored to specifically address such issues. Thus, whether continued reliance on the sovereignty-centric international law paradigm in environmental protection is justified is a matter to be determined on the basis of an assessment into the capacity of normative approaches to remedy the sovereignty-centric deficiencies with the law.

2.4. Normative remedies in the international law paradigm

Various normative approaches have been relied on in an effort to minimise flaws with the sovereignty-centric international law paradigm.[115] Traditionally, the primary normative approach in addressing these deficiencies under the sovereignty-centric international law paradigm was customary international law, a trend reflected under international environmental law.[116] However, as the environmental protection movement has gained momentum, other normative approaches have increasingly been relied on, in addition to customary international law. Notable examples of approaches to remedy flaws with the sovereignty-centric international law paradigm include reliance on soft law, sustainable development, and institutionalism.

[113] J Werksman 'Compliance and the Kyoto Protocol: Building a Backbone into a 'Flexible' Regime' (1998) 9 *Yearbook of International Environmental Law* 48, 53.
[114] See Chapter One.
[115] SA Hajost and QJ Shea 'An Overview of Enforcement and Compliance Mechanisms in International Environmental Agreements' available at: http://www.inece.org/1stvol1/hajost.htm
[116] P Sands, *supra* n.2, at 143-144. D Freestone, *supra* n.50, at 195. G Palmer, *supra* n.14, at 265.

2.4.1. Customary international law

Customary international law consists of state practice and *opinio juris*, that is, the conviction that conduct is motivated by a sense of legal obligation. 'Both conduct and conviction on the part of the state are usually thought to be essential before it can be said that a custom has become law, whether universally, regionally, or as between particular states involved in its formation.'[117]

Importantly for present purposes, the identification of customary laws has always been, and remains, a task requiring research and the exercise of judgment. To this end, suffice it to note that in international environmental law customary international law in the form of state practice and *opinio juris* has often informed the content of universally acknowledged 'principles' of international environmental law.[118] Unlike binding rules, 'principles do not have to create rules of customary law to have legal effect, nor do they need to be incorporated in treaties or reflect national law. They cannot override or amend the express terms of a treaty, so their importance derives principally from the influence they may exert on the interpretation, application, and development of treaties. What gives principles their authority and legitimacy is simply the endorsement of states. Thus, they lay down the parameters which affect the way courts decide cases or how an international institution exercises its discretionary powers. They can set limits, or provide guidance, or determine how conflicts between other rules or principles will be resolved. They may lack the supposedly harderedge of a 'rule' or 'obligation,' but they should not be confused with 'non-binding' or emerging law.'[119] Importantly, focus here is drawn to principles that have crystallized and can be broadly described as forming the basis of aspects of customary international law.

Accepting that these principles are the harbingers of customary international environmental law, it is the capacity of these principles to tackle the difficulties posed by the sovereignty-centric international law paradigm that is reflective of the capacity of customary international law to remedy difficulties attaching to the sovereignty-centric international environmental law. It must be noted however, that principles of international environmental law have differing status levels, with some being more prominent than others. In addition, the international law basis of international environmental law means that some of these principles

[117] P Birnie, A Boyle and C Redgwell, *supra* n.9, at 17, 22-23. P Sands, *supra* n.2, at 144-147.
[118] AE Utton 'International Environmental Law and Consultation Mechanisms' (1973) 12 *Columbia Journal of Transnational Law* 56, 57-64. P Birnie, A Boyle and C Redgwell, *supra* n.9, at 26. P Sands, *supra* n.2, at 150-152. M Poustie, *supra* n.68, at paras 11, 12. E Louka, *supra* n.2, at 23-24, 49-54.
[119] P Birnie, A Boyle and C Redgwell, *supra* n.9, at 27-28.

are rooted in age-old international law custom. As such, the sentiment behind some international environmental law principles predates the complex modern day environmental protection efforts and treaty regimes.[120] Importantly, as a normative approach to remedy difficulties in international environmental law, these principles have been used arguably indiscriminately to overcome the hurdles posed by that sovereignty-centric paradigm.[121] Furthermore, while there are various principles of international environmental law that are reflective of the customary international law, focus is only drawn to three of the more prominent principles, namely, due diligence, the polluter pays principle and the common but differentiated responsibility principle.[122] This is justified on the grounds that these principles have often played a significant role in addressing some of the difficulties that are encountered under a sovereignty-centric international law paradigm.

In addition to the focus on the aforementioned principles, focus is also drawn to the precautionary principle. While it is commonly referred to as a 'principle,' with the exception of India and Pakistan which have regarded it as part of customary international law, the precautionary 'principle' does not fall in the same category as principles of customary international environmental law in the rest of the world.[123] However, the debate over its actual status exceeds the scope of the discussion here. Suffice it to note that its inclusion under this head is only to facilitate a more fluid discussion on the manner in which the deficiencies of the sovereignty-centric international law paradigm have been addressed through the normative means of customary international law represented in the form of principles. As such, it is fitting to include under this head a normative approach that is frequently referenced to as a principle and has been previously been regarded as part of the customary international law albeit not universally.

Having noted these factors, the due diligence principle is a principle expressing the conduct of good government. It offers states discretion in determining what constitutes due diligence. In practice, this has often been limited by reference to international standards such

[120] P Birnie, A Boyle and C Redgwell, *supra* n.9, at 23-25, 26-27. NG Onuf 'Further Thoughts on a New Source of International Law' (1971) 65 *American Journal of International Law* 774, 775. P Dupuy, *supra* n.73, at 432. D Freestone, *supra* n.50, at 210.

[121] P Birnie, A Boyle and C Redgwell, *supra* n.9, at 105-108.

[122] T Scovazzi 'State Responsibility for Environmental Harm' in G Ulfstein and J Werksman (eds) (2001) 12 *Yearbook of International Environmental Law* 43, 47. K Sachariew, *supra* n.79, at 31. G Handl 'Transboundary Impacts' in D Bodansky, J Brunnee and E Hey *The Oxford Handbook of International Environmental Law* (2007) 531, 532-535. M Dixon *Textbook on International Law* (4ed) (2003) 466.

[123] P Birnie, A Boyle and C Redgwell, *supra* n.9, at 159, 160. M Poustie, *supra* n.68, at para 12.

as those set out in treaties or in the resolutions and decisions of international bodies.[124] Examples include the Annexes to the Protocol to the Convention for the Prevention of Pollution from Ships and the International Atomic Energy Agency's safe standards for the management of nuclear installations.[125] This approach has been codified through inclusion in treaties such as the United Nations Convention on the Law of the Sea which, effectively, incorporates the Annexes to the Protocol to the Convention for the Prevention of Pollution from Ships and the 1972 London Convention on the Prevention of Marine Pollution by Dumping Wastes and other Matter.[126]

Regardless of whether due diligence has been exercised, once environmental harm occurs or can be anticipated, the polluter pays principle seeks to address deficiencies of the sovereignty-centric international law paradigm through assigning liability for environmental damage. The principle is essentially an economic policy for allocating the costs of environmental damage borne by public authorities.[127] It entails that the polluter should bear the expense of carrying out measures decided by public authorities to ensure that the environment is in an acceptable state. In addition, the cost of these measures should be reflected in the cost of goods and services which cause environmental harm in production and, or, in consumption. Thus, where issues relating to assigning state liability under a sovereignty-centric international law paradigm are problematic and prone to being affected by political considerations, the polluter pays principle avoids these difficulties, in part, through pursuing internalization of the economic costs of environmental harm, clean up and protection measures.

Another principle that has sought to address the difficulties posed by the sovereignty-centric international law is the common but differentiated responsibility principle.[128] In terms of this principle, all states are commonly responsible for environmental protection. However, responsibility is differentiated between states. Differentiation often focuses on giving more advantageous treatment to some states based on a consideration of historic, economic and

[124] P Birnie, A Boyle and C Redgwell, *supra* n.9, at 148-149.

[125] International Atomic Energy Agency 'Nuclear Safety and Security' available at: http://www-ns.iaea.org/standards/

[126] Convention on the Prevention of Marine Pollution by Dumping Wastes and other Matter (London) 11 *ILM* (1972) 1294.

[127] *Ibid*, at 322-326.

[128] Y Matsui 'The Principle of 'Common but Differentiated Responsibilities'' in N Schrijver and F Weiss *International Law and Sustainable Development* (2004) 73, 95. P Birnie, A Boyle and C Redgwell, *supra* n.9, at 106-152, 175-184. P Sands, *supra* n.2, at 231.

political differences between states.[129] In practice, distinctions have been drawn most often between developed and developing states. In addition to setting higher standards for developed states, obligations for solidarity assistance to developing states commonly occur in the form of funds and the transfer of environmentally sound technologies or substitutes.[130]

Examples of the practical application of this principle can be found in the Climate Change Convention and the Biodiversity Convention.[131] Obligations under these treaties have been structured on the basis of parties' relative levels of economic development.[132] Thus, while it is recognised that the responsibility to contribute to environmental protection is shared, the burden of responding is differentiated on the basis of a party's economic ability to take action.[133] In support of this, funds have been created to support developing states through the Global Environmental Facility.[134]

In addition to these principles that inform customary international environmental law, the precautionary principle is another normative approach that has emerged to address difficulties with regulating environmental protection under the sovereignty-centric international law paradigm.[135] Its purpose is to make greater allowance for uncertainty in the regulation of environmental risks and the sustainable use of natural resources. As such, the principle represents an attempt to sway the focus of the law from a reactive approach to an approach based on precaution.[136] This approach underpins various multilateral environmental agreements, most notably, the Vienna Convention on the Protection of the Ozone Layer and its Montreal Protocol as well as the Climate Change Convention and its Kyoto Protocol. These agreements serve as examples of how the law, like the principle, has increasingly grown to focus less on the sovereignty-centric standard of liability for transboundary harm

[129] L Rajamani, *supra* n.2, at 1.
[130] *Ibid*, at 9.
[131] *Preamble* and Article 3 (1) of the Climate Change Convention. *Preamble* and Article 20 of Biodiversity Convention.
[132] G Palmer, *supra* n.14, at 263.
[133] J Werksman 'Consolidating Governance of the Global Commons: Insights From the Global Environmental Facility' (1995) 6 *Yearbook of International Law* 47.
[134] *Ibid*, at 47-48.
[135] M Mason 'Citizenship Entitlements Beyond Borders? Identifying Mechanisms of Access and Redress for Affected Publics in International Environmental Law' (2006) 12 *Global Governance* 283, 288. P Sands, *supra* n.2, at 266. D Freestone, *supra* n.50, at 209. P Birnie, A Boyle and C Redgwell, *supra* n.9, at 152-164. G Handl, *supra* n.67, at 20.
[136] T Crossen 'Multilateral Environmental Agreements and the Compliance Continuum' (2004) 16 *The Georgetown International Environmental Law Review* 1, 11. T Scovazzi, *supra* n.122, at 51. M Mason, *supra* n.135, at 288.

and more on preventive and precautionary approaches to the protection of the global environment.[137]

As the primary method by which difficulties in the sovereignty-centric international law paradigm have been addressed, these principles have achieved much success. For instance, the due diligence principle limits the potentially detrimental effect of unconstrained sovereign activity by creating an obligation to exercise diligence. Alternatively, the polluter pays principle limits the difficulty attaching to assigning responsibility to states and actors within states under a sovereignty-centric international law paradigm. Similarly, the common but differentiated responsibility principle has proven instrumental to addressing some of the difficulties posed in securing collaboration under the sovereignty-centric international law paradigm by encouraging consensus to act collectively in response to environmental deterioration. Lastly, the precautionary principle has played an instrumental role in swaying the focus of environmental protection efforts from a former punitive approach to a more appropriate precautionary approach to environmental protection. As such, the role of principles in advancing ecocentric objectives has been notable. This is evidenced by the fact that they have often formed the backbone for the creation of various treaties in international environmental law as highlighted above.[138] In addition to directly influencing the content of laws, these principles have been relied on in interpreting international environmental law to achieve rather than defeat environmental protection objectives.[139]

2.4.2. Soft law

Reliance on soft law, referred to previously, is another normative approach through which the difficulties that attach to relying on the sovereignty-centric international law paradigm have been addressed. While soft law consists of rules or codes of conduct that articulate norms in a non-binding written form, it does not lack authority. Much of soft law is negotiated in good faith and there is an expectation that it will be adhered to where possible. In addition, soft laws are often motivated by the desire to influence the development of state practice. Thus, they can be a vehicle for focusing consensus on rules and principles and for mobilizing a

[137] A Boyle, *supra* n.9, at 229-230. M Ehrmann, *supra* n.85, at 385. D Freestone, *supra* n.50, at 209. M Mason, *supra* n.135, at 288. P Birnie, A Boyle and C Redgwell, *supra* n.9, at 39. A D'Amato, *supra* n.44. M Poustie, *supra* n.68, at para 9.

[138] P Sands, *supra* n.2, at 232. D Freestone, *supra* n.50, at 209.

[139] P Birnie, A Boyle and C Redgwell, *supra* n.9, at 18-22, 28. M Poustie, *supra* n.68, at paras 11, 12, 13. E Louka, *supra* n.2, at 39-47.

consistent, general response on the part of states.[140] Typical examples include the joint Ministerial Declarations adopted at the end of the series of conferences held on the protection of the North Sea, the United Nations Environment Programme's 1987 Guidelines on Environmental Impact Assessment and the Rio Declaration. It must be noted however that to some extent, the Rio Declaration restates and declares a number of rules of customary international environmental law. Importantly, the reason for agreement to these, and similar instances of soft law, is that they typically grant states discretion on how and when to conform to the requirements.

The benefit of a soft law approach in environmental protection is that it combats the difficulty that attaches to securing widespread consent to new rules by states under the sovereignty-centric international law paradigm. This is particularly important to environmental protection where collective action based on a precautionary approach may be required despite the fact that scientific evidence may be inconclusive or incomplete.

2.4.3. Sustainable development

Another normative approach that has increasingly grown to be relied on to address difficulties with regulating environmental protection under the sovereignty-centric international law paradigm is the idea of sustainable development.[141] This idea is traceable to the formative phases of international environmental law when the Founex Report was published in 1971.[142] However, it gained prominence following the Brundtland Report, *Our Common Future*, in 1987.[143] The report defined sustainable development as development which meets the needs of the present without compromising the ability of future generations to meet their own needs.[144] Since then, the term 'sustainable development' has appeared in

[140] E Louka, *supra* n.2, at 35-37.

[141] DB Magraw and LD Hawke 'Sustainable Development' in D Bodansky, J Brunnee and E Hey *The Oxford Handbook of International Environmental Law* (2007) 613, 623. J Martens and K Schilder 'Sustainable Development' in J Krieger *et al* (2ed) *Oxford Companion to World Politics* (2001) 813, 814. P Birnie, A Boyle and C Redgwell, *supra* n.9, at 4. PS Thatcher 'The Role of the United Nations' in A Hurrell and B Kingsbury (eds) *The International Law of the Environment* (1992) 183, 188-190. G Handl, *supra* n.67, at 24. U Beyerlin 'Different Types of Norms in International Environmental Law: Policies, Principles and Rules' in D Bodansky, J Brunnee and E Hey (eds) *The Oxford Handbook of International Law* (2007) 425, 433.

[142] SC Schreck 'The Role of Nongovernmental Organizations in International Environmental Law' (2006) 10 *Gonzaga Journal of International Law* 252, 256. DB Magraw and LD Hawke, *supra* n.141, at 614. PS Thatcher, *supra* n.141, at 188. D Leary and B Pisupati 'Introduction' in D Leary and B Pisupati *The Future of International Environmental Law* (2010) 5.

[143] P Sands, *supra* n.2, at 10. D Leary and B Pisupati, *supra* n.142, at 6. T Scovazzi, *supra* n.122, at 51. DB Magraw and LD Hawke, *supra* n.141, at 615.

[144] P Sands, *supra* n.2, at 48-50.

various treaties such as the Rio Declaration, the Climate Change Convention and the Biodiversity Convention. It has also influenced the content of treaties such as the 1995 Agreement Relating to the Conservation and Management of Straddling and Highly Migratory Fish Stocks through inclusion of the principle of sustainable utilization.[145] In 2002 following the World Summit on Sustainable Development, Resolution 1 of the Johannesburg Declaration on Sustainable Development described sustainable development as having three interdependent and mutually reinforcing pillars, namely, economic development, social development and environmental protection.[146]

Despite its growth, sustainable development's status in international environmental law is a matter of some debate. Judge Weeramantry, in the *Gabcikovo-Nagymaros* case referred to it as a principle of international environmental law in the mold of principles that reflect the state of customary international law discussed above.[147] This view was based on considerations such as sustainable development's 'inescapable necessity, but also by reason of its wide and general acceptance by the global community.'[148] However, alternative arguments hold that sustainable development may be more appropriately regarded as 'a policy which can influence the outcome of cases, the interpretation of treaties and the practice of states and international organizations, and may lead to significant changes and developments in the existing law.'[149] Yet another view holds that 'wide and general acceptance' as noted by Judge Weeramantry is not enough to create a legally binding norm. Instead, the term in question must also be capable of conferring rights on states. Ultimately, this perspective argues that sustainable development is more accurately regarded as a goal of international environmental law rather than a principle of law in the traditional sense.[150]

While the debate over the status of sustainable development may be interesting, it exceeds the scope of this discussion. Suffice it to note that as a normative approach to remedy difficulties with regulating environmental protection under the sovereignty-centric international law paradigm, sustainable development makes a state's management of its own domestic environment a matter of international concern in a systematic way.[151] By doing so,

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[145] United Nations Agreement Relating to the Conservation and Management of Straddling Fish Stocks and Migratory FishStocks, 34 *ILM* 1542.
[146] *Report of the WSSD*, UN Doc A/Conf 199/20 (2002).
[147] *Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia)* 37 *ILM (*1998) 162.
[148] *Ibid*, at 208.
[149] P Birnie, A Boyle and C Redgwell, *supra* n.9, at 127.
[150] A Rieu-Clarke *International Law and Sustainable Development: Lessons from the Law of International Watercourses* (2005) 53.
[151] P Birnie, A Boyle and C Redgwell, *supra* n.9, at 124-125.

sustainable development effectively creates global responsibility over the environment in a manner which challenges the autonomy that states hold over resources within their jurisdiction that is preserved under the sovereignty-centric international law paradigm.[152]

2.4.4. Institutionalism

Recourse to institutionalism is another normative approach for addressing the difficulties that attach to reliance on the sovereignty-centric international law paradigm in regulating environmental protection.[153] The tasks which institutions tend to perform relate to information and data collection, receiving reports on treaty implementation by states, facilitating independent monitoring and inspection and acting as a forum for reviewing the performance of individual states or the negotiation of further measures and regulations. Such bodies may thus acquire law enforcement, law-making and dispute settlement functions. In some cases they are also responsible for the allocation or management of natural resources. It is for example, one method by which the principle of equitable utilization of shared resources can be implemented or by which preferential or shared rights to common resources such as high seas fisheries can be allocated.[154] Notable examples of key institutions include the United Nations Environmental Programme, the International Union for the Conservation of Nature and the World Meteorological Organization.

Alternatively, a prominent manner in which institutionalism has grown to influence international environmental law is through growing reliance on Conferences of the Parties. These Conferences of the Parties are not merely intergovernmental conferences. Rather, they are established by treaties as permanent organs carrying subsidiary bodies and a secretariat. Reliance on such bodies in this role is traceable to Article XI of the Convention on International Trade in Endangered Species. Since then, they have grown to become the preferred institutional machinery for cooperation under multilateral environmental agreements.[155] Notable examples in which they have been created include Article 6 of the Vienna Convention on the Protection of the Ozone Layer, Article 7 of the Climate Change Convention and Article 23 of the Biodiversity Convention.

Typical functions of these Conferences of the Parties include establishing subsidiary bodies, adopting rules of procedure and giving guidance to subsidiary bodies and the

[152] T Scovazzi, *supra* n.122, at 51.
[153] M Poustie, *supra* n.68, at para 16-20. W Bradnee Chambers, *supra* n.65, at 517-518.
[154] A Boyle, *supra* n.9, at 231-232.
[155] G Ulfstein 'Treaty Bodies' in D Bodansky, J Brunnee and E Hey *The Oxford Handbook of International Environmental Law* (2007) 877, 878.

secretariat. Importantly, Conferences of the Parties often carry extensive powers to take decisions which enter into force without ratification by the parties.[156] For instance, under Article 2 of the Montreal Protocol, Conferences of the Parties could adjust the Protocol's substantive requirements by a two-thirds majority vote of present parties. Similarly, Article 15 of the Climate Change Convention and Article 29 of the Biodiversity Convention allow for amendments based on three-fourths and two-thirds majority decisions respectively. As such, Conferences of the Parties carry law-making powers.[157] The effect of this progression to amending the law based on majority voting, rather than unanimous consent, has been to minimise the difficulties encountered under a process of securing unanimous consent based on sovereignty-centric considerations under the sovereignty-centric international law paradigm.

In addition to the above, reliance on institutionalism has also formed the backbone for the rise of international environmental governance. This has been described as the pursuit of a broad, dynamic, complex process of interactive decision-making in environmental protection in a manner that is unfettered by traditional sovereignty constrictions.[158] International environmental governance captures the idea of a community of states with responsibility for addressing common problems through a variety of political processes which are inclusive in character, and which to some degree 'embody a limited sense of a collective interest, distinct in specific cases from the particular interests of individual states.'[159]

A corollary development to rising recourse to institutionalism has been the increasing recognition across these instititutions of the important role of non-state actors in pursuing effective environmental protection.[160] This has seen increased participation in law-making by industry and environmental pressure groups in a manner that has positively impacted the

[156] G Ulfstein, *supra* n.155, at 879. D Caron 'Protection of the Stratospheric Ozone Layer and the Structure of International Environmental Lawmaking' (1991) 14 *Hastings International and Comparative Law Review* 755. G Palmer, *supra* n.14, at 273.

[157] G Ulfstein, *supra* n.155, at 888-889. D Bodansky 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law' (1999) 93 *American Journal of International Law* 596, 607-610. J Brunee, *supra* n.73, at 5.

[158] D Leary and B Pisupati, *supra* n.142, at 10. A Boyle, *supra* n.9, at 230.

[159] A Roberts and B Kingsbury *United Nations: Divided World* (1993) 16-17. SJ Toope 'Emerging Patterns of Governance and International Law' in M Byers (ed) *The Role of Law in International Politics* (2000) 94-99.

[160] K Nowrot 'Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law' (1999) 6 *Indian Journal of Global Legal Studies* 579.

pursuit of effective environmental protection through depoliticising regulation and minimising the centrality of sovereignty.[161]

Thus, the value of institutionalism has been that where adherence to a conservative reading of sovereignty under international environmental law perpetuates state autonomy necessitating frequent collaboration in environmental protection endeavours, institutionalism seeks to overcome this through the creation of centralised institutions empowered to create, coordinate and supervise implementation of international environmental law.[162]

2.5. Evaluating normative approaches

In assessing the capacity of normative approaches to remedy difficulties with reliance on the sovereignty-centric international environmental law paradigm, it is important to note that properly classifying their status has evoked much debate. For instance, it very well could be argued that the precautionary principle has evolved into customary international law as done in India and Pakistan. Alternatively, it is open for debate whether sustainable development is a principle or merely a goal of environmental protection. Importantly, such classification of these concepts as is adopted is only to facilitate more accessible assessment of the capacity of these techniques, as normative approaches generally, to remedy the difficulties with regulating environmental protection under the sovereignty-centric international law paradigm. To this end, it it is helpful that most of these concepts, applied as normative approaches, have had practical and measurable effects on regulation under international environmental law.

For instance, various treaties, some of which have been noted above, serve as examples of how principles that inform the customary international environmental law have shaped the content of multilateral environmental agreements.

An assessment of the due diligence principle certainly highlights the value of the principle as a mechanism to ensure the conduct of states meets an objective standard of diligence. While the principle positively relies on, and utilises international standards to establish what constitutes due diligence, its capacity to remedy difficulties encountered under the sovereignty-centric international law paradigm is compromised by the fact that it does not limit states' tendency to agree to standards which reflect the lowest common denominator

[161] DB Hollis 'Why State Consent Still Matters: Non-State Actors, Treaties and The Changing Sources of International Law' (2005) 23 *Berkley Journal of International Law* 137.
[162] S Charnovitz 'A World Environment Organization' (2002) 27 *Columbia Journal of Environmental Law* 324, 328. A Boyle, *supra* n.9, at 230-231.

rather than best available techniques. As such, the limitation of the principle lies in its reliance on international law standards that are prone to sovereignty-centric manipulation. Thus, despite the value of the principle, its effect is limited where the standard of due diligence may be low when ecocentric considerations are taken into account.

Separately, the polluter pays principle has played an important role in advancing internalization of costs in a manner that has overcome some of the difficulties encountered in assigning liability under the sovereignty-centric international law paradigm. However, the difficulty with the principle as a normative approach is that it is neither absolute nor obligatory. In treaties in which it appears, this has largely been left to state practice rather than international action. Thus, there is no consistency in ensuring that the costs of environmentally harmful activities are internalised. If anything, the impact has been to create variable standards that allow for the displacement of environmentally harmful activities from states in which internalization of the costs of such activities is vigorously pursued to those in which the commitment is less. For instance, western companies consider that they are losing business to Chinese competitors, particularly in Africa, because the Chinese use a combination of minimal labour and environmental standards. This has enabled them to win a large business share in the infrastructure and extractive sectors.[163]

Like the other principles, the common but differentiated responsibility principle has certainly had a positive impact on addressing the difficulties attaching to the sovereignty-centric international law paradigm. For instance, it is often the adoption of a common but differentiated responsibility approach in law-making that leads to broader acceptance of more stringent regulation than states would have undertaken. However, the success of the principle has previously been limited by sovereignty-centric considerations. For instance, a common feature of the Montreal Protocol, the Biodiversity Convention and the Climate Change Convention is that the obligations of developing states to comply with these conventions will depend upon the effective implementation of their provisions on financial assistance and transfer of technology by developed states.[164] This is essentially the principle of solidarity. While it is a positive development, the draw-back of solidarity in this form is that, in the absence of clear provision on how funding will be accumulated, it makes environmental protection conditional on funding that is not guaranteed.

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[163] P Bosshard 'China's Environmental Footprint in Africa' (2008) South African Institute of International Affairs (*SAIIA*) China in Africa Policy Briefing No. 3, April 2008 available at: http://www.internationalrivers.org/files/SAIIA%20policy%20briefing%20508.pdf

[164] Article 5 (5) Montreal Protocol. Article 20 (4) Biodiversity Convention. Article 4 (7) Climate Change Convention.

Thus, while principles that are the harbingers of customary international law are decidedly ecocentric, they remain susceptible to limitation based on various sovereignty-centric considerations.[165] This is a quality that is also discernible under the precautionary principle. Certainly, the principle has been useful in encouraging the adoption of environmental protection measures when scientific evidence is incomplete or inconclusive. However, the impact of the principle has been limited by the fact that, applied in the context of the sovereignty-centric international law paradigm, it is subject to sovereignty-centric considerations.[166] For instance, Principle 15 of the Rio Declaration is clear on the fact that states cannot rely on lack of scientific certainty to depart from a precautionary approach. However, the same principle, in what can arguably be described as deference to sovereignty considerations, leaves leeway for states to cite lack of cost-effectiveness of precautionary approaches as a basis for sustaining or undertaking environmentally detrimental practices.[167]

Similar observations can be made about the role of soft law as a normative approach. To a marked extent, soft law has proven to be instrumental to advancing the objectives of environmental protection. This is most apparent in instances where soft law 'hardens' to form binding obligations on states. For instance, soft law in the form of the United Nations Environmental Programme's Guidelines on Environmental Impact Assessment were subsequently substantially incorporated in the 1991 Convention on Environmental Impact Assessment in a Transboundary Context.[168]

Despite the potential benefits that attach to soft law, the non-binding qualities of soft law that often make it desirable and acceptable to states also mean that progress to effective environmental protection through this manner of law can be slow-moving.[169] This is because, as previously discussed, achieving adequate binding obligations is difficult in a sovereignty-centric international law paradigm.

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[165] P Birnie, A Boyle and C Redgwell, *supra* n.9, at 161-164. G Palmer, *supra* n.14, at 266. P Weil, *supra*, n.87, at 434.

[166] M Mason, *supra* n.1235, at 288. J Gupta 'Legitimacy in the Real World: A Case Study of the Developing Countries, Non-Governmental Organizations and Climate Change' in JM Coicaud and V Heiskanen *The Legitimacy of International Organizations* (2001) 482, 495. E Louka, *supra* n.2, at 19-20, 29.

[167] JC Carlson 'International Environmental Law, Climate Change and Intergenerational Justice' (2009) *University of Iowa Legal Studies Research Paper* 1, 4: available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1525018&http://scholar.google.co.uk/scholar?hl=en&q=effective+international+environmental+law&as_sdt=0%2C5&as_ylo=2009&as_vis=1

[168] Convention on Environmental Impact Assessment in a Transboundary Context (Espoo) 30 *ILM* (1991) 802. P Birnie, A Boyle and C Redgwell, *supra* n.9, at 36.

[169] P Birnie, *supra* n.51, at 53. M Poustie, *supra* n.68, at para 14.

Similar difficulties attach to reliance on sustainable development as a normative approach to remedy the difficulties encountered in relying on the sovereignty-centric international law paradigm. Certainly, sustainable development has raised the profile of environmental protection *vis-a-vis* development. States are now under a more onerous obligation to pursue development that is sustainable.[170] It has even been argued that from the perspective of states that are still pursuing development, sustainable development tips the balance between the three pillars of social development, economic development and environmental protection in favour of the protection of the environment.[171] However, the difficulty encountered with reliance on sustainable development to overcome the difficulties posed by the sovereignty-centric international law paradigm is that, in balancing considerations related to the three central pillars of sustainable development, substantial discretion is left to the value judgments of states unless specific international action has been agreed. In light of the difficulties attaching to defining and quantifying what is 'sustainable,' such discretion effectively means that sustainable development has emerged as a legalised exception to environmental protection obligations in international environmental law.[172] Thus, as a normative approach, sustainable development potentially compromises the pursuit of ecocentric objectives through law rather than advancing environmental protection.[173]

Like other normative approaches, in its role as a normative approach seeking to address the difficulties that attach to the sovereignty-centric international law paradigm, institutionalism has achieved some success. International organizations such as those affiliated with the United Nations, Specialized Agencies, and Regional organizations have developed procedures that allow pressure to be brought against governments which do not comply with recognized standards of conduct.[174] These agencies often create a 'club' like

[170] P Birnie, *supra* n.51, at 126-127.

[171] X Fuentes 'International Law-making in the field of Sustainable Development: The Unequal Competition Between Development and the Environment' in N Schrijver and F Weiss *International Law and Sustainable Development* (2004) 1, 10-12.

[172] S Oberthur and T Gehring 'Reforming International Environmental Governance: An Institutionalist Critique of the Proposal for a World Environment Organisation' (2004) 4 *International Environmental Agreements: Politics, Law and Economics* 359, 360. A Chayes and A Chayes, *supra* n.105, at 27. M Poustie, *supra* n.68, at paras 21, 24.

[173] P Birnie, A Boyle and C Redgwell, *supra* n.9, at 125-126. SC Schreck, *supra* n.142, at 256. AE Utton, *supra* n.118, at 66. R Falk, *supra* n.12, at 3-8. J Martens and K Schilder, *supra* n.141, at 813-814. T Scovazzi, *supra* n.122, at 51. DB Magraw and LD Hawke, *supra* n.141, at 615.

[174] BH Desai 'Mapping the Future of International Environmental Governance' in G Ulfstein and J Werksman (eds) (2002) 13 *Yearbook of International Environmental Law* 43, 45. MR Goldschmidt 'The role of Transparency and Public Participation in International Environmental Agreements: The North American

atmosphere for the national representatives to them. If their governments behave in such a way as to hinder the attainment of the organization's goals, other members can make club membership uncomfortable for them in various ways such as suspension or expulsion from membership.[175] Alternatively, Conferences of the Parties overcome the difficulties posed by the sovereignty-centric international law paradigm through offering a responsive approach to environmental protection once agreement has been achieved. Yet another positive attribute of institutionalism is the fact that it has fostered greater reliance on the principle of conditionality. This can assume many forms such as giving or withholding military aid, development assistance and the imposition of sanctions in order to compel targeted states to give greater consideration to environmental protection.[176] While conditionality is certainly not exclusively applied within institutional frameworks, its effect in this context has been to compel targeted states to prioritise environmental protection objectives where ordinarily they may have subjugated these to other concerns such as development goals. For example, in Article 5 of the Montreal Protocol conditionality was effectively applied to compel global participation of states in the movement to combat ozone depletion particularly those states in the developing world.

Despite its benefits however, institutionalism carries flaws as a normative approach to address the deficiencies of the sovereignty-centric international law paradigm.[177] For instance, where institutions have the backing of states, it is often the case that they are no more than the expression of their members' willingness or unwillingness to act.[178] This is largely because state representatives who are members of the institutions are explicitly or tacitly compelled to act in accordance with the mandate of their parent states. Alternatively, in the case of non-governmental organizations, their effective participation in institutions may

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Agreement on Environmental Cooperation' (2005) available at: http://bc.edu/schools/law/lawreviews/meta-elements/journals/bcealr/29_2/05_TXT.htm

[175] SA Hajost and QJ Shea, *supra* n.115.

[176] CJ Dias 'Conditionality Re-Visited: Under which Conditions? What Alternatives?' (1996) 5 *Beyond Law* 31, 32. P Dupret 'Conditionality and the Countries of the Periphery in the Diplomatic Centre of Europe' (1996) 5 *Beyond Law* 63, 63-65.

[177] S Oberthur and T Gehring, *supra* n.172, at 360-361.

[178] A Boyle, *supra* n.9, at 231. A Cassesse, *supra* n.24, at 166. E Engle 'Beyond Sovereignty? The State After The Failure of Sovereignty' (2008) 15 *ILSA Journal of International and Comparative Law* 33, 44. LR Helfer and AM Slaughter 'Why States Create International Tribunals: A Response to Professors Posner and Yoo' (2005) 93 *California Law Review* 1, 3. DB Hollis, *supra* n.161, at 147-148. T Marauhn, *supra* n.3, at 741. OR Young 'The Effectiveness of International Institutions: Hard Cases and Critical Variables' in JN Rosenau and E Czempiel (eds) *Governance Without Government: Change and Order in World Politics* (1991) 160, 161. JM Coicaud 'International Democratic Culture and its Sources of Legitimacy: The Case of Collective Security and Peacekeeping Operations in the 1990s' in JM Coicaud and V Heiskanen *The Legitimacy of International Organizations* (2001) 256, 261.

require considerable financial resources. Where these organizations are funded by private parties or organizations, this leaves them prone to succumbing to their financiers' interests.[179] The result is that institutions are often no different from any other political institution in failing to transcend state boundaries.[180]

Alternatively, reliance on Conferences of the Parties has been criticised for its inability to facilitate cooperation between different environmental protection agreements.[181] In addition, to the extent that these Conferences of the Parties undertake law-making functions, the legitimacy of the laws that emerge can be questioned or challenged under the sovereignty-centric international law paradigm.[182] This is particularly true in the case of global environmental concerns such as climate change where international decision-making has increasingly direct implications for civil society.[183]

These are merely some of the limitations of institutionalism that threaten its capacity as a normative approach to facilitate the full attainment of ecocentric objectives under the sovereignty-centric international law paradigm applied as international environmental law. Importantly, these limitations highlight that institutionalism's capacity to remedy the difficulties attached to reliance on the sovereignty-centric international law paradigm has itself been limited through exercises of sovereignty.[184]

2.5.1. Intrinsic quality of normative approaches

The preceding review of a representative sample of normative approaches that have been relied on to remedy flaws in the international environmental law paradigm certainly suggests that such an approach has achieved some success in this endeavour. However, they have also been unable to substantially and consistently overcome the flaws of the sovereignty-centric international law paradigm in regulating environmental protection.[185] Whether recourse to

[179] X Fuentes, *supra* n.171, at 17. T Marauhn, *supra* n.3, at 741-742.
[180] A Boyle, *supra* n.9, at 231. S Oberthur and T Gehring, *supra* n.172, at 360-361. A Hurrell and B Kingsbury, *supra* n.2, at 23.
[181] G Ulfstein, *supra* n.155, at 888.
[182] D Bodansky, *supra* n.157, at 607-610. J Brunee, *supra* n.73, at 5.
[183] J Brunee, *supra* n.73, at 11.
[184] A Boyle, *supra* n.9, at 231. A Cassesse, *supra* n.24, at 166. E Engle, *supra* n.178, at 44. LR Helfer and AM Slaughter, *supra* n.178, at 3. DB Hollis, *supra* n.161, at 147-148. T Marauhn, *supra* n.3, at 741. OR Young, *supra* n.178, at 160, 161. JM Coicaud, *supra* n.178, at 261. CJ Dias, *supra* n.176, at 32-33.
[185] WJ Aceves, *supra* n.2, at 262-264. M Byers 'Conceptualising the Relationship Between *Jus Cogens* and *Erga Omnes* Rules' (1997) 66 *Nordic Journal of International Law* 211. EJ Criddle and E Fox-Decent, *supra* n.24, at 331-332.

that paradigm in regulating environmental protection remains justifiable is therefore dependent on whether this is due to intrinsic flaws in the normative approaches.

In addressing this issue, it is useful to consider that a consistent theme in the assessment of normative approaches has been that, when they falter, it is not due to the flawed constitution of the approaches. Rather, such failings are due to the effects of sovereignty and the sovereignty-centric concessions that are made to accommodate various issues such as capacity differences among states.[186] As such, these normative approaches are not intrinsically flawed. Rather, they are limited in their effect by the sovereignty-centric nature of the international law paradigm under which they are applied. In terms of this paradigm, while cooperation and collaboration may be achieved, they rarely reach the levels required to achieve consistently effective environmental protection.[187] This is a feature that cannot be overcome through normative means.

It is telling that despite the fact that normative approaches have been relied on under international environmental law for a protracted period of time, major works devoted to the protection of the environment still invoke the principles of state responsibility relating to the liability of the territorial sovereign for sources of danger to other states which are created or tolerated within its territory.[188] This suggests that as long as pursuing effective environmental protection remains based on the sovereignty-centric international law paradigm, it is likely that even alternative normative approaches would similarly be unable to overcome the sovereignty hurdle.[189]

2.6. Conclusion

The preceding discussion has established that the sovereignty-centric nature of the international law paradigm under which effective environmental protection is pursued is unable to secure effective regulation. However, the fact that sovereignty has played such a detrimental role in regulating environmental protection is not necessarily an indictment on continued reliance on the general international law paradigm based on world ordering in terms of states as sovereign entities.[190] Rather, it highlights the more salient fact that

[186] A Cassesse, *supra* n.24, at 164. P Weil, *supra*, n.87, at 434.
[187] EJ Ringquist and T Kostadinova, *supra* n.96, at 86-102.
[188] I Brownlie, *supra* n.4, at 284.
[189] JC Carlson, *supra* n.167.
[190] RR Churchill and G Ulfstein, *supra* n.59, at 628. HH Koh 'Why Do Nations Obey International Law' (1997) 106 *Yale Law Journal* 2599, 2639-2641. S Barrett, *supra* n.105, at 132-135. A Dan Tarlock, *supra* n.65, at 62.

sovereignty is problematic to regulation because the sovereignty-centric international law paradigm, under which regulation of environmental protection is pursued, allows sovereignty to play such a central role.[191]

To remedy this flaw, developments in the fields of human rights and international trade suggest that the detrimental effects of sovereignty to regulating environmental protection can be curtailed within the confines of an international law regulatory paradigm in which sovereignty does not play as central a role as it does under international environmental law.[192]

[191] R Axelrod and R Keohane, *supra* n.89, at 235.

[192] KW Abbott 'The Trading Nation's Dilemma: The Functions of the International Law of Trade' (1985) 26 *Harvard International Law Journal* 501, 502-503. A von Bogdandy, *supra* n.3, at 227-229. EJ Criddle and E Fox-Decent, *supra* n.24, at 357. E Engle, *supra* n.178, at 45-47. D Held, *supra* n.10, at 14. LR Helfer, *supra* n.14, at 194. SD Krasner 'Compromising Westphalia' (1996) 20 *International Security* 115, 116. F Kratochwil 'Of Systems, Boundaries and Territoriality: An Inquiry into the Formation of the State System' (1986) 39 *World Politics* 27, 49.

Chapter Three

An ecocentric regulatory framework

'So locked are we within our tribal units, so possessive over national rights, so suspicious of any extension of international authority, that we may fail to sense the need for dedicated and committed action over the whole field of planetary necessities'[1]

3.1. Introduction

The previous chapter challenged the validity of the sovereignty-centric international law paradigm as the paradigm on which to base the pursuit of consistently effective environmental protection. This led to a conclusion of that framework's invalidity. The difficulty presented by this conclusion is that world ordering based on sovereignty and states means there are few international regulatory frameworks aside from the sovereignty-centric international law paradigm that present themselves as obvious substitutes.[2]

The dearth of alternative regulatory frameworks means that in determining how the vacuum that would result from departure from the sovereignty-centric international law paradigm might be filled, guidance must be drawn from instances in which alternatives to that paradigm have been secured, notably, the aforementioned fields of human rights and international trade. It has been argued that these fields have established the precedent that pursuant to departure from the sovereignty-centric international law paradigm, it is reasonable to pursue regulation unfettered by sovereignty and tailored to the attributes and particularities of the field, in this instance environmental protection.

[1] J Brunnee and SJ Toope 'International Law and Constructivism: Elements of an Interactional Theory of International Law' (2000) 39 *Columbia Journal of Transnational Law* 19, 22.
[2] R Falk 'Sovereignty' in J Krieger *et al* (2ed) *Oxford Companion to World Politics* (2001) 789, 790-791.

Thus, in order to construct a replacement ecocentric regulatory framework for environmental protection it is necessary to turn to the frameworks in human rights and international trade and account for how effective regulation was achieved. This would then instruct the construction of the ideal regulatory framework for environmental protection.

3.2. Effective regulation in human rights and international trade

Regulation in human rights centralises regulatory authority and features autonomous, universal, peremptory laws contained in the compendium of documents which constitute the 'International Bill of Human Rights.'[3] The building blocks of this International Bill of Human Rights are the United Nations Charter's provisions on human rights and the Universal Declaration of Human Rights of 1948.[4] Its central instruments include the 1976 Covenants on Civil and Political Rights and on Economic Social and Cultural Rights; the 1981 Covenant on the Elimination of all forms of Discrimination Against Women and the 1990 United Nations Convention on the Rights of the Child. In addition to these laws, critical executive functions are entrusted to the United Nations Human Rights Council.[5] The Council oversees and brings persistent human rights abuses to the attention of the United Nations Security Council.

While the framework is decidedly hierarchical, it applies the concept of subsidiarity to the extent that states retain a central function in implementing laws. Where a state is committed to human rights and has the institutions to make them effective, there is little interference from the international order. Rather, focus is drawn to the improvement of the structures already in place. In the opposite scenario the international order is, expectedly,

[3] JW Dacyl 'Sovereignty versus Human Rights: From Past Discourses to Contemporary Dilemmas' (1996) 9 *Journal of Refugee Studies* 136, 144-146. D Held 'Law of States, Law of Peoples: Three Models of Sovereignty' (2002) 8 *Legal Theory* 1, 9. M Koskenniemi 'Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol' in G Handl (ed) (1992) 3 *Yearbook of International Environmental Law* 123, 397-398. E Petersmann 'How to Reform the UN System? Constitutionalism, International Law and International Organizations' (1997) 10 *Leiden Journal of International Law* 421, 429. WJ Aceves 'Relative Normativity: Challenging the Sovereignty Norm Through Human Rights Litigation' (2002) 25 *Hastings International and Comparative Law Review* 261, 265-269. S Gardbaum 'Human Rights and International Constitutionalism' in JL Dunoff and P Trachtman *Ruling The World? Constitutionalism, International Law and Global Governance* (draft) (2007) 4-5: available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1088039

[4] Universal Declaration of Human Rights, UNGA Res 217A (III). E Louka *International Environmental Law: Fairness, Effectiveness and World Order* (2006) 6.

[5] WJ Aceves, *supra* n.3, at 270-272. HP Schmitz and K Sikkink 'International Human Rights' in W Carlsnaes, T Risse and BA Simmons (eds) *Handbook of International Relations* (2007) 517, 518.

more active in encouraging and facilitating implementation. However, states still retain the central role of implementing laws.[6]

In addition, most continents carry their own versions of the International Bill of Rights that are subsidiary to the original Bill but are reflective of the continents' own positions as regards human rights. In this way, the regulation of human rights accommodates diversity among states.[7] For instance, and as noted in the previous chapter, the European system came into being as a natural reaction to gross human rights violations during the Second World War and a defence against all forms of totalitarianism. The Inter-American system was designed to be an ideological framework to make a coalition against communist threats. The Inter-American regional human rights system was thought to be a springboard to defend effective political democracy in this region. Alternatively, the African system was created to safeguard independence, collective security, territory integrity while promoting solidarity.[8]

Importantly however, despite variances in the regional human rights frameworks, there is universal understanding that states' conduct must always remain within the spirit and purporse of the law. To ensure that this is achieved, the regulation of human rights features a well evolved adjudicatory arm.[9] Under this branch, states remain the parties to human rights laws. Thus, where conduct that is contrary to regulations occurs, actions can be brought in domestic courts applying international human rights law or, alternatively, interpreting domestic laws in a manner consistent with such laws. Thus, at the national level, implementation of human rights standards depends on the normal constitutional, legislative, administrative, and judicial institutions.[10] Where satisfactory relief cannot be achieved, rights of appeal flow to regional superior courts and, where applicable, to international *fora* such as

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[6] D Galligan and D Sandler 'Implementing Human Rights' in S Halliday and P Schmidt *Human Rights Brought Home: Socio-legal Perspectives on Human Rights in the National Context* (2004) 48. A Zimmerman 'Dispute Resolution, Compliance Control and Enforcement in Human Rights Law' in G Ulfstein, T Marauhn and A Zimmerman (eds) *Making Treaties Work* (2007) 15, 29-30.

