"This book presents a thoughtful and deeply researched account of how international environmental law can achieve the transformation that the global environment demands. Its recommendations highlight that internalising international environmental law goes far beyond the state, and indeed ultimately requires participation and cooperation on the local level."

– Prof Emily Lydgate, *Deputy Director UK Trade Policy Observatory, Reader, Sussex Law School*

"This book offers an important and insightful discussion on the effectiveness of international environmental law and governance, addressing the pivotal question of how to strengthen and enhance compliance with international environmental norms. As such, it will be a valuable reading for academics, researchers and policy-makers interested in understanding how to improve international environmental law and make it work effectively."

– Dr Emanuela Orlando, *Senior Lecturer in Environmental Law, School of Law, Politics, and Sociology, University of Sussex*

Implementing International Environmental Law and Policy

This book introduces a novel discourse, based on socio-legal theory of compliance with international environmental law, which addresses the overarching question: When can international environmental law and policy achieve implementation, compliance, and be effective?

Offering an important contribution to academic and practical understandings of implementation and compliance with international environmental obligations, the book firstly critiques existing multidisciplinary theories of law and then brings together international and domestic legal theories to highlight their symbiotic relationship. It also stresses the importance of interactions between domestic and international legal and policy processes. This pioneering discourse is argued to be transformative to international environmental regimes and offers a way for them to be truly normative and to achieve compliance.

The book will be of interest to students and scholars in the field of socio-legal studies and international environmental law and policy.

Joanna Miller Smallwood has a long-standing interest in nature conservation and law. Her career began as a solicitor, including working on environmental law multi-party actions representing claimants against multi-national corporations. Joanna's PhD and post-doctoral fellowship at the University of Sussex concerned the implementation of the Convention on Biological Diversity's Aichi Targets in the UK. She is a member of the international Taskforce on the Governance of Nature and Biodiversity, part of the Earth System Governance network, and a fellow of the University of Sussex Sustainability Research Programme (SSRP). Joanna's research focuses on transformative governance of food production and consumption and nature conservation, implementing legal and policy frameworks for the rights of nature in Brazil, Ecuador, Colombia, and UK, and the implementation of forest risk commodity legislation in Cote D'Ivoire. Joanna is the solicitor and co-lead for the Environmental Law Foundation/University of Sussex Environmental Justice Law Clinic, supervising students working on local environmental cases.

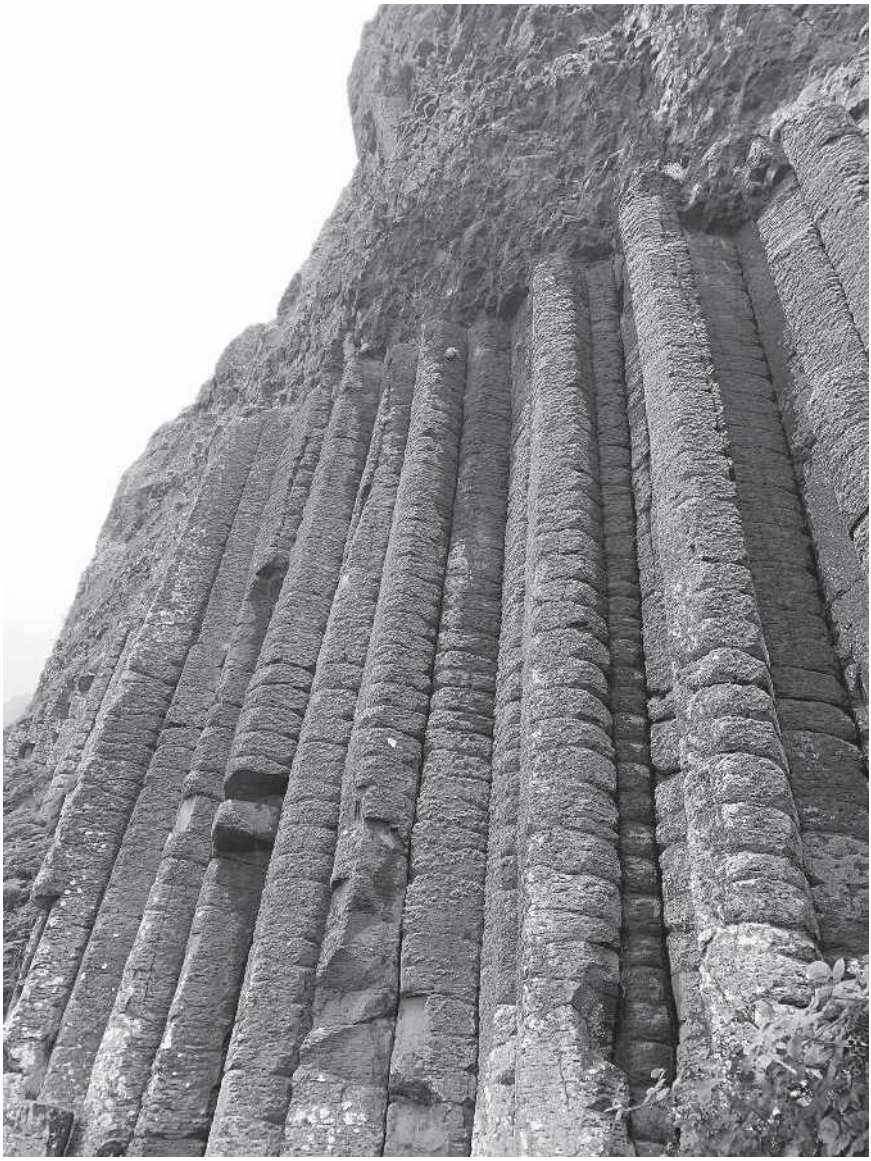

Figure a.1 The Giant's Causeway, Northern Ireland.

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Implementing International Environmental Law and Policy

An Interactive Approach to Environmental Regulation

Joanna Miller Smallwood

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For Sam and Tabitha, forever my inspiration.

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I dedicate this book to Sam and Tabitha and hope that your generation will provide the shift in shared understandings needed to place environmental issues as a top priority and for you to live in a world with a positive and respectful relationship with non-human species. I know you both will be an inspiration in this regard.

Acronyms and abbreviations

ATs	Aichi Targets
COP	Conference of the Parties
DEFRA	Department for the Environment Food and Rural Affairs
ETF	enhanced transparency framework (Paris Agreement)
GEF	Global Environment Facility
HLPF	High-Level Political Forum on Sustainable Development
IAS	invasive alien species
ICJ	International Court of Justice
INNS	invasive non-native species
IPBES	Intergovernmental Platform on Biodiversity and Ecosystem Services
IPCC	Intergovernmental Panel on Climate Change
IPLC	indigenous peoples and local communities
LAGs	local action groups
LBPs	local biodiversity partnerships
LNPs	local nature partnerships
MSC	Maritime Safety Committee
MEAs	multilateral environmental agreements
MOP	Meetings of the Parties
NBSAP	National Biodiversity Strategy and Action Plan
NCAI	Natural Capital Asset Index
NDC	Nationally Determined Contribution
NFP	national focal point
NGO	bon-governmental organisation
NRW	Natural Resources Wales
PAICC	Paris Agreement Implementation and Compliance Committee
SBSTTA	Subsidiary Body on Scientific, Technical, and Technological Advice
SBI	Subsidiary Body on Implementation
SCBD	Secretariat of Convention of Biological Diversity
SDGs	Sustainable Development Goals
SMART	specific, measurable, ambitious, realistic, and time-bound
UNFCCC	United Nations Framework Convention on Climate Change

UNOLA	United Nations Office of Legal Affairs
VPRM	voluntary peer-review mechanism
VNR	voluntary national review mechanism (SDGs)
WEO	World Environment Organisation
WHO	World Health Organisation

Introduction

Finding solutions to international environmental problems has never been more urgent as multiple environmental crises advance, critically impacting planetary systems. For more than 50 years, a vast range of international environmental law and policy has been agreed by countries across the globe, yet the results have had limited impact on improving the health of our planet. Now is the time for bold action on many levels to safeguard our unique planet and all the species that it hosts; there is only a short window of time to take action before life on earth will become intolerable for many. This book sees that international law and policy can play a vital role in the transformations required, but it, too, needs to transform to become 'interactive' in order to achieve the required changes across society.

Eras of international environmental law

The human relationship with our environment has long been arduous. The 2700 BC poem 'The Epic of Gilgamesh' refers to King Gilgamesh's punishment by deities when he cuts down sacred trees and is cursed with drought. In 1720, the first recorded environmental activists, the Bishnoi Hindus of Khejarli, were killed by the Maharaja of Jodhpur, attempting to protect the forest felled to build his palace. Civilisations have collapsed through over-exploitation of their environment: at the end of the 17th century, the Rapa Nui people on Easter Island are thought to have triggered cultural collapse through deforestation of the island.[1] Most societies have had a long-standing battle with the environment and have struggled to collectively manage environmental problems,[2] and never more so than today as we witness multiple global environmental crises, including rapid biodiversity loss, climate change, and pollution.

International environmental law and policy, a key means to manage collective global environmental issues, emerged in what has been labelled 'the first era' of international environmental law, from 1900 to 1972.[3] International legal agreements at this time were largely concerned with regulating exploitation of specific species, such as migratory birds,[4] fur seals,[5] whales,[6] regional nature conservation,[7] transboundary pollution,[8] specific ecosystems such as wetlands,[9] dumping waste at sea,[10] and nuclear waste.[11] In 1945, the creation of the UN system saw the development of international institutions with competence in environmental matters.[12]

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This developing body of international environmental law and institutions coincided with the birth of the modern environmental movement in the late 1960s and 1970s, marked with revered publications, such as Rachel Carson's *Silent Spring*,[13] and the development of environmental philosophies, such as Aarne Naess's deep ecology movement,[14] Shepard's subversive ecology,[15] and the rapid expansion of environmental movements with raising awareness of the importance of environmental issues.[16]

The beginning of the 'second era' of international environmental law is marked by the 1972 Stockholm Conference, which hosted the United Nations Conference on the Human Environment, the first international intergovernmental conference to focus on environmental problems, with 113 of the UN's 132 member states present. The UN Stockholm Declaration on the Human Environment ('The Stockholm Declaration'), the Stockholm Action Plan on international measures against environmental degradation, and general principles for the human environment, such as 'sustainable development' and 'intergenerational' obligations, were agreed.[17] The Stockholm Declaration opened a conversation between industrialised and developing countries on the link between economic growth, its environmental impacts, and the well-being of people around the world and recognised the role of non-governmental organisations (NGOs), with 250 being officially accredited.[18] The second era also saw efforts by the UN to coordinate responses to environmental issues, the adoption of regional and global conventions, and global trade restrictions for some products, such as the 1972 Convention for the Prevention of Marine Pollution by Dumping of Wastes and Other Matter,[19] the 1972 Convention for the Protection of World Cultural and Natural Heritage,[20] and the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).[21]

The start of the 'third era', initiated by the 1992 UN Conference on Environment and Development (UNCED), or the Rio 'Earth Summit', saw international environmental agreements thrive, with over 1,500 multilateral environmental agreements (MEAs) now in existence[22] and a rising global recognition of the need to integrate environmental matters into all activities. MEAs include treaties but cover other international legal agreements, such as conventions, protocols, and other binding instruments related to the environment.

Two of the key outcomes from the 'Earth Summit' are the 1992 UN Convention on Biological Diversity (CBD)[23] and the 1992 UN Framework Convention on Climate Change (UNFCCC).[24] The CBD is an international framework convention with 196 parties which addresses the global biodiversity crisis and contains legal obligations designed to be binding on its parties. The UNFCCC, also a binding framework convention, has 198 parties. The Rio negotiations also resulted in agreement to Agenda 21, representing a high-level political commitment, as opposed to a legal agreement, to integrate environmental and social issues into governmental strategies for sustainable development.[25] Agenda 21 was superseded by the agreement the Millennium Development Goals in 2000, and in 2015 by the Sustainable Development Goals (SDGs), agreed by 193 member states.[26] The SDGs include environmentally related goals, such as SDG 6, 'clean water and sanitation'; SDG 7, 'affordable and clean energy'; SDG 12, 'responsible production and consumption';

SDG 13, 'climate action'; SDG 14, 'life below water'; and SDG 15, 'life in land', all relevant to planetary environmental health.

A rudimentary observation is that our unique planet, home to us and millions of other species, is in crisis, unlike it has experienced for 65 million years,[27] despite the plethora of MEAs agreed during the first three eras of international environmental law, setting global goals and targets for environmental issues such as biodiversity and climate, as well as efforts by civil society and, increasingly, business. The reality of a world with rapidly depleting environmental systems is alarming. Large-scale ecosystem change is likely to have catastrophic effects for humans and non-humans alike, including widespread food insecurity, institutional failure, increasingly damaged soils, and lack of water, all of which could worsen inequality and lead to widespread conflict.[28]

More specifically, for international biodiversity law, none of the CBD's 2011–2020 Aichi Targets were met.[29] Species abundance is rapidly declining, and we are in a period of mass extinction, the sixth of its kind in Earth's 4.5 billion years of history.[30] Modern humans evolved 0.5 million years ago, and whilst in evolutionary terms we are a relatively new species, we are the only species in the planet's history that is the primary cause of a mass extinction. Wild animal populations have fallen by more than two-thirds since 1970 and have continued to decline since 2010.[31] One million plant and animal species face extinction,[32] roughly 1/8th of the estimated species on our planet.

For climate, the UNFCCC objective 'to stabilize greenhouse gas concentrations at a level that would prevent dangerous anthropogenic interference with the climate system'[33] has not been achieved. Despite the development of legally binding protocols, including the 1997 Kyoto Protocol[34] and the 2015 Paris Agreement,[35] currently the world is on track to over-reach the safe agreed level of 1.5 degree level by 2027.[36] Levels of Co2 in the atmosphere are over 417 parts per million Co2 in 2022,[37] which is 50% higher than before the Industrial Revolution. Planetary boundaries, which outline a safe operating space for humanity, have already been crossed for climate, and the irreversible loss of summer polar sea ice, rising sea levels, and loss of terrestrial carbon sinks, such as the world's rainforests, indicate that climate planetary systems are at a tipping point.[38]

For the SDGs, implementation is complex, and finding means of measuring progress for the broad scope of goals and targets covering social, economic, and environmental issues is challenging, with inadequate development of monitoring systems.[39] A global report calls for urgent action 'to rescue the SDGs' and deliver meaningful progress by 2030.[40] A model used to predict a 'best-case scenario' in Australia found that less than half of the 52 targets were met, and many of these were socially related, with very few environmental goals met.[41]

Solutions to a harmonious existence between human and non-human species remain elusive.[42] As it stands, global environmental governance, of which international environmental law and policy could play an important role, have not been able to sufficiently challenge the direct and indirect drivers of environmental degradation or challenge the economic, political, and social patterns that drive environmental destruction.[43] A key challenge for international environmental law and

policy is to achieve the objectives, goals, and targets set, and the overarching question this book seeks to address is: What makes international environmental law and policy effective?

The fourth era of global environmental governance and interactive law

2020 marks the beginning of the 'fourth era' of global environmental governance concerned with facilitating transformative change, or 'fundamental, system-wide reorganisation across technological, economic and social factors, including paradigms, goals and values'.[44] The need for transformative change is becoming widely recognised, for example, the CBD's Post-2020 Global Biodiversity Framework is underpinned by a theory on transformative change.[45] The governance of transformative change concerns developing 'formal and informal (public and private) rules, rulemaking systems and actor networks at all levels of human society that enable transformative change'.[46]

International law is an important tool which provides an opportunity to change the status quo and lead the required personal and social transformations, including shifts in values, beliefs, and patterns of social behaviours.[47] Law is a lever that can promote transformative change, by protecting the rights of the public, future generations, and marginalised communities from private interests.[48] Yet repeatedly, international environmental legal frameworks fail to manifest transformative agendas, with mostly incremental changes being adopted.[49] International environmental law and policy are rarely binding, lack clear goals and targets that can be monitored and measured, and there is a general lack of transparency of progress towards goals and targets and weak accountability mechanisms,[50] all of which impede implementation and compliance.

Bold re-imaginings of international environmental law that call for 'Earth systems law' that move past state-centric systems to a system of planetary law concerned with planetary and ecological boundaries are supported here;[51] nonetheless, they are ambitious and would require a radical re-structuring of global politics, alongside normative, ontological, epistemological-conceptual, and methodological challenges,[52] which would be time-consuming.

This book seeks to contribute to the field of transformative governance by providing a socio-legal perspective on furthering transformative change through international environmental legal and policy mechanisms – in other words, by developing formal and informal rule-making systems that are transformative in nature. This book showcases the workings of an alternative vision of law, within reach of current shared understandings, that can be transformative by facilitating implementation and compliance and entrenching new legal and social norms to prioritise environmental protection. Two legal theories inspired this research: interactional law, initially presented by Jutta Brunnée and Stephen Toope,[53] and Harold Koh's theory on the internalisation of international legal obligations into the domestic sphere through transnational legal process.[54] This research has built upon and developed these theories to propose what I label as an interactive discourse of law or 'interactive law', which presents a holistic understanding of the social organisation of international environmental law from global to local.

This book claims that an understanding of international environmental law and policy as purely the domain of states is outdated, and that stronger recognition must be given to the role non-state actors play in legal processes. Positivist international legal scholars understand that certain entrenched rules and procedures must be followed in international law-making for the outcomes to be seen as legitimate and binding.[55] Yet the results of this research, from doctrinal analysis and an empirical study, indicate that non-state actors are influential and important in the creation and implementation of international environmental law and policy, an observation readily observed for some time by international environmental governance scholars.[56]

Interactive law departs from understandings that formal legal sources and binding law are the principal indication of effectiveness, and instead outlines four requirements for international environmental law and policy to meet during implementation at multiple levels of governance to become interactive and thus achieve implementation and compliance: (1) obligations meet Fuller's internal criteria of law; (2) interactive systems of accountability are adopted; (3) just, fair, and inclusive decision-making and implementation processes are achieved that empower those who represent transformative values; and (4) socialisation processes around international and internalised legal obligations are upheld.

Methodology

This book explores the possibilities and challenges to achieving interactive law by applying the interactive legal discourse to the international institutional mechanisms of the CBD, UNFCCC, and SDGs, followed by an interactive analysis of the journey of implementation of two of the CBD Aichi Targets from global to local levels in the UK. The research uses a novel mixed methodology and adopts a socio-legal approach through the use of different theories to understand the effect of international legal obligations and applies the theory of interactive law to understand the making of international obligations by the CBD COP and their travel to the domestic level.

The methods used to gather data for this research are a combination of doctrinal analysis, interdisciplinary literature review, semi-structured qualitative elite interviews, micro-ethnography, and thematic analysis. The 15 elite interviews were conducted at the international level with delegates from CBD COP 13.[57] The data from the international interviews was the subject of a six-step thematic analysis,[58] an inductive analysis identifying themes, to give a rich and insightful understanding of the CBD COP. The 14 national-level interviews included UK representatives from central government departments, regulatory agencies, quasi-governmental bodies, local government, local consultancies, and NGOs within each of the four countries. The data gathered from the UK interviews was used in a descriptive and interpretive way.

Four in-person meetings relating to the CBD COP were attended: (1) Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA 20), Montreal, Canada, 25–30 April 2016; (2) Subsidiary Body on Implementation (SBI1), Montreal, Canada, 2–6 May 2016; (3) 13th meeting of the Conference of the Parties

to the Convention on Biological Diversity (CBD COP13), Cancun, Mexico, 4–17 December 2016; and (4) 15th meeting of the Conference of the Parties to the Convention on Biological Diversity, Part II, Montreal, 7–19 December 2022 (CBD COP15). My observations constitute a 'micro-ethnography' as a 'minimally participant observer'.[59]

Outline of the book

Chapter 1 critiques existing multidisciplinary theoretical understandings of international environmental law. In law, the dominant understanding is that hard law from formally recognised sources is binding and will more effectively achieve compliance.[60] Understandings that 'hard' international environmental law is always the best means to achieve compliance arise from the transferral of assumptions from domestic legal systems, and it is argued that such assumptions are not easily transferred to the international level. There is evidence that countries can take non-binding or 'soft' international environmental legal obligations seriously and that they can be normative[61] – in this sense, soft law can 'guide or influence behaviour by providing reasons for action.'[62]

Chapter 1 proposes that interactive law can explain this observation, because it is an actor's internal sense of obligation to a law that makes it normative, which is not necessarily linked to formal sources of law. The first criteria of interactive law proposes that hard or soft law can be effective and draw conformity when it fulfils certain internal principles of legality: when law is general or prohibiting, requiring, or permitting certain conduct; is promulgated and accessible to the public; is not retroactive but prospective; is clear; avoids contradiction; is realistic and does not demand the impossible; and is constant, there is congruence between legal obligations and the actions of officials operating under the law.[63] This assertion is important because a range of law and policy can form 'interactive law' if the internal legal criteria are met, and when the interactive criteria are not met at the international level, there are opportunities during implementation to facilitate interactive law.

Chapter 2 presents the principal case studies of the book which originate from the 1992 Rio Earth Summit: the UN CBD, which is studied empirically, and the UNFCCC and the UN SDGs. Key challenges to implementation are identified, and the subsequent chapters of this book use interactive law and a socio-legal analysis to better understand these challenges and to identify opportunities for transformation.

Chapter 3 explores when effective international environmental law and policy can be agreed by international environmental/sustainability institutions. An analysis of consensus decision-making from traditional legal perspectives and from the perspective of interactive law is undertaken, with a particular focus on the social context within which decision-making occurs. Social context is seen as important as it affects the content of international environmental law and policy agreed by institutions and shapes the identity of those actors exposed to law and policymaking practices, thus connecting law-making and identity formation.

Different values and interests as expressed by different actors are significant in the creation and implementation of international environmental law and policy, and institutions present an opportunity to accommodate divergent interests. Chapter 3 argues for decision-making that brings together parties in a just and equitable way and provides a space for all relevant actors whilst empowering those who represent values that prioritise environmental protection, such as youth, indigenous peoples and local communities, women, and NGOs. Empowering certain actors can elevate alternative values of the environment and lead to transformation of international environmental law and policy by influencing actors to think differently about environmental issues and place them as a higher priority on international and national agendas to elicit compliance. Nonetheless, the analysis finds that current institutional mechanisms favour those in powerful positions and neoliberal valuations of the environment, which are reflected in weak international environmental law and policy.

Chapter 4 concerns agreeing on effective means of compliance and accountability. Different approaches are taken to facilitate compliance and accountability for international environmental obligations, including dispute resolution, enforcement, transparency, peer review, and implementation mechanisms. These mechanisms are analysed through the lens of interactive law, which sees that shared understandings fostered within treaty institutional bodies and international political forums are key to determine the use of compliance and accountability mechanisms. Opportunities for improvement are suggested, but the principal conclusion of the analysis finds that there are almost insurmountable hurdles within international governance processes which prevent agreement to interactive compliance and accountability mechanisms that would allow hasty progress towards the environmental objectives, goals, and targets of international environmental law and policy.

Chapter 5 looks to better understand the role of secretariats in international environmental institutions through case studies of the secretariat of the CBD, UNFCCC, and SDGs. Interactive law and a socio-legal analysis study the legal personality and role of secretariats and their influence in decision-making and during implementation. Four observations are made: (1) the legal powers, and thus roles attributed to secretariats through soft law and implied powers, are constantly changing; (2) the willingness of institutional bodies to formally or informally elaborate or impede the powers of secretariats depend upon the shared understandings developed within treaty institutions; (3) secretariats are important actors in the processes within institutional bodies and during implementation and influence shared understandings; (4) secretariats can act as facilitators for more just, inclusive, and equitable decision-making within institutional bodies. Studying secretariats through the lens of interactive law provides a novel way to legitimise their semi-autonomous actions and moves beyond stale arguments relating solely to a limited interpretation of democracy, based around state action.

Chapter 6 considers how international environmental law and policy can be 'kept alive' during the implementation process. It is argued that implementation of international environmental law and policy is a multi-level interactive and ongoing process encompassing global to local levels of governance. Existing scholarship on

implementation and an interactive analysis of the implementation of the CBD Aichi Targets (ATs) in the UK are drawn upon to: (1) illustrate how international environmental law and policy are 're-interpreted' and 're-shaped' during implementation; (2) identify if laws, policies, and governance processes meet the requirements of interactive law during implementation; and (3) identify points of connection and influence at different levels of governance that can facilitate interactive international environmental law.

The research exposes limitations to achieving interactive law at the international level, and this finding highlights the importance of understanding international environmental law and policy beyond international levels of governance. Here, international environmental law and policy are seen as a holistic process encompassing multiple levels of governance and do not begin or end at international level. Actions at national, sub-national, and local levels of governance both contribute towards and can strengthen international environmental law and policy during implementation and provide an opportunity to strengthen domestic shared understandings, which in turn can feed into and push forward shared understandings in international environmental institutions. The entire non-linear implementation process is important to study in order to understand the multiple processes which create, uphold, and enforce international environmental law and policy.

Chapter 7 makes policy recommendations and considers the lessons to be learned from the analytical outcomes of the book.

The book concludes by summing up the key findings and highlights obstacles and opportunities for achievement of interactive international environmental law. Recognising variable socio/geographic and political contexts, this book maintains that there are common challenges to the implementation of international environmental law and policy, and the lessons learned from this research can offer insights for the implementation of international environmental law and policy more generally and provide a useful framework for analysis. Working towards achieving the interactive legal criteria at all levels of governance, with a particular focus on domestic practices during implementation, can challenge entrenched barriers of international environmental law and policy and thus offers an optimistic path forward.

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1 Law, but not as you know it

A new discourse of international environmental law

Introduction

The pivotal 1972 Stockholm UN Conference on the Human and Environment triggered a new era of global cooperation on the environment and multilateral treaty making, resulting in the agreement to date of more than 1,500 multilateral environmental agreements (MEAs).[1] The use of MEAs as a governance tool fits 'formal' understandings of international law, where states are central in law-making, state sovereignty is not threatened, as they can typically opt out of treaties, and certain provisions of treaties and sources of international law are dictated by statute.[2] Recognising that formality is a complex and contested concept in international law and can also concern substance, process, and procedure,[3] global environmental governance has developed far beyond formal international law. Intergovernmental organisations (IGOs), such as the UN and treaty institutional bodies, continually develop new 'informal' legal obligations beyond the founding treaty provisions; states enter into high-level political agreements, and agreements are made by informal governmental organisations and private and public–private institutions.[4] Informal international environmental law does not follow the outputs, the processes, or involve the same actors that are traditionally linked to international environmental law[5] and is frequently used for environmental issues where state and non-state actors develop the global agenda for environmental protection.[6] The move away from formal international environmental law raises a legitimacy crisis because law-making is no longer the sole dominion of states, and there is a large body of informal international environmental law which does not fit neatly into the traditional categories of treaty, customary law, or general principles yet can be influential.[7] International environmental treaty institutions will increasingly be required to strengthen to address escalating environmental crises and make agreements that potentially challenge political authority.[8] It is vital that the hard work of international environmental institutions are considered legitimate, yet legitimacy will not always be found through the application of traditional understandings of international environmental law.

As it stands, neither formal nor informal international environmental laws are adequately protecting the environment,[9] and despite the significant achievement of agreeing on a myriad of MEAs and the ambitions set, the decline in our natural environment has never been faster,[10] and planetary boundaries are being exceeded,

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thus risking planetary integrity.[11] This leads to a pressing and fundamental question: What makes a legal obligation effective? Or in other words: How can legal obligations be agreed that are implemented and complied with, achieving their objectives, goals, and targets?

The focus of this book are the rules established by MEAs attempting to steer change and to lead the required personal and social transformations, including shifts in values, beliefs, and patterns of social behaviours, to halt environmental degradation.[12] This chapter begins by examining how international environmental law is understood based on literature across disciplines and how these different understandings of legal obligation are closely connected to different theories of implementation and compliance. Secondly, the roles of different actors in creating international legal obligations are considered according to the different theoretical perspectives. Following the review of current theories, a new discourse is introduced, interactive law, offering an alternative lens through which to understand the effect and to legitimise international environmental law.

Different understandings of legal obligation

Different understandings of legal obligation lead to different theories of implementation and compliance. Theories of compliance often focus on the importance of strong enforcement mechanisms to increase the effectiveness of international law,[13] thus supporting a traditional positivistic view of formal law.[14] Alternative understandings of law suggest that other means of achieving compliance are more appropriate and effective and are relevant to those with an interest in international environmental law, where the use of enforcement mechanisms is unpopular.[15] Fully understanding the nature of legal obligation lays the foundations upon which suitable compliance mechanisms can be built. The advancement of theories in relation to legal obligation is relevant to compliance, because unless a position is taken in relation to legal obligation, there is no sound basis for discussions surrounding theories of compliance or, indeed, non-compliance. Compliance is therefore not a 'free-standing' concept but is directly linked to theories on the nature and operation of the law to which it relates. Different theories have significantly different notions of what legal obligations are, and what compliance is and how best it can be achieved.[16] International lawyers and international relations take different positions on the 'nature and operation of law'.[17] International relations theories look to provide conceptual frameworks within which relationships between states can be analysed and can deepen understandings of the causes of, and potential legal responses to, international environmental problems and the role of particular institutional arrangements such as those found under MEAs.

In the following sections, two important questions are addressed. Firstly, which actors make law, and secondly, how?[18] These questions frame a debate on how different theoretical positions understand the importance of different actors in international environmental law and the important factors, processes, and outcomes in the creation of legal obligations. Gloabl Administrative Law (GAL) and some of the major schools of international relations theory are discussed in comparison with the traditional legal theory of positivism.

Positivist law

Traditionally, lawyers have taken for granted and assumed the existence of an objective form of legal obligation arising from legal doctrinal sources.[19] Positivism, originally developed in relation to domestic law, reveres the state as the ultimate, objective source of power and views law as residing only in the official acts of government with coercive power.[20] Legal obligations are understood as normative and key to controlling behaviour. Traditional legal positivists require the ultimate power and sanctions of the sovereign state or its official government entities to make laws objective.[21] This is the first assumption of hard legal positivism, that law is created by the sovereign state(s) and states are the principal actors.

The second assumption under positivism is that legal obligations are valid when they emanate from recognised sources, such as legislatures or courts in domestic law, and through treaty, custom, and general principles in international law.[22] International law can thus be generated through legitimate sources, such as state-centred institutions and mechanisms that are recognised as valid international legal sources, such as treaties.

The third assumption is that legal obligations do not have to conform to any moral standard.[23] In other words, social factors do not affect the nature of legal obligations or their merit or legitimacy. A positivist understanding of law implies that law can be objective and transcend the social.[24] Hobbes understood law as being the expressed will of the sovereign,[25] but there is diversity within the positivistic theory,[26] particularly in relation to morality and law.

A further requirement for traditional legal positivists is a means of enforcement and sanction to uphold the law.[27] Given the general reluctance of international courts and tribunals to engage in clarifying and building upon the provisions of international environmental law,[28] and the limited engagement by domestic courts,[29] there is support for the creation of an umbrella institution such as a World Environment Organisation (WEO) to centralise, guide, and coordinate the fragmented system of MEAs,[30] yet to be realised.

Positivist interpretations place importance on international law-making processes through treaty and custom, and a clear distinction is drawn between international sources of law and domestic sources. That said, the blur between international and domestic law and policy is increasingly visible, and legal obligations can be seen to arise from sources other than treaties and custom. The diversity of international environmental law does not fit into 'old bottles labelled "treaty", "custom" or "general principles" '.[31] Positivist understandings of distinct dual jurisdictions do not fully capture the workings and influence of international law, which is not separate or entirely distinct from domestic law, and in practice, the two overlap and are interwoven. International legal obligations may originate from non-traditional sources, such as institutions, have direct and indirect influence on domestic law and policies,[32] and international courts and tribunals can clarify points of international law at the domestic level.[33]

Another limitation of positivism is the categorisation of legal obligations as either 'hard' or 'soft' law. Hard law is created through recognised law-making procedures, contain legal obligations of a formally binding nature, which if not

followed will invoke sanctions.[34] The general lack of enforcement mechanisms in international environmental law supports traditional positivists who view international law as 'epiphenomenal'.[35] From this standpoint, most international environmental law would be described as 'soft' law. This is problematic because if a law is 'soft' and not 'binding', then from this viewpoint it is questionable if it is a law at all.[36]

To overcome this dilemma, positivist frameworks have evolved that understand international law can be 'hard' law when obligations or commitments are agreed which legally bind states through the scrutiny under the general rules, procedures, and discourse of international law, and often of domestic law as well.[37] The 'bindingness' of international law can thus be seen in relation to the authority it holds as opposed to the means of enforcement available: a law is not binding because there is a means of enforcement available, but it is binding and therefore it will be enforced.[38] From this perspective, some international law can be seen as hard law, and strongly worded treaty provisions such as 'shall' require states to adjust their behaviour and are generally recognised as binding international law in practice.