[7] HP Schmitz and K Sikkink, *supra* n.5, at 518. D Held, *supra* n.3, at 9. HH Koh 'How is International Human Rights Law Enforced?' (1999) 74 *Indiana Law Journal* 1397, 1408-1409. JL Dunoff and P Trachtman 'A Functional Approach to Global Constitutionalism' in JL Dunoff and P Trachtman *Ruling The World? Constitutionalism, International Law and Global Governance* (draft) (2009) 10: available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1311983

[8] J Kim 'Development of Regional Human Rights Regime: Prospects for and Implications to Asia' (2009) 59-60: available at: http://www.sylff.org/wordpress/wp-content/uploads/2009/03/sylff_p57-1022.pdf

[9] A von Bogdandy 'Constitutionalism in International Law: Comment on a Proposal from Germany' (2006) 47 *Harvard International Law Journal* 223, 233-235. WJ Aceves, *supra* n.3, at 272-278. AM Burley 'Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine' (1992) 92 *Columbia Law Review* 1907, 1918. D Held, *supra* n.69, at 12. A Zimmerman, *supra* n.6, at 41.

[10] D Galligan and D Sandler, *supra* n.6, at 30.

the International Court of Justice and the International Criminal Court.[11] For instance, it was noted in the 2000 case of *Kudla v Poland* in reference to application of Article 13 of the European Convention on Human Rights:

> "The object of Article 13 ... is to provide a means whereby individuals can obtain relief *at national level* for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court. From this perspective, the right of an individual to trial within a reasonable time will be less effective if there exists no opportunity to submit the Convention claim first to a national authority."[12]

Separately, in international trade, departure from the sovereignty-centric international law paradigm culminated in regulation based on a universal peremptory law that centralised regulation, in this instance, the General Agreement on Tariffs and Trade.[13] Exceptions were built into the Agreement to allow for protectionism where necessary based on a consideration of individual states' circumstances.[14] This General Agreement on Tariffs and Trade would form the building block on which the World Trade Organization would be agreed to and created in 1994.[15]

The World Trade Organization oversees the implementation, administration and operation of Multilateral Trade Agreements which are legally binding upon its members.[16] In this role, it is sufficiently empowered to assume legislative and executive functions over international trade matters.[17] It can even review and propagate national trade policies to

[11] A Zimmerman, *supra* n.6, at 16-18. International Court of Justice http://www.icj-cij.org/homepage/index.php International Criminal Court Official website: http://www.icc-cpi.int/Menus/ICC?lan=en-GB

[12] ECHR appl. no. 30210/96, para 152.

[13] KW Abbott 'The Trading Nation's Dilemma: The Functions of the International Law of Trade' (1985) 26 *Harvard International Law Journal* 501, 502. R Howse 'From Politics to Technocracy-and Back Again: The Fate of the Multilateral Trading Regime' (2002) 96 *American Journal of International Law* 94, 95. R Howse and K Nicolaidis 'Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?' (2003) 16 *Governance* 1, 4-5. G Orcalli 'A Constitutional Interpretation of the GATT/WTO' (2003) 14 *Constitutional Political Economy* 141, 141.

[14] R Howse (2002), *supra* n.13, at 95. E Petersmann, *supra* n.3, at 436.

[15] Agreement Establishing the World Trade Organisation (Marrakesh), WTO *Legal Texts*, 3. MCEJ Bronckers 'Better Rules for a New Millennium: A Warning Against Undemocratic Developments in the WTO?' (1999) 2 *International Economic Law* 547. G Orcalli, *supra* n.13, at 142.

[16] P Birnie, A Boyle and C Redgwell (3ed) *International law and the Environment* (2009) 756.

[17] KW Abbott, *supra* n.13, at 523. J Atik 'Democratizing the WTO' (2001) 33 *George Washington International Law Review* 451, 452. P Sands and P Klein *Bowett's Law of International Institutions* (2009) 116-118.

ensure the coherence and transparency of trade policies.[18] In addition, it includes an adjudicatory function and has the backing of a powerful enforcement mechanism.[19]

This brief overview suggests that part of the success of human rights and international trade regulatory frameworks has been in persuading states to cede aspects of their sovereignty to central regulatory institutions to levels that allow for effective autonomous regulation.[20] The fact that regulation is predominantly by consent means that even when illegitimacy is alleged, this does not compromise effective regulation.[21] Importantly, this has allowed regulation to be based on characteristics such as the rule of law versus power politics.[22] In addition, the regulatory frameworks are characterised by a comprehensive system of accountability to the governed, that is, states that are party to these regulatory frameworks.[23]

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[18] HH Koh 'Why Do Nations Obey International Law' (1997) 106 *Yale Law Journal* 2599, 2640. P Goldman 'The Democratization of the Development of United States Trade Policy' (1994) 27 *Cornell International Law Journal* 631, 633-634. MC Tsai 'Globalization and Conditionality: Two Sides of the Sovereignty Coin' (2001) 31 *Law and Policy in International Business* 1317, 1319.

[19] A von Bogdandy, *supra* n.49, at 226. MCEJ Bronckers, *supra* n.15, at 547. JL Dunoff 'Why Constitutionalism Now? Text, Context and the Historical Contingency of Ideas' (2005) 1 *Journal of International Law and International Relations* 191, 193-194. J Goldstein, M Kahler, R Keohane and AM Slaughter 'Introduction: Legalization and World Politics' (2000) 54 *International Organization* 385, 389. LR Helfer 'Constitutional Analogies in the International Legal System' (2003) 37 *Loyola of Los Angeles Law Review* 193, 202. RH Steinberg 'Judicial Law-making at the WTO: Discursive, Constitutional and Political Constraints' (2004) 98 *American Journal of International Law* 247, 247. JP Trachtman 'Constitutional Economics of the WTO' in JL Dunoff and P Trachtman *Ruling The World? Constitutionalism, International Law and Global Governance* (draft) (2008) 10-15: available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1243806

[20] S Gardbaum, *supra* n.3, at 3.

[21] D Bodansky 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law' (1999) 93 *American Journal of International Law* 596, 609. A von Bogdandy, *supra* n.9, at 240-241, 242. B Kingsbury 'Sovereignty and Inequality' (1998) 9 *European Journal of International Law* 599, 601. TM Franck 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium' (2006) *American Journal of International Law* 88, 93. TM Franck *The Power of Legitimacy Among Nations* (1990) 17-20, 24-26. JP Trachtman, *supra* n.20, at 6. S Gardbaum, *supra* n.3, at 4.

[22] TM Franck 'Preface: International Institutions: Why Constitutionalize' in JL Dunoff and JP Trachtman *Ruling the World: Constitutionalism, International Law and Global Governance* (2009) xii. JL Dunoff, *supra* n.19, at 195. DZ Cass 'The 'Constitutionalization' of International Trade Law: Judicial Norm Generation as the Engine of Constitutional Development in International Trade' (2001) 12 *European Journal of International Law* 39, 52. JP Trachtman, *supra* n.20, at 1-5, 13.

[23] JP Trachtman, *supra* n.20, at 13. AM Slaughter 'A Liberal Theory of International Law' (2000) 94 *American Society of International Law and Process* 240. S Gardbaum, *supra* n.3, at 1-2. HP Schmitz and K Sikkink, *supra* n.5, at 521. HV Milner 'International Trade' in W Carlsnaes, T Risse and BA Simmons (eds) *Handbook of International Relations* (2007) 448, 453-455. JN Rosenau 'Citizenship in a Changing Global Order' in JN Rosenau and E Czempiel (eds) *Governance Without Government: Change and Order in World Politics* (1991) 272, 274.

Additionally, non-state parties play a crucial role in bringing light to undesirable state actions at the domestic and international levels.[24]

To account for the success of these efforts, it is useful to explore observations that regulatory frameworks such as those in human rights and international trade have a different *gravitas* from traditional frameworks under the sovereignty-centric international law paradigm.[25] This has motivated recent arguments that the success of such frameworks can be attributed to the fact that there has been a turn to constitutionalism in regulation.[26]

3.2.1. The turn to constitutionalism

Constitutionalism, a concept that is traditionally applied to explain regulation within states, is based on ensuring that the ruler's power is distributed among different institutions that ensure that no single branch of government has excessive power. For instance, the rule of law, a central feature of constitutionalism, protects against both government overreaching and short-sighted decisions by the population.[27] Furthermore, it is a long-standing ideal of constitutionalism to separate power among central institutions along legislative, executive and judicial functions.[28] This is part of a system to ensure that the three institutions 'check' and 'balance' each other's respective competencies.[29] In addition, a part of securing

[24] K Stairs and P Taylor 'Non-Governmental Organizations and the Legal Protection of the Seas' in A Hurrell and B Kingsbury (eds) *The International Politics of the Environment* (1992) 110, 134-136.

[25] TM Franck, *supra* n.22, at xiii. A von Bogdandy, *supra* n.9, at 241. JE Alvarez 'How Not to Link: Institutional Conundrums of an Expanded Trade Regime' (2001) 7 *Widener L. Symp. J.* 1. KW Abbott 'International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts' (1999) 93 *American Journal of International Law* 361, 362. JL Dunoff, *supra* n.19, at 210. LR Helfer and A Slaughter 'Why States Create International Tribunals: A Response to Professors Posner and Yoo' (2005) 93 *California Law Review* 899. E Posner and J Yoo 'Judicial Independence and International Tribunals' (2005) 93 *California Law Review* 1.

[26] LR Helfer, *supra* n.19, at 204. GJ Ikenberry 'Constitutional Politics in International Relations' (1998) 4 *European Journal of International Relations* 147, 149-150, 152-153. J Klabbers 'Constitutionalism Lite' (2004) 1 *International Organizations Law Review* 31, 32. D Bodansky 'Legitimacy' in D Bodansky, J Brunnee and E Hey (eds) *The Oxford Handbook of International Law* (2007) 704, 711-712, 715-721. H Barnett (8ed) *Constitutional and Administrative Law* (2011) 6. JP Trachtman, *supra* n.20, at 19. MW Doyle 'A Global Constitution? The Struggle Over the UN Charter' in JL Dunoff and P Trachtman *Ruling The World? Constitutionalism, International Law and Global Governance* (draft) (2010) 18: available at: http://www.iilj.org/courses/documents/HC2010Sept22.Doyle.pdf

[27] JL Dunoff, *supra* n.19, at 195. E Petersmann, 'How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?' (1998) 20 *Michigan Journal of International Law* 1, 13, 17.

[28] E Petersmann, *supra* n.3, at 426-428.

[29] TM Franck, *supra* n.22, at xii E Petersmann, *supra* n.3, at 425.

legitimacy is the requirement that government is subject to law.[30] Equally importantly, constitutionalism incorporates a system of accountability to the governed.[31] This pronounced system of accountability imbues the framework with legitimacy.[32]

For present purposes, an argument has been convincingly made that the success of human rights and international trade regulatory frameworks has been based on the application of these principles to the regulation of these fields.[33] While this may be so, it is important to note that in regulation of these fields, there has not been a drive to achieve constitutionalism.[34] Rather, the turn to constitutionalism is a matter that can be discerned in *ex post facto* analysis of regulation in these fields.[35] As such, a consequence of this is that differences subsist among theorists on how the turn to constitutionalism in these fields can be perceived.

For instance, in arguing that a turn to constitutionalism is apparent in human rights, Gardbaum first identifies three elements of constitutionalism and measures the human rights framework against these elements. First, Gardbaum notes that in constitutional models, law is made by a special, episodic, and self-consciously constituent power as compared to the ordinary, continuous lawmaking processes.[36] With respect to this condition, Gardbaum notes that methods of international lawmaking are hard to specify with any precision. However, he cites the United Nations Charter and central agreements that constitute the International Bill of Rights as products of constitutional moments that are not prevalent across international law.[37] Second, Gardbaum notes that constitutional law is higher law and typically occupies the highest position in the hierarchy of norms comprising all types of positive law, trumping such other law in case of conflict.[38] Discussing this element of constitutionalism, Gardbaum notes that 'there is general agreement that a small but critical core of human rights law has

[30] T Crossen 'Multilateral Environmental Agreements and the Compliance Continuum' (2004) 16 *The Georgetown International Environmental Law Review* 1, 35-36. E Petersmann, *supra* n.27, at 1. TM Franck (1990), *supra* n.21, at 17-20, 24-26.
[31] TM Franck, *supra* n.22, at xii-xiv.
[32] DM Bodansky, *supra* n.21, at 611-612. GH Aldrich and CM Chinkin 'A Century of Achievement and Unfinished Work' (2000) 94 *American Journal of International Law* 90.
[33] LR Helfer, *supra* n.19, at 194.
[34] JL Dunoff and P Trachtman, *supra* n.7, at 20-21. MW Doyle, *supra* n.26, at 18. S Gardbaum, *supra* n.3, at 4-5.
[35] GJ Ikenberry, *supra* n.26, at 148. JL Dunoff , *supra* n.19, at 197. D Bodansky, *supra* n.26, at 722. JE Alvarez 'Constitutional Interpretation in International Organizations' in JM Coicaud and V Heiskanen *The Legitimacy of International Organizations* (2001) 104, 106.
[36] S Gardbaum, *supra* n.3, at 9.
[37] *Ibid*, at 13-14.
[38] *Ibid*, at 10.

achieved *jus cogens* and, thus, higher law status as binding treaty makers and probably also trumping conflicting custom, although there is less consensus on how such status is achieved.'[39] Third, Gardbaum argues that constitutional law is entrenched against ordinary methods of amendment or repeal that apply to statutes and other forms of law by means of some type of additional procedural or supermajority requirement.[40] With regard to this element, Gardbaum argues that the attainment of *jus cogens* necessarily means that entrenchment is achieved. In addition, human rights treaties typically contain formal amendment processes that are somewhat more onerous and specific than the general or default international law of treaty amendments contained in the Vienna Convention which permits amendment where there is agreement by parties.[41] Thus, it is through satisfaction of these elements that a turn to constitutionalism can be perceived.

Separately, constitutionalism in international trade has been established based on different indicators. For instance, Jackson contends that the turn to constitutionalism in international trade is perceivable from the manner in which regulation has shifted from a power base to a rule oriented formulation.[42] He argues that in the economic context, only a rule-oriented approach will provide the security and predictability necessary for decentralized international markets to function.[43] From a practical perspective, the turn to constitutionalism is apparent in the turn to institutionalism in the form of the World Trade Organization.

Unlike Jackson, Petersmann focuses less on institutional arrangements. Rather, he contends that constitutions are premised upon values such as the rule of law, which subjects government actions to tests such as necessity and proportionality, and the separation of powers. Most importantly, Petersmann regards a critical function of constitutional systems as being the recognition and protection of inalienable rights.[44] Thus, constitutionalism ensures that 'self-limitation of our freedom of action by rules and self-imposition of institutional constraints...are rational responses designed to protect us against future risks of our own passions and imperfect rationality.'[45] In international trade, Petersmann perceives the turn to

[39] *Ibid*, at 16-17.
[40] *Ibid*, at 17.
[41] *Ibid*, at 17-19.
[42] JH Jackson *Restructuring the GATT System* (1990) 52.
[43] JL Dunoff 'Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law' (2006) *Legal Studies Research Paper Series* 1, 6.
[44] E Petersmann, *supra* n.27, at 13. E Petersmann 'Constitutionalism and International Organizations' (1998) 17 *NW Journal of International Law and Business* 398, 431.
[45] E Petersmann, *supra* n.27, at 1.

constitutionalism as apparent from the elevation of a set of normative values designed to protect against government overreaching and short-sighted decisions by the population.[46]

Alternatively, Cass notes that constitutionalism is apparent in the departure from power politics to the generation of constitutional norms by the World Trade Organization's judicialized dispute resolution process. Thus, she notes that the World Trade Organization's Appellate Body 'is the dynamic force behind constitution-building by virtue of its capacity to generate constitutional norms and structures during dispute resolution.'[47] For instance, based on what she terms the Appellate Body of the World Trade Organization's constitutional doctrine of amalgamation, Cass argues that the turn to constitutionalism is apparent in the manner in which the body borrows constitutional rules, principles, and doctrines from other systems and amalgamates them into its own caselaw. Alternatively, Cass notes that such a turn is apparent in the manner in which the Appellate Body associates itself with deeper constitutional values in crafting and justifying its decisions.[48]

Despite these differences in identifying the turn to constitutionalism in the regulation of both human rights and international trade, some consistencies can be perceived in theorising. For instance, there is consistency in the argument that the turn to constitutionalism is evidenced by a turn away from power politics toward rule oriented regulation. In addition, the turn to constitutionalism is evidenced by the pursuit or regulatory models that seek to avoid abuses of power through ensuring accountability. In human rights this has been achieved through reliance on domestic processes within states. Separately, in international trade the Dispute Settlement Body and its Appellate Body have assumed the central role in ensuring accountability. Furthermore, a turn to constitutionalism is arguably evidenced by flexibility in regulation, with regulatory models being tailored to accommodate the particularities of the field. Thus, while the domestic model of constitutionalism may not be apparent in its puristic form on the international plane, its qualities and central elements are certainly reflected in the regulatory models applied in human rights and international trade.[49]

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[46] JL Dunoff, *supra* n.43, at 8.

[47] DZ Cass, *supra* n.23, at 42.

[48] *Ibid*, at 51.

[49] H Barnett, *supra* n.26, at 6. JL Dunoff, *supra* n.19, at 194-195. LR Helfer, *supra* n.19, at 209. E Petersmann, *supra* n.27, at 1. CA Whytock 'Thinking Beyond the Domestic-International Divide: Toward a Unified Concept of Public Law' (2004) 36 *Georgetown Journal of International Law* 155, 166. M Loughlin and N Walker 'Introduction' in M Loughlin and N Walker (eds) *The Paradox of Constitutionalism* (2006) 1. P Allott 'Intergovernmental Societies and the Idea of Constitutionalism' in JM Coicaud and V Heiskanen *The Legitimacy of International Organizations* (2001) 69, 70-74, 90-93. S Gardbaum, *supra* n.3, at 2. D Halberstam 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States' in JL

Based on this analysis, the argument can be made that achieving effective regulation following departure from the sovereignty-centric international law paradigm is dependent on constructing an international constitutionalism regulatory framework. Such framework would ideally be flexible and built to reflect the particularities of a certain field.

3.3. An ecocentric regulatory framework

Having noted necessary qualities of an ideal constitutionalism-based regulatory framework it is useful to construct such a framework for environmental protection. To this end, experience under international environmental law suggests that within an international constitutionalism regulatory framework, there are various attributes of the environment and necessary qualities of environmental protection necessary for securing consistently effective environmental protection through regulatory means.[50] When these are considered together with experience with effective regulation under human rights and international trade it seems three such attributes and qualities must inform an ideal replacement regulatory framework.[51]

Dunoff and P Trachtman *Ruling The World? Constitutionalism, International Law and Global Governance* (draft) (2008) 4: available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1147769

[50] F Biermann and K Dingwerth 'Global Environmental Change and the Nation State' (2004) 4 *Global Environmental Politics* 1, 9-11. A von Bogdandy, *supra* n.49, at 230. C Boyden Gray and DB Rivkin 'No Regrets: Environmental Policy' (1991) 83 *Foreign Policy* 47, 54. A Boyle 'Saving the World? Implementation and Enforcement of International Environmental Law Through International Institutions' (1991) 3 *Journal of Environmental Law* 229, 231-232. A Cassesse 'The Role of Legal Advisers in Ensuring that Foreign Policy Conforms to International Legal Standards' (1992) 14 *Michigan International Law Journal* 139, 162, 164. EJ Ringquist and T Kostadinova 'Assessing the Effectiveness of International Environmental Agreements: The Case of the 1985 Helsinki Protocol' (2005) 49 *American Journal of Political Science* 86, 87. A Dan Tarlock 'The Role of Non-Governmental Organizations in the Development of International Environmental Law' (1992) 68 *Chicago-Kent Law Review* 61, 62. RB Mitchell 'Compliance Theory: Compliance, Effectiveness and Behaviour Change in International Environmental Law' in D Bodansky, J Brunnee and E Hey (eds) *The Oxford Handbook of International Law* (2007) 893, 912-917. D Esty and MH Ivanova 'Revitalizing Global Environmental Governance: A Function-Driven Approach' in D Esty and MH Ivanova *Global Environmental Governance: Options and Opportunities* (2002) 181.

[51] MCEJ Bronckers, *supra* n.15, at 550. JL Dunoff 'From Green to Global: Toward the Transformation of International Environmental Law' (1995) 19 *Harvard Environmental Law Review* 241, 268-270. JL Dunoff 'The Misguided Debate over NGO Participation,the WTO' (1999) 1 *Journal of International Economic Law* 433, 435-451. M Fitzmaurice and C Redgewell 'Environmental Non-compliance Procedures and International Law' (2000) 31 *Yearbook of International Environmental Law* 35, 39-43. DB Hollis 'Why State Consent Still Matters: Non-State Actors, Treaties and The Changing Sources of International Law' (2005) 23 *Berkley Journal of International Law* 137, 144-146. JH Jackson 'The Perils of Globalization and the World Trading System' (2000) 24 *Fordham International Law Journal* 371, 380. M Mason 'Citizenship Entitlements Beyond Borders? Identifying Mechanisms of Access and Redress for Affected Publics in International Environmental Law' (2006) 12 *Global Governance* 283, 284. K Raustiala 'The 'Participatory Revolution in International Environmental Law' (1997) 21 *Harvard Envtironmental Law Review* 537. SC Schreck 'The Role of Nongovernmental Organizations in International Environmental Law' (2006) 10 *Gonzaga Journal of International Law* 252, 254-256. K Sikkink 'Human Rights, Principled Issue-Networks and Sovereignty in Latin

3.3.1. New actors in environmental deterioration

In determining the first attribute of an ideal regulatory framework in environmental protection, it must be considered that the subjects of environmental protection regulatory efforts have changed since the commencement of the environmental protection movement. Traditionally, the perception that environmental protection was a bilateral issue between states, with states being responsible for activities within their territories, led to a focus on states as the primary subjects of environmental protection efforts.[52] While this approach remains relevant in varied instances, globalization and the growth of capitalism have created a new class of international actors whose environmentally detrimental activities are so extensive as to necessitate a reconsideration of this state centric approach.[53]

For instance, most issues which lie at the core of the environmental protection movement such as various forms of transboundary pollution, domestic pollution, environmental harm and natural resource depletion result from private parties operating in and across national domains.[54] Indeed, environmental protection is often concerned with environmental harm that is the result of a varied group of perpetrators that features multinational corporations, individuals driving cars, power-plant operators, leather-goods

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America' (1993) 47 *International Organization* 411, 413-415. AE Utton 'International Environmental Law and Consultation Mechanisms' (1973) 12 *Columbia Journal of Transnational Law* 56. EB Weiss 'International Environmental Law: Contemporary Issues and the Emergence of a New World Order' (1993) 81 *Georgetown Law Journal* 675, 684. DA Wirth 'Re-examining Decision-Making Processes in International Environmental Law' (1994) 79 *Iowa Law Review* 769, 769-770. L Susskind and C Ozawa 'Negotiating More Effective International Environmental Agreements' in A Hurrell and B Kingsbury (eds) *The International Law of the Environment* (1992) 142.

[52] M Mason, *supra* n.51, at 288. P Birnie, A Boyle and C Redgwell, *supra* n.16, at 1, 6, 17. T Marauhn 'Changing Role of the State' in D Bodansky, J Brunnee and E Hey *The Oxford Handbook of International Environmental Law* (2007) 727, 728.

[53] D Bodansky, J Brunnee and E Hey 'International Environmental Law: Mapping the Field' in D Bodansky, J Brunnee and E Hey *The Oxford Handbook of International Environmental Law* (2007) 1, 6-7. J Klabbers 'Compliance Procedures' in D Bodansky, J Brunnee and E Hey *Oxford Handbook of International Environmental Law* 995, 1001. E Louka, *supra* n.4, at 47-49. D Leary and B Pisupati 'Introduction' in D Leary and B Pisupati *The Future of International Environmental Law* (2010) 8-9.

[54] M Anderson 'Transnational Corporations and Environmental Damage: Is Tort Law the Answer?' (2002) 41 *Washburn Law Journal* 399, 400. D Zaelke and J Cameron 'Global Warming and Climate Change: An Overview of the International Legal Process' (1990) 5 *American University Journal of International Law and Policy* 249, 250. A Nollkaemper 'Compliance Control in International Environmental Law: Traversing the Limits of the National Legal Order' in G Ulfstein and J Werksman (eds) (2002) 13 *Yearbook of International Environmental Law* 165, 167.

importers and shipping companies.[55] Importantly, these polluting parties are not necessarily citizens of states in which the harm occurs. This blurs the traditional lines of responsibility based on citizenship which is, in turn, determined on the basis of sovereignty and the state system.[56] These developments are not fully consistent with the current focus of international environmental law which sees states retain responsibility for activities within their territories.[57]

This is particularly problematic since this expanding body of non-state actors is often shielded from effective regulation through international environmental law.[58] For instance, the law's focus on states as subjects means that responsibility for controlling the activities of non-state parties predominantly falls on states.[59] While the failure to implement treaties may lead to activation of compliance control procedures, the issue of whether or not the state has established procedures that might correct non-compliance is left to the judgment of the state itself.[60] This is exemplified in Article 3 (4) of the 1992 Convention on the Transboundary Effects of Industrial Accidents which holds that 'to implement the provisions of this Convention, the Parties shall take appropriate legislative, regulatory, administrative and financial measures for the prevention of, preparedness for and response to industrial accidents.'[61]

It must be noted that agreements such as the 1996 Protocol to the London Dumping Convention and the Basel Convention impose obligations on states to ensure that conduct within states meets legal standards.[62] However, these attempts are cautious and they remain

[55] A Nollkaemper, *supra*, n.54, at 167. K Kline and K Raustiala 'International Environmental Agreements and Remote Sensing Technologies' (2000) 7 available at: http://sedac.ciesin.columbia.edu/rs-treaties/rs-treaties_bckgnd.pdf

[56] HH Koh, *supra* n.18, at 2631. A Nollkaemper, *supra* n.54, at 166-167. WJ Aceves, *supra* n.3, at 265. HE Judge CG Weeramantry *Foreword* in MC Cordonier Segger and A Khalfan *Sustainable Development Law* (2004) xi. K Raustiala, *supra* n.51, at 557.

[57] J Brunee 'Enforcement Mechanisms in International Environmental Law' in U Beyerlin, P Stoll, R Wolfrum *Ensuring compliance with Multilateral Environmental Agreements: A Dialogue Between Practitioners and Academia* (2006) 1, 12. P Birnie, A Boyle and C Redgwell, *supra* n.16, at 214.

[58] T Marauhn, *supra* n.52, at 732.

[59] P Sands (2ed) *Principles of International Environmental Law* (2003) 176. A Nollkaemper, *supra*, n.54, at 167.

[60] A Nollkaemper, *supra*, n.54, at 168.

[61] United Nations Economic Commission for Europe Convetion on the Transboundary Effects of Industrial Accidents, 31 *ILM* 1330 (1992).

[62] Articles 9, 10, Protocol to the London Dumping Convention, 36 *ILM* (1997) 7. Articles 4, 5, Basel Convention.

subject to the principle that the modalities of compliance control at the national level are to be left as much as possible to the states themselves.[63]

In this context, a focus on states is problematic on many fronts. For instance, states' decision-making processes that dictate how the law will be implemented are often influenced by political considerations rather than ecocentric needs.[64] In addition, public authorities, in poor states in particular, may lack capacity to effectively implement laws. This is often due to the fact that a focus on development may influence states to compromise on environmental protection standards that are in place.[65] For instance, this is an issue that has garnered growing attention with the increasing role played by Chinese investors in Africa.[66]

Factors such as these have often created loopholes in regulating environmental protection under international environmental law. These loopholes have allowed some private perpetrators of environmental harm within states that have inadequate regulatory mechanisms to go unpunished.[67] Previously, as was the case following the Bhopal disaster in India, this has, in some ways, been addressed through reliance on civil liability suits against perpetrators of environmental harm by injured citizens.[68] However, in the greater effort to secure effective global environmental protection, this approach is limited by factors such as the conflicts in the rules of procedure relating to access to court in different states. Alternatively, this approach is human-centric and relates only to measurable environmental harm that affects

[63] A Nollkaemper, *supra*, n.54, at 186.

[64] P Birnie, A Boyle and C Redgwell, *supra* n.16, at 236. EN Ojukwu-Ogba 'Legal and Regulatory Instruments on Environmental Pollution in Nigeria: Much Talk, Less Teeth' (2006) 8 *International Energy law & Taxation Review* 201, 206.

[65] J Bulmer 'Compliance Regimes in Multilateral Environmental Agreements' in J Brunnee, M Doelle and L Rajamani *Promoting Compliance in an Evolving Climate Regime* (2012) 55, 61.

[66] P Bosshard 'China's Environmental Footprint in Africa' (2008) South African Institute of International Affairs (*SAIIA*) China in Africa Policy Briefing No. 3, April 2008 available at: http://www.internationalrivers.org/files/SAIIA%20policy%20briefing%20508.pdf

[67] M Mason, *supra* n.51, at 289. T Yang 'International Treaty Enforcement as A Public Good: Institutional Deterrent Sanctions in International Environmental Agreements' (2007) 27 *Michigan Journal of International Law* 1131, 1173. T Scovazzi 'State Responsibility for Environmental Harm' in G Ulfstein and J Werksman (eds) (2001) 12 *Yearbook of International Environmental Law* 43, 55-57. M Anderson, *supra* n.54, at 402-404. P Birnie, A Boyle and C Redgwell, *supra* n.16, at 221-223.

[68] M Mason, *supra* n.51, at 295. G Handl 'Environmental Security and Global Change: The Challenge to International Law' in G Handl (ed) (1990) 1 *Yearbook of International Environmental Law* 3, 18. P Sands, *supra* n.59, at 177. M Poustie 'Environment' in E Moran *et al* (eds) *Stair Memorial Encyclopaedia Reissue* (2007) paras 109, 110. P Birnie, A Boyle and C Redgwell, *supra* n.16, at 224, 298.

people.[69] In addition, the approach is also typically backward-looking and not preventative to the extent that a right of action often arises once the environmental harm has occured.[70]

Thus, exclusive reliance on a state-centric approach is undesirable as the dominant mode of policing and enforcing laws in order to secure consistently effective environmental protection.[71] The challenge therefore is to develop effective ways of engaging and regulating these private activities directly.[72]

Another difficulty that attaches to a focus on states as subjects of international environmental law is the fact that as part of securing international agreement among varied states of different levels of capacity, international environmental law often reflects lowest common denominator standards.[73] This means that laws are framed in a broad manner that allows states discretion in their implementation.[74] For example, Article 2 of the Basel Convention calls for the disposal of hazardous wastes in an environmentally sound manner. However, it does not precisely define what constitutes an environmentally sound manner with this determination being left to separate states.[75] Certainly, the conference of the parties may set standards that would move obligations from lowest common denominator standards. Alternatively, the same function could be, and has been, performed by the Governing Council of the United Nations Environment Program which approved the Cairo Guidelines and Principles for Environmentally Sound Management of Hazardous Wastes.[76] However, the effect of lack of clarity and precision in the Convention is that it grants states extensive leeway in implementing laws.

The inevitable result is that state implementation of the law becomes a political rather than scientific issue.[77] This ultimately results in uncoordinated implementation of environmental protection objectives leading to different environmental protection standards among states.[78] This is particularly undesirable in environmental protection where, more often than not, each state must adopt roughly equivalent environmental protection measures

[69] MG Faure and M Visser 'Law and Economics of Environmental Crime: A Survey' (2003) available at: http://www.hertig.ethz.ch/LE_2004_files/Papers/Faure_Environmental_Crime.pdf
[70] P Birnie, A Boyle and C Redgwell, *supra* n.16, at 224-231.
[71] T Scovazzi, *supra* n.67, at 57-61. M Koskenniemi, *supra* n.3, at 126-127. P Sands, *supra* n.59, at 869-890. M Mason, *supra* n.51, at 295. M Poustie, *supra* n.68, at para 23.
[72] D Bodansky, J Brunnee and E Hey, *supra* n.53, at 6-7.
[73] P Sands, *supra* n.59, at 176.
[74] J Klabbers, *supra* n.53, at 1001-1002.
[75] L Susskind and C Ozawa, *supra* n.51, at 147-148.
[76] By decision 14/30 of 17 June 1987 (A/42/25, Annex I).
[77] JL Dunoff 'Levels of Environmental Governance' in D Bodansky, J Brunnee and E Hey (eds) *The Oxford Handbook of International Law* (2007) 85, 90. J Klabbers, *supra* n.53, at 1001. P Sands, *supra* n.59, at 869-890.
[78] T Scovazzi, *supra* n.67, at 57.

for the law to be effective.[79] At the worst, failure to achieve this allows for the displacement of environmentally harmful activities from states in which regulations are more stringent to states in which regulations are more lenient.[80] The previously cited example related to the unfair advantage enjoyed by Chinese competitors to Western firms in the African market is illustrative in this regard.[81]

These experiences with regulating environmental protection under international environmental law suggest that in constructing an ideal regulatory framework, the activities of non-state parties cannot be properly regulated as long as the regulatory efforts remain focused on the traditional state category.[82] If there is no proper connection between the international domain and national institutions, it will not be uncommon that international prescriptions fail to reach their objectives.[83] Thus, an ideal regulatory framework must feature imperative authority that allows for both direct regulation of states and regulation of the activities of parties within states.[84] Effectively, this means the first essential attribute of an ideal regulatory framework is that it should be hierarchical.[85]

3.3.1.1. Hierarchy

The argument for hierarchical regulation fulfils the requirements of constitutionalism to the extent that it advocates rule-oriented regulation. In addition, advocacy of hierarchy is also based on the idea that effective regulation demands set principles, universality and uniform legislation.[86] These considerations suggest that a necessary attribute of an international constitutionalism regulatory framework in environmental protection is the progression to a legislative based approach that would see the creation of a universal, for ease of reference, replacement international environmental law.

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[79] S Elworthy and J Holder *Environmental Protection: Texts and Materials* (1997) 107. P Allott *Eunomia: New Order for a New World* (1990).

[80] M Anderson, *supra* n.54, at 403. K Nowrot 'Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law' (1999) 6 *Indian Journal of Global Legal Studies* 579, 587. JL Dunoff, *supra* n.77, at 94.

[81] See Chapter Two.

[82] M Mason, *supra* n.51, at 284. T Yang, *supra* n.67, at 1173. T Scovazzi, *supra* n.67, at 51. GH Aldrich and CM Chinkin, *supra* n.32, at 90. T Marauhn, *supra* n.52, at 734.

[83] A Nollkaemper, *supra*, n.54, at 167.

[84] A Cassesse, *supra* n.50, at 164. A Nollkaemper, *supra* n.54, at 171. AM Burley, *supra* n.9, at 1916-1917. T Marauhn, *supra* n.52, at 732-736. D Bodansky, J Brunnee and E Hey, *supra* n.53, at 20.

[85] UJ Wagner 'The Design of Stable International Environmental Agreements: Economic Theory and Political Economy' (2002) 15 *Journal of Economic Surveys* 377, 377-378.

[86] D Galligan and D Sandler 'Implementing Human Rights' in S Halliday and P Schmidt *Human Rights Brought Home: Socio-legal Perspectives on Human Rights in the National Context* (2004) 24.

In directing all regulation of environmental protection this body of replacement international environmental law would ideally provide centralised standards to be placed on all the subjects of the law regardless of territory. This would necessarily void the potential displacement of responsibility for environmental harm and harm itself. Considering that the law would apply to all parties, formulating central laws and highlighting potential areas of difficulty would ideally incorporate the views of all stakeholders, that is, states, international organizations, civil society and non-governmental organizations.[87] This is particularly important because experience under international environmental law suggests that in addition to states, other stakeholders have an important role to play in law-making. For instance, organizations such as the International Union for the Conservation of Nature have a significant role to play in law-making to the extent that they often provide a reservoir of legal and technical expertise and diplomatic machinery not always possessed by individual states.

Substantively, replacement international environmental law would codify basic, broadly formulated and non-derogable principles of environmental protection. In constructing such principles guidance could be drawn from generally accepted principles of current international environmental law with an emphasis on making them applicable to all actors not just states.[88] The law could also draw, as has been done under international environmental law, from various privately generated and implemented rules in the environmental arena.[89] These rules include private standards, codes of conduct, and agreements on environmental measures to be carried out by specific enterprises, sectors or firms. A prominent example relates to the environmental protection standards developed by the International Organization for Standardization.[90]

While hierarchy may be desirable in environmental protection, it must also be considered that focusing regulatory efforts on all relevant parties, not states exclusively, means that a hierarchical approach may not always be the most effective method of

[87] K Nowrot, *supra* n.80, at 590. DA Wirth, *supra* n.51, at 777.

[88] S Hall 'The Persistent Spectre: Natural Law, International Order and Limits of Legal Positivism' (2001) 12 *European Jurnal of International Law* 269, 292. U Beyerlin, P Stoll, R Wolfrum 'Different Types of Norms in International Environmental Law: Policies, Principles and Rules' in D Bodansky, J Brunnee and E Hey (eds) *The Oxford Handbook of International Law* (2007) 425, 438-442. TM Franck (1990), *supra* n.21, at 25-26, 41-207. HH Koh, *supra* n.18, at 2629. A Chayes and A Chayes *The New Sovereignty: Compliance with International Regulatory Agreements* (1995) 15.

[89] N Roht-Arriaza 'Private Voluntary Standard-Setting, the International Organization for Standardization, and International Environmental Lawmaking' (1995) 6 *Yearbook of International Environmental Law* 107-108. P Birnie, A Boyle and C Redgwell, *supra* n.16, at 164-173. M Mason, *supra* n.51, at 292.

[90] N Roht-Arriaza, *supra* n.89, at 108. D Bodansky, J Brunnee and E Hey, *supra* n.53, at 22. L Susskind and C Ozawa, *supra* n.51, 154.

regulation. Indeed, experience under international environmental law suggests that with regard to certain regions or environmental phenomena, effective environmental protection has been achieved through reliance on community-based as well as market-based regulatory mechanisms.

Community-based mechanisms are typically relied on where communities made up of states in close proximity to each other have intimate connections, shared values and common histories.[91] In such instances, the community influence is so strong that member states are no longer entirely free to pursue their own policies, either at home and abroad.[92]

Incorporating environmental protection objectives into these established relationships has led to more stringently enforced environmental protection standards as part of the greater and more established community regulatory effort.[93] This is perhaps best exemplified by the manner in which environmental protection objectives have been significantly achieved in the European Union. Rather than a decidedly hierarchical approach to regulation, the European Union significantly relies on community-based regulation in order to achieve environmental protection, and other, objectives.[94] The fact that environmental protection objectives are introduced into a pre-established community-based regulation model has meant that achieving such objectives is intertwined with other objectives such as those related to matters of security, trade and human rights. Within this context, the community influence among member states is so strong that individual states are no longer entirely free to pursue their own policies, either at home and abroad.[95] Certainly, hierarchy in regulation remains however, states are often compelled by community pressure, and the fear of adversely affecting relations with other states in all other matters, to act in a manner that is in concert with community-mandated environmental protection objectives.

Similar levels of succesful regulation rooted in this community-based approach are also perceivable in the regulation of regional seas, notably the North Sea, Baltic Sea, Mediterranean Sea and the Black Sea. The community-based approach has played a central

[91] S Barrett *Environment and Statecraft: The Strategy of Environmental Treaty-making* (2003) 17.
[92] N Haigh 'The European Community and International Environmental Policy' in A Hurrell and B Kingsbury (eds) *The International Law of the Environment* (1992) 228.
[93] A Hurrell and B Kingsbury *The International Politics of the Environment* (1992) 9. GW Downs and MA Jones 'Reputation, Compliance and International Law' (2002) 32 *Journal of Legal Studies* S95, S97-S98, S109. M Koskenniemi, *supra* n.3, at 123.
[94] N Hawke *Environmental Policy: Implementation and Enforcement* (2002) 2. A Tokar Something Happened. Sovereignty and European Integration (2001) *IWM Junior Visiting Fellows Conferences* (11) 1.
[95] N Haigh, *supra* n.92, at 228.

role in shaping custom and regional agreements that direct regulation.[96] These customary rules for self-governance, monitoring mechanisms, and sanctions rooted in the community-based approach often inform more international regulatory agreements covering these regions rather than externally imposed hierarchical regulation.[97]

Thus, while remaining hierarchical, an ideal regulatory framework would ideally incorporate this community-based form of regulation.[98] From a practical perspective, incorporating a community-based approach could be achieved through making provision in replacement international environmental law for the creation of subsidiary laws that would give effect to central provisions of the replacement international environmental law. These subsidiary laws would not be bound to a hierarchical approach and would focus on applying the most effective regulatory mechanisms. This would facilitate reliance on community-based mechanisms where appropriate.

Despite the need to incorporate these community-based mechanisms, it must be considered that in environmental protection, the community of nations is so called primarily because of common occupancy of the earth and not because of many shared assumptions or expectations. There are large and basic areas of human experience and value where no consensus exists.[99] The prevailing paradox is that of a political world deeply divided on a planet that is a complex ecological unity.[100] In this context, a community-based approach to regulation is only justifiably relied on to the extent that it advances environmental objectives. Where the pursuit of such objectives would be defeated under a community-based approach, regulation would revert to the hierarchical structure in the reform of replacement international environmental law.

In addition to this community-based approach, international environmental law has also increasingly relied on market-based mechanisms in regulating the environmentally harmful conduct of states and non-state parties that operate within states.[101] This is based on

[96] P Birnie, A Boyle and C Redgwell, *supra* n.16, at 394-396, 423-430.

[97] F Berkes 'From Community-Based Resource Management to Complex Systems: The Scale Issue and Marine Commons' (2004) 11 *Ecology and Society* 45, 10-13. EA Kirk 'Maritime Zones and the Ecosystem Approach: A Mismatch? (1999) 8 *Review of European Community and International Environmental Law* 67, 67-68.

[98] A Boyle, *supra* n.50, at 230. TM Franck (1990), *supra* n.21, at 196.

[99] LK Caldwell *International Environmental Policy* (1996) 155.

[100] *Ibid.*

[101] P Sands, *supra* n.59, at 155-167. JL Dunoff (1995), *supra* n.51, at 253-255. E Louka, *supra* n.4, at 25-26. RB Stewart 'Environmental Regulation and International Competitiveness' (1992) 102 *Yale Law Journal* 2039, 2049, 2093. DJ Dudek, RB Stewart and JB Wiener 'Technology-based Approaches Versus Market-based Approaches' in P Sands *Greening International Law* (1993) 182, 184. A Chayes and A Chayes, *supra* n.88, at 2-3, 109-111. A Cardesa-Salzman 'Non-compliance Procedures in Multilateral Environmental Agreements:

the rationale that activities which lead to environmental harm are often undertaken or conducted by states and non-state parties as part of cutting the costs attached to production processes motivated by financial gain. Alternatively, harmful activities are perpetrated by ordinary individuals within states conducting routine activities such as driving vehicles or operating small businesses. All these actors have traditionally been receptive to various economic instruments as the impetus for halting or limiting their undesirable activities. Thus, the logic behind these mechanisms is that attaching appropriate forms of financial incentives or disincentives to these parties' activities may achieve significantly positive results in combating environmental deterioration.

Market-based regulatory mechanisms often assume the form of taxes, tradable permits, auditing and management schemes and eco-labels. Such techniques have most notably been incorporated into the Kyoto Protocol which, in Article 17, utilises emissions trading to take full account of costs and benefits thus minimizing both actual injury and loss of potential gains.[102]

In this and other instances where they have been applied, the benefit of these market-based techniques has been that they have managed to 'decentralise decision making to a degree that polluters or resource users have the flexibility to select the production or consumption option that minimizes their cost of achieving a particular level of environmental quality.'[103] Thus, while effective regulation must remain hierarchical, to the extent that it must be directed at all manner of perpetrators of environmental harm, it must ideally also incorporate these market-based approaches.[104] From a practical perspective, as with accommodating community-based mechanisms, this could be achieved through making

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Weaknesses' Diagnosis and Therapy' (2010) 4: available at: http://www.esil-en.law.cam.ac.uk/Media/Draft_Papers/Agora/Cardesa-Salzmann.pdf.

[102] A Gillespie *International Environmental Law, Policy and* Ethics (1997) 33.

[103] T Scovazzi, *supra* n.67, at 67. DJ Dudek, RB Stewart and JB Wiener, *supra* n.101, at 182-193. M Poustie, *supra* n.68, at para 130. J Whalley and B Zissimos 'Making Environmental Deals: The Economic Case for a World Environmental Organization' in D Esty and MH Ivanova *Global Environmental Governance: Options and Opportunities* (2002) 163, 168. A D'Amato 'The Evolution of International Environmental Law' (2001) 7: available at: http://anthonydamato.law.northwestern.edu/IELA/Intech01-2001-edited.pdf

[104] A Chayes and A Chayes 'Compliance Without Enforcement: State Regulatory Behaviour Under Regulatory Treaties' (1991) 7 *Negotiation Journal* 311, 318. A Cardesa-Salzman, *supra* n.100, at 4. DG Victor 'Enforcing International Law: Implications for an Effective Global Warming Regime' (1999) 10 *Duke Environmental Law and Policy* 147, 174-109. CA Whytock, *supra* n.49, at 160. N Roht-Arriaza, *supra* n.89, at 107-108. DJ Dudek, RB Stewart and JB Wiener, *supra* n.101, at 182-183. S Krasner (ed) *International Regimes* (1983) 6.

provision in replacement international environmental law for the creation of subsidiary laws that apply market-based techniques where appropriate.[105]

However, it must also be considered that this market-based approach has been criticised on grounds such as the fact that economic mechanisms do not question the underlying political and social implications behind them, such as overt individualism and the vicissitudes of the free market. Alternatively, it has been argued that economic approaches are curtailed by the limitations imposed through the current economic structure, its in-built biases, and myopic circumferences.[106] To the extent that some merit attaches to these criticisms of the market-based approach, it is critical to ensure that recourse to market-based techniques is limited only to the subsidiary branches of replacement international environmental law. Where these techniques should prove ineffective or undesirable, recourse would revert to the hierarchical regulation of replacement international environmental law.[107]

3.3.2. A multifaceted approach to environmental protection

In determining the second attribute of an ideal environmental protection regulatory framework it must be considered that various environment phenomena such as air, water bodies and different species have a global dimension and are interconnected.[108] Similarly, activities detrimental to the environment such as transboundary atmospheric pollution, global warming and ozone depletion, also have a global dimension and are interconnected.[109] In addition, in regulating these issues, it is difficult to establish the traditional causal link between harm and conduct.[110] As experience under international environmental law has

[105] A von Bogdandy, *supra* n.9, at 230, 231. T Marauhn, *supra* n.52, at 738-739. HH Koh, *supra* n.18, at 2631. EB Weiss, *supra* n.51, at 693. K Raustiala, *supra* n.51, at 578.

[106] A Gillespie, *supra* n.102, at 176.

[107] HH Koh, *supra* n.18, at 2613. JL Dunoff (1995), *supra* n.51, 253-255. T Scovazzi, *supra* n.67, at 67. A Cardesa-Salzman, *supra* n.101, at 4. JL Dunoff, *supra* n.77, at 89. DJ Dudek, RB Stewart and JB Wiener, *supra* n.101, at 192, 206. A Hurrell and B Kingsbury, *supra* n.93, at 9.

[108] BH Desai 'Mapping the Future of International Environmental Governance' in G Ulfstein and J Werksman (eds) (2002) 13 *Yearbook of International Environmental Law* 43. K Raustiala, *supra* n.51, at 537. EJ Ringquist and T Kostadinova, *supra* n.50, 87. SC Schreck, *supra* n.51, at 252-253. A Hurrell and B Kingsbury, *supra* n.93, at 2.

[109] E Louka, *supra* n.4, at 11.

[110] M Ehrmann 'Procedures of Compliance Control in International Environmental Treaties' (2002) 13 *Colorado Journal of International Environmental Law* 377, 380-381. M Fitzmaurice and C Redgewell, *supra* n.51, at 41. D Freestone 'The Road from Rio: International Environmental Law after the Earth Summit' (1994) 6 *Journal of International Environmental Law* 193, 195-196. FFL Kirgis 'Editorial Comment: Standing to Challenge Human Endeavours that Could Change the Climate (1990) 84 *American Journal of International Law* 525, 528. SC Schreck, *supra* n.51, at 257. D Zaelke and J Cameron, *supra* n.54, at 250-251. M Koskenniemi, *supra* n.3, at 126. K Sachariew 'Promoting Compliance with International Environmental Legal Standards: Reflections on Monitoring and Reporting Mechanisms' in G Handl (ed) (1991) 2 *Yearbook of International*

shown, environmental deterioration is often the result of the cumulation of activities in different states.

Another aspect of the environment is that it features extensive interlinkages.[111] This means that effective environmental protection of one aspect of the environment in isolation could result in transfer of the problem to other phenomena. For instance, a framework that caters extensively to water pollution but not to land pollution is flawed to the extent that both are interlinked.[112] Alternatively, some of the leading replacements for ozone-depleting substances are greenhouse gases which in turn contribute to global warming. Similarly, protecting one species may encourage its growth while doing harm to another.[113]

Yet another quality of the environment that merits consideration in constructing an ideal regulatory framework is that some aspects of the environment such as non-migratory species, habitats and watercourses are of common interest regardless of the territory within which they fall.[114] Thus, all states have a stake in those aspects of the environment regardless of the fact that they may not fall within their territories.[115] A corollary to this is the fact that all states may have an interest in aspects of the environment that fall in no state's territory such as various aspects of the atmosphere.[116] It is partly to acknowledge these dimensions that some environmental phenomena have been accorded the status of common heritage and common concern matters.[117]

Environmental Law 31, 32. CD Stone 'Defending the Global Commons' in P Sands *Greening International Law* (1993) 38. J Gupta 'Legitimacy in the Real World: A Case Study of the Developing Countries, Non-Governmental Organizations and Climate Change' in JM Coicaud and V Heiskanen *The Legitimacy of International Organizations* (2001) 482, 487. IFI Shihata 'Implementation, Enforcement and Compliance with International Environmental Agreements-Practical Suggestions in the Light of the World Bank's Experience' (1996) 9 *Georgetown International Environmental Law Review* 37, 40.

[111] UJ Wagner, *supra* n.85, at 377. EB Weiss, *supra* n.51, at 690.

[112] DJ Dudek, RB Stewart and JB Wiener, *supra* n.101, at 190-191.

[113] D Bodansky, J Brunnee and E Hey, *supra* n.53, at 6.

[114] P Sands, *supra* n.59, at 184. P Birnie, A Boyle and C Redgwell, *supra* n.16, at 128-129.

[115] M Koskenniemi 'The Future of Statehood' (1991) 32 *Harvard International Law* 397, 408. M Mason, *supra* n.51, at 288. AS Timoshenko, *supra* n.4, at 136-137. AE Utton, *supra* n.51, at 57. EB Weiss, *supra* n.51, at 691. A Hurrell and B Kingsbury, *supra* n.93, at 45. A D'Amato, *supra* n.103, at 6.

[116] P Sands, *supra* n.59, at 184. S Barrett 'International Cooperation and the International Commons' (2000) 10 *Duke Environmental Law and Policy* 131, 135. T Yang, *supra* n.67, at 1149.

[117] P Birnie, A Boyle and C Redgwell, *supra* n.16, at 129-130, 197-198. M Mason, *supra* n.51, at 288. A Cassesse, *supra* n.50, at 159. JL Dunoff (1995), *supra* n.51, 273, 274. D Held 'Law of States, Law of Peoples: Three Models of Sovereignty' (2002) 8 *Legal Theory* 1, 15. The United Nations Convention on the Law of the Sea (1982). The Convention on Biological Diversity (1993).

An equally important consideration in constructing an ideal regulatory framework is the fact that the discipline is a highly science-driven enterprise.[118] For instance, the depletion of the ozone layer was diagnosed through science and ultimately addressed through the development of new technologies conceived in the scientific world.[119] A corollary to this is the fact that many environmental problems such as the build-up of greenhouse gases and global warming carry effects that are widely dispersed, long term and with long latency periods. Thus, scientists cannot always provide early conclusive answers. Consequently, decisions must often be made in the face of uncertainty.[120] The result is that new scientific findings frequently necessitate different approaches to environmental protection.[121] For instance, it may quickly emerge that some environmental phenomena require more immediate protection than had been previously thought.[122] It may similarly be the case that these new efforts may affect existing practices to protect other environmental phenomena.[123]

The implication of these attributes and qualities is that no state can effectively protect the environment and solve various environmental problems on its own no matter how advanced its science and technology or how perfect the means of legislation and implementation of environmental law.[124] Similarly, it is important to be considerate of the fact that,

> "global environmental change puts additional stress on societies-for instance through drought, regional climate changes, or sea-level rise-the capacities to cope with additional stress may even become overstretched, with local and regional crises as a likely consequence. Given the uneven geographic distribution of adverse consequences of global environmental change, some nation states will face more demands for adaptation than others. In addition, given the uneven distribution of adaptive capacities, for some societies the development and provision of these new services and technologies will come at significant costs, while for others it may

[118] E Louka, *supra* n.4, at 19. P Sands, *supra* n.59, at 113-114. MJ Kelly 'Overcoming Obstacles to the Effective Implementation of International Environmental Agreements' (1997) 9 *Georgetown International Environmental Law Review* 448, 480. EB Weiss, *supra* n.51, at 688.

[119] D Bodansky, J Brunnee and E Hey, *supra* n.53, at 6.

[120] *Ibid*.

[121] RR Churchill and G Ulfstein 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law' (2000) 94 *American Journal of International Law* 623, 628.

[122] A Dan Tarlock, *supra* n.50, at 62. G Handl, *supra* n.68, at 4. D Bodansky, J Brunnee and E Hey, *supra* n.53, at 7. A Hurrell and B Kingsbury, *supra* n.93, at 14. J Brunee 'Coping with Consent: Law-Making Under Multilateral Environmental Agreement' (2002) 15 *Leiden Journal of International Law* 1, 15.

[123] EB Weiss, *supra* n.51, at 690.

[124] C Boyden Gray and DB Rivkin, *supra* n.50, at 47-49. LR Helfer, *supra* n.19, at 194. AS Timoshenko, *supra* n.4, at 141-142. EB Weiss, *supra* n.51, at 706. A D'Amato, *supra* n.103, at 6. J Brunee, *supra* n.57, at 14.

> even turn out to be economically beneficial, e.g. by promoting economic sectors in which adaptation technologies are being developed. The vulnerability, adaptive capacity and disaster preparedness of nation states are therefore inextricably linked to the level of economic development as well as to a number of additional socioeconomic factors. As a general statement, however, global environmental change, by requiring states to prepare for and adapt to its consequences, increases the demand for the administrative, organizational, technological and financial capacity of the nation state-a demand which some states will find easier to meet than others. In sum, it can be expected that global environmental change, by putting added stress on core capacities of the nation state, poses a significant challenge to the provision of internal security and to effective government."[125]

Essentially, some states may lack the requisite capacity to participate effectively in environmental protection endeavours. Thus, they require assistance in meeting their obligations. Importantly, environmental protection is a collective responsibility. Ideally, states only assume the role of trustees over environmental phenomena falling within their territories.[126] This can be contrasted to the traditional proprietorship role over the environment often ascribed to states based on sovereignty.[127] In addition, there is a need to institute requisite cross-cutting approaches to preventing or controlling environmental deterioration.

Thus, an ideal regulatory framework cannot approach regulation of environmental protection from a piecemeal perspective.[128] Instead, efforts at securing effective regulation of environmental protection should be coordinated and centralised.[129]

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[125] F Biermann and K Dingwerth, *supra* n.50, at 3.

[126] P Birnie, A Boyle and C Redgwell, *supra* n.16, at 39. EA Kirk, *supra* n.97, at 71.

[127] P Sands, *supra* n.59, at 236-237. EB Weiss, *supra* n.51, at 703. P Birnie, A Boyle and C Redgwell, *supra* n.16, at 190-198. E Engle 'Beyond Sovereignty? The State After The Failure of Sovereignty' (2008) 15 *ILSA Journal of International and Comparative Law* 33, 35. D Freestone, *supra* n.110, at 196. D Held, *supra* n.117, at 15. SD Krasner 'Compromising Westphalia' (1996) 20 *International Security* 115, 115-116. F Kratochwil 'Of Systems, Boundaries and Territoriality: An Inquiry into the Formation of the State System' (1986) 39 *World Politics* 27, 49. CD Stone, *supra* n.110, at 35. I Brownlie *Principles of Public International Law* (7ed) (2008) 105. J Whalley and B Zissimos, *supra* n.103, at 169. E Louka, *supra* n.4, at 49. A D'Amato, *supra* n.103, at 5.

[128] F Biermann and K Dingwerth, *supra* n.50, at 15-16. S Charnovitz 'Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices' (1994) 9 *American University Journal of International Law and Policy* 751, 805. JH Jackson, *supra* n.51, at 380. M Mason, *supra* n.51, at 284. DJ Dudek, RB Stewart and JB Wiener, *supra* n.101, at 190.

[129] G Handl, *supra* n.68, at 12. JL Dunoff, *supra* n.77, at 89-100. E Louka, *supra* n.4, at 16. J Brunee, *supra* n.57, at 2. U Beyerlin, P Stoll, R Wolfrum 'Conclusions drawn from the Conference on Ensuring Compliance with MEAs' in U Beyerlin, P Stoll, R Wolfrum (eds) *Ensuring Compliance with Multilateral Environmental Agreements: Academic Analysis and Views from Practice* (2006) 2-4, available at: https://www.ippc.int/file_uploaded/1182346189781_conclusionsfrom_MEA_Compliance_conf.pdf

3.3.2.1. Centralisation

In the context of constitutionalism, centralisation is an essential part of the turn to rule oriented regulation that is secured by a hierarchical approach. This is because centralization ensures that no state can ever do excessive harm to the environment. To this end, experience with regulation of international trade in particular, which features centralisation of power in the World Trade Organization is particularly useful. Such experience suggests that achieving the requisite amount of centralisation as part of the drive toward an ideal regulatory framework in environmental protection would be best achieved through vesting regulatory authority in a central institution. This institution would be empowered by and derive its authority from replacement international environmental law. Importantly, the central institution would be vested with extensive and effective executive powers allowing it to formulate global environmental protection policies.[130] These policies would give effect to the much broader provisions of replacement international environmental law. In addition, such policies would be based on ecocentric considerations and the interconnectedness of the environment rather than political considerations.[131] This would also allow the institution to formulate policy that reflects changing needs of environmental protection at a more expedited rate than through legislative means.

In addition to formulating policy and as part of its executive mandate, the institution would also be charged with policing implementation and compliance with replacement international environmental law.[132] Ideally, drawing largely from the experience with the regulation of human rights, policing would include functions such as inspection and monitoring of compliance and legal or administrative proceedings to investigate complaints and determine appropriate penalties for violators.[133] This would ensure that environmental standards are satisfied on a practical level.[134]

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[130] T Marauhn, *supra* n.52, at 728-732.

[131] C Boyden Gray and DB Rivkin, *supra* n.50, at 52. D Freestone, *supra* n.109, at 209-210.

[132] EJ Ringquist and T Kostadinova, *supra* n.50, at 89. A Dan Tarlock, *supra* n.50, at 63. W Lang 'Diplomacy and International Environmental Law-Making: Some Observations' in G Handl (ed) (1992) 3 *Yearbook of International Environmental Law* 109, 122. D Bodansky, J Brunnee and E Hey, *supra* n.53, at 19. IFI Shihata, *supra* n.110, at 41-44.

[133] J Schneider *World Public Order of the Environment: Towards an International Ecological Law and Organization* (1979) 144.

[134] AS Timoshenko, *supra* n.4, at 138-139. T Yang, *supra* n.67, at 1141-1143. R Falk 'Environmental Protection in an era of Globalization' in G Handl (ed) (1995) 6 *Yearbook of International Law* 3, 21-22. K Sachariew, *supra* n.110, at 33-34, 48.

Another critical function of the institution relates to facilitating capacity building. As experience under international environmental law has shown, a central reason for non-compliance is often a lack of capacity to implement legal directives. Achieving centralisation has the benefit of directing attention to potentially weak areas of regulation and ensuring capacity building in those areas. As a practical example, centralisation would allow for early identification of weak capacity areas through channelling funds to third-party monitoring agencies. In this way, activities potentially detrimental to the environment could be identified at an early stage.

With respect to the construction of this central institution, experience under international environmental law suggests it is essential to incorporate and secure the participation of various stakeholders, most notably, non-governmental organizations.[135] These organizations have proven indispensible to policy making under international environmental law.[136] For example, organizations such as Greenpeace increasingly advocate new international policy agendas and agitate for changes in existing international legal regimes.[137] In addition, these organizations have played a central role in policing implementation and compliance with international environmental law.[138]

Despite the need for the centralised institution, it is important to consider and accommodate the fact that 'the world as a whole contains cultural and national communities representing such radically diverse values that no conception of a legitimate political order can be constructed under which they could all live - a system of law backed by force that was

[135] U Beyerlin, P Stoll, R Wolfrum, *supra* n.129, at 9-10. W Bradnee Chambers 'Towards an Improved Understanding of Legal Effectiveness of International Environmental Treaties' (2003) 16 *Georgetown International Environmental Law Review* 501, 517. K Nowrot, *supra* n.80, at 590. DA Wirth, *supra* n.51, at 777.

[136] X Fuentes 'International Law-making in the field of Sustainable Development: The Unequal Competition Between Development and the Environment' in N Schrijver and F Weiss *International Law and Sustainable Development* (2004) 1, 16-17. DB Hollis, *supra* n.51, at 145, 161-165. T Marauhn, *supra* n.52, at 733, 741-743. U Beyerlin, P Stoll, R Wolfrum, *supra* n.129, at 9-10. W Bradnee Chambers, *supra* n.135, at 517. JL Dunoff (1991), *supra* n.51, at 435-451, 453-455. M Mason, *supra* n.51, at 284. HH Koh, *supra* n.18, at 2656. F Biermann and K Dingwerth, *supra* n.50, at 14-15. K Raustiala, *supra* n.51, at 538. EB Weiss, *supra* n.51, at 693. DA Wirth, *supra* n.51, at 774. A Hurrell and B Kingsbury, *supra* n.93, at 10. B Gemmill and A Bamidele-Izu 'The Role of NGOs and Civil Society in Global Environmental Governance' in D Esty and MH Ivanova *Global Environmental Governance: Options and Opportunities* (2002) 77, 79-85. MJ Kelly, *supra* n.118, at 485-487. D Leary and B Pisupati, *supra* n.53, at 10.

[137] K Nowrot, *supra* n.80, at 590. A Dan Tarlock, *supra* n.50, at 65-66. R Falk, *supra* n.134, at 11-12, 21. K Stairs and P Taylor, *supra* n.24, at 129.

[138] SC Schreck, *supra* n.51, at 257-258, 260-264. M Mason, *supra* n.51, at 294. EB Weiss, *supra* n.51, at 693. G Handl, *supra* n.68, at 17. J Klabbers, *supra* n.53, at 999. D Bodansky, J Brunnee and E Hey, *supra* n.53, at 20. B Stigson 'Sustainable Development' in J Krieger *et al* (2ed) *Oxford Companion to World Politics* (2001) 816. E Louka, *supra* n.4, at 15.

in its basic structure acceptable to them all.'[139] In addition, experience under international environmental law suggests that in certain areas of the earth environmental problems are not wholly dissimilar.[140] Various parts of the environment are interconnected more at the regional and national levels than at the global level in a manner that makes centralised regulation on the global level inadequate or inappropriate.[141]

In light of these factors, adopting the principle of subsidiarity rather than extensive centralisation may be more appropriate. Subsidiarity can be described as the idea that a central authority should have a subsidiary function, performing only those tasks which cannot be performed effectively at a more immediate or local level.[142] It was, arguably, best enunciated in Article 5 of the general principles of the European Union Treaty, which read: 'In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.'[143]

In environmental protection subsidiarity would be based on an appreciation of the value of devolving as much regulatory authority to authorities closest to environmental resources and situations that require protection and attention. As an example, this could be the basis for adopting a regional approach to regulating environmental protection rather than a centralised universal approach.[144] From a practical perspective, subsidiarity could be achieved through provision in replacement international environmental law for the creation of subsidiary, regional or environmental phenomena specific, institutions endowed with executive capabilities similar to those of the central institution.[145]

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[139] T Nagel *Equality and Partiality* (1991) 170.

[140] F Biermann and K Dingwerth, *supra* n.50, at 15.

[141] C Boyden Gray and DB Rivkin, *supra* n.50, at 54. G Handl, *supra* n.68, at 13. P Sand *Lessons Learned in Global Governance* (1990) 12. P Birnie, A Boyle and C Redgwell, *supra* n.16, at 70. CE Bruch and E Mrema *Manual on compliance with and enforcement of Multilateral Environmental Agreements* (2006) 87.

[142] A Reich 'Bilateralism versus Multilateralism in International Economic Law: Applying the Principle of Subsidiarity' (2010) 7 available at http://ssrn.com/abstract=1489845.

[143] Treaty on European Union (EU), 7 February 1992, 1992 O.J. (C 191) 1, 31 *ILM* 253. This is now canvassed under 'The Protocol on the Application of the Principles of Subsidiarity and Proportionality' in the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community 2007/C 306/01.

[144] S Barrett, *supra* n.91, at 17. JL Dunoff, *supra* n.77, at 88-89. F Biermann and K Dingwerth, *supra* n.50, at 15-16.

[145] A Dan Tarlock, *supra* n.50, at 63. EB Weiss, *supra* n.51, at 693. T Marauhn, *supra* n.52, at 738-739.

A benefit of the principle of subsidiarity is that, where subsidiary bodies are well equipped to identify potential areas of environmental deterioration, this means potentially harmful environmental activities and conditions can be identified and addressed at an early stage. A corollary benefit of such an approach is that it creates an obligation to pursue and achieve capacity building within the replacement regulatory framework.

While value attaches to this approach, experience under international environmental law also suggests that even neighbouring communities often find the need to call upon the state to resolve inter-community conflict.[146] Similarly, though 'we may speak of the 'community of nations,' nations are distinguished by their differences, not their commonalities. Commonalities bind communities together to form a nation, differences keep nations apart.'[147] Thus, while subsidiarity may be a necessary component of an ideal regulatory framework, it remains important to preserve hierarchy and centralisation in a manner that ensures that subsidiarity does not compromise the attainment of environmental protection objectives. In practical terms, this means that dissemination of centralised authorities in terms of application of subsidiarity would only be to the extent that this would facilitate the effective attainment of environmental protection objectives. Where this would be threatened, recourse would lie to the policies and jurisdiction of the central institution.

3.3.3. Adherence to laws

In determining the third attribute of an ideal regulatory framework, it is important to consider that securing adherence to international environmental law through enforcement, and complementary techniques, has proven problematic. This means little guidance in constructing an enforcement branch can be drawn from that body of law.[148] Despite this, guidance in constructing the enforcement branch can be drawn from instances of effective enforcement of international environmental law from state practices within their own jurisdictions. This is justifiable on the grounds that integration of national institutions in international systems for enforcement has traditionally been critical to the effective application of the sovereignty-centric international law paradigm.[149] Indeed, in environmental

[146] S Barrett, *supra* n.91, at 17.
[147] *Ibid*.
[148] See Chapter Two.
[149] B Conforti *International Law and the Role of Domestic Legal Systems* (1993).

protection national enforcement has always constituted a key element of pursuing environmental protection under international environmental law.[150]

As such, much guidance in constructing an effective enforcement branch can be drawn from the study of enforcement of international environmental law in the national realm. However, to the extent that enforcement at the international level does not mirror that in domestic jurisdictions, it is necessary to supplement this initial approach with guidance on effective enforcement drawn from international law. To this end, much insight on constructing an effective enforcement branch can be drawn from international trade which features an empowered and relatively effective enforcement model headed by its Dispute Settlement Body.[151]

Importantly however, it is critical to consider four factors. First, experience with international environmental law suggests that failure to meet obligations is often rooted in lack of capacity rather than disregard of regulatory objectives. Considering that an inability to meet obligations would in some cases only come to light once violation of obligations would have occurred, it is important to ensure that lack of capacity is not punished in the same manner as wanton non-compliance.[152] Certainly, an executive branch that would be part of the central institution proposed above would be empowered to pursue capacity building where necessary. However, in complement to this, it is preferable that efforts to secure adherence with replacement international environmental law must remain cognisant of capacity differences and accommodate such failures while highlighting areas of potential capacity building to the executive branch.

Second, in seeking to ensure adherence to the law it must be considered that the main focus of environmental protection is on preventing environmental deterioration.[153] This means it is critical to ensure that the directives of replacement international environmental law are adhered to prior to environmental harm occuring.[154]

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[150] D Bodansky, J Brunnee and E Hey, *supra* n.53, at 681.

[151] MCEJ Bronckers, *supra* n.15, at 548-550.

[152] J Brunnee 'Promoting Compliance with Multilateral Environmental Agreements' in J Brunnee, M Doelle and L Rajamani *Promoting Compliance in an Evolving Climate Regime* (2012) 38, 40-41.

[153] T Crossen, *supra* n.30, at 11. M Ehrmann, *supra* n.110, at 385. M Fitzmaurice and C Redgewell, *supra* n.51, at 39-43. D Freestone, *supra* n.110, at 210. D Zaelke and J Cameron, *supra* n.54, at 251. P Birnie, A Boyle and C Redgwell, *supra* n.16, at 39. E Louka, *supra* n.4, at 50.51.

[154] S Barrett, *supra* n.116, at 139-140. GW Downs, KW Danish and PN Barsoom 'Is the Good News about Compliance Good News anout Cooperation?' (1996) 50 *International Organization* 379, 395. T Crossen, *supra* n.30, at 30-31. DG Victor, *supra* n.104, at 152. M Fitzmaurice and C Redgewell, *supra* n.51, at 39-40. J Klabbers, *supra* n.53, at 999. P Birnie, A Boyle and C Redgwell, *supra* n.16, at 238, 245-246.

Third, it must not be overlooked that regardless of how comprehensive the regulatory framework and how effective efforts at capacity building may prove to be, environmental harm will inevitably occur. Furthermore, where harm does occur, it has often been the case under international environmental law that the nature of violations of the law leading to harm differ in gravity and cover a wide spectrum of offences.[155] Also, it merits consideration that the replacement regulatory framework proposed thus far is based on retaining states. To this end, experience suggests that disputes and conflicts between states will inevitably arise.[156] Importantly, all these factors suggest that effective regulation demands a comprehensive enforcement branch capable of accommodating and accounting for these variables.[157]

Fourth, and in light of the constitutionalism basis of the proposed framework, it must also be considered that, from a constitutionalism perspective, the regulatory framework must also ensure that there is accountability within central institutions of the proposed framework and to states as the governed entities of such framework. As such, transparency requirements would be useful to securing enhanced accountability.

3.3.3.1. An adherence mechanism

In constructing an effective adherence mechanism for replacement international environmental law, the different ways in which adherence to replacement international environmental law needs to be secured as well as the need to appreciate the fact that non-compliance may be due to a lack of capacity, suggest that the best approach to enforcement is one that borrows from central tenets and principles of Ayres and Braithwaite's enforcement pyramid.[158]

It must be noted that the pyramid was designed with national regulation in mind. However, replacement international environmental law's focus on hierarchy and centralisation brings this manner of regulation closer to that seen in national regulation. Indeed, the preceding discussion has made reference to necessary reliance on subsidiarity,

[155] EJ Ringquist and T Kostadinova, *supra* n.50, at 87. T Yang, *supra* n.67, at 1151-1153.

[156] P Sands 'Enforcing Environmental Security' in P Sands *Greening International Law* (1993) 50, 52. E Louka, *supra* n.4, at 55. T Crossen, *supra* n.30, at 11. D Freestone, *supra* n.110, at 210. DG Victor, *supra* n.104, at 149. P Birnie 'International Law and Solving Conflicts' in JE Carroll (ed) *International Environmental Diplomacy* (1988) 95, 105.

[157] M Mason, *supra* n.51, at 296. A von Bogdandy, *supra* n.9, at 230. A Boyle, *supra* n.50, at 231, 233. RR Churchill and G Ulfstein, *supra* n.121, at 629. GW Downs, KW Danish and PN Barsoom, *supra* n.154, at 383. HH Koh, *supra* n.18, at 2639. D Freestone, *supra* n.110, at 195. P Okowa in M Evans (ed) *Remedies in International Law* (1998) 157, 158. DW Drezner 'Bargaining, Enforcement and Multilateral Sanctions: When Is Cooperation Counterproductive?' (2000) 54 *International Organization* 73, 83.

[158] I Ayres and J Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (1992).

community-based and market-based regulation in a manner that makes securing adherence to the law within states an important consideration in constructing the ideal regulatory framework. In addition, as noted above, international environmental law is often enforced on the basis of the pyramid or frameworks that resemble or borrow tenets of the pyramid, in a manner that justifies drawing guidance from this approach.

Thus, borrowing from central aspects of Ayres and Braithwaite's pyramid approach, the primary focus of the adherence mechanism for replacement international law, particularly within states, should be on encouraging adherence to the law by all subjects of the law in order to secure compliance. In the initial phases this would be pursued through techniques such as taxation, licensing, monitoring and reporting at the local state level. In the latter phases of the adherence mechanism, fines would be available for non-compliance. These would be complemented by more stringent sanctions for continued non-compliance.[159]

Despite this initial focus on conciliatory methods and techniques geared toward encouraging compliance, where disputes arise, non-compliance persists, or, results in extensive environmental harm, this pyramid based approach means emphasis must, in the first instance, be placed on non-confrontational dispute resolution and adjudicatory techniques. This can be achieved through recourse to various methods of alternative dispute resolution such as conciliation, mediation and arbitration.[160] The nature of the environmental protection effort means that a necessary quality of all these methods is that they must be capable of granting urgent preventative relief when this is necessary to halt environmentally detrimental activities.[161] A benefit of such an approach is that it allows for non-compliance due to lack of capacity to be brought to light at an early stage, allowing for capacity building while avoiding punitive measures.

Regardless of how comprehensively this mechanism may be structured, it is inevitable that serious conflicts will arise and serious violations causing extensive harm may occur. To accommodate this, replacement international environmental law must also make provision for formal adjudicatory techniques under this adherence mechanism. This could be achieved

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[159] *Ibid*, at 25.

[160] DA Wirth, *supra* n.51, at 779-780. P Sands, *supra* n.156, at 56-57. P Birnie 'International Environmental Law: Its Adequacy for Present and Future Needs' in A Hurrell and B Kingsbury *The International Politics of the Environment* (1992) 53, 69. P Birnie, A Boyle and C Redgwell, *supra* n.16, at 39, 264-266. E Louka, *supra* n.4, at 55-57. C Chinkin 'Alternative Dispute Resolution Under International Law' in M Evans (ed) *Remedies in International Law* (1998) 157. SA Hajost and QJ Shea 'An Overview of Enforcement and Compliance Mechanisms in International Environmental Agreements' available at: http://www.inece.org/1stvol1/hajost.htm

[161] J Goldstein, M Kahler, R Keohane and AM Slaughter, *supra* n.19, at 194. P Birnie, A Boyle and C Redgwell, *supra* n.16, at 226.

through a comprehensive courts system. For reasons of efficacy and practicality, it is essential to incorporate national court systems in this adjudicatory and dispute resolution role. One of the main benefits of such an approach is that it would allow for reliance on the civil and criminal jurisdiction of these courts in pursuing environmental protection. In addition, these courts would offer an avenue for relief and dispute resolution at the local level.[162] Thus, harmed parties within states or states themselves could bring actions against perpetrators of environmental harm in these *fora* where applicable.

Despite the benefits of reliance on alternative dispute resolution mechanisms within states and domestic court structures, in terms of the pyramid approach these *fora* would only constitute the lower tiers of the courts system. This is because the dangers of lack of capacity, politicisation of regulatory bodies and inadequate expertise suggest the need for superior, objective and specialised courts at the international level.[163]

It is also important to bear in mind that within a constitutionalism based regulatory framework the judiciary plays a critical accountability role through performing checking functions on the legislature and the executive. Thus, it is critical in addition to incorporate a comprehensive courts model as part of enforcement and securing accountability.

In constructing this tier of the courts system, the precedent of enforcement under international trade is particularly instructive.[164] Ideally, central courts under the adherence mechanism would be modelled on the same principles as those of the Dispute Settlement Body of the World Trade Organization. Thus, with regard to their functions, the preventative focus of environmental protection suggests that these courts' focus would remain on non-confrontational techniques. This would be achievable through an emphasis on conciliation in the first instance. Failing this, litigation would ensue. Importantly in environmental protection, a necessary aspect of litigation at this level is that it should be complemented by a liberal approach to standing allowing access to all stakeholders and not just states.[165] A corollary to this, and in light of the fact that financial barriers may make it difficult for claimants to file suits for the purpose of protecting the environment, it is critical that

[162] M Mason, *supra* n.51, at 289. P Birnie, *supra* n.156, at 105. A Nollkaemper, *supra* n.54, at 184. RR Churchill and G Ulfstein, *supra* n.121, at 643-647. WJ Aceves, *supra* n.3, at 262. SA Hajost and QJ Shea, *supra* n.160.

[163] MJ Kelly, *supra* n.118, at 480.

[164] ML Busch and E Reinhardt 'Trade Brief on the WTO Dispute Settlement' *SIDA Publications* (2004) available at: http://www9.georgetown.edu/faculty/mlb66/SIDA.pdf

[165] M Mason, *supra* n.51, at 298-300. B Gemmill and A Bamidele-Izu, *supra* n.136, at 79. A Cardesa-Salzman, *supra* n.101, at 8. OA Hathaway 'Do Human Rights Treaties Make a Difference' (2002) 111 *Yale Law Journal* 1935, 2023. M Anderson, *supra* n.54, at 404-408. A Nollkaemper, *supra* n.54, at 181-184. P Birnie, A Boyle and C Redgwell, *supra* n.16, at 214-225, 253-254, 262.

provision must be made for measures to assist parties in getting to court.[166] Furthermore, interested or harmed parties would ideally have a right of access and appeal to these superior courts. Alternatively, in serious matters direct access to the superior courts would also need to be available to all parties. In addition, the courts would need to be open to allowing contributions from interested parties in the form of *amicus curiae* briefs.[167] This would follow the precedent set by the Dispute Settlement Body of the World Trade Organization in the *Shrimps/Turtles* case where it was held that it was within the powers of of the body to decide whether or not to accept such briefs.[168]

However, two factors also merit consideration. First, in light of its focus on conciliation, the court system may fail to reach satisfactory conclusions for all parties. Second, disputes of an international nature that exceed the capacities of regional or environmental phenomena specific courts may arise. Thus, in addition to these tiers of the courts system, there is also need for another tier that features a superior appellate court to adjudicate over matters in which effective relief would not have been achieved in the court structures or in which the matters concerned would exceed the jurisdictions of the other tiers.

In structuring this court, much guidance can be drawn from the precedent of the Dispute Settlement Body of the World Trade Organization which features a powerful Appellate Body with powerful enforcement capabilities.[169] Thus, replacement international environmental law would ideally make provision for an overarching supreme court.[170] This supreme court would have jurisdiction over all environmental disputes as a court of first instance in 'global-level' matters. In addition, rights of appeal would flow to this court from all subsidiary institutions.[171] The fact that the supreme court serves as a court of last resort means, ideally, there would be an accompanying obligation on all stakeholders to exhaust all other remedies prior to pursuing relief or redress in the supreme court. Importantly however,

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[166] JW Dacyl, *supra* n.3, at 152-153. A Cardesa-Salzman, *supra* n.101, at 8. BB Ghali 'A Grotian Moment' (1995) 18 *Fordham International Law Journal* 1609, 1611. FFL Kirgis, *supra* n.110, at 528-530. M Mason, *supra* n.51, at 290. A Dan Tarlock, *supra* n.50, at 64, 73. DA Wirth, *supra* n.51, at 769. T Yang, *supra* n.67, at 1172. D Zaelke and J Cameron, *supra* n.54, at 285. M Koskenniemi, *supra* n.3, at 128. K Stairs and P Taylor, *supra* n.24, at 140.

[167] M Mason, *supra* n.51, at 293. K Nowrot, *supra* n.80, at 590. A Dan Tarlock, *supra* n.50, at 67-73. DA Wirth, *supra* n.51, at 790-791. B Gemmill and A Bamidele-Izu, *supra* n.136, at 95. M Anderson, *supra* n.54, at 404-408. P Sands, *supra* n.59, at 198-200.

[168] *Import Prohibition of Certain Shrimp and Shrimp Products WTO Appellate Body* (1998) WT/DS58/AB/R; 109.

[169] RH Steinberg, *supra* n.19, at 247. JP Trachtman, *supra* n.20, at 10-15.

[170] P Sands, *supra* n.59, at 228. M Ehrmann, *supra* n.110, at 382. A Nollkaemper, *supra* n.54, at 174. P Birnie, A Boyle and C Redgwell, *supra* n.16, at 255-257.

[171] A Nollkaemper, *supra* n.54, at 166 166-167.

the court must be empowered to compel all parties to bring their actions in accordance with the law.

In light of the latter stages of this enforcement branch including an overarching supreme court, some consideration must be given to the debate over the need for specialised international environmental courts.[172] For instance, the question of whether environmental issues carry a case-load that justifies such an approach has previously been contentious.[173] This has been supported by the fact that the special chamber for environmental matters established by the International Court in 1993 under Article 26 (1) of its Statute had to be abolished after thirteen years because no cases had been brought before it.

Alternatively, the merits of such a court have been questioned on the grounds that it is not easy to identify what is an environmental case. For instance, it has been argued that cases may raise environmental issues, whether legal or factual, but they rarely do so in isolation. To illustrate this, the *Gabcikovo-Nagymaros Case* has been cited as an example of a case which is as much about the law of treaties, international watercourses, state responsibility, and state succession as it is about environmental law. This has formed the backbone of the argument that parties in environmental disputes will often need a generalist court rather than a specialist one.[174]

It has also been contended that an international court is unnecessary to the extent that international dispute resolution forums are often most effective when they have a special body of law to apply, usually a treaty such as the European Convention on Human Rights, the United Nations Convention on the Law of the Sea or the General Agreement on Tariffs and Trade. In such instances, such forums carry much-needed specialist expertise, procedures and importantly, they relieve the International Court of Justice of a burden of litigation it could not sustain. Unlike these bodies of law however, international environmental law is not a self contained, codified system. Settling environmental disputes, as with most forms of international dispute resolution, requires a wide-ranging grasp of international law. In addition, the jurisdiction of such a court would necessarily be shared by specialized tribunals such as the European Court of Human Rights, the International Tribunal on the Law of the Sea, or the World Trade Organization's Appellate Body. This leaves little room to justify a dedicated environmental court.[175]

[172] P Birnie, A Boyle and C Redgwell, *supra* n.16, at 70.
[173] P Okowa, *supra* n.157, at 157.
[174] *Ibid.*
[175] *Ibid,* at 168-172.

These arguments certainly hold true under international environmental law. However, their potency would diminish in an ideal regulatory framework based on replacement international environmental law. Progression to such a universal body of law would create opportunities for violations of international environmental law to come to light in a manner that would inevitably increase the case-load for the envisaged supreme court. In addition, replacement international environmental law would create a singular body of law on which adjudication would be based, negating the thrust of some of the critique. While the issues relating to choice of forum would persist, under a hierarchical and centralised regulatory framework based on replacement international environmental law, there would be greater clarity over matters that would decidedly fall under the jurisdiction of the international environmental courts. As such, while the critique of such an approach may hold true under international environmental law, in the context of replacement international environmental law, much of the potency of such critique diminishes.

3.4. Conclusion

It has been argued that an international constitutionalism regulatory framework can be constructed to fill the void that departure from an ill-suited international environmental law paradigm would create. Central and constitutionalism-based aspects of such a replacement framework would be adherence to the rule of law, separation of powers, and a comprehensive system of accountability. This would imbue the framework with legitimacy. This approach formed the basis of the construction of an ideal replacement regulatory framework that, it is submitted, could secure consistently effective environmental protection. Central features of this framework, based on a consideration of environmental protection and tenets of constitutionalism, would be hierarchy, centralisation and effective accountability.

Certainly, developments in international environmental law suggest that such an approach is feasible. For instance, it has previously been noted that 'despite ebbs and flows in international concern about the environment, there has been a remarkable growth, overall, in the number and range of international instruments and institutions addressing environmental problems.'[176] Indeeed, states are currently

[176] D Bodansky, J Brunnee and E Hey, *supra* n.53, at 3. E Louka, *supra* n.4, at 27.

> "subject to obligations of restraint and control over the extraterritorial effects of activities within their jurisdiction or control, as well as in the exploitation of shared natural resources and common spaces but, more significantly, notions of common heritage, common interest, common concern, and inter-generational equity have extended the scope of international law and legitimate interest of other states into the management of every state's domestic environment, at least in respect of certain issues such as global climate change and conservation of biodiversity."[177]

Thus, sovereignty is no longer just the legal basis of exclusion.[178] It now forms the legal basis of inclusion, or at the very least, of a commitment to co-operate for the good of the international community at large.[179] The present reality is one in which states have grown increasingly amenable to qualification, manipulation and limitation of sovereignty in order to facilitate the achievement of effective environmental protection.[180] Furthermore, trends in environmental protection that have seen a general growth of the environmental conscience suggest that it is conceivable that states may acquiesce in this ideal regulatory framework based on replacement international environmental law.[181] This can be taken to be evidenced by states' agreement to increasing numbers of multilateral environmental agreements in which they have seemingly accepted significant constraints on future freedom of action.[182] These agreements point to the willingness of states to cooperate for the achievement of desirable outcomes. As an example, developed states have increasingly been willing to

[177] P Birnie, A Boyle and C Redgwell, *supra* n.16, at 41.
[178] KW Abbott, *supra* n.25, at 507.
[179] G Handl, *supra* n.68, at 32. A Perez 'Who Killed Sovereignty? Or Changing Norms Concerning Sovereignty in International Law'(1993) 14 *Wisconsin International Law Journal* 463, 467.
[180] A von Bogdandy, *supra* n.9, at 227-229. EJ Criddle and E Fox-Decent 'A Fiduciary Theory of Jus Cogens' (2009) 34 *Yale Journal of International Law* 331, 357. JL Dunoff (1995), *supra* n.51, at 241. LR Helfer, *supra* n.19, at 194. SD Krasner, *supra* n.127, at 116. JJ Merriam 'Kosovo and the Law of Humanitarian Intervention' (2001) 33 *Case Western Reserve Journal of International Law* 111, 116. K Raustiala, *supra* n.51, at 417-418. M Loughlin 'The Tenets of Sovereignty' in N Walker (ed) *Sovereignty in Transition: Essays in Eurpean Law* (2003) 55, 82-83, 86. G Hafner and HL Pearson 'Environmental Issues in the Work of the International Law Commission' in J Brunnee and E Hey (eds) (2000) 11 *Yearbook of International Environmental Law* 1, 16. WP Nagan and C Hammer 'The Changing Character of Sovereignty in International Law and International Relations' (2003) 18: available at: http://milestonesforlife.com/thetaxistand/sov.pdf
[181] E Hey 'International Institutions' in D Bodansky, J Brunnee and E Hey *The Oxford Handbook of International Environmental Law* (2007) 750, 755. A Hurrell and B Kingsbury, *supra* n.93, at 16-17. L Susskind and C Ozawa, *supra* n.51, at 154. M El-Ashry 'Recommendations from the High-level Panel on System-wide Coherence-Section C on Environment' in L Swart and E Perr *Global Environmental Governance: Perspectives on the Current Debate* (2007) 7.
[182] S Barrett, *supra* n.91, at 269-270.

compensate developing states for their participation in cooperative arrangements which carry the promise of global beneficial environmental effects but that may, at the same time, slow the pace of growth.[183] Another indicator of possible state acquiescence to this ideal regulatory framework is the fact that within contemporary multilateral environmental agreements, states have been willing to establish Conferences of the Parties which often have extensive powers that allow for their decisions to enter into force without ratification by the parties.[184]

While these developments support the feasibility of this alternative regulatory framework, it must not be overlooked that significant practical difficulties attach to this approach. These difficulties are rooted in the fact that sovereignty has traditionally put states

> "in a legal position within their own respective territories and within most of the great common area of the planet, to conduct such activities injurious to the environment as they pleased, up to the limits permitted by the state of development of the relevant technologies and by their own unilateral assessment of their political, economic, military, or other requirements."[185]

As such, in the current sovereignty-centric context, it cannot be overlooked that experience with international environmental law suggests that achieving a preconceived ideal regulatory framework, such as the one proposed here, is that such a framework must be agreed to by states. Such agreement is often based on significant collaboration and compromise that is difficult to achieve.[186] Thus, while acquiescence in a replacement regulatory framework remains feasible, it is more likely that similar compromises to the ones that have stunted progression to effective regulation under international environmental law would limit the

[183] E Louka, *supra* n.4, at 11.

[184] D Caron 'Protection of the Stratospheric Ozone Layer and the Structure of International Environmental Lawmaking' (1991) 14 *Hastings International and Comparative Law Review* 755. G Palmer 'New Ways to Make International Environmental Law' (1991) 86 *American Journal of International Law* 259, 273.

[185] JL Hargrove (ed) *Law, Institutions and the Global Environment* (1972) 93.

[186] J Atik 'Democratizing the WTO' (2001) 33 *George Washington International Law Review* 451, 454. D Bodansky 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law' (1999) 93 *American Journal of International Law* 596, 598. D Bodansky, *supra* n.26, 705-706. JM Coicaud 'International Democratic Culture and its Sources of Legitimacy: The Case of Collective Security and Peacekeeping Operations in the 1990s' in JM Coicaud and V Heiskanen *The Legitimacy of International Organizations* (2001) 256, 259. TM Franck (1990), *supra* n.21, at 17-20, 24-26. TM Franck (2006), *supra* n.21, at 93. J Brunee, *supra* n.57, at 10.

achievement of a replacement regulatory framework.[187] More specifically, the process of securing agreement would likely limit the autonomy of the intended regulatory framework.[188] Thus, rather than autonomous and ecocentric regulation, there would be need to rely on frequent renegotiation to accommodate necessary changes that are part of the evolutionary character of environmental protection.[189] This would lead to a rigid regulatory framework.[190]

Another difficulty with realising replacement international environmental law is that central institutions of the framework effectively take democratic power away from elected governments and vest it in institutions that potentially suffer from democratic deficiency.[191] Certainly, experience with the regulation of human rights and international trade suggests that the established comprehensive framework of accountability as well as incorporating the participation of various stakeholders as critical factors that imbue the framework with legitimacy.[192] However, experience in international relations, where the illegitimacy of external regulatory frameworks is frequently alleged, suggests a greater likelihood of calls for illegitimacy.[193] This would likely limit the willingness of states to cede authority to such an externally imposed regulatory framework.[194] The result therefore, is that as long as

[187] E Miles *Environmental Regime Effectiveness: Confronting Theory with Evidence* (2001) xii.

[188] E Hey, *supra* n.181, at 755-756. A Hurrell and B Kingsbury, *supra* n.93, at 5. TM Franck (2006), *supra* n.21, at 199.

[189] MJ Kelly, *supra* n.118, at 481-482. RR Churchill and G Ulfstein, *supra* n.121, at 628-629, 632. LR Helfer, *supra* n.19, at 196. E Hey, *supra* n.181, at 755. D Bodansky (2007), *supra* n.26, at 713. P Dupuy 'Soft Law and International Law of the Environment' (1991) 12 *Michigan International Law* 420, 431. D Freestone, *supra* n.110, at 201-202. K Kline and K Raustiala, *supra* n.55, at 6. D Bodansky, J Brunnee and E Hey, *supra* n.53, at 8. A Hurrell and B Kingsbury, *supra* n.93, at 15-16, 23. L Susskind and C Ozawa, *supra* n.51, at 143. M Poustie, *supra* n.68, at para 13. J Brunee, *supra* n.57, at 21-33.