Many MEAs contain provisions that are not worded in a way that can be seen under positivism to bind states and predominantly include softly worded treaty provisions,[39] and the products of the activity of institutional bodies such as Conferences of the Parties (COPs) are seen as soft law, including decisions, recommendations, guidelines, principles, norms, standards, or codes of conduct and policy declarations. Regulation of the environment is a highly political issue, and softer legal approaches are popular; the blurred line between law and politics is particularly acute in international environmental law, often leading to issues being addressed in a pragmatic, non-legalistic way.[40]

The widespread use of 'soft' law by international actors is popular because 'soft' law can offer superior solutions[41] and, whilst not formally binding, may nonetheless have legal significance.[42] Soft laws have the ability to be normative in that they guide and influence behaviour by providing reasons for action.[43] Further, they are easier to negotiate than hard law and so may contain clearer and more ambitious provisions, are less costly to legislate, provide more effective ways of dealing with uncertainty, and allow actors to learn about the impacts of the agreement over time.[44] They also facilitate compromise and cooperation between parties with divergent interests.[45] Soft-law institutions offer greater flexibility with respect to participation and sectoral emphasis, can exert political pressure on shirkers in negotiations over binding rules, and can adopt verification and review processes. Contrastingly, hard-law instruments are subject to more thorough negotiation and preparation, thus watering down of obligations.[46]

The ability of soft law to be normative and draw compliance requires a move beyond positivist understandings of law to other theories, which help explain when law can change state behaviour. A focus solely on legal doctrine sets international law in a cycle of repeated mistakes, because wider social forces that ultimately lead to the success or failure for legal obligations to achieve compliance are not fully considered. The positivist focus on the 'bindingness' of law at the 'enactment'

stage ignores the effect law has when it is implemented.[47] This largely avoids the complex issue of lawyers taking a theoretical position within many competing theories about international law and its effect.

The actual effect of international environmental legal obligations is difficult to determine due to limited empirical evidence.[48] That said, research demonstrates both that international 'hard law' does not necessarily achieve compliance,[49] and that international soft law can.[50] Separately, international environmental soft law can contain specific national implementation objectives.[51] These findings do not fit easily with the legal positivist view that if international obligations do not form part of a treaty or reflect existing customary law, then they are purely political or moral documents.[52] It suggests that legal obligations originating from non-traditional sources, or 'soft' law, can be normative and achieve implementation and compliance and are important in international relations and global environmental governance.

Thinking in the binary terms of 'hard' and 'soft' law can imply that laws are either strong or weak, good or bad, workable or unworkable, and the terminology, whilst widely used, is unhelpful. Bodansky, defines *legal norms* as:

> Community standards that aim to guide or influence the behaviour of States, institutions and private actors.[53]

Bodansky sees the 'state of mind' of the actors that comprise the relevant community to a legal norm as the most important element of compliance.[54] The sense of 'legal obligation' conferred upon actors to comply with a norm is what confers weight upon it, and this is why states are more likely to comply with legal rather than non-legal norms. Further, legal norms can be seen on a continuum and differ on many dimensions, not only relating to legal quality.[55] Thinking in terms of legal norms removes the constraint of hard or soft categories pertaining only to how they have been enacted. Other things are important and confer a sense of legal obligation, and this way of thinking helps incorporate understandings that 'soft' laws can be effective and lays the foundations for a more diverse range of compliance theories.

Global administrative law

Kingsbury's theory of GAL recognises that actors beyond the state are important in shaping international law. GAL sees institutions themselves as important actors and recognises that IGOs play a role in setting international agendas.[56] Non-state actors are recognised as active bodies within the global administrative space, including informal groups of officials, private international standard-setting bodies, public–private partnerships, NGOs, national governments, and IGOs.

GAL supports the understanding that legal obligations can be created through non-traditional processes, such as through treaty institutions, and form a distinct type of law.[57] IGOs, as well as other actors, operate within the global administrative space, which transcends and is distinct from international and domestic

jurisdictions. The outputs from treaty bodies such as COPs, common to many MEAs, are examples of legal obligations created from non-traditional sources. These outputs are influential internationally and can have effect domestically even if not officially ratified and implemented at the state level, and to label them as 'non-law' does not adequately explain their impact. In agreement with Alvarez, the central pillars of the international legal order are increasingly challenged due to the precarious distinction between domestic and international law, the prevalence of soft forms of rule-making, and the decay of sovereign equality of states.[58]

The role of IGOs in regulation and administration is considered an example of the global administrative space.[59] It is increasingly recognised that IGOs show some autonomy, and in this sense, they become important actors themselves, with some independence from the states that create them. Kingsbury observes that much global governance can be understood in terms of regulation and administration: administrative functions are performed between officials and institutions on different levels, often in a global rather than national context, including the binding decisions of IGOs, non-binding agreements in intergovernmental networks, domestic administrative action regarding global regimes, and public–private regimes. GAL embraces the true complexity of international law and the interplay between different levels of governance, different processes, and different actors. Kingsbury observes that:[60]

> The strict dichotomy between domestic and international has largely broken down, in which administrative functions are performed in often complex interplays between officials and institutions on different levels, and in which regulations may be highly effective despite its predominantly non-binding forms.

That said, a key criticism of GAL is its normative deficit[61] and the lack of a distinct means of accountability, raising concerns over its legitimacy.[62] In relation to IGOs, if these are bodies performing public functions, creating legal norms impacting on citizens, but mostly there are no means by which to hold them accountable, there is a democratic deficit,[63] and how can GAL be seen as legitimate? Savino seeks to address the issue of accountability through 'global interest representation', whereby global regulation is held accountable to both states and individuals by abiding by the rule of law and incorporating procedural arrangements allowing individuals participatory rights, for example, through public consultation, the drafting and adoption of international laws.[64] The practicality and achievability of such measures are questionable.

Another limitation of GAL is that it does not provide a means by which to understand the interaction between traditional sources of international law (e.g. treaty and custom) and GAL (e.g. COP decision, goals, and targets). Interactive law seeks to fill these gaps by proposing criteria to legitimise international environmental law-making, including through the fulfilment of the internal criteria of law, of just, fair, and inclusive decision-making empowering certain actors and values at all levels during implementation, and stresses the importance of implementing

interactive means of accountability (see following sections on interactive law and interactive law and vertical compliance).

International relations: rationalism

Like legal positivism, rationalist theories also see the state at the centre of international affairs, but a crucial difference is that positivism focuses on the importance of systems of law-making, whereas international relations focus on power relations between states. Rationalist methodology sees that the principal actors, that is, states, pursue their own interests and goals through 'calculated choices' and 'means–end rationality', subject to limitations on their decision-making capacity and external constraints.[65] International law is not well incorporated under these theories and is largely seen as a by-product of state interests or a creation of interest-based bargaining.[66] These theories do not see that legal obligations can constrain power, and are therefore highly sceptical of international law.[67]

This 'egoistical' understanding of states as actors who pursue their interests even at the expense of others differs from predominant understandings within international law.[68] Rationalist theories encompass solely state interest and fail to take account of the 'values' and moral drivers that lead to the creation of international legal obligation.[69] Without considering how the identity and interests of states are formed, theories of change cannot be encompassed.[70]

Liberal institutionalism

Liberal institutionalism goes some way to addressing how actor identity is formed. This theory shares the rationalist mentality that state actors are pursuing their own rational interests in an anarchic system to maximise their own position and gains, but it differs in that it considers what shapes state preferences. This is useful as it deepens understanding of how political will can be increased in relation to environmental issues, which is often a key factor limiting progress of international environmental laws. Societal ideas, interests, and institutions are all seen to influence state behaviour by shaping state preferences. Liberal institutionalists understand that 'value actors' are important, such as individuals, businesses, NGOs, and other non-state actors, because they shape state preferences. To maximise political support, the government must respond to different claims from competing constituents. Dai finds that competing interests within domestic constituents have electoral leverage and informational status to influence governments' compliance decisions, and international institutions can empower certain value actors such as environmental activists by providing information and legitimising their demands.[71] Collective preferences are determined (primarily at the state level) not by objective conditions but on the demands of private actors on the nation state.[72] States become collective agents that further the aggregate interests of their members.[73] In this sense, internal governance structures become important, such as the ability of different actors to input and influence government officials and how domestic and international politics interact.[74] Liberal understandings can be applied to international institutions

and how different actors involved in institutional processes can be seen to transform state identities and interests, although lack of democratic process in MEA institutions remains a challenge. The limitation of liberal institutionalism remains in the framing of international environmental law as the product of competing state interests, which fails to explain state agreement to normative international environmental law, entailing costs for many states.

Constructivism

Constructivist understandings are useful to consider the processes that shape international law and have a very different view on the position of actors to rationalist debates. Constructivists do not see actors with objective identities or interests that control structures; instead, they understand that the 'rationality' of actors is dominated by different social constructions of reality. Context-specific 'social structures' influence the identities and interests of actors, such as states, institutional bodies, agencies, and NGOs. Actor identities and interests are constructed in the form of shared subjective understandings, and social structures create 'meaning and social value' and are more influential than the actors or agencies themselves.[75] Thus, international actors acquire identities and role-specific understandings about self, through participation in collective meanings. Actors behave in conformity with the identities, values, and norms to which they have been socialised and which they have internalised.[76]

Constructivism introduces a different way of understanding the 'workings' of institutional bodies. Actors perform within the legal decision-making process according to their socially constructed values and identities and can be understood as the products of the social structures themselves. Constructivism places greater emphasis on the factors and processes that cause, influence, or constitute decisions, actions, and outcomes than the actors. This theory lends itself well to 'social' interactions within COPs, but in legal terms, this can be problematic, because constructivism can diminish the role of law to such an extent that it becomes defunct. Processes and the social mechanisms of law's influence become more important than the legal obligations that international law creates. Legal obligations are understood to operate by changing interests and thus reshaping the purposes for which power is exercised.[77] For Ruggie, legal and social norms are influential because they represent ideas and preferences rather than regulating behaviour.[78]

Constructivists see that international institutions are important not because they are objective passive bodies used as a means for states to interact but because they contain certain social meanings.[79] The dominance of states within this structure may be recognised, but this is understood as a reflection of society rather than as a necessity for law-making. States are not simply acting in pursuit of rational interests, but state action and dominance are constructed from a complex and specific mix of history, ideas, norms, and beliefs. Therefore, the focus on the social context in which international relations occurs is important because it determines and shapes how states act.

The role of institutions is based on constructed attitudes; they reflect the attitudes of the particular social group which includes non-state actors as well. This opens up understandings of how all relevant actors, not just states, are important within an institutional body as they form the social group of that institution, and the institution reflects the social attitudes of that combined group. Slaughter notes the importance of perceptions within groups such as friends and enemies, in-groups and out-groups, fairness and justice, which determine state behaviour.[80]

In using a constructivist lens, two important observations are made. Firstly, international institutions can be seen as distinct actors and may seek to pursue their own interests – which at times may conflict with the states that created them.[81] For MEAs, this proposal is particularly interesting, firstly because implementing and achieving compliance with the legal obligations created by their institutional bodies could well challenge political authority, as the legal obligations agreed may be in conflict with the state's short-term interests and mostly neoliberal agendas of economic growth. Secondly, identities of states and other actors are created, at least in part, through interaction, and in this way, a framework is provided through which the identities and interests of states and other actors can change through interaction.[82] Constructivists are therefore interested in how knowledgeable practices constitute subjects, which is not far from the strong liberal interest in how institutions transform interests.[83]

Constructivist legal theories

Brunnée and Toope use the concept of legal norms to reconcile constructivism with law and propose a theory of interactional law.[84] Brunnée comments on the 'puzzle' of voluntary compliance and the need to look for theories to explain what makes states comply with international law.[85] Interactional law departs from traditional structural distinctions of law creation and looks towards legal process and influence. Interactional law proposes that if certain internal criteria of legal obligation are met and there is broad participation in legal decision-making fora by a range of actors, then 'interactional' legal norms will be created that draw compliance. Interactional law sees the internal criteria of morality of legal obligation originally proposed by Lon Fuller as important.[86] Eight internal criteria of legality must be fulfilled to make legal obligations 'legitimate' and attract 'fidelity' or, in other words, draw compliance. For Fuller, legal obligations must be general, prohibiting, requiring, or permitting certain conduct; they must be promulgated and accessible to the public so that citizens know what the law requires; law must not be retroactive but prospective so that citizens can take the law into account when making decisions; the law must be clear so citizens can understand what is prohibited, permitted, or required by the law; the law should avoid contradiction; the law must be realistic and not demand the impossible; the requirements of laws on citizens must remain relatively constant; and there must be congruence between legal obligations and the actions of officials operating under the law.

Interactional law stresses the importance of 'broad participation' of all relevant actors in international legal decision-making processes to ensure the legitimacy of

international law which reflect shared understandings. This legitimacy, or 'interactionality', increases the ability of international law to shape arguments, persuade, and promote adherence.[87]

Interactional law sees distinctions such as hard and soft law as 'illusionary' because even domestic law, which from a positivist perspective is more likely to be a hard law due to the legal systems in place, varies in terms of its impact on behaviour.[88] Interactional law outlines the requirements to make international law 'interactional', which sees that the process by which a law is made and its internal quality are what confers a sense of obligation rather than its doctrinal source. Thus, the importance of the processes used to create legal norms is highlighted, as these processes are seen to ultimately contain the foundations for compliance.[89] Brunnée and Toope see that vertical legitimacy is gained by strengthening the legitimacy of horizontal interactions and the relationship between MEAs and civil society at the international level, thus promoting the vertical conditions for its acceptance as legitimate by civil society; less emphasis is placed on the vertical journey of implementation.

Koh's theory goes further in addressing the implementation of international law; he sees that international legal obligations are internalised into the domestic sphere through 'transnational legal process'.[90] For Koh, through social, political, and legal vertical processes, international legal obligations can be internalised into domestic spheres. He proposes, firstly, that if an international legal obligation is seen as publicly legitimate, then it will be internalised by social processes, and this will result in widespread obedience. Secondly, if elites accept an international legal obligation and adopt it into government policy, it will be internalised by political process. Thirdly, if international legal obligations are incorporated into domestic legal systems, then they are internalised by legal process.[91]

Koh recognises the importance of process at each step of internalisation and the possibility that law can change as it travels up and down this pathway. This supports interactional understandings that communities of practice can shape and reshape international law. For Koh, implementation of international law is 'a swirling interactive process whereby norms get "uploaded" from one country into the international system, and then "downloaded" elsewhere into another country's laws or even a private actor's internal rules'.[92]

Interactional law and Koh's theory of internalisation incorporate constructivist understandings that international legal obligations are more than just a reflection of underlying power and interest balances between states. International legal obligations are normative, frame social interaction, create 'shared understandings', and influence actors and their interests, thus changing behaviour.[93] International law's influence is strongly felt in processes of persuasion that are grounded in shared understandings of 'right conduct'.[94] These understandings are dependent upon the legitimacy of processes that create international legal obligations and in the positive values embedded in their substantive content.

Interactive law – a new discourse

Interactive law proposes four requirements to achieve 'effective' implementation of international environmental law which draws compliance.

Table 1.1 The four requirements of interactive law

Interactive law requires that:
1. International environmental law and corresponding internalised laws and policies meet Fuller's internal criteria of 'moral' law. Law must (a) be general; (b) be prohibiting, requiring, or permitting certain conduct; (c) be promulgated and accessible to the public; (d) not be retroactive but prospective; (e) be clear, avoid contradiction; (f) be realistic and not demand the impossible; (g) be constant; and (h) display congruence between legal obligations and the actions of officials operating under the law.
2. Processes during implementation of international environmental law at multiple levels enable 'just, fair, and inclusive' interactions between all relevant actors and law-making officials, empowering under-represented actors and values to develop shared understandings prioritising environmental issues.
3. Compliance or accountability mechanisms fostered in shared understandings are adopted at multiple levels of governance to form a continual practice of legality.
4. Socialisation processes between communities of practice around international environmental law and policy and internalised obligations are facilitated and connected at multiple levels of governance.

International legal scholars have been criticised for being 'utopian' and for focusing on policy prescriptions and having idealistic tendencies.[95] This book aims to move beyond such disenchanted images of legal scholarship; it builds upon the solid foundations of Brunée and Toope's interactional legal theory and Koh's theory of internalisation to introduce a new discourse, which is the book's conceptual framework. The discourse of interactive law, like interactional law, sees that the source of international environmental law does not necessarily give it legitimacy; 'hard' and 'soft' law and policy can be interactive law when certain criteria are fulfilled. Firstly, Fuller's internal criteria of legality must be met, which make legal obligations 'legitimate' and attract 'fidelity'. Secondly, process is important to legitimise decision-making at multiple levels of governance. Values and interests are seen as significant in the creation and implementation of international environmental law and policy, as expressed by different actors. Thus, it is argued that decision-making processes around international environmental law must be just, fair, and inclusive and facilitate the prioritisation of environmental issues by empowering currently under-represented actors and values in decision-making.

Interactive law sees that international environmental law is in a constant process of evolution, and understanding the dynamics of actors across multiple levels, how they shape international environmental law and how their identity and interests can be shaped in turn, is key to processes of change. The discourse proposed in this book stresses that actions taken at all levels of creation and implementation of international environmental law and policy are important. Thus, the journey back and forth from sub-national to international levels of governance and the sum of these processes must be considered together to fully understand the process of implementation, compliance, and effect. In particular, the domestic level is argued to be a key point where the legitimacy of international environmental law can be strengthened and can feed into and push forward ambition at the international-level law.

The third and fourth requirements of interactive law speak to accountability and socialisation around international environmental law to facilitate implementation and compliance and are discussed in the section on interactive law and vertical compliance.

Interactive law calls upon the involvement of 'society' in international environmental law-making and law-applying, which challenges traditional views of law. It proposes that whilst states may remain the principal actors in international environmental law and policymaking, the involvement of other actors is important and necessary to ensure legitimacy and to raise normative ambition through what positivists label as hard or soft law.[96] Further, legitimate domestic processes are understood as key as they filter up to influence international law-making in MEAs. Interactive law moves beyond thinking solely of horizontal or vertical processes; instead, the entire process of implementation presents opportunities to increase the interactive nature of international environmental law. For example, domestic processes can filter up to the international level and are part and parcel of the legitimacy of international environmental law.

Implementation, compliance, and effectiveness

It is important to consider implementation, compliance, and effectiveness carefully; whilst connected, they each have separate meanings, and different understandings of legal obligation will lend themselves to different theoretical approaches. Implementation for Victor et al. concerns the adoption of domestic regulations to put international obligations into practice, the passage of legislation, creation of institutions, and enforcement of rules.[97] Here, implementation is recognised as more than just the adoption of systems of domestic regulation, although the interactive implementation of laws and policies is the key focus of this book. Other important issues which support successful implementation are systems of information gathering, for example, scientific assessments, measurements, and evaluation; management, for example, designation of administrative bodies and focal points; technologies, for example, measures and procedures to address/manage environmental problems; and finance, for example, assistance and contributions. Chapter 6 contains a more detailed discussion of different theoretical underpinnings of implementation and a detailed analysis of implementation using the conceptual framework of interactive law.

Implementation of international obligations is a step towards compliance but does not ensure compliance, and compliance may occur without implementation. What is meant by *compliance*? *Compliance* refers to conformity to expectations, or the adherence of state parties and the correspondence of state behaviour to legal obligations.

For Young:

> Compliance can be said to occur when the actual behaviour of a given subject conforms to prescribed behaviour, and non-compliance or violation occurs when actual behaviour departs significantly from prescribed behaviour.[98]

Distinctions between different understandings of legal obligation are important because the way in which a theory understands legal obligation lends itself to different compliance theories, which are discussed in the section on interactive law and vertical compliance. The aim of law is to produce compliance with its obligations, and the obligations set the standard by which compliance is measured.[99]

Yet neither implementation nor compliance guarantees effectiveness, defined by Kehone et al. as 'the degree to which a legal obligation induces change in behaviour that further the obligation's goals'.[100] Further, compliance may not achieve a law's objective if that law is phrased in such a way as to enable compliance without requiring behavioural change.[101]

Compliance is different from the concept of effectiveness in the sense of improving the state of the underlying problem. In relation to MEAs, it is questionable that their provisions have the ability to remedy the environmental problems they address, for example, halting biodiversity loss or climate change, and therefore their effectiveness, even if universal compliance were achieved, is questionable.[102] Many MEAs set minimum standards at a global level, which is a positive step, yet these standards may not necessarily influence the behaviour of states or supply an 'effective' framework that will resolve the underlying problem.[103] Interactive law seeks to reveal the conditions under which international environmental law can improve environmental problems. Achieving interactive law requires not only ensuring certain processes and characteristics but also socialisation around international environmental law at multiple governance levels. Developing connections between different communities of practice at multiple governance levels, as discussed in Chapter 6, is seen as key to instigate the changes needed to see positive environmental change.

Rationalist theory, and 'coincidental' compliance with legal obligation

The following sections look to the main theories of compliance from the discipline of international relations and connects them to variant understandings of legal obligation. Rationalist theories do not recognise that change in state behaviour and state action necessarily flows from law and legalities do not constrain power. States act in pursuit of their own self-interest in international matters to survive in a world of anarchy.[104] Goldsmith and Posner, for example, argue that it is state interest that determines compliance.[105] States act in pursuit of security and survival, and powerful states set the agenda of inter-state cooperation. Whilst states may cooperate and make legal commitments, it is the powerful who set the terms of these commitments. Legal institutions and their influence therefore depend upon the underlying power realities, and treaty institutions and international organisations are little more than reflections of state interests.[106]

Pursuit of power is the primary factor influencing inter-state relations and decisions taken at the global level, some of which form the body of international law.[107] Power dynamics and pursuing actions in their self-interest motivate states to act in certain ways. State actions may coincide with compliance with international legal obligations, but this is because these actions are in the self-interest of states rather

than because the law has any power to draw states to comply.[108] The concepts of hard and soft law are superfluous to the workings of international life, and rationalist theories significantly, if not entirely, diminish the role of international law. Koskenniemi observes that:

> The doctrinal outcomes often seem irrelevant. In the practice of states and international organisations these are every day overridden by informal, political practices, agreements and understandings. If they are not overridden, this seems to be more a matter of compliance being politically useful than a result of the 'legal' character of the outcomes or the methods whereby they were received.[109]

Yet as already discussed, a large body of international environmental law has been agreed to by states, which sets normative goals for environmental quality, which presents significant shorter-term costs to states and could be argued in this sense against their interest.

Enforcement theories of compliance

Enforcement theorists see the matter of compliance as a choice to be made by the state. Some choices may be easier because compliance is clearly in the national interest, whilst other choices may require considerable resources in time, political energy and attention, and money. A state may enter a treaty because it believes it to be in the national interests, but the decision to comply with treaty obligations involves distinct political calculations.[110]

The enforcement school of thought promotes the use of sanctions and other hard means of enforcement to gain compliance by states with international law. For this school of thought, if international laws are 'shallow', there is no interest for the state in non-compliance; therefore, states will comply without the need for enforcement measures. However, as a regime 'deepens' and the legal obligations become harder to put into effect, which can be argued is the case for some international environmental laws, the incentive for states not to comply is greater as more effort is required on behalf of the state to ensure obligations are met. This is when the need for stronger enforcement mechanisms arises to prevent non-compliance and to give stronger incentives for the states to cooperate.[111] Strong incentives to comply can be initiated through enforcement procedures, such as penalties in relation to restricting access to regime benefits,[112] naming and shaming,[113] and withdrawal of financial support mechanisms.[114] The argument of the enforcement school of thought is that unless enforcement mechanisms are incorporated in the legal regime, the easiest and least costly option for states would be to choose not to comply with deeper obligations that require considerable change in their behaviour.

For international environmental law, a particular limitation to this theory is that agreement to enforcement mechanisms in the first place is a decision of the states, rather than an independent mechanism, either at the point of drafting or signing of a treaty or within institutional bodies, and they are rarely adopted.

Managerial theory and compliance

In line with the managerial approach, Henkin famously commented that:[115]

> Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.

This statement is challenged as 'exaggerated' and simplified because studies show there is variation in compliance with international law on a number of dimensions.[116]

Chayes and Chayes's managerial theory of compliance assumes a general tendency of states to comply with international law and advocates a cooperative, problem-solving approach to achieving compliance.[117] Benefits of compliance with international law firstly include costs saving and to be efficient, because non-compliance requires states to recalculate the costs and benefits of a decision. Secondly, because consent-based treaties are instruments serving the interests of state parties. Thirdly, a general atmosphere of compliance with international law furthers a norm of state compliance. For managerial theorists, the very existence of an international legal obligation for most actors equates to a presumption or norm of compliance for states and serves as a basis for conforming behaviour.[118]

Managerial theory does not focus on strong enforcement mechanisms because it sees certain types of international law as an agreement between states to behave in a particular way. Under this theory, there is no incentive to cheat or break the agreement, and therefore, enforcement measures are irrelevant. Managerial theory looks to the importance of the consent/agreement of states to certain obligations. It understands that states generally will enter into an international commitment with the intention to comply and that non-compliance can usually be explained by norm ambiguity or capacity limitations rather than deliberate disregard. This is why resources are best directed to 'managerial issues', which help coordination between states, such as transparency, dispute settlement, and capacity building.[119]

Critics of this theory question, firstly, if the costs saved by states through a general rule of compliance are so significant to explain why states comply with international law. Secondly, if state consent to a treaty actually leads to any change or constraint in their behaviour to achieve compliance with its obligations. In any event, this theory fails to explain why a legal obligation would influence a state's behaviour; it only observes or suggests that it does.[120] Lastly, in relation to the presumption of a norm of compliance, no explanation is offered as to why such a norm exists; there is no underpinning theoretical framework, and hence, it does not help us fully understand state behaviour.[121]

Managerial theory is suggested as a useful but incomplete model of compliance.[122] It works well in relation to international agreements that involve 'coordination games', but this consists of a narrow set of international agreements.[123] It does not fit well with international agreements such as MEAs that require states to change or constrain their behaviour significantly to achieve the goals of the relevant legal obligations. Downs and others propose that the observed high rate of compliance with international laws are 'over-stated' and can be explained by states

predominantly formulating treaties that require them to do little more than they would do in the absence of a treaty.[124] They argue that analysis of such regimes that require little or no change in state behaviour does not indicate state willingness, as compared to compliance to deeper commitments in regimes where states have material incentives for violations.[125]

Other theories seek to explain why international legal obligations can change the behaviour of states and draw compliance. De Visscher proposes a 'social conscience' that brings about compliance with international law.[126] Thomas Franck considers why states obey 'powerless rules'; he looks to the legitimacy of law to those who it addresses. He sees that the quality of a legal obligation is derived from a perception on the part of those to whom it is addressed and that it has come into being in accordance with 'right process'.[127] The exact nature of what might be considered 'right process' is less clear. Such theories, whilst recognising the importance of legal process to legitimise legal obligations, do not develop theories of how the processes of international law can gain legitimacy. It is just assumed to exist and is dependent on rationalist theories concerning 'interest-based' accounts of state behaviour.[128]

Interactive law and vertical compliance

Interactional law realises compliance mechanisms as effective when they are understood by the relevant social community to be a legitimate process. No single theory can exert universal explanatory power; in some circumstances, compliance pull and legitimacy of obligations will be sufficient to induce compliance; at other times, sanction-orientated approaches are needed.[129]

For the enforcement school, some form of sanction is necessary where deep cooperation is required and where there are strong incentives for states not to comply, as is the case with many international environmental problems.[130] Enforcement mechanisms are rarely used by MEAs (see Chapter 5), reflecting the lack of shared understandings in support of enforcement mechanisms. This does not mean that they cannot be agreed; such 'strong' shared understandings may take time to develop, as the importance of achieving the MEAs aims is realised between state parties and other actors. Forums such as the institutional bodies of MEAs present an opportunity for interaction and a chance for shared understandings to develop though interactions.

Managerialism focuses on managing cases of non-compliance and creating positive compliance strategies through increasing transparency in relation to areas such as the regime's norms and procedures, state parties' performance, dispute settlement, and capacity building.[131] This approach fits well with interactive law, which places importance on continuous processes of interaction, argument, and persuasion. Nonetheless, the managerial approach is criticised for failing to consider the context of MEAs and placing emphasis on obligations being of key importance, because this creates a 'one-size-fits-all' approach to compliance, which critics argue should be avoided.[132] Many MEAs adopt a managerialist approach to compliance, yet there is variation in relation to requirements on member states for

transparency, limited use of dispute settlements mechanisms, and limited resources available for capacity building (see chapter 5).

The challenge of effective implementation and achieving compliance with international environmental law and policy varies according to diverse individual state circumstances. A key argument of this book is that this diversity must be better considered between parties and other actors in multi-level governance processes. Achieving 'just, fair, and inclusive' processes between all relevant actors and law-making officials is challenging, particularly at the international level. Empowering under-represented actors such as indigenous peoples and local communities (IPLC), youth, and women is rarely achieved: the rights of IPLC depend upon their recognition by states. Suiseeya finds that the nature, scope, and engagement with IPLC during negotiations of the Nagoya Protocol were limited.[133] Increased focus on domestic practices uncovers potential spaces to better meet the requirement of 'just, fair, and inclusive' decision-making and enable commonalities and differences to be better accounted for in international environmental governance.

Global politics scholars recognise the rescaling of the intergovernmental realm of environmental politics and international cooperation, reflecting reciprocity between domestic and international politics, vertical interactions between sub-national, national, and supranational arenas, and the role of epistemic communities and other non-state actors on the intergovernmental arena.[134] Hanf outlines a perspective to analyse interactions between domestic and international politics in the formation and operation of international environmental regimes, arguing that public concern at the domestic level drives legal and political responses from the bottom up. A limitation of the analysis is its resource-based focus, perhaps a result of the case studies analysed, which focus on pollution, and the misconception that MEAs are agreed purely as a result of other socially beneficial activities, such as resource exploitation. Thus, failing to appreciate shared understandings in MEAs, such as the CBD and UNFCCC, develop in complex patterns, and these can recognise the environment as more than purely a resource, from both anthropocentric and occasionally intrinsic viewpoints. On the other hand, it is agreed here with Hanf that national processes, including conflict resolution and bargaining, are key to finding cooperative solutions to global environmental issues.[135]

In an empirical study of domestic corporate environmental behaviour, Gunningham argues that in economically advanced countries, a 'social license' constrains corporate activities in pulp and paper mill factories to align with societal expectations, and interestingly, these standards go beyond the environmental and social legal requirements of companies,[136] highlighting the important role of socialisation and societal understandings during implementation processes to further environmental ambition. In another study, Gunnigham finds the overall effect of sustained inspection and enforcement activity or 'implicit general deterrence' as far more important than either specific or general deterrence enforcement incidents.[137] These empirical studies support the proposals that interactive law must be based on shared understandings of all relevant actors, which prioritise the environment alongside systems of accountability, which develop a practice of legality. In Gunnigham's study, 'shared understandings' of relevant actors, in this case business,

state, and society, formed the basis of the social licence to comply with regulations. The social licence to operate led corporate firms to look to the relevant regulations to achieve or, in fact, go beyond compliance in order to keep a good reputation. Additionally, continual inspection processes, a form of accountability, developed a practice of legality, and 'rather than providing a threat, regulations and inspections acted as a reminder or guide of what was required of them'.[138] Contrastingly, there are important examples where corporations continually underperform and ignore social license, such as the water companies' failure to address sewage in the UK, suggesting that the law and policy in this area fall short of the interactive criteria.[139]

Kaufman sees that MEAs often fail to solve global environmental problems and highlights the role of transnational networks in (1) successfully adapting and implementing 'global ideas' from global climate policies and best practices at the local level in watershed management programs in Ecuador and (2) scaling up and promoting successful local projects at the global level.[140] Eilstrup-Sangiovanni sees that direct enforcement activism in maritime conservation plays an important role in enhancing the compliance pull of international environmental law.[141] These studies all focus attention on the key role of domestic actors in transnational networks and move far beyond the idea that only 'state' actions further compliance. Interactive law also argues the importance of just, fair, and inclusive interactions between all relevant actors and law-making officials during implementation of international law and policy and sees value in connecting communities of practice at multiple governance levels to expediate compliance.

Interactive law builds upon scholarship recognising that domestic processes are connected to international law-making, and it offers a holistic approach through which the reality of domestic implementation, in its varied forms, can be better accounted for in the process of international environmental law and policymaking. Focus on domestic processes, including accountability and compliance mechanisms around internalised international environmental law, can illuminate practices to inform other levels of governance, both vertically and horizontally, and contribute towards developing a continual practice of legality which upholds international environmental law.

Notes

1 RB Mitchell, International Environmental Agreements Database Project 2002–2020" http://iea.uoregon.edu accessed 20 June 2023.
2 Article 38 of the Statute of the International Court of Justice (entered into force 18 April 1946) 33 UNTS 993 recognises formal sources of international law arising from international conventions, international custom, as evidence of a general practice accepted as law, and the general principles of law recognised by civilised nations.
3 Stephen J Toope, "Formality and Informality" in Daniel Bodansky and others (eds), *The Oxford Handbook of International Environmental Law* (OUP 2008) 1.
4 B Kingsbury and R Stewart, "Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organizations" in S Flogaitis (ed), *International Administrative Tribunals in a Changing World* (Esperia Publications 2008).
5 J Pauwelyn and others, *Informal International Lawmaking* (Oxford University Press 2012).