[190] BH Desai, *supra* n.108, at 43-44. P Birnie, A Boyle and C Redgwell, *supra* n.16, at 11-12. R Falk, *supra* n.2, at 790-791. D Bodansky, J Brunnee and E Hey, *supra* n.53, at 7-8. OR Young 'The Effectiveness of International Institutions: Hard cases and Critical Variables' in JN Rosenau and O Czempiel (eds) *Governance Without Government: Change and Order in World Politics* (1991) 160, 161. C Streck 'Global Public Policy Networks as Coalitions for Change in Global Environmental Governance' in D Esty and MH Ivanova *Global Environmental Governance: Options and Opportunities* (2002) 121, 122. AM Burley, *supra* n.9, at 1923-1926. R Axelrod and R Keohane 'Achieving Cooperation Under Anarchy: Strategies and Institutions' (1985) 38 *World Politics* 226, 244. EJ Ringquist and T Kostadinova, *supra* n.50, at 88. KW Danish 'International Relations Theory' in D Bodansky, J Brunnee and E Hey (eds) *The Oxford Handbook of International Law* (2007) 205, 223.

[191] J Brunee, *supra* n.57, at 10. HH Koh, *supra* n.18, at 2619. J Atik, *supra* n.186, at 456-460.

[192] X Fuentes, *supra* n.136, at 15. D Bodansky (2007), *supra* n.26, at 710. TM Franck (1990), *supra* n.21, at 17-20, 24-26.

[193] HH Koh, *supra* n.18, at 2641-2643. D Bodansky (2007), *supra* n.26, at 714.

[194] J Atik, *supra* n.186, at 456-460. D Bodansky (2007), *supra* n.26, at 600-603. TM Franck, *supra* n.22, at 93.

sovereignty subsists in international ordering, states may not be persuaded to pursue such a framework.[195]

In theory, the difficulties that attach to proactively pursuing and achieving an international constitutionalism regulatory framework in a practical manner are to be expected. Indeed, they are consistent with the earlier assertion that even in human rights and international trade constitutionalism regulatory frameworks were not explicitly pursued as such. Rather, they emerged through a protracted process of encouraging and persuading states to pursue the most ideal regulatory frameworks. Thus, while the qualities of what would be an ideal regulatory framework in environmental protection may be clear, achieving this in practice requires a framework for persuading states to pursue this framework. It is instructive therefore to turn to international relations theories, which have looked extensively at how states might be persuaded to pursue an ideal regulatory framework which would lead to consistently effective environmental protection.

[195] A von Bogdandy, *supra* n.49, at 227-229. EJ Criddle and E Fox-Decent, *supra* n.180, at 357. E Engle, *supra* n.127, at 45-47. H Stacy 'Relational Sovereignty' (2003) 5 *Stanford law Review* 2029, 2036. SD Krasner, *supra* n.127, at 116. LR Helfer, *supra* n.19, at 194. T Marauhn, *supra* n.52, at 727, 729-732. M Loughlin, *supra* n.180, at 82-83, 86. GH Aldrich and CM Chinkin, *supra* n.32, at 90. AM Burley, *supra* n.9, at 1923-1926. WP Nagan and C Hammer, *supra* n.180, at 18.

Chapter Four

A practical approach to effective regulation of environmental protection and some theoretical perspectives

'There are major limitations in the international legal system some are systemic, such as the sovereignty of the national state, which results in the absence of an established central legislature comparable to that existing in national systems; the absence of a compulsory, or even widely used, judicial system, coupled often with the absence of effective machinery to enforce international law. However, in the absence of a central legislative body, the international community has developed its own systems of norm creation of international law-making and these are the fundamental law-making processes of international environmental law'[1]

4.1. Introduction

The preceding chapter argued that achieving effective environmental protection is predicated on persuading states to pursue progression to an international constitutionalism regulatory framework. While this is a conclusion seemingly supported by progression to effective regulatory frameworks in human rights and international trade, achieving this in practice is a more problematic issue. It is submitted that one way of establishing how this might be achieved is through exploring theoretical perspectives in International Relations Theory that have considered how states could be persuaded to pursue an ideal regulatory framework such as that proposed.

This approach presents one notable difficulty however. There has been no theorising on how states could be persuaded to pursue progression to international constitutionalism

[1] D Freestone 'The Road from Rio: International Environmental Law After the Earth Summit' (1994) 6 *Journal of International Environmental Law* 193, 196-197.

regulatory frameworks. Rather, available theories have explored how states might be persuaded to pursue effective regulatory frameworks. Thus, while the intention is to consider how states might be persuaded to pursue an international constitutionalism regulatory framework, greater value attaches to an objective analysis of how states might be persuaded to pursue any ideal regulatory framework. Once this is achieved, it can then be explored whether the international constitutionalism regulatory framework, proposed in the previous chapter, is indeed an ideal framework. If so, this allows for some analysis of where such a framework fits in the context of the drive to persuade states to pursue an ideal regulatory framework.

Having noted this, it is also important to note that there have been various theories to explain how states might be persuaded to pursue effective regulatory frameworks. It exceeds the scope of the thesis to explore all of these theories. In order to narrow down the ambit of the discussion it is useful to rely on aspects of the preceding discussion to establish relevant theories. For instance, the argument that consistently effective environmental protection depends on an inclusive approach that incorporates all stakeholders aligns with aspects of Slaughter's liberalism argument in international relations theory. Similarly, it has been argued that achieving consistently effective regulation in environmental protection is dependent on persuading the greater body of states to adopt an ecocentric regulatory framework. This suggests that social processes that persuade states, as opposed to power politics, are critical to achieving an ideal regulatory framework. This is an issue that has received extensive attention from the constructivist school of international relations. Lastly, even if states could be persuaded to pursue such an ideal regulatory framework, it is essential to explore how these social processes could form the basis of a transition to actual legal regulation. This is an area that has been extensively explored by Brunnee and Toope through their interactional law theory.

Ultimately, it is from these theories that guidance on how consistently effective environmental protection could be achieved will be drawn. Importantly, in discussing these theories primary focus is drawn to the core principles of such theories. For illustrative purposes, reliance will be placed on the previous fields of human rights and international trade. If the argument for an international constitutionalism regulatory framework is consistent with perspectives drawn from theoretical analysis, then these theories can be relied on to explain how states might be persuaded to pursue progression to an international constitutionalism regulatory framework.

4.2. Slaughter's liberalism

Slaughter's account of liberalism is based on the observation that liberal states embody six essential attributes. First, liberal states feature the existence of peaceful, albeit not harmonious, relationships between states. Second, these states typically feature adherence to fundamental tenets of constitutionalism such as separation of powers, the protection of fundamental civil and political rights, and the rule of law overseen by an independent judiciary. A third trait of liberal states is that they carry state-independent market economies structured around private property rights. Fourth, such states carry a dense network of transnational economic and social relations between individuals and groups. The fifth characteristic of liberal states is that they feature informal relations between sub-units of states. Such sub-units are typically separated into legislative, executive, and judicial functions. Finally, it is common among liberal states to recognize that domestic political issues are as important to foreign policy as national security interests. Consequently, the distinction between foreign and domestic policy is not prioritised.[2]

Based on these characteristics of liberal states, Slaughter argues that three core assumptions can be made about international regulation.[3] First, the primary actors in international life are individuals and groups who act both within their own domestic political structures and transnationally. Second, states and these primary actors are in a complex relationship of representation and regulation. Thus, states often represent individuals and groups. However, they also regulate their activities. Third, the preferences of states as expressed in international relations are a function of the demands and interests of individuals and groups within the relevant states. Thus, state preferences will vary over time depending upon the demands of domestic constituencies.

Slaughter uses these assumptions as the basis for the argument that domestic rather than international institutions are the main instruments by which a system of international law is constructed and applied.[4] As such, state functions are ancillary to the functioning of the

[2] AM Slaughter 'International Law in a World of Liberal States' (1995) 6 *European Journal of International Law* 503, 511-514.
[3] *Ibid*, at 516-534. AM Slaughter 'A Liberal Theory of International Law' (2000) 94 *American Journal of International Law* 240, 240-241, 242.
[4] AM Slaughter, *supra* n.3, at 244.

system.[5] Thus, rather than a focus on international processes, focus should be drawn to developing ties and linkages among domestic regulatory frameworks.[6] For instance, Slaughter perceives liberal states as being committed to the rule of law, nationally and internationally, there is no need for international courts to play a major role in upholding an international rule of law. Thus, where sufficient progress is made, international institutions become redundant. Rather, there are three necessary levels of law to govern liberal states

First, Slaughter makes the observation that laws which directly regulate individuals or groups are more likely to get to the root of a particular problem and gain success. As such, she argues that in pursuing effective regulation, there is a need for legal and non-legal rules generated between individuals and groups in their transnational relationships. For example, such rules range from accounting standards to international contracts. Importantly, such an approach allows individuals and groups to choose the norms and institutions they consider best suited to govern their relationships. For instance, in commercial contracts they might choose the law of a particular jurisdiction and the courts of another. Alternatively they might prefer international commercial arbitration, with the award ultimately enforced by a domestic court.[7] Importantly, states retain some critical functions. For instance, states typically welcome private arrangements ond often offer rules and frameworks to complement private regulation. Alternatively, states can underpin private arrangements with assured exercise of public authority to enforce private arrangements. Lastly, states play a central role in regulating conflicts between different private actors.[8]

Second, a focus on state-society relations also leads to a focus on the activities of different state institutions to regulate relations among themselves and with individuals and groups. As such, transnational law which is designed to reach actors beyond national borders is important. Such transnational law can be achieved through domestic law and public or private international law. Importantly, state institutions establish the respective limits of their authority and influence. In addition, guidance can be drawn from transgovernmental regulatory organizations such as the Basel Committee.[9]

[5] *Ibid*, at 244.
[6] *Ibid*, at 246.
[7] *Ibid*, at 243-244.
[8] *Ibid*, at 244.
[9] *Ibid*, at 245.

Third, a focus on regulatory efforts driven by individuals or groups necessitates public international law norms of treaty law and custom which regulate relationships between states. In these frameworks, states are agents of individuals or groups serving to facilitate transnational activity initiated by individuals or groups. In this context, international law's role is to harmonize the efforts of individual state institutions in regulating transnational activity through domestic legal systems. With regard to enforcing this third level of law, Slaughter argues that this is a matter best left to the domestic courts of liberal states rather than to the classical horizontal modes of enforcement of public international law.[10]

Importantly, Slaughter argues that the theory applies to all states. To this end, she notes, 'totalitarian governments, authoritarian dictatorships, and theocracies can all be depicted as representatives of some subset of actors in domestic and transnational society, even if it is a very small or particularistic slice. The preferences of such states are likely to differ from the preferences of states with more representative governments and more diverse and complex societies, but not necessarily and not on all issues.'[11] Thus, from Slaughter's perspective, how states behave depends on how they are constituted.[12]

4.2.1. Limitations

Slaughter's liberalism theory has been critiqued on various grounds.[13] Importantly, detailed exploration of this critique exceeds the scope of the thesis. It is more pertinent to critique the theory to the extent that it argues against the need for an international constitutionalism regulatory framework as proposed in the thesis.

To this end, the value in this approach lies in its attentiveness to the role of individuals or groups within states as well as the influence of state institutions in progressing regulatory efforts. However, the difficulty with this approach is that it overlooks the value of coordinated action at the international level that may or may not be motivated by individuals or groups. This is particularly true in environmental protection where there is often a need to

[10] *Ibid*, at 245.
[11] AM Slaughter, *supra* n.2, at 509.
[12] *Ibid*, at 537.
[13] For a summary of such critique, see JE Alvarez 'Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory' (2011) 12 *European Journal of International Law* 183, 192.

establish fixed understandings of what should constitute legal practice.[14] Thus, a focus on the activities of individuals or groups may mean that attention is drawn only to issues that matter to such individuals or groups. Alternatively, focus is drawn to the interests of those individuals or groups and not to matters of common concern over which no individual or group has a particular concern. Similarly, where the available knowledge is contested or precautionary, it may be difficult for individuals or groups to gather sufficient interest in an issue.[15]

These factors suggest that, in environmental protection at least, while recourse should be had to the activities of individuals or groups, there needs to be more of an effort to consider that 'a distinguishing characteristic of environmental problems, that they adhere to ecosystems and geographic features rather than political boundaries, often renders national and local actions ineffective and frequently necessitates international cooperation.'[16] Indeed, Brunnee and Toope argue that given the large number of actors in international society and the relatively limited opportunities for direct interaction, 'snap shots' of the common ground will often be needed to advance regulatory efforts. Alternatively, it may be important to establish standards that go beyond what private groups may pursue, leading to more effective environmental protection.[17]

To illustrate, it is useful to note the example of human rights. As highlighted in Chapter Two, the development of the human rights regime certainly benefitted from the activities of individuals or groups such as the Catholic Church, the American Institute of Law, and the International Labour Organization.[18] However, the success of the international human rights movement since then has arguably depended on 'snapshots' of common ground, notably in the compendium of documents which constitute the 'International Bill of Human Rights.'[19] This has played a central role in coordinating human rights protection

[14] J Brunnee and SJ Toope 'Interactional International Law: An Introduction' (2011) 3 *International Theory* 301, 313.
[15] See Chapters Two and Three.
[16] K Raustiala 'The 'Participatory Revolution in International Environmental Law' (1997) 21 *Harvard Envtironmental Law Review* 537.
[17] J Brunnee and SJ Toope, *supra* n.14, at 315.
[18] See Chapter Two.
[19] JW Dacyl 'Sovereignty versus Human Rights: From Past Discourses to Contemporary Dilemmas' (1996) 9 *Journal of Refugee Studies* 136, 144-146. D Held 'Law of States, Law of Peoples: Three Models of Sovereignty' (2002) 8 *Legal Theory* 1, 9. M Koskenniemi 'The Future of Statehood' (1991) 32 *Harvard International Law* 397, 397-398. E Petersmann 'How to Reform the UN System? Constitutionalism, International Law and International Organizations' (1997) 10 *Leiden Journal of International Law* 421, 429. WJ

efforts at international level through establishing clarity on what human rights discourse should focus on.[20] It is an approach similar to this that would be beneficial to environmental protection rather than exclusive reliance on the creation of standards by individuals and groups as advocated under Slaughter's approach.

These are merely some of the limitations of Slaughter's approach as applied to environmental protection. However, they do not diminish the argument on the value that the activities of individuals, groups and state institutions acting within states and acting transnationally hold to securing progress to effective regulation. As such, it is left to explore other theories that acknowledge the impact of the activities of individuals, groups and state institutions, while simultaneously acknowledging the value that attaches to achieving international consensus.

4.3. Constructivism

Constructivists are attentive to the sources of change in international relations. Although power is not irrelevant to constructivists, they emphasize the impact of ideas exchanged through discourse as critical to shaping beliefs and interests in a manner that leads to accepted norms of behaviour.[21] These norms then form the basis of progression to effective regulatory frameworks.[22]

By way of example, a very broad interpretation of constructivism would hold that early regulation of human rights and international trade fell within the general and broad *grundnorm* that states will respect each other's autonomy.[23] This norm is regulated under the

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Aceves 'Relative Normativity: Challenging the Sovereignty Norm Through Human Rights Litigation' (2002) 25 *Hastings International and Comparative Law Review* 261, 265-269. S Gardbaum 'Human Rights and International Constitutionalism' in JL Dunoff and P Trachtman *Ruling The World? Constitutionalism, International Law and Global Governance* (draft) (2007) 4-5: available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1088039

[20] HP Schmitz and K Sikkink 'International Human Rights' in W Carlsnaes, T Risse and BA Simmons (eds) *Handbook of International Relations* (2007) 517.

[21] For a history see, S Guzzini 'A Reconstruction of Constructivism in International Relations' (2000) 6 *European Journal of International Relations* 147.

[22] SM Walt 'International relations: One world, Many Theories' (1998) *Foreign Policy* 4: available at: http://www.columbia.edu/itc/sipa/S6800/courseworks/foreign_pol_walt.pdf

[23] EJ Criddle and E Fox-Decent 'A Fiduciary Theory of Jus Cogens' (2009) 34 *Yale Journal of International Law* 331, 334. S Krasner (ed) *International Regimes* (1983) 2.

sovereignty-centric international law paradigm.[24] The paradigm directs that in instances where states act contrary to the *grundnorm*, punishment under the sovereignty-centric international law paradigm ensues.[25]

Inevitably, regulation under the sovereignty-centric international law paradigm is most efficient when addressing issues in which states are expected to respect each other's autonomy.[26] However, this proved inconsistent with effectively regulating human rights and international trade. An important aspect of the formative phases of pursuing effective regulation in these fields was recognition of the fact that both fields focused on matters that exceeded simple non-intervention in other states' practices and policies.[27] For instance, most of the more recognisable fundamental rights issues were regarded as fundamental to all persons.[28] These include at a minimum, the prohibitions against genocide; slavery or slave trade; murder or disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination; and 'the international law principles of the United Nations Charter prohibiting the use of force.'[29] Alternatively, in international trade non-protectionism was seen as beneficial to everyone on some level. As such, it was seen to be a matter requiring standardized and centralised regulation.[30] In this context, the breadth, general and state centric nature of the international law paradigm made it insufficient and inadequate as the primary regulatory framework.

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[24] BB Ghali 'A Grotian Moment' (1995) 18 *Fordham International Law Journal* 1609, 1616. P Weil 'Towards Relative Normativity in International Law?' (1983) 77 *American Journal of International Law* 413.

[25] A Florini 'The Evolution of International Norms' (1996) 40 *International Studies Quarterly* 364.

[26] P Weil, *supra*, n.24, at 413-414.

[27] A Florini, *supra* n.25, at 364. P Weil, *supra*, n.24, at 423.

[28] WJ Aceves, *supra* n.19, at 262-264. M Byers 'Conceptualising the Relationship Between *Jus Cogens* and *Erga Omnes* Rules' (1997) 66 *Nordic Journal of International Law* 211. EJ Criddle and E Fox-Decent, *supra* n.23, at 331-332. S Hall 'The Persistent Spectre: Natural Law, International Order and Limits of Legal Positivism' (2001) 12 *European Jurnal of International Law* 269, 302. M Mason 'Citizenship Entitlements Beyond Borders? Identifying Mechanisms of Access and Redress for Affected Publics in International Environmental Law' (2006) 12 *Global Governance* 283, 288. JJ Merriam 'Kosovo and the Law of Humanitarian Intervention' (2001) 33 *Case Western Reserve Journal of International Law* 111, 114. S Gardbaum, *supra* n.19, at 11. HP Schmitz and K Sikkink, *supra* n.20, at 521. A Pellet 'State Sovereignty and the Protection of Fundamental Human Rights: An International Law Perspective' *Pugwash Occasional Papers* (2000) available at: http://www.pugwash.org/reports/rc/pellet.htm

[29] EJ Criddle and E Fox-Decent, *supra* n.28, at 331-332. D Shelton 'Normative Hierarchy in International Law' (2006) 100 *American Journal of International Law* 291, 323.

[30] KW Abbott 'The Trading Nation's Dilemma: The Functions of the International Law of Trade' (1985) 26 *Harvard International Law Journal* 501. MCEJ Bronckers 'Better Rules for a New Millennium: A Warning Against Undemocratic Developments in the WTO?' (1999) 2 *International Economic Law* 547, 549. JL Dunoff 'The Death of the Trade Regime' (1999) 10 *European Journal of International Law* 733, 737. D Shelton, *supra*

Effectively, the realisation that effective regulation under these fields required international law regulatory frameworks that were not sovereignty-centric suggested that these fields had grown to exceed the parameters of the *grundnorm*.[31] By this logic, persuading states to pursue progression to international constitutionalism regulatory frameworks focused on driving states to the realisation that regulating these fields under the *grundnorm* was inadequate and undesirable.[32] Thus, human rights and international trade had grown to a status in which they needed to be recognised as imposing separate but legitimate behavioural claims on all states, that is, separate international norms.[33] As such, they necessarily required regulation beyond what the *grundnorm* and its sovereignty-centric international law paradigm could provide.[34] Importantly, as discussed in the preceding chapter, in determining the qualities of the replacement paradigms, states were persuaded to rely on international constitutionalism regulatory frameworks as the most legitimate and most effective substitute form of regulation.

This is a very loose application of constructivism to human rights and international trade. However, it does suggest that this approach pays sufficient attention to the importance that attaches to international action in complemement to the activities of individuals and groups, as advocated by Slaughter. As such, it is necessary to explore how constructivism

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n.29, at 299-302. HV Milner 'International Trade' in W Carlsnaes, T Risse and BA Simmons (eds) *Handbook of International Relations* (2007) 448, 449.

[31] See Chapter Two.

[32] SG Simon 'The Contemporary Legality of Unilateral Humanitarian Intervention' (1993) 24 *California Western International Law Journal* 121. A Florini, *supra* n.25, at 366. A Etzioni 'Social Norms: Internalization, Persuasion and History' (2000) 34 *Law and Society Review* 157, 157-160. G Goertz and PF Diehl 'Toward a Theory of International Norms: Some Conceptual and Measurement Issues' (1992) 36 *The Journal of Conflict Resolution* 634, 636. P Weil, *supra*, n.24, at 420. J Brunnee 'Coping with Consent: Law-Making Under Multilateral Environmental Agreement' (2002) 15 *Leiden Journal of International Law* 1, 33-37.

[33] G Goertz and PF Diehl, *supra* n.32, at 638. T Yang 'International Treaty Enforcement as A Public Good: Institutional Deterrent Sanctions in International Environmental Agreements' (2007) 27 *Michigan Journal of International Law* 1131, 1151-1153. JE Alvarez 'How Not to Link: Institutional Conundrums of an Expanded Trade Regime' (2001) 7 *Widener Law Symposium Journal* 1, 1-2. A von Bogdandy 'Constitutionalism in International Law: Comment on a Proposal from Germany' (2006) 47 *Harvard International Law Journal* 223, 225-226. MCEJ Bronckers, *supra* n.30, at 547. JL Dunoff 'Why Constitutionalism Now? Text, Context and the Historical Contingency of Ideas' (2005) 1 *Journal of International Law and International Relations* 191, 194-195, 196. DZ Cass 'The 'Constitutionalization' of International Trade Law: Judicial Norm Generation as the Engine of Constitutional Development in International Trade' (2001) 12 *European Journal of International Law* 39, 42. HV Milner, *supra* n.30, at 450.

[34] W Bradnee Chambers 'Towards an Improved Understanding of Legal Effectiveness of International Environmental Treaties' (2003) 16 *Georgetown International Environmental Law Review* 501, 508. S Tharoor and S Daws 'Humanitarian Intervention: Getting Past the Reefs' (2001) 18 *World Policy Journal* 21, 25. P Weil, *supra*, n.24, at 416-417, 436-437. MJ Hoffman 'Entrepreneurs and Norm Dynamics: An Agent-Based Model of the Norm 'life cycle'' 3-4 : available at: opim.wharton.upenn.edu/~sok/papers/h/Hoffmann_norms.doc

may explain how progression to consistently effective environmental protection could be achieved. To this end, a particularly useful vehicle to pursuing this goal is Finnemore and Sikkink's norm life cycle strand within constructivism. Its value to this discussion lies in the fact that the theory seeks to explain, in a useful tiered 'life cycle,' how norms emerge and lead to consistently effective regulation.

4.3.1. Norm life cycle

Finnemore and Sikkink argue that the emergence of new norms, which signal departure from the traditional international law paradigm, can be explained within the context of a norm 'life cycle.' The onset of the norm 'life cycle' is the point when it becomes apparent that a field of international relations exceeds the parameters of the *grundnorm*.[35] This is usually most apparent when regulating a particular field under the sovereignty-centric international law paradigm is no longer adequate. However, the onset of the cycle does not guarantee that progression to norm status will be achieved. Completion of the cycle in order to achieve international norm status hinges on the efforts of a body of norm entrepreneurs.[36] While nothing guarantees that norm entrepreneurs will not be influenced exclusively by self interest, they most commonly are motivated to advance the norm by factors such as altruism, empathy, or ideational commitment.[37] Akin to Slaughter's liberalism, Finnemore and Sikkink argue that this body of norm entrepreneurs is a varied group of individuals, groups and state institutions. They similarly ascribe great importance to these actors in securing effective international regulation.

Once committed to the creation of a new norm, norm entrepreneurs call attention to issues or even 'create' issues in a manner that raises dissatisfaction with regulation of the field under the *grundnorm*.[38] In this endeavour, they often use 'existing organizations and norms as a platform from which to proselytize, framing their issue to reach a broader

[35] M Finnemore and K Sikkink 'International norm dynamics and political change' (1998) 52 *International Organization* 887, 895. MJ Hoffman, *supra* n.34, at 6-8.
[36] M Finnemore and K Sikkink 'Taking Stock: The Constructivist Research Program in International Relations and Comparative Politic' (2001) 4 *Annual Review of Political Science* 391, 400. ME Keck and K Sikkink *Activists Beyond Borders: Advocacy Networks in International Politics* (1998) 199. M Finnemore and K Sikkink, *supra* n.35, at 895. MJ Hoffman, *supra* n.34, at 7.
[37] KW Danish 'International Relations Theory' in D Bodansky, J Brunnee and E Hey (eds) *The Oxford Handbook of International Law* (2007) 205, 214. ME Keck and K Sikkink, *supra* n.36, at 1.
[38] HH Koh 'Why Do Nations Obey International Law' (1997) 106 *Yale Law Journal* 2599, 2646.

audience.'[39] Importantly, norm entrepreneurs rarely are able to coerce states into adopting a norm.[40] The main tool that they rely on is persuasion.[41]

The fact that the success of the body of norm entrepreneurs is dependent on persuasion means that whether they succeed depends on their perceived and actual independence and impartiality.[42] If they are seen as advancing certain interests that are not objectively framed, their ability to persuade states to accept the new norm is compromised.[43] Alternatively, another justification for ensuring independence and impartiality can be found in Granovetter's argument that the greatest transmission of novel information among individuals, groups or communities, of states for instance, typically occurs where there are weak ties between the parties involved. This can be contrasted to the observation that stronger ties facilitate transmission of information with which parties would already be familiar.[44] As such, independence and impartiality foster weak ties that allow norm entrepreneurs' message to reach a wider audience.

However, while independence, impartiality and objectivity are important, they are merely preliminary steps in elevating a field to international norm status. Once an independent and impartial body of norm entrepreneurs frames essential matters in a manner that secures enough initial support for the new norm, their next task is to persuade a greater number of states to adopt the norm. An important tool that norm entrepreneurs rely on in this regard is developing transnational issue networks. In establishing such networks, norm entrepreneurs seek national government officials and bureaucracies concerned with the same issues and enlist them as allies in their transnational cause.[45] Here, another similarity can be drawn to Slaughter's argument to the extent that Finnemore and Sikkink argue that norm

[39] M Finnemore and K Sikkink, *supra* n.35, at 897. M Finnemore and K Sikkink, *supra* n.36, at 401. A Dan Tarlock 'The Role of Non-Governmental Organizations in the Development of International Environmental Law' (1992) 68 *Chicago-Kent Law Review* 61, 63.

[40] SJ Toope 'Formality and informality' in D Bodansky, J Brunnee and E Hey (eds) *The Oxford Handbook of International Law* (2007) 107. MJ Hoffman, *supra* n.34, at 5.

[41] S Charnovitz 'Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices' (1994) 9 *American University Journal of International Law and Policy* 751, 805. M Finnemore and K Sikkink, *supra* n.36, at 402. A Dan Tarlock, *supra* n.39, at 65.

[42] M Finnemore and K Sikkink, *supra* n.36, at 402-403.

[43] G Therborn 'The World's Trader, the World's Lawyer: Europe and Global Processes' (2002) 5 *European Journal of Social Theory* 403, 405. Z Maoz and DS Felsenthal 'Self-Binding Commitments, the Inducement of Trust, Social Choice and the Theory of International Cooperation' (1987) 31 *International Studies Quarterly* 177, 197.

[44] MS Granovetter 'The strength of Weak Ties' (1973) 78 *American Journal of Sociology* 1360.

[45] M Finnemore and K Sikkink, *supra* n.35, at 897-900. HP Schmitz and K Sikkink, *supra* n.20, at 517, 522.

entrepreneurs and their allies, once they reach this stage, seek competent governmental and non-governmental *fora* competent to declare the new norm as requiring regulation under international law. It is essential therefore that these governmental and non-governmental *fora* are capable of defining, elaborating and testing the definition of the norm and its violation.[46]

Ultimately, the goal of norm entrepreneurs through these processes is to push the emergent norm to a 'tipping point.'[47] A tipping point is attained once norm entrepreneurs persuade a critical mass of states to become norm leaders and adopt new norms.[48] Typically, a critical mass is achieved when approximately a third of states adopt the norm.[49] Alternatively, a critical mass can be achieved if enough strategically placed states adopt the norm despite the fact that the number of states may constitute less than a third of the whole body of states.[50] In such instances, all that matters is that states which do adopt the norm have sufficient authority to persuade, or coerce, further adoption of the emergent norm by other states.[51]

The completion of this tipping phase signals the next phase of the norm 'life cycle.' This is characterised by norm cascading. Where tipping secures a critical mass that leads to recognition and adoption of the norm by about a third of states, cascading refers to the process of adopting the norm by the greater majority of states. An important characteristic of norm cascading is that states are motivated to adopt the emergent norm for varying reasons that may or may not be connected to actual objectives of the norm. In addition, pressure to adopt the norm comes from sources external to states. Here, norm entrepreneurs often rely on processes rooted in international socialization techniques to encourage state participation.[52] These socialization techniques include emulation, shaming, praise and ridicule.[53] For

[46] HH Koh 'How is International Human Rights Law Enforced?' (1999) 74 *Indiana Law Journal* 1397, 1410-1412.
[47] M Finnemore and K Sikkink, *supra* n.35, at 901.
[48] MJ Hoffman, *supra* n.34, at 7.
[49] M Finnemore and K Sikkink, *supra* n.35, at 901.
[50] A Florini, *supra* n.25, at 375.
[51] A Cassesse 'The Role of Legal Advisers in Ensuring that Foreign Policy Conforms to International Legal Standards' (1992) 14 *Michigan International Law Journal* 139, 156. A Florini, *supra* n.25, at 375. HP Schmitz and K Sikkink, *supra* n.20, at 522-523. E Louka *International Environmental Law: Fairness, Effectiveness and World Order* (2006) 9.
[52] RB Mitchell 'Compliance Theory: Compliance, Effectiveness and Behaviour Change in International Environmental Law' in D Bodansky, J Brunnee and E Hey (eds) *The Oxford Handbook of International Law* (2007) 893, 902. S Barrett 'International Cooperation and the International Commons' (2000) 10 *Duke Environmental Law and Policy* 131, 140. HP Schmitz and K Sikkink, *supra* n.20, at 523.
[53] M Finnemore and K Sikkink, *supra* n.35, at 902. A Florini, *supra* n.25, at 375.

instance, 'shaming' was a central aspect of compelling cascading in fighting human rights abuses, most notably perhaps, during the South African Apartheid regime.[54]

At the extreme end of this norm cascading process, internalization of the norm occurs.[55] Internalization is a reference to the point where the new norm becomes so widely accepted that it achieves a 'taken-for-granted' quality that makes conformity to the norm almost automatic.[56] Norm breakers are induced to become norm followers and determining appropriate behaviour becomes based on the norm.[57] Thus, norm breaking behaviour generates disapproval or stigma while norm conforming behaviour produces praise. In the case of a highly adopted norm that has grown to be taken for granted, norm confirming behaviour provokes no reaction whatsoever.[58] Attainment of this phase is based on individual-level psychological arguments about the effect of socialization and peer-pressure to encourage laggard states to adopt the norms.[59]

Considered thus, Finnemore and Sikkink's norm 'life cycle' is a viable framework to explain how progression to consistently effective international regulation could be achieved.

4.3.2. Limitations

The foregoing discussion of Finnemore and Sikkink's norm life cycle highlights how progression to an international constitutionalism regulatory framework could be achieved from a constructivist perspective. It is important to note however that in spite of its apparent value, this strand of constructivism has been criticised for various reasons, some of which have even been highlighted by noted constructivists.[60] However, as with Slaughter's theory, a

[54] T Risse and K Sikkink 'The socialization of International Human Rights Norms into Domestic Practices: Introduction' in T Risse, SC Ropp and K Sikkink (eds) *The Power of Human Rights: International Norms and Domestic Change* (1999) 15.

[55] HH Koh, *supra* n.46, at 1400-1401. A Cassesse, *supra* n.51, at 159. A Etzioni, *supra* n.32, at 167. T Risse and K Sikkink, *supra* n.54.

[56] M Finnemore and K Sikkink, *supra* n.35, at 904. OA Hathaway 'Do Human Rights Treaties Make a Difference' (2002) 111 *Yale Law Journal* 1935, 2020. MJ Hoffman, *supra* n.34, at 6.

[57] M Finnemore and K Sikkink, *supra* n.35, at 904-905. HH Koh, *supra* n.38, at 2602-2603, 2634, 2657.

[58] M Finnemore and K Sikkink, *supra* n.35, at 905. RB Mitchell, *supra* n.52, at 902.

[59] M Finnemore and K Sikkink, *supra* n.35, at 902. A Chayes and A Chayes 'Compliance Without Enforcement: State Regulatory Behaviour Under Regulatory Treaties' (1991) 7 *Negotiation Journal* 311, 323-324. HH Koh, *supra* n.46, at 1400-1401. P Allott 'The Concept of International Law' (1999) 10 *European Journal of International Law* 31, 32-34.

[60] M Finnemore and K Sikkink, *supra* n.35, at 909. A Florini, *supra* n.25, at 365. G Goertz and PF Diehl, *supra* n.32, at 637. M Finnemore and K Sikkink, *supra* n.36, at 393, 403. HH Koh, *supra* n.46, at 1401-1402. KW

detailed discussion of the general critique exceeds the scope of this thesis. It is only to some of the critique relevant to the current discussion that focus is drawn.

To this end, a prominent criticism of the constructivist perspective is that, unlike Slaughter's theory for instance, it places extensive focus on the international plane while disregarding the domestic processes that determine whether, or how, a norm gains domestic acceptance.[61] There is certainly some value that attaches to this criticism. However, in the context of the current argument, which seeks to construct a comprehensive overview of how states might be persuaded to pursue effective regulation, this is an issue that is remediable through recourse to Slaughter's liberalism argument which focuses extensively on the role of internal processes in shaping international relations. Thus, while the critique may be potent, its value diminishes in this context.

Another criticism of constructivism relates to its failure to fully acknowledge the fleeting nature of internalization.[62] To this end, it is pertinent to note that this is a challenge more pertinent to fields that are not strictly relatable to environmental protection. Examples include issues surrounding torture and international labour standardization. Unlike environmental protection, these are fields in which there is the very real possibility that views with regard to the status of the intended, or achieved, norms could change. For instance, in difficult economic climates the need to make employment opportunities available may lead to acceptance of lesser labour standards within states compromising internalization of the norm. Similarly, the heightened threat of terrorism affects attitudes towards the use of torture in a manner that affects internalization of the norm. Thus, international consistency on the fact that these fields should be regarded as norms or alternatively, that they should retain that status once achieved, is more complicated and prone to evolving.

However, in the regulation of fields which bear a marked resemblance to environmental protection, like human rights and international trade, the impact of this fleeting nature of internalization is significantly reduced. This is because once the norms are internalized enormous pressure is applied on states through various means to ensure that departure from the course of the norm is not a desirable avenue. The human rights example of

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Abbott 'International Relations Theory, International Law and the Regime Governing Atrocities in Internal Conflicts' (1999) 93 *American Journal of International Law* 361, 364. HP Schmitz and K Sikkink, *supra* n.20, at 521. MJ Hoffman, *supra* n.34, at 8. R McKeown 'Norm Regress: US Revisionism and the Slow Death of the Torture Norm' (2009) 23 *International Relations* 5, 7-8. P Weil, *supra*, n.24, at 440-442.

[61] R McKeown, *supra* n.60, at 7-8.

[62] *Ibid*.

detention without trial is particularly illustrative. In the United Kingdom for example, heightened awareness to the threat posed by terrorism following September 11, led to efforts to extend periods for which suspected terrorists could be detained without trial through the Anti-Terrorism Crime and Security Act of 2001. Since then, the relevant aspects of the Act have been repealed. However, suspected terrorists can still be held for 14 days without trial. Importantly for present purposes, this situation has not adversely affected the internalization of the human rights norm. Instead, it is fundamental rights drawn such as those to a fair trial and to liberty which have been relied on to apply pressure on the state to pursue practices consistent with such rights. This suggests that while separate states may pursue practices that challenge the status of established norms such as the human rights norm, once internalization is achieved, it is not fleeting. Rather, internalization plays a central role in ensuring the perseverance of the norm. It can be deduced therefore, that in a field like environmental protection, which shares similarities to human rights, internalization is not fleeting even where practices that are not consistent with the norm are pursued. As such, this criticism of norm theory does not diminish the value of this theory in explaining how progression to effective regulation might be achieved.

Lastly, constructivism has been criticized for its teleological outlook.[63] While this is a valid general criticism, it must be considered that fields like human rights and international trade that bear a marked resemblance to environmental protection have succeeded in establishing norms regardless of their teleological perspective. For instance, human rights are regarded as fundamental 'goods' that accrue to all persons for largely teleological purposes. Thus, once internalization is achieved, the likelihood of swaying attitudes is limited. As such, the critique of norm theory does not render the theory flawed as an explanation for progression to effective regulation in human rights. Similarly, in international trade the criticism that norm theory is teleological is not as potent to the extent that it is this teleological purpose that drove elevation of the field to international norm status. In addition, this also accounts for unwavering attitudes to the status of the norm once internalization had been secured.

While this may be a brief analysis, it serves the purpose of highlighting the fact that in fields like environmental protection, which is pursued ultimately for the 'good' of humanity and to secure humanity's future, it is reasonable to rely on a constructivist perspective to

[63] MJ Hoffman, *supra* n.34, at 8.

construct a framework for progression to an international constitutionalism regulatory framework despite the critique of the theory.

A more potent criticism of norm 'life cycle' theory is that it fails to explain how the transition to a legal framework is practically achieved once a norm is established. Put differently, while the norm 'life cycle' explains how norms emerge, it is not immediately apparent how, or why, legal norms rather than merely social norms emerge. This is an issue that has been convincingly addressed by Brunnee and Toope in their interactional law approach.

4.4. An interactional law approach

Brunnee and Toope have argued that 'while the idea of the norm life cycle illustrates the origin and progression of particular understandings, its focus is on the, often strategic, actions of norm entrepreneurs and on how norms then come to be embraced by others, be it as a result of calculation or reasoning. This agency-centred account pays relatively less attention to the social communication through which collective understandings are built.'[64] They also note that, the norm 'life cycle' approach has proven better at explaining stasis rather than change.[65]

As such, they offer an interactional law approach that 'considers the most important ways in which international law is created, upheld, changed, and destroyed in contemporary practice, that is, through custom, treaty, and soft law to argue that law is a purposive enterprise that is both shaped by human interaction and aimed at guiding that interaction.'[66] Effectively, Brunnee and Toope argue that legal norms are derived from shared understandings. They perceive these shared understandings to be collectively held background knowledge, norm or practices. As such, once shared understandings are in existence, they become the background knowledge or norms that shape how actors perceive themselves and the world, how they form interests and set priorities, and how they make or evaluate arguments.[67] Importantly, these shared understandings do not simply exist, or

[64] J Brunnee and SJ Toope *Legitimacy and Legality in International Law* (2010) 61-62.
[65] *Ibid*, at 19.
[66] *Ibid*, at 316.
[67] *Ibid*, at 310. SJ Toope 'Torture: Can Law Prevent It?' (2011) *A Lecture at the University of Melbourne* 2: available at: http://president.ubc.ca/files/2011/05/umelbourne2011.pdf

miraculously emerge as agreed among actors. They are shared understandings precisely because they are generated and maintained through social interaction.[68]

Therefore, while Brunne and Toope do not accept Finnemore and Sikkink's approach in its entirety, it is apparent that they regard the creation of shared understandings as being based on processes similar to those prioritised by Finnemore and Sikkink in the creation of norms.[69] Similarly, and akin to Slaughter's argument discussed above, shared understandings will not emerge in the absence of processes that allow for the active participation of relevant social actors such as states, intergovernmental organizations, civil society organizations, other collective entities, and individuals.[70] A further important point that Brunnee and Toope note is that 'shared understandings do not simply exist, or emerge as agreed among actors. They are shared understandings precisely because they are generated and maintained through social interaction. The central insight is that social interaction is the engine that leads to common practice.[71] As such, Brunnee and Toope's framework 'explains how diverse actors can interact through law and accommodates both the continuing pre-eminence of states in the international legal system and the rise of non-state actors.'[72]

While their argument shares some similarities with Slaughter's approach as well as Finnemore and Sikkink's approach, an important distinction to be found in Brunnee and Toope's work is that they identify that not all shared understandings or norms lead to law.[73] Only those shared understandings that are accompanied by a basic acceptance of the need for law to shape certain social interactions within a society could lead to effective legal regulation. Even then, such shared understandings alone do not make law.[74] Instead, progression to international law regulation based on shared understandings is dependent on adherence to the requirements of legality.[75]

In establishing the parameters of legality, Brunnee and Toope rely on Fuller's eight criteria for legality, notably, 'generality, promulgation, nonretroactivity, clarity, non-contradiction, not asking the impossible, constancy, and congruence between rules and

[68] J Brunnee and SJ Toope, *supra* n.64, at 64.
[69] *Ibid*, at 57-65.
[70] SJ Toope, *supra* n.67, at 2.
[71] J Brunnee and SJ Toope, *supra* n.64, at 64-65.
[72] *Ibid*, at 8, 45, 61.
[73] *Ibid*, at 4.
[74] *Ibid*, at 3-4.
[75] *Ibid*, at 8.

official action.'[76] They note that their recourse to Fuller's requirements despite the fact that they were formulated in explaining progression to legal regulation within states is motivated by the fact that Fuller cared about the generation of social norms through interaction and the sense of responsibility that arises only from the human ability to reason with norms.[77] These are qualities they perceive as reflected by states in their interactions on the international level, justifying transposition of this model to the international realm. In addition, an important point that Brunnee and Toope note with regard to Fuller's requirements is that they are largely procedural in orientation. As such, they are not contingent upon particular political or value commitments. This is particularly important in international regulation because it enables the law to embrace the diversity of priorities in international society, allowing states to pursue their own ends while being guided by law.[78]

Proceeding with their interactional approach, Brunnee and Toope note that, laws based on shared understandings which result in regulatory frameworks that reflect Fuller's legality criteria and thus, allow for interactions among the regulated and regulators will be regarded as legitimate.[79] Once laws are perceived a legitimate, they attract the acceptance of legal obligations and generate fidelity to the obligations they impose.[80] Brunnee and Toope argue that fidelity is best viewed as an internalized commitment and not as an externally imposed duty matched with a sanction for non-performance.[81] Such fidelity means regulated parties are willing to have their behaviour guided by the promulgated rules even if they disagree with them on substantive moral grounds.[82]

Within Brunnee and Toope's framework however, they note that even if legality leads to a legitimate regulatory framework that inspires fidelity to laws, such a framework only succeeds where a community of practice develops around the framework.[83] Such a community of practice does not necessarily require homogeneity in the practice of states. All that is required are shared collective understandings of what states are doing and why.[84] For instance, in climate change there are vast divergences among state positions. However, the

[76] *Ibid*, at 6.
[77] *Ibid*, at 20.
[78] *Ibid*, at 77-86.
[79] *Ibid*, at 52–55
[80] *Ibid*, at 56.
[81] *Ibid*, at 27. SJ Toope, *supra* n.6, at 5.
[82] J Brunnee and SJ Toope, *supra* n.64, at 30, 68.
[83] *Ibid*, at 313.
[84] *Ibid*, at 313.

climate change regime has been maintained for over twenty years by a strong community of practice because all states share a collective understanding of the enterprise they are engaged in, and of why the enterprise is important, but they do not necessarily have a common outlook regarding all aspects of the problem or common priorities in addressing it.[85]

It is particularly important to note that achieving legality, legitimacy, cultivating fidelity and ensuring a community of practice are particularly important with respect to creating international regulatory frameworks. This is because norms and shared understandings that are legal and inspire fidelity often create the desire for clarity and for relative certainty among parties. With respect to international level issues such as environmental protection, human rights, and international trade, such clarity and certainty is often only attainable through formal international regulatory frameworks.[86]

To this end, Brunnee and Toope note that formal international regulatory frameworks allow for the crystallization and specification of norms and shared understandings.[87] 'Given the very real practical challenge of capturing and communicating shared understandings in the international setting, the treaty will often be an important step in interactional law-making. After all, the number of actors in the international arena is so large and their opportunities for direct interaction so limited that 'snapshots' of the common ground will often be needed to advance the law-making process.'[88] In addition, such frameworks become a reference point allowing for existing understandings to be pushed or advanced modestly allowing for normative change.[89] Alternatively, such frameworks may include rules that are not grounded in shared understandings with the hope that the new 'rule' may become a reference point around which new law may coalesce.[90]

[85] *Ibid*, at 142-46
[86] *Ibid*, at 315.
[87] *Ibid*, at 48
[88] *Ibid*, at 48.
[89] *Ibid*.
[90] *Ibid*, at 50.

4.4.1. Limitations

This interactional account has been criticised for various reasons and Brunnee and Toope have responded to some of the critique.[91] As with the theories previously discussed, the thesis does not engage in a discussion of the general critique. Rather, attention is drawn to those aspects of the theory that are pertinent to the objectives of the thesis. To this end, it is useful to note that the shared understandings on the need to achieve environmental protection, which is the motivation of the thesis, have already been established as requiring legal regulation. This can be inferred from the various treaties of a legal nature that have already been concluded in efforts to regulate environmental protection internationally. These treaties canvass various aspects of environmental protection such as the Climate Change Convention, the Convention on Long-Range Transboundary Air Pollution, and the Biodiversity Convention alluded to earlier. Having noted this, in order to illustrate the limitations of Brunnee and Toope's framework, it is useful to turn to two notable examples of efforts to internationally regulate environmental protection, notably, climate change and ozone protection.

From the onset, the drive to combat climate change was recognised as being relevant to all states with climate change recognised as 'the greatest threat to the environment other than global nuclear war.'[92] However, an Advisory Group on Greenhouse Gases established to tackle the issue of climate change was met with wide-spread suspicion predominantly from western states.[93]

Despite this, the Advisory Group composed terms of reference for an international assessment body in which any interested state could be involved. Importantly, participation in this Group was closed to industry or non-governmental organizations except in an observer role. Following this, the World Meteorological Organization and the United Nations Environment Programme were appointed as secretariat for the assessment body, endorsed by

[91] See P Liste 'Book Review: Legitimacy and Legality in International Law' (2011) 22 *The European Journal of International Law* 589, 592-593. C Reus-Smit 'Obligation Through Practice' (2011) 3 *International Theory* 339. M Koskenniemi 'The Mystery of Legal Obligation' (2011) 3 *International Theory* 319. WG Werner 'Book Review: Legitimacy and Legality in International Law' (2011) 58 *Netherlands International Law Review* 283. For a response to some of the critique, see J Brunnee and SJ Toope 'History, Mystery, and Mastery' (2011) 3 *International Theory* 348.

[92] P Usher and Q Ye 'A Historical Review on the Roles of Science and Politics in Addressing Global Environmental Issues' (2009) 3 *Front. Earth Scie. China* 57, 59.

[93] *Ibid*.

states as the Intergovernmental Panel on Climate Change.[94] The role given to these agencies was challenged by the United States from the onset. While this challenge did not succeed, other challenges have been made to the institutional fabric of the climate change regime. Most notably, the research of the Intergovernmental Panel on Climate Change has been questioned. For instance, Usher and Ye cite the controversial allegations that the hand of the fossil fuel lobby is often not far from the Intergovernmental Panel on Climate Change's pronouncements.[95]

Thus, the history of the international regulation of climate change featured consensus over the need to regulate climate change. However, this was accompanied by deep divisions among states on how to regulate efforts to combat climate change.[96] Importantly, Brunnee and Toope argue that these thin shared understandings on the need to combat climate change still provided the impetus for progression to an international regulatory framework which has been built in an incremental manner.[97] As such, they argue that thin shared understandings can lead to formal law which meets the legality criteria and will often be the starting point for interactional law-making rather than the end point.[98] Further, and with respect to fidelity to law, Brunnee and Toope note that such formal law develops a setting in which a community of practice develops allowing for contentious substantive issues to be legitimately addressed. This, in turn, allows all parties to participate in the development of shared understandings.[99]

Here, it is useful to consider Brunnee and Toope's framework in the context of the ozone protection regime. That experience shows that around 1975, concern over the deterioration of the ozone layer was limited. Most states perceived ozone depletion as being nothing more than a scientific curiosity rather than an earth-threatening phenomenon. However, following a United Nations Environment Programme meeting on the matter in 1977, a World Plan of Action on the Ozone Layer was crafted. Under this Plan, research into ozone depletion would be undertaken by specialized agencies of the United Nations system under the overall coordination of the United Nations Environment Programme and the World Meteorological Organization. Based on the information gathered, annual assessments of

[94] *Ibid*, at 59.
[95] *Ibid*, at 59.
[96] J Brunnee and SJ Toope, *supra* n.64, at 217.
[97] *Ibid*, at 130, 142.
[98] *Ibid*, at 217.
[99] *Ibid*.

ozone layer depletion would be made by a Coordinating Committee on the Ozone Layer and targeted research agendas would be recommended to clarify uncertainties.[100]

The Coordinating Committee on the Ozone Layer comprised of lead United Nations agencies and states identified as having major ozone layer research programmes. Most of these were developed states from North America, Europe and the Soviet Union. However, some developing states were included, notably India, largely because it was an increasing user of Chlorofluorocarbons which had been identified as being the leading cause of ozone depletion. In addition, the Chemical Manufacturers Association, a consortium of Chlorofluorocarbon producers, was included based on the recognition that their research programme was larger than many national programmes. As such, the information they would provide would ensure that the committee's assessment would be as comprehensive as possible. Additional states were allowed to participate provided that they had active research programmes relating to the ozone layer and that they would bear the costs of participation.[101]

Notably, as part of the research effort and setting agendas, political considerations from a state perspective were given a limited role. In any respect, states were only mildly interested in the Committee's findings and recommendations. A consequence of this approach was that the research of the Committee placed greater emphasis on achieving certainty in framing ozone issues and presenting them in an accessible format without much political distraction. For instance, attention was drawn to the implications of ozone depletion on agriculture, forestry and human health, notably, the potential for skin cancers. This approach played a central role in drawing out media interest in the research outputs of the Committee. Importantly, such interest led to aggressive media comment on ozone depletion. This would reach a crescendo with the discovery of a hole in the ozone layer, a discovery that ultimately played an important role in subsequently engaging states on the seriousness of ozone depletion leading to the Vienna Convention for the Protection of the Ozone Layer.[102]

These two examples suggest that Brunnee and Toope's framework is a useful vehicle where the goal is to secure progression to international regulation. Thus, in both climate change and ozone protection, shared understandings were established in the first instance. This was followed by the realisation that legal regulation was required, prompting progression to the relevant international treaties. A solid base of interaction meant that the

[100] P Usher and Q Ye, *supra* n.92, at 57.
[101] *Ibid*, at 58.
[102] *Ibid*, at 58-59.

criteria of legality were met with a community of practice ensuing. However, where the objective is to construct an effective international regulatory framework as intended in the thesis, difficulties emerge with Brunnee and Toope's framework.

For instance, Brunnee and Toope contend that 'although the stock of shared understandings may be relatively limited in international society, law-making is possible.'[103] They use the example of climate change regulation to argue that, while deeper shared understandings are yet to be established over the regulation of climate change, given more time and with increasing interaction among all relevant parties, communities of practice in climate change can become more interconnected and value-based, allowing for richer substantive rules.[104]

However, as recently as the latest major instalment of efforts to secure effective international climate change regulation in Durban in December of 2011, it was apparent that shared understandings among states remain thin. This can be inferred from the fact that little progress was made at the Durban Conference with regards to the creation of a legally binding successor to the Kyoto Protocol.[105] Instead, states agreed to a second commitment to the Kyoto Protocol with assurances that a legally binding agreement would be established by 2015. In addition, and reflective of the absence of deeper shared understandings, the decision on targets was deferred until the end of 2012. Considering the state of shared understandings, these outcomes have met with positive reactions from various sectors, including the European Union and some non-goevrnmental organizations.[106] However, when it is considered that the Durban Conference came more than twenty years after the initial attempt to achieve formal law in the form of the United Nations Framework Convention on Climate Change it is reasonable to argue that the climate change experience stands in contrast to Brunnee and Toope's assertion that deeper shared understandings will evolve once progression to formal law based on thin shared understandings is achieved. As such, their framework succeeds only in explaining progression to international regulation, not necessarily effective regulation.

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[103] J Brunnee and SJ Toope, *supra* n.64, at 71.

[104] *Ibid*, at 87.

[105] *Ibid*, at 129, 217.

[106] Europa Press Release RAPID (2011) 'Durban conference delivers breakthrough for climate' MEMO/11/895: available at: http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/895 Conservation International (2011) 'Statement on Outcome of Durban COP17 Climate Summit' available at: http://www.conservation.org/newsroom/pressreleases/Pages/Conservation-International-Statement-Durban-Climate-Change.aspx

To explore this point further, it can be considered that the ozone regime certainly seems to support Brunnee and Toope's assertion that, at the minimum, the attainment of an international regulatory framework requires only thin shared understandings among states. However, the same example also suggests that the attainment of an effective regulatory framework, that is, a framework in which substantive rules eventually emerge that effectively address the area regulated, requires more than thin shared understandings. Indeed, the preceding discussion suggests that by the time formal regulation was pursued in the form of the Vienna Convention for the Protection of the Ozone Layer, media coverage had been exploited to ensure that deep shared understandings had been cultivated among various stakeholders including citizens, non-governmental organizations and ultimately, states. Considering that the ozone protection regime has been more effective than the climate change regime, it is reasonable to contend that it was the fact that a concerted effort had been made to secure such deep shared understandings which facilitated progression to an effective regulatory framework.

Ultimately, these examples suggest that Brunnee and Toope's framework certainly holds value in explaining progression to an international regulatory framework. However, it does not comprehensively explain how effective regulation could be achieved in the first instance, as pursued here. Specifically, contrasting experiences with climate change and ozone protection suggest that where deeper shared understandings are not cultivated among states, an effective regulatory framework will not emerge.

Importantly, this experience also suggests that where deeper shared understandings are not cultivated, 'social' issues that threaten the effectiveness of an international regulatory framework will not be effectively addressed. This is best exemplified by the climate change regime where the approach to differentiated obligations among states, a 'social' issue, has been particularly problematic.[107] Thus, states share the understanding that there is a need to address climate change. However, it is less clear what states' or groups of states' responsibilities are to be differentiated, and what the criteria or reasons are for such differentiation.[108]

For instance, on one end of the spectrum, China, a state that frequently derails efforts at international regulation by arguing that while it is the largest emitter of greenhouse gases,

[107] J Brunnee and SJ Toope, *supra* n.64, at 154.
[108] *Ibid.*

consideration should be given to the fact that the state's per capita emissions are quite low compared to other large emitters such as the United States or the European Union.[109] In addition, China often notes that its domestic regime for combating climate change, headlined by its Twelfth Five-Year Plan in 2011, is quite extensive and represents a dramatic move to reduce fossil energy consumption, promote low-carbon energy sources, and restructure China's economy with a key goal being to 'gradually establish a carbon trade market.'[110] On the other end of the spectrum, the United States, has often adopted the much maligned position that differentiation of states' obligations in the effort to combat climate change based on the traditional categories of 'developed versus developing' states needs to be reconsidered to take into account that some 'developing' states are large emitters of greenhouse gases and should not be exempt from the stringent targets sought to be imposed on 'developed' states. It was for this reason that the Bush administration refused to ratify the Kyoto Protol. They noted that their concern was that any benefit from emissions reductions in the United States would be cancelled out by unregulated greenhouse gas emissions from China.[111] Despite this, as a party to the United Nations Framework Convention on Climate Change, the United States' commitment to combating climate change remains clear, as exemplified by the fact that it boasts a domestic regime for combating climate change that exceeds regulations proposed at international level.[112]

As such, the climate change regime suggests that it is'social' issues such as diffentiation that have compromised the attainment of effective regulation. A useful contrast can be drawn to the ozone protection effort where, as noted above, care was taken to cultivate deeper shared understandings prior to pursuing formal regulation. Thus, by the time states negotiated the Vienna Convention for the Protection of the Ozone Layer, it was well accepted that differentiation, for example, was necessary and that some states would need support to participate in the ozone protection movement. Thus, Article 4 of the Convention makes reference to taking into account the needs of developing countries. Unlike in climate change,

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[109] The Climate Group (2008) *China's Clean Revolution*: available at: http://www.theclimategroup.org/_assets/files/Chinas_Clean_Revolution.pdf

[110] J Lewis 'Energy and Climate Goals of China's 12th Five-Year Plan' (2011) *Center for Climate and Energy Solutions*: available at: http://www.pewclimate.org/international/factsheet/energy-climate-goals-china-twelfth-five-year-plan

[111] K Lieberthal and Dd Sandalow 'Overcoming Obstacles to U.S.-China Cooperation on Climate Change' (2009) *Brookings*: available at: http://www.brookings.edu/reports/2009/01_climate_change_lieberthal_sandalow.aspx

[112] United States Environmental Protection Agency 'United States Climate Policy and Actions': available at: http://www.epa.gov/climatechange/policy/index.html

this did not derail regulatory efforts. Rather, the Global Environmental Facility set up as part of this effort helped cultivate deeper shared understandings among states.[113] In this way, 'social' issues such as those that have adversely affected climate change were pre-empted. Importantly, this is not to suggest that no controversy attached to the international regulatory effort. For instance, following the Vienna Convention and during negotiations on a Protocol which would set targets for the reductions in the production of specific chemicals and the timetables for doing so, there was controversy as to whether to base the targets on production or consumption of chemicals. However, because deeper shared understandings had been established beforehand, this did not derail negotiations with compromises being readily made.[114]

It is left then to surmise that, perhaps, greater success in the international regulation of efforts to curb climate change could have been achieved had there been a more concerted effort to resolve 'social' issues prior to making the step to formal law.[115] This would have, possibly, led to the cultivation of deeper shared understandings between states and all actors.

A consequence of attaching importance to deeper shared understandings in this manner is that this necessarily raises the question of how such understandings can be cultivated. Drawing from experience with ozone protection, it would seem that this is a task best performed by norm entrepreneurs. Importantly, this point also highlights another limitation with Brunnee and Toope's framework.

If the objective is to construct an effective international regulatory framework, Brunnee and Toope's framework is problematic to the extent that it does not attach sufficient importance to the role of norm entrepreneurs in constructing the framework. Certainly, Brunnee and Toope accept that it is necessary for norm entrepreneurs to work to construct shared understandings.[116] For instance, they highlight that norm entrepreneurs can work to make shared understandings deeper through 'more and more' interaction.[117] They also contend that 'basic understandings can be fostered through pre-legal mutual interaction in

[113] IFI Shihata 'Implementation, Enforcement and Compliance with International Environmental Agreements-Practical Suggestions in the Light of the World Bank's Experience' (1996) 9 *Georgetown International Environmental Law Review* 37, 47-49.

[114] EB Weiss 'The Vienna Convention for the Protection of the Ozone Layer and The Montreal Protocol on Substances that Deplete the Ozone Layer' (2009) *United Nations Audio Visual Library of International Law* available at: http://untreaty.un.org/cod/avl/pdf/ha/vcpol/vcpol_e.pdf

[115] J Brunnee and SJ Toope, *supra* n.64, at 127-128.

[116] *Ibid*, at 33.

[117] *Ibid*, at 33.

informal and formal institutions, through the work of norm entrepreneurs, through the engagement of epistemic communities and issue networks, and through other processes of socialization affecting the self-perception and identity of actors.'[118] In addition, they acknowledge that 'merely declaring the form of 'law' based on shared understandings alone will not accomplish effective regulation.[119] However, beyond this, they do not comprehensively explore the role of norm entrepreneurs in driving progression to effective regulatory frameworks in a manner reflective of the role they play in cultivating deeper shared understandings which are critical to achieving effective international regulatory frameworks as argued above.[120]

The objective here is not to discount the value of Brunnee and Toope's contribution. Rather, the point is to highlight that, if the intention is to pursue consistently effective international regulation, as is the case here, a more nuanced framework is necessary.[121] Thus, like Slaughter's approach and Finnemore and Sikkink's norm life cycle approach considered above, Brunnee and Toope's interactional account retains value. However, aspects of the approach feature limitations that mean, for present purposes, it must be relied on in complement to the other perspectives which place greater emphasis on the strategic actions of norm entrepreneurs.

4.5. Securing progression to an effective regulatory framework

Based on the preceding assessment of theory, it would seem that in seeking to establish a consistently effective regulatory framework, various considerations are important. To account for variances between theories and in order to accommodate the limitations of the different theories, it is useful to characterise the process of progression to an effective regulatory framework in the form of a construct that captures central processes of pursuing such progression among the different theories.

Having noted this, it is submitted, drawing from the discussed theories, that four phases seem especially important in seeking to achieve consistently effective international regulation. The ensuing discussion identifies the central phases of the construct. For

[118] *Ibid*, at 42-43.
[119] *Ibid*, at 33.
[120] *Ibid*, at 56-65.
[121] *Ibid*, at 81.

illustrative purposes, the discussion is complemented by consideration of how the construct explains the progression to consistently effective regulation in the fields of human rights and international trade. Importantly, and as noted earlier, it will also be considered if an international constitutionalism regulatory framework fits in the construct.

4.5.1. Establishing an active body of norm entrepreneurs

One of the primary lessons from Slaughter's liberalism, the constructivist approach and Brunnee and Toope's interactional law approach is that securing progression to an effective regulatory framework is dependent on the activities of a body of entrepreneurs that includes individuals, groups and states. Ideally, this body of norm entrepreneurs is independent and objective. Furthermore, their motivations cover a wide spectrum that includes self interest, empathy and even altruism.

For instance, in the movement to elevate the protection of fundamental human rights to international norm status, the body of norm entrepreneurs was an inclusive group that featured states, international organizations and civic society.[122] This is apparent when it is considered that the evolution of the norm in a form most resembling its contemporary form is traceable to the early 1940s. During this period, the Catholic Church, the American Institute of Law, the American Jewish Committee and the International Labour Organization undertook extensive agenda-setting and lobbying efforts. These efforts focused on encouraging inclusion of human rights issues in the new United Nations Charter that would be agreed to in 1950. These efforts ultimately compelled progression to the International Bill of Rights, a process which was formally controlled by states.[123]

Separately, in international trade the body of norm entrepreneurs consisted largely of states which sought liberalization of trade. This was largely because the issues surrounding trade were often driven by industry leaders, the electorate and other interest groups within states pursuing liberalization based on the potential such policies would hold for increasing

[122] HH Koh, *supra* n.38, at 2639. K Sikkink 'Human Rights, Principled Issue-Networks and Sovereignty in Latin America' (1993) 47 *International Organization* 411. J Gupta 'Legitimacy in the Real World: A Case Study of the Developing Countries, Non-Governmental Organizations and Climate Change' in JM Coicaud and V Heiskanen *The Legitimacy of International Organizations* (2001) 482, 491.
[123] HP Schmitz and K Sikkink, *supra* n.20, at 525.

their incomes.[124] The domestic pressure they applied on states subsequently compelled states seeking political legitimacy to pursue advancement of the norm on the international level.[125]

Importantly, from these experiences, it can also be deduced that states need not be a part of the body of norm entrepreneurs.[126] However, the ability of the body of norm entrepreneurs to secure the emergence of a new norm benefits from the inclusion of strategically placed states within the group.[127] These are states that can compel other states to act in a manner that assists in developing shared understandings among states and thus, elevating the field in question to international norm status.[128] The only caveat to the inclusion of states in the body of norm entrepreneurs is that where states do form part of the body of norm entrepreneurs they should only act as norm entrepreneurs without selfishly seeking to advance their own state objectives.[129] This is essential to depoliticising the group and establishing its actual and perceived independence and impartiality. This cultivates the requisite levels of trust among the greater body of states to which the body of norm entrepreneurs' message is relayed, enhancing the depth of shared understanding and facilitating adoption of the regulatory frameworks based on the norms or understandings.[130]

4.5.2. Achieving a tipping point

Once a body of norm entrepreneurs has brought attention to a norm they proceed to cultivate shared understandings among states with the goal of bringing in the norm to a tipping point. Drawn largely from Finnemore and Sikkink's norm 'life cycle,' the tipping point is the point

[124] S Lester, B Mercurio with A Davies and K Leitner *World Trade Law: Text, Materials and Commentary* (2008) 66-70. HV Milner, *supra* n.30, at 448-453.
[125] HV Milner, *supra* n.30, at 449-453. J Gupta, *supra* n.122, at 491.
[126] A Florini, *supra* n.25, at 381-382.
[127] *Ibid*, at 375. T Yang, *supra* n.33, at 1140.
[128] HH Koh, *supra* n.46, at 1397, 1401-1402. G Goertz and PF Diehl, *supra* n.32, at 639. J Hart 'Three Approaches to the Measurement of Power in International Rela-tions' (1976) 30 *International Organization* 289, 291. DA Lake 'Anarchy, Hierarchy and the Variety of International Relations' (1996) 50 *International Organization* 1, 19-20. D Bodansky 'Legitimacy' in D Bodansky, J Brunnee and E Hey (eds) *The Oxford Handbook of International Law* (2007) 704, 707. JE Thomson 'Explaining The Regulation of Transnational Practices: A State-Building Approach' in JN Rosenau and E Czempiel (eds) *Governance Without Government: Change and Order in World Politics* (1991) 195, 216.
[129] A Florini, *supra* n.25, at 375, 382. K Kline and K Raustiala 'International Environmental Agreements and Remote Sensing Technologies' (2000) 14 available at: http://sedac.ciesin.columbia.edu/rs-treaties/rs-treaties_bckgnd.pdf
[130] A Cassesse, *supra* n.51, at 156. Z Maoz and DS Felsenthal, *supra* n.43, at 197. TM Franck *The Power of Legitimacy Among Nations* (1990) 199.

where a third of states or enough strategically placed states adopt the norm. Importantly, achieving a tipping point is largely dependent on domestic processes within states.[131]

Perhaps it is important to note, for present purposes, a tipping point is established as having been achieved once a broad and general treaty is agreed to by states. Following this, more detailed and specific regulatory frameworks emerge. These more detailed and specific regulatory frameworks arise when regional treaties drawn from the international agreements emerge. Alternatively, this can assume developments in state legislation and practice to reflect the international agreements.

For instance, in human rights, once shared understandings were established and the human rights norm had started to take root, states accepted the transition to binding human rights treaties for various reasons, such as ensuring political survival.[132] Thus, in some states, the motivation for acceptance of the norm was largely to enhance domestic legitimacy based on standards that were created once some states had accepted the emergent norms.[133] Following this, a tipping point was arguably achieved with the agreement to the Universal Declaration of Human Rights in 1948. Fourty eight states voted in favour of the agreement. Importantly, included in that number were various strategically placed states such as the United States, the United Kingdom and France.

Separately, in the movement to elevate international trade to international norm status, the fact that shared understandings had been established was particularly apparent from the autonomous drive of newly independent or lesser developed states to be included in what was, at the time, an international trade norm in its infancy. In many ways, this was pursued by states as a response to the pressure applied on them by industry leaders, the electorate and other interest groups within states that often sought protection or liberalization because such policies would positively impact on their incomes.[134] Ultimately, a tipping point can be said to have been achieved with the progression to the General Agreement on Tariffs and Trade in 1947. Certainly, the number of states that signed up to the agreement, twenty three, was small in relation to the total number of states at the time, two hundred and fifty seven.[135] However,

[131] T Risse and K Sikkink, *supra* n.54, at 15.
[132] HP Schmitz and K Sikkink, *supra* n.20, at 522.
[133] CA Whytock 'Thinking Beyond the Domestic-International Divide: Toward a Unified Concept of Public Law' (2004) 36 *Georgetown Journal of International Law* 155, 172.
[134] HV Milner, *supra* n.30, at 448-453.
[135] S Gibbs 'Official List for ARRL DX Contest and the Post-war DXCC' available at: http://www.guernsey.net/~sgibbs/amateur_radio/dxcc0247.html

it is important to consider that the body of states that did sign the agreement included various strategically placed states.[136] Notable examples included the United Kingdom, the United States, and France.

4.5.3. Progression to legality

Once a tipping point is secured, the next phase in transitioning to international regulation is establishing the legality of norms or shared understandings.[137] Importantly, and reverting to the limitations in Brunnee and Toope's approach noted earlier, it is submitted that a slight departure from their interactional approach is necessary in pursuing effective international regulation. Specifically, achieving effective international regulation depends on norm entrepreneurs cultivating deeper shared understandings among various states in the first instance.[138] These deeper shared understandings form the basis on which frameworks that reflect legality criteria emerge. Considering that norm entrepreneurs play a central role in cultivating deeper shared understandings which lead to the attainment of legality, understanding progression to legality requires some appreciation of the necessary qualities of norm entrepreneurs as well as the role they play in cultivating shared understandings.

With respect to necessary qualities of the body of norm entrepreneurs, experience with human rights and international trade suggests that the perceived and real objectivity of norm entrepreneurs as a group is an essential quality of the body of norm entrepreneurs. Similarly, the objectivity of the obligations that norm entrepreneurs seek to be reflected in international regulatory frameworks is also an essential quality that must be present if their enterprise should succeed.

For instance, it is reasonable to deduce, from the constitution of the body of norm entrepreneurs in human rights, that they had varied backgrounds and different interests likely making them an objective group. This objective group relied on tenets of natural law to frame shared understandings on the human rights norm.[139] A central reason for reliance on natural

[136] S Lester, B Mercurio with A Davies and K Leitner, *supra* n.124, at 66-70.
[137] J Brunnee and SJ Toope, *supra* n.14, at 310.
[138] *Ibid*, at 71.
[139] JW Dacyl, *supra* n.19, at 137, 147-148. D Shelton, *supra* n.29, at 299-302. H Barnett (8ed) *Constitutional and Administrative Law* (2011) 57. P Sands (2ed) *Principles of International Environmental Law* (2003) 6.

law was the fact that it was, at the time, widely regarded as an objective standard.[140] Thus, norm entrepreneurs argued that human rights were fundamental to all persons.[141] As such, they accrued to all persons regardless of their geographic location. This was the basis on which they further argued that regulating human rights had to feature a shift from state egotism towards legal pluralism and collectivist understanding.[142] The result of the efforts of this objective body and the objective framing of obligations has been the compendium of documents that constitute the International Bill of Rights.[143]

Separately, the objectivity of the body of norm entrepreneurs in international trade was rooted in the fact that it was a group that featured and reflected varied interests. As in human rights, this body also succeeded because it managed to frame the norm in an objective manner. Thus, norm entrepreneurs framed the norm around potential economic benefits of unfettered trade for all states and their citizenry. Based on this, they argued for a reduction in tariffs and the elimination of multiple forms of protectionism in international trade.[144] This culminated in agreement to the General Agreement on Tarrifs and Trade.[145]

Having noted central qualities of norm entrepreneurs, it is important to consider the role they play in cultivating deeper shared understandings among states and relevant actors. This is best explained through Brunnee and Toope's conception of communities of practice as a means of 'fixing' the parameters of the pursued regulatory framework in the diffuse international society.[146] To this end, Brunnee and Toope argue that 'it is only when actors become engaged in a community of practice that shared understandings come to be more widely shared.'[147]

It is important to note however, that in distinction to Brunnee and Toope's framework which argues that a community of practice must follow the attainment of legality, the community of practice that is advocated here would form part of the effort to cultivate deeper shared understandings among states prior to achieving a regulatory framework that meets the

[140] EJ Criddle and E Fox-Decent, *supra* n.28, at 334, 343. JW Dacyl, *supra* n.19, at 137. S Hall, *supra* n.28, at 269-270, 273.
[141] HH Koh, *supra* n.46, at 1410-1411. ME Keck and K Sikkink, *supra* n.36, at 79-80.
[142] HP Schmitz and K Sikkink, *supra* n.20, at 517.
[143] See Chapter Two and Chapter Three.
[144] KW Abbott, *supra* n.30, at 501. MCEJ Bronckers, *supra* n.30, at 549. JL Dunoff, *supra* n.30, at 737. D Shelton, *supra* n.29, at 299-302. HV Milner, *supra* n.30, at 449.
[145] See Chapter Two and Chapter Three.
[146] SJ Toope, *supra* n.67, at 7.
[147] J Brunnee and SJ Toope, *supra* n.64, at 64.

legality criteria. As such, it is best understood as a preliminary community of practice generated through the efforts of norm entrepreneurs as they seek to cultivate deeper shared understandings.

Importantly, a preliminary community of practice helps norm entrepreneurs cultivate deeper shared understandings through encouraging greater interaction among states. Experience with human rights and international trade suggests that a consequence of this progression is that it highlights the need for an international regulatory framework which crystallizes and specifies shared understandings and communities of practices in a manner that meets the legality criteria.[148]

For instance, following the tipping of the human rights norm which culminated in the Universal Declaration of Human Rights of 1948, a preliminary community of practice was developed around the human rights norm. This culminated in eventual agreement to separate treaties such as the International Covenants on Civil and Political Rights, the International Convention on the Elimination of all forms of Racial Discrimination, the Covenant on the Elimination of all forms of Discrimination Against Women, the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, and the United Nations Convention on the Rights of the Child. These international level agreements reflect constitutionalism values, satisfy the criteria of legality, and lead to effective legality.

Separately, and as noted above, the tipping point for the international trade norm was the General Agreement on Tariffs and Trade of 1947. Following this, a preliminary community of practice around the norm facilitated progression to the Agreement Establishing the World Trade Organization in 1994. As in human rights, this regulatory framework reflects values of constitutionalism, satisfies the criteria of legality while also ensuring effective legality in the broader sense.

Once deeper shared understandings emerge from a preliminary community of practice, creating regulatory frameworks that meet legality criteria is relatively 'easier' particularly when it is recalled that the legality criteria are largely procedural in orientation and allow actors to pursue their own ends while being guided by law.[149] In addition, achieving legality criteria is also 'easier' because states will already be enganged in a practice

[148] *Ibid*, at 48.
[149] *Ibid*, at 77-86.

of regulation. As such, their concern will lie predominantly in securing that other states act in a manner consistent with the shared understandings or norms.

Importantly, experience with human rights and international trade suggests that where deeper shared understandings have been cultivated and preliminary communities of practice established, the result has been international constitutionalism regulatory frameworks.[150] This makes sense since such frameworks offer hierarchical and centralised regulation in a manner that often meets legality criteria and effectively crystallizes existing shared understandings and norms.[151] In addition, in international relations where states are both subjects and law-makers, reciprocity becomes important to ensuring the success of regulatory efforts. As such, international constitutional regulatory frameworks offer a framework to ensure reciprocity through a pronounced system of accountability.[152] For instance, the framework secures the accountability of laggard states to the framework's machinery and to other states, as well as the accountability of the regulators to regulated states. Also, international constitutionalism regulatory frameworks are considered desirable because of the perceived legitimacy of such frameworks.[153]

It must be acknowledged that a potential drawback with this approach, which places emphasis on cultivating deeper shared understandings in the first instance, is that developing such deeper shared understandings predictably takes time. This is seemingly undesirable, for instance in areas of international environmental protection such as climate change where international regulation may be needed as a matter of urgency. However, while urgency may attach to achieving the international regulation of some environmental protection matters, it is important to bear in mind that what is envisaged here is not a situation in which nothing is done to address pressing problems. Rather, cultivating deeper shared understandings among states, and the interaction that is characteristic of communities of practice, necessarily leads to domestic regulation as illustrated by the United States and Chinese examples noted above. Indeed, the possibility remains that resultant frameworks may even be more aspirational than what would be available through international regulatory frameworks.

[150] See Chapter Three.
[151] J Brunnee and SJ Toope, *supra* n.64, at 48.
[152] *Ibid*, at 40.
[153] See Chapter Three.

4.5.4. Development of a community of practice

Brunnee and Toope convincingly argue that it is not enough to achieve legality, and the same applies to the effective legality discussed above. This is because, once effective legality is achieved, culminating in perceived and real legitimacy of the law in a manner that inspires fidelity, transition to effective legal regulation is dependent on the development of a community of practice around laws in the regulatory framework, in this instance an international constitutionalism regulatory framework.

Importantly, Brunnee and Toope note that it is not necessary or helpful to imagine the existence of a homogenous 'international community' for law to emerge.[154] Rather, all that is required is that states understand what the law requires and why. Thus, in this phase, states interact with the law with the expectation of reciprocity from other states. Effectively, and as in Finnemore and Sikkink's norm cascade, social processes become important to ensuring that regulatory measures assume a taken-for-granted quality.

The importance of a community of practice is apparent in the evolution of the human rights norm. Thus, by 1975, 33 states, the equivalent of 23 percent of United Nations membership at the time had ratified the International Covenants on Civil and Political Rights. However, by 2001, 147 states, the equivalent of 76 percent of United Nations membership had ratified the treaty.[155] This number has since risen to 167 states. To further illustrate the cascade of the human rights norm generally, it is also worth noting that presently, 174 states are party to the International Convention on the Elimination of all forms of Racial Discrimination, 160 the International Covenant on Economic, Social and Cultural Rights, 168 the Covenant on the Elimination of all forms of Discrimination Against Women, 147 the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, and 194 the United Nations Convention on the Rights of the Child.

Effectively, the standards of the human rights norm have significantly entered into the understandings of states. Thus, the norm may not necessarily be complied with, but it cannot just be ignored. Even where the intention is to avoid the law, the norm must still be taken into account.[156] Essentially, the International Bill of Human Rights has entrenched the notion that

[154] J Brunnee and SJ Toope, *supra* n.64, at 86.
[155] HP Schmitz and K Sikkink, *supra* n.20, at 521.
[156] D Galligan and D Sandler 'Implementing Human Rights' in S Halliday and P Schmidt *Human Rights Brought Home: Socio-legal Perspectives on Human Rights in the National Context* (2004) 37.

a legitimate state must uphold certain core fundamental rights such as the rights to life, privacy and freedom of expression.[157] The reputations of laggard states could easily be at stake in a manner that affects all other relations of these states. As such, most states do not want to be seen to violate fundamental rights and often take extensive measures to ensure that their conduct is not perceived as being in violation of these rights.[158]

A similar progression to a norm cascade based on a community of practice is also perceivable in the evolution of the international trade norm. The norm arguably tipped with the coming into effect of the 1947 General Agreement on Tariffs and Trade which carried 23 signatory states. Since then, the norm cascade has been in effect bolstered by agreement to the 1994 World Trade Organization which seeks to give effect to the General Agreement on Tariffs and Trade.[159] Membership to the World Trade Organization in 1995 stood at 128 member states. Presently, the World Trade Organization has a membership of 153 parties representing 97 percent of the world's population.[160]

As with human rights, the dictates of the international trade norm have extensively affected state activities. Thus, even in regulating other aspects of international relations, care is taken to ensure that pursued regulatory frameworks are not inconsistent with fundamental principles of the trade norm. This is apparent in environmental protection where, for instance, enforcement of environmental protection obligations is often cognisant of the international trade regime.[161]

4.6. Conclusion

The foregoing analysis of theory suggests that progression to consistently effective environmental protection in the mould of human rights and international trade is predicated

[157] T Risse and K Sikkink, *supra* n.54, at 1.

[158] T Crossen 'Multilateral Environmental Agreements and the Compliance Continuum' (2004) 16 *The Georgetown International Environmental Law Review* 1, 21-25. GW Downs and MA Jones 'Reputation, Compliance and International Law' (2002) 32 *Journal of Legal Studies* S95, S95-S96. RB Mitchell, *supra* n.52, at 902. A Chayes and A Chayes *The New Sovereignty: Compliance with International Regulatory Agreements* (1995) 119.

[159] HV Milner, *supra* n.30, at 449.

[160] Understanding the World Trade Organization: The Organization *Members and Observers* available at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm

[161] See for instance, S Barrett 'The Strategy of Trade Sanctions in International Environmental Agreements' (1997) 19 *Resource and Energy Economics* 345.

on completing the processes in the above construct. This argument coincides with the previous argument to the extent that an international constitutionalism regulatory framework secures the third, effective legality phase of the construct.

While this conclusion affirms the conclusion in Chapter Three that progression to an international constitutionalism regulatory framework is the gateway to consistently effective international regulation, it raises some important issues that merit attention. First, it remains un-explored how states might be persuaded to pursue progression to an international constitutionalism regulatory framework in environmental protection specifically. Secondly, the discussion highlights that an international constitutionalism regulatory framework only satisfies the third phase of the proffered four-phase construct. This suggests that while the proposed international constitutionalism regulatory framework may be the gateway to consistently effective international regulation, it is merely the penultimate phase of the construct. At the very least, this implies that achieving an international constitutionalism regulatory framework would not necessarily lead to consistently effective environmental protection as previously argued. Addressing these issues is the focus of the remaining chapters.

Chapter Five

The environmental protection norm in the proposed construct

'Given the necessary heterogeneity (of the modern world), our very understanding of sovereignty is stretched, perhaps to the breaking point...we can see more clearly that territorial boundaries have always had multiple purposes or been associated with multiple rights that have been bundled together in the name of sovereignty. We can also see that these purposes and rights can be unbundled and assigned different masters or agents in a reformed global social and political architecture'[1]

5.1. Introduction

The preceding chapter argued that an effective international regulatory framework can be achieved following the completion of the four phases in the proposed construct. These phases consist of, establishing a body of norm entrepreneurs, pushing an emergent norm to a tipping point, securing effective legality of the norm and lastly, achieving a community of practice around regulatory efforts based on the norm. Importantly, it was also noted, based on consideration of experience with human rights and international trade, that an international constitutionalism regulatory framework that was previously identified as the gateway to consistently effective environmental protection fulfils the requirements of the third phase, that is, effective legality.

If this proffered construct is the means by which to achieve consistently effective regulation, the fact that consistently effective environmental protection is yet to be achieved, as argued previously, suggests that the norm is yet to complete the four phases of the construct. However, for the sake of completeness it is important to consider where precisely the environmental protection norm is currently situated in its progression through the four

[1] NG Onuf *The Republican Legacy in International Thought* (1998).

phases of the construct. Importantly, in the drive to achieve consistently effective environmental protection, as is the objective of the thesis, this will allow for an analysis into why the norm is yet to complete the phases of the construct. Knowledge gleamed from this analysis will then be useful to establishing how completion of the phases of the construct might be secured leading to consistently effective environmental protection.

5.2. Environmental protection in the construct

Traditionally, environmental protection was, and continues to be, perceived as a field under the *grundnorm* regulated under the sovereignty-centric international law paradigm.[2] This was somewhat justifiable in the formative phases of the environmental protection movement when the environment was not degraded to current levels.[3] Development concerns and decolonialization rightly assumed more important status, with environmental protection efforts being predominantly relegated to the status of a bilateral issue between states.[4]

In the modern world, such an approach to environmental protection is no longer justifiable.[5] Environmental deterioration has evolved beyond its former status as a mere bilateral concern to a more global and multilateral concern.[6] Even more, scientific and

[2] S Barrett 'International Cooperation and the International Commons' (2000) 10 *Duke Environmental Law and Policy* 131, 140-141. See Chapter Two.

[3] M Ehrmann 'Procedures of Compliance Control in International Environmental Treaties' (2002) 13 *Colorado Journal of International Environmental Law* 377, 386. LR Helfer 'Constitutional Analogies in the International Legal System' (2003) 37 *Loyola of Los Angeles Law Review* 193, 195.

[4] MJ Kelly 'Overcoming Obstacles to the Effective Implementation of International Environmental Agreements' (1997) 9 *Georgetown International Environmental Law Review* 448, 449, 454. B Fassbender 'Sovereignty and Constitutionalism in International Law' in N Walker (ed) *Sovereignty in Transition: Essays in Eurpean Law* (2003) 115, 119. E Louka *International Environmental Law: Fairness, Effectiveness and World Order* (2006) 8. A D'Amato 'The Evolution of International Environmental Law' (2001) 4: available at: http://anthonydamato.law.northwestern.edu/IELA/Intech01-2001-edited.pdf

[5] M Ehrmann, *supra* n.3, at 386. F Biermann and K Dingwerth 'Global Environmental Change and the Nation State' (2004) 4 *Global Environmental Politics* 1, 5-6.

[6] K Nowrot 'Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law' (1999) 6 *Indian Journal of Global Legal Studies* 579, 588. G Handl 'Transboundary Impacts' in D Bodansky, J Brunnee and E Hey *The Oxford Handbook of International Environmental Law* (2007) 531, 532-535. N Choucri 'Environmentalism' in J Krieger *et al* (2ed) *Oxford Companion to World Politics* (2001) 253, 253-255. EB Weiss 'International Environmental Law: Contemporary Issues and the Emergence of a New World Order' (1993) 81 *Georgetown Law Journal* 675, 709.

technological advancements have revealed the need for a precautionary approach to environmental protection.[7]

In this context, it has grown increasingly apparent, as discussed previously, that the sovereignty-centric international law paradigm is unable to effectively regulate environmental protection.[8] This has effectively established that environmental protection has grown to exceed the parameters of the *grundnorm*. Importantly, having established that there has been some acceptance of the need for an environmental protection norm, it is useful, to consider where the environmental protection norm rests within the context of the four-phase construct proffered in Chapter Four.

5.2.1. Norm entrepreneurs

The revelation that environmental protection exceeds the parameters of the *grundnorm* has significantly been driven by the efforts of an ever-expanding body of norm entrepreneurs who have argued for environmental protection's progression to the status of an international norm.[9]

This body of norm entrepreneurs features an extensive and complex network of intergovernmental, non-governmental, scientific organizations, state agencies, industry and environmental pressure groups.[10] Raustiala notes that 'states have come to rely upon particular non-governmental organisations within environmental law because it is politically and technocratically beneficial for them to do so, and because there is a recognition that as stakeholders private actors have interests worthy of consideration.'[11] In addition, where

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[7] T Crossen 'Multilateral Environmental Agreements and the Compliance Continuum' (2004) 16 *The Georgetown International Environmental Law Review* 1, 11. D Freestone 'The Road from Rio: International Environmental Law After the Earth Summit' (1994) 6 *Journal of International Environmental Law* 193, 210.

[8] See Chapter Two.

[9] ME Keck and K Sikkink *Activists Beyond Borders: Advocacy Networks in International Politics* (1998) 128-133.

[10] P Pattberg and J Stripple 'Beyond the Public and Private Divide: Remapping Transnational Climate Governance in the 21st century' (2008) 8 *International Environmental Agreements* 367, 378-384. K Stairs and P Taylor 'Non-Governmental Organizations and the Legal Protection of the Seas' in A Hurrell and B Kingsbury (eds) *The International Politics of the Environment* (1992) 110, 111-113. C Streck 'Global Public Policy Networks as Coalitions for Change' in Global Environmental Governance' in D Esty and MH Ivanova *Global Environmental Governance: Options and Opportunities* (2002) 121, 123-127. ME Keck and K Sikkink, *supra* n.9, at 122-126.

[11] K Raustiala 'The 'Participatory Revolution in International Environmental Law' (1997) 21 *Harvard Envtironmental Law Review* 537, 540.

access to international and national policy processes had previously been exclusive to governmental officials, a wide range of public interest groups now participate.

Despite making significant headway toward elevating environmental protection to international norm status, the progress of norm entrepreneurs has been significantly impeded by having to conduct their activities within the context of a sovereignty-centric international environmental law paradigm. However, as noted in Chapter Two, there is an emerging trans-national institutional framework driven significantly by these norm entrepreneurs. This has emerged to complement traditional normative techniques such as customary international law, the precautionary principle and sustainable development in seeking to remedy the difficulties that characterise reliance on the sovereignty-centric international law paradigm in environmental protection.

5.2.2. Tipping point

Certainly, norm entrepreneurs have succeeded in pushing the environmental protection norm to a tipping point. Undoubtedly, enough generally and strategically placed states have adopted the emergent environmental protection norm. This is apparent in two main ways.

First, while it is an approach that has been applied to specific issue areas in environmental protection, the Framework Convention-Protocol approach is particularly illustrative in this regard. Its applicability to a discussion of broader international regulation, despite the fact that it is applied to certain sub-fields of environmental protection efforts, derives from the fact that it is an approach that has been widely relied on in general environmental protection. Indeed, a significant number of these Framework Conventions have been agreed to across various sub-fields of environmental protection.[12] Notable fields relate to Ozone Protection, Climate Change, Movement of Transboundary Waste and Biodiversity. Their sheer number, as well as the fact that they cover most of the areas at the centre of environmental protection efforts, makes them a useful vehicle for determining whether a tipping point has been achieved in environmental protection generally.

Having noted this, within the context of the Framework Convention-Protocol approach it is reasonable to consider that a tipping point is achieved when the Framework

[12] RB Mitchell 'International Environmental Agreements Database Project (Version 2012.1)' (2002-2012) Available at: http://iea.uoregon.edu/

Convention is created.[13] This is because agreement to a Framework Convention often requires ratification by about a third of the body of states. For instance, to come into force the United Nations Framework Convention on Climate Change required ratification by fifty states. The group of states that ratified the Convention consisted of strategically placed states such as the United Kingdom, Germany, France and the United States. It is perhaps important, in regarding these numbers, to note that in various sub-fields of environmental protection such as the transboundary movement of hazardous waste and its disposal, not all states are active participants in regulated activities. As such, the requisite third of states may often be fulfilled based on the total number of states affected by regulation or partaking in certain activities, rather than the entire body of states. Alternatively, Framework Conventions in areas in which there is vast agreement on the need for regulation may require fewer numbers of states, based on the prior knowledge that most states will ratify international agreements. For instance, the Basel Convention required ratification by twenty states to enter into force. However, this was in-part due to the fact that the process of negotiation had established that states would ratify the treaty. Importantly, the fact that the numbers of states required to ratify a treaty before it comes into force fluctuates establishes, as noted earlier, that it is not solely a matter of a third of states' ratification that carries weight, rather, it is also important that enough strategically placed states ratify.

Second, attainment of a tipping point can be considered to be evidenced by the fact that a significant number of the more powerful states in much of the developed world, and a few in the developing world, carry extensive environmental protection regulatory frameworks which reflect a precautionary approach to environmental protection.[14] In addition, norm entrepreneurs in these states have managed to apply pressure on international institutions such as the World Bank to add environmental concerns to project approval processes for developing states.[15] As a consequence of efforts such as these, the environmental protection

[13] See Chapter Four.

[14] P Birnie, A Boyle and C Redgwell (3ed) *International Law and the Environment* (2009) 159. MJ Kelly, *supra* n.4, at 454.

[15] RB Mitchell 'International Environment' in W Carlsnaes, T Risse and BA Simmons (eds) *Handbook of International Relations* (2007) 500, 503. IFI Shihata 'Implementation, Enforcement and Compliance with International Environmental Agreements-Practical Suggestions in the Light of the World Bank's Experience' (1996) 9 *Georgetown International Environmental Law Review* 37, 49-51. MJ Kelly, *supra* n.4, at 456-457. J Werksman 'Greening Bretton Woods' in P Sands *Greening International Law* (1993) 65. JL Dunoff 'From Green to Global: Toward the Transformation of International Environmental Law' (1995) 19 *Harvard Environmental Law Review* 241, 283-284. J Goldstein, M Kahler, R Keohane and AM Slaughter 'Introduction: Legalization and World Politics' (2000) 54 *International Organization* 385, 390. G Handl 'Controlling Implementation of and Compliance with International Environmental Commitments: The Rocky Road from

norm has tipped. Perhaps this is best illustrated by the fact that the precautionary approach to environmental deterioration has increasingly grown to be reflected in various states in both the developed and the developing world, with some states elevating it to the status of customary international law.[16]

5.2.3. Effective legality

In considering whether environmental protection has achieved effective legality, it is important to reiterate, as noted in Chapter Four, that effective legality is not solely a measure of whether Fuller's criteria for legality are met as Brunnee and Toope have argued.[17] Rather, in the context of a construct to secure consistently effective international regulation, emphasis is placed on achieving effective legality which is what leads to effective regulation.