6 *Global environmental governance* is understood here as laws, institutions, organizations, policy instruments, financing mechanisms, rules, procedures, and norms regulating the environment, including both public and private sectors.
7 Frederich Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (CUP 1989).
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2 The 1992 UN Convention on Biological Diversity and common challenges to implementation

Introduction

At the 1992 Rio Earth Summit, countries deliberated on global environmental problems, resulting in the agreement to the Convention on Biological Diversity (CBD), the United Nations Framework Convention on Climate Change (UNFCCC),[1] and three other international environmental and sustainable development agreements.[2] Different legal and policy approaches were agreed, with the adoption of 'formal' and 'informal' obligations.[3] The CBD is a formal binding treaty, yet its predominantly weak wording and subsequent development largely through soft-law provisions with weak review mechanisms has led to unmet goals and targets.[4] The UNFCCC and the 2015 Paris Agreement[5] are formal obligations with strengthened accountability mechanisms, yet the ambition of parties is insufficient to reach the global climate target.[6] Agenda 21 is a non-binding programme for action for sustainable development, superseded by Agenda 2030 and the 17 Sustainable Development Goals and targets.[7] The SDGs are informal obligations that operate within agreed institutional structures and subject to a system of review, yet achieving Agenda 2030 is in 'grave jeopardy'.[8] Why are the formal and informal obligations agreed for international environmental and sustainability issues failing to achieve their aims? The research underpinning this book seeks to address this question and studies these regimes to better understand where shortfalls exist for the attainment of interactive law. The research reveals four ongoing challenges for the achievement of interactive law: (1) agreeing on interactive goals and targets (Chapter 3), (2) understanding the role of secretariats (Chapter 4), (3) adopting effective systems of accountability (Chapter 5), and (4) effective implementation (Chapter 6).

Evolution of UN Convention on Biological Diversity

The CBD is the first global treaty addressing multiple aspects of biodiversity. Before the CBD, biodiversity laws and policies were *ad hoc* and concerned either isolated species or isolated geographical areas.[9] International biodiversity laws mostly worked in separation from each other, failing to make reference to each other and using inconsistent terminology,[10] and the CBD was agreed to address

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these gaps.[11] The CBD has a wide remit, concerned not solely with biodiversity conservation but also the sustainable use of resources and the equitable sharing of benefits from resources, as noted in the Article 1 objectives of the CBD:

> The conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.

The CBD has been described as a 'middle ground', a convention of commonly shared values, providing definitions, rules, and norms agreed upon as a compromise between actors and groups.[12] The inclusion of non-conservation provisions set a new precedent and reflects the positioning of CBD signatories from lower-economic and transition countries, for whom development is a key concern.[13] The CBD treaty negotiations gained near universal ratification, but notably, the United States remains absent as a signatory, despite attending and having a key influence in negotiations.[14]

The CBD as a framework treaty establishing broad binding commitments for its 196 parties and is a formal source of 'hard law'. It was intended that the CBD would be developed through protocols to set more specific binding targets, or in national legislation, yet this aim has only been realised to a limited extent.[15] To date, only three protocols have been agreed under the Article 28 mechanism, and it is notable that none of these relate to the first objective of the CBD of biodiversity conservation.[16] The CBD conservation objective has mostly been developed through informal law or 'soft law' decisions made by the CBD's main institutional body, the Conference of the Parties (COP), an active body which has agreed on several strategic plans, goals, targets, and numerous other decisions and recommendations.

The CBD has struggled to reach its objectives[17] and to facilitate implementation through its predominantly soft target-based approach. In 2002, a COP decision adopted a vague '2010 Biodiversity Target': to achieve a significant reduction of the current rate of biodiversity loss at the global, regional, and national level by 2010[18]; the aims of this target were not reached.[19] Subsequently, in 2011, at COP 10, Nagoya, Japan, the 2020 strategic plan, 'Living in harmony with nature', set 20 targets, known as the Aichi Targets (ATs).[20] The ATs were seen as an improvement on the initial 2010 target[21] but were also unmet by 2020.[22] That said, some progress has been made towards the ATs, with six targets being partially met, including those on protected areas and invasive species.[23]

In 2022, the Post-2020 Kunming to Montreal Global Biodiversity Framework (Post-2020 GBF) was agreed, including four long-term goals for 2050 and 23 action targets for immediate action and completion by 2030.[24] Goal A concerns improving ecosystems and their integrity, halting/reducing extinction of species, increasing the abundance of native wild species, and maintaining genetic diversity within species. The conservation-focused targets towards Goal A are more ambitious than their predecessors – the new action targets concern the quantity of land in protected areas, and the quality of protected areas, and prioritise key biodiversity areas within countries. Action target 2 aims to ensure 30% of degraded land,

sea, and inland waters are under effective restoration to enhance biodiversity and ecosystem functions. Action target 3, the headline target of COP 15, aims to ensure that at least 30% of terrestrial, and 30% of inland water, coastal, and marine areas, especially areas of particular importance for biodiversity and ecosystem functions, are effectively conserved and managed, through ecologically representative, well-connected, and equitably governed systems of protected areas and other effective area-based conservation measures, recognizing indigenous and traditional territories. Despite increased ambition, it is not clear how the corresponding indicators for these targets, which predominantly focus on area coverage, will allow measurement of quality, 'effectiveness' of these areas, or respect of human rights; further, the predominant use of varied national indicators, as opposed to global indicators, limits the ability to track regional and global progress.[25] An overarching consideration is the value of protected areas in addressing the biodiversity crisis,[26] as opposed to addressing the indirect drivers which are at the roots of the crisis.

Goal B addresses the sustainable use and management of biodiversity for present and future generations and the importance of prioritising biodiversity for the attainment of the SDGs, emphasising the connection between biological and cultural diversity. Target 10 addresses the need for sustainable practices in agriculture, aquaculture, fisheries, and forestry using biodiversity-friendly practices, a key and more refined target from the previous strategic plan to address the rising issue of unsustainable food systems.[27]

Goal C focuses on equitable sharing of monetary and non-monetary benefits, an important and contentious element of biodiversity governance. Action target 13 loosely references that parties 'should' take effective measures to ensure a 'significant increase' by 2030 in the benefits shared from the utilisation of genetic resources and from digital sequence information on genetic resources. Such weak wording may hinder the implementation of this target.

Goal D tackles securing equitable access to adequate means of implementation and mainstreaming, such as finance, capacity building, and technology, recognising the need to support those parties with the least resources and address the gap in financial flow for biodiversity, which amounts to $700 billion/year. Action target 14 aims to ensure the full integration of biodiversity across government and all sectors, particularly those that most impact biodiversity, by integration of its multiple values into policies, regulations, planning and development processes, poverty eradication strategies, strategic environmental assessments, environmental impact assessments, and national accounting, progressively aligning all relevant public and private activities, fiscal and financial flows, with the goals and targets of this framework. Whilst recognition of the multiple values of biodiversity begins to address the problematic framing of biodiversity solely as a natural resource to be exploited,[28] the other elements of this target are similar to its predecessor, AT2, for which implementation was challenging for parties due to the complexity, ambiguity, and lack of measurability for this target (see Chapter 6).

Action target 15 aims to facilitate the state regulation of businesses, particularly large and transnational companies and financial institutions, to progressively reduce negative impacts on biodiversity and increase positive impacts. For

example, by disclosing their risks, dependencies, and impacts on biodiversity along their operations, supply and value chains, and portfolios. This represents a step forward for the CBD to better engage the private sector to address their impacts on biodiversity. Europe and the UK pre-empted the importance of holding the private sector accountable for their impacts on forests through the passing of legislation on transparent supply chains for forest risk commodities and monitored checks on business systems of due diligence.[29]

Action target 16 aims to ensure people are enabled to make sustainable consumption choices and, by 2030, reduce the global footprint of consumption in an equitable manner, halve global food waste, significantly reduce overconsumption, and substantially reduce waste generation, in order for all people to live well in harmony with Mother Earth. The quantifiable element for food waste is a step forward, but other elements of this target are vague.

Several targets address the need to significantly increase the finance needed for the achievement of the goals and targets of the Post-2020 GBF. Most notably, action target 19 calls to substantially and progressively increase the level of financial resources from all sources, in an effective, timely, and easily accessible manner, including domestic, international, public, and private resources, and attempt to address the ongoing contentious issue of providing sufficient funding for developing countries for implementation by increasing transfers from developed to developing countries to at least USD 20 billion per year by 2025, and at least USD 30 billion per year by 2030. Action target 18 calls parties to identify by 2025 and eliminate, phase out, or reform incentives, including subsidies harmful for biodiversity, by at least $500 billion per year by 2030, starting with the most harmful incentives, and scale up positive incentives for the conservation and sustainable use of biodiversity. Thus incentivising the re-direction of harmful subsidies towards positive incentives for conservation and sustainable use of biodiversity. Action target 14 calls for raised ambition to align fiscal and financial flows from the private and public sector with the Post-2020 GBF. These relatively clear and time-bound targets are a key step towards facilitating the financial resources needed to realise the Post-2020 GBF.

The Post-2020 GBF is underpinned by a theory of change;[30] whether another set of soft-law targets, many with limited specificity and lack of accountability, can achieve the transformation required across society for biodiversity is questionable. Whilst the agreement to new global targets has seen raised ambition in some areas and agreement to some quantifiable targets, of key concern is the lack of adoption of a significantly strengthened implementation mechanism, thus questioning if parties will be sufficiently incentivised to transform their implementation efforts. The implementation mechanism is described as ‘an enhanced multidimensional approach to planning, monitoring, reporting and review with a view to enhancing implementation’. Yet there is no system of global review that is transparent in relation to individual party progress, only a limited voluntary peer-review mechanism and no system to increase parties’ ambition, that is, a ratcheting-up mechanism. New NBSAPs must be implemented by parties to align with the Post-2020 GBF and submitted to COP for review by 2024, and a global stock take on

implementation progress will take place by 2028, leaving very little time to achieve the action targets by 2030, and questions whether the targets are overly ambitious and achievable in seven years.[31]

Through the hard work of the COP, its Presidents secretariat, and the subsidiary bodies, the CBD has undoubtedly evolved since 1992, and progress has been made towards some global biodiversity targets but is not rapid enough: the CBD has repeatedly failed to reach its overall aims and faces ongoing challenges in relation to implementation, compliance, and effectiveness. It is argued here that interactive law can be applied to better understand four key challenges faced for international environmental law and is applied to the empirical case study of the CBD and the UNFCCC and SDGs to reveal opportunities to facilitate effective implementation through actions at multiple governance levels.

Agreeing interactive international environmental law and policy

The use of soft-law goals and targets are popular in MEAs, and non-binding political goals and targets also form the basis of the SDGs. Target-based mechanisms are intended to create a simple, transparent method which allows progress to be measured and to provide flexible options for parties and can form interactive law when the relevant criteria are met. Targets are widespread due to their flexibility, thus allowing different approaches to be taken during implementation to account for varied socio-ecological and political contexts and can guide the actions of non-state actors, a key issue, given the role of unsustainable business in driving environmental degradation.[32] Despite the popularity of this regulatory approach, there is debate whether goal- and target-setting is an effective mechanism for global governance,[33] as illustrated by the CBD.

Over 30 years since its inception, the CBD has failed to meet its first objective, 'the conservation of biological diversity'. Global levels of biodiversity loss are at their highest ever, and the Aichi Targets were unmet by 2020.[34] The UNFCCC has also failed to achieve its overall objective: Nationally Determined Contributions (NDCs) declared and/or updated in 2021 by the Paris Agreement are inadequate to achieve the commitment to limit the temperature increase to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels.[35] Currently, NDCs and other commitments suggest a 66% chance of reaching a global temperature of 2.6°C by the end of the 21st century.[36] For the SDGs, a 2022 report states that the 2030 Agenda for Sustainable Development is in 'grave danger, along with humanity's very own survival'.[37]

What makes an operational target? Maxwell sees targets which are 'specific, measurable, ambitious, realistic, and time-bound' (SMART) as effective.[38] The SMART criteria are similar to Lon Fuller's internal legality requirements, the first requirement of interactive law.[39] Scholars have identified limitations to the SMARTness of the ATs, including ambiguities in definition and quantification or lack of specificity, measurability, being over-ambitious and unachievable in the time scale set.[40]

Through the lens of interactive law, some of the ATs are clear and include quantifiable means of success. For example, AT11 sets percentages for protected area coverage, 17% land and 10% oceans, and was close to being achieved.[41] Action targets 2 and 3 increase ambition by calling for protected areas on 30% of land and water, yet to achieve 'representative coverage', the global percentage of protected areas would need to be at least 50%,[42] questioning if international biodiversity targets correspond to the overall aims of the CBD or contradict them.

Targets are limited in accounting for complexities, such as the suggested substantial time lags between actions taken to preserve biodiversity and the recovery of biodiversity.[43] Substantial tropical forest recovery is estimated at 20 years,[44] and modelling predictions indicate the earliest date to halt and reverse biodiversity loss is by 2050,[45] not 2030. This speaks to the contentious question of 'achievability', a prerequisite of interactive law. Global biodiversity targets have time limits, and in theory, all environment and sustainable development targets are achievable, yet they are repeatedly missed, indicating lack of sufficient political will to act upon the agreements.[46] The Covid-19 pandemic has illustrated unprecedented political action globally to prevent the spread of the virus,[47] yet despite evidence of imminent biodiversity and climate crises, so far there has been insufficient action.

Many of the Post-2020 GBF action targets, particularly those addressing the underlying causes of biodiversity loss, fall short of the requirements of internal legality, including clarity. Setting clear targets is easier for 'politically benign' issues, in contrast to issues with diverse stakeholder values, and where the costs and benefits of reaching targets are disputed.[48] Contentious issues raised during COP 15 negotiations forced 'flexibility' or 'wiggle out room' to be built into targets to obtain agreement of multiple parties with diverse interest.

Chapter 3 undertakes an interactive analysis of CBD COP decision-making processes and seeks to better understand some of the challenges to agreement to interactive goals and targets in international environmental law and policy. Consensus decision-making is examined and found to be more than just a state-led process and is significantly shaped by non-state actors at multiple governance levels who contribute to the shared understandings upon which international environmental law and policy are based. The influence of non-state actors can be seen as both positive and negative. On the one hand, inclusion of non-state actors can lead to more representative shared understandings, persuasion, and social learning. On the other hand, hierarchies of influence, with business actors and some NGOs in more powerful positions, lend to unbalanced dimensions, which are problematic in achieving decisions that reflect shared understandings prioritising environmental issues.

Understanding the role of secretariats

This research found the CBD secretariat acts with a level of autonomy and facilitates 'just, fair, and inclusive' decision-making within state-led governance processes, an important component of interactive law. Secretariats play a key role within governance processes, which is often presumed to be solely state-led, and the extent and legitimacy of the actions of secretariats have not been

fully conceptualised. Whilst contested, a growing number of scholars recognise that secretariats have some autonomy from parties.[49] Secretariats consist of non-elected bureaucrats and are officially subject to impartiality,[50] yet they can be powerful actors, using their focal position, privileged access to information, technical expertise, and professional authority to influence governance processes.[51] Further, secretariats can facilitate the orchestration of non-state actors, such as business, NGOs, sub-national actors, and transnational networks, to take action towards global environmental targets by coordinating, connecting, and mobilising their actions.[52]

The ability of secretariats to influence decision-making varies. For biodiversity conventions, including the CBD,[53] the Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat,[54] and the Convention on International Trade in Endangered Species of Wild Fauna and Flora,[55] their secretariats are recognised as having considerable power, and the CBD secretariat has been described as a 'norm entrepreneur'.[56]

The UNFCCC secretariat has traditionally been seen to act within a narrow mandate and be constrained within a tight straightjacket.[57] In recent years, the secretariat's straightjacket has loosened, acting with increasing autonomy from parties, including by initiating, guiding, broadening, and strengthening non-state actions, through sub-national governments, civil society organisations, private companies, to achieve progress in the international climate negotiations.[58] The UNFCCC secretariat has progressively engaged in processes of 'orchestration', resulting in the 2015 Paris Agreement,[59] actively influencing rule-setting for the Clean Development Mechanism[60] and increasingly playing a proactive and influential role in international climate governance.[61]

The Division for Sustainable Development Goals within the UN secretariat acts as the SDG secretariat, charged with providing support in implementation, capacity building, analysis of thematic issues, organising focal teams, advocacy, outreach, and coordinating inputs for the review and implementation. Beyond these bureaucratic roles, the SDG secretariat and other non-state actors were influential in the Open Working Group leading to the creation of the SDG 'package'.[62]

Understanding how international environmental and sustainability governance processes account for the autonomous actions of secretariats is of common concern. Autonomous actions of secretariats have been argued to lack a solid democratic foundation and are beyond state authority. Further, when secretariats play a role in orchestration, this is seen by some as problematic because secretariats lack control over those non-state-actors orchestrated and systems of accountability are lacking.[63]

Chapter 4 undertakes an interactive analysis of the role of secretariats, revealing that (1) secretariat activities are facilitated by soft-law mechanisms, such as COP decisions, and are dynamic; (2) whilst many secretariat activities can be explained by powers bestowed upon them through hard and soft law, some activities go beyond their legal mandates, and these semi-autonomous activities of secretariats are accepted by parties due to shared understandings developed within institutional bodies; (3) secretariats have a unique influence on shared understandings in

institutional decision-making and during implementation; and (4) secretariats can be key actors in facilitating 'just, fair, and inclusive' decision-making processes and hold potential for furthering interactive law.

Adopting effective systems of accountability

Regulating environmental issues on a global scale is complicated and essentially tasks international environmental institutions to 'provide governance without government'.[64] A key issue for the CBD, the UNFCCC, and the SDGs is to ensure parties/member states not only agree but also implement and comply with standards set. This has proved to be a fundamental challenge for public-orientated environmental obligations, further complicated by the increase in public–private and private forms of environmental governance.[65] The adoption of adequate accountability mechanisms would be a key means to facilitate implementation, yet insufficient progress has been made to hold parties accountable for missed goals and targets.

To implement accountability mechanisms, a means to measure progress towards global environmental goals and targets is needed. Lack of quantification in many global biodiversity targets[66] means they are not easily measured, and indicators have predominantly been set at the national level and vary in quality and quantity, and measuring overall progress towards global targets is challenging.[67] Parties may have limited capacity to generate effective national indicators, the quality and quantity of data collected varies and is often insufficient, and parties have limited access, ability, and desire to make use of global indicators.[68]

For climate, whilst emissions reductions are the key means of measuring progress, a broader range of indicators are needed to fully capture progress towards climate targets. Measurements predominantly focus on emissions limits or emissions intensity, rather than indicators to measure progress in addressing underlying changes to energy systems, such as technology, infrastructure, and institutions, which will enable long-term goals to be reached.[69] Similar to biodiversity, measurement is impeded by lack of basic observation systems in many countries, inadequate indicator systems, and inadequate data storage systems to collate, synthesise, and communicate emissions data in a meaningful fashion.[70]

For the SDGs, measuring progress towards the 17 goals and 169 targets, using the 232 indicators, has been described as an 'unprecedented statistical challenge', particularly apparent for least developed countries, many lacking the resources to collect and compute data for the large number of indicators.[71] Indicators developed thus far demonstrate less ambition than their corresponding targets; this may reflect complexities of finding ways to measure certain targets but may also reflect indicators being set according to data availability, rather than ambition, and more worrying disorientation of targets due to lowering of political ambition. Other concerns include the predominant focus on quantitative data, failing to consider qualitative analysis more broadly towards the SDGs; lack of resources at the national level available to national statistic offices to implement the SDG indicator framework; and the politicisation of data collection and transparency by governments. In

May 2018, only 40% of the SDG indicators could be populated with implications for measurability.[72]

Biodiversity, climate, and the SDGs adopt different systems of accountability, yet they face common challenges to find means to motivate states to implement their obligations. The system of accountability under the CBD is facilitative, non-intrusive, non-punitive, and respectful of national sovereignty and relies on parties submitting national reports, a binding requirement under Article 26 of the convention.[73] At the time of writing, 192 out of 196 5th national reports (5NR) were submitted, and the most recent round of reporting sees 103 6th national reports (6NR) submitted,[74] the deadline for submission being 31 December 2018, the drop in numbers explained largely due to the Covid-19 pandemic. If a party does not produce a report or achieve the requirements of the targets set, there are no sanctions, or naming and shaming.[75] The feedback given by the CBD focuses on global progress, is very broad, and lacks details of individual party progress and lacks transparency.[76] Article 27 of the convention establishes a voluntary dispute resolution mechanism, but it has never been used.

Review and compliance processes for climate have undergone several stages of evolution. In 2005, the Kyoto Protocol's compliance mechanism was adopted, consisting of two branches, a facilitative branch and an enforcement branch.[77] In 2022, the enforcement branch held its 36th meeting. The enforcement branch can place economic sanctions on states for failure to reduce emissions and procedural breaches, such as failing to submit reports.[78] The enforcement branch has handled nine cases to date. In 2014, the Subsidiary Body on Implementation (SBI) of the UNFCCC adopted the International Assessment and Review (IAR) process, a multilateral process for the assessment of biennial reviews for developed countries.[79] The process is reasonably transparent and allows comparison between parties' progress.[80]

Most recently, Article 15 of the Paris Agreement provides for a facilitative compliance mechanism which is transparent, non-adversarial, non-punitive, and respects national circumstances.[81] Without corresponding national substantive binding targets for greenhouse gas reductions, the effective functioning of the new compliance mechanism has been described as 'duplicative' and unnecessary until parties have agreed on legally binding emission restrictions.[82] There are differing views on how the compliance committee should be developed.[83] The accountability system for climate is more developed than for biodiversity, yet accountability under the climate regime is complex, and questions remain regarding which is the most relevant and effective accountability mechanism and how the different review and compliance processes adopted can be reconciled.[84]

The SDGs are purely voluntary agreements, and clear accountability mechanisms are lacking.[85] Various actors have committed to the achievement of SDGs, including state and non-state actors. While goals and targets mention accountability such as targets 18 and 19 on 'data, monitoring and accountability' and goal 17 to 'revitalize the global partnership for sustainable development', there is no clear accountability mechanism[86] or consideration for how an overarching accountability system can best engage different groups of actors and their connections,

for example, government, business, and civil society.[87] The 2030 Agenda for Sustainable Development provides for a 'follow-up and review' mechanism, and states are encouraged to conduct regular and inclusive voluntary national reviews (VNRs) of progress towards the SDGs at the national and sub-national levels.[88] VNRs are intended to be reviewed by the High-Level Political Forum (HLPF). In 2021, 44 states carried out VNRs. The HLPF review has been criticised for adopting a reporting system as opposed to providing an analysis and evaluation of VNRs, therefore lacking transparency, and is, as of yet, underdeveloped.[89] It is likely that accountability mechanisms will mostly be pursued at the national level through the development of national sustainable development strategies and reporting systems,[90] yet such systems are also underdeveloped and encumbered with the difficulties of agreeing on suitable indicators and means of measuring progress, understanding the connections between goals and targets and encompassing the range of actors or networks.[91]

Adopting effective accountability systems presents significant challenges for MEAs and the SDGs, yet it is argued in Chapter 5 that they are an essential element of interactive law. Systems of accountability may vary; of key concern is that the agreed mechanism can facilitate a continual practice of legality reinforcing and revisiting obligations and commitments.

Challenge 4: effective implementation

Effective implementation is a key challenge for international environmental law[92] and sustainability policy.[93] Implementation of international environmental obligations can be facilitated through the development of clear targets agreed during 'just, fair, and inclusive' decision-making which prioritises environmental issues, by supporting secretariats and enhancing their roles, through the adoption of interactive accountability mechanisms and through the provision of sufficient financial and technological support for implementation. Underpinning these requirements is the necessity for increasing political and societal will to take action on global environmental and sustainability commitments.

Political will is predominantly aligned to support capitalist valuations of nature, which will ultimately always be problematic in achieving effective environmental protection.[94] Challenges to achieving best practice targets are illustrated by the CBD ATs, where contentious political negotiations failed to achieve consensus and collaboration for meaningful targets which, if achieved, would effectively conserve global biodiversity.[95] The Post-2020 GBF made some incremental improvements,[96] but targets addressing underlying causes of biodiversity loss are not SMART, and the means of accountability weak.

This book seeks to explain limitations in international institutional design and global governance mechanisms by identifying how this falls short of meeting the requirements of interactive law. There are scarce examples of global environmental or sustainable governance processes that achieve the requirements of interactive law, with some exceptions, such as the Montreal Protocol.[97] The requirements of interactive law are seen here as key to facilitate implementation by socialising actors

to global goals and targets and motivating, persuading, and educating parties and other actors on the importance and value of taking action during implementation.

The interactive analysis the ATs in the UK in Chapter 6 reveals opportunities to strengthen interactive law during implementation. When implementation of international environmental law and policy is recognised as a holistic multi-directional and ongoing process encompassing global to local levels of governance, opportunities are revealed beyond international governance to better achieve their aims, objectives, goals, and targets. During implementation, laws and policies can better fulfil the requirements of interactive law and thus accelerate and steer the shifts needed to accomplish their objectives. Recognising variable contexts and the limitations of a single-country analysis, this book maintains that the overarching challenges to implementation identified are relevant more widely than the case studies and are relevant to MEAs. Additionally, the lessons learned from the implementation of the CBD ATs in the UK offer insights and demonstrate the application of interactive law for other MEAS and other countries and propose that more focus should be placed on national and sub-national levels of governance to identify opportunities to strengthen international environmental laws and policies.

Notes

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11 Stuart Harrop and Diane Pritchard, "A Hard Instrument Goes Soft: The Implications of the Convention on Biological Diversity's Current Trajectory" (2011) 21(2) Global Environmental Change 474.
12 Valéire Boisvert and Franck-Dominique Vivien, "The Convention on Biological Diversity: A Conventionalist Approach" (2005) 53(4) Ecological Economics 466.
13 Ibid (n11 Harrop). Harrop and Pritchard describe conflict during the CBD negotiations between conservation priorities in richer countries and economic priorities in poorer countries. Around 80% of the world's biodiversity is located in the Global South, and these countries feared they would bear the brunt of responsibility to save the world's biodiversity without enough compensation from the richer countries.

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3 Making international environmental law and policy that works

Introduction

Agreeing on effective goals and targets for international environmental law and policy that facilitate implementation and compliance is challenging in international environmental institutions, such as Conference of the Parties (COPs). COPs have been found to be autonomous institutions functioning beyond state consent,[1] with legal personality,[2] generating ever-evolving legal outputs, including concepts and decisions.[3] The dynamics of actors at COPs have been found to shape the direction and output of COPs,[4] including the negative influence of business at the CBD COP in re-shaping the concept of biodiversity conservation to serve capitalist expansion,[5] to promote protected area conservation,[6] and in the development of targets for biofuel and synthetic biology.[7] Better understanding COP processes and how to improve them is vital as they are an important source of informal international environmental law.

This chapter begins by examining the legal nature of COPs and finds them to be a type of international organisation (IO) with a level of legal autonomy from their parties. COPs act with implied powers bestowed upon them, and this enables them to act independently from parties to some extent. Understanding COPs as a type of IO offers legitimacy for autonomous behaviour to some extent. Autonomy here is concerned with the 'legal and pragmatic' distance between treaty institutions and parties and 'to what extent non-state actors can and do influence the legal obligations made by institutions'.[8] Whilst autonomy is seen by some as a threat to the role of parties in the organisation of environmental regimes and governance, here autonomy is seen to be positive when 'just, fair, and inclusive' dynamics prioritising environmental issues are achieved through the empowerment of certain actors and values in decision-making. These dynamics can provide an avenue for COPs to push forward shared understandings to strengthen environmental protection.

Next, the normative outputs of COPs are studied. Whilst not formal binding obligations, COP decisions have been used to interpret treaty provisions under the 1969 Vienna Convention on the Law of the Treaties (VCLT),[9] and COP decisions have been interpreted by the International Court of Justice (ICJ) as 'subsequent agreements', their acts as 'subsequent practice', and as 'supplementary forms of practice'. Despite the legal recognition that output from COPs may hold some status

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in international law, a case law analysis demonstrates that international courts and tribunals rarely engage with 'binding' treaty provisions from international environmental law, let alone the 'non-binding' output from treaty institutions. This is not to say that this body of 'law' is not influential, but to fully understand and legitimise the influence and effect of treaty institutions requires moving beyond traditional theories of international law; thus, it is argued that interactive law is key to understand when the activity and legal and policy outputs of COPs are influential.

Finally, an interactive analysis of consensus decision-making at CBD COP 13 uncovers limitations in achieving 'just, fair, and inclusive' dynamics prioritising environmental issues. Unbalanced dynamics in participation between parties and non-parties in decision-making processes supporting dominant actors' priorities are revealed. Opportunities and alternative decision-making models are considered in relation to their ability to achieve interactive decision-making. Ultimately, the chapter finds there are significant constraints on meeting this requirement of interactive law through strict consensus decision-making at the global level.

An interactive approach can legitimise legal obligations created by institutional bodies, such as COPs, through the incorporation of constructivist understandings of institutional bodies as normative institutions. Treaty institutions are seen as more than an assembly of states but as an organisation that reflects ongoing social processes, prevailing ideas, and of the participants in such processes. Interactive legal obligations can be seen to arise from a mutually generative process – different actors interact to influence the scope and content of international environmental law, whilst the institutions shape the context of interactions and the identities of the actors themselves. Thus actors come to understand themselves and their interests, considering their interactions with others, and in light of the legal obligations that frame the interaction.

COPs as international organisations

Treaty institutions such as COPs are the most common form of governance used by MEAs: international environmental law lacks an overarching international environmental institution with general governance functions,[10] making the role of COPs key to effective governance. There are a wide variety of MEA institutions – global, regional, and bilateral – that cover a vast array of environmental challenges, from the specific, such as ozone-depleting substances, to the broad, such as the CBD; from environmental, such as the United Nations Environmental Programme, to non-environmental areas that effect the environment, such as the World Trade Organisation (WTO). The role of COPs in creating international environmental law is important to understand, considering their distinct position as supreme decision-making bodies tasked to review and further implementation of treaties and facilitate compliance. Most multilateral environmental agreements (MEAs) establish a COP, and some non-environmental treaties have similar institutional bodies, such as the WTO[11] and the Treaty on the Non-Proliferation of Nuclear Weapons.[12] COPs usually act alongside a permanent secretariat and subsidiary bodies. The SDGs High-Level Political Forum (HLPF) has a similar role to a COP through voluntary

national reviews of progress towards sustainable development goals and targets and by furthering implementation.[13]

IO characteristics

The following section undertakes a legal analysis of the VCLT and common law to argue that COPs can be seen as IOs who can act with implied powers and highlights the legal implications of this. Whilst the HLPF is not a COP and thus would not fall within the legal definition of an IO, it is an important global forum for agreeing international political goals and targets which have the potential to form interactive law.

COPs have a significant normative output; they make decisions and recommendations to facilitate implementation based on information from state and non-state actors, prioritise actions, review implementation, provide a forum for discussion, and can revise treaties.[14] Despite the recognition of the significant works undertaken by COPs, there is debate as to their legal nature. Some argue that treaty institutions, governed by the 1969 VCLT, are purely diplomatic conferences, in no sense independent of their parties.[15] This chapter disagrees and sees that COPs have their own functions, decision-making rules, organisational cultures, and a body of international civil servants who work for them, which makes them distinctive from their parties, and they have a status equivalent to IOs.[16] Further, treaty institutions are 'global legislatures',[17] which create legal norms that states act upon, and in this sense, they are lawmakers.[18]

There is no generally accepted legal definition, but IOs are widely referred to as 'forms of cooperation founded on an international agreement creating at least one organ with a will of its own, established under international law'.[19] IOs, by their very nature, are diverse,[20] have varying degrees of autonomy from parties, and can be seen on a spectrum ranging from IGOs (IGOs) with little autonomy from parties, such as the G7 intergovernmental political forum and consultative meetings of the Antarctic Treaty, to supranational organisations with almost-complete autonomy, such as the European Court of Human Rights (ECHR). COPs are usually created by treaties, have a permanent secretariat, meet regularly, and have the power invested in them to make decisions. Despite the significant academic support for treaty institutions to be recognised as IOs, it is still debated whether the relevant body of law governing treaty institutions is international institutional law; the law of treaties, namely, the VCLT; or a combination of both.

If COPs are legally recognised as IOs, they are 'subjects' capable of independently bearing rights and obligations under international law, and subject to international institutional law, a separate field within public international law.[21] International institutional law has largely been developed through opinions of the ICJ and academic scholars, and there is increased recognition of the normative output of IOs.[22]

Global administrative law,[23] and interactional law,[24] seek to conceptualise the nature of legal norms emanating from institutional bodies. Nonetheless, finding a common framework for all institutions is complicated due to the diversity

and distinct internal legal order of each IO.[25] International institutional law has attempted to develop some 'unity' through the discussion on the legal nature of IOs. There are conflicting ideas of what constitutes an IO, the legal effects of the instruments they adopt, how they can be controlled and how much they relate to their parties. This area of law often favours a functionalist approach towards IOs and assumes that they exercise functions conferred upon them by parties. The extent of these powers, though, is not clearly defined.

COPs have been recognised as IOs as they involve the same participant states as other IOs, have a similar *modus operandi*[26] and a level of independence from parties.[27] COPs have been considered as IGOs,[28] thus falling on the lower end of the spectrum of IOs.[29] The narrow focus of COPs on specific problems such as biodiversity and climate change and the limits of COPs to address problems beyond the remit of the parent treaty is seen to reduce opportunities for autonomous activity.[30] Parties fear the creation of 'Frankenstein' IOs with a will of their own acting contrary to state interests, thus explaining the conservative nature of powers invested in them, yet this fear limits the ability to make progress on collective global issues.[31]

Further support that treaty institutions are more than purely functional bodies can be found in the judgement of the ICJ in the *Reparation for Injuries* case,[32] which found that treaty institutions have implied powers. This is a significant finding. If IOs exercise implied powers, they can act beyond what is expressly provided for in the basic instruments that govern their activities and can take autonomous actions from parties as long as the actions concern fulfilling the purposes of the organisation and promoting its effectiveness. The UN Office of Legal Affairs (UNOLA) issued an opinion recognising the UNFCCC COP as an 'international entity/organisation with its own separate legal personality', allowing it to enter into agreements with other entities.[33] The UNLOA opinion references both the VCLT and provisions within the parent treaty, giving the COP its mandate.