Achieving this effective legality is predicated on cultivating a preliminary community of practice around a norm that would have tipped. This often establishes the need for a regulatory framework, such as the proposed international constitutionalism regulatory framework, to 'fix' legal understandings.[18]

In this context, the failure of international environmental law, generally, to secure consistently effective environmental protection, as argued in Chapter One and Chapter Two, suggests that effective legality has not been achieved. Alternatively, in assessing whether effective legality has been achieved it is useful to revert to the previous discussion which identified the creation of a Framework Convention as signifying a tipping point. Ideally, and within the context of the construct proffered in Chapter Four, a Framework Convention 'fixes' legal understandings around a norm. This forms the backbone of a preliminary community of practice around the norm. This subsequently leads to a Protocol which reflects constitutionalism values, criteria of legality, while ensuring effective legality. Thus, whether

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Rio' (1994) 5 *Colorado Journal of International Environmental Law and Policy* 305, 319-320. DA Wirth 'Re-examining Decision-Making Processes in International Environmental Law' (1994) 79 *Iowa Law Review* 769, 783. DB Magraw and LD Hawke 'Sustainable Development' in D Bodansky, J Brunnee and E Hey *The Oxford Handbook of International Environmental Law* (2007) 613, 634. CD Stone 'Defending the Global Commons' in P Sands *Greening International Law* (1993) 35. ME Keck and K Sikkink, *supra* n.9, at 127. E Louka, *supra* n.4, at 28. The World Bank Operational Manual-Appendix 3 'Operational Policies' (1999) available at: http://www.env.go.jp/earth/coop/coop/document/10-eiae/10-eiae-7.pdf

[16] See Chapter Two.

[17] See Chapter Four.

[18] See Chapter Four.

effective legality has been achieved is a measure of whether these central processes are generally effectively achieved in international regulation.

To this end, it is important to note that there are instances that suggest the attainment of effective legality in environmental protection. For instance, in Ozone protection a tipping point was achieved with the coming into force of the 1985 Vienna Convention on the Protection of the Ozone Layer. Following this, a preliminary community of practice was developed around the ozone protection norm. This facilitated progression to the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer which met the criteria of legality and effectively addressed the dangers posed by ozone depletion.

Importantly however, such success in regulating environmental protection is far from the norm.[19] In other fields of international environmental law, securing of a tipping point often leads to various Framework Conventions as noted above.[20] Importantly, whether or not the Protocols reflect the legality criteria, these Protocols, as noted in Chapter Two, result in 'weak' laws that reflect lowest common denominator standards and therefore, do not lead to consistently effective environmental protection. Equally importantly, the failure to achieve a preliminary community of practice following a tipping point often means that Protocols are based on very thin shared understandings among states. In this context, framing laws that meet the legality criteria is relatively made easy by the fact that the laws created reflect weak commitments and therefore, meeting the criteria of legality is relatively easy.[21] To cite an earlier example, the norm surrounding the control of transboundary air pollution achieved a tipping point with agreement to the 1979 Geneva Convention on Long-Range Transboundary Air Pollution. Following this, attempts were made to secure a preliminary community of practice around the approach to controlling various substances in the air, for instance nitrous oxides. However, a lack of commitment to the process, for various reasons, by states precluded a successful community of practice around the norm. The result was the 1988 Protocol Concerning the control of Emissions of Nitrogen Oxides or their Transboundary

[19] See Chapter Two.
[20] RB Mitchell, *supra* n.12.
[21] For instance, Brunnee and Toope highlight that regulatory efforts in Climate Change fail to meet the criteria of legality. See J Brunnee and SJ Toope *Legitimacy and Legality in International Law* (2010) 216-218.

Fluxes which, while broadly meeting aspects of legality criteria, is a broad compromise on ecocentric needs.[22] As such, effective legality was not achieved.

By this measure, the reality across most environmental protection efforts is that effective legality is yet to be achieved. Importantly, numerous Framework Conventions that 'fix' legal understandings have already been agreed to. The difficulty has often attached to creating effective Protocols. Indeed, it was noted earlier that these Protocols often offer lowest common denominator laws as in control of emissions of nitrogen oxides or their transboundary fluxes. These factors suggest that the reason for failure to achieve Protocols that meet the requirements of effective legality is rooted in the inability to achieve a preliminary community of practice around norms in a manner that would lead to effective laws.

Importantly, and as noted in Chapter Four, the success of a preliminary community of practice that leads to effective legality is based on the objectivity of norm entrepreneurs and their ability to frame the objectives of the norm in an objective manner. As such, the failure to secure an effective preliminary community of practice around the environmental protection norm suggests lack of objectivity. Indeed, this coincides with the earlier argument that the sovereignty-centric nature of international environmental law, which often sees states assume a biased and self-interested position, makes it ill-suited to achieving consistently effective environmental protection.[23] This formed the premise of the argument in Chapter Three, based on comparative analysis of human rights and international trade, that progression to an international constitutionalism regulatory framework would lead to consistently effective environmental protection. Importantly, it was established in the previous chapter that such an international constitutionalism regulatory framework meets the criteria of effective legality to the extent that it reflects the criteria of legality while achieving effective environmental protection.

If lack of objectivity accounts for the environmental protection norm's inability to secure effective legality, it is necessary, bearing in mind that the objective of the thesis is to explore how consistently effective environmental protection could be achieved, to consider how the objectivity of the body of norm entrepreneurs and how they frame environmental objectives can be secured in a manner that would facilitate the development of a preliminary

[22] See Chapter Two. JB Skjaerseth, O Schram Stokke and J Wettestad 'Soft Law, Hard Law, and Effective Implementation of International Environmental Norms' (2006) 6 *Global Environmental Politics* 104, 109.
[23] See Chapter Two.

community of practice. Achieving such objectivity would lead to the attainment of effective legality through progression to an international constitutionalism regulatory framework as experience with human rights and international trade has shown.

To this end, a useful approach in exploring how objectivity could be achieved is to first consider the factors that have derailed former attempts at achieving objectivity. This can be the basis for an exploration of necessary aspects to consider in order to achieve objectivity.

5.3. Reasons for failure to achieve objectivity

Simply stated, the fact that the current body of norm entrepreneurs has been unable to achieve perceived and real objectivity is an inescapable part of the legacy of the Stockholm Conference which set the precedent of a state centric, human-centric approach to environmental protection. This legacy has meant that the body of norm entrepreneurs in environmental protection is predominantly constituted of states, their representatives and their institutions. Certainly, a greater entrepreneurial role for non-state actors is being carved out.[24] For instance, as far back as 2001 Yamin noted:

> "The last 10 years have witnessed an extraordinary rise in the level of international activities undertaken by non-governmental organizations. United Nations and Convention-based meetings are attended by record numbers of non-governmental organizations despite the proliferation of meetings and the high costs of travel. Almost every month a director of a major United Nations organization emphasizes the vital contributions of non-governmental organizations to delivering sustainable development."[25]

Despite the increasing role of non-state actors, entrepreneurship in environmental protection remains a largely state-oriented affair based on sovereignty considerations as noted earlier. Indeed, an important indicator of the detrimental impact of extensive state participation in the body of norm entrepreneurs is the framing of environmental protection issues.

[24] B Gemmill and A Bamidele-Izu 'The Role of NGOs and Civil Society in Global Environmental Governance' in D Esty and MH Ivanova *Global Environmental Governance: Options and Opportunities* (2002) 77.

[25] F Yamin 'NGOs and International Environmental Law: A Critical Evaluation of their Roles and Responsibilities' (2001) 10 *RECIEL* 149.

Framing is a reference to the processes that determine what issues get on the agenda and how they progress through the policy process. Thus, 'successful framing makes environmental concerns more salient to those not otherwise interested.'[26] In environmental protection, framing is particularly difficult because environmental issues often need to be addressed from a precautionary perspective.[27] In this context, framing environmental protection objectives in an objective manner becomes particularly important because this precautionary approach is significantly based on predictive scientific findings.[28]

For example, under international environmental law, extensive state participation in the body of norm entrepreneurs has often meant that where predictive findings that inform the precautionary approach highlight the need for standards which are already reflected in the jurisdictions of states forming part of the body of norm entrepreneurs, this has led to the argument that those states already implementing such standards pursue their inclusion in global regulation only for eco-imperialistic purposes. Alternatively, state participation in the body of norm entrepreneurs has meant that where precautionary scientific recommendations are in conflict with other established state concerns such as the pursuit of development, some states simply reject predictive findings as being overly cautious.[29]

Furthermore, even when framing elicits wide-scale agreement, the difficulties posed by the extensive participation of states in the body of norm entrepreneurs are also apparent in the substantive standards adopted by states. Here, the central role played by states in the body of norm entrepreneurs has created a situation where the focus of efforts at environmental protection often reflects political considerations rather than ecocentric objectives.[30]

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[26] RB Mitchell, *supra* n.15, at 503-504.

[27] MJ Kelly, *supra* n.4, at 465, 480. C Boyden Gray and DB Rivkin 'No Regrets: Environmental Policy' (1991) 83 *Foreign Policy* 47, 48-49. T Crossen, *supra* n.7, at 11.

[28] C Boyden Gray and DB Rivkin, *supra* n.27, at 50. D Bodansky, J Brunnee and E Hey 'International Environmental Law: Mapping the Field' in D Bodansky, J Brunnee and E Hey *The Oxford Handbook of International Environmental Law* (2007) 1, 7.

[29] JB Skjaerseth, O Schram Stokke and J Wettestad, *supra* n.22, at 109. S Karlsson 'The North-South Knowledge Divide: Consequences for Global Environmental Governance' in D Esty and MH Ivanova *Global Environmental Governance: Options and Opportunities* (2002) 53, 54. J Whalley and B Zissimos 'Making Environmental Deals: The Economic Case for a World Environmental Organization' in D Esty and MH Ivanova *Global Environmental Governance: Options and Opportunities* (2002) 163, 169. J Gupta 'Legitimacy in the Real World: A Case Study of the Developing Countries, Non-Governmental Organizations and Climate Change' in JM Coicaud and V Heiskanen *The Legitimacy of International Organizations* (2001) 482, 495. E Louka, *supra* n.4, at 19-20, 29.

[30] See Chapters One and Two.

The case of sustainable development is particularly illustrative. In theory, sustainable development's attempt at seeking a balance between development and environmental protection should be, and has been, celebrated. However, as argued previously, states have ensured that sustainable development often constitutes a legalised exception to international environmental law to the extent that it affords states discretion in determining what is 'sustainable.' This allows them to address environmental protection as a corollary to development concerns.[31]

Certainly, this is a broad and general account of why the objectivity of norm entrepreneurs has been compromised. As such, it would benefit from analysis of the practical ways in which the lack of objectivity of the body of norm entrepreneurs has adversely affected the cultivation of a preliminary community of practice around the environmental protection norm in a manner that would lead to the achievement of effective legality and thus, an international constitutionalism regulatory framework. To this end, it is submitted that three areas, conflicting interests, capacity differences, and justice considerations, are particularly illustrative of the impact that a state-led body of norm entrepreneurs has had in precluding the attainment of perceived and real objectivity and consequently, the development of a preliminary community of practice around the environmental protection norm.

5.3.1. Conflicting interests

One of the main ways in which a lack of objectivity has posed an obstacle to securing a preliminary community of practice around international environmental law is perceivable through the consistently noted perspective that efforts to achieve the effective regulation of environmental protection significantly interfere with the pursuit of state interests. Importantly, it is often accepted that environmental protection objectives are necessarily in conflict with existing objectives and the body of norms, principles and practices in place to secure them.[32] However, a lack of objectivity among norm entrepreneurs has resulted in

[31] M Pallemaerts 'International Environmental Law from Stockholm to Rio: Back to the Future?' in P Sands *Greening International Law* (1993) 17. M Poustie 'Environment' in E Moran *et al* (eds) *Stair Memorial Encyclopaedia Reissue* (2007) para 21, 24.

[32] A Florini 'The Evolution of International Norms' (1996) 40 *International Studies Quarterly* 363, 367. D Shelton 'Normative Hierarchy in International Law' (2006) 100 *American Journal of International Law* 291, 297. M List and V Rittberger 'Regime Theory and International Environmental Management' in A Hurrell and B Kingsbury *The International Politics of the Environment* (1992) 85, 92. L Rajamani *Differential Treatment in International Environmental Law* (2006) 4.

states' reluctance to accept that their narrower national interests are inextricable from the interests of the whole.[33]

As an example, experience with international environmental law has shown that an inescapable conflict that pursuing an effective regulatory framework for environmental protection encounters is with development goals.[34] State pursuit of development is a long-standing and established principle of international relations.[35] In contrast, concern with environmental protection only dates back to the late 1960s and early 1970s.[36] Under international environmental law this, and similar conflicts, has played a significant role in limiting the attainment of effective regulation.

With respect to the conflict with development, sustainable development which seeks to find a balance between development objectives and environmental protection has been relied on to address this conflict.[37] However, a lack of objectivity in the body of norm entrepreneurs as well as a flawed approach to framing sustainable development has fostered the perception that the pursuit of environmental protection is necessarily in conflict with development. Consequently, sustainable development has arguably offered states legal justification for prioritising development goals over environmental protection objectives.[38] It is therefore not a satisfactory resolution of the conflict between environmental protection, social progress and development.[39] Instead, it allows states to place greater emphasis on the provision of societal services and the pursuit of economic-oriented development goals.[40] Importantly, this has compromised the attainment of a preliminary community of practice around environmental protection objectives because such objectives are frequently, and legitimately, regarded as corollary to other concerns.[41]

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[33] R. St. J. Macdonald 'Solidarity in the Practice and Discourse of Public International Law' (1996) 8 *Pace International Law Review* 259, 290.

[34] F Biermann and K Dingwerth, *supra* n.5, at 2. A Cassesse 'The Role of Legal Advisers in Ensuring that Foreign Policy Conforms to International Legal Standards' (1992) 14 *Michigan International Law Journal* 139, 160. A Hurrell and B Kingsbury *The International Politics of the Environment* (1992) 2.

[35] M List and V Rittberger, *supra* n.32, at 92.

[36] D Held 'Law of States, Law of Peoples: Three Models of Sovereignty' (2002) 8 *Legal Theory* 1, 14.

[37] DB Magraw and LD Hawke, *supra* n.15, at 619.

[38] F Biermann and K Dingwerth, *supra* n.5, at 2-3. M List and V Rittberger, *supra* n.32, at 92. MJ Kelly, *supra* n.4, at 471-473.

[39] See Chapter Two.

[40] See Chapter Two.

[41] See Chapter Two.

Considering that this, and similar conflicts, is an unavoidable aspect to regulating the global environment, it is important to consider how such conflict might be addressed differently in order to secure a preliminary community of practice around the environmental protection norm if it is to achieve effective legality.[42]

5.3.2. Capacity differences

The active involvement of states in the body of norm entrepreneurs has also compromised objectivity and the attainment of a preliminary community of practice around the environmental protection norm through state-led efforts to qualify environmental protection obligations based on capacity considerations.[43]

Capacity refers to states' ability to meet environmental protection obligations.[44] For instance, capacity could relate to financial resources required to satisfy environmental protection obligations.[45] Alternatively, in light of the indelible link between environmental protection, science and technology, meeting environmental protection obligations may

[42] WJ Aceves 'Relative Normativity: Challenging the Sovereignty Norm Through Human Rights Litigation' (2002) 25 *Hastings International and Comparative Law Review* 261, 265. M Byers 'Conceptualising the Relationship Between *Jus Cogens* and *Erga Omnes* Rules' (1997) 66 *Nordic Journal of International Law* 211. RB Stewart 'Environmental Regulation and International Competitiveness' (1992) 102 *Yale Law Journal* 2039, 2049, 2053. M List and V Rittberger, *supra* n.32, at 92.

[43] A Cassesse, *supra* n.34, at 161-162. RB Stewart, *supra* n.42, at 2049, 2053. W Lang 'Diplomacy and International Environmental Law-Making: Some Observations' in G Handl (ed) (1992) 3 *Yearbook of International Environmental Law* 109, 122. A Chayes and A Chayes *The New Sovereignty: Compliance with International Regulatory Agreements* (1995) 22. OR Young 'The Effectiveness of International Institutions: Hard Cases and Critical Variables' in JN Rosenau and E Czempiel (eds) *Governance Without Government: Change and Order in World Politics* (1991) 160, 183, 185. F Biermann and K Dingwerth, *supra* n.5, at 5. L Susskind and C Ozawa 'Negotiating More Effective International Environmental Agreements' in A Hurrell and B Kingsbury (eds) *The International Law of the Environment* (1992) 142. GW Downs, KW Danish and PN Barsoom 'Is the Good News About Compliance Good News about Cooperation?' (1996) 50 *International Organization* 379, 382. RR Churchill and G Ulfstein 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law' (2000) 94 *American Journal of International Law* 623, 643-647. A Cardesa-Salzman 'Non-compliance Procedures in Multilateral Environmental Agreements: Weaknesses' Diagnosis and Therapy' (2010) 7: available at: http://www.esil-en.law.cam.ac.uk/Media/Draft_Papers/Agora/Cardesa-Salzmann.pdf

[44] F Biermann and K Dingwerth, *supra* n.5, at 5. JL Dunoff, *supra* n.15, at 288. EB Weiss, *supra* n.6, at 701-702.

[45] RB Mitchell 'Compliance Theory: Compliance, Effectiveness and Behaviour Change in International Environmental Law' in D Bodansky, J Brunnee and E Hey (eds) *The Oxford Handbook of International Law* (2007) 893, 909.

require technological capacity.[46] Expectedly, different priorities within states, as well as levels of development mean that differences in capacity subsist between states.[47]

Under international environmental law, there have been attempts to accommodate capacity differences in different ways. For instance, accommodating capacity differences accounts for lowest common denominator laws that reflect compromise, often, based on capacity considerations.[48] Alternatively, capacity has been accommodated through leaving implementation of environmental obligations to states.[49] In addition, capacity differences have been addressed through recourse to conditionality, as noted in Chapter Two.

Such a turn to lowest common denominator laws as well as disparate implementation has not cultivated the stature of environmental protection as imposing legitimate behavioural claims.[50] Instead, as with the sustainable development example noted earlier, concessions to capacity have ensured that environmental protection remains a corollary concern to issues such as development. Alternatively, reliance on conditionality has created a culture in which a sector of states, particularly in the developing world, expects incentives for participation in environmental protection efforts.[51] For example, rooted in Article 10 of the Montreal Protocol, funding for developing countries was withheld if those countries did not report their baseline data within one or two years of their first funded projects.[52] Similarly, the threat of denied Global Environmental Facility funding played an integral role in the effective handling of the Russian and East European non-compliance cases under the same Protocol.[53] As a result, the global consumption of chlorofluorocarbons, the main cause of ozone depletion, declined by more than 70 percent between 1987 and 1996.[54] It is doubtful that such a marked change would have occurred had the Montreal Protocol, with its incentive-based

[46] M Ehrmann, *supra* n.3, at 390. RB Mitchell, *supra* n.45, at 909. A Hurrell and B Kingsbury, *supra* n.34, at 30. OR Young, *supra* n.43, at 183-185.
[47] JL Dunoff, *supra* n.15, at 288, 291.
[48] See Chapter Two, Three.
[49] See Chapters Two and Three.
[50] E Louka, *supra* n.4, at 29.
[51] GW Downs, KW Danish and PN Barsoom, *supra* n.43, at 395. JL Dunoff, *supra* n.15, at 271. A Cardesa-Salzman, *supra* n.43, at 7. T Yang 'International Treaty Enforcement as A Public Good: Institutional Deterrent Sanctions in International Environmental Agreements' (2007) 27 *Michigan Journal of International Law* 1131, 1157. L Rajamani, *supra* n.32, at 6.
[52] S Barrett, *supra* n.2, at 138.
[53] IFI Shihata, *supra* n.15, at 47-49.
[54] Y von Schirnding, W Onzivu and AO Adede 'International Environmental Law and Global Public Health' (2002) 80 *Bulletin of the World Health Organization* 970, 972.

approach, not been adopted.[55] However, the down-side of such an approach has been that it has become common practice to rely on an incentive-based approach to environmental protection.[56] Indeed, some states seemingly participate in the environmental protection effort only to obtain access to incentive funds.[57]

As such, limiting the potency of environmental protection as well as flexible approaches to implementation based on capacity considerations, which is a consequence of the lack of objectivity in the body of norm entrepreneurs, has not secured a preliminary community of practice around the environmental protection in a manner that would lead to effective legality. Thus, if norm entrepreneurs are to succeed in establishing a preliminary community of practice around the environmental protection norm, it is pertinent to reconsider these approaches to accommodating capacity differences.

5.3.3. Justice considerations

State participation in the body of norm entrepreneurs has also compromised the attainment of a preliminary community of practice by taking focus away from environmental protection objectives and placing it on justice considerations. In particular, state participation in the body of norm entrepreneurs has raised significant difficulties with respect to securing procedural and distributive justice in regulatory efforts.[58]

Procedural justice requires that proper mechanisms are in place to ensure the creation, interpretation and application of law. Thus, it is critical that all states have an opportunity to play a role in the lawmaking and decision-making processes. A predictable limitation of this approach in the sovereignty-centric international law paradigm is that it requires equality among states to a significant degree, a factor which is not reflective of state relations in practice.[59] In addition, it must be considered that concern with environmental protection has arisen at a time when the economic problems, development needs and aspirations of the less

[55] *Ibid*.
[56] P Sands (2ed) *Principles of International Environmental Law* (2003) 180.
[57] Y von Schirnding, W Onzivu and AO Adede, *supra* n.26, at 973. A Hurrell and B Kingsbury, *supra* n.34, at 17. E Louka, *supra* n.4, at 15. CE Bruch and E Mrema *Manual on compliance with and enforcement of Multilateral Environmental Agreements* (2006) 45.
[58] See a useful summary in U Beyerlin and T Marauhn *International Environmental Law* (2011) 36.
[59] *Ibid*, at 36-37.

developed states have become urgent.[60] The difficulties this poses have only been exacerbated by the fact 'there are no standard methods for making international environmental law treaties. Consequently, existing law-making processes are often wasteful, expensive for poorer nations to participate in, as noted in Chapter Two.[61]

Conversely, distributive justice is concerned with the law's capacity to secure proper allocations of burdens and benefits.[62] Where inequalities among states may compromise the attainment of procedural justice, distributive justice seeks the unequal treatment of unequal states as appropriate. The objective of this is to ensure that the outcomes of inter-state decision-making processes meet the requirements of justice.[63]

Attainment of distributive justice has been difficult in regulating environmental protection under international environmental law for varied reasons that are traceable to state participation in the body of norm entrepreneurs. Most notably, it has frequently been a point of contention between developing and developed states that the focus of environmental protection efforts has been on what most of the developing world perceive to be distant and unproven harms such as climate change and ozone depletion. The developing world regards these issues as being more reflective of the concerns of the developed world. In contrast, more immediate and devastating matters that are more relevant to the developing world such as desertification are seen as not attracting similar attention.[64]

This friction among states is best exemplified in climate change.[65] Developing states frequently argue that climate change is the result of the actions of the developed world which achieved current levels of development based on high and unsustainable levels of energy consumption and natural resource depletion.[66] They argue further that it makes logical sense

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[60] P Birnie, A Boyle and C Redgwell, *supra* n.14, at 11. D Leary and B Pisupati 'Introduction' in D Leary and B Pisupati *The Future of International Environmental Law* (2010) 1-3. P Dupuy 'Soft Law and International Law of the Environment' (1991) 12 *Michigan International Law* 420, 421. EB Weiss, *supra* n.6, at 704.

[61] M Poustie, *supra* n.31, at para 13.

[62] TM Franck *Fairness in International Law and Institutions* (1995) 22-24.

[63] U Beyerlin and T Marauhn, *supra* n.58, at 37.

[64] JL Dunoff, *supra* n.15, at 288. D Freestone, *supra* n.7, at 212. D Bodansky, J Brunnee and E Hey, *supra* n.28, at 2. A Hurrell and B Kingsbury, *supra* n.34, at 3, 37. L Susskind and C Ozawa, supra n.43, at 153. E Louka, *supra* n.4, at 18. S Karlsson, *supra* n.29, at 57. MJ Kelly, *supra* n.4, at 455-456.

[65] MJ Kelly, *supra* n.4, at 454-455.

[66] C Boyden Gray and DB Rivkin, *supra* n.27, at 64. D Zaelke and J Cameron 'Global Warming and Climate Change: An Overview of the International Legal Process' (1990) 5 *American University Journal of International Law and Policy* 249, 280. P Sands 'Enforcing Environmental Security' in P Sands *Greening International Law* (1993) 50, 60. PS Thatcher 'The Role of the United Nations' in A Hurrell and B Kingsbury (eds) *The International Law of the Environment* (1992) 183, 193. A Hurrell and B Kingsbury, *supra* n.34, at 3.

that the developed world should bear the bulk of the responsibility in combating the detrimental effects of, and future, climate change that is the result of activities undertaken by the developed world in the past.[67] As such, they are suspicious of the concept of common responsibility for climate change, perceiving it to be unjust.[68] This is compounded by the fact that the 'clean' development that is often proposed as a key aspect in combating climate change has been regarded as a more expensive form of development than the practices the developed world relied on to secure development.[69] Remedying this has often resulted in arguments by the developing world that developed states should give them as much economic and technological assistance as possible if they should be expected to rely on 'clean' development.[70]

Counter arguments have featured acceptance of greater responsibility for climate change by developed states. This has culminated in recourse to the common but differentiated responsibility principle where climate issues are concerned.[71] The principle establishes combating climate change as the common responsibility of all states.[72] However, this is accompanied by fair recognition of the fact that responsibility for environmental deterioration should be apportioned based on differing capacities among states that are often reflective of development levels. Furthermore, a distinction is made based on consideration of the perpetrators of the environmentally detrimental practices that created the problems that are sought to be addressed.[73]

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[67] A Hurrell and B Kingsbury, *supra* n.34, at 40. E Louka, *supra* n.4, at 9. A D'Amato, *supra* n.4, at 6. RO Keohane and JS Nye 'The Club Model of Multilateral Cooperation and the World Trade Organization: Problems of Democratic Legitimacy' in *Efficiency, Equity and Legitimacy* available at: http://www.hks.harvard.edu/visions/publication/keohane_nye.pdf

[68] M List and V Rittberger, *supra* n.32, at 92. L Rajamani, *supra* n.32, at 56. M Poustie, *supra* n.31, paras 22, 78. E Louka, *supra* n.4, at 29. IFI Shihata, *supra* n.15, at 40-41.

[69] JW Dacyl 'Sovereignty versus Human Rights: From Past Discourses to Contemporary Dilemmas' (1996) 9 *Journal of Refugee Studies* 136, 140. ME Keck and K Sikkink, *supra* n.9, at 124. MJ Kelly, *supra* n.4, at 455. E Louka, *supra* n.4, at 31-32.

[70] A Dan Tarlock 'The Role of Non-Governmental Organizations in the Development of International Environmental Law' (1992) 68 *Chicago-Kent Law Review* 61, 73-75. E Louka, *supra* n.4, at 29. B Stigson 'Sustainable Development' in J Krieger *et al* (2ed) *Oxford Companion to World Politics* (2001) 816, 816.

[71] JL Dunoff, *supra* n.15, at 292. D Freestone, *supra* n.7, at 215. EB Weiss, *supra* n.6, at 705. CE Bruch and E Mrema, *supra* n.57, at 102-105. P Sands, *supra* n.56, at 285-289.

[72] P Birnie, A Boyle and C Redgwell, *supra* n.14, at 132-133.

[73] L Rajamani, *supra* n.32, at 132-133.

Using this framework, some success has been achieved in bringing the developed and developing world closer in the effort to combat climate change.[74] However, a point of contention from some of the developed world has been that the framework does not effectively differentiate responsibility within the body of developing states.[75] This has often compromised negotiations for effectively regulating climate change.[76]

Ultimately, this focus on justice considerations, which is a consequence of state participation in the body of norm entrepreneurs, has often drawn attention away from environmental protection objectives as noted above. In this context, the legitimacy of laws is often questioned based on justice considerations precluding the development of a preliminary community of practice around potential regulatory frameworks. Thus, it is important to explore whether justice can be achieved, and be seen to be achieved, in a manner that would facilitate a preliminary community of practice around the environmental protection norm in a manner that would facilitate progression to effective legality in the form of an international constitutionalism regulatory framework.

5.4. Conclusion

The reasons for the failure of environmental protection regulatory efforts, through international environmental law, to achieve consistently effective environmental protection can be ascribed to an inability of the international environmental law regulatory framework to achieve effective legality. This is largely the result of extensive state participation in the body of norm entrepreneurs. For instance, such state participation has led to the qualification of objectives in a manner that makes them a corollary matter. Alternatively, a concern with justice considerations often draws attention away from the environmental protection goal and creates divisions among states. These divisions have precluded the development of a preliminary community of practice around the environmental protection norm that would lead to the attainment of effective legality.

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[74] P Birnie, A Boyle and C Redgwell, *supra* n.14, at 134-135. A Najam 'Developing Countries and Global Environmental Governance: From Contestation to Participation to Engagement' (2005) 5 *International Environmental Agreements* 303, 317. IM Porras 'The Rio Declaration: A New basis for International Cooperation' in P Sands (ed) *Greening International Law* (1993) 20, 27-30.

[75] KW Danish 'International Relations Theory' in D Bodansky, J Brunnee and E Hey (eds) *The Oxford Handbook of International Law* (2007) 205, 214. A Najam, *supra* n.74, at 304-305.

[76] MJ Kelly, *supra* n.4, at 456.

This inability to secure a preliminary community of practice around the environmental protection norm is particularly important to explaining why international environmental law has been unable to secure consistently effective environmental protection. Such a preliminary community of practice plays an important role in 'fixing' legal understandings that will be perceived as imposing legitimate behavioural claims on states, and thus, meriting adherence and fidelity. This facilitates progression to effective regulation, for instance, through an international constitutionalism regulatory framework as proposed.

If the inability to secure the objectivity of the body of norm entrepreneurs has resulted in an inability to secure consistently effective environmental protection, it must be considered how such objectivity could be achieved. Importantly, some of the issues that have precluded a preliminary community of practice, such as conflicting interests, capacity differences and justice considerations, highlighted above, have become central aspects of international discourse on environmental protection. Thus, it is a measure of the objectivity of norm entrepreneurs that they should be capable of addressing these issues while still encouraging the development of a preliminary community of practice. Only when objectivity to levels that can accommodate this is achieved can a preliminary community of practice around the environmental protection norm be achieved in a manner that would facilitate the achievement of effective legality and thus, an international constitutionalism regulatory framework autonomously.

Chapter Six

Securing a preliminary community of practice around an international constitutionalism regulatory framework

'Solutions to environmental problems may well require that some countries accept constraints on development that are not in their short-term interest. Without the pressure of collective commitments few countries will take unilateral action, nor would these steps be sufficient to reduce the pace of global change to a level the biosphere can accommodate'[1]

6.1. Introduction

The preceding chapter argued that the environmental protection norm's progression through the four phases of the construct proffered in Chapter Four has stalled at the third phase, effective legality. The inability to achieve effective legality was attributed to the failure to secure the perceived and real objectivity of the current body of norm entrepreneurs in environmental protection. The main reason for the lack of perceived and real objectivity is largely rooted in extensive state participation in the body of norm entrepreneurs. In addition, it was noted that the failure to achieve objectivity has resulted in international environmental law's inability to compel a necessary preliminary community of practice around the environmental protection norm.

If consistently effective environmental protection should be achieved, it is necessary to explore how an objective body of norm entrepreneurs in environmental protection could be achieved. Following this, it is also important to explore whether such body of norm

[1] L Susskind and C Ozawa 'Negotiating More Effective International Environmental Agreements' in A Hurrell and B Kingsbury *The International Politics of the Environment* (1992) 143.

entrepreneurs would have the qualities necessary to generate a preliminary community of practice around the environmental protection norm in a manner that would facilitate progression to effective legality and thus, an international constitutionalism regulatory framework.

As such, this chapter will first consider how objectivity in the body of norm entrepreneurs might be achieved. Following this, it will be considered whether the proposed objective body of norm entrepreneurs would be capable of facilitating the development of a community of practice around the environmental protection norm. Finaly, the chapter also considers that, even if objectivity could be achieved in a manner that would lead to effective legality, attainment of this phase is only the penultimate phase of the construct proffered in Chapter Four. A final phase places emphasis on the need to secure a community of practice around an international constitutionalism regulatory framework that would emerge following the attainment of effective legality. As such, the chapter also considers whether a community of practice around a potential international constitutionalism regulatory framework would develop.

6.2. Achieving objectivity

It is submitted that one way in which to achieve objectivity in the body of norm entrepreneurs is through letting scientific bodies play the leadership role in the body of norm entrepreneurs.[2] Such bodies provide 'a diversity of knowledge and provide an independent or neutral source of publicly accessible data.'[3] Thus, scientists are well positioned to raise

[2] SC Schreck 'The Role of Nongovernmental Organizations in International Environmental Law' (2006) 10 *Gonzaga Journal of International Law* 252, 257. D Bodansky, J Brunnee and E Hey 'International Environmental Law: Mapping the Field' in D Bodansky, J Brunnee and E Hey *The Oxford Handbook of International Environmental Law* (2007) 1, 19-20. S Andresen and J Birger Skjaerseth 'Science and Technology: From Agenda Setting to Implementation' in D Bodansky, J Brunnee and E Hey (eds) *The Oxford Handbook of International Law* (2007) 182, 186, 190. P Birnie 'International Environmental Law: Its Adequacy for Present and Future Needs' in A Hurrell and B Kingsbury *The International Politics of the Environment* (1992) 53, 75-76. OR Young 'The Effectiveness of International Institutions: Hard Cases and Critical Variables' in JN Rosenau and E Czempiel (eds) *Governance Without Government: Change and Order in World Politics* (1991) 160, 190-193.

[3] P Birnie, A Boyle and C Redgwell (3ed) *International Law and the Environment* (2009) 99.

concern by clarifying environmental impacts.[4] Effectively, this argument is based on the linear model of interfacing science and policy.[5] Describing this model, Beck notes:

> "First, science has to 'get it right' and after that policy comes into play. The linear model of expertise can be characterized by the position that knowledge is a necessary (if not sufficient) basis for decision-making. The influence of science on policy is assumed to be strong and deterministic: if the scientific facts are 'sound', then they have an immediate, direct impact on policy. It is scientific consensus that determines and thus drives political decisionmaking."[6]

A central aspect of this turn to science is empowering the science-led body to control and define state participation in the body of norm entrepreneurs. This is certainly possible when it is considered that the bulk of the states which would need to be excluded from the current body of norm entrepreneurs for example, seem to be states that are genuinely concerned with the advancement of environmental protection.[7] As such, it can reasonably be assumed that they would generally be amenable to compromises such as exclusion from the body of norm entrepreneurs in order to advance the environmental protection movement. In addition, such exclusion would allow such states to play a greater role in the international socialization as pioneers in adoption of the norm. Of course, and as noted previously, state participation in the body of norm entrepreneurs particularly by strategically placed states is also desirable.[8] Thus, some states would need to be retained as part of the science-led body of norm entrepreneurs to facilitate progression of the norm.

Indeed, isolated instances of successful entrepreneurship in environmental protection seem to suggest the viability of this approach.[9] For instance, the success of the ozone

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[4] RB Mitchell 'International Environment' in W Carlsnaes, T Risse and BA Simmons (eds) *Handbook of International Relations* (2007) 500, 503.

[5] JP van der Sluijs, R van Est and M Riphagen 'Beyond Consensus: Reflections from a Democratic Perspective on the Interaction Between Climate Politics and Science' (2010) 2 *Current Opinion in Environmental Sustainability* 409, 410.

[6] S Beck 'Moving Beyond the Linear Model of Expertise? IPCC and the Test of Adaptation' (2011) 11 *Regional Environmental Change* 297, 298.

[7] HH Koh 'How is International Human Rights Law Enforced?' (1999) 74 *Indiana Law Journal* 1397, 1410.

[8] See Chapter Four.

[9] A Dan Tarlock 'The Role of Non-Governmental Organizations in the Development of International Environmental Law' (1992) 68 *Chicago-Kent Law Review* 61. A Hurrell and B Kingsbury *The International Politics of the Environment* (1992) 19.

protection movement was arguably because the British Antarctic Survey scientists played a central role as entrepreneurs in bringing to light the depletion of the ozone layer. This would prove critical to progression to a successful ozone regulation framework.[10] For instance, Usher and Ye note that once initial concern over ozone depletion was established, the United Nations Environment Programme crafted a World Plan of Action on the Ozone Layer which delegated responsibility of gathering information to agencies such as the World Meteorological Organization, the United Nations Food and Agriculture Organization, the World Health Organization, and the Organization for Economic Development. The information gathered would be the basis of annual assessments of ozone depletion, conducted by a Coordinating Committee on the Ozone Layer.[11]

Similarly, recognition of climate change as a global phenomenon requiring immediate attention has largely depended on the entrepreneurial role played by the Intergovernmental Panel on Climate Change established by the United Nations Environment Programme and the World Meteorological Organization.[12] Vasileiadou *et al* note that 'the Intergovernmental Panel on Climate Change synthesizes the scientific knowledge of an entire scientific field for policymakers. Even though the Panel has been recently under attack, its role and authority remain unique in this respect. Furthermore, its global scale is also unparalleled, even acknowledging the geographical biases that exist in Intergovernmental Panel on Climate Change knowledge.'[13]

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[10] P Usher and Q Ye 'A Historical Review on the Roles of Science and Politics in Addressing Global Environmental Issues' (2009) 3 *Front. Earth Scie. China* 57. Foreign and Commonwealth Office Website (2010): available at: http://www.fco.gov.uk/en/travel-and-living-abroad/your-trip/antarctica/uk-in-antarctica

[11] P Usher and Q Ye, *supra* n.10, at 58.

[12] JP van der Sluijs, R van Est and M Riphagen, *supra* n.5, at 411. E Louka *International Environmental Law: Fairness, Effectiveness and World Order* (2006) 19-20. P Birnie, A Boyle and C Redgwell, *supra* n.3, at 100. . Z Maoz and DS Felsenthal 'Self-Binding Commitments, the Inducement of Trust, Social Choice and the Theory of International Cooperation' (1987) 31 *International Studies Quarterly* 177, 197. S Karlsson 'The North-South Knowledge Divide: Consequences for Global Environmental Governance' in D Esty and MH Ivanova *Global Environmental Governance: Options and Opportunities* (2002) 53, 57. J Gupta 'Legitimacy in the Real World: A Case Study of the Developing Countries, Non-Governmental Organizations and Climate Change' in JM Coicaud and V Heiskanen *The Legitimacy of International Organizations* (2001) 482, 493. C Boyden Gray and DB Rivkin 'No Regrets: Environmental Policy' (1991) 83 *Foreign Policy* 47, 52-53. K Stairs and P Taylor, *supra* n.88, at 117-118. C Monckton 'Dishonest Political Tampering with the Science on Global Warming' (2007) available at: http://www.coloradomining.org/Content/Release_Pdf/Dishonest%20Political%20Tampering.pdf. K Kline and K Raustiala 'International Environmental Agreements and Remote Sensing Technologies' (2000) 9, 14, 28, available at: http://sedac.ciesin.columbia.edu/rs-treaties/rs-treaties_bckgnd.pdf

[13] E Vasileiadou, G Heimeriks and AC Petersen 'Exploring the Impact of the IPCC Reports on Science' (2011) 14 *Environmental Science and Policy* 1052, 1053.

These examples lend credibility to the argument that letting scientific bodies assume a leadership role in the body of norm entrepreneurs is a key factor in depoliticising this body. This is because a turn to science would lead to the perceived and real legitimacy of regulatory efforts, inspiring fidelity to regulation and ultimately, facilitating progression to effective regulation.[14] As Beck notes,

> "The linear trajectory from scientific closure to political closure is thought to enable science to serve as a neutral arbiter or harmonizing force in politics. Since scientific closure precedes political battles, scientific advice is supposed to be independent of political values and interests and to offer a forum where people with different perspectives can be brought together to set aside their differences in favor of a common, rationalistic approach to problem solving."[15]

As noted previously however, achieving objectivity must also reach beyond the constitution of the body of norm entrepreneurs. In order to cultivate the requisite preliminary community of practice around the environmental protection norm, it is equally important to frame environmental protection objectives in an objective manner. In this regard, to the extent that framing environmental protection issues objectively has been compromised by excessive state participation in the body of norm entrepreneurs, this is also remediable through recourse to science.[16] The value of science in this role is easily apparent in those sub-fields of environmental protection in which norm entrepreneurs have managed to secure effective legality.[17]

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[14] P Birnie, A Boyle and C Redgwell, *supra* n.3, at 99.

[15] S Beck, *supra* n.6, at 299.

[16] SC Schreck, *supra* n.2, at 257. S Andresen and J Birger Skjaerseth, *supra* n.2, at 190. C Boyden Gray and DB Rivkin, *supra* n.12, at 48-49. T Crossen 'Multilateral Environmental Agreements and the Compliance Continuum' (2004) 16 *The Georgetown International Environmental Law Review* 1, 11. D Freestone 'The Road from Rio: International Environmental Law After the Earth Summit' (1994) 6 *Journal of International Environmental Law* 193, 210. ME Keck and K Sikkink *Activists Beyond Borders: Advocacy Networks in International Politics* (1998) 121. J Gupta, *supra* n.12, at 495.

[17] E Louka, *supra* n.12, at 18-19. A Cassesse 'The Role of Legal Advisers in Ensuring that Foreign Policy Conforms to International Legal Standards' (1992) 14 *Michigan International Law Journal* 139, 156. DA Lake 'Anarchy, Hierarchy and the Variety of International Relations' (1996) 50 *International Organization* 1, 21. EJ Ringquist and T Kostadinova, *supra* n.76, at 88. TM Franck, *supra* n.62, at 199.

As noted earlier, the difficulties surrounding framing issues in a manner that would lead to greater participation in the movement to combat ozone depletion were overcome by reliance on the scientific findings of the British Antarctic Survey. These findings would later form the impetus for progression to the Montreal Protocol.[18] Similar reliance on the science to frame climate change objectives has provided the impetus for progression to the Kyoto Protocol.[19]

An advantage of framing environmental protection issues in a scientific manner is that in this form, the problem is removed from being solely a political issue to one that is accessible to individuals, groups, and state institutions.[20] In concert with Slaughter's liberalism argument, this is important to the extent that it acknowledges that individuals and groups within states have grown increasingly empowered to influence state practices in much of the liberal world.[21] Framing environmental problems in a manner accessible to these individuals or groups would allow them to shape states' policies through application of pressure on the domestic level. This would have the same effect that application of similar

[18] P Usher and Q Ye, *supra* n.10, at 57. Foreign and Commonwealth Office Website, *supra* n.10.

[19] T Yang 'International Treaty Enforcement as A Public Good: Institutional Deterrent Sanctions in International Environmental Agreements' (2007) 27 *Michigan Journal of International Law* 1131, 1176-1183. F Biermann and K Dingwerth 'Global Environmental Change and the Nation State' (2004) 4 *Global Environmental Politics* 1, 3-4.

[20] E Louka, *supra* n.12, at 18. KL Sherlock, EA Kirk and AD Reeves 'Just the Usual Suspects? Partnerships and Environmental Regulation' (2004) 22 *Environment and Planning C: Government and Policy* 651, 652-653.

[21] M Mason 'Citizenship Entitlements Beyond Borders? Identifying Mechanisms of Access and Redress for Affected Publics in International Environmental Law' (2006) 12 *Global Governance* 283, 290. HE Judge CG Weeramantry *Foreword* in MC Cordonier Segger and A Khalfan *Sustainable Development Law* (2004) x-xii. J Martens and K Schilder 'Sustainable Development' in J Krieger *et al* (2ed) *Oxford Companion to World Politics* (2001) 813. D Held 'Democracy' in J Krieger *et al* (2ed) *Oxford Companion to World Politics* (2001) 196. JN Rosenau 'Citizenship in a Changing Global Order' in JN Rosenau and E Czempiel (eds) *Governance Without Government: Change and Order in World Politics* (1991) 274. A Hurrell, *supra* n.9, at vii, xv. JM Coicaud 'International Democratic Culture and its Sources of Legitimacy: The Case of Collective Security and Peacekeeping Operations in the 1990s' in JM Coicaud and V Heiskanen *The Legitimacy of International Organizations* (2001) 256, 259. F Fukuyama 'The Limits of Liberal Democracy' in J Krieger *et al* (2ed) *Oxford Companion to World Politics* (2001) 201. S Marks 'Democracy and International Governance' in JM Coicaud and V Heiskanen *The Legitimacy of International Organizations* (2001) 47, 48. AM Slaughter 'A Liberal Theory of International Law' (2000) 94 *American Journal of International Law* 240. S Gardbaum 'Human Rights and International Constitutionalism' in JL Dunoff and P Trachtman *Ruling The World? Constitutionalism, International Law and Global Governance* (draft) (2007) 25-26: available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1088039. JL Dunoff and P Trachtman 'A Functional Approach to Global Constitutionalism' in JL Dunoff and P Trachtman *Ruling The World? Constitutionalism, International Law and Global Governance* (draft) (2009) 23: available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1311983 MR Goldschmidt 'The role of Transparency and Public Participation in International Environmental Agreements: The North American Agreement on Environmental Cooperation' (2005) available at: http://bc.edu/schools/law/lawreviews/meta-elements/journals/bcealr/29_2/05_TXT.htm

pressures proved critical to advancing the progression of both the human rights and international trade norms to effective international constitutionalism regulatory frameworks.[22]

Importantly however, while recourse to this science based model in pursuing the objectivity of environmental protection norm entrepreneurs is desirable, it suffers from some predictable deficiencies.[23] For instance, science as a singular standard for addressing the issues faced in environmental protection has notable deficiencies.[24] In addition, noteworthy arguments have been made that science is politicized to a degree that constituting the body of norm entrepreneurs based on science would not remedy issues surrounding the politicization, and thus objectivity, of norm entrepreneurs. Lastly, the growing body of literature and international emphasis on public participation suggests that recourse to science is undesirable to the extent that it potentially limits public participation in the body of norm entrepreneurs.

As such, it is necessary to explore the impact of these arguments on the greater argument that a turn to science can remedy the deficiencies that attach to the politicization of the body of norm entrepreneurs.

6.2.1. Science as a singular measure

One of the main difficulties with recourse to science in remedying the difficulties encountered with extensive state participation in the body of norm entrepreneurs is that experience with international environmental law suggests that even a science-led body of norm entrepreneurs often succeeds only when the issues in question do not conflict with other established concerns.[25]

For example, in the movement to halt ozone depletion which featured the extensive contributions of the British Antarctic Survey's scientists arguably succeeded because rectifying the ozone problem was 'easy.' Workable substitutes for the chlorofluorocarbons, which science had highlighted as the root cause for ozone depletion, were readily available.[26] In contrast, a similarly science-led body of norm entrepreneurs in the form of the

[22] See Chapter Three and Chapter Four.
[23] S Beck, *supra* n.6, at 299.
[24] SC Schreck, *supra* n.2, at 257.
[25] A Dan Tarlock, *supra* n.9, at 62.
[26] RB Mitchell 'Compliance Theory: Compliance, Effectiveness and Behaviour Change in International Environmental Law' in D Bodansky, J Brunnee and E Hey (eds) *The Oxford Handbook of International Law* (2007) 893, 918. A Hurrell and B Kingsbury, *supra* n.9, at 38.

Intergovernmental Panel on Climate Change has been unable to replicate levels of success similar to those seen in the ozone regime.[27] This is presumably because potential solutions to the problems highlighted are expensive and potentially in conflict with the development goals of states.[28]

Alternatively, reliance on science is only valuable in framing some environmental problems such as ozone protection, as discussed earlier. In other areas of environmental protection, science leads to unsatisfactory policy outcomes. In addition, with respect to some environmental problems the state of scientific knowledge very rarely enables unequivocal conclusions to be drawn about the measures needed to secure environmental protection.[29] A related point is that a focus on science may exclude effective consideration of viable alternative mechanisms that are not drawn from a science-based perspective.[30] To this end, Beck notes that:

> "following the linear model of expertise, politically relevant questions are framed and addressed in a very abstract, disembodied, and non-political way. Solutions often follow the well-trodden path of seeking a technological fix for a technologically created problem. The types of policy measures that emerge from these scenario-based assessments-such as irrigation schemes, drought tolerant seed varieties, and infrastructural improvements-are rather static and technical in nature."[31]

Importantly for present purposes, these deficiencies that attach to a turn to science are not irremediable. Rather, they merely suggest that recourse to science, as proposed, must be complemented with other techniques to assist in framing environmental protection objectives

[27] S Eden 'Public Participation in Environmental Policy: Considering Scientific, Counter-scientific and Non-scientific Contributions' (1996) 5 *Public Understanding of Science* 183, 187-188.
[28] A Underdal 'One Question, Two Answers' in E Miles *et al* (eds) *Environmental Regime Effectiveness: Confronting Theory with Evidence* (2002) 3, 15.
[29] P Birnie, *supra* n.2, at 75. L Susskind and C Ozawa, *supra* n.1, at 152. S Karlsson, *supra* n.12, at 55. E Louka, *supra* n.12, at 18. KL Blackstock, EA Kirk and AD Reeves 'Sociology, Science and Sustainability: Developing Relationships in Scotland' (2005) 10 *Social Research Online*, 2.3, available at: http://www.socresonline.org.uk/10/2/blackstock.html
[30] S Beck, *supra* n.6, at 302.
[31] S Beck, *supra* n.6, at 302.

in an objective manner.[32] To this end, it makes sense to consider that the process of determining what these complementary tools should be must be informed by consideration of issues to which states have been traditionally responsive.

For instance, notable complementary tools would derive from the economic implications of environmental protection.[33] This is based on the argument that ecology and economics are intrinsically linked. As an example, the Stern Review on the Economics of Climate Change has highlighted that overall costs of climate change would be equivalent to losing at least 5 percent of global Gross Domestic Product each year, now and forever.[34] Alternatively, it is worth considering that energy is typically drawn from environmental resources. In turn, the application of energy affects the environment through agriculture, mining, manufacturing, construction, transportation and other activities.[35] As such, effective regulation of environmental protection could secure reductions in production costs and enhance productivity. For instance, air pollution controls can reduce crop injury while boosting agricultural output.[36] In addition, the relation between economics and the environment can also be relied on in framing environmental protection objectives since the two interests intersect in a manner that potentially affects competitive advantage in aspects such as trade.[37] Thus, states adopting regulatory approaches that enable industry to meet environmental goals at lower costs would enjoy a competitive advantage over those that do not.[38]

These are merely some of the factors that cumulatively suggest that, as a complementary tool to reliance on science, norm entrepreneurs could also rely on the

[32] SC Schreck, *supra* n.2, at 257. S Karlsson, *supra* n.12, at 58. S Andresen and J Birger Skjaerseth, *supra* n.2, at 190.
[33] S Eden, *supra* n.27, at 190.
[34] N Stern *The Economics of Climate Change: The Stern Review* (2007) xv.
[35] LK Caldwell *International Environmental Policy* (1996) 330.
[36] RB Stewart 'Environmental Regulation and International Competitiveness' (1992) 102 *Yale Law Journal* 2039, 2049, 2065. N Roht-Arriaza 'Private Voluntary Standard-Setting, the International Organization for Standardization and International Environmental Law-making' in G Handl (ed) (1995) 6 *Yearbook of International Environmental Law* 107, 2049, 2065.
[37] P Sands (2ed) *Principles of International Environmental Law* (2003) 172. IM Porras 'The Rio Declaration: A New basis for International Cooperation' in P Sands (ed) *Greening International Law* (1993) 20, 30. K Priyadarshini and KO Gupta 'Compliance to Environmental Regulations: The Indian context' (2003) 2 *International Journal of Business and Economic* 9.
[38] RB Stewart, *supra* n.136, at 2049, 2057. RB Mitchell, *supra* n.26, at 905.

economic implications of environmental protection.[39] Based on historical trends, this is an approach to which the bulk of states would be more receptive.[40]

Alternatively, where recourse to the linear model of science in policymaking is unable to lead to unequivocal declarations of fact, this could be remedied through recourse to the Consensus Model. Van der Sluijs *et al* note that:

> "Within this interfacing model uncertainty is primarily perceived as a problematic lack of unequivocalness. One scientist says this, the other says that. It is unclear who is right and which scientific viewpoint should guide the decision making. The solution has been a comparative and independent evaluation of research results, aimed at building scientific consensus via multidisciplinary expert panels. This approach is geared towards generating robust findings representing 'the best of our knowledge' that is used as a proxy for the scientific truth that is needed in the Linear Model."[41]

Thus, while there may be drawbacks to relying on science as a singular model, a turn to science remains a viable option in seeking to depoliticise the body of norm entrepreneurs. It is only important to ensure that such an approach is complemented by other techniques to enhance the objectivity of the norm framed by norm entrepreneurs.

6.2.2. The politicization of science

Even if the issues attaching to science as a singular standard are remediable and consensus can be achieved, experience with international environmental law has shown that, for purposes of policymaking, scientific consensus will not be achieved in all matters.[42] Importantly, where consensus cannot be achieved, the result is often a body of scientific outputs all supporting the adoption of different policy positions. Such uncertainty has often played a leading role in the frequently alleged politicization of science. For instance, while

[39] P Birnie, A Boyle and C Redgwell, *supra* n.3, at 788.
[40] RB Stewart, *supra* n.136, at 2049, 2065. N Roht-Arriaza, *supra* n.36, at 107.
[41] JP van der Sluijs, R van Est and M Riphagen, *supra* n.5, at 410.
[42] *Ibid*.

discussing the Intergovernmental Panel on Climate Change, Beck notes that lack of conclusive scientific findings:

> "facilitates the instrumental use of science as a 'political resource.' All the parties begin to 'cherry-pick' scientific uncertainties in order to support or delay immediate political action. When an issue is both politically and scientifically contentious, one's own point of view can usually be supported with an array of legitimate facts that seem no less compelling than those assembled by others advocating a different perspective."[43]

Thus, in this field, the politicization of science typically occurs where scientific and political statements become inseparable, and it becomes difficult to disentangle political arguments about climate policies from scientific arguments about the evidence for man-made climate change.[44] The result is that allegations of the politicization of the Intergovernmental Panel on Climate Change and its outputs have become a frequent occurence.[45] In particular, there have been allegations of conspiracy and elitism from those that attribute climate change to solar events and orbital irregularities rather than changing concentrations of radiatively-active gases and global warming.[46] This has often led to media calls for the increased transparency of the Panel.[47] Alternatively, Kandekar has noted that the Intergovernmental Panel on Climate Change's assessment of global warming is far from objective and needs to be critically re-assessed.[48] Similarly, while referencing Chapter 9 of the Intergovernmental Panel on Climate Change's 2007 climate-science assessment entitled *Understanding and Attributing Climate Change*, which was the basis for the Panel's general claims about man-made "global warming" and for the contributions from the working groups on mitigation of and adaptation to climate change, McLean argues:

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[43] S Beck, *supra* n.6, at 303.
[44] *Ibid*, at 303.
[45] See generally, E Vasileiadou, G Heimeriks and AC Petersen, *supra* n.13, at 1054-1055.
[46] P Usher and Q Ye, *supra* n.10, at 60.
[47] JP van der Sluijs, R van Est and M Riphagen, *supra* n.5, at 409. D Laframboise 'Book excerpt: Conspiracy of silence' (2011) *Financial Post*, available at: http://opinion.financialpost.com/2011/10/21/book-excerpt-conspiracy-of-silence/
[48] M Khandeker 'Has the IPCC Exaggerated Adverse Impact of Global Warming on Human Societies' (2008) 19 *Energy and Environment* 713, 718.

> "The relationships between most of the authors of Chapter 9 demonstrate a disturbingly tight network of scientists with common research interests and opinions. The contrast between this close-knit group and the Intergovernmental Panel on Climate Change's stated claim to represent a global diversity of views is remarkable and does not augur well for the impartiality or integrity of chapter 9's conclusions."[49]

Importantly, these are views that have been increasingly voiced where science has been relied on to guide environmental protection efforts generally. Thus, it has increasingly been argued that the biases and parochial interests that are common to industry and non-governmental organization lobbyists are not wholly absent from the scientific community.[50] For instance, Eden cites the example that:

> "The World Resources Institute used greenhouse gas emissions data to rank countries in terms of their contributions to the global total. Because the World Resources Institute had selectively used four key greenhouse gases, had not incorporated the effects of greenhouse gas 'sinks' as well as sources, and had employed deforestation rates averaged over short (and possibly unrepresentative) time periods, it was criticized for 'sweeping and unsupportable generalizations about the lack of responsibility for the past and the impossibility of knowing the future.' These inadequacies were seen to favour ethnocentric western (particularly the United States) interpretations of global responsibilities, which preferentially placed the burdens of reform on countries in the South. These methodological criticisms were weighted further by the perceived United States policy influence granted to the World Resources Institute because of its 'impeccable reputation within official circles as publishers of environmental data.' Consequently, the Centre for Science and the Environment in India offered a different interpretation of the WRI data to redress the balance in favour of the South and were in turn criticized as ethnocentric and crude in their assumptions."[51]

These examples illustrate the growing perspective that scientific experts are not neutral truth seekers above the fray of interest group politics and more as themselves, interest

[49] J McLean 'Prejudiced authors, prejudiced findings: Did the UN bias its attribution of "global warming" to humankind?' (2008) 202 *Science and Public Policy Institute* 4, 11.
[50] RB Mitchell, *supra* n.4, at 503, 506. S Eden, *supra* n.27, at 189.
[51] S Eden, *supra* n.27, at 189.

bearers who seek their own advantages from regulation.[52] Thus, scientists in the form of agronomists, chemists, and foresters for instance, have increasingly begun to be perceived like allies of states rather than motivated by environmental protection objectives.[53] This necessarily poses a challenge to the argument that a turn to science would lead to depoliticisation, as alleged, that requires some exploration.

While it must be acknowledged that there is certainly a danger of the politicization of science, in seeking to establish the extent of the danger, it is useful to turn to Jasanoff who notes that recourse to science in regulation can be approached in different ways.[54] For instance, science can be relied on in a manner that leads to technocratic, secretive, and science based regulation. Alternatively, science might be considered in conjunction with necessary public and community interests to lead to flexible and inclusive regulation. Lastly, recourse to science could include extensive public participation with scientists empowered to make final decisions.[55]

Within this framework, it is only when regulation is based on a pure form of technocracy that the politicization of science is particularly problematic. For the value of a turn to science to be retained, regulation should ideally be led by scientific findings that are moderated. This can be achieved through consideration of other social policies in policymaking rather than strict application of the Linear and Consensus Models of science mentioned earlier. Alternatively, this can be pursued through allowing for extensive scrutiny by the public and all stakeholders.

As such, within the proposed framework, the dangers that attach to a turn to science can be averted or minimised when it is considered that recourse to science is not proposed as the exclusive consideration in framing policy. Instead, recourse to science in constituting the body of norm entrepreneurs is only part of an effort to create an inclusive and objective body of norm entrepreneurs. The benefit of such an approach is that it ensures that the body of norm entrepreneurs takes into account, not only scientific findings but also other relevant factors. While this may not neutralise it entirely, such an approach effectively diminishes the impact of the politicization of science. In addition, an inclusive approach means that any scientific standards are subject to extensive scrutiny. Thus, the politicization of science poses

[52] M Shapiro 'The Globalization of Law' (1993) 1 *Indiana Journal of Legal Global Studies* 37, 46.
[53] M Shapiro, *supra* n.52, at 46.
[54] S Jasanoff *Risk Management and Political Culture* (1986) 80-81. Russell Sage: New York.
[55] *Ibid*.

legitimate difficulties to the argument proposed. However, such difficulties are remediable through an inclusive approach to the constitution of a body of norm entrepreneurs.

6.2.3. The role of public participation

One of the implications of extensive reliance on science in constructing the body of norm entrepreneurs and framing environmental protection issues is that framing of environmental protection objectives will be led predominantly by scientific expertise. As noted above, this is based on 'the belief that by substituting the objectivity and rationality of science for the messiness and corruptibility of politics experts produces better, that is, more efficient outcomes.'[56] However, such an approach poses significant difficulties in the modern era, which has seen a premium placed on ensuring public participation in all aspects of regulation.

Public participation, broadly defined, means participation of non-governmental actors in governmental affairs.[57] It is generally recognised that there are three interdependent pillars of public participation, namely, access to information, participation in decision-making, and access to justice.[58] From a practical perspective it is worth noting that, while it may be desirable, it would be impractical for every individual to be heard in policymaking as part of fulfilling the requirement of public participation. To accommodate this, it is well recognised that the requirements of public participation can be satisfied through representative means.[59] Thus, political processes are trusted to ensure that state representatives in any forum present positions that would have been scrutinised and accepted through public participation. There is also growing reliance on the role of non-governmental organizations that represent various interests to meet public participation requirements.

The increasingly important role ascribed to public participation in environmental protection is a development traceable to the Stockholm Conference on the Human Environment. To this end, Recommendation 7(a) of the 1972 Action Plan on the

[56] M Mitre and B Reis 'Science, Expertise and Democracy: A Study of the Role of Scientists in Shaping the Regulation of Genetically Modified Organisms and Human Embryonic Stem-Cell Research in Brazil' (2010) *The American Political Science Association Annual Meeting IPSA Research Committee #12 Biology and Politics*, 4, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1643183

[57] U Beyerlin and T Marauhn *International Environmental Law* (2011) 234.

[58] *Ibid*, at 234. J Ebbeson 'The Notion of Public Participation in International Environmental Law' in (1997) 8 *Yearbook of International Law* 51, 58.

[59] J Ebbeson, *supra* n.58, at 58, 60.

Environment 'recommended the provision of equal opportunities for everybody, both by training and ensuing access to information to influence the environment by themselves.' Following this, Principle 23 of the 1982 World Charter for Nature noted that "all persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation."

Pursuant to these initial statements, the increasing role of public participation was acknowledged under Principle 10 of the Rio Declaration which declared that on the domestic level, 'environmental issues are best handled with the participation of all concerned citizens, at the relevant level.' In *Agenda 21*, the Action Plan that emerged from the Rio Declaration, Chapters 8, 28, and 36 make reference to an obligation on states to facilitate public participation.[60]

Since then, the international movement toward public participation has been enhanced by the 1998 Aarhus Convention. While it was established within the framework of the United Nations Economic Commission for Europe, any United Nations member state may accede to it. Article 1 of the Convention acknowledges an obligation to secure environmental protection for present and future generations. To this end, it calls on member states to 'guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.'

In a comprehensive account of public participation, Ebbeson notes that:

> "The benefit of public participation, at both domestic and international levels, is that it provides a means for contributing to and influencing decisionmaking and for implementing substantive laws. Problems and concerns related to the environment cannot be understood only in objective terms by measuring decibels, concentrations, or the number of a specimen. Whether an effect on the environment is a problem or not depends on the context in which we regard it and on our perception of it. Through public participation, this subjective dimension is brought into decisionmaking and, thus, the environmental problem, the harm, and the

[60] S Eden, *supra* n.27, at 184-185.

> nuisance are defined in accordance with applicable rules and principle. In addition, participatory procedures serve as a means for communication-for exchanging 'second thoughts' and reflections among those parties involved. Thus, participation and transparency in decisionmaking also provide a basis for thinking in terms of alternatives."[61]

Thus, allowing participation enhances the legitimacy and thus, acceptance levels of decisions taken.[62] Driesen has argued that public opinion has always driven environmental improvement, so dissemination of good and understandable information and opportunities to act on that information are extremely important.[63] Similarly, Newig and Fritsch consider that public participation leads to more ecologically rational decisions than in top-down approaches. They note further that, participation leads to improved compliance with decisions and thus, better outcomes and impacts in ecological terms than top-down models of governance.[64]

In this context, a turn to science has various implications that potentially restrict public participation. For instance, the science-led body of norm entrepreneurs that is proposed would seem to suggest that the leaders of environmental protection efforts will largely consist of scientists and scientific bodies that are not representative of the public.[65] Alternatively, environmental objectives based on science may not be framed in a manner easily accessible to ordinary citizens. This would necessarily exclude their effective participation in the formulation and framing of environmental protection objectives.[66] As, Mitre and Reis note:

> "It is not difficult to understand how the technocratic ideology goes against principles that are cherished in modern democracies, such as the openness of the political system to the competition among interest-groups, the weight of public opinion, and the deliberative

[61] J Ebbeson, *supra* n.58, at 58.
[62] J Ebbesson 'Public Participation in Environmental Matters' in R Wolfrum (ed) *Max Planck Encyclopaedia of Public International Law* (2009) para 3, available at http://www.mpepil.com
[63] DM Driesen 'Thirty Years of International Environmental Law: A Retrospective and Plea for Reinvigoration' (2003) 30 *Syracuse Journal of International Law and Commerce* 353, 366.
[64] J Newig and O Fritsch 'Environmental Governance: Participatory, Multi-Level-and Effective?' (2009) 19 *Environmental Policy and Governance* 197, 200, 205-206.
[65] S Eden, *supra* n.27, at 192-193.
[66] *Ibid*, at 191.

character of decision-making, understood as a process involving exchange of ideas, negotiation, bargaining and the reaching of consensus."[67]

Importantly, the significance of the limitations imposed on public participation by a turn to science is particularly enhanced when it is considered that science, as noted above, is neither infallible nor incorruptible necessitating extensive scrutiny, of which, public participation is an important aspect. It is difficult therefore to justify, as Mitre and Reis point out, 'how the input of scientists in the regulation of scientific and technological issues can have any precedence over inputs from other political actors.'[68] Thus, despite the benefits of a turn to science, the implications of such an approach, notably, its potential to restrict public participation merit some attention.

To this end, it is worthwhile to consider that there is certainly merit to the argument that a focus on science limits public participation. However, it must also be considered that the proposed body of norm entrepreneurs is intended to be an inclusive group featuring various participants reflecting individuals, groups, and state institutions in pursuit of a singular goal, that is, effective environmental protection. This inclusive approach enhances rather than diminishes public participation in the body of norm entrepreneurs for at least four reasons.[69]

First, science does not necessarily exclude public participation. For instance, based on research conducted in the United Kingdom, Eden notes that despite reliance on science in framing environmental problems, there remains public interest in environmental issues raised by science. This is because science serves as the ultimate arbiter of imperceptible, especially global issues. She attributes this to the fact that while many global environmental issues are primarily identified and documented by science, science is neither the primary motivator of environmental action nor the main source of environmental knowledge. The public often relies on first-hand knowledge acquired in their daily lives. Science is then applied to explain changes. For instance, evidence of changing weather conditions at a local level can be relied on to solidify scientific accounts of climate change.[70] Thus, science does not exclude the

[67] M Mitre and B Reis, *supra* n.36, at 4.
[68] *Ibid*.
[69] See S Eden, *supra* n.27, at 193 who discusses the democratization of science.
[70] *Ibid*, at 191.

general public from participation. Rather, the public looks to science for unequivocal data but can then adopt their own interpretations through their experiences.[71]

This is a conclusion that is supported by Lorenzoni and Hulme who point out that despite a turn to science in Climate Change through recourse to reports published by the Intergovernmental Panel on Climate Change, the public 'are highly aware and concerned about climate change. To illustrate this point, their comparisons of polls across 30 countries in 2003 and 2006 showed notable increases in the number of people who considered climate change or global warming as a very serious problem.'[72]

Second, in order to achieve necessary objectivity in framing environmental protection objectives, one of the primary obligations on norm entrepreneurs is to ensure that the framing of environmental protection is presented in an easily accessible format. A corollary benefit of this is that it makes the goals of environmental protection more accessible to the general public. This is particularly true in environmental protection where the public may not be able to perceive the risks of environmental deterioration, for instance, in climate change. Consequently their knowledge of these issues is derived from external sources.[73] From this perspective, science plays a particularly important role in facilitating public participation in the activities of the body of norm entrepreneurs. It is perhaps important to note that while the accessibility of information is desirable, it has been argued that a more important factor is ensuring that the public can engage with the information.[74]

To this end, the third benefit of a turn to science is that it 'allows people, primarily activists within non-governmental organizations, to become 'counter-experts' who are scientifically competent through self-education to play a direct role in the body of norm entrepreneurs, as part of the groups or individuals.[75] Even where such individuals are not part of the body of norm entrepreneurs directly they can affiliate themselves with groups within the body of norm entrepreneurs that champion their own interests. When contrasted to having to accept the positions of state representatives that would only be reflecting the greater consensus in the state, which is often the case when representative participation is relied on, this approach arguably enhances rather than diminishes public participation.

[71] *Ibid*, at 192.
[72] I Lorenzoni and M Hulme 'Believing is seeing: laypeople's views of future socioeconomic and climate change in England and in Italy' (2009) 18 *Public Understanding of Science* 383, 384.
[73] U Beck *Risk Society: Towards a New Modernity* (1992) 52-73.
[74] I Lorenzoni and M Hulme, *supra* n.72, at 385.
[75] S Eden, *supra* n.27, at 194.

Fourth, it must be considered in assessing whether a turn to science diminishes public participation, that:

> "Confronted with complex issues with high decision stakes, uncertain facts and values in dispute, scientists may still aim to deliver truth, but often there are many competing interpretations of the same problem (conflicting truths), none of which can be refuted given the state of knowledge-so that a consensus can only be an enforced reduction of complexity into single 'best of our knowledge' claim. In case of such complex issues, both the Linear Model and the Consensus Model are not fit for the characteristics of the issue addressed, because the truth cannot be known at the moment the decision needs to be made, and can thus not be a substantial aspect of the issue."[76]

Thus, despite the need for a turn to science, it must be acknowledged that it is often desirable in instances of scientific uncertainty, that recourse should be had to traditionally non-scientific forms of argument, such as morals and emotions. This is particularly true where issues under consideration could have enormous public impacts.[77] These non-scientific forms of argument can be advanced by state institutions that are representative of their states and would ideally raise issues that would have been arrived at through public participation. However, even where non-scientific arguments are relied on in policymaking, there is often a need to explore future ramifications of policies adopted. To this end, science can offer 'best of our knowledge' findings. These 'best of our knowledge' findings can be relied on to guide policymaking to the extent that they allow for some insight into potential future consequences in a manner that improves the quality of policy choices.[78]

Thus, a turn to science may appear to threaten the role of public participation. However, the potency of the threat is diminished when it is considered that science also offers an opportunity to secure greater public participation as argued above. In addition, and equally importantly, it must be recalled that science is not proposed as as a singular standard. Rather, other interests are included and reflected in the body of norm entrepreneurs. This protects and enhances public participation rather than diminishes it. These factors suggest that a turn to

[76] JP van der Sluijs, R van Est and M Riphagen, *supra* n.5, at 410.
[77] S Eden, *supra* n.27, at 194. S Beck, *supra* n.6, at 302-303.
[78] I Lorenzoni and M Hulme, *supra* n.72, at 385-386.

science in constructing the body of norm entrepreneurs remains a viable option in seeking to limit the difficulties that extensive state participation in the current body has played. In this context, the resultant regulatory framework is more likely to be perceived as legitimate, inspiring fidelity.

6.3. Developing a preliminary community of practice

Having accounted for the limitations of a turn to science, it remains true that a turn to science would lead to objectivity in the constitution of the body of norm entrepreneurs and in framing environmental protection objectives. This would, in theory, allow for the development a preliminary community of practice around the environmental protection norm in a manner that would lead to effective legality and thus, an international constitutionalism regulatory framework.

While this may be a sound theoretical conclusion, it remains important, bearing in mind that the objective of the thesis is to explore how consistently effective environmental protection could be practicably achieved, to assess the practical value of a turn to science in leading to this preliminary community of practice. To this end, it is submitted that the best measure of the practical value of a turn to science is through an analysis of whether such a turn to science would overcome factors that have currently compromised the development of a preliminary community of practice around the environmental protection norm, notably, conflicting interests, capacity considerations, and justice considerations.[79] Importantly, it is useful to consider that while these factors are useful indicators of lack of objectivity, they are not as well suited to establishing whether a turn to science would lead to the objectivity required to cultivate a community of practice around the environmental protection norm. A more useful measure is to consider that when the adverse issues surrounding these factors have been overcome, that is, when conflicting interests, capacity considerations, and justice considerations are not problematic issues individually, solidarity is achieved among states.

[79] See Chapter Five.

Solidarity is a concept of cooperation that goes beyond merely an intensified form of inter-state cooperation that reaches beyond normal partnership.[80] Macdonald argues that solidarity is:

> "first and foremost a principle of cooperation which identifies as the goal of joint and separate state action an outcome that benefits all states or at least does not gravely interfere with the interests of other states. Solidarity, as a principle of international law, creates a context for meaningful cooperation that goes beyond the concept of a global welfare state; on the legal plane it reflects and reinforces the broader idea of a world community of interdependent states."[81]

Certainly, experience with generating a preliminary community of practice culminating in effective regulation in human rights, international trade, and even aspects of environmental protection suggests that effective legality was achieved following on the attainment of solidarity.

For instance, following agreement to the Universal Declaration of Human Rights a preliminary community of practice was achieved when it was established that all states had the responsibility to be actively involved in the pursuit of practices that were consistent with fundamental rights. The requirement for no charitable or welfarist approaches was satisfied with agreement to the fact that no state would be exempt from human rights obligations. In addition, a balanced give and take was secured through appreciation of the fact that perceptions of rights differed. This led to adoption of different regional rights frameworks to reflect diversity in how states perceived rights as noted in previous chapters.

Separately, following the General Agreement on Tariffs and Trade the active involvement of all states was secured through agreement to the effect that the benefits of unrestricted trade would fall on all states. The fact that international trade obligations applied to all states equally ensured that no charitable or welfarist approaches would be adopted. Lastly, exceptions to the General Agreement on Tariffs and Trade based on considerations of

[80] U Beyerlin and T Marauhn, *supra* n.57, at 35.
[81] R. St. J. Macdonald 'Solidarity in the Practice and Discourse of Public International Law' (1996) 8 *Pace International Law Review* 259, 259-260.

separate states' circumstances and goals played a critical role in establishing that regulatory efforts pursued only a balanced give and take among states.

Even in some areas of environmental protection such as ozone protection where an effective preliminary community of practice has been achieved, this has arguably been based on achievement of these elements of solidarity. For instance, following the Vienna Convention on the Protection of the Ozone Layer, the involvement of all states was secured through recourse to scientific evidence that the deterioration of the ozone layer would have extensive implications for all states. No charitable or welfarist approaches were taken, with all states expected to contribute equally to ozone protection. However, as part of ensuring fair give and take, measures were set in place to ensure that developed states would assist developing states to meet the requirements of their obligations under the ozone protection effort.

Thus, if the achievement of solidarity forms the basis for progression to a successful preliminary community of practice, it is useful to rely on solidarity as a measure of whether a turn to science could lead to effective legality. Put differently, whether a science-led body of norm entrepreneurs can inspire a preliminary community of practice around the environmental protection norm in a manner that would lead to an international constitutionalism regulatory framework is dependent on their capacity to frame environmental protection obligations in a manner that leads solidarity.

In order to fully explore whether a science-led body of norm entrepreneurs has the capacity to achieve solidarity it is useful to consider that there are three elements to solidarity. First, solidarity is neither charity nor welfare. Second, solidarity requires the pertinent actors to become active in pursuing a common interest.[82] Third, solidarity is based on mutual respect and a soundly balanced give and take, ensuring that the obligations of solidarity devolve on all states.[83]

It must be noted however that such categorisation is only to facilitate ease of the ensuing discussion. In reality, the elements do not present in the distinct categories in terms of which they are presently classified. For instance, ensuring that no charitable approaches are relied on must be considered in the context of the need to ensure balanced give and take among states. Thus, concessions to ensure balanced give and take may lead to reliance on

[82] U Beyerlin and T Marauhn, *supra* n.57, at 35.
[83] R. St. J. Macdonald, *supra* n.81, at 290.

conditionality where, for instance, benefits and aid from the developed to the developing world are withheld pending satisfaction of requirements to meet overall community objectives as in ozone protection discussed above. While the transfer of aid or resources in that framework may suggest recourse to charitable or welfarist approaches, it is entirely reasonable when considering that this is done to ensure fair give and take among states.

6.3.1. No charity or welfare

A central element of solidarity is that it pursues effective regulation in a manner that is neither charitable nor welfarist. The detrimental effects of the adoption of such charitable or welfarist approaches are easily apparent when present efforts to regulate the environmental protection norm under international environmental law are considered.

For instance, in tackling the conflicts of interest alluded to earlier, the approach has arguably been charitable or welfarist.[84] An example of this can be found in the turn to sustainable development. While a pure form of sustainable development is commendable, in reality, reliance on this approach has often been accompanied by qualification of environmental protection objectives to allow states to pursue social and economic objectives.[85] As noted in Chapter Five, there is certainly value in an approach that recognises the need to allow states to pursue social and economic development. However, based on an arguably charitable and welfarist approach, sustainable development has been relied on to afford leeway to states to pursue social and economic development goals while subjugating environmental protection goals. This has arguably precluded the development of a preliminary community of practice around international environmental law and has had the effect of compromising the achievement of consistently effective environmental protection.[86]

Thus, if a preliminary community of practice is to develop around the environmental protection norm in a manner that would lead to an effective international constitutionalism regulatory framework, it is necessary to explore whether a depoliticised body of norm entrepreneurs, as well as qualities of an international constitutionalism regulatory framework

[84] See Chapter Five.
[85] F Biermann and K Dingwerth, *supra* n.19, at 2-3. M List and V Rittberger 'Regime Theory and International Environmental Management' in A Hurrell and B Kingsbury *The International Politics of the Environment* (1992) 85, 92. MJ Kelly 'Overcoming Obstacles to the Effective Implementation of International Environmental Agreements' (1997) 9 *Georgetown International Environmental Law Review* 448, 471-473.
[86] See Chapter Two and Chapter Five.

can secure effective environmental protection while ensuring the achievement of this element of solidarity.

To this end, it merits consideration that a depoliticised body of norm entrepreneurs is well positioned to ensuring that environmental protection objectives are framed in a manner that is neither charitable nor welfarist. An objective body of norm entrepreneurs can seek the advancement of the environmental protection norm without qualifying the norm's obligations based on deference to the status of social and economic development in the international norm hierarchy.[87] Thus, rather than make concessions where conflicts arise, the depoliticised nature of these norm entrepreneurs gives them standing to argue that environmental protection should carry the same status as existing and future norms.

This elevated and equal status for environmental protection is justifiable for various reasons.[88] For instance, from an human-centric perspective, such status is justified to the extent that continued environmental deterioration threatens the quality of human life.[89] This accounts for the gradual transition toward regard of a clean environment as a basic human right.[90] Alternatively, from an ecocentric perspective, environmental protection deserves such status solely for purposes of preserving the environment for its own sake.[91] This is a trend traceable to 1973 when the European Ministerial Conference on the Environment noted that 'the environment must be taken care of because of its own value, as a part of the world's heritage.' In the same year, the preamble of the Convention on International Trade in Endangered Species sought the preservation of endangered species on the grounds that they constituted 'an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come.' In addition, elevating the status of environmental

[87] D Shelton 'Normative Hierarchy in International Law' (2006) 100 *American Journal of International Law* 291.

[88] P Birnie, A Boyle and C Redgwell, *supra* n.3, at 7-8. A Florini 'The Evolution of International Norms' (1996) 40 *International Studies Quarterly* 363, 374. M Koskenniemi 'The Future of Statehood' (1991) 32 *Harvard International Law* 397, 403. A Gillespie *International Environmental Law, Policy and* Ethics (1997).

[89] A Gillespie, *supra* n.88, at 4-18. C Boyden Gray and DB Rivkin, *supra* n.12, at 281. D Freestone, *supra* n.16, at 196. Y von Schirnding, W Onzivu and AO Adede 'International Environmental Law and Global Public Health' (2002) 80 *Bulletin of the World Health Organization* 970. M Dixon *Textbook on International Law* (4ed) (2003) 466. E Louka, *supra* n.12, at 18.

[90] AS Timoshenko 'Ecological Security: Global Change Paradigm' (1990) 1 *Colorado Journal of International Environmental* 127, 136. JL Dunoff 'From Green to Global: Toward the Transformation of International Environmental Law' (1995) 19 *Harvard Environmental Law Review* 241, 282. D Bodansky, J Brunnee and E Hey, *supra* n.2, at 15. JG Merrills 'Environmental Rights' in D Bodansky, J Brunnee and E Hey *The Oxford Handbook of International Environmental Law* (2007) 663, 644.

[91] AS Timoshenko, *supra* n.90, at 127-131. D Bodansky, J Brunnee and E Hey, *supra* n.2, at 15-16. E Louka, *supra* n.12, at 16-17. M Dixon, *supra* n.89, at 466. P Birnie, A Boyle and C Redgwell, *supra* n.3, at 7.

protection is also justifiable on the basis of aesthetic appreciation of the environment. For example, in 1933 the Convention Relative to the Preservation of Fauna and Flora in their Natural State suggested, in Article 2, that the signatories set up national parks 'for the propagation, protection and preservation of ... objects of aesthetic importance.'[92] Similarly, the preamble of the Convention on International Trade in Endangered Species noted that the signatories were conscious of the ever growing value of wild fauna and flora from aesthetic and other points of view. Lastly, elevating the status of environmental protection is also justifiable on the grounds that environmental deterioration such as deforestation, desertification, salination, denudation, or water or fuel wood scarcity undermine the economic base and social fabric of inter-state tensions and conflicts by stimulating increased flows of refugees. In this way, environmental protection affects states' economic and security interests.[93]

It is also important to consider that the independence and impartiality of a depoliticised body of norm entrepreneurs means that they carry the capacity to argue that despite its ecocentric focus, regulation of the environmental protection norm does not purport to override existing or future norms.[94] Rather, their objectivity allows them to argue that elevation of the environmental protection norm only pursues fair consideration of environmental protection objectives and fair balancing of all relevant interests.[95] Where conflicts emerge, establishing a regulatory framework for environmental protection is to ensure that such conflicts are settled based on a fair and objective balancing of all interests involved.

For instance, reverting to the development example, persuading states to accept regulation based on environmental protection and pursue progression to an international constitutionalism regulatory framework, requires clarity on the fact that environmental protection will pursue a fair and uncompromised balance between environmental protection

[92] Convention Relative to the Preservation of Fauna and Flora in Their Natural State 1933. 1 LNTS Vol. 172 (No. 3995) 241.

[93] AS Timoshenko, *supra* n.90, at 127. A Hurrell and B Kingsbury, *supra* n.9, at 3. JL Dunoff, *supra* n.90, at 282-283. JL Dunoff 'The Death of the Trade Regime' (1999) 10 *European Journal of International Law* 733, 737-738. F Kratochwil 'Of Systems, Boundaries and Territoriality: An Inquiry into the Formation of the State System' (1986) 39 *World Politics* 27, 49.

[94] DB Magraw and LD Hawke 'Sustainable Development' in D Bodansky, J Brunnee and E Hey *The Oxford Handbook of International Environmental Law* (2007) 613,628.

[95] JE Alvarez 'How Not to Link: Institutional Conundrums of an Expanded Trade Regime' (2001) 7 *Widener Law Symposium Journal* 1, 1-2.

objectives and development goals.[96] This is a balance that captures the pure sentiment behind the idea of sustainable development. In contrast to how sustainable development has been practically applied under international environmental law however, an environmental protection regulatory framework would mean that environmental protection would be established as imposing legitimate behavioural claims on all states. Thus, in contrast to the current approach which sees the determination of what is 'sustainable' often left to the value judgments of states, the approach under replacement international environmental law would see states' discretionary authority to subjugate environmental protection to developmental goals invalidated.[97] Despite the importance of these processes, there would remain a very real need to qualify the behavioural claim imposed by environmental protection obligations where developmental concerns must take precedence. Thus, progression to an environmental protection regulatory framework would only ensure that this process of qualifying environmental protection objectives would be based on a fair and objective consideration of all interests.

Importantly, the need for this balancing of interests necessarily highlights the benefits of an international constitutionalism regulatory framework to facilitate solidarity.[98] The framework is neither welfarist nor based on charitable concessions. Rather, it regards the obligations on all states as equal. To this end, policy making authority is vested in an executive branch. It is then left to this branch to formulate policy while taking account of development needs at a central level with the input of various stakeholders. Such policy would form the basis of subsidiary legislation to ensure that developmental concerns would be reflected in regulation. An important corollary of the international constitutionalism regulatory framework is that even if the executive and legislative branches should falter, the adjudicatory branch ensures that states and all interested parties have access to judicial review.[99]

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[96] IFI Shihata 'Implementation, Enforcement and Compliance with International Environmental Agreements-Practical Suggestions in the Light of the World Bank's Experience' (1996) 9 *Georgetown International Environmental Law Review* 37, 41. AS Timoshenko, *supra* n.90, at 142-143. M Byers 'Conceptualising the Relationship Between *Jus Cogens* and *Erga Omnes* Rules' (1997) 66 *Nordic Journal of International Law* 211.

[97] A Dan Tarlock, *supra* n.9, at 62. AE Utton 'International Environmental Law and Consultation Mechanisms' (1973) 12 *Columbia Journal of Transnational Law* 56, 66. J Martens and K Schilder, *supra* n.21, at 813-814.

[98] DA Wirth 'Re-examining Decision-Making Processes in International Environmental Law' (1994) 79 *Iowa Law Review* 769, 796.

[99] A Chayes and A Chayes 'Compliance Without Enforcement: State Regulatory Behaviour Under Regulatory Treaties' (1991) 7 *Negotiation Journal* 311, 314-318. E Petersmann 'How to Reform the UN System? Constitutionalism, International Law and International Organizations' (1997) 10 *Leiden Journal of International*

Thus, the tendency toward charitable and welfarist approaches to environmental protection rooted in historical practice remains a real threat to inspiring fidelity to an international constitutionalism regulatory framework and its perception as establishing legitimate behavioural claims. However, a depoliticised body of norm entrepreneurs is well positioned to argue for the turn to an international constitutionalism regulatory framework that is neither charitable nor welfarist. As such, a turn to science has the capacity to facilitate satisfaction of this first element of solidarity.

6.3.2. Active involvement of all states

The second core element of solidarity is the active involvement of all states in regulating a common concern. With respect to achieving a necessary preliminary community of practice around the environmental protection norm, fulfilment of this requirement is particularly important. This is because, by definition, a preliminary community of practice around the environmental protection norm is dependent on the active involvement of all states in environmental protection efforts. Indeed, the detrimental effects of an inability to secure such active involvement are quite apparent when the experience with regulating the environmental protection norm under international environmental law is considered.

Under international environmental law, some appreciation of the need to secure the active involvement of all states in environmental protection efforts has led to attempts to secure such involvement in two notable ways. Firstly, in framing environmental protection obligations, consideration is often given to different capacities that subsist between states. Most often, this results in environmental protection obligations being qualified to accommodate capacity differences between states.[100] A consequence of this, within the present approach is that, while this approach may be justifiable, states that lack capacity are often not sufficiently involved in environmental protection efforts. Secondly, efforts to secure the active involvement of all states have been pursued through recourse to conditionality as discussed in Chapter Two. While the effort to rely on conditionality is commendable, it has had some undesirable consequences. Notably, some states, particularly in the developing

Law 421, 433-434. TM Franck 'Preface: International Institutions: Why Constitutionalize' in JL Dunoff and JP Trachtman *Ruling the World: Constitutionalism, International Law and Global Governance* (2009) xiii.

[100] See Chapter Three.

world, expect incentives for participation in environmental protection efforts and will do little to be actively involved without such assistance.[101]

Importantly however, this inability to secure the active involvement of all states in environmental protection is effectively addressed through depoliticising the body of norm entrepreneurs and the qualities of the international constitutionalism regulatory framework. Such a depoliticised body of norm entrepreneurs would have perceived and real objectivity and would therefore be justified in arguing that environmental protection places legitimate behavioural claims on all states.[102] Being independent and objective, such a body of norm entrepreneurs would be capable of framing obligations in a manner that accounts for differing capacities in an un-biased manner.[103] The implication of this would be that environmental protection obligations would be universal and would require the active involvement of all states. For instance, the active involvement of all states would be required regardless of capacity. Similarly, involvement would not be contingent on the principle of conditionality. However, this would be accompanied by assurances that legal framing of state obligations under the norm would take the different capacities of states into account.

It also merits consideration that an international constitutionalism regulatory framework is particularly useful to securing the active involvement of all states. The framework imposes universal obligations through replacement international environmental law. However, the framework would vest executive authority in a branch that would then be considerate of capacity differences. Once policy is made, it forms the basis of subsidiary legislation to give effect to this policy. In the event that allowances for capacity differentials are contested, the framework offers an adjudicatory branch empowered with powers of review and dispute resolution.[104]

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[101] GW Downs, KW Danish and PN Barsoom 'Is the Good News About Compliance Good News about Cooperation?' (1996) 50 *International Organization* 379, 395. JL Dunoff, *supra* n.90, at 271. T Yang, *supra* n.19, at 1157. L Rajamani *Differential Treatment in International Environmental Law* (2006) 6. A Cardesa-Salzman 'Non-compliance Procedures in Multilateral Environmental Agreements: Weaknesses' Diagnosis and Therapy' (2010) 7: available at: http://www.esil-en.law.cam.ac.uk/Media/Draft_Papers/Agora/Cardesa-Salzmann.pdf

[102] P Birnie, A Boyle and C Redgwell, *supra* n.3, at 125-126. SC Schreck, *supra* n.2, at 256. AE Utton, *supra* n.97, at 66. R Falk 'Environmental Protection in an era of Globalization' in G Handl (ed) (1995) 6 *Yearbook of International Law* 3, 3-8. J Martens and K Schilder, *supra* n.21, at 813-814.

[103] P Birnie, A Boyle and C Redgwell, *supra* n.3, at 40.

[104] See Chapter Three.

In addition, an arguably more compelling reason in persuading states to pursue the international constitutionalism regulatory framework is that such a framework streamlines environmental protection efforts in a centralised, hierarchical structure.[105] A necessary corollary to this is the pooling of funds managed by the executive branch.[106] The possibility of access to these funds in return for participation in the environmental protection regulatory effort would offer a compelling incentive for states to pursue an international constitutionalism regulatory framework.[107]

Thus, an objective and depoliticised body of norm entrepreneurs and qualities of an international constitutionalism regulatory framework secure the active involvement of all states in regulation. Where qualification of the obligations on states is necessary however, this is acknowledged and accounted for in a reasonable, consistent and centralised manner. In this way, the conditions of the second element of solidarity are satisfied.

6.3.3. Balanced give and take

The final element of solidarity is ensuring a balanced give and take among states. As noted in the previous chapter, environmental protection efforts must often contend with different capacities among states as well as historical events that have played a role in determining variances in capacities among states. From a justice perspective, accommodating these issues requires a framework that ensures that there is fair and considerate give and take between states. Indeed, the detrimental effects of an inability to secure fair give and take in efforts to secure effective environmental protection are quite apparent under efforts to regulate the environmental protection norm through international environmental law.

[105] JL Dunoff, *supra* n.90, at 249.

[106] G Handl 'Controlling Implementation of and Compliance with International Environmental Commitments: The Rocky Road from Rio' (1994) 5 *Colorado Journal of International Environmental Law and Policy* 305. 321.

[107] D Zaelke and J Cameron 'Global Warming and Climate Change: An Overview of the International Legal Process' (1990) 5 *American University Journal of International Law and Policy* 249, 281. L Susskind and C Ozawa, *supra* n.1, at 156. A Chayes and A Chayes, *supra* n.99, at 318-319. GW Downs, KW Danish and PN Barsoom, *supra* n.99, at 395. JL Dunoff, *supra* n.90, at 271. DG Victor 'Enforcing International Law: Implications for an Effective Global Warming Regime' (1999) 10 *Duke Environmental Law and Policy* 147, 161-163. T Yang, *supra* n.19, at 1157. CE Bruch and E Mrema *Manual on compliance with and enforcement of Multilateral Environmental Agreements* (2006) 100.