Implications of treating COPs as IOs

If COPs are considered IOs, then this is significant in that it opens up the remit of COPs to 'further the purpose and effectiveness' of the relevant convention even if there is conflict with the interests of parties.[34] It allows the scope of the original treaty to be changed to some extent without formal amendment procedures. The proviso that 'no more power is given than is strictly necessary' for the exercise of an IOs functions in the fulfilment of its purpose places a limit to implied powers.[35]

The debate concerning implied powers can be somewhat peripheral if the treaty explicitly recognises these. For example, CBD Article 23(4) (j) confers wide powers on the COP to:

> Consider and undertake any additional action that might be required for the achievement of the purposes of this Convention in the light of experience gained in operation.

The phrase 'in light of the experience gained in operation' appears to confer additional powers to the CBD COP beyond solely the achievement of the purposes of the convention. It permits the COP to build upon treaty provisions according to knowledge accumulated over time and qualifies the COP to take 'any additional action'. This, in theory, invests the CBD COP with reasonably wide powers that justify autonomous activity, such as COP decisions and resolutions, to further the objectives of the treaty, and to develop procedures to promote implementation. The level of autonomy exercised by COPs is limited by procedural requirements, such as voting by consensus or unanimity, which limits the ability of COPs to act in dramatically different ways to the wishes of their parties. Nonetheless, consensus decision-making itself does provide some distance from parties through its procedure and, as this chapter proposes, through the ability of non-state actors to influence and shape the decisions made by the COP.

Not all viewpoints agree that COPs are autonomous bodies. Functionalism sees COPs with little or no independence from parties[36] but as institutions to increase efficiency by performing functions more easily than states on an individual basis to reduce transaction costs.[37] For example, through the provision of public goods, collection of information, establishment of credible commitments, monitoring of agreements, and helping states overcome problems associated with collective action and enhancing individual and collective welfare. Through the functionalist lens, COPs are purely agents of states who exercise delegated authority, not strictly recognising autonomy. However, principal–agent theory recognises that agents do not always act as their principal's wish.[38]

The functionalist approach sees the power of IOs as limited, rather than the argument raised by some international lawyers, and supported here, that they are self-governing communities with independent legal personality and inherent powers. IOs can be seen to exercise their own organic jurisdiction, which derives not from territory or citizens but from the existence of the organ itself.[39] If COPs are a type of IO who can act with implied powers, this has implications for the legal status of their outputs, which will be considered in the next section.

Legal recognition of COP decisions

The VCLT is the main international legal instrument which governs treaties and their institutions, yet it does not clearly define what treaty institutions are legally, or how decisions of treaty institutions should be seen in international law. The following legal analysis demonstrates how COP decisions are relevant to 'the interpretation of treaties' under the 1969 VCLT, thus determining how the activities of treaty institutions can be understood legally. Further, an analysis of case law shows how the ICJ has interpreted the acts and decisions of treaty institutions as 'subsequent agreements', and their acts as 'subsequent practice', and 'supplementary forms of practice'.

Whilst, international courts have provided some helpful guidance on the interpretation of the relevant provisions, relying on judicial interpretation at the international

level can be seen as problematic because decisions of international legal bodies do not form binding precedents on other courts, and the judges apply laws to specific cases to settle a dispute and do not provide generally applicable answers.[40] That said, the interpretation of international legal bodies does have persuasive value, and they aim to be consistent with their own precedents and look to other courts for guidance, and decisions of the ICJ carry significant persuasive value.

VCLT 'subsequent agreements', 'subsequent practice', and 'supplementary forms of practice'

The 1969 VCLT provides general provisions under Articles 11–17 concerning the consent of states to be bound by treaty provisions, but these do not extend to decisions of treaty institutions. States are not legally bound under the 1969 VCLT to the decisions of treaty institutions, but Article 31 VCLT provides rules of interpretation of treaties which include 'subsequent agreements', 'subsequent practice', and 'other subsequent practices' between parties.[41]

The ICJ, in the *legality of the use of nuclear weapons in armed conflict* case, found that Article 31(3)(b) 'subsequent practices' are applicable to the practices of IOs;[42] thus, if COPs are recognised as IOs, then their 'activities' may be relevant to treaty interpretation. The *Antarctic whaling* case found Article 31(3)(a) 'subsequent agreements' to include modifications to the treaty, adopted through the amendment procedures provided for in the parent treaty, or through the agreement of supplementary protocols to the parent treaty.[43] Recommendations of the whaling commission amounted to self-standing 'subsequent agreements' and were relevant to the interpretation of the parent convention or its schedule. Thus, self-standing subsequent agreements between parties, such as protocols and modifications to treaties by parties, may amount to 'subsequent agreements'. Whilst such modifications are used by parties from time to time, the most common way in which interpretation of the parent treaties takes place is through treaty institutions, such as through COPs.

Can COP decisions be seen as 'subsequent agreements' under Article 31(3)(a)? One related legal discussion suggests that parties may act to form 'subsequent agreements' within the plenary organs of the treaty. The decision taken at the European Council to label European currency as 'the Euro' was seen to be a 'subsequent agreement' under Article 31(3)(a) because states were seen to be acting in their individual capacity as government representatives.[44] Thus, consideration must be given to the content and all the circumstances in which the decision was adopted to determine if parties are meeting as government representatives or within their capacity as members of a plenary organ. The *Euro case* does not give any precedent to treaty institutions that act within their own capacity, rather than as government representatives.

The *Clove Cigarettes case* decision by the WTO Appellate Body found that decisions made by plenary organs may qualify as 'subsequent agreements' between parties[45] when the agreement constitutes a further authentic element of interpretation of the treaty and the parties acted as members of the constituent instrument of an international organisation, not institutionally as members of the respective

plenary organ.[46] In the *Antarctic whaling* case, the ICJ saw that the use of consensus voting (or unanimous voting) was relevant in this respect. If the decision-making mechanism used by the plenary organ, in this case the International Whaling Commission, was by consensus or unanimous voting, then the decisions it made could be seen relevant to Article 31(3)(a).[47] The ICJ cautions that agreements adopted without the support of the parties would not be regarded as 'subsequent agreements'. This suggests that decisions made by plenary organs by majority voting or opt-out decisions would not fall within the provisions of Article 31; however, provisions agreed by consensus, such as at the CBD and UNFCCC COP, could form 'subsequent agreements'.

Article 32 1969 VCLT provides 'supplementary means' of interpretation and recognises practices of organisations in their 'own right', separate to the practice of parties, may be relevant to treaty interpretation.[48] In an Advisory Opinion, the ICJ refers to the acts of organs themselves as relevant for the interpretation of the constituent treaty. Further, in the case of the *Constitution of the Maritime Safety Committee*, the ICJ interprets the treaty in relation to its general purposes and the special functions of the Maritime Safety Committee,[49] thus opening the door to look to other 'organs' of treaties, such as COPs, when interpreting treaties.

Ultimately, the legal status of COP decisions depends on the individual treaty provisions and the rules of procedure. Depending on the circumstances, in limited cases, decisions made by institutional bodies, including by consensus, have been used to interpret treaty provisions under the 1969 VCLT as 'subsequent agreements', their acts as 'subsequent practice', and as 'supplementary forms of practice'. This indicates that the normative output of institutional institutions can, to some extent, be legally recognised, and COP decisions taken by consensus may be considered, together with context, in the interpretation of the treaty. Overall international courts and tribunals rarely engage with 'binding' treaty provisions from international environmental law, let alone the 'non-binding' output from treaty institutions, yet the outputs of COPs can be influential, and this indicates that the legal source is not the key determining factor in relation to making effective international environmental law. The following sections of this chapter analyse how far the processes of COP decision making meet the interactive legal critieria.

Decision-making by COPs

COPs are in a unique position to further MEA implementation and can steer decisions to be agreed which are not just politically minded but scientifically relevant by encouraging engagement with scientific dialogue through processes such as the creation of advisory subsidiary bodies.[50] COPs can create a space to positively encourage parties to comply with legal obligations and promote implementation, including through the involvement of non-state actors.[51] The decision-making processes adopted by COPs are important as they create dynamics which can facilitate bolder decisions for environmental protection or hinder them. The following sections consider the value of decision-making by unanimity, majority, and consensus and how they relate to interactive law.

Unanimous decision-making

Activities such as formally amending treaty text, amending appendices and annexes, and concluding protocols generally require unanimous consent by parties. The requirement of consent is seen as a key protection against unwanted legally binding commitments, a safeguard for state sovereignty, and an assurance of legitimacy.[52] Even so, requiring consent from all parties is a significant limitation to achieving sufficient global ambition for international environmental law, and calls have been made to move away from the consensus model for over a half century.[53] The general requirement of unanimous consent has obvious drawbacks; it prevents MEAs from being able to accommodate community interests, including environmental interests, in a truly satisfactory manner[54] and hinders the creation of 'just, fair, and inclusive' processes which prioritise environmental issues.

Majority voting

It is rare that legally 'binding' provisions at the international level will be agreed without unanimous consent of the parties, although the Montreal Protocol is an exception and contains provisions to agree on the scope, amount, and timing of adjustments of controlled substances by majority voting: this procedure requires a simple majority from both developing and developed countries to agree to any veto, thus reducing the ability of a few high-chlorofluorocarbon-producing countries to block new, tighter adjustments.[55] The Montreal Protocol has been heralded as an exemplar of successful international environmental regulation, based upon scientific rather than politically decided goals.[56] Majority voting has never had to be used in the Montreal Protocol, suggesting that the option of majority is sufficient to motivate parties to more readily reach consensus. Majority decision-making has also been adopted by the Global Environmental Facility (GEF).[57] That said, generally, MEAs are unwilling to agree to majority decision-making. Whilst rule 40 of the CBD rules of procedure could allow for 2/3 majority voting if no decision can be reached by consensus, this option has never been used, illustrating the difficulty of unwillingness of parties to use voting that limits their sovereign rights.

A key advantage of majority voting is its efficiency and effectiveness due to the reduced emphasis on minority parties' positions seeking to block proposals. Focusing on a critical mass approach to governance[58] allows environmental issues to be prioritised, and concerns of 'just, fair, and inclusive' decision-making can be addressed through weighted systems across negotiating coalitions such as that adopted by the Montreal Protocol, which can protect minority rights by preserving anonymity and neutrality so that no voters are privileged above others.[59] Thus, majority decision-making, when carefully thought out, can facilitate interactive processes.

Consensus decision-making

Consensus decision-making is the most common form of decision-making adopted by MEAs[60] and is a dynamic way of reaching agreement between all members of a group where the group of parties work together to find common ground on agreements. A key defining element of consensus decision-making is the absence of an

applied veto,[61] indicating that there must be no formal objections, and to reach consensus, everyone must at least be able to live with the agreement. The UN Convention on the Law of the Seas defines *consensus* as the 'absence of formal objection to a decision by Party at that meeting'.[62] Consensus decision-making at COPs has led to the creation of a significant body of normative instruments.

Consensus decision-making softens the requirement of unanimous consent and still gives COPs a degree of autonomy from individual parties. This step back from state sovereignty is often justified in international law because states are seen to have inherently given their consent for COP activity by signing and ratifying the parent treaty, so in this sense, any obligations that the COP creates are 'self-imposed', and the legitimacy of COP decisions is often not contested.[63] However it is framed, consensus and majority voting soften state consent, allow some autonomy in decision-making, and open up the possibility of more result-orientated decision-making without the constraint of unanimous multilateral agreement.[64]

Individual consent or autonomy is replaced by a 'community consciousness' created within forums such as COPs. When voting processes are 'consensual', at first glance, it is hard to see autonomy from the state, but the process itself means that a state may be bound to a legal obligation to which it would not have agreed but which 'crystallised' without, or despite, its input. In this way, the consensus decision-making process, to some extent, creates a space for autonomy where community consent can displace individual consent.[65] On the other hand, gaining global consent for international commitments means that decisions are led by the least-ambitious state's interests, and only weak provisions will be agreed, or 'lowest-common denominator' outcomes,[66] meaning, progress is dictated by the slowest vessel;[67] thus, environmental issues are not prioritised.

Interactive law sees the role of COPs in creating 'shared understandings' as a potential opportunity for making effective international environmental law. COPs can create opportunities for social learning and persuasion and for parties to be directed by deliberative processes when the dynamics and influence of all relevant actors at COPs are 'just, fair, and inclusive'. Effective participation for certain actors representing less-dominant values should be empowered in decision-making[68] and is key to develop truly representative shared understandings at COP which prioritise the environment. In turn, this can educate and persuade parties to pass ambitious decisions and deviate from their state position.[69] That said, achieving these dynamics at COPs is very challenging, given the state-led nature of the process, power struggles, and the diverse positions that COPs accommodate.

Consensus decision-making at CBD COP – a case study

The following socio-legal analysis analyses decision-making at the CBD COP to better understand the challenges to achieving interactive decision-making. Doctrinal sources, data from a micro-ethnography of CBD COP 13 in 2016, Cancun, Mexico, and COP 15 in 2022 Montreal, Canada, and interviews with delegates of CBD COP 13 are studied to illustrate the process of consensus decision-making and the roles of different actors in developing shared understandings at COP.

Before COP

Consensus decision-making at the CBD is the final stage of an ongoing process formed of a two-year cycle. This final stage of negotiation, draws on outcomes of intersessional meetings where parties have already negotiated and agreed on draft decisions, shaped by written submissions from a wide range of actors, technical studies, and outcomes of expert group meetings and working groups. Two key intersessional meetings are the Subsidiary Body on Scientific, Technical, and Technological Advice (SSBSTA) and the Subsidiary Body on Implementation (SBI). For COP 13, the CBD secretariat drafted agendas and distributed background documents for parties in advance, and consensus decision-making was used to agree on draft decisions.[70] Pre-COP meetings of working groups take place, for example, on Article 8(j), indigenous peoples and local communities, protected areas, and the Review of Implementation of the Convention (WGRI). Working group recommendations to COP can provide a forum for negotiations of new instruments under the Convention and were intended to play a key role in developing the Post-2020 GBF. Regional, sub-regional, and group meetings also take place, such as Like-Minded Mega Diverse Countries, to promote common interests and priorities to feed into COP.

During COP

MEETING OF THE HIGH-LEVEL SEGMENT

A high-level segment meeting was held at the start of CBD COP 13, with the theme of 'Mainstreaming Biodiversity for Well-Being', consisting of ministers and high-level delegation members, with ministers of environment; heads of delegation; ministers; high-level representatives of the agriculture, tourism, fisheries, and forestry sectors; representatives of national and international organisations; local authorities and sub-national governments; the private sector; indigenous peoples and local communities; and youth. The high-level segment agreed on 'the Cancun Declaration on mainstreaming the conservation and sustainable use of biodiversity for well-being' (2016). Governments 'committed' in this declaration to 'work at all levels within our governments and across all sectors to mainstream biodiversity, establishing effective institutional, legislative and regulatory frameworks.'[71]

At COP 15 Part 1, Kunming 2021, a ministerial declaration was adopted: 'Ecological Civilization: Building a Shared Future for All Life on Earth'.[72] At Part 2, the meeting of the high-level minsters took place towards the end of the two-week negotiations.

PLENARY WORKING GROUP

Concurrent meetings of the CBD COP 13, COP-MOP8 of the Cartagena Protocol, and COP/MOP2 of the Nagoya Protocol were held. An agenda, drafted by the CBD secretariat and based upon recommendations from the subsidiary meetings, formed the beginnings of the consensus decision-making process. Parties can make representations on each agenda item and propose suggestions to alter the text; with

193 parties present, this was a lengthy process. Observers can propose changes to the text of draft decisions after all party interventions but must be supported by two parties to officially form part of the proceedings. Once consensus has been achieved, the text of the agenda item is adjusted to reflect the agreement between parties, and potentially other supported observers, and this forms the basis of the COP decision officially adopted at the end of the COP. Unagreed text remains in square brackets and is the key focus of negotiations.

CONTACT GROUPS

For controversial issues, the chair may call smaller informal groups of interested delegates to try to find common understanding or agreement and to find acceptable text through consensus. A typical first group called by the chair is called the 'contact group', where only certain parties can make representations. These groups discuss contentious matters and can run for many hours/days while parties battle out an acceptable text. At CBD COP 13, contact groups included negotiations on agenda items for resource mobilisation, synthetic biology, and marine and coastal biodiversity: ecologically or biologically significant marine areas. Contact groups operate less formally than the COP and do not have to follow its official rules of procedure. Contact groups may be open or closed to all delegates and report to the working group, who then reports to the plenary session.

FRIENDS OF THE CHAIR

The chair may call another informal negotiation group called 'friends of the chair'. This consists of a few prominent negotiators invited by the working group chair to develop a consensus proposal on a specific issue to present to working groups. These are closed groups and not open to all delegates.

HUDDLES

The chair may also call an informal closed small group called a 'huddle', a spontaneously formed group used when a small number of parties have different views. Huddles are more ad hoc than contact groups and only attended by specific parties as requested by the chair. They take place during plenary working groups sessions or in the corridors and were an almost-daily occurrence at CBD COP 13. The changing aspects of smaller decision-making groups are particularly interesting, as clear dynamics can manifest according to the power and privilege of certain negotiators, or even their physical strength and height.[73]

SIDE EVENTS

The CBD COP is more than the sessions of working groups; a variety of events take place during the COP meetings, including volunteer side events hosted by individual parties on country-specific initiatives, international and national

NGOs, international organisations, business groups, intergovernmental bodies, and financial organisations. Side events are generally well attended by parties and other delegates, and they enrich discussions and promote learning relevant to agenda items.

Other events include partnership events, such as the Rio Conventions Pavilion, linking the Rio Conventions on biodiversity, climate change, and sustainable land management; the Biodiversity-Related Conventions; the Business and Biodiversity forum, which invites businesses to commit to the CBD objectives. A Communication, Education, and Public Awareness (CEPA) event where parties and organisations highlight best implementation practices and showcase work towards achieving the three objectives of the CBD. The Global Legislators Organisation, an international organisation comprising of national parliamentarians from over 80 countries committed to developing and overseeing the implementation of laws in pursuit of sustainable development. As well as these events, the main halls are dedicated to promotional materials from NGOs, a civil society publication (ECO), and the Earth Negotiations Bulletin, a publication form an independent reporting service.

NON-PARTY DELEGATES

Parties are the primary participants at COPs and have the power to make decisions and bear the responsibility of meeting legal commitments under the CBD. There are key procedural limitations to any official role of non-parties in consensus decision-making. For example, in plenary group sessions, due to time constraints, representations from non-parties were often not allowed or limited. In contact groups, whilst non-parties are generally allowed, they cannot contribute in any formal way to the discussions. Friends of the chair and huddles are closed groups. These demonstrate limitations to non-party involvement in consensus decision-making, particularly in politically controversial matters, and thus place a limit to the ability of non-parties to contribute to shared understandings at COP.

That said, COP is the final stage of a two-year process which consists of a wide range of participants at different levels of governance who influence shared understandings. COPs attract a wide range of non-parties, such as representatives from the United States; observers from the UN and its specialised agencies, for example, FAO; certain groups, such as education, women, children and youth, and farmers; non-governmental organisations (NGOs); business and industry; science and technology; sub-national actors; cities, regions, and local authorities; trade unions; and media. Observers participate at the COP by attending preparatory meetings of key caucuses and civil society networks, such as the CBD Alliance, the International Indigenous Forum on Biodiversity, the Global Youth Biodiversity Network, the Women's Caucus, and the Indigenous Women's Biodiversity Network; they discuss recommendations with party delegations, the secretariat, and national focal points, often in advance of the COP; prepare and deliver oral statements; present at or attend side events; and help track and share information about the negotiations.

At COP 13, the women's caucus successfully campaigned parties to support better recognition of gender in its decisions. Parties supporting the proposals on gender were given a broach to wear, and proposals were made and supported by several parties as a result of this campaign, culminating in action target 23 on gender in the Post-2020 GBF.[74]

Each COP is unique, hosting a different combination of actors and events, yet the case study illustrates a broader point – that the action of parties at COPs cannot be seen in a vacuum from a range of influences and the atmosphere generated by its participants, which shape and influence the direction of discussions and, ultimately, the text agreed. Together, CBD COP delegates and those that have had input towards the COP form a unique collaboration which develop shared understandings around international biodiversity law.

Thematic analysis of actors and their influence in decision-making at COP 13

The findings from the thematic analysis of interviews with actors at COP 13 and their influence in decision-making reveal six key themes (see Table 3.1): (1) a hierarchy or participation of parties; (2) missing state sectors; (3) NGOs and researchers as key collaborators; (4) limited business engagement; (5) elevated position of IPLC; (6) the key influence of the secretariat of the CBD. These themes illustrate the unbalanced dynamics in decision-making processes at CBD COP 13 and the varied levels of influence of parties and non-parties on the development of shared understandings.

Table 3.1 Themes from interview data relating to CBD COP 13

Theme	*Example extract from data*
1. A hierarchy of participation of parties	*Each government is represented, and each government is heard but this doesn't mean each government's interests are reflected in the decisions. A decision adopted on the basis of consensus doesn't reflect all the governments' views. I can see that different regions have different influential capacity on different decisions*. INT 14 Secretariat of the CBD
2. Missing state sectors	*The High-level segment was basically only ministers of the environment. In Paris suddenly other ministers were present not just ministers of the environment. It became a high-level political development issue. At the Cancun High level segment there were less than 10 ministers from other sectors present*. LA6 Party Delegate Latin America and Caribbean Group

(*Continued*)

Table 3.1 (Continued)

Theme	*Example extract from data*
3. NGOs and researchers as key collaborators	*Civil society is engaged more and more within proper political spaces at the CBD COP and country level. I am here representing my country and I am in civil society, whilst I have the hat of a party delegate on I have a clear interest in civil society. Civil society has gained more and more formal spaces, they are very successful and productive. If they were not, we would be way further behind in terms of concrete actions. Farmers, indigenous peoples, NGOs, research centres, they share their experiences and insight and ideas on conservation*. LA 6 Party Delegate Latin America and Caribbean Group
4. Limited business engagement	*A lot of businesses are not interested in biodiversity, this is very different from the climate change process. In climate change there is a huge conflict of interests with business so business care about the decisions and they will try to influence the decisions such as agriculture, in their favour*. INT 15 International Coalition of NGOs
5. Elevated position of indigenous peoples and local communities	*Indigenous people are an important group. Article 8j set up a working group, I originally thought this was a thought club, but I have changed my mind. In this group Indigenous people and local communities have equal standing alongside government representatives, this gives them a lot of attention in other I and the role they play there due to this standing in the working group. They are strong*. WEO11 Education Western European and Other Group
6. The key influence of the secretariat of the CBD	This theme will be discussed in depth in Chapter 4.

The themes highlight the unbalanced dynamics of participation of parties, with higher economic countries having a stronger influence on decisions due to well-prepared and large delegations as compared to smaller, under-resourced delegations from lower economic countries. There is under-representation of economic sectors from trade, agriculture, fisheries, forestry, mining, water management, and energy production. NGOs are seen as key collaborators adopting vital roles through the provision of funding, policy research, and development to parties. For example, some lower economic countries were funded by NGOs to attend the COP and had influence on the direction of their negotiations. Business was under-represented at CBD COP 13; since 2006, businesses have been encouraged to engage with the

CBD and to 'adopt practices and strategies that contribute to achieving the goals and objectives of the Convention and the Aichi Targets'.[75] There is a 'business and biodiversity' agenda, a Global Partnership for Business and Biodiversity and a Business and Biodiversity Forum. In 2017, the Business and Biodiversity Pledge had 141 signatories, but most multi-national corporations have not signed, and business involvement is limited.[76] IPLC was seen to hold an elevated position and influence in negotiations.

Discussion

The analysis finds unbalanced dynamics between parties within consensus decision-making, with higher economic parties having greater ability to influence decision-making. This supports understandings that whilst consensus decision-making may be inclusive to all parties, it is not 'fair and just'. COP outputs do not fully reflect the shared understandings of all parties; instead, they reflect the dominant views and understandings of privileged parties. There was poor representation of parties from lower economic countries and those parties with smaller delegations, who are most impacted by biodiversity loss and bear the burden of responsibility for hosting key areas of global biodiversity; their just and fair involvement in decision-making is crucial in the formulation of interactive law.

Within parties, the economic sectors were under-represented, and business. The presence of economic and business actors is a double-edged sword; whilst they may exert strong influence which can impede progress towards effective environmental goals,[77] they would benefit from exposure to processes of social learning and persuasion as their regulation and actions are key to the attainment of biodiversity goals. Economic sectors exert immense pressure on biodiversity;[78] for example, agricultural land use is responsible for 80% of global deforestation, and 33% of commercial fish populations are over-exploited.[79] 'Mainstreaming' aims to address biodiversity loss within the sectors where it matters the most, rather than leaving it as the sole remit of conservation bodies, whose actions can only achieve a certain level of impact.[80] Despite repeated attempts and a priority of the CBD, including the theme of mainstreaming at COP 13, this goal has not been sufficiently realised at global or national levels.[81]

For interviewee WEO1:

> The CBD feels like the 'converted speaking to the converted'. You know what they will say, but the CBD does not reach out to those who really need to be converted, they are not involved.

COP 14 and 15 have seen more business engagement.[82] Their position in CBD processes should be carefully thought out. So far, their presence at negotiations has been found to be problematic, with a focus on profit-making as opposed to biodiversity conservation, and a neoliberal framing of biodiversity by the CBD risks attainment of conservation objectives.[83]

The findings of the analysis support the inclusive reputation of the CBD to non-party actors[84] and are in line with a general recognition in international governance that governments no longer have sole command to represent public interests in decision-making.[85] Whilst formal independence given to non-party actors is relatively small, they were found to be influential and key collaborators in decision-making processes, and they contribute to the development of shared understandings at COP. Formally, NGOs were present and influential within party delegations and made representations during consensus decision-making subject to time constraints.

Informally, NGOs are key in knowledge production and dissemination. Before COP, NGOs use domestic political power through lobbying, advocacy, and pressure to influence negotiations on international issues and influence state policies,[86] spread information, bring legal actions, and work with media and academia.[87] NGOs support the development of key official publications, such as the 5th Global Biodiversity Outlook, and provide a monitoring role through the provision of information on compliance.[88] During the COP, NGOs play a role in facilitating negotiations with their expertise through daily reports for delegates on key points of negotiation; they act as 'whistle-blowers', drawing attention to urgent concerns,[89] and enter into partnerships such as memorandums of understanding with the secretariat to enhance cooperation and collaboration between the CBD and NGOs to facilitate implementation.[90]

Initiatives such as the 'Sharm El-Sheikh to Kunming Action Agenda for Nature and People', agreed at CBD COP 14, aim to raise awareness and inspire positive action from nonstate and sub-national stakeholders in support of nature in line with the Post-2020 GBF.[91] To date, 393 voluntary commitments have been made from the private sector, NGOs, academic and research institutes, governments, individuals, IPLC, the UN system, individuals, and youth, demonstrating the range of non-state actors invested in the CBD process.

This analysis talks of broad groups of non-state actors, 'NGO', 'IPLC', 'business'; in fact, great diversity exists within each 'category', reflecting different interests, priorities, and policy angles at different scales of governance. It is problematic to generalise categories of 'NGOs', as each hold subjective positions according to their mandates and there are differing levels of participation between NGOs at COP.

Lessons can be learned from climate scholarship, where NGO participation and influence in climate change politics were found to vary between higher and lower economic countries, with NGOs from higher economic countries enjoying better representation in international climate change negotiations.[92] For this reason, only parts of 'global civil society' are able to participate effectively in global arenas.[93] Non-state-actor involvement in climate negotiations and as governing partners, formally and informally, is complex.[94] There are clear differences between the motivations of non-state actors in climate negotiations, and different categories of non-state actors have distinct governance profiles, to fulfil particular governance activities.[95] Non-state actions can lead to politically contentious outcomes and may not align with the priorities and needs of developing countries.[96]

The thematic analysis here suggests that IPLCs hold an elevated status and have a unique influence to shared understandings developed at COP, thus fulfilling the interactive requirements that decision-making be inclusive and prioritise environmental values to some extent. CBD Article 8(j) states that parties, as far as possible and appropriate, respect, preserve, and maintain knowledge, innovations, and practices of indigenous and local communities embodying traditional lifestyles; promote their wider application; and encourage the equitable sharing of the benefits. CBD working group 8j was established in 1998. IPLCs are on an equal footing to state actors in the working group or 'quasi-state actors'.[97] Whilst IPLC submissions in consensus decision-making are not officially taken into account unless supported by two parties, IPLC delegates can influence negotiations by enrolling, shaming, and reinforcing state actors.[98] Heterogeneity exists within IPLC, and current governance processes fail to sufficiently recognise the diversity of interests and values that each group represents or sufficiently allow for consideration of their different values and interests.[99]

Overall, the analysis exposes participation in consensus decision-making at the CBD COP as unbalanced, which impedes the creation of interactive international environmental law. Further, absent 'actors' will not be exposed to social processes to educate, persuade, and facilitate implementation. The analysis finds that privileged parties from high economic countries are the dominant actors in decision-making. Parties from lower economic countries lack the resources and expertise to participate on an equal footing, and their agendas may be directed by funders from higher economic countries. Lack of political will or motivation to change 'business as usual' excludes sufficient involvement from economic sectors or business, and whilst non-state actors can participate, the dynamics are complex, and they are not on an equal footing to parties.

Achieving 'just, fair, and inclusive' participation which prioritises environmental issues at COP is complex and would involve significant change in terms of the procedures of the CBD COP. Equal participation of lower economic countries would be needed, strengthened inclusion of representations from certain groups such as IPLC, NGOs, youth, and women into decisions of the CBD COP, as well as allowing business and economic sectors to participate without controlling the agenda.

Alternative decision-making models should also be considered in light of the interactive requirement that they are 'just, fair, and inclusive' and prioritise environmental issues. The Montreal Protocol requires a simple majority of both developed and developing countries and demonstrates the ability of international environmental law to accommodate provisions to further equity and to adopt effective decision-making procedures, enabling stronger environmental goals to be agreed and reached.

The approach adopted in the working group of the SDG process led by co-chairs and supported by the secretariat was heralded a success.[100] The SDG co-chairs departed from strict consensus decision-making and refused to allow scrutinisation of text 'word for word' by parties and instead 'held the pen' with the support from the secretariat to incorporate states' concerns and find appropriate compromises.[101]

The co-chairs and secretariat thus determined the order and agenda of topics of discussion, with participants working 'in parallel'; this required considerable political trust and led to a focus on topics, not on reactions to other member states' positions, and reduced sub-group 'ownership' of competing draft texts.[102] Interestingly, the co-chairs did not make use of smaller decision-making groups, as they saw that this would jeopardise broadly shared commitments being agreed, impact the overall consistency of agreements, reduce the chair's ability to suggest cross-issue deals, and be overly time-consuming.[103] Whilst this method of negotiation may have reduced individual state power, it overcame hurdles of agreeing consensus, which often makes text difficult to agree on, especially on politically charged issues,[104] whilst maintaining a grounding in shared understandings.

Consensus on the Post-2020 GBF was hard to reach, with over 1,800 square brackets of unresolved text remaining until the last day of COP 15.[105] Persistent differences between developed and developing countries remained, with developing countries highlighting the principle of equity in international environmental law and the need for support through finance and implementation.[106] On the penultimate day, the COP presidency proposed a 'take-it-or-leave-it' GBF text which was more ambitious than expected, and thanks to widespread support from NGOs, media, and the promise of financial support, it was adopted by the parties.[107] Similar to the SDG negotiations, strict consensus was departed from, and the presidency and secretariat 'took hold of the pen'.

'Just, fair, and inclusive' participation in the construction and reconstruction of legal obligations which prioritise environmental issues is key to develop interactive law by creating shared understandings, mutually constructing legal obligations, and providing a space for social learning. To achieve a truly representative social consensus with thousands of actors involved in a state-led process is challenging. Due to the legal constrictions of gaining consensus, only parties can negotiate the provisions agreed, and dominant parties overshadow the process; input from non-parties is valuable but ultimately curtailed by the procedure. Alternative decision-making procedures such as majority voting are preferrable and can better accommodate environmental issues by moving away from gaining strict consensus through negotiation of word-by-word text, instead placing focus on text underpinned by broadly shared values while retaining focus on the scientific basis for the required environmental goals.

Conclusion

This chapter began by arguing that COPs can be considered a type of IO with implied powers to act somewhat independently of parties. It illustrates how consensus decision-making can operate to soften state consent and potentially produce agreements that push states towards stronger environmental goals and targets. COP outputs have been interpreted as 'subsequent agreements', their acts as 'subsequent practice', and as 'supplementary forms of practice' under the VCLT, which grants them some legal authority. Yet ultimately, COPs are dependent on the states that

create them both for the authority to exist, to make decisions, and to fund their actions. Despite the recognition of COPs as legal forums with some autonomy and their outputs having been recognised as legal authority, international jurisprudence rarely references treaty provisions agreed upon unanimously by parties, let alone decisions and other outputs of COPs such as goals and targets agreed by consensus. Which invites the question if legal source is the key determinant of effective international environmental law.

Interactive law proposes an alternative vision for international environmental law, which sees that the source is not necessarily the predominant factor but instead that effective interactive law arises when certain requirements are fulfilled in legal or non-legal forums. This chapter focuses on the importance of developing shared understandings at COPs and in other international policy forums that are 'just, fair, and inclusive' and prioritise environmental issues. Autonomous activity observed at the CBD COP is seen in a positive light towards forming more representative shared understandings which prioritise environmental issues. The thematic analysis suggests that the decision-making process is shaped by both state and non-state actors at multiple governance levels who contribute to the shared understandings. Yet the dynamics are far from 'just, fair, and inclusive', with unbalanced dynamics of participation between and within different actor groups. The effect of unbalanced participation impedes the creation of interactive international environmental law, as the obligations agreed upon represent those most dominant in the process who do not prioritise environmental issues.

Achieving 'fair, just, and inclusive' decision-making can be a goal for international environmental institutions, and lessons can be learned from other forums. For example, the use of majority decision-making in the Montreal Protocol on ozone-depleting substances and the move away from strict consensus in SDG working groups, both of which better fulfil the criteria of interactive law. Secretariats can play a key role in facilitating more equitable decision-making, and this is considered in more depth in Chapter 4.

A final point of reflection is that COP is only one part of a process, and whilst an important stage, the implementation of international environmental law consists of complex, intertwined, multi-level governance processes in which multiple actors interact to create social meanings around international environmental law. Understanding COP as one arena of many for creating 'shared understandings' between different communities of practice which develop international environmental law allows the dynamics being witnessed to be placed in a more holistic context, as will form the discussion in Chapter 7.

Notes

1 Robin Churchill and Geir Ulfstein, "Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law" (2000) 94(4) American Journal of International Law 623. Churchill and Ulfstein argue that the UNFCCC is an autonomous institution in their seminal paper.

2 Duncan French, "Finding Autonomy in International Law and Governance" (2009) 21(2) Journal Environmental Law 255. French analyses a statement by the UN Office of Legal Affairs (UNOLA) relating to the separate legal personality and the statement of principles of the UNFCCC.
3 Elisa Morgera and Elsa Tsioumani, "Yesterday, Today, and Tomorrow: Looking Afresh at the Convention on Biological Diversity" (2011) 21(1) Yearbook of International Environmental Law 3. CBD COP10 decisions relating to indigenous and local communities and traditional knowledge were found to be legal outputs of the CBD COP which contributed to the evolution of the legal concept of benefit sharing.
4 Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (CUP 2010). The UNFCCC COP was found to reflect shared understandings of the actors present.
5 Kenneth MacDonald, "The Devil Is in the (Bio)Diversity: Private Sector 'Engagement' and the Restructuring of Biodiversity Conservation" (2010) 42(3) Antipode 513. Business actors were found to shape contemporary biodiversity conservation (through institutions) to serve broader political ideas, such as capitalist expansion.
6 Catherine Corson and others, "Everyone's Solution? Defining and Redefining Protected Areas at the Convention on Biological Diversity" (2014) 12(2) Conservation and Society 190. The CBD COP was seen to align disparate actors to construct the concept of protected areas (PAs) as the best means of conservation.
7 Deborah Scott, "Co-Producing Soft Law and Uncertain Knowledge: Biofuels and Synthetic Biology at the UN Convention on Biological Diversity" (PhD Thesis, Graduate School-New Brunswick Rutgers 2015). Knowledge politics was found to play a key role in decision-making at the CBD and in developing soft law on biofuels and synthetic biology.
8 Duncan French, "Finding Autonomy in International Law and Governance" (2009) 21(2) Journal Environmental Law 255. French analyses a statement by the UN Office of Legal Affairs (UNOLA) relating to the separate legal personality and the statement of principles of the UNFCCC.
9 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.
10 F Biermann, "The Case for a World Environment Organization" (2000) 42(9) Environment: Science and Policy for Sustainable Development 22.
11 Agreement establishing the World Trade Organisation (entered into force 15 April 1994) 1867 UNTS 154, 33 ILM 1144 Article IV 1. The WTO Agreement establishes a ministerial conference that meets at least every two years and has authority to take decisions on all matters under any of the multilateral trade agreements.
12 Treaty on the Non-Proliferation of Nuclear Weapons 1 July 1968 729 UNTS 161 Article VIII (3). A review conference is held every five years which makes decisions by consensus. It reviews the articles of the NPT and makes recommendations and formulates conclusions on the application and interpretation of the provisions of the NPT.
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14 UNEP & Earthscan, *Global Environment Outlook 2000* (United Nations 1999).
15 Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd edn, OUP 2009).
16 Ibid (n1 Churchill) Churchill and Ulfstein argue that the UNFCCC is an autonomous institution.
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34 French (n8) 278. French questions the level of autonomy of treaty institutions vis-à-vis an individual state party or even, in some instances, a small minority of state parties.
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41 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331. Article 31. GENERAL RULE OF INTERPRETATION.
    1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
    2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
        (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
        (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
    3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

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Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.
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4 The role of secretariats in international environmental governance

Introduction

A second challenge for international environmental governance concerns understanding the role of secretariats. Lawyers generally see secretariats as the administrative support organs of international organisations (IOs); with clear functions legally defined by the parent treaty, less consideration has been given to their important role as semi-autonomous influential actors. Using a socio-legal analysis, this chapter contributes to the growing interdisciplinary body of literature on secretariats. The chapter begins by undertaking an analysis of the legal personality of secretariats. Next, an interdisciplinary literature review uncovers ways in which secretariats can act independently from their institutional bodies and considers the role of the secretariats of the CBD, UNFCCC, and the Division for Sustainable Development Goals. Then the results of a socio-legal analysis are presented.

The key findings of the chapter demonstrate that: (1) The legal powers attributed to secretariats through soft law constantly change, and the willingness of institutional bodies to formally or informally elaborate or impede the powers of secretariats depends upon the shared understandings developed within treaty institutions. (2) Some activities of secretariats go beyond their legal mandates but are within the shared understandings of institutional bodies. (3) Secretariats have a unique influence on shared understandings in institutional decision-making and during implementation. (4) Secretariats can be key actors in facilitating 'just, equitable, and inclusive' decision-making processes that prioritise the environment.

The legal personality of secretariats

Secretariats are created by parties to a treaty, or member states in the case of the SDGs, to provide administrative support, assist them in management and implementation. They are bodies with a level of permanence, consisting of international civil servants who are subject to a mandate and formal rules and collectively controlled by parties. Depending upon the expertise required, secretariats generally have a fixed location, are staffed by mostly permanent international civil servants appointed on merit, with a diverse range of scientific, technical, economic, legal, policy, and administrative expertise, which often goes beyond the expertise of party delegates.[1]

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The operational structure of secretariats typically consists of support to parties to carry out their official business through a vertical 'hierarchical rule-based organisation' with an administrative head at the top,[2] the executive secretariat. Secretariats vary in size: in 2023, the CBD secretariat had 110 staff[3]; the UNFCCC secretariat over 450 staff[4]; and the Division for Sustainable Development Goals acting as the secretariat for SDGs7 staff. Budgets also vary: $18.4 million for CBD secretariat in 2022,[5] and EUR 178.2 million for the UNFCCC secretariat in 2022–23.[6]

Remarkably, no international law expressly references the role of secretariats within IOs. In Chapter 3, the legal personality of IOs is studied under the 1969 Vienna Convention on the Law of Treaties (VCLT) and the doctrine of implied powers of IOs. The VCLT does not mention the role of secretariats, and it is hard to see how Articles 31 and 32 VCLT[7] can be helpfully used to understand secretariat activities. A further relevant convention, not yet in force, is the 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations (VCLTIO), although it does not elaborate on the role of secretariats.[8]

Legal understandings of the roles of secretariats have been developed through interpretation of their mandates, legal opinions, and by the International Law Commission. MEAs lay out the key functions of secretariats in the parent treaty,[9] which typically include organising meetings of the COP and subsidiary bodies, compiling and sending out reports, assisting parties, and coordinating with other relevant international bodies. For the SDGs, the Division for Sustainable Development Goals (DSDG) forms part of the United Nations Department of Economic and Social Affairs (UNDESA), more broadly part of the UN system, with no official legal mandate.

There is general agreement that secretariats possess independence to coordinate activities between MEAs and present the results of collaborations to COP for a decision.[10] Secretariats may also be instructed to prepare, organise, and document meetings through their rules of procedure[11] and are thus responsible for drafting provisional agendas for meetings, aided by the chairs and the Bureau.[12] Provisional agendas drafted by the secretariat form the basis upon which meetings, including COPs, take place, to discuss issues and make decisions. Provisional agendas are based on previous decisions taken during inter-sessional meetings and suggestions put forward by parties and are presented in advance to the Bureau. Nonetheless, the secretariat ultimately decides how the agenda and other information should be presented and thus plays a key role in bringing together all the issues, considering non-party contributions. Taking the lead in drafting documents is a significant power[13] and sets the initial direction of discussions, including through prioritisation of certain issues and introducing norms, and sets the tone of meetings.

More contentious, the subject of academic debate relates to the ability of secretariats to enter contractual arrangements with external bodies. A UN Office of Legal Affairs opinion recognises the legal personality of the secretariat of the UNFCCC;[14] whilst not a binding precedent, this is a significant finding from a respected body.[15] The International Law Commission has also recognised secretariats' legal personality to enter into memorandum of understandings with IOs.[16] The

VCLTIO states that an IO must be granted authority through its rules to enter into agreements with other IOs. In some cases, treaties grant powers to secretariats in this respect: Article 24(d) CBD gives powers to the secretariat to enter 'administrative and contractual arrangements with other relevant international bodies', granting it some independence from parties. Further, the wording 'as may be required for effective discharge of its functions' gives a wide proviso as to what arrangements can be made. Article 8(2)(f) UNFCCC grants the secretariat powers to enter administrative and contractual arrangements as may be required for the effective discharge of its functions, with the proviso that this is under the overall guidance of the COP. The ability of secretariats to enter into contracts with other organisations is contentious because it grants them independent legal personality and parties tend to be cautious about allowing secretariats too much independence.[17]

Alongside their mandates, soft law plays an important role in granting or restraining the powers of MEA secretariats and can be agreed relatively quickly within institutional bodies. For example, the CBD secretariat's powers were constrained in the development of the Post-2020 Global Biodiversity Framework (Post-2020 GBF).[18] An Open-Ended Working Group (OWEG) was established and tasked with advancing preparations for the development of the Post-2020 GBF through a COP decision, a process mostly managed by co-chairs representing parties. This marked a significant change from rule 8 of the CBD rules of procedure and the previous freedom given to the CBD secretariat to draft agendas for COPs.[19] A move towards a party-led process may reflect distrust in the CBD secretariat in light of concerns that they have overstepped their role in the past.[20]

Soft law has been used to further the powers of the UNFCCC secretariat, traditionally seen to be held in a straitjacket. Initially, powerful parties were unwilling to allow the secretariat to further the regime or act beyond its mandate due to a fear of the economic and social consequences of an effective climate regime.[21] That said, there have been significant developments to the climate regime over the last 16 years, including the adoption of the 1997 Kyoto Protocol and the 2015 Paris Agreement, and an organisational overhaul of the secretariat of the UNFCCC in 2020, 'to mobilize climate action towards global transformation to meet the targets of the Paris Agreement in an effective, efficient manner'.[22]

Not all secretariats are established by legal mandate. General Assembly resolution 70/299 authorises the Division for Sustainable Development Goals ('The SDG Division') to act as secretariat for the SDGs, to facilitate intergovernmental processes, including the High-Level Political Forum (HLPF) on the 2030 Agenda, and the SDGs.

International law can explain the evolving role of secretariats to some extent. It is clear from the case studies that the roles of secretariats are not stagnant and can change relatively quickly through COP or political decisions; thus, secretariats have the potential to adapt.[23] The formal mandate of secretariats is undoubtedly limited compared to other treaty institutions, such as COPs, and the secretariat is not prima facie a 'decision-maker'. The lack of guidance in international law regarding institutional bodies such as secretariats means that traditional legal theories can only go so far in formulating understandings of the autonomous activity by

secretariats. Despite the use of soft law to grant powers to secretariats, their work sometimes goes beyond their legal mandates – hard or soft; an alternative explanation through interactive law is that these activities are supported through the creation of shared understandings in institutional bodies which accept the independent activities of secretariats.

The functions of secretariats

Research on the secretariats of international environmental institutions demonstrates that they can act independently to parties. In 2009, the CBD secretariat was found to have significant influence on the intergovernmental cooperative process through conference facilitation, documentation, service provision to the CBD COP, and negotiation facilitation.[24] The CBD secretariat initiated the inclusion of certain provisions on other international agendas, such as the 'eco-system approach'. Their influence was attributed to administrative style and effective internal management. The study found that the CBD secretariat's role in knowledge brokerage had little effect on external stakeholders, yet 13 years later, information reports such as the 5th Global Biodiversity Outlook Reports[25] are used widely by governments, NGOs, the scientific community at large,[26] and the media.[27] The CBD secretariat's influence on capacity building has also expanded in the last decade, with increased powers to support parties.[28]

The UNFCCC secretariat plays an instrumental, influential, and proactive role in international climate governance, particularly in establishing strategic links and social networks with non-state actors,[29] including within education-specific communication networks in UNFCCC negotiations.[30] The UNFCCC secretariat facilitates interaction among parties, particularly developing countries; between party and non-party stakeholders; and with other UN bodies. The number of admitted observer organisations has increased from 177 at COP 1 in 1995 to 3,178 at COP 27 in 2022,[31] showing the increased participation at COP facilitated by the secretariat. The UNFCCC secretariat has helped develop the infrastructure for an enhanced transparency framework and design the global stocktake of the implementation of the Paris Agreement.

A study of ten secretariats finds that their activity varies; they potentially play important roles in knowledge brokerage, capacity building, and negotiation facilitation and can promote global legitimacy supporting the interests of less-powerful actors and promoting collective interests.[32] Explanations for the variations observed in the outcomes of secretariat activity are sought, and it is argued that despite their outwardly similar institutional and legal mandates, their influence varies. Key determinants of secretariat activity are found to be, firstly, the structure of the problem; secretariat influence is seen to be dependent on the political salience and scope of the decision at question.[33] Secondly, the people and procedures, for example, structural features, such as formal executive characteristics, administrative resources, and organisational competences.[34] Different 'administrative styles' and informal working routines allow secretariats to exert differing levels of autonomy.[35]

The SDG Division has similar functions to the secretariats of the CBD and UNFCCC. It provides analytical inputs for intergovernmental discussions on sustainable development and integrated policy responses on related thematic issues, such as ocean, water, and climate. The SDG Division leads the drafting of the Secretary-General's reports, such as the 'Global Sustainable Development Report', which aims to strengthen the science–policy interface. The SDG Division supports member states in preparing their voluntary national reviews, evaluates implementation of the 2030 agenda, and develops capacity building for integrated planning and policy design, linked to national planning processes in key sectoral areas. It facilitates advocacy and outreach to UN agencies, stakeholders, and partners and hosts an online platform for partnerships for SDGs and a platform for sustainable development knowledge.

The procedural format of the Open Working Group (OWG) and the summit of the UN General Assembly sessions for the 2030 Sustainable Development Agenda and SDGs differ from those at the CBD and UNFCCC, both in the political nature of the agreements, rather than legal, and in the style of decision-making. Rather than an agenda being drawn up by the secretariat and altered by individual states during consensus decision-making, here the co-chairs, supported by the secretariat, led the drafting of text. This may be seen as a reduction in the power of the secretariat as compared to the CBD and UNFCCC, although the secretariat advised the co-chairs on key issues and compromises emerging from parallel political discussions.[36]

Are the independent activities of secretariats problematic? Secretariats have been described as 'the Cinderellas' of environmental treaty regimes, and their important role in treaty implementation neglected.[37] The independent actions of secretariats are important to legitimise as they can be a vital contribution to the success of international environmental institutions.[38] Whilst legal scholars have vigorously debated the form, function, and autonomy of IOs in the discipline of international law (see Chapter 3), they have only paid token homage to secretariats, recognising them as an 'integral part' of free-standing treaty institutions, which themselves are distinct from parties, with their own law-making powers and compliance mechanisms.[39]

From traditional international legal perspectives, the activity of secretariats depends upon the legal powers bestowed upon them by the treaty and by the COP through soft-law provisions. Treaty institutions, including secretariats, can be considered on a spectrum depending on their independence from parties.[40] Secretariats have been seen to hold legal personality when entering into agreements with other organisations, but this only relates to a very specific action of secretariats. Secretariats have been vested with soft-law powers by COPs, such as drafting agendas, yet other activities are beyond their express legal mandates.

Important scholarship from international relations sheds light on theories which can conceptualise the activities of secretariats. Principal–agent theory can be applied to secretariats as subservient agents that can be controlled to varying degrees by their principals, the parties.[41] Jinnah observes that secretariats have

diverging interests from states' interests and can undertake activities that states did not explicitly demand,[42] and this can be explained through 'agency slack', which is characterised as unwanted independent action by an agent. Agency slack can be in the form of 'shirking', when the agent minimises the effort it exerts on the principals' behalf, or, perhaps more relevant to secretariats, 'slippage', when the agent moves policy away from the principals' desired outcome towards its own preferences.[43] Agency slack is seen as an independent action rather than an autonomous action: 'the range of independent actions available to an agent after the principal has established mechanisms of control for example by screening, monitoring and sanctioning mechanisms of the agent intended to constrain their behaviour'.[44] Spaces for autonomy are created through:

1. Difficulties of monitoring and controlling agents by multiple principles.[45]
2. Incomplete contracts, where the agent is left to decide how best to fulfil its mandates.[46]
3. State principals may choose to endow the agent with some degree of independence because 'participation by even a partially autonomous, neutral actor can increase efficiency and effect the legitimacy of individual and collective actions. This provides even powerful states with incentives to grant IOs substantial independence'.[47]

All these observations are potentially true of secretariats who are 'active participants' in international systems and not just the passive subjects of state power[48] and can be seen to act autonomously through limits to the multiple-state control system of secretariats and their broad mandates. From this view, international bureaucracies are seen problematically as actors with 'ideas, agendas and preferences of their own' and a threat to global democracy. Problems may arise if the agents have more knowledge than the principals, or if the goals between principal and agent are mismatched in some way.[49] Principal–agent theory is criticised for failing to recognise wider forces in environmental governance, such as structure and embeddedness.[50] It does not explain how secretariats can alter state's interests positively to prioritise environmental issues and to facilitate 'just, fair, and inclusive' processes.[51] Further, if principal and agents share the same goals, then the theory is defunct.[52]

A constructivist perspective sees that secretariats can influence shared understandings within international environmental institutions, including by their ability to influence state preferences,[53] by managing state interactions in particular ways and shaping how parties see their own interests.[54] They act as norm entrepreneurs, equalise power dynamics, and create new rules and institutions.[55] In a study of the management of regime overlap by secretariats in four related treaties, support is found for the 'agency diffusion' hypothesis.[56] Secretariats are seen as much more than 'administrative lackeys' but as emerging political actors in their own right acting as 'norm entrepreneurs', particularly in relation to the governance of overlapping regimes.[57]

Specifically, the CBD secretariat is found to have shaped understandings of parties of the biodiversity–climate change link by filtering, framing, and reiterating strategic representations in a more attractive way to developing countries, thus decreasing the divide in views between developed and developing countries. The CBD secretariat had no mandate to do this but acted within its discretionary limits to reconstruct shared understandings in this respect.[58] Jinnah proposes that secretariats can alter power relations through shaping ideas, relations, and institutions when two conditions are met:[59] firstly, when states disagree about what should be done and, secondly, when the secretariat possesses specialised expertise.

Results from thematic analysis

Table 4.1 Themes from interview data relating to the CBD secretariat

Theme	*Sub-theme*	*Example extract from data*
1. Direct influence on COP decision-making	1.1 Drafting agendas	'They draft the decisions; they are very knowledgeable people . . . have all the background . . . and write up documents for COP SSBSTA, ART 8j, etc. You are always a strong power, when you make the first draft of the decisions you can have a lot of influence in this way.' WEO 11 Education – Western European and Others Group
	1.2 Whispering in proposals	'In the decision-making process the secretariat should not make suggestions on the floor, proposals should come from the delegates or co-chair or friends of the chair however, proposals might be whispered in from the secretariat.' WEO 8 Party Delegate Western European and others group
	1.3 Suggesting compromise text	'They run around trying to get text agreed. If a point is not clear and they say the text is not practical then they will suggest another text that the government might find more suitable.' INT 13 UN Agency
	1.4 Testing ideas	'The secretariat tries to approach influential negotiators and they try to test ideas.' WEO8 Party Delegate Western European and Others Group

Theme	*Sub-theme*	*Example extract from data*
2. Indirect influence	2.1 Knowledgeable and expert actor	'The secretariat can shape and influence decisions. This sounds manipulative but they have experience and an in depth understanding. . . . [T]hey review text and documents and improve the content using their technical expertise.' LA6 Party delegate – Latin America and Caribbean Group
	2.2 Setting the tone	'They give the colour of the COP and this is very, very important as the colour of the COP makes the noise and the sounds. Different bodies come with lots of different views and the way the secretariat prepares these discussions is very, very important.' WEO 11 Education – Delegate Western European and Others Group
	2.3 Institutional memory	'They have the institutional memory, and they can bring back decisions or actions from the past into discussions to enlighten and relate to the present, this is important in an environment where delegates constantly change. The secretariat can give a policy political angle that is not reflected clearly otherwise.' LA6 Party delegate – Latin America and Caribbean Group
	2.4 Supporting developing countries	'The secretariat is developing-country biased; the draft decisions are biased towards the developing countries.' WE08 Party Delegate – Delegate Western European and Others Group
	2.5 A major influence	'The secretariat has a major influence, too much if you ask me. The secretariat is much too powerful. In a system where people are only negotiating every 2 years, the secretariat plays a heightened role.' WE08 Party Delegate – WEOG

(*Continued*)

Table 4.1 (Continued)

Theme	*Sub-theme*	*Example extract from data*
	2.6 Strengthening relationships with other MEAs	'The senior leadership is involved in many other MEAs and can highlight good things from other conventions.' LA6 Party Delegate – Latin America and Caribbean Group
3. Limits to autonomous activity of the CBD secretariat	3.1 State sovereignty	'Parties stress the need for them to make a clear request to the executive secretariat to produce a document and parties will stress if it has not been requested by the parties.' INT 12 UN Agency

The thematic analysis reveals that the CBD secretariat has a significant level of independence from parties and influences decision-making at COP. Direct influence on decision-making is seen through drafting agendas, recommendations, and conclusions of negotiations authorised by soft-law rules of procedure.

Beyond this, the CBD secretariat is seen to play a major role at meetings with direct influence on negotiations by interacting with parties and non-parties and facilitating agreement, by suggesting compromise text in difficult negotiations, by 'whispering in' proposals, by testing ideas through parties, and by the promotion of the interests of lower economic countries. Indirect influence on decision-making is seen through the knowledge, expertise, and institutional memory that the CBD secretariat brings during negotiations and other processes. The CBD secretariat is seen to 'colour the COP' and set the tone of CBD meetings.

These observed activities are not expressly authorised by COP yet are generally accepted. That said, while some interviewees see the role of the CBD secretariat in a positive light by improving the content of documents as a knowledgeable actor with expertise, institutional memory, and political awareness, others see the activity to be problematic and a threat to state led processes. An interviewee commented, 'The secretariat has a major influence, too much if you ask me', and noted bias in favour of lower economic countries. This is an interesting finding, considering the unbalanced, power-laden dynamics in decision-making at the CBD COP exposed in Chapter 3. An alternative interpretation suggests the CBD secretariat is an important actor in facilitating 'just, fair, and inclusive' decision-making that prioritises environmental issues.

Some interviewees highlight the limits or 'checks' to autonomous activity of the secretariat of the CBD. Parties have to request actions of the CBD secretariat; parties 'unpick' text drafted by the CBD secretariat during negotiations, and the Bureau and chairs of the COP monitor secretariat activity. Overall, the data in Table 4.1 supports findings that the CBD secretariat plays more than just a neutral role in negotiations and is an important and unique actor in shaping shared

understandings at CBD COP. Not all activities are expressly authorised in its legal mandate but instead can be seen to be generally accepted within the shared understandings of COP.

Discussion

International lawyers have paid token consideration to the distinct role of secretariats compared to political scientists, who have become increasingly aware of the importance of secretariats within treaty institutions, as semi-autonomous actors. The range of activities and divergence in secretariat activity is explained due to the structure of the political problem, different administrative styles, and the ability of secretariats to influence state preferences and to balance power dynamics, rather than their legal mandates. Yet it is proposed here that the (1) use of soft law to develop legal mandates and (2) the independent actions of secretariats reflect shared understandings within international environmental institutions, which can explain the changing nature of secretariat activities. The four key findings of the analysis are presented next.

Soft law and the evolution of secretariat activities

Secretariat activities change over time and can be amplified or constrained through soft law; further, some activities go beyond any express legal provision. These changes are argued to reflect the shared understandings of institutional and political bodies developed by party and non-party actors, which form the foundation of decisions taken. Bierman and others[60] argue that secretariats have similar institutional and legal mandates, and these cannot explain the significant variation in the activities of secretariats observed. To some extent, this is true; at first glance, legal mandates laid out in treaties for secretariats may be similar, yet these mandates change over time through soft law, and this influences the scope of actions taken by secretariats and can offer an explanation in the variation of activities to some extent.

The significant expansion of international climate law since 1992 includes the adoption of the Kyoto Protocol in 1997 and the Paris Agreement in 2015; the role of the secretariat of the UNFCCC has also developed through soft law, such as rules of procedure and work plans and decisions of the COP. The increased trust placed on the secretariat of the UNFCCC reflects shared understandings developed within institutional meetings of the urgency needed to address climate change. The secretariat of the UNFCCC is now more than a neutral body held in a 'straitjacket' but plays an important role in facilitating the involvement of stakeholders around decision-making, to influence global climate policy outputs.[61] A key observation is in the facilitation of non-state engagement by the secretariat of the UNFCCC, increasing the number of admitted observer organisations to institutional meetings.

Rules of procedure for both the UNFCCC and CBD enable secretariats to daft agendas and other documents for meetings, such as the COP, and this is a significant point of influence. Drafting agendas enables the secretariat to have influence on negotiations by setting the tone of meetings or, as one interviewee aptly states,

by 'colouring the COP', thus shaping discourses and problems, by introducing agenda items, drafting proposals, and advancing the incorporation of their ideals. Further, the CBD secretariat has had a significant influence on proposals and compromises proposed by the chairs or presidencies. The powers of the secretariat of the CBD are not unchecked and are supervised by the CBD COP Bureau; it is questionable how much of their activity the Bureau can realistically scrutinise.[62]

The CBD recently departed from rule 8 to adopt a working group to develop the Post-2020 Global Biodiversity Framework (Post-2020 GBF), which led to the initial drafting of the Post-2020 GBF by co-chairs supported by the secretariat, a prolonged process, with five OEWGs before COP 15. This demonstrates that powers attributed to secretariats can be both extended and reduced over time through soft law. The Post-2020 OEWGs made slow progress and were criticised for a lack of leadership and political ambition,[63] with the secretariat's influence lessened.[64]

Secretariats as semi-autonomous bodies

Some activites of secretariats have no express legal mandate but are accepted nonethe-less by parties to the COP. Secretariats play important independent roles, such as gathering and disseminating information and knowledge brokering; they can decide how problems should be structured and understood, and this, in turn, can shape and influence how other actors 'react' to the information.[65] Secretariats can influence negotiations and provide direct assistance to countries for implementation,[66] and they formulate new ideas, promote key problems, initiate the emergence of norms, and hold parties to account by monitoring their actions.[67] Secretariats can coordinate and steer the initiatives of non-party actors at multiple levels of governance to the attainment of global environmental goals towards coherence and good practice.

An interviewee observes that:

> The secretariat can shape and influence decisions. This sounds manipulative but they have experience and an in depth understanding. . . . [T]hey review text and documents and improve the content using their technical expertise.

Secretariats are key actors in environmental governance who can facilitate interactive processes by enabling 'just, fair, and inclusive' decision-making, pushing towards the attainment of global environmental goals and targets. Embracing their potential role is a key opportunity to address limitations in current global governance processes, but secretariats require the political trust of parties to support their independent actions and sufficient resources.

Secretariats unique influence on shared understandings in institutional decision-making and during implementation

Secretariats can be seen as important 'actors' in the creation of shared understandings through institutional decision-making and implementation processes. Secretariats may draft documents, broker information, whisper in proposals, facilitate

compromises, play a strong role in capacity building to support implementation, and oversee systems of reporting and review. These roles provide an opportunity for secretariats to influence the creation of shared understandings within institutional bodies and during implementation.

Secretariats have been found to be supportive at keeping parties at the negotiating tables even when there are conflicting interests, heterogeneous cultural backgrounds, and differing levels of expertise.[68] As an interviewee observed at CBD COP 13, the secretariat 'runs around trying to get text agreed. If a point is not clear and they say the text is not practical then they will suggest another text that the government might find more suitable'.

Secretariats can be knowledgeable actors with expertise, institutional memory, and political awareness. Secretariats sit in on all decision-making processes of institutional bodies, ranging from large plenary to smaller working group sessions. Negotiators can struggle to reach agreed text around contentious issues, especially during smaller working session. In such cases, secretariats may openly suggest text to the parties to be agreed.[69] Further, secretariats may 'test' ideas or ways forward and ask parties to introduce their proposals, a process known as 'whispering in'.[70] Secretariats operate behind a 'veil of legitimacy' and find ways to channel their ideas through chair persons or parties.[71] These forms of influence illustrate how secretariats can act as 'norm entrepreneurs' and are important political actors in their own right. One interviewee comments: 'The secretariat can shape and influence decisions. This sounds manipulative but they have experience and an in-depth understanding. . . . [T]hey review text and documents and improve the content using their technical expertise'.

Secretariats can have a key influence on implementation. The CBD secretariat has significantly developed the format of national reports, with positive repercussions as the information presented back to parties becomes more transparent (see Chapter 5). The CBD secretariat also plays a significant role in capacity building and project work on the ground; whilst not in the form of funded projects, this can influence and shape actions taken by parties and other actors at domestic levels.

A key point of influence and co-learning during implementation is between secretariats and national focal points (NFPs). NFPs are designated representatives of parties who communicate with the secretariat between institutional meetings. Activities of NFPs include communication and dissemination of information, representation at meetings, information provision, collaboration with stakeholder groups, monitoring, promoting, and/or facilitating national implementation. NFPs can facilitate connections between government ministries and departments within countries, between the governments of different countries, and between different programmes and initiatives and provide a link between national governments, the private sector, and civil society. Secretariats support NFPs, including through the development of toolkits,[72] yet NFPs generally lack sufficient capacity and support to achieve national contributions towards global targets.[73] Secretariats have the ability to influence shared understandings during implementation through the support of NFPs, and in turn, they receive direct information on challenges and opportunities for implementation to feed back into international institutional meetings.

Secretariats as facilitators of 'just, fair, and inclusive' decision-making which prioritise environmental issues

Chapter 3 illustrates the unbalanced dynamics of participation in consensus decision-making with more powerful actors, such as higher economic countries, dominating negotiations. Secretariats are in a unique position to witness the sometimes-subtle manifestation of inequitable processes and can act as an equaliser to some extent. Playing such an active role in negotiations could be seen as problematic because it steers CBD decisions towards the thinking of the CBD secretariat rather than parties. Yet the CBD secretariat has a strong environmental justice perspective, technical expertise, institutional history and acts as an important voice for environmental concerns, as well as strengthening the representation of parties from lower economic countries and NGOs; thus, its influence supports the attainment of interactive law.

Secretariat mandates may expressly instruct the secretariat to support lower economic countries; the UNFCCC treaty stresses the need to facilitate assistance particularly to developing country parties, and this provides an important and legally binding obligation. The secretariat of the UNFCCC is obliged to support less-powerful parties in the 'compilation and communication of information'[74] and implementation and thus can act to facilitate more equitable processes within the climate regime, particularly important, given that the fundamental principle of 'equity' within the UNFCCC is still far from being achieved.[75] The trend to inspire non-state action through state-led processes[76] is visible in the UNFCCC, with the number of observer organisations significantly increased and 29,550 non-state actors engaged in climate actions through the Non-State Actor Zone for Climate Actions.

Secretariats are key in encouraging and managing the involvement of non-state actors, by encouraging party–NGO dialogue and by entering into agreements and partnerships with non-state actors. There are 251 'memorandum of understandings' between the secretariat of the CBD and non-state actors, and the 2018 Sharm El-Sheikh to Kunming Action Agenda for Nature and People ('The Action Agenda'), agreed at CBD COP 14, aims to stimulate non-state and sub-national initiatives to assist in the achievement of global biodiversity goals.[77] In 2022, the Action Agenda had received 426 pledges and 191 partnership initiatives. Thus, the CBD secretariat plays an important role in the facilitation of what has been heralded a highly inclusive process.[78]

What does involvement of non-state actors in the governance of international environmental law mean in relation to achieving global environmental goals? There may be reason for optimism, and involvement of non-state actors can be positive, for example, by strengthening the representation of developing countries, raising awareness of collective issues, and providing finance and social learning. During implementation, non-state actors can be key agents of change, facilitating the actions needed to contribute towards global goals and targets at national and sub-national levels. However, there are serious concerns about how the involvement of non-state actors can be managed to ensure positive environmental actions. Corporations can use global political agendas to maintain business as usual,[79] and

the commodification of nature is seen as a threat to conservation,[80] with an emphasis on measuring quantifiable impacts,[81] thus under-valuing the complexities of social, economic, and environmental impacts.[82]

Secretariats are key actors who moderate the involvement of non-state actors, by forming alliances, and by adopting different styles of orchestration, they can facilitate non-state action, which pushes forward global responses.[83] The analysis suggests secretariats act as facilitators of non-state action and use their discretion to decide who may be admitted as observers, whom they will enter into partnerships with, and which NGOs they will support in interactions with parties. Thus, secretariats can play a key role towards attainment of interactive processes.

Conclusion

This chapter highlighted the important role of secretariats, which have varying degrees of separation from their institutional bodies due to their legal mandates, the development of soft law, and shared understandings within international environmental institutions. Here it is argued that secretariats are more than 'international bureaucracies' or 'agents of states' but are important political actors in international environmental governance.

Secretariats have legal mandates that enable or constrain their ability to influence negotiations and shape shared understandings. Secretariats undertake a wide range of activities: they organise meetings, prepare documents, facilitate agreement, orchestrate non-state involvement, decide how to disseminate information, and play an important role in capacity building. They can act as norm entrepreneurs, facilitate more equitable processes during negotiations, form alliances with other MEAs and non-state actors at multiple levels of governance, and assist implementation through capacity building, interactions with NFPs, and developing systems of reporting and review.

Secretariats facilitate international cooperation, supporting developing countries and moderating the input of non-state actors. The thematic analysis in Chapter 3 highlights the difficulties lower economic countries face in effectively contributing to CBD COP meetings, due to lack of resources and smaller delegations and the role of the secretariat in supporting them. Empowering secretariats in decision-making processes is an opportunity to facilitate 'just, fair, and inclusive' processes and to create shared understandings that prioritise environmental issues. They are unique actors and can use their knowledge, technical expertise, institutional memory, and can be in a trusted position to push parties to agree effective goals and targets, facilitate implementation and social learning between state and non-state actors, thus furthering action to achieve the objectives of international environmental law and policy.

The merit of the autonomous activity of secretariats is a disputed area. Interactive law is helpful to conceptualise their activities and looks to the ever-changing social context of legal and political institutions. Secretariats are argued to be important actors in the context of shaping shared understandings and their ability to produce and control knowledge, through the dissemination of norms, by

fixing meanings and establishing acceptable behaviours, and classifying persons and objects, which give them some control over reconfiguration of definitions and identities. The analysis finds that secretariats can actively work to reinforce the importance of implementation to parties and are thus a positive influence for environmental issues.

Whilst parties are the official decision-makers and can change the legal mandate of the secretariat and their proposals, due to their expertise and often trusted position, as well as the sheer volume of matters covered, parties usually accept the secretariats' work and proposals. Yet despite the hard work of secretariats and other actors, it only takes one party to block proposals from being adopted by an institutional body, which highlights the difficulties within the current global environmental governance architecture in achieving global consensus regarding the urgent transformations in environmental governance.

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5 Compliance and accountability for international environmental law and policy

Introduction

Compliance is generally understood in international law as state behaviour that conforms to a treaty's explicit rules, and famously, Oran Young proposed that

> compliance can be said to occur when the actual behavior of a given subject conforms to prescribed behavior, and non-compliance or violation occurs when actual behavior departs significantly from prescribed behavior.[1]

The concept of legal compliance is closely linked to the broader concept of accountability, relevant beyond treaties to political agreements and corporate behaviour. Whilst there is no clear legal definition of accountability, political scientists have described *accountability* as 'an institutional relation or arrangement in which an agent can be held to account by another agent or institution',[2] thus relevant to states and/or corporate bodies. Common to both compliance and accountability systems are the concepts of answerability for actions taken and enforceability when relevant standards are unmet.[3]

Implementation of international environmental law and policy can be a step towards compliance and is defined here as an interactive process encompassing global to local levels, including the formation of laws/policies outlining actions that collectively can achieve global objectives. Implementation concerns not only the passage of legislation or formation of policies but also the creation of institutions, systems of monitoring and review, and domestic enforcement mechanisms. Implementation mechanisms are a key means to stimulate actions to achieve compliance with global environmental goals and targets.

Often overlooked in compliance literature is effectiveness. Whilst compliance and implementation may lead to effect, this can by no means be presumed, lending the question: How can effective implementation and compliance mechanisms be adopted for international environmental law and policy that improve environmental conditions?

Different approaches towards compliance and accountability are taken by MEAs and for the Sustainable Development Goals (SDGs), and it is clear from the lack of progress towards global environmental goals that it is challenging to achieve

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effective systems in this respect. This chapter argues that the shared understandings fostered within treaty institutional bodies and international political forums are key, as these determine the development and use of compliance and accountability mechanisms, such as dispute resolution, enforcement, transparency, peer review, and implementation mechanisms. Yet there are severe challenges at the global level to agree on ambitious shared understandings for effective means of implementation, compliance, and accountability. Interactive law is used as a lens to analyse different approaches taken to compliance and accountability in MEAs, including the CBD, UNFCCC, and also for the SDGs. Their strengths and limitations according to interactive law are studied and opportunities for improvement identified.

Dispute resolution mechanisms

Dispute settlement procedures are the traditional legal mechanism for solving conflicts between two or more parties on the interpretation and application of international law. They involve an independent tribunal, such as an ad hoc arbitration tribunal or a permanent tribunal, such as the International Court of Justice (ICJ), where independent judges assess the facts of the dispute and the demands of the parties to make a judgment, to which there is no right of appeal.[4]

Recourse to dispute settlement in international environmental law is often seen as a last resort and is complex because there is no single overarching forum for actors to seek remedy to an environmental dispute. Instead, a variety of non-confrontational compliance mechanisms are used by MEAs, which involve assessment and response measures to remedy non-compliance, which are often politically charged and dealt with outside of the legal authority of international courts and arbiters, indicating the unwillingness of states to openly confront non-compliance using dispute resolution mechanisms.[5]

More than half of MEAs have their own internal dispute resolution mechanism, for example, Article 27 CBD and Article 14 UNFCCC outline that parties should negotiate first and then, if resolution cannot be agreed, to take the dispute to arbitration or the ICJ.[6] Typically, parties attempt to settle a dispute through diplomatic means and negotiation in the first instance and, failing that, through arbitration, conciliation, or the dispute can be submitted to the ICJ for resolution. The underuse of dispute resolution in international environmental law indicates that states are generally unwilling to openly shame other states and thus impact on their international relations and wish to avoid setting a precedent that they themselves could be held accountable to.[7]

External dispute mechanisms have been used when there is a clear breach in international law which is bilateral and confrontational in nature.[8] For example, the Permanent Court of Arbitration[9] heard the *Mox Plant case* concerning a dispute between Ireland and the UK relating to access to environmental impact assessments on the risks of the transport of nuclear waste and discharges from the MOX plant in Sellafield to the coast of the Irish sea.[10] In 2018, the ICJ ordered compensation for environmental harm caused by Nicaragua to Cost Rica caused by the construction and dredging of a canal and road construction.[11] The International Tribunal of

the Law of the Seas issued a decision concerning oil exploration by Ghana causing environmental damage in a marine protected area in the Cote D'Ivoire.[12] The International Centre for Settlement of Investment Disputes heard a dispute relating to oil extraction in Ecuador.[13] The Inter-American Court of Human Rights made a judgement concerning planned offshore activities and infrastructure projects in Ecuador.[14] The Permanent Court of Arbitration has administered disputes relating to the Kyoto Protocol's Clean Development Mechanism and the UNFCCC. The SDGs do not have a dispute resolution system, although there are calls for reform of the Investor-State Dispute Settlement System to enable foreign investors to bring states to arbitration in relation to human rights and environmental issues.[15]

There has undoubtedly been a rise in the recognition of international environmental law within dispute mechanisms,[16] yet dispute mechanisms are not usually triggered by provisions within international environmental law. For collective environmental problems such as conservation and sustainable use, where soft-law provisions dominate, it is often difficult to pinpoint cases of non-compliance and sanction them, as they tend to be broad commitments, are global in nature, and concern many states and thus are not well suited to traditional bilateral dispute resolution. Whilst environmental obligations from the UNFCCC and, to a lesser degree, the CBD have been raised in international investment disputes and procedures relating to these, they have been almost completely neglected in substantial discussions.[17] Economic policy overrides environmental policy, questioning whether these are helpful forums for environmental concerns to be raised.

For example, the case of *CDSE v Costa Rica* concerned a decree ordering expropriation of a tourism development purchased by a US company (CDSE) by Costa Rica for environmental purposes.[18] In a dispute over the amount of compensation due to the US owners, Costa Rica argued that it was party to many international treaties, including the CBD, which gives rise to obligations to protect the environment, and these should be considered when calculating compensation costs.[19] However, the links between the measures taken by Costa Rica to protect the environment in accordance with international environmental law were not considered by the tribunal when deciding the level of compensation due to the CDSE.[20]

Further, in the *Metalclad case*, an international arbitration panel considered if a US company was entitled to compensation from Mexico for prohibiting a hazardous landfill operation alleged to be the cause of disease and water pollution as well as damaging the environment.[21] Mexico argued that it acted in the interests of the environment and its citizens and, amongst other treaties, relied upon provisions within the CBD. The tribunal failed to analyse the relevance of CBD obligations, and they did not form a decisive role in the tribunals reasoning. These examples demonstrate the hesitancy of investment disputes to refer to international environmental law.[22] The fact that international environmental law is being used in arguments by parties highlights an increasing awareness of environmental issues within shared understandings of international law, yet the impact of international environmental law on decisions is minimal.

Other limitations to voluntary dispute mechanisms arise due to the wide number of forums available to hear environmental disputes, meaning, states can 'forum

shop' due to the principal, that they may pursue disputes by whatever means they choose, including via dispute resolution mechanisms outside the specific MEA in question. This may create opportunities but also complexities, such as choosing the forum with least commitment to environmental issues, the instigation of cluster litigation in multiple forums, and the possibility to challenge final judgements.[23] Dispute resolution excludes the involvement of non-state actors, including secretariats, from the process who might be well placed to bring actions yet have no authority and cannot instigate procedures in cases of non-compliance.

The failure to utilise MEA dispute resolution mechanisms indicates that they are, to some extent, symbolic; that said, having an agreed mechanism in place provides a foundation that can be developed in the future, and disputes will become more common as environmental crises develop in frequency and intensity. Yet such mechanisms could provide an important independent means to assess and remedy non-compliance, to strengthen practices of legality around international environmental obligations, to create a dialogue and build shared understandings around the overarching values of international environmental law, foster rapport between parties, and consider divergent interests. Dispute resolution mechanisms offer a 'problem-solving' arena for mutual consideration and analysis and provide an opportunity for interaction and shaping of actor identity to conform to international environmental law. Persuasion and argument are important in constructivist paradigms and key tools in dispute resolution.[24]

Dispute resolution may be more suitable for environmental issues, where non-compliance is more readily identifiable, such as CITES, which concerns the illegal trade of certain species, and the CBD protocols. For conservation and sustainable, it can be much harder to pinpoint the area of dispute.

Recourse to dispute resolution could be strengthened by enabling non-state actors, such as secretariats and NGOs, to initiate or encourage the use of dispute resolution procedures to address breaches of environmental law, such as environmental damage caused outside sovereign territories.[25] Such visions may seem illusionary when parties are cautious to even adopt 'naming and shaming' in relation to non-compliance with obligations,[26] and shared understandings would need to shift significantly within institutional bodies to make better use of dispute resolution procedures.

Enforcement mechanisms

MEA compliance mechanisms consist of

> a body of procedures, ranging from the gathering of information, consideration of the information provided, the causes and degree of non-compliance and the decision-making by the COP, MOP or a specifically designed and designated compliance committee with regard to a Party to the treaty that encounters difficulties in meeting the treaty requirements.[27]

Compliance mechanisms are commonly used by MEAs and vary according to (1) the nature of compliance issues for each MEA and (2) the dynamics of each MEA

COP who are authorised to agree on compliance mechanisms through 'enabling clauses' in the parent treaty.

Enforcement mechanisms are seen as necessary by some to draw compliance to environmental goals and targets that entail considerable efforts by parties to comply and require concrete changes in their behaviour.[28] Enforcement approaches incorporate a broad range of measures that create costs and remove benefits to parties in non-compliance.[29] Enforcement mechanisms are often imagined as negative, using some form of sanction or disincentive to enforce cooperation and incentivise compliance, such as on-site inspections or fact-finding missions, judicial proceedings (including dispute settlement procedures), official warnings, and financial penalties, which may be preventative in nature.[30] That said, enforcement does not always have to be in the form of punitive measures, and MEAs are mostly geared towards encouraging future compliance and urging parties to engage in better planning actions needed to ensure compliance. Measures that MEA compliance committees typically suggest include writing compliance action plans, financial and technical assistance, capacity building (workshops, training, etc.), warnings,[31] and making decisions and recommendations which can have legal effect.[32] For example, the CBD Cartagena Protocol has established a free-standing compliance committee, mandated to be non-confrontational and to support parties to reach compliance with no ability to issue sanctions.[33]

The use of negative sanctions as a means of enforcement in MEAs is relatively unpopular, and such measures are often mixed with managerial approaches.[34] For example, the Kyoto Protocol utilises a mixed enforcement approach using facilitative mechanisms and punishment in the form of economic sanctions for the failure of developed countries to attain fixed emission reduction targets.[35] The Convention on International Trade in Endangered Species (CITES)[36] provides technical assistance to support parties but uses trade sanctions for non-compliance in relation to lack of national implementing legislation, non-submission of annual reports, and non-designation of scientific authorities.[37] The CITES compliance committee has enabled the suspension of trade in species in cases of consistent non-compliance.[38]

Not all MEAs have established compliance mechanisms, including the CBD and the Convention on Migratory Species (CMS).[39] The required negotiations to establish compliance committees can be quite 'arduous';[40] however, the recent negotiations in relation to the Paris Agreement resulted in the successful establishment of a mechanism to facilitate implementation and promote compliance.[41] A compliance committee will be established, composed of experts, and will function in a transparent, non-adversarial, and non-punitive manner and pay particular attention to the respective national capabilities and circumstances of parties.[42] This mechanism, which requires further development, allows both facilitative and non-punitive enforcement means to be taken in relation to compliance.

Non-compliance procedures can be triggered in different ways – by the party itself, by other parties, by the secretariat, and in some instances, by NGOs and citizens. The ability of the secretariat and citizens to trigger cases of non-compliance in the Aarhus Convention,[43] and the London Convention,[44] enables a just, fair, and inclusive means of ensuring compliance and accountability for progress towards environmental goals. The public has triggered 60 cases of potential non-compliance

under the Aarhus Convention,[45] illustrating the willingness of the public to hold states accountable for their actions.

Transparency is essential for environmental regimes that use enforcement approaches to correctly initiate sanctions or positive incentives and capacity building. Transparency alone is viewed as not enough to offset the benefits of cheating;[46] thus, sanctions are needed alongside transparency to make non-compliance too costly an option for states. This dynamic is highlighted in the management of international fisheries, which failed until an effective means of enforcement was established.[47] To collate sufficient information to enforce punitive measures for non-compliance would involve much more demanding requirements in terms of information gathering, and such forms of sanction could, in fact, reduce the transparency: those engaged in non-desirable behaviour will have few incentives to supply accurate information themselves and strong incentives to prevent others from supplying such information.[48]

Whilst many see binding law and strong enforcement mechanisms as essential to achieve compliance with international environmental law, most state parties to MEAs are far away from agreeing on such stringent limitations on their state sovereignty. Compliance mechanisms must be embraced by state parties and cannot merely be added to a regime and expected to function[49]; they must also be agreed to within the constraints of global consensus decision-making. Whilst some MEAs such as CITES and the Kyoto Protocol have incorporated negative sanctions, these are exceptions rather than the norm.

When adopted, enforcement mechanisms show the collective disapproval of environmental harm by international society,[50] and establishment of compliance committees in some MEAs suggests that difficult as such negotiations are, the global community is becoming more aware of the urgency of environmental issues and is capable of negotiating compliance mechanisms. To make progress, shared understandings within MEA institutions without compliance mechanisms, such as for biodiversity, would need to shift and inspire parties of the utility of compliance mechanisms. This is challenging when current decision-making within global institutions promotes and reproduces neoliberal values of the environment, seeking to maintain 'business as usual'.[51] Thus, precluding progress for the adoption of compliance mechanisms, education, persuasion, and just, fair, and inclusive decision-making is key to promote the adoption of more effective compliance mechanisms within MEAs.

Transparency mechanisms

The most popular compliance approach adopted by MEAs concerns accountability through transparency and promotes the 'answerability' of parties for their actions. There is a proliferation of 'governance by disclosure' in the environmental domain that uses targeted disclosure of information both to assess the behaviour of actors and to steer their behaviour in certain directions.[52] Instances of non-compliance are seen as problems to be solved, rather than violations to be punished; thus, transparency and the reaction it provokes become a key

strategy.[53] The impact on the reputation of a party as an actor of good standing in the international system becomes a major pressure for states to comply with international environmental law.[54]

Whilst transparency is largely seen as an effective means of governance, it may inadvertently promote more secrecy and increase conflict and mistrust.[55] The existence and degree of transformation that transparency has in environmental regimes cannot be assumed. If actors see the requirements of transparency to be effective, they may see adhering to transparency requirements as costly, because they will have to implement changes to their behaviour and thus may resist transparency.[56] This is exemplified by the case of genetically modified organisms, where the costs of increased transparency craft a 'contested political terrain'.[57]

Transparency may provide potential to inform and empower, but a key limitation is that environmental improvements may only be indirectly addressed. Inputs to transparency systems include reporting on, monitoring, and verifying behaviours on the state of the environment. The outputs include aggregating, processing, evaluating, publicising, and responding to this information.[58] Transparency is procedural in nature and contrasts with the substantive aims of environmental improvement. Explicit links to environmental goals are infrequently employed in transparency mechanisms,[59] and where links exist, they may be supportive or in tension with one another.[60]

Transparency linked clearly to environmental goals is argued as key to the effectiveness of MEAs to foster the gathering, analysis, and dissemination of information that is accurate, relevant, and timely. Transparency facilitates implementation, compliance, effectiveness, and the ability to assess both, and it can have its own influence, independent of strategically deployed sanctions or rewards.[61] Transparency can strengthen the practice of legality around international environmental obligations at multiple governance levels, with opportunities emerging at global, national, and sub-national levels to create interactive systems of reporting and review. The following discussion uses interactive law to analyse the case studies of biodiversity, climate, and sustainable development to reveal limitations and opportunities for their transparency mechanisms.

Clearing the muddy waters

MEA reporting mechanisms under the CBD and UNFCCC contain binding obligations on parties to submit national reports to treaty institutions on implementation measures and their effectiveness.[62] The SDG voluntary national review (VNR) adopts a voluntary reporting system to the UN High-Level Political Forum (HLPF). Institutions play an active role in encouraging countries to submit reports[63] and provide reporting support.[64] Most countries comply with reporting requirements. For example, 190 out of 198 CBD 5th national reports were submitted to the SCBD,[65] and for the SDGs between 2016 and 2020, 168 countries presented VNR reports.[66]

Transparency in reporting requires sufficient and appropriate data to assess progress towards environmental objectives, goals, and targets.[67] Thus, the choice of indicators is important: they provide parameters to measure and frame issues;

can reduce complexity and highlight areas where intervention is needed; discover sources of innovation through comparative analysis; facilitate deliberation; and can drive changes in policies, management practice, and action on environmental issues.[68] Radical transparency is called for to recognise the true complexity of sustainability indicators and reduce inaccuracies through the dominant use of technocratic approaches which fail to fully consider the values upon which indicators are based.[69]

MEA indicators are typically agreed internationally but can be difficult to develop and are often policy-orientated rather than ecologically relevant.[70] For example, biodiversity indicators tend to monitor general trends rather than be implemented with a specific purpose or directly linked to decision-making.[71] The ease of developing indicators depends on the environmental problem. Biodiversity is formed of multiple levels of constantly changing ecological systems, and it is challenging to develop ecologically relevant indicators that can assess change over time.[72] Collection of data at the national level can be problematic, and measurements of many biodiversity indictors are unavailable.[73] That said, some progress has been made developing a monitoring framework and indicators for the Post-2020 GBF action targets;[74] whilst increased transparency in progress is called for, there is no commitment to a more rigorous global review against goals and targets.[75]

Developing a science for monitoring performance against indicators is key. Many countries lack the capacity to generate and use data, resulting in an uneven picture of global biodiversity loss.[76] Technological developments such as 'earth surface observation' by active or passive sensors on space-based, airborne, ground-based, ship, and underwater systems[77] are important means by which environmental data can be gathered and data gaps reduced. Closer collaboration between environmental measurement and Earth-observing satellite communities would facilitate the development of relevant satellite-based indicators.[78]

For climate, indicators may appear more straightforward, but tracking national progress towards the global climate target requires a hierarchy of indicators, spanning different levels and time periods, and is underdeveloped.[79] For sustainable development, indicators are also underdeveloped; 62% of SDG indicators have no internationally established methodology or standards, or data is not regularly produced by countries using the indicator.[80] Global indicators and national indicators are skewed, with national indicators used more frequently than agreed global indicators.[81]

Identifying baselines and clear metrics to ensure measurable priority national targets[82] that are aligned with global targets can facilitate implementation and assessment of progress.[83] Identifying synergies and clusters of interconnected targets can strengthen implementation and reduce the burden on states. For example, a UNEP report highlights the use of second-generation NBSAPs to strengthen implementation of related goals and targets for biodiversity, poverty reduction, and sustainable development.[84] Interlinkages between targets must be carefully considered to reduce trade-offs between development and the environment.[85] The wider inclusion of NGOs, scientific, and research communities would support implementation processes.[86]

Style of reporting is a key issue to ensure transparency and facilitate reflection on implementation. The CBD secretariat has developed the format of national reports to facilitate the production of richer knowledge[87] and improve the content to gather information on outcomes, compelling parties to reflect on the effectiveness of national measures in relation to global goals and targets.[88] Yet national reports have been criticised as box-ticking exercises gathering limited information.[89] The outsourcing of compilation of reports to consultancies forgoes self-assessment, reflection, and social learning, key elements of interactive transparency systems.

Following the gathering of information, synthesis of the data, linked formally to environmental improvement, is key to facilitate progress towards global environmental obligations. Different styles of synthesis within MEAs reflect different shared understandings of institutional bodies. For biodiversity, the broad synthesis of information provided by Global Biodiversity Outlook reports[90] and analysis by the CBD secretariat[91] fails to communicate progress of parties, or groups, towards global biodiversity goals; instead, good practice case studies are highlighted, and actions to enhance progress to each target. This approach is seen here as a key limitation for the attainment of global biodiversity targets; most parties have not adopted national targets in line with global ambition,[92] and the global biodiversity targets were unmet by 2020.[93] The lack of transparency at the CBD indicates a lack of buy-in from parties to take concrete action on addressing the direct and indirect drivers of biodiversity loss.[94]

For sustainable development, VNRs are primarily member state–led reviews, with varying levels of participation of civil society. Whilst there are voluntary guidelines for reporting,[95] there is no strict format for reports, and a lack of consensus as to how reviews should be organised and the methods used.[96] The contents of reports raise concerns regarding transparency; too few countries detail accountability mechanisms or processes for engaging stakeholders.[97] Further, the process of global feedback from the HLPF is designed to be general and merely synthesises key messages from VNRs.

The climate regime reporting and review mechanism is more advanced. In 2018, at COP24 in Katowice, parties agreed on guidelines on the implementation of the Paris Agreement, including the enhanced transparency framework (ETF). Agreeing on the ETF is a significant international achievement, and the shared understandings formed at climate COP reflect the need to progress the architecture of the climate regime, including in relation to transparency. The ETF is designed to inform the global stocktake process of implementation of the Paris Agreement, including tracking progress of implementation and achievement of Article 4, Nationally Determined Contributions (NDCs): voluntary targets set by parties to contribute towards the global target and keep greenhouse gas emissions well below 2ºC and preferably 1.5ºC. NDCs should define how targets will be reached and include details on systems to monitor and verify progress; they are designed to be reviewed, and commitment increased, every five years.

The climate reporting, review, and ratcheting system is a step towards an interactive legal system through its incorporation of a transparent and robust review system at international and domestic levels. The ETF aims to (1) facilitate cooperation

among parties; (2) make national actions more transparent; (3) share best reporting and associated institutional arrangements, collection use, and management of data; (4) strengthen parties' capacity for domestic policy design and consultation through the credibility, legitimacy, and information provided by the review; (5) build capacity and identify further capacity-building needs, particularly in relation to transparency; and (6) mobilise and provide assistance to address these needs.[98] Reporting is thus linked to environmental outcomes; an improvement would be to explicitly link to the Article 15 compliance mechanism to facilitate implementation and promote compliance.[99] The ETF reporting model facilitates transparency in relation to individual country progress towards global goals: a 'naming and shaming' approach is thus possible, with clear recognition of equity and differential capabilities of countries across the globe.

Non-state actors can play an important role to fill the gaps of opaque state-led reporting and review systems. The SDG implementation review process is designed to be 'robust, voluntary, effective, participatory, transparent, and integrated',[100] fulfilling the requirement of participatory and inclusive governance processes. The political nature of the SDGs means that the development of review processes is not constrained by strict multilateral consensus decision-making processes. This heightens the influence of civil society and NGOs in governance processes and the development of SDG monitoring systems independent of official review processes.[101] The expansion of rigorous and independent global analyses of VNRs already undertaken by non-state actors[102] would facilitate transparency by offering expert and civil society feedback on implementation, moving beyond solely big data analysis,[103] thus providing a valuable contribution to the intergovernmental review process to inform implementation on the SDGs.

An NGO coalition report at CBD COP 13 aligned national targets to global biodiversity targets and outlined progress towards them,[104] thus undertaking a stronger review process. The synthesis of data revealed progress towards targets and by political and economic groupings, showing where more needs to be done and encouraging parties to act to meet their obligations within the global community.[105] The role of non-state actors in review processes proved unpopular with parties at the CBD yet, as with the SDGs, can reduce transparency gaps. This is a key opportunity, given that negotiations for the Post-2020 Global Biodiversity framework made little progress in strengthening accountability mechanisms. Whilst not officially recognised, NGO reports on progress inform, shape, and influence parties and other actors in institutional bodies and play a role in persuading countries of the usefulness of this approach.

Interactive law argues that reporting systems at all levels of governance should be 'just, equitable, and inclusive'. The World Heritage Convention (WHC) presents an alternative model to individual country reporting, adopting a regional approach, where several countries contribute to reporting within a region and recommendations and action plans from the WHC are regional, thus accounting for specific regional characteristics and promoting collaboration and interaction between countries within regions. The reporting system initiates the construction of knowledge, expertise, and shared understandings at multiple levels of governance through networks and training activities.[106]

The SDGs stress the importance of processes of national and sub-national review, and the SDG principles of participatory and transparent approaches are equally relevant at these levels of governance. Interactive and transparent systems of national or sub-national review can feed up to and influence shared understanding in global systems. For example, three yearly reporting by sub-national authorities in Wales on their statutory duty to 'maintain and enhance' biodiversity facilitates transparency and provides opportunities for inclusivity in review systems through engagement with stakeholders, business, and the community.[107] Evaluation of reports enables assessment of progress and identifies actions taken for biodiversity, as well as enabling social learning and exchange and sharing good practice at the national level between public authorities, pooling efforts and sharing good practice for future action. More inclusive processes at sub-national levels of governance facilitate implementation and influence shared understandings at other levels of governance by highlighting good practice.

Voluntary peer review

Peer-review processes recognise state sovereignty and are designed to be constructive, persuasive, and non-adversarial and reflect the shared understandings of parties to allow their performance to be examined, judged, and to receive recommendations for improvement. Peer review may offer a means to assess the development of implementation measures, promote peer learning, review implementation of international environmental targets and goals between Parties, and increase transparency and accountability. Peer reviews can rally criticism, praise, and feedback from peers and other actors, which in turn may pressure and encourage countries to justify performance and improve implementation.[108]

The CBD began to develop a methodology for its voluntary peer-review mechanism (VPRM) of NBSAP revision and implementation in 2015, reviewing Ethiopia and India as case studies. A pilot phase was conducted between 2017 and 2019, and three countries have been reviewed in the pilot phase.[109] The VPRM was adopted in 2018[110] as part of the CBD 'multidimensional review approach'. The transformative potential of peer-review mechanisms in MEAs is recognised,[111] yet lessons learned from the African Peer Review Mechanism (APRM) and the Universal Periodic Review of the UN Human Rights Council (UHRPR) demonstrate that their design requires careful thought to become interactive mechanisms. Obstacles to the success of peer review include (1) insufficient uptake by countries, (2) limited participation of stakeholders, (3) lack of political will and capacity to participate, (4) lack of transparency in reports of reviews, (5) absent or ineffective systems for review of implementation of recommendations, (6) logistical challenges, for example, timely publication and accessibility.

The African Peer Review Mechanism (APRM), adopted in 2005, is voluntary, and 19 countries have completed the review process. The APRM process involves the production of a self-assessment report by states, combined with an expert review by experts from other African countries, discussion by heads of state of member countries at annual forums on the review results, and implementation of a national programme of action to address governance shortcomings. Since its

inception and initial uptake, the number of reviews undertaken has declined, with no reviews taking place between 2013 and 2016, the lack of a permanent CEO for the secretariat is seen as problematic, and the lack of political engagement seen through varying attendance at annual forums for the APRM; only four heads of state attended the 2019 forum.[112]

The APRM was made part of a specialised agency in 2018 with an expanded mandate, including tracking progress of the SDGs and the 2063 African Union's Agenda. Since its expanded mandate, more reviews and some second reviews have taken place, focusing on cross-cutting issues, yet synthesis of reports could be improved as only broad trends are reported and countries are not mentioned by name. The APRM encourages an inclusive 'whole of country' approach, envisioning input from government, business, and civil society, yet inclusivity in the peer-review process varied, depending upon the political context of individual countries. For example, Ghana's self-assessment, led by independent research institutions, enabled strong involvement of civil society and a robust review, whereas the Rwanda process was a tightly controlled government-led process lacking transparency. Suggested improvements to the APRM process include enabling the secretariat to release reviews more promptly; improving accessibility to reports, for example, language used, website accessibility; and strengthening the role of civil society at the secretariat.[113]

The Universal Periodic Review of the UN Human Rights Council (UHRPR), created in 2006, has a different design to the CBD VPRM or APRM; there is a compulsory requirement for all member states to be reviewed every four years, with 48 states reviewed annually.[114] The UHRPR is designed to create an interactive dialogue; the review working group consists of a 'troika' of three states who actively engage with the human rights situation of the state under review using information from independent human rights experts, treaty bodies, and other stakeholders, thus promoting inclusivity and equity in the process. The outcome of the review is adopted by the Working Group and submitted to the Human Rights Council for adoption. Whilst an official follow-up mechanism does not exist, the state under review should provide information on the actions taken to implement the recommendations in the previous review. The UHRPR reporting process encourages national dialogue on human rights amongst governments and stakeholders and helps set national priorities for joint action, yet a more concrete means of tracking progress on implementation of recommendations would strengthen the review system.[115] The UHRPR involves input from civil society and NGOs, who are invited to participate and can ask questions of the country under review and better fulfil requirements of 'just, fair, and inclusive' processes than purely government-led processes, and this provides an important opportunity for social learning and persuasion around global goals and targets.[116]

The CBD VPRM peer-review mechanism is relatively underdeveloped compared to the UHRPR or the APRM; it is designed to provide advice on implementation measures rather than assess progress towards global goals and targets and purposefully avoids any reference to it being used as a compliance mechanism.[117] The CBD VRPM is a party-led process and an important point of social learning between parties, with some input from civil society, such as meetings with NGO

experts with the review team. The involvement of NGOs could be strengthened by ensuring a wide range of NGOs are consulted and by providing NGOs an opportunity to include questions or recommendations to the party under review in the report and cross-cutting issues identified. Establishing a clear follow-up process on implementation of review recommendations is key to ensure a continual interactive process is established. A compulsory review process such as that implemented by the UHRPR would strengthen the review system at the CBD, yet political will to agree to such a mechanism is lacking. The CBD secretariat tested the ground regarding the need for a stronger review mechanism, but the idea was pushed back by some parties and described as 'premature' and 'distracting', illustrating the challenges to achieving global consensus to stronger means of review at the CBD.[118]

Peer-review mechanisms can provide an important opportunity to identify where and what support is needed for counties struggling to achieve implementation and compliance, including financial resources, capacity building, and highlight key actions and solutions to implementation. To develop the CBD VPRM further, a 'naming but not shaming' approach could be adopted. A more detailed analysis of implementation would be required, which could then be used to initiate a compulsory peer-review process by the secretariat with wide stakeholder engagement, to influence national and sub-national actions. Adoption of a 'naming but not shaming' approach to support state parties struggling to reach their environmental goals could be achieved by developing political will through persuasion and encouragement at the CBD COP.

Implementation mechanisms

To achieve compliance with MEA obligations, effective implementation of laws and policies is required at the national and sub-national levels. The CBD and Paris Agreement contain legal requirements, and the SDGs outline instruments, or approaches, for implementation by parties/member states. Article 6 CBD creates a legal obligation for national biodiversity planning and for parties to develop national strategies which will reflect how countries 'intend' to fulfil the objectives of the CBD in light of specific national circumstances, and to create related action plans which will show the sequence of steps that will be taken to meet these goals,[119] known as National Biodiversity Strategies and Action Plans (NBSAPs). Article 4(2) Paris Agreement requires parties to prepare, communicate, and maintain successive Nationally Determined Contributions (NDCs) and to pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions. For the SDGs, whilst no specific implementation mechanism is outlined, countries have agreed to mainstream the 2030 Agenda into national planning instruments, policies, strategies, and financial frameworks.[120]

COPs play a key role in furthering implementation by building on relevant treaty provisions; for example, Aichi Target 17 requires that parties develop, adopt as a policy instrument, and commence implementation of an effective, participatory, and updated national biodiversity strategy and action plan. CBD COP decisions urge parties to develop national targets in line with global targets in updated NBSAPs.[121]

Despite legal requirements on countries to develop implementation mechanisms, their effectiveness is questioned, and for the CBD, they have been described as 'mere declarations of intention' rather than commitment to action.[122] For the CBD, whilst most parties have developed NBSAPs,[123] only about 40% of parties have adopted national targets in line with global targets, and only 16% have adopted NBSAPs as whole-of-government policy instruments.[124] Without adoption of national targets, there cannot be transparency in progress towards national or global biodiversity targets. The Post-2020 GBF calls for revision of NBSAPs in line with the new goals and action targets through the adoption of national targets in a standardised format.[125] Revised NBSAPs are due to be submitted by 2024, a short time frame, and reviewed by COP 16. The Post-2020 GBF aims to support parties in baseline monitoring data collection through the 'NBSAP Accelerator',[126] and action target 19 calls for substantial increase in funding for NBSAP implementation.[127]

For climate, at COP 21, the Paris Agreement initiated NDCs as the implementation mechanism, thus promoting a more transparent mechanism than the CBD by requiring states to set national targets towards the global climate goal. Whilst most parties have implemented NDCs, together they will not achieve the global climate goal, to stabilise global warming to between a 1.5 and 2°C increase, and are estimated to lead to global warming of about 2.8°C above pre-industrial levels by 2100.[128] Additionally, current national policies are behind NDC ambitions and far from meeting individual NDC objectives, with resulting projected warming at about 3.5°C.[129] This indicates the need to improve ambition and implementation of climate policies, for example, by designing climate policies to also contribute to non-climate objectives, by using sectoral roadmaps with targets and indicators that track progress toward zero emissions, and by creating broad coalitions of supporters such as partnerships with stakeholders.[130]

The SDGs have no set mechanism for implementation, yet most member states have begun implementation,[131] taking different approaches, such as establishing or strengthening institutional frameworks, and governance arrangements for coordination and consultation on the SDGs, assessing the alignment of the SDGs with existing development plans and strategies and incorporating the SDGs into new strategies.[132] Implementation by public and private sectors is called for, including business,[133] universities,[134] and civil society.[135] Implementation progress is limited and lacks scientifically based approaches for implementation, national targets, policy evaluation, integrated approaches and target prioritisation,[136] and evaluation of interlinkages between targets, which may be in conflict with each other.[137]

Resource mobilisation under the CBD, UNFCCC, and SDGs are key for implementation,[138] yet there are large financing gaps. For example, only $79.6 billion of climate finance was mobilised in 2019, falling short of the $100 billion/year pledged by parties to support developing countries, with less finance available for adaption measures as compared to mitigation measures.[139] The financing gap to achieve the SDGs in developing countries is estimated to be US$ 2.5–3 trillion per year.[140] Trade-offs exist between climate and biodiversity financing; countries' commitments to raise $100 billion per year for climate change by 2020 may leave less money available for additional investment to support biodiversity conservation.[141]

That said, in 2014, there was an estimated $80 trillion in gross world product and US$ 200 trillion global gross private sector financial assets.[142] Despite declining public sector budgets, there is enough money globally to fund measures to address environmental and sustainable development issues. Possible mechanisms for governments to facilitate financial mobilisation include eliminating and redirecting perverse subsidies, improvement of regulatory frameworks to incentivise private sector contributions, re-structuring overseas aid budgets to support environmental issues, tax incentives, and seeking philanthropic contributions or crowdfunding.[143] The Post-2020 GBF aims to reform harmful incentives by reducing their investment by $500 billion per year by 2030; if redirected for positive action on biodiversity, this would contribute to the requirement of action target 19 to increase biodiversity finance by $200 billion/year.[144]

Resource mobilisation concerns more than financial support; capacity building and technical support are also key elements to support implementation. The CBD secretariat plays an important role in this respect and has furthered capacity building by developing an indicative outline for NBSAPs with a checklist of essential elements, including guidance on adopting national targets.[145] Two series of capacity building workshops were held in 2008–2009 and 2011–2013 to guide countries in the drafting and reviewing of national legislation and implementation more generally. NBSAP capacity building modules are available through the CBD website, and the 'capacity building package' is designed to be used for several types of capacity building purposes.[146] The NBSAP forum supports parties in action and implementation of NBSAPs, including through a peer-review framework of NBSAPs,[147] and the Global Environment Fund (GEF) provides financial support to eligible parties, with a new 'Global Biodiversity Framework Fund' agreed at COP 15, to support Post-2020 GBF implementation and open to financing from all sources.

Discussion

The CBD has no compliance mechanism, and its approach facilitates and encourages implementation of NBSAPs, setting of national targets, and adoption as whole-of-government policy instruments. So far, this approach has had limited effect beyond a token nod to implementation through the production of 'weak' NBSAPs.[148] NBSAPs have not diminished the main drivers of biodiversity loss or contributed to mainstreaming in a broader policy context.[149]

Interviewee INT14:

Even if NBSAPs are given the nod at cabinet or parliament level as a, 'whole of government policy instrument' . . . it does not mean it becomes a major strategy on the same level as other strategies and plans. Countries have other priorities.

Mechanisms for CBD implementation require a more structured approach, both in their format and content and by agreement to a global mechanism to enable assessment towards achievement of global goals and targets to improve individual and collective performance.[150] It is positive that the Post-2020 GBF action target 15 encourages businesses to monitor, assess, and disclose their risks, dependencies, and impacts on biodiversity; provide information to consumers to promote sustainable consumption patterns; and report on compliance with access and benefit-sharing regulations and measures, yet no systems of accountability have been agreed.

For climate, parties set voluntary targets towards the global climate goal through the implementation of NDCs. A system of global review is in place through the secretariat's NDC synthesis report, which details progress and general trends towards NDCs, and the enhanced transparency framework will detail individual party progress, with parties' first biennial transparency reports due in 2024. The Paris Agreement Implementation and Compliance Committee (PAICC) is non-adversarial and non-punitive and seeks to facilitate the communication of and to ensure the maintenance of NDCs. So far, the PAICC has met nine times but has focused on developing its rules of procedure, guiding principles and deciding how best to initiate and facilitate cases of compliance.[151] Opportunities for strengthening interactive processes will emerge when cases of non-compliance are reviewed by the PAICC and would be strengthened through the ability of non-state actors to nominate parties for review. Like the CBD, it is unclear how the climate regime can best account for contributions of non-state actions towards the global climate agenda.

For the SDGs, the HLPF inclusive review system can further interactive processes of accountability through VNRs. The process of review of VNRs promotes revisiting of the SDGs, social learning, facilitates implementation, and make countries answerable to civil society for implementation of the SDGs. Key limitations include the voluntary, non-standardised nature of reporting which lacks transparency.

Interactive implementation mechanisms for the CBD, climate, and the SDGs is key to achieving global environmental goals and targets. Setting clear and measurable global targets facilitates implementation of national targets – in the case of climate, a clear global goal for parties to plan for through NDCs facilitates implementation. Complexities for implementation are introduced by the broad scope of the CBD and SDGs, whose targets and goals are often difficult to correlate at the national level and lack guidance on prioritisation of targets,[152] leaving room for parties to cherry-pick on implementation.[153] Variation in format and content of national policies hinders the ability to assess individual and collective progress; thus, clearer guidance on reporting requirements as well as technical assistance and resource mobilisation can support the development of implementation mechanisms.

The involvement of a wide range of actors to support implementation, for example, secretariats, peers, NGOs, scientific and research communities, and civil society, provides much-needed technical and expert support and increases the accountability of party actions. Requirements to review and ratchet up national policies, such as in the climate regime, go towards developing interactive systems whereby parties continually review and revisit their efforts towards global environmental objectives, goals, and targets.

Conclusion

The third requirement of interactive law calls for compliance and accountability mechanisms fostered in shared understandings adopted at multiple levels of governance to from a continual practice of legality. Reinforcing and revisiting legal/policy obligations in a continual process are key for interactive law. The analysis of the case studies in this chapter shows that none of the MEAs or the SDGs studied have fully achieved this requirement at the international level. Certain elements of interactive law are fulfilled, for example, a strength of the climate regime is the development of shared understandings at COP, which facilitated the agreement of a clear global target, thus facilitating implementation and transparency. Further, the adoption of a mixed approach to climate compliance, through facilitative and non-punitive enforcement and an enhanced transparency framework, a 'review and ratchet mechanism', and a compliance committee, facilitates interactive processes.

For the SDGs and the Aarhus Convention, the involvement of non-state actors in processes of accountability increases their legitimacy. The SDG voluntary review process is designed to be participatory, and civil society plays a key role in the development of SDG monitoring systems, which are independent of official review processes and incorporate multiple levels of governance to provide a rigorous global analysis of VNRs. The secretariat and citizens can trigger non-compliance processes for the Aarhus Convention, key to holding countries to account.

For the CBD and SDGs, largely broad, ambiguous, and complex targets make implementation difficult and hinder transparency and accountability. For biodiversity, transparency is lacking regarding party progress towards global goals, and the VPRM is underdeveloped, under-used, and not linked to global biodiversity goals and targets. The absence of a compliance mechanism, or even a robust system of review, poses a challenge for international biodiversity obligations that are not reinforced or revisited, and opportunities for crucial interactions for learning, persuasion, and shaping actor identity are missed. A clear weakness for biodiversity is the failure of COP to develop shared understandings reflecting the need for a significantly strengthened review mechanism, essential in establishing a clear practice of legality.

How can shared understandings be developed further to strengthen global mechanisms to achieve compliance? Current shared understandings at CBD COP are unbalanced and reflect dominant actors who do not prioritise environmental issues. Chapter 3 highlights that participatory spaces can exclude certain actors, such as lower-income countries and those representing the interests of nature, such as IPLC and NGOs. Key actors dominating decision-making represent perceived legitimate interests, which ultimately fail to realise the health of our planet as a priority and responsibilise weaker actors to address global challenges. With such power dynamics, agreeing to strengthened means of compliance and accountability is thus challenging.

Interactive law recognises that enforcement mechanisms cannot just be thrown into a regime; it suggests that the presence or absence of a means to achieve compliance/accountability reflects the shared understandings of parties and the perceived importance of the agreed environmental obligations. COPs, or for the SDGs

meetings of the HLPF, provide an important 'practice' which creates the opportunity for repeated interaction between actors around environmental obligations. To strengthen shared understandings around compliance and accountability, participation of all relevant actors in decision-making processes is required, including means to even out power dynamics and promote the views of less-powerful actors in decision-making processes. Facilitating the participation of actors such as IPLC, women, youth, and NGOs who champion alternate environmental views has the potential to raise expectations and push shared understandings forward.

The use of persuasion and argument can foster new shared understandings in relation to the use of compliance procedures, and the success for climate in Paris shows that it is possible to achieve. For the CBD, entrenched procedures and lack of political will continue to impede progress for biodiversity, as demonstrated at CBD COP 15, where parties were unable to agree to a significantly strengthened means of review. The sustainable development regime offers greater opportunity than COPs for 'just, fair, and inclusive processes' through broader participation, including in systems of review; persuasion and education thus have potential to further systems of accountability for the SDGs although are voluntary.

The focus of the book so far has been on international governance processes, undoubtedly an important layer, and the main focus of international environmental law. Yet there are very significant hurdles within international environmental governance which prevent hasty progress towards environmental objectives, goals, and targets, including the lack of development of compliance and accountability mechanisms. Interactive law sees international environmental law as a holistic process which does not begin or end at the international level: ultimately, actions at national and sub-national levels of governance will achieve implementation and compliance. Chapter 6 analyses the entire implementation process and argues that the non-linear journey of international environmental obligations is key to study in order to understand the multiple processes which create, uphold, and enforce international environmental obligations, including the role of EU and domestic levels in furthering interactive law through adoption of effective compliance and accountability mechanisms.

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6 Keeping international environmental law and policy alive

The important journey of implementation

Introduction

The discussion in the preceding chapters identifies major limitations to the global institutional mechanisms for international environmental law and policy. Constraints include (1) the use of consensus decision-making by MEAs, which precludes the agreement of international environmental law and policy which fulfil Fuller's internal legal criteria (Chapter 3); (2) unbalanced symmetries in decision-making (Chapter 3); and (3) weak compliance and accountability mechanisms (Chapter 5). Together these limitations place considerable barriers to achieving the requirements of interactive law. Unless there is a significant increase in global political and societal will to agree to radical change, it is hard to see how international environmental institutions as they stand can strengthen and transform international environmental governance quickly enough to address escalating environmental harm. This chapter proposes that opportunities arise during the implementation process to address some of the gaps to achieving interactive international environmental law observed at the global level.

Implementation has been described as an ambiguous term referring to (1) 'giving practical effect to' or execution of policy, on the one hand, and (2) 'fulfilling' or accomplishment on the other.[1] This understanding ties closely to the concepts of formal 'outputs' from MEAs, as opposed to consequences of implementation and adaptation, classified as 'outcomes' or changes in human behaviour and 'impacts' on the biophysical environment.[2] In the context of international environmental law and policy, (1) 'outputs' can be seen as the creation of related national laws/policies to contribute to global objectives/targets/goals/decisions; (2) 'outcomes' as adjustments to human behaviour to align with environmental objectives; and (3) 'impacts' as desired changes to the biophysical environment, such as the restoration and enhancement of biodiversity. Achieving 'outputs' should be the most straightforward part of the implementation equation and talks to actions, such as the passage of legislation, formation of national policies, creation of institutions, development of systems of monitoring and review, and enforcement mechanisms. The 'outcomes' and 'impacts', or what I describe as the 'effectiveness' of implementation, are more elusive and less-tangible. The existence of relevant laws and policies may be a necessary stepping stone, but they are meaningless unless they

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trigger the necessary socio-ecological change to achieve the aims, objectives, goals, and targets of international environmental law and policy.

The effectiveness of international environmental law and policy during implementation depends upon context such as the domestic capacity of parties, political systems, ecological and geographical variations. Historical context is important, recognising the inequitable and colonial contexts behind planetary environmental problems, such as biodiversity loss and climate change,[3] and the continued inadequate levels of support, finance, and capacity building provided to lower economic countries despite the development of explicit obligations in relation to funding[4] and the legal recognition of differential responsibilities.[5] This book recognises that there is no 'one-size-fits-all' approach to implementation and that national circumstances differ yet argues that attention to the criteria of interactive law during the implementation process provides a flexible approach and can improve the effectiveness of international environmental law and policy in different contexts, including by reducing inequity in international environmental law and policy by better representing the voices and needs of less-dominant actors.

The following analysis finds connections between (1) interactive law, (2) 'socialisation', and (3) multi-level governance theories to better understand how international environmental law and policy can be effective during implementation. Interactive law recognises that whilst states may remain the principal actors in international environmental law and policymaking, other actors' input is necessary to ensure legitimacy and to enable change, and there are opportunities during implementation to create dynamics to support interactive international environmental law and policy.

The analysis draws upon existing interdisciplinary scholarship on implementation (s6.1) and reveals how implementation is a multi-layered and connected process (s6.2). An interactive analysis of the implementation of the Convention on Biological Diversity (CBD) Aichi Targets (ATs) in the UK and its devolved administrations is presented. The ATs build upon the formal/hard obligations of the CBD and provide an example of informal/soft international environmental law. The ATs were unmet in 2020 after a decade's worth of implementation efforts and important to study to understand their limitations. The UK is an interesting and unique case study due to its constitutional make-up, which consists of four devolved administrations with differing levels of devolved powers, thus allowing a multi-faceted exploration of the journey of implementation in different contexts, connecting different communities of practice at multiple governance levels. AT9 on invasive alien species addresses a direct driver of biodiversity loss and contains quantifiable elements, whilst AT2 concerns the integration of biodiversity values into national development policies which address indirect drivers of biodiversity loss and contain ambiguous and complex provisions (6.3.1).

The analysis provides an illustration of the application of interactive law and demonstrates how:

1. International environmental law and policy are 're-interpreted' and 're-shaped' during implementation using Fuller's internal criteria of legality (s6.3.2).

2. The requirement of interactive law for 'just, fair, and inclusive' involvement of 'society' in international environmental law and policymaking can be better achieved at domestic levels (s6.4).
3. Interactive law is better fulfilled at domestic levels through developing practices of legality that revisit, uphold, and reinforce international environmental obligations, such as review, accountability, and compliance mechanisms (s6.5).
4. Opportunities for socialisation exist at the local level around the operationalisation of international environmental law and policy through local action groups, partnerships, and local governments, where norm champions can accelerate socio-ecological change. (s6.6).
5. Opportunities to connect multiple governance levels exist to strengthen and link communities of practice from global to local, with domestic levels being seen to provide a particular opportunity to influence and advance the co-construction of shared understandings and social learning between actors in international environmental governance (s6.7).

It is put forward that the journey of implementation of the ATs in the UK is a multi-directional and ongoing process encompassing global to local levels of governance and sees that this entire process sets the ability for the aims, objectives, goals, and targets of international environmental law and policy to be achieved or not. During implementation, laws and policies can better fulfil the requirements of interactive law and thus accelerate and steer the shifts needed to accomplish international environmental law and policy objectives. Recognising variable contexts and the limitations of a single-country analysis, this book maintains that common challenges to implementation of international environmental law exist, and the lessons learned from the implementation of the CBD ATs in the UK offer insights for the implementation of international environmental obligations for other countries, suggesting that more focus should be placed on national and sub-national levels of governance to identify opportunities to strengthen international environmental laws and policies.

Understanding implementation

Scholarship on implementation of international environmental law and policy ultimately seeks to understand how real-world behaviour can align with the ideals and values of international environmental law and policy – in other words, not only the creation of legal and policy instruments but also on its 'operational effectiveness'. Studies on implementation are thus concerned with the entire system of governance, including non-legal/policy matters, such as individual and group behaviours, varied contexts, the role of non-state actors, and practical considerations, such as finance, technology, and capacity.

Implementation has been described as a 'devilish wicked problem' and said to 'elude understanding'.[6] That said, political scientists have studied the effectiveness of international environmental law and policy to provide important insights which align with the interactive legal discourse. For example, Young's study[7] proposes that

the effectiveness of international environmental regimes can be improved through the existence of a coalition of influential actors who are prepared to take the lead in initiation and development of the regime, maintenance of feelings of fairness and legitimacy, and problem-solving opportunities provided by the involvement of non-state actors and hybrid/private governance systems. Young stresses that environmental regimes are dynamic, that international law and policymaking generates important knowledge about environmental problems and contributes to developing shared understandings among participating actors, and that legally binding obligations lack depth and do not necessarily attract higher compliance rates, findings also pertinent to interactive law. Yet the key focus of the literature reviewed is on international institutions rather than recognising the importance of multi-level governance practices.

Raustiala and others study how international commitments are translated into practice and make several important observations from 14 case studies in eight areas of international environmental regulation: (1) that underdeveloped data systems to monitor, verify, and enforce international environmental law are problematic; (2) harder measures and sanctions are sometimes needed for deeper commitments; (3) active participation of industry can facilitate implementation; (4) NGOs are surprisingly inactive during implementation and could play a much more active role in verifying parties' implementation commitments; (5) countries in transition would benefit from financial support for implementation; (6) mixtures of less-ambitious binding commitments and more-influential and ambitious non-binding commitments can improve effectiveness.[8] Raustiala and others recognise the complexities of domestic implementation and argue that attempts to develop comprehensive implementation theories have failed,[9] and this finding is confirmed in the succeeding paragraphs on 'top-down', 'bottom-up', and 'hybrid' models, each of which has shortcomings. Critique of implementation theories rightly surrounds the problematic nature of applying generalised theories of implementation in context-specific situations.[10] Contingency theorists suggest there is no one-size-fits-all implementation strategy: due to varied contexts, good implementation will look different based on situational variables.[11] For example, the localised context of environmental issues, such as biodiversity, becomes a key factor in implementation, given the complexity of divergent ecosystems and habitats, as well as socio-political contexts with different interests, knowledges, and disproportionate power. This chapter recognises that each implementation process is unique, but nonetheless asserts that lessons can be learned from applying the discourse of interactive law to varied implementation processes to identify opportunities and challenges for effective implementation in different contexts.

Top-down, bottom-up, and hybrid

Several generations of public policy literature have developed theoretical insights to better understand implementation. Early top-down models seek to explain 'command and control' mechanisms and to clarify how policy proposals can best come to fruition through a vertical hierarchical process;[12] implementation of international

environmental law has also been seen as a vertical, top-down process.[13] The 1971 Ramsar Convention on Wetlands adopts a top-down approach to the designation of protected wetland areas and has successfully initiated the designation of nearly 250 million hectares of wetlands.[14] Whilst this success in creation of legal systems of protected areas is to be applauded ('outputs'), the governance of many wetlands, especially in urban areas, is weak, and the top-down approach is critiqued for lack of recognition of complex urban social-ecological systems, political complexity of policy processes, and lack of environmental justice (outcomes), leading to failures in urban wetlands governance (impacts).[15]

The bottom-up model concerns local administrators delivering policy through negotiation processes with stakeholders and networks of implementers.[16] 'Street-level' politics is seen as key to successful implementation, at a level where the intricacies of implementation are better understood and where those primarily affected by implementation can be actively involved in planning and execution.[17] The 1994 UN Convention to Combat Desertification heralds such an approach and focuses on the development of regional, sub-regional, and National Action Programmes (NAPs) involving participation of stakeholders both driving and impacted by desertification.[18] Despite their participatory approach, the implementation of NAPs has been slow, and less than 60% of NAPs have been operationalised.[19] Lack of institutional and human capacity and lack of funding have been practical hurdles to NAP operationalisation and over-emphasis on alignment of NAPs with shifting strategies and approaches, rather than on practical implementation.[20] These limitations suggest some element of top-down control is necessary to ensure progress towards implementation.[21]

Hybrid models attempt to reconcile limitations of top-down and bottom-up approaches by combining elements of both.[22] The Paris Agreement is an example of such an approach, where a multilateral target on the reduction of greenhouse gases has been agreed, and voluntary climate pledges, Nationally Determined Contributions, are required from all parties towards the target. A key aim is to incorporate bottom-up governance approaches to increase equity and climate ownership, rather than parties being forced into top-down commitments from a select and unbalanced group of diplomats in negotiation. So far, this approach has mustered less ambition than hoped for, and in 2021, the sum of ambitions from COP 26 NDCs would not achieve the 1.5–2º global warming goal.[23] The CBD and the SDGs can also be seen as a form of hybrid model where global non-binding targets have been set, and significant leeway is given to party implementation, yet ambiguous targets and lack of guidance on what individual national contributions should be towards global targets, along with lack of transparent accountability mechanisms, impede implementation.

Multi-level governance

Multi-level governance advocates consider a different model of governance: 'shifting from the centre towards the periphery; from the domestic to international arenas; and from the public to the private sphere of society',[24] in complex

multi-layered processes of implementation with non-linear interactions between 'domestic' and 'international' policymaking arenas.[25] For example, the roles of national, sub-national, regional, and local governments are recognised in shaping supranational entities such as the EU[26] and, as this book argues, MEA institutional bodies. The extent of the role that sub-national governments can play will depend upon the relevant constitutions or legislation that outline the nature of relationships between central, local, and regional government and the level of autonomy of local government,[27] with Western democracies most likely to encourage local autonomy.[28] For example, in the UK, many environmental issues are a devolved matter, enabling regional and local governments some freedom to bypass central government to position themselves in international arenas.[29]

Empowerment of sub-national governments can facilitate creative decision-making to better match local contexts and capabilities[30] but is not without its own complexities.[31] At national and sub-national levels of governance, a diverse range of actors form networks and non-state actors may perform important governance roles, for example, government functions can be partially privatised at sub-national levels, with private stakeholders involved in government functions.[32] Other key actors at sub-national levels include cities and regions: despite rarely enjoying formal autonomy,[33] they can be targeted by international institutions for funding schemes and invited to participate in international governance processes.[34] Interactive law sees the inclusion of domestic actors, including sub-national governments, cities, regions, NGOs, and private stakeholders, as key to both develop shared understandings to underpin international environmental law and policy and for exposure to socialisation processes to facilitate the operationalisation of related laws and policies during implementation.

Interactive law sees multi-level governance as a holistic, connected process. Multi-level governance has been aptly described as a marble cake with blurred and fluid boundaries, rather than the neat, layered cake it is often imagined to be.[35] This understanding encompasses the nature of international environmental laws/policies that are necessarily complex and fluid in nature, reflecting divergent and evolving interests at multiple levels, rather than something which is static and can be 'completed'. Implementation of international environmental law and policy needs to be flexible to adapt to changing goal posts. Scholars recognise the complexities of governing shifts to more sustainable behaviours when they are 'messy, conflictual, and highly disjointed'[36] and involve complex and changing human and social dimensions which preclude planning.[37] For example, evaluation of the success of international environmental law and policy is difficult to disentangle from other changes; trade-offs will be made between efficiency and equity; conflicts emerge between individual interest and social interest; and perfect implementation is not obtainable.[38]

If perfect implementation is not obtainable, how, then, can international environmental objectives ever be achieved? The old saying goes, 'practice makes perfect', and this chapter proposes that when implementation of international environmental law and policy is seen as a continuous process, achievement of goals and targets is not the only objective, and suggests more focus should be placed on the lessons

learned during implementation at multiple governance levels to achieve interactive processes. Typically, implementation looks backwards to assess policies, actions taken, and results achieved. The focus on accountability and achievement of objectives means that, generally, actors at the bottom are accountable to expectations from actors at the top,[39] and this book reveals complexities and limitations to such an approach for weak international environmental law and policy, where strong global accountability mechanisms are rare.

Implementation can also be seen as forward-looking: a process of exploration where ideas are tested and evaluation focuses on lessons learned during implementation rather than solely on the static baseline of achievement of objectives. Interactive processes facilitate learning and can reform policy design at multiple governance levels, reveal false assumptions, and adjust goals, including by strengthening them, according to information gained during implementation. Interactive law is an adaptive process and enables learning, experimentation, reflexivity, monitoring, and feedback[40] throughout the implementation process. The experience of falling short and then learning from this, rather than repeating the same mistakes, is worthy in itself.[41] Although many MEAs repeat the same mistakes and evolve without learning[42] due to insufficient political will, when interactive processes are achieved, with particular opportunities at national and sub-national governance levels, this can facilitate organisational change. Implementers become key knowledge actors able to inform international policy processes and feed into their re-design, having directly witnessed opportunities and obstacles to implementation in a learning process.

Socialisation

Interactive law sees importance in 'just, fair, and inclusive' involvement of all relevant actors in international environmental law-making and law applying. 'Socialisation' literature is helpful to some extent to better understand how this can be achieved. Socialisation is a concept which has been used to explain how an individual acquires the characteristics of a 'social being and participant' required for membership of society.[43] The concept of socialisation has since developed through different lens, and there is no single definition of socialisation: rational accounts of socialisation focus on behavioural change, whilst constructivists look at how socialisation changes actor identity.[44] Different contexts are important to understand how individuals or groups become socialised to social norms and roles and become an important explanation of behaviour based on what is seen as appropriate.[45] It is argued here that socialisation is also relevant to legal norms, which guide and influence behaviour and set aims for societal conduct.

Socialisation has been used in international relations to examine how actors, mainly states, change their behaviour to join groups and to internalise values and norms, including by elite learning within international institutions, naming and shaming, and coercion, and through the bottom-up mobilisation of ideas.[46] The influence of international human rights norms on domestic practices has been studied, and socialisation, defined as a five-stage 'spiral process' by which

international norms are internalised and implemented domestically.[47] Risse et al. see socialisation as a process by which individuals' principled ideas become norms which influence collective understandings about appropriate behaviour, thus changing actor identity interests and behaviour. Key to the socialisation process are transnational advocacy networks connected by shared principled ideas and values which can converge social and cultural norms to support the integration and diffusion of norms.

In the human rights context, Risse et al. demonstrate how continued pressure from transnational networks on states and societal opposition have led to the internalisation of international human rights norms into state practice, including those with histories of human rights violations: a key factor being the relationship between domestic groups and transnational networks that pressure oppressive regimes to alter their behaviour. Socialisation in Risse's study explains change in state behaviour but does not examine the role of international law and policy in influencing or socialising a range of domestic actors to habitualise norms and change behaviours. Interactive law seeks to understand changes in state and non-state actor identity to correspond with more sustainable behaviours outlined in international environmental law and policy.

The examination of socialisation around international environmental law and policy during implementation is important for two reasons: (1) It uncovers opportunities and barriers to the adoption of new norms around international environmental law and policy by state and non-state actors. (2) It reveals under what conditions/contexts international environmental norms are habitualised at national, sub-national, group, and individual levels to correspond to international environmental law and policy. It is argued here that domestic socialisation processes are particularly important because (1), ultimately, behaviour at domestic levels must change to achieve the aims, objectives, targets, and goals of international environmental law and policy, and (2) international interests and actions are influenced by domestic socialisation processes.

Limitations in achieving the outcomes of international environmental law and policy are not necessarily all about failure in the implementation process *per se*, although I identify several opportunities to strengthen these, but also relate to problems with 'socialisation'. Key to determine the success or failure of internalised environmental laws and policies is change in actor identity and social actions particularly at domestic levels of governance, and close attention to the requirements of interactive law can facilitate this change. It is argued that it is in this blurred area, between environmental law and policy, and societal attitudes towards the legal norms set out by these rules where a key barrier to effective implementation lies. The lack of equivalence between environmental legal and policy obligations and social practice within communities is a key obstacle to effective implementation, and this is particularly apparent at sub-national levels of governance. The analysis in this chapter identifies different contexts at the local level, where there are opportunities for the socialisation of communities of practice to international environmental law and policy, and for truly sustainable actions to be seen as appropriate behaviour within communities. It is argued that this is where resources and

efforts must be concentrated to push forward societal understandings to adopt new norms and trigger the necessary actions at ground level to conserve the environment, which in turn will feed back and influence global governance processes. Such shifts in behaviour may be challenging and will require education, social learning, and support for just transitions away from unsustainable behaviours.

Communities of practice are formed by people who engage in a process of collective learning, in formal and informal spaces, in a shared domain of human endeavour.[48] How communities learn through social engagement can enrich understandings of how a range of different actors, state and non-state, influence and reciprocate laws.[49] Communities of practice emerge at multiple governance levels from global to local and are important in developing shared understandings. Different communities of practice are connected and encompass socialisation processes around international environmental law and policy, which are seen here as key to gain reciprocity, that is, law/policy which is accepted and followed by actors.[50] Fulfilling the obligations set by international environmental law and policy such as the ATs requires significant adjustments to behaviour and actor identity. It is argued that implementation and operationalisation must be considered carefully against the criteria of interactive law at multiple levels of governance to encourage socialisation.

Connected layers: the implementation of the Aichi Targets in the UK

Global

The analysis considers the journey of two ATs to sub-national levels and local levels in the UK (see Figure 6.1). The ATs were agreed at CBD COP 10 in Nagoya in 2010 and formed part of the 2011–2020 strategic plan of 'Living in Harmony with Nature'. Whilst the analysis considers the top-down journey of these global targets, the journey reveals itself to be multi-directional.

AT2 addresses an underlying cause of biodiversity loss and concerns the integration of 'biodiversity values' into decision-making at national and sub-national levels of governance. Its focus is two-fold, firstly, on the 'value' of biodiversity and, secondly, on the importance of national and local governance in relation to biodiversity. The objective of this target is to ensure that biodiversity values and opportunities derived from its conservation and sustainable use are recognised and reflected in all relevant public and private decision-making.[51] Biodiversity can be valued in many ways, including intrinsic, economic, social, and cultural. Parties specifically report the absence of the economic valuation of biodiversity as problematic.[52] Until 2022, the CBD predominantly promoted economic valuations, evidenced through its reference to 'ecosystem services',[53] 'natural capital',[54] and its encouragement of business engagement.[55] The CBD secretariat contributed to the development of the Natural Capital Protocol (NCP) produced by the Natural Capital Coalition (NCC), of which the CBD is a member.[56] The Post-2020 GBF has recognised the importance of multiple nature valuations, led by an IPBES assessment,[57] with reference made to ecocentric concepts such as 'Mother Earth Centric Action' as tools for implementation for NBSAPs.[58]

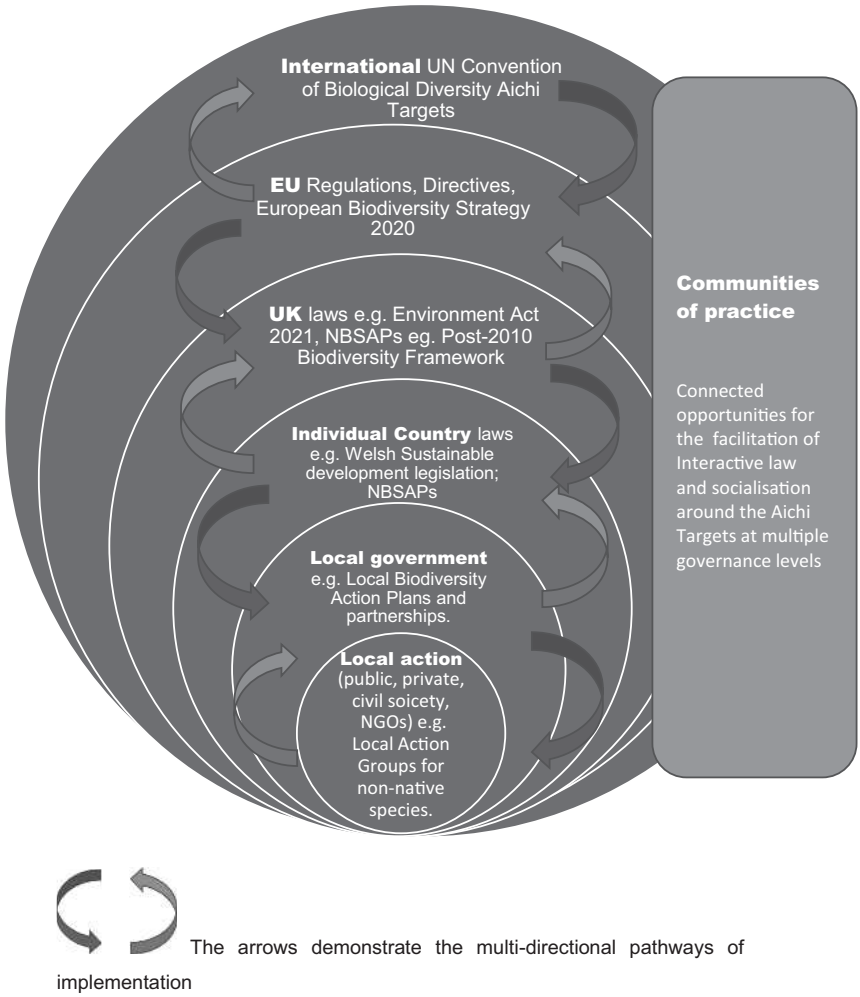

Figure 6.1 The journey of implementation of the Convention on Biological Diversity's Aichi Targets in the UK.

AT9 regulates invasive alien species (IAS), which are a major threat to biodiversity loss;[59] the target builds upon Article 8(h) of the CBD treaty.[60] Thirty-four CBD COP decisions relate to IAS; a toolkit has been developed by the CBD secretariat on the management of IAS,[61] as well as supplementary voluntary guidelines on IAS and trade.[62] The CBD is one of the primary global responses to 'biological invasion' but is by no means their only system of regulation,[63] raising questions as to how complex systems of international institutions interact.[64] Amos finds the regulation of IAS as ineffective due to the lack of a single coherent strategy to deal with all stages of a biological invasion, and the comparative lack of detailed provisions rather than the multiplicity of regulations.[65] Kim criticises fragmented,[66]

polycentric,[67] and complex[68] international environmental regulatory systems for facilitating an environmental 'problem-shifting approach',[69] rather than making sufficient headway in achieving transformative change. Many of these global questions are also pertinent to local governance; it is during implementation that struggles between policy mixes play out, revealing obstacles and opportunities to achieving global environmental goals locally.

EU

The EU is a supranational entity and presents an important layer of implementation for its parties and promotes interactions between international, European, and domestic laws, thus connecting communities of practice. The EU is a signatory to the CBD and has produced EU law and policy as a result of international environmental law, relevant to its parties.[70] For example, EU National Biodiversity Strategy and Action Plan (NBSAP): the EU Biodiversity Strategy 2020 (EBS 2020) implements CBD obligations and called to halt biodiversity loss in the EU, restore ecosystems where possible, and step up EU efforts to avert global biodiversity loss,[71] updated to the EU Biodiversity Strategy 2030 (EBS 2030). EBS 2030 operates alongside relevant EU directives and regulations: Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora;[72] Wild Birds Directive 79/409/EEC, codified by 2009/147/EC;[73] EU Regulation 1143/2014[74] on invasive alien species (IAS), which aims to control or eradicate priority species and to manage pathways to prevent the introduction and establishment of new IAS.[75] EU Regulation 2023/1115, on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation, aims to regulate indirect drivers of deforestation through corporate accountability, replacing EU Regulation No. 995/2010, the European Union Timber Regulation (EUTR).[76]

National

In 1994, the UK was the first CBD party to establish an NBSAP[77] and has since agreed three generations of NBSAPs, which complement a second wave of individual country NBSAPs. The UK connects global to sub-national processes. The most recent UK NBSAP, the Post-2010 Biodiversity Framework, has two 'implementation plans',[78] and the JNCC[79] reports towards the milestones in the implementation plans.[80] The UK undertakes reviews of progress through the Article 6 national reporting requirement, the most recent being the sixth UK national report.[81] Supplementary to the sixth national report is an overview of progress towards the ATs.[82] Despite these efforts, very few CBD obligations, including the ATs, have been met.[83]

Sub-national

In the UK, most legal and policy efforts in relation to biodiversity are devolved and carried out by individual countries.[84] Each country has its own NBSAP, government

environment department, biodiversity conservation body, statutory environmental agency, NGOs, and stakeholder groups who work towards the implementation of international biodiversity law. The devolved administrations have clear opportunities for divergence in governance approaches and implementation strategies of biodiversity laws and policies. There are opportunities for collaborative policy-making involving a variety of relevant actors.[85] These distinct interactions provide a setting for developing shared understandings within communities of practice and for social learning. Individual country practices mostly focus on their own 'place-based' ecological, geographical, and sociological interests, and the specificity of policies and governance mechanisms can be strengthened to their particular country context. Experts who have more comprehensive understandings of their local environment and society can tailor international environmental obligations to formulate the most appropriate response.

Different approaches may be warranted and needed due to the localised nature of biodiversity and differing socio-economic contexts across the four countries. Since withdrawal from the EU, each devolved nation has more freedom to diverge on approaches taken towards environmental matters[86] but is bound to the MEAs to which they are a party.[87] A concern is that decentralisation may weaken environmental commitments if they are not prioritised by individual countries. In this way, regional and national perspectives are key at ensuring common standards are met.[88] Iterative processes of policy development and planning are important as they enable interaction between different levels of UK governance.[89] The retention of a UK biodiversity framework in addition to country-level NBSAP safeguards common standards across the UK and provides interactive opportunities.

Local government and cities

In the UK, local authorities take heterogenous approaches to biodiversity planning and work with local stakeholders to implement international environmental law and policies, for example, through land management schemes, such as nature recovery networks.[90] Cities and urban planning documents present an opportunity to incorporate city-level goals and targets for biodiversity and ecosystem services,[91] for example, the city of London Biodiversity Action Plan 2021–2026.[92] Local-level actions and social learning in communities of practice influence, from the bottom up, sub-national, national, and international policies, through local expertise and institutional capacity.[93]

UK Implementation involves several layers of governance which are interconnected. Communities of practice play a key role during implementation in promoting the wide-scale behaviour changes needed to challenge current unsustainable patterns at multiple governance levels and to shift perceptions and understandings around environmental issues.

An interactive analysis of the CBD Aichi Targets

The first requirement of interactive law is that international environmental law and corresponding internalised laws and policies meet Fuller's internal criteria of

'moral' law. In this section, the first part of the analysis concerns the internal legality of law and policy during implementation, which sees that laws attract fidelity when they are (1) general; (2) prohibiting, requiring, or permitting certain conduct; (3) promulgated and accessible to the public; (4) not retroactive but prospective; (5) clear, avoid contradiction; (6) realistic and not demand the impossible; (7) constant; (8) congruent between legal obligations and the actions of officials operating under the law.

Generality

In respect of the requirement of 'generality', there lies a certain paradox applicable to the CBD, UNFCCC, and SDGs; whilst international environmental obligations typically apply equally to all parties, the burden of remedying global environmental problems is unevenly distributed between parties with varying socio-political and environmental contexts nationally and sub-nationally. For example, biodiversity hotspots contain extraordinary levels of endemic species undergoing exceptional extinction rates and loss of habitat and are mostly contained within lower-income countries, thus creating a disproportionate burden of responsibility on these countries, raising questions of equity.

Attempts are made within the CBD and the climate regime to reconcile such issues, but these largely fall short of what is needed. The CBD takes heed of the principle of 'common but differentiated responsibility', which recognises that the special needs of developing countries should be taken into account in the development, application, and interpretation of rules of international environmental law. Article 20 and Article 21 of the CBD lay the foundations for a financial mechanism to aid developing countries, which has been managed through the Global Environment Facility (GEF). The Post-2020 GBF includes goal D and target 19, requiring specific quantities of financial resources from all sources of at least USD 200 billion per year by 2030. GEF provides financial resources for developing countries and countries with economies in transition to implement the CBD, and a new Global Biodiversity Framework Fund under GEF has been created, open to all sources of finance to support implementation. Nonetheless, GEF funds several MEAS, which limits the support it can provide specifically for CBD implementation.

Despite these efforts, it is debateable if this support is enough to argue a case that the ATs are general to all countries in terms of the efforts required for implementation and compliance. The requirement of generality in international environmental law and policy needs to be carefully thought out to achieve just and equitable division of responsibility for remedying global environmental problems.

Prohibiting, requiring, or permitting certain conduct; promulgated and accessible to the public; and not retroactive but prospective

Some criteria are more easily met by international environmental law and policy, including the requirements that laws and policies require certain conduct, be made publicly available, and are forward-looking.

CLARITY

A key limitation of international environmental law and policy is that it can lack clarity: with ambiguous obligations, complex provisions, and unnecessary wording being commonly used.

These limitations are demonstrated in the ATs analysed.

Aichi Target 2 states:

By 2020, at the latest, biodiversity values have been integrated into national and local development and poverty reduction strategies and planning processes and are being incorporated into national accounting, as appropriate, and reporting systems.

For AT2, the wording is overly complex, with five elements to the target which all need further clarification. For example, what is meant by 'biodiversity values'. Ambiguous wording such as 'as appropriate' gives significant leeway for parties and encourages low ambition, and there is no quantitative element to the target. The Post-2020 target 14 made some clarifications,[94] including as to where biodiversity integration can be achieved, recognition of multiple values of biodiversity, the importance of a prioritised whole of government approach, and alignment of public and private activities and finance with global biodiversity goals,[95] yet there is still no means for quantification; the target is complex, and ambiguous wording such as 'as appropriate' remains. Another limitation concerns AT2, which asks the impossible. It is questionable whether a decade was enough time to make all the changes necessary in laws and policies at the national level to meaningfully integrate biodiversity values.

AT9 states:

By 2020, invasive alien species and pathways are identified and prioritised, priority species are controlled or eradicated, and measures are in place to manage pathways to prevent their introduction and establishment.

AT9 lacks clarity as there are no quantifiable aspects to the target; this has been partly rectified by GBF target 6 for invasives, which requires a 50% reduction in rates of introduction and establishment of IAS by 2030, with prioritisation for most vulnerable sites in line with the 'risk analysis' approach, thus providing a clearer approach.[96] It is not beyond the reach of global politics to agree on clear targets, for example, the Paris Agreement climate target,[97] and some progress has been made

in respect of the GBF targets, with more targets containing quantifiable elements, although these address direct drivers of biodiversity loss, such as IAS, rather than the underlying causes or indirect drivers of biodiversity loss, such as the integration of biodiversity values across government sectors and private and financial activities.

NON-CONTRADICTORY

Achievement of the requirement that international environmental law and policy are 'non-contradictory' is questionable. Politically agreed rather than scientifically based obligations[98] could be contradictory to the overall aims of international environmental law as they do not go far enough and allow 'business as usual'. For example, even if the ATs were met, cumulatively, they could not have achieved the mission of the 2011–2020 strategic plan to 'halt biodiversity loss by 2020' and to live in harmony with nature by 2050.[99] Further, the system of NDCs introduced by the Paris Agreement fails to add up to enough emission reductions to achieve the global climate 1.5–2ºC goal.[100]

Be realistic and not demand the impossible

Does international environmental law demand too much? On one hand, the notion that international environmental laws and policies are over-ambitious in the time scales outlined has been raised.[101] On the other hand, they are seen not to go far enough, a key factor being the failure to sufficiently address indirect drivers of biodiversity loss, such as inequality, patterns of increasing resource consumption, investment and trade patterns, unsustainable technologies, and values and governance that do not prioritise or promote nature.[102] Indirect drivers fuel the direct drivers of biodiversity loss, such as climate change, fossil fuels, unsustainable food systems, over-extraction, land and sea conversion, and pollution.[103]

AT9 could be argued to be ambitious and difficult to achieve in practice, yet AT9 does not go far enough in terms of stopping damage to biodiversity. The question of what is realistic is closely tied with political and societal will; the Covid-19 pandemic shows that monumental societal, political, and legal change is achievable.[104] Implementing effective international environmental law is also achievable, with re-direction of socio-political priorities needed.

Constancy

The requirement of constancy is fulfilled when considering broader global environmental objectives, for example, the CBD's vision of 'Living in Harmony with Nature' by 2050, which provides the consistency envisioned by Fuller. For the CBD, strategic plans are developed every decade. For climate, a range of legal approaches have been taken to achieve the overall UNFCCC objective to stabilise greenhouse gas concentrations 'at a level that would prevent dangerous anthropogenic (human induced) interference with the climate system'.

Congruence between legal obligations and the actions of officials operating under the law

Congruence in the international context concerns achieving equivalence with the obligations created by international law and policy and their actual administration. The binding requirements of international environmental law, such as producing national reports or specific tools for implementation, such as NBSAPs, NDCs, and VNRs, are clear to countries, yet the official monitoring and accountability frameworks are often limited. In Chapter 5, an analysis of the role of MEA institutions in monitoring and accountability identifies that there is a lack of clear guidance to parties on their progress towards formal and informal obligations, and this is a limitation to achieving interactive law: officials rarely taking any action whatsoever against parties failing to achieve compliance.

Internalised laws and policies and Fuller's internal criteria of legality

The interactive analysis of the CBD Aichi Targets, identifies limitations to fulfilling Fuller's internal criteria of legality in relation to AT9 and AT2, particularly in terms of clarity and being realistic. The following analysis reveals how clarity is improved during implementation but argues that socialisation and better-connected multi-level governance processes during the implementation of international environmental law are key to shift shared understandings to prioritise environmental issues. It is suggested that Fuller's other internal criteria of legality are largely unproblematic during implementation, and that law in the UK is general, prohibits or requires a certain conduct, is prospective, constant, and congruent with official actions.

For AT9, the first stop on its journey of implementation is at the EU level. EU Regulation 1143/2014 on invasive alien species[105] provides a binding requirement of member states, better fulfilling Fuller's requirements, in particular, prohibiting, requiring, or permitting certain conduct, being available to the public, constant, congruent with the actions of officials, and the regulation provides greater clarity regarding the actions that EU member states must take.[106] In establishing a priority 'blacklist',[107] it is clear which species to focus on for regulation. There are also clear requirements that EU member states must adopt surveillance systems, assess key pathways of introduction, and establish and implement action plans to address priority pathways.[108]

At the Great Britain national level, further clarity is given to AT9 through the 2015 British Invasives Strategy, superseded by the 2023–2030 Strategy, which contain a set of key actions and a framework for supporting and coordinating action.[109] The key actions, intended not just for public bodies but importantly also non-state actors, provide clear guidance on what needs to be done to implement and operationalise policies to reduce the threat and minimise the risk of IAS in the UK.

The four countries have also implemented formal laws to tackle invasives, such as Species Control Agreements (SCAs) and Species Control Orders (SCOs).[110] To supplement the legislation, England and Wales have detailed codes of practice for

invasives,[111] thus improving clarity. In England and Wales, s14 Wildlife and Countryside Act 1981 prohibits the release of non-native animals in the wild and prohibits growing certain non-native plants.[112] Similar provisions exist in Scotland[113] and Northern Ireland.[114] Clarification of definitions in legislation is needed, such as 'non-native' and 'the wild', while some concepts such as 'release' or 'causing to grow' create ambiguity, with repercussions for enforcement and accountability.

A trade-off can be found in the use of lists and clarity, conflicting with Fuller's criteria that laws must be non-contradictory. Lists do not contain all relevant species,[115] and the management of a few IAS will not resolve the threat posed to biodiversity by un-listed species. Scientists recognise that bigger lists are needed to effectively manage the problem of IAS,[116] yet sub-national local groups actively dealing with the management of IAS struggle to address a few major IAS and do not have the resources or capacity to cope with large lists of species; in this sense, the internalised policies 'ask the impossible'. For interviewee 2(d):

> At a local level you cannot give people managing these sites such a big list. They have local knowledge, and they use this to pare the list down to a more manageable size . . .. we are just focusing on 3 main, easy species, this is the most we can manage.

Invasives are extremely hard to control, and the practicality of eradicating an invasive is often complicated and resource-heavy. For interviewee 2(d):

> A marine species, carpet sea squirt, has carpeted everything in an estuary. We wrapped every structure in black plastic to try and get rid of it for 1 or 2 years, to try to kill it, however we didn't manage to eradicate it.

For interviewee 1(a):

> The current strategy on INNS hasn't worked. We are the Japanese knotweed capital of Wales! There are not the resources to tackle it in any meaningful way. There is nothing on the market to control it. You can put it into dormancy, but you just limit the spread.

Despite the existence of laws and policies which generally meet Fuller's requirements, the key obstacle concerns their operationalisation. Eradicating IAS is complex, time-consuming, and costly and requires increased investment.[117]

AT2 speaks to the proper valuation of biodiversity in national planning and development processes. So far, the CBD has mainly focused on the economic value of biodiversity through the development of concepts such as natural capital, an attempt to account for the human value of ecosystem services. Recent valuations of natural capital globally are an estimated US$125 trillion;[118] in the UK, the latest valuation is £1.8 trillion.[119] Ultimately, natural capital approaches are a way to place a financial value on the world's stock of natural resources, and quantifying such value is undoubtedly problematic.[120] They have been contended on ethical

grounds for failing to take account of diverse valuations of nature by different cultures,[121] the intrinsic value of nature, and for being purely anthropocentric.[122] The approach is also questioned for bowing down to capitalist ideologies and therefore its ability to effectively safeguard biodiversity.[123] These are valid concerns, but ultimately, with only limited time to address the biodiversity and climate crises,[124] natural capital approaches are argued as important, alongside approaches which address the capitalist conservation mentality.[125]

Natural capital speaks to biodiversity users and non-environmental sectors, who must play a much larger part to stem the current biodiversity crisis,[126] and natural capital provides a means to mainstream biodiversity and ecosystem services into the decisions of these sectors.[127] It allows the benefits of biodiversity to be quantified as well as assessing the risks involved in its loss.[128] Further, its focus does not always have to be monetary.[129] To engage other sectors, nature's value must be understood and made relevant to them. In the short term, this can be facilitated by concepts such as natural capital and ecosystem services, language which production sectors and businesses can relate to and implement, as well as focusing on the undoubted importance of nature's intrinsic and cultural values.

Natural capital is not directly included in the CBD 2011–2020 Strategic Plan or ATs but is linked to the ecosystems approach taken by the CBD so far,[130] noting a change of course with the adoption of the Post-2020 GBF, which stresses the importance of multiple values of nature to be accounted for during implementation.[131] At the global level, it is unclear how parties should account for nature's value and leaves this up to interpretation. In Europe, the EBS2020 vision and targets[132] highlight the intrinsic value of biodiversity[133] and the concept of 'natural capital',[134] thus increasing Fuller's requirement of clarity by defining how biodiversity value can be considered and presenting a means to measure it. It stresses the need to focus on ecosystem services[135] and natural capital as well as biodiversity.[136] EU targets also reference ecosystem valuations and natural capital assessments[137] and form the basis for the adoption of such approaches by EU member states.

The European level provides greater clarity on how natural assets can be valued: Regulation (EU) No 691/2011 on European Environmental Economic Accounts requires member states to regularly report on air emissions accounts, environmental taxes by economic activity, and economy-wide material flow accounts; the implementation time of these mandatory modules has taken over ten years.[138] It is only recently that a new module on ecosystem services has been introduced for 2019–2023.[139] Whilst it is a positive step forward, questions are raised as to the speed of implementation.

Despite these concerns, the EU's inclusion of the concept of natural capital in its vision and targets sends a message that business, policy, and development decisions need to take better account of nature's 'value'. The implementation of AT2 at the EU level provides clarification on how this can be achieved with a detailed framework, typologies, and indicators contained in technical reports for use by member states for mapping and assessing the state of their ecosystems, thus facilitating implementation.

In the UK, AT2 has been internalised in part through the creation of natural capital approaches in Scotland, England, and Northern Ireland. In Wales, a sustainable development and ecosystems approach has been taken in relation to biodiversity conservation.

Scotland was the first country in the world to publish a detailed report in 2011 which monitors annual changes in its natural capital, using the 'Natural Capital Asset Index' (NCAI).[140] The NCAI analyses nature's potential contribution to the well-being of Scotland's citizens and is a composite index which tracks changes in the capacity of Scotland's terrestrial ecosystems and uses ecosystem services to assess how nature contributes to the well-being of Scottish citizens. Interestingly, the NCAI does not attribute a monetary value to natural capital, but it reflects the relative contribution of habitats to human well-being.[141]

For Interviewee 2(c):

> This is a fantastic step forward as it values biodiversity within national plans, it is an integrated value alongside other indicators such as GDP and employment.

In England, the Office for National Statistics has produced natural capital ecosystem services accounts,[142] including a set of metrics to measure natural capital in England.[143] The commitment towards the natural capital approach has been reiterated in the UK government's 25-Year Environment Plan,[144] incorporating recommendations from the English Natural Capital Committee;[145] a roadmap sets out early priorities for scoping and developing various types of accounts,[146] and the requirement of 10% biodiversity net gain as a condition of planning permission.[147] The UK's steps forward in relation to natural capital approaches provide greater clarity to AT2 and engage non-environmental sectors, including at local levels, on biodiversity issues.

The move towards natural capital has been welcomed by DEFRA. For interviewee 3(a):

> The UK would like to move towards the natural capital approach. The CBD is keeping the biodiversity term alive for the UK. Is biodiversity still resonating well globally since 2010? The problem with the term biodiversity is that it is difficult to get backing from other departments. Natural capital will be more effective at achieving this.

The natural capital approach builds upon the ecosystem approach and is filtering down to local levels of governance, such as in the South Downs National Park:

> We took the natural capital approach, and it has become much more mainstream, most organisations incorporate ecosystem approaches and now natural capital. It is not just about how it looks but about how it functions. Local plans need to contain strategic policies around protecting and enhancing ecosystem services and natural capital policies. They need clear guidance on how they can meet these requirements. This is a live exercise.

The approach is having some effect, as described by interviewee 3(a):

> It has gone from no dialogue on biodiversity to a more open door to other sectors that don't speak the conservation language. Economists are talking with Local Enterprise Partnerships to provide evidence and make the argument that the natural environment is an asset and an opportunity for growth, and it needs to be invested in.

That Scotland and England are furthering innovative approaches to incorporate natural capital also speaks to a forward-looking process of experimentation and learning advocated by interactive law. The adoption of natural capital approaches has broken down some significant barriers to mainstreaming biodiversity into non-environmental sectors and at least opened conversations with these sectors. In turn, these shared understanding developed at the local level can feed back to global institutional processes (see also the section on opportunities to connect multi-directional processes).

AT2 is also implemented through 'public biodiversity duties', which place statutory obligations on public bodies at the national and sub-national levels of governance to embed the consideration of biodiversity and ecosystems into their policies, plans, programmes, and projects as well as their day-to-day activities. Historically, the four countries varied in their approaches to the biodiversity duty, but since the Environment Act 2021, there is more evenness in approach. Until recently, English public bodies have only had to 'have regard to biodiversity',[148] requiring no positive action at all.[149] The Welsh and English biodiversity duties require public bodies to 'maintain/conserve and enhance' biodiversity in their functions.[150] The wording implies that positive action must be taken by public bodies though the exercise of their functions to maintain the current level of biodiversity and to enhance it, although there is a restriction 'so far as consistent with the proper exercise of those functions'. The Scottish and Northern Ireland biodiversity duties are weaker[151] and require public bodies to 'further' the conservation of biodiversity 'so far as is consistent with the proper exercise of those functions of the public bodies': there is no obligation to restore or enhance it. The Scottish duty is also qualified by a proviso. There are requirements to report publicly on compliance with the duty,[152] which focuses public bodies on the measures they are taking to further the conservation of biodiversity.

The unique constitution of the UK and the interaction enforced upon the four countries mean that shared understandings from one country can influence another. For example, the Welsh approach to implement an enhanced biodiversity duty has triggered debate in Scotland, as noted by interviewee 2c:

> Wales have taken a ground-breaking approach and have stepped ahead in some ways. We are all watching Wales so we can steal the best bits.

This indicates that the approach taken by Wales has influenced and shaped shared understandings in the other countries. The unique constitution of the UK allows

for different communities of practice in different countries to interact, and these interactions can shape and influence each other's shared understandings relating to biodiversity law and policy and feed into other governance levels.

Just, fair, and inclusive processes during implementation

The second requirement of interactive law is that processes of international environmental law and policymaking at multiple levels of governance during implementation and operationalisation must enable 'just, fair, and inclusive' interactions between all relevant actors and law-making officials. The analysis reveals some opportunities during implementation to better achieve more inclusive approaches. That said, problematic dynamics are still present at national and sub-national levels and it is stressed here that certain actors must be empowered at all levels of governance during participation in implementation processes, such as indigenous people and local communities, women, youth, nature and animals.

The dynamics of participation can have significant implications for the empowerment (or disempowerment) of affected stakeholders, and the dynamics of participation are key to ensure all stakeholders' views are properly valued.[153] When present, economic actors can be influenced through exposure to persuasive discussions around environmental issues, which can strengthen their understanding of the obligations and increase the likelihood of reciprocating their requirements.[154] Well-designed participatory processes trigger the construction of shared understandings based on mutual learning and create policy discourses which influence policy outcomes.[155] On the other hand, there are significant risks resulting from unbalanced power dynamics in participatory approaches;[156] the participation of dominant economic actors can be reflected in policy outcomes and during implementation, favouring economic valuations of nature, promoting business as usual, and marginalising intrinsic, ecological, spiritual, cultural, and aesthetic values of nature.[157] Participatory processes need to be carefully thought out to address disproportionate power dynamics to ensure that participatory practices between actors are meaningful and that marginalised actors are empowered.[158] Implementation is influenced by stakeholders' perception of the requirements. When their 'expectations, perceptions, personal agendas, and concerns' are taken into consideration,[159] this facilitates implementation.

The EU mandates participatory processes for environmental policy implementation[160] and emphasises the importance of greater openness, accountability, and responsibility by getting more people and organisations to shape and deliver EU policy. Some see that processes of policy design, delivery, and implementation at the Commission allow for action and participation to take place at multiple levels.[161] In contrast, others observe a big gap between the rhetoric on participation and real-life implementation of participatory processes from EU to local level.[162]

Participatory processes were used in the formation of EBS 2020, and before its adoption, EBS 2020 underwent extensive consultation with EU institutions, member states, environmental NGOs, biodiversity user groups (agriculture, forests, business,

and fisheries sectors), professional associations, trade and business associations, companies/groups, academia, research institutes and think tanks, and international/intergovernmental organisations.[163] The membership is therefore diverse, although biodiversity user groups were less well represented than NGOs. EU participatory processes, whilst not perfect, are argued to go beyond participation at the CBD and are more inclusive (see chapter 3). The fact that a range of stakeholders, including production sectors and the general public, were involved in the design process of EBS2020 strengthens shared understandings around AT2 and AT9.

The consultation on the proposal for EU Regulation 1143/2014 also provided an inclusive space. A range of stakeholders, including production sectors and the public, were involved in the decision-making process. Two public consultations on the Commission's proposals in 2008 and 2012 led to considerable change in approach,[164] demonstrating the influence of diverse stakeholder participation on the co-construction of knowledge in policy. Public influence on law-making shaped changes to the legislative proposals in 2008 by emphasising the importance of restricting certain trades, working better with industry, and adopting a listing approach, subsequently adopted in EU Regulation 1143/2014. Yet participatory processes can be risky, as seen at the EU level, where the influence of industry campaigns resulted in the exclusion of American mink from the EU IAS list,[165] demonstrating how powerful actors steer environmental agendas. Overall, the EU facilitates more inclusive approaches to law-making than at the global level and is not constrained by consensus decision-making, thus better fulfils the second requirement of interactive law.

At the national level, the Britain's non-native secretariat has developed the Great Britain Strategy for Invasive Non-Native Species (GBINNS) through participatory processes, including a working group of key stakeholders from industry, NGOs, representatives from English, Scottish, and Welsh governments and working groups, public consultation, a programme board, and risk analysis panel. Regular reviews of the strategy involve workshops with stakeholders, public consultations on the review's interim findings, and inputs from international experts. Annual workshops with local action groups (LAGs), groups focused on reducing the risks and impacts of IAS from single project areas, such as rivers to regions, are hosted, allowing a space for interaction between volunteers and staff across GB around policy delivery, to exchange best practice and common issues, and to keep up to date on national initiatives whilst also feeding into policy design. This inclusive approach to policy design and re-design goes some way towards fulfilling the second requirement of interactive law and connects communities of practice at international, national, sub-national, and local levels.

Compliance and review mechanisms

The third requirement of interactive law is that compliance and accountability mechanisms are incorporated at all levels of governance and from a continual practice of legality.

In relation to binding EU law, such as EU Regulation 1143/2014, the European Commission monitors implementation, and the European Court of Justice interprets and enforces the law. Together, the EU institutions can strengthen accountability and provide a vital space for ongoing interactions regarding implementation and compliance, strengthening the practice of legality around AT9.

In terms of EU policy such as EBS2020, mid-term and final review and evaluation were undertaken by the European Commission, reported to the European Parliament and European Council.[166] The evaluation considered its effectiveness, efficiency, coherence with other policies, relevance, and EU added value. Positively, the evaluation included stakeholder consultation, yet report of progress towards actions and targets failed to highlight individual member state progress or include any consequences for failure to achieve targets. The development of a more robust governance and monitoring framework for EBS 2030 would strengthen the practice of legality for the ATs.

In relation to IAS offences contained in national law, there are established enforcement and accountability mechanisms, contributing to the practice of legality around AT9. Yet practical considerations mean that offences are unlikely to be reported due to the general lack of public awareness around non-native species: it can be difficult to trace their source,[167] and defence provisions are wide,[168] although a successful legal case has developed guidance on 'unintentional and accidental release'.[169]

At the British level, there is a five-year review, a participatory process for the IBNNS, led by the BNNS programme board, which consists of senior representatives from the GB governments and their agencies. The BNNS programme board reviews progress towards delivery of the strategy actions every quarter to identify and agree on priorities, facilitate delivery of policy, and assess the impact of delivery mechanisms, coordinate research programmes, exchange information and experience, increase public awareness of threats posed by IAS, and encourage the development of guidelines and codes of conduct with industry. The meetings of the GB programme board form an important system of review for the key actions in GBINNS, and the outcomes guide subsequent strategies.[170] Case law,[171] and the system of review, strengthens the practice of legality around AT9. The key actions provide clarity regarding implementation, and the programme board sustains the practice of legality during implementation by encouraging ongoing dialogue around the policy obligations and facilitating a learning process.

In relation to biodiversity duties, at the sub-national level, systems of reporting have been developed in England, Scotland, and Wales, which strengthen the practice of legality around AT2. Despite limitations, the review system has enabled the development of a practice of legality for biodiversity duties, which are binding requirements on public bodies in GB. Improvements could be made in terms of shortening the reporting cycle, currently every five years, providing more guidance on how to fulfil the duty, using a template for reports, and providing feedback to public bodies following reports. The lack of feedback and overall evaluation of reports means that public bodies cannot assess their progress for this duty or receive feedback on how to improve. Some public bodies produce detailed reports, and others none.

The analysis shows how systems of accountability and review have been put in place, which further practices of legality around AT2 and AT9, and better meet the criteria of interactive law. That said, there is room for improvement: by providing guidance on reporting formats, including feedback, and facilitating the process to bring legal actions to the courts. The creation of the Office of Environmental Protection in 2021 for England and Northern Ireland aims to further systems of compliance through their role in enforcement of environmental law to hold government and other public authorities to account.[172]

Effectiveness: the importance of socialisation

AT9 has been implemented into clear policies, based on the shared understandings of a wide range of actors, and supported by processes of review, and this has facilitated implementation in GB. Despite these positive steps forward in relation to the GB system of invasives regulation, AT9 was not met by the UK by 2020.[173] The number of IAS