For instance, recognition of the need to ensure fair give and take among states accounts for a turn to the common but differentiated responsibility approach under international environmental law which was discussed in Chapter Two. While the principle certainly attempts to ensure balanced give and take among states, an inability to achieve what is perceived as fair differentiation, as noted in Chapter Five, has precluded the attainment of solidarity among states.[108] This is most apparent in climate change. Developed states have largely accepted greater responsibility in the effort to curb climate change. However, relying on the common but differentiated responsibility principle, some large emitters of greenhouse gasses such as China and India often cite historical practices of developed states as the basis for the refusal to accept proportionate responsibility to their activities.[109] The effect is that while a common but differentiated responsibility approach pursues fair give and take, this is not always achieved. Arguably, this is because states remain central parties in the body of norm entrepreneurs in a manner that precludes this body from being perceived as objective.

As with other elements of solidarity, this is an issue that is easier to tackle in the context of a depoliticised body of norm entrepreneurs. For instance, with regard to the previously discussed justice example, an objective body of norm entrepreneurs is well-positioned to make the claim that environmental responsibility attaches to all states regardless of historical and other considerations. Importantly, such a body is also well-positioned to take a central and impartial role in establishing how environmental protection responsibility should be differentiated between states. In addition, and as noted earlier, the fact that the body of norm entrepreneurs is inclusive also allows for the representation of all interests to ensure that framing of what constitutes fair give and take is done in an objective manner. Thus, the fact that the body of norm entrepreneurs is objective allows them to present a position that ensures balanced give and take while avoiding the perception that they are biased. In this way, an objective body of norm entrepreneurs is well-suited to ensuring that this element of solidarity is achieved.[110]

Equally important, the international constitutionalism regulatory framework is built to ensure that fair give and take which meets the requirement of justice is achieved. Thus, an international constitutionalism regulatory framework centralises policy making functions in

[108] See Chapter Two.
[109] J Brunnee and SJ Toope, *supra* n.14, at 127-128. A D'Amato 'The Evolution of International Environmental Law' available at: http://anthonydamato.law.northwestern.edu/IELA/Intech01-2001-edited.pdf
[110] CE Bruch and E Mrema, *supra* n.107, at 50.

an executive branch consulting with all stakeholders. This executive branch would objectively apportion responsibility among states as part of its policy making function. Policy would then form the basis of subsidiary laws that reflect justice considerations, for instance, through a common but differentiated responsibility approach. If this is done in a contested manner, fairness and justice would be achievable through an adjudicatory branch that can review executive functions.[111]

Certainly, experience with international environmental law suggests that the need to ensure fair give and take threatens solidarity and thus, progression to an effective regulatory framework. However, a depoliticised body of norm entrepreneurs as well as the qualities of an international constitutionalism regulatory framework minimise the potency of the threat and facilitate progression to fair give and take of environmental protection responsibilities. Apportionment of such responsibilities is arrived at with recourse to public participation and is susceptible to judicial review in a manner that ensures a fair give and take is achieved, satisfying the third element of solidarity.

6.4. Progression to an international constitutionalism regulatory framework

It has been argued that a turn to science would lead to an objective body of norm entrepreneurs capable of framing objectives in a manner that addresses some of the difficulties that a state-led body of norm entrepreneurs has created. This body of norm entrepreneurs would be well positioned to pursue and achieve all the central elements of solidarity. Importantly, and as highlighted in the foregoing discussion, achieving solidarity necessarily addresses issues which have compromised the achievement of a preliminary community of practice such as conflicting interests, capacity differences, and justice considerations.

Importantly however, once solidarity among states is achieved, the role of norm entrepreneurs is to frame environmental protection objectives in an objective manner with the participation of all relevant parties. Drawing from Slaughter's liberalism argument, the norm 'life cycle' and the interactional approaches discussed earlier, such norm entrepreneurs play an important role in shaping domestic and international state policy.[112] For instance, in their

[111] DA Wirth, *supra* n.98, at 796-797. TM Franck, *supra* n.99, at xiii.
[112] See Chapter Four.

interactions, they may enact private standards and in doing so, place pressure on states to regulate generally. This general regulation will be driven by state institutions or will necessarily reflect compromises between state institutions and private entities.[113]

As such, the achievement of objectivity in the body of norm entrepreneurs ensures consistency, across jurisdictions, of what entrepreneurs ask of states. As state institutions respond and react to this, a consistent approach to regulation emerges at the state and inter-state level. Once this emerges, rather than drawing focus to securing the participation of states in environmental protection efforts, as is currently the case under international environmental law, states will be driven to focus on achieving legal consistency and clarity in regulation at the international level.[114]

In this context, an international regulatory framework for environmental protection becomes desirable. It would crystallize and 'fix' shared legal understandings on environmental protection.[115] In addition, and as noted in Chapter Three, the international constitutionalism regulatory framework is particularly desirable to states. This is because such a framework promises efficacy in environmental protection, while retaining its perceived and real legitimacy. This is a conclusion that can be drawn from, and is supported by, developments in human rights and international trade.

Ultimately, this suggests that a turn to science would practicably cultivate the development of a preliminary community of practice around the environmental protection norm facilitating progression to an international constitutionalism regulatory framework and thus, consistently effective environmental protection. Importantly, states would be persuaded to pursue an international constitutionalism regulatory framework rather than have an ideal regulatory framework externally imposed on them.Certainly, the fact that the regulation of human rights and international trade have progressed in this manner suggests that a similar evolution is likely to occur in environmental protection if an objective body of norm entrepreneurs is entrusted with the role of cultivating a preliminary community of practice around the environmental protection norm.

[113] See Chapter Four.
[114] See Chapter One and Chapter Two.
[115] J Brunnee and SJ Toope, *supra* n.14, at 48.

6.5. Conclusion

The preceding discussion explored how the objectivity that would result from a turn to science in constituting the body of norm entrepreneurs would lead to effective legality. It has emerged that this is attainable through a turn to science in constituting the body of norm entrepreneurs and in framing environmental protection issues. The result of this will be to create the need for a comprehensive and legitimate regulatory framework to 'fix' legal understandings. It has been argued that such a framework would be an international constitutionalism regulatory framework. This suggests, and supports the earlier argument in Chapter Three, that persuading states to pursue an international constitutionalism regulatory framework is the gateway to consistently effective environmental protection.

However, it must be considered that satisfying this effective legality phase of the construct proffered in Chapter Four through an international constitutionalism regulatory framework merely signals completion of the third phase of the four-phase construct. The fourth phase, achieving a community of practice around the regulatory framework, in this case an international constitutionalism regulatory framework, remains the final step in progressing to consistently effective international regulation.

While this is an important issue, it must be considered that, in environmental protection, achieving effective legality is predicated on achieving a preliminary community of practice around the environmental protection norm. Importantly, qualities of the international constitutionalism regulatory framework, as noted in the preceding discussion play a central role in encouraging solidarity in the first instance. Furthermore, once the international constitutionalism regulatory framework emerges, it plays a central role in ensuring the persistence of solidarity. As such, fulfilling the requirement of a community of practice around the international constitutionalism regulatory framework is therefore best perceived as a continuation of the initial preliminary community of practice. Effectively, once the preliminary community of practice that is required to ensure the solidarity that is required to secure progression to an international constitutionalism regulatory framework, it is very likely that the continued existence of the framework is dependent on solidarity to the framework, and a community of practice around the framework. As such, achievement of an international constitutionalism regulatory framework remains the essential step if progression to consistently effective environmental protection is to be achieved.

Chapter Seven

Conclusion

'..a lawyer who acquires knowledge of the body politic acquires a duty not simply to observe transnational legal process, but to try to influence it.'[1]

7.1. Introduction

The discussion in the thesis considered how the oft-researched issue of bridging the gap between law and the environment in order to consistently secure effective environmental protection could be achieved. Departing from traditional approaches to this issue, the thesis argued that effective environmental protection could be achieved in a practicable manner through persuading states to pursue progression to an international constitutionalism regulatory framework.

In concluding this discussion it is instructive to consider the sentiment behind Dworkin's argument, albeit in legal interpretation, that in developing and applying the law fidelity must be shown to the historical and moral institutions of the legal system to ensure that suggested solutions to perceived problems 'fit' in the broader context of the legal system.[2] Furthemore, though referring to the domestic realm, Dworkin also noted that 'each judge must regard himself, in deciding a new case before him, as a partner in a complex enterprise of which (the) innumerable decisions, structures, conventions and practices are history. He must interpret what has gone before because he has a responsibility to advance the enterprise in hand rather than strike out in some new direction of his own.'[3]

[1] HH Koh 'How is International Human Rights Law Enforced?' (1999) 74 *Indiana Law Journal* 1397, 1416.
[2] R Dworkin *Law's Empire* (1986) 251.
[3] *Ibid*, at 258.

While they may have related to interpretation of laws in the domestic realm, these are important observations, the sentiment of which can instruct the attempt to develop all aspects of the law. Certainly, it is important to consider the 'fit' of the approach in the thesis to the general body of knowledge on how bridging the gap between law and the environment could be achieved in order to secure effective environmental protection.

By way of examining the 'fit' of an argument for an international constitutionalism regulatory framework in the context of existing perspectives, this chapter critically analyses this framework against existing perspectives which have explored how to bridge the gap between law and the environment. For ease of reference, the chapter commences with a summary of the argument for persuading states to pursue progression to an international constitutionalism regulatory framework. It subsequently proceeds to the critical analysis of this framework against existing perspectives. The chapter concludes with an assessment of the international regulatory framework against existing perspectives and considers whether the findings in the thesis meet the stated objectives of the thesis.

7.2. Summary of the argument

The thesis began with the observation that the global environment is in decline despite the fact that an extensive body of international environmental law has increasingly been dedicated to environmental protection for the past four decades. This was taken to suggest that a gap subsists between law and the environment. However, it was also observed that environmental decline is far from universal in regulated areas. There remain notable instances of effective environmental protection under international environmental law. These observations combined, were taken to suggest that achieving consistency in effective environmental protection was dependent on bridging the gap between law and the environment. Thus, the primary motivation for the thesis was to consider how the gap between law and the environment could be bridged in a more systematic way.

In seeking to establish how this gap could be bridged, the thesis considered an expansive body of research that has previously pursued this task. The research suggested that the reasons for the gap between law and the environment have been attributed to various reasons, most notably, non-compliance with international environmental law, ineffective

laws, uncoordinated implementation of laws and lack of effective enforcement of the law.[4] It was quickly established that while there is merit to the arguments, they individually suffer from notable deficiencies. This prompted further research which revealed arguments that the gap between law and the environment is attributable to the concept of sovereignty. In terms of these perspectives, the concept of sovereignty is the systemic reason that accounts for symptomatic deficiencies that manifest as flawed law-making, implementation and enforcement in international environmental law.[5]

The difficulty with these sovereignty-centric perspectives is that they regard sovereignty as an insurmountable hurdle to environmental protection. Thus, they propose solutions for bridging the gap between law and the environment which revolve around greater collaboration and coordination among states. This was taken to be an unconvincing solution based, for example on the fact that various multilateral environmental agreements are evidence of comprehensive collaborative efforts between states, yet the gap between law and the environment persists. Despite this, an important observation emerged from analysis of the sovereignty-centric perspectives. Specifically, it became clearer that the reason for the gap between law and the environment is that the regulatory framework, under which environmental protection is currently pursued, is flawed to the extent that it is sovereignty-centric.[6] As such, the thesis proceeded to consider perspectives that have sought to bridge the gap between law and the environment as a regulatory issue.

It emerged that there are few arguments that tackle this issue from a regulatory perspective. In addition, available arguments are unsatisfying to the extent that they are

[4] RR Churchill and G Ulfstein 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law' (2000) 94 *American Journal of International Law* 623, 628. KW Danish 'International Relations Theory' in D Bodansky, J Brunnee and E Hey (eds) *The Oxford Handbook of International Law* (2007) 205, 225. A Chayes and A Chayes *The New Sovereignty: Compliance with International Regulatory Agreements* (1995). DG Victor 'Enforcing International Law: Implications for an Effective Global Warming Regime' (1999) 10 *Duke Environmental Law and Policy Forum* 147, 163.

[5] See Chapter One.

[6] W Bradnee Chambers 'Towards an Improved Understanding of Legal Effectiveness of International Environmental Treaties' (2003) 16 *Georgetown International Environmental Law Review* 501, 501-502. GW Downs, KW Danish and PN Barsoom 'Is the Good News about Compliance Good News anout Cooperation?' (1996) 50 *International Organization* 379, 383.

concessionary to sovereignty. Thus, they predominantly advocate techniques that rely on diplomacy as the key to achieving consistently effective environmental protection.[7]

Based on this discussion, the thesis identified an important gap in the literature as being the absence of convincing regulatory perspectives to address the gap between law and the environment. It was argued that this is largely due to the fact that current approaches are premised on implicit acceptance of the sovereignty-centric international law paradigm. This was highlighted as being the reason why recommendations in current perspectives are concessionary to sovereignty. Whether this is justifiable or not was raised as a point to consider. Another gap in the literature that emerged, related to the absence of perspectives that focused on expediting progression to consistently effective environmental protection. The concession was made that this was justifiable in light of available theories having been formulated at a time when the urgency that currently attaches to achieving environmental protection was not present. However, it was also argued that in the modern era, this is a critical aspect to any attempt to achieve consistently effective environmental protection.

Having laid this foundation, the thesis began with an assessment of the validity of reliance on the sovereignty-centric international law paradigm in pursuing consistently effective environmental protection. This was based on comparative analyses informed by human rights and international trade. This discussion highlighted that international environmental law suffers from irremediable deficiencies. This was taken to mean that closing the gap between law and the environment cannot be achieved under this paradigm.[8]

Having arrived at this conclusion, the thesis considered how the regulatory vacuum that would ensue from departure from that paradigm could be filled. To gain insight, the thesis considered how this problem was tackled under human rights and international trade. This revealed that once deficiencies in the international law paradigm were highlighted, both human rights and international trade achieved effective regulation through transition to international constitutionalism regulatory frameworks. To achieve these frameworks, states were persuaded to pool regulatory authority and place it in a central autonomous authority. This authority created flexible autonomous institutions that feature internal controls such as a

[7] A Stone 'What is a Supranational Constitution? An Essay in International Relations Theory' (1994) 56 *The Review of Politics* 441, 469. CA Whytock 'Thinking Beyond the Domestic International Divide: Toward a Unified Concept of Public Law' (2004) 36 *Georgetown Journal of International Law* 155, 160-164. A Hurrell and B Kingsbury *The International Politics of the Environment* (1992) 4-5.
[8] See Chapter Two.

separation of powers and external controls such as retaining states as subjects of the regulatory frameworks with authority to veto unfettered exercises of authority by institutions of the framework.

Based on this analysis, the thesis argued that the regulatory vacuum that would result from a departure from the sovereignty-centric international law paradigm in environmental protection could be filled by progression to an ecocentric international constitutionalism regulatory framework.[9] As such, the thesis sought to construct an ideal regulatory international constitutionalism regulatory framework for environmental protection. This process was instructed by environmental attributes, experiences under international environmental law and consideration of effective regulation in human rights and international trade. Ultimately, it revealed that an ideal regulatory framework highlighted three necessary attributes of such an ideal framework.[10]

First, an ideal regulatory framework had to be hierarchical, headed by and based on replacement international environmental law. Experience with international environmental law suggested that the effectiveness of this framework was dependent on disseminating legislative authority based on environmental phenomena and regionally. In addition, experience under international environmental law also suggested that this hierarchical framework needed to be complemented with community-based and market-based regulation. Second, the framework had to be centralised with a central institution carrying extensive executive powers. This institution would assume policy making and policing functions. Despite the need for centralisation, there was a corresponding need for dissemination of authority based on environmental phenomena or regionally. Third, an ideal regulatory framework had to feature an effective enforcement branch. Ideally, the replacement international environmental law would empower an adjudicatory branch to oversee enforcement. Again, authority in adjudication needed to to be disseminated based on environmental phenomena and regionally.[11]

It was conceded however that the difficulty with this approach was that for the proposed ideal regulatory framework to be realised, it would need to be externally imposed on states. This would necessitate extensive state agreement to the framework in a manner which would make sovereignty considerations central to regulation of environmental

[9] See Chapter Three.
[10] See Chapter Three.
[11] See Chapter Three.

protection. Thus, such a framework would potentially suffer from rigidity and illegitimacy. This was argued to be undesirable to the extent that it would recreate the situation under international environmental law which a replacement international environmental law regulatory framework is intended to combat.[12]

In order to explore how states might be persuaded to pursue progression to an international constitutionalism regulatory framework, the thesis considered how consistently effective environmental protection could be achieved through regulation, from a theoretical perspective. In identifying relevant theory, much regard was placed on the earlier discussion. Based on analysis of three main theories, notably, Slaughter's liberalism, Finnemore and Sikkink's norm theory and Brunnee and Toope's interactional theory, it was argued that achieving consistently effective environmental protection was dependent on completion of a four phase construct. The thesis identified these phases as being norm emergence, progression to a tipping point, achievement of effective legality, and a community of practice around an ideal regulatory framework. Importantly, it was noted that experience with human rights and international trade suggest that an international constitutionalism regulatory framework is the outcome of the completion of the third phase of this construct.[13]

In assessing whether consistently effective environmental protection can be achieved, the thesis explored where the field currently rests within the proffered construct. This analysis revealed that environmental protection's progression through the four phases of the construct has stalled at the third phase, effective legality. The thesis argued that this is predominantly due to the politicized nature of the current body of environmental protection norm entrepreneurs which means they lack the requisite objectivity to compel progression to effective regulation. As such, it was argued that removing such politicization and making the body of norm entrepreneurs more objective would facilitate completion of the third phase culminating in an international constitutionalism regulatory framework and thus, consistently effective environmental protection.[14]

Having identified lack of objectivity as problematic, the thesis explored how such objectivity might be achieved. To this end, the thesis argued that objectivity could be achieved through a turn to science in constituting the body of norm entrepreneurs, and in framing environmental protection objectives.

[12] See Chapter Three.
[13] See Chapter Four.
[14] See Chapter Five.

In exploring the value of this approach, the thesis considered whether such a turn to science would create solidarity among states in a manner that would lead to the preliminary community of practice required to facilitate completion of the environmental protection norm's progression through the four phase construct. That discussion established that such a turn to science would indeed facilitate the achievement of solidarity. In turn, this would lead to completion of the third phase of the proffered construct culminating in an international constitutionalism regulatory framework.[15]

Importantly, it was noted that an international constitutionalism regulatory framework would only meet the first three requirements of a four phase construct. To the extent that consistently effective environmental protection is predicated on completion of the four phase construct, it was argued that a preliminary community of practice, the achievement of which is central to achieving this third phase, would merely need to be extended to full community of practice around an international constitutionalism regulatory framework once achieved. As such, achievement of an international constitutionalism regulatory framework would be the gateway to consistently effective environmental protection.

The preceding summary highlights the salient points of the argument in the thesis. It is this argument that must be critically assessed against existing perspectives.

7.3. Existing perspectives and international constitutionalism

The introductory chapter considered, albeit in an abridged manner, most of the dominant views that have sought to bridge the gap between law and the environment. The breadth of these arguments means it would be impractical to assess the international constitutionalism regulatory framework approach against all these approaches. A more effective way of conducting this analysis is to base it on three of the common and more dominant threads in existing perspectives that have sought to bridge the gap between law and the environment thus securing effective environmental protection.

[15] See Chapter Six.

7.3.1. Sovereignty-driven perspectives

The first common thread in current approaches that pursue effective environmental protection consists of what can be referred to as sovereignty-driven perspectives.[16] This is a reference to existing perspectives which have argued that the gap between law and the environment is attributable to the concept of sovereignty. Examples include approaches which have argued that ineffective environmental protection is attributable to law-making, implementation, enforcement and securing compliance with the law. These earlier versions of this perspective set the stage for latter perspectives that regarded these specific flaws with regulating environmental protection as being symptomatic of the systemic difficulties which the concept of sovereignty poses to regulating environmental protection. In addition, this sovereignty-driven perspective includes approaches which argue that bridging the gap between law and the environment is dependent on diplomatic approaches that are state-driven.[17] Also, this sovereignty-driven perspective includes approaches which propose or advocate reliance on 'framework' or 'umbrella' treaties approach as the gateway to bridging the gap between law and the environment.[18]

When considered alongside the international constitutionalism regulatory framework approach advocated in the thesis, it is quite apparent that there are similarities between these sovereignty-based perspectives and the international constitutionalism regulatory framework approach. For instance, both approaches converge on the fact that sovereignty is a central issue in bridging the gap between law and the environment. A consequence of this is that all the approaches argue that diplomacy, albeit in different forms, is key to bridging the gap between law and the environment. Sovereignty-driven perspectives perceive the influence of sovereignty to mean that the leading role in these diplomatic efforts falls to states.[19] Alternatively, an international constitutionalism regulatory framework highlights the need to

[16] P Birnie 'International Law and Solving Conflicts' in JE Carroll (ed) *International Environmental Diplomacy* (1988) 95-118.

[17] LK Caldwell 'Beyond Environmental Diplomacy: The Changing Institutional Structure of International Cooperation' in JE Carroll (ed) *International Environmental Diplomacy* (1988) 13, 24-25.

[18] P Birnie, *supra* n.16, at 95. RR Churchill and G Ulfstein, *supra* n.4, at 628. JL Dunoff 'From Green to Global: Toward the Transformation of International Environmental Law' (1995) 19 *Harvard Environmental Law Review* 241, 249. L Susskind and C Ozawa 'Negotiating More Effective International Environmental Agreements' in A Hurrell and B Kingsbury (eds) *The International Law of the Environment* (1992) 142, 144. K Kline and K Raustiala 'International Environmental Agreements and Remote Sensing Technologies' (2000) 8-10, available at: http://sedac.ciesin.columbia.edu/rs-treaties/rs-treaties_bckgnd.pdf

[19] See Chapter One.

depoliticise diplomatic efforts and assigns the leading role in such efforts to a science-led, independent, and impartial body of norm entrepreneurs.[20]

Despite sharing these similarities, there are significant differences between the approaches. Most notably, they are based on different premises. For instance, sovereignty-driven perspectives implicitly accept the validity of the sovereignty-centric international law paradigm as the correct basis on which to pursue effective environmental protection. The fact that this framework is sovereignty-centric means that they offer solutions which are concessionary to sovereignty. Alternatively, an international constitutionalism regulatory framework perspective is based on a challenge and subsequent rejection of the sovereignty-centric international law paradigm as the valid basis on which to pursue effective environmental protection. The justification for this rejection is drawn from consideration of the fact that the paradigm's sovereignty-centric focus makes it ill-suited to pursuing effective regulation in environmental protection.[21] This is supported by analysis of theoretic perspectives which argue that consistently effective environmental protection is dependent on the activities of other parties in addition to states. This forms the basis of the argument that progression to consistently effective environmental protection requires a turn to science.

Importantly, it is the rejection of the current international law paradigm that facilitates progression to an international constitutionalism regulatory framework in which sovereignty does not play the central and detrimental role it does under the sovereignty-centric international law paradigm.

7.3.2. Institutionalism-based perspectives

The second frequently recurring thread in existing perspectives which have attempted to bridge the gap between law and the environment consists of what can be referred to as institutionalism-based perspectives.[22] Under this thread are included approaches which advocate institutionalism as the way in which to secure effective regulation that reflects the

[20] See Chapter Four.
[21] A Florini 'The Evolution of International Norms' (1996) 40 *International Studies Quarterly* 363, 375, 381-382.
[22] LK Caldwell, *supra* n.17, at 13. K von Moltke 'International Commissions and Implementation of Law' in JE Carroll (ed) *International Environmental Diplomacy* (1988) 87.

interconnectedness of the environment.[23] Such an approach regards cooperative action, common rules and standards and continuous decision-making among relevant actors rather than a piecemeal collaborative approach as the building blocks on which effective environmental protection could be achieved.[24] In addition, institutionalism is seen as affording the opportunity to incorporate all stakeholders to the pursuit of effective environmental protection.[25]

There are certainly similarities between these institutionalism-based perspectives and the international constitutionalism regulatory framework approach. Both approaches are based on recognition and acknowledgment of the fact that the complex, transnational and interconnected character of many environmental problems presents regulatory difficulties in a sovereignty-centric world.[26] These difficulties cannot be resolved within the confines of a sovereignty-centric international law paradigm. Thus, both approaches see achieving effective environmental protection as being predicated on a coordinated approach rather than piecemeal, collaborative approaches.[27] Closely related to this is the fact that both approaches converge on the fact that consistently effective regulation of environmental protection must extend beyond a focus solely on states. Thus, both approaches consider the contribution of non-governmental organizations and civic society groups as being particularly salient to achieving effective environmental protection.[28]

Despite these similarities, there are significant differences between these approaches. Perhaps the most notable difference is the fact that institutionalism-based perspectives, while born from recognition of the need to limit the detrimental effects of sovereignty in regulation,

[23] J Goldstein, M Kahler, R Keohane and AM Slaughter 'Introduction: Legalization and World Politics' (2000) 54 *International Organization* 385, 392. GH Aldrich and CM Chinkin 'A Century of Achievement and Unfinished Work' (2000) 94 *American Journal of International Law* 90. K von Moltke, *supra* n.22, at 87.

[24] G Palmer 'New Ways to Make International Environmental Law' (1991) 86 *American Journal of International Law* 259, 262. S Charnovitz 'A World Environment Organization' (2002) 27 *Columbia Journal of Environmental Law* 324. M List and V Rittberger 'Regime Theory and International Environmental Management' in A Hurrell and B Kingsbury *The International Politics of the Environment* (1992) 85.

[25] S Oberthur and T Gehring 'Reforming International Environmental Governance: An Institutionalist Critique of the Proposal for a World Environment Organisation' (2004) 4 *International Environmental Agreements: Politics, Law and Economics* 359, 359-360. K von Moltke, *supra* n.22, at 87.

[26] LK Caldwell, *supra* n.17, at 13.

[27] M List and V Rittberger, *supra* n.24, at 85.

[28] M List and V Rittberger, *supra* n.24, at 85. D Esty *Greening the GATT* (1994) 75-83.

offer no frameworks for actually addressing sovereignty.[29] The solutions they posit are dependent on states' voluntary efforts through collaboration.[30] It has emerged from experience under international environmental law that resultant frameworks, which do not directly address the sovereignty issue, are susceptible to failure based on explicit exercises of sovereignty.[31]

In contrast to institutionalism-based perspectives, an international constitutionalism regulatory framework approach is based on an initial challenge to the sovereignty hurdle through departure from the sovereignty-centric international law paradigm. This limits the detrimental effects of sovereignty to regulatory efforts from the onset. In addition, the framework is based on a theory-based approach that explores how states might be led to pursue progression to an international constitututionalism regulatory framework rather than imposing this upon them.[32] Specifically, the success of the international constitutionalism regulatory framework is predicated on assigning an entrepreneurship role to a science-led inclusive group that features states and other stakeholders. The objectivity of this group is critical to cultivating a preliminary community of practice around the environmental protection norm. This plays a central role in securing solidarity among states thus, facilitating progression to an international constitutionalism regulatory framework.

This means that while the potential for undesirable exercises of state power remains a threat to the framework's capacity to secure consistently effective environmental protection, the threat is very limited based on the fact that states voluntarily pursue progression to such a framework. As such, they are more invested in compliance and seeing to the success of the framework. In addition, to the extent that such a framework is predicated on elevating environmental protection to international norm status, a status in which it imposes legitimate behavioural claims on states, where states act contrary to the dictates of institutional

[29] S Oberthur and T Gehring, *supra* n.25, at 360-361. F Biermann 'Reforming Global Environmental Governance: From UNEP towards a World Environment Organization' 111-112: available at: www.centerforunreform.org/system/files/GEG_Biermann.pdf

[30] LK Caldwell, *supra* n.17, at 24-27.

[31] S Oberthur and T Gehring, *supra* n.25, at 360. P Weil 'Towards Relative Normativity in International Law?' (1983) 77 *American Journal of International Law* 413, 434. OR Young 'The Effectiveness of International Institutions: Hard Cases and Critical Variables' in JN Rosenau and O Czempiel (eds) *Governance Without Government: Change and Order in World Politics* (1991) 161.

[32] A Florini, *supra* n.21, at 364. J Gupta 'Legitimacy in the Real World: A Case Study of the Developing Countries, Non-Governmental Organizations and Climate Change' in JM Coicaud and V Heiskanen *The Legitimacy of International Organizations* (2001) 482, 505.

regulation, this is more likely to cause backlash on the states acting undesirably than to limit the capacity of the framework to achieve effective environmental protection.[33]

7.3.3. Regulatory body-based perspectives

The third common thread in current arguments that have sought to bridge the gap between law and the environment is what can be best described as the 'regulatory body' perspective. This is a reference to those arguments that have regarded sovereignty as the systemic problem in regulating environmental protection. Consequently, they propose centralised, hierarchical, regulatory bodies to oversee regulation of environmental protection as the key to effective environmental protection.[34] Earlier versions of this perspective, before the Stockholm Declaration of 1972, argued for regulation to be placed in separate authorities empowered to regulate all states. Latter versions after the Stockholm Declaration highlighted the need to move away from sovereignty-centric regulation towards less sovereignty-centric regulation.[35]

Considering that the approaches are rooted in the same argument that the way to effective environmental protection is through regulatory frameworks in which sovereignty is not central, it is to be expected that the regulatory body perspective shares the most similarities with the international constitutionalism regulatory framework perspective.[36] Thus, both approaches pursue regulation based on considerations of qualities of the environment and environmental protection rather than concessions to sovereignty.

Despite these similarities, the notable difference between these approaches is the fact that regulatory body perspectives offer no frameworks for how these regulatory bodies could be achieved. Before the Stockholm Declaration, versions of this regulatory body perspective were based on the optimistic perspective that states would adopt such an approach as the most logical and ideal regulatory framework in pursuing effective environmental protection. After the Stockholm Declaration established that states would be unwilling to submit to external regulatory bodies, latter versions of the regulatory body perspective were based on the optimistic view that states would be open to being subject to external authority. These

[33] See Chapter Four.

[34] GF Kennan 'To Prevent a World Wasteland: A Proposal' (1970) 48 *Foreign Affairs* 401. LD Levien 'Structural Model for a World Environmental Organization: The ILO Experience' (1972) 40 *George Washington Law Review* 464.

[35] JL Dunoff, *supra* n.18, at 260-261.

[36] G Palmer, *supra* n.24, at 260-262.

views were often influenced by general developments in international relations such as The Hague Declaration and the emergence of the World Trade Organization in 1994 that suggested state willingness to submit to external regulatory bodies. In the absence of frameworks for how these regulatory bodies could be realised, the regulatory bodies are effectively, externally imposed on states. Realising the regulatory bodies in practice is predicated on states agreeing to and transitioning to such bodies.[37]

In contrast, the argument for an international constitutionalism regulatory framework is a regulation-based approach with a framework for how effective regulation could be achieved drawn from an analysis of relevant international relations theories. To secure the greatest likelihood of progression to effective regulation, the framework is not externally imposed on states. Instead, based on an analysis of theoretical perspectives on how states might be led to pursue consistently effective international regulation the international constitutionalism regulatory framework approach is based on a construct which establishes how progression to consistently effective regulation of environmental protection would emerge.[38]

Thus, in contrast to regulatory body perspectives that externally provide desirable regulatory frameworks without a practical framework for how this might be achieved, an international constitutionalism regulatory framework approach is proposed based on a four-phase construct on how it would be achieved.[39] This is a critical difference between the approaches. Indeed, the fact that regulatory body perspectives omit to provide practical frameworks for how they might be achieved is arguably the reason that the proposed regulatory bodies are yet to be realised.

7.4. Critical analysis

In critically assessing the international constitutionalism regulatory framework against existing perspectives, an important issue to consider is that a consequence of broad categorization of detailed existing perspectives is that the categories succumb to the dangers which attach to categorization and summarizing of often intricate arguments. Despite this,

[37] See Chapter One.
[38] See Chapters Five and Six.
[39] See Chapters Four and Five.

these categories are useful to the extent that they capture much of the more salient aspects of existing perspectives on bridging the gap between law and the environment.

With that disclaimer in mind, it is immediately apparent that there are extensive similarities between the international constitutionalism regulatory framework and existing perspectives. This is to be expected and is attributable to the fact that the perspectives share a commonality of purpose. In addition, in constructing the international constitutionalism regulatory framework much guidance has been drawn from aspects of existing perspectives that have proven to be useful, or successful, in pursuing effective environmental protection under international environmental law. Thus, it is inevitable that there will be instances of overlap in these approaches.

While the similarities among the perspectives are noteworthy, they are limited in the insight they can give to a critical analysis of an international constitutionalism regulatory framework measured against existing perspectives. As such, they have already been highlighted and need not be reconsidered. However, an important issue pertaining to these similarities that should not be overlooked is that their existence necessarily raises the important question of why an international constitutionalism regulatory framework, sharing similarities with existing perspectives would succeed where those approaches have been argued to have faltered. It is only through focusing on the differences between the approaches that some insight into the resolution of this issue can be acquired. To this end, three differences between an international constitutionalism regulatory framework perspective and existing perspectives are especially noteworthy.

First, the main difference between the approaches lies in their treatment of sovereignty. Existing perspectives make extensive concessions to sovereignty and rely on a sovereignty-centric international law paradigm. Alternatively, the international constitutionalism regulatory framework perspective is premised on rejection of this sovereignty-centric mode of regulation. Instead, it pursues a regulatory framework in which sovereignty does not play such a detrimental role.[40] This is supported by theoretical analysis which suggests that progression to consistently effective international regulation requires departure from a state-centric approach.

[40] A von Bogdandy 'Constitutionalism in International Law: Comment on a Proposal from Germany' (2006) 47 *Harvard International Law Journal* 223, 227-229. D Held 'Law of States, Law of Peoples: Three Models of Sovereignty' (2002) 8 *Legal Theory* 1, 14. M Loughlin 'The Tenets of Sovereignty' in N Walker (ed) *Sovereignty in Transition: Essays in Eurpean Law* (2003) 55, 82-83, 86.

Second, the international constitutionalism regulatory framework approach, unlike existing perspectives, does not leave the task of advancing environmental protection to states.[41] Rather, this responsibility is vested in an independent and impartial body of norm entrepreneurs. This depoliticises the body of norm entrepreneurs and the framing of environmental protection objectives in a manner that removes some of the contentious hurdles that have precluded achievement of effective regulation in environmental protection. In addition, depoliticisation of norm entrepreneurs is pursued in a manner that ensures solidarity among states. The effect of this is that it addresses specific issues such as conflicting interests, capacity differences and justice considerations, which have previously derailed efforts to achieve solidarity among states in addressing environmental protection problems. Importantly, achieving solidarity allows norm entrepreneurs to cultivate a preliminary community of practice around the environmental protection norm in a manner that facilitates progression to an international constitutionalism regulatory framework and thus, consistently effective environmental protection.

Third, drawing from theories on how consistently effective international regulation can be achieved an international constitutionalism regulatory framework approach offers a detailed four phase framework for how departure from sovereignty-centric regulation could be achieved. In the first instance, this is driven by norm entrepreneurs. Following these efforts however, sufficient pressure would be placed on states to pursue consistently effective regulation of environmental protection through an international constitutionalism regulatory framework. This can be contrasted to existing perspectives which do not offer frameworks for how states could be directed to pursue environmental protection at the levels required for efficacy.

These three differences are significant. They highlight the capacity of the international constitutionalism regulatory framework approach to escape the confines of a sovereignty-centric international law paradigm. This encourages the development of solidarity among states, leading to a preliminary community of practice around the environmental protection norm and ultimately, progression to an international constitutionalism regulatory framework capable of achieving consistently effective environmental protection. Effectively, the international constitutionalism regulatory framework approach addresses and avoids issues

[41] See Chapter Six.

which have crippled efforts to bridge the gap between law and the environment under international environmental law.

In sum, the international constitutionalism regulatory framework approach incorporates positive aspects of existing perspectives while tackling the deficiencies in these approaches. These factors combined suggest that the international constitutionalism regulatory framework would likely succeed to a greater extent where former approaches have largely failed.

7.5. Concluding remarks

In drawing this discussion to a close, there is a need to devote some attention to an all-round assessment of the international constitutionalism regulatory framework approach. First, it is important to note that the thesis commenced from the assertion in Chapter Two that the sovereignty-centric international law paradigm is ill-suited to regulating environmental protection. To remedy this, Chapter Three of the thesis argued that achieving consistently effective environmental protection is predicated on progression to an international constitutionalism regulatory framework. This framework would ideally be characterised by progression to a regulatory framework under replacement international environmental law. This would be characterised by the three attributes, hierarchy, centralisation and an effective enforcement branch.

It quickly emerged however, that for all the benefits this approach promised such a theoretical 'solution' would be no different from existing regulatory body type perspectives that are externally imposed on states. To counteract this, and make the solution more practicable, the thesis presented a practical framework for how the international constitutionalism regulatory framework could be achieved. Thus, Chapter Four and the ensuing chapters relied on theoretical perspectives to explain how the process of progressing to this international constitutionalism regulatory framework could be achieved. Particular focus was drawn to the need for driving states to persuade states to autonomously pursue progression to an international constitutionalism regulatory framework.

As such, the thesis is a mix of theoretical and practical solutions to the problem of bridging the gap between law and the environment in order to secure consistently effective environmental protection. While this is submitted to be an improvement upon what existing

perspectives have offered, two issues in this field that were not extensively addressed in the thesis merit some attention.

First, a potential limitation with this international constitutionalism regulatory framework approach is that its success hinges significantly on the efforts of a science-led body of norm entrepreneurs. Importantly, the thesis has presented no argument for how this science-led body could be mobilised, empowered to requisite levels and motivated to adopt the cause to elevate environmental protection to international norm status.

This is a noteworthy limitation that cannot be succinctly addressed here. As such, it is a matter best left for further research in this area. Suffice it to note that, based on progression of the environmental protection norm to a tipping point as argued in Chapter Five, it is reasonable to consider that a very active body of norm entrepreneurs is already established in environmental protection. In addition, this is also, arguably, evidenced by the fact that these entrepreneurs have formed significant networks which have managed to progress the environmental protection norm to a tipping point.[42]

In this context, the thesis presents practical tips about how this body of norm entrepreneurs could be remodelled for efficacy. An example of such a 'tip' is the suggestion that the body of norm entrepreneurs should be depoliticised, predominantly through heightening the role of scientific bodies. In addition, the thesis argues that once constituted the science-led body of norm entrepreneurs could frame issues surrounding environmental protection in a more objective manner. Beyond these contributions, full discussion of these issues must be reserved for further research.

Second, it is interesting to reconsider the earlier observation that one of the gaps in current research in this area is that there have been few attempts to argue for an approach that pursues progression to consistently effective environmental protection at an expedited rate. To this end, the fact that the international constitutionalism regulatory framework approach proposed offers a detailed framework for how consistently effective environmental protection could be achieved, potentially establishes it as a useful framework for expediting progression to consistently effective environmental protection in a manner that has not always been available in the present literature.

[42] See Chapter Four.

For the sake of completeness, it must be conceded that some arguments made in support of the international constitutionalism regulatory framework perspective, in contrast to existing perspectives, benefit from the fact that there has been a shift in environmental conscience.[43] Most states now take environmental protection seriously. This is evidenced by the fact that most states feature intricate environmental regulatory frameworks as part of their national laws.[44] This was arguably not the case at the time most of the current approaches were formulated. In addition, environmental deterioration is consistently increasing and has reached levels that account for the need for expediency in achieving effective regulation of environmental protection in a manner that may not have been as justified under existing perspectives as it is now.

In addition, despite the international constitutionalism regulatory framework approach's capacity to expedite progression to consistently effective environmental protection, it must also be noted that experience with a similar approach in human rights and international trade suggests that progression to consistently effective environmental protection through central phases of the proffered construct is an extremely protracted process.[45] Importantly, such experience suggests that completion of the processes in the construct is dependent on 'certain windows of opportunities such as wars, revolutions and upheavals. Such events can lead to shifts of power that accelerate the acceptance and evolution of new ideas and norms. In times of national or global crisis old power structures are cracked open and fundamental questions about the identity and purposes of social systems are more likely to be contested.'[46] Indeed, this is seemingly exemplified by the manner in which achieving international norm status in both human rights and international trade was achieved based on variable and unpredictable stressors attributable to such windows of

[43] F Biermann and K Dingwerth 'Global Environmental Change and the Nation State' (2004) 4 Global Environmental Politics 1, 11. JW Dacyl 'Sovereignty versus Human Rights: From Past Discourses to Contemporary Dilemmas' (1996) 9 Journal of Refugee Studies 136, 139. JL Dunoff, supra n.18, at 241. A Dan Tarlock 'The Role of Non-Governmental Organizations in the Development of International Environmental Law' (1992) 68 Chicago-Kent Law Review 61, 63. S Barrett 'International Cooperation and the International Commons' (2000) 10 Duke Environmental Law and Policy 131, 132-135. M El-Ashry 'Recommendations from the High-level Panel on System-wide Coherence-Section C on Environment' in L Swart and E Perr Global Environmental Governance: Perspectives on the Current Debate (2007) 7.

[44] JL Dunoff 'Levels of Environmental Governance' in D Bodansky, J Brunnee and E Hey (eds) The Oxford Handbook of International Law (2007) 85, 86.

[45] OA Hathaway 'Do Human Rights Treaties Make a Difference' (2002) 111 *Yale Law Journal* 1935, 2022. See Chapters Two and Four.

[46] HP Schmitz and K Sikkink 'International Human Rights' in W Carlsnaes, T Risse and BA Simmons (eds) *Handbook of International Relations* (2007) 517, 522.

opportunity.[47] Thus, the main stressor in elevating human rights to international norm status and progression to an international constitutionalism regulatory framework was arguably the similarity of the emotions and reactions that the Holocaust evoked on a world wide scale.[48] Alternatively, the main stressor in elevating international trade to international norm status and progression to an international constitutionalism regulatory framework was arguably the emergence of newly independent states which unilaterally sought to liberalize their trade policies.[49] This offered norm entrepreneurs the opportunity to exploit the financial incentives that attached to liberalizing trade as the basis on which to persuade states to pursue an international constitutionalism regulatory framework.[50]

The fact that completion of the four phase construct proffered in the thesis would lead to an international constitutionalism regulatory framework is seemingly dependent on these windows of opportunity poses a particularly difficult obstacle to the argument that the proffered construct would necessarily expedite progression to consistently effective environmental protection. This is because the varied nature of the issues that lie at the core of environmental protection means that it is unlikely to feature a singular stressor event in the mould of the Holocaust or the emergence of newly independent states.

Despite this, it is worth noting that the difficulties posed by the lack of a singular stressor event of the magnitude of the Holocaust or newly independent states in environmental protection is somewhat mitigated by the fact that various environmental disasters such as Chernobyl, Exxon Valdez, the depletion of the ozone layer, desertification,

[47] *Ibid*, at 522. M Finnemore and K Sikkink 'International norm dynamics and political change' (1998) 52 *International Organization* 887, 896-901. OA Hathaway, *supra* n.45, at 2022. R Howse 'From Politics to Technocracy-and Back Again: The Fate of the Multilateral Trading Regime' (2002) 96 *American Journal of International Law* 94, 101. R Howse and K Nicolaidis 'Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?' (2003) 16 *Governance* 1, 6. JH Jackson 'The Birth of the GATT-MTN System: A Constitutional Appraisal' (1980) 12 *Law and Policy in International Business* 21, 21-22. DG Victor, *supra* n.4, at 156. MJ Hoffman 'Entrepreneurs and Norm Dynamics: An Agent-Based Model of the Norm 'life cycle'' 20, 23-24 : available at: opim.wharton.upenn.edu/~sok/papers/h/Hoffmann_norms.doc

[48] JW Dacyl, *supra* n.43, at 140. A Florini, *supra* n.21, at 377. S Hall 'The Persistent Spectre: Natural Law, International Order and Limits of Legal Positivism' (2001) 12 *European Jurnal of International Law* 269, 301. HP Schmitz and K Sikkink, *supra* n.46, at 522. . ME Keck and K Sikkink *Activists Beyond Borders: Advocacy Networks in International Politics* (1998) 83.

[49] HV Milner 'International Trade' in W Carlsnaes, T Risse and BA Simmons (eds) *Handbook of International Relations* (2007) 448, 448-453.

[50] E Louka *International Environmental Law: Fairness, Effectiveness and World Order* (2006) 9.

to name a few, have cumulatively fostered growth of global environmental concern.[51] For instance, international negotiations promptly followed the Chernobyl nuclear accident, the Sandoz spill in the Rhine, forest die-off in Germany and North Sea algae blooms. Certainly, such catalysts move the progress of environmental protection when conditions align. However, the difficulty with this argument lies in the fact that state activity following these notable catalysts is paralleled by inactivity following often greater disasters in Africa and Latin America.[52]

Thus, despite all the progress that has been made, it can reasonably be surmised that states are yet to be persuaded to elevate environmental protection to an international norm. This suggests that, as in human rights and international trade, elevating the environmental protection norm to international norm status and subsequently pursuing progression to an international constitutionalism regulatory framework in environmental protection will likely be a protracted process in spite of the proffered construct.

Importantly, these two issues, the difficulty that attaches to establishing the science-led body of norm entrepreneurs and the absence of a singular stressor event to expedite progression to consistently effective environmental protection, are certainly worth noting. However, rather than detract from the argument in the thesis, they merely highlight the need for new perspectives in the field of research relating to achieving consistently effective environmental protection. It is to meet this need that the thesis argues that one possible way in which to achieve consistently effective environmental protection is through progression to an international constitutionalism regulatory framework. The limitations that attach to the framework are best addressed in further research.

In conclusion, the thesis set out to explore how consistently effective environmental protection could be achieved through bridging the gap between law and the environment. At its close, it has presented the argument that one way of achieving this would be through progression to an international constitutionalism regulatory framework. Such a framework would address the difficulties posed by sovereignty to environmental protection in a manner that would allow for bridging the gap between law and the environment. Importantly, this

[51] G Handl 'Environmental Security and Global Change: The Challenge to International Law' (1990) 1 *Yearbook of International Environmental Law* 3, 4. JL Dunoff, *supra* n.44, at 87. CD Stone 'Defending the Global Commons' in P Sands Greening International Law (1993) 34.

[52] RB Mitchell 'International Environment' in W Carlsnaes, T Risse and BA Simmons (eds) *Handbook of International Relations* (2007) 500, 502-503.

framework ‘fits’ with existing perspectives to the extent that it draws from and incorporates positive attributes of the existing international environmental law framework. As such, the additions proposed merely fill gaps in the body of current knowledge.

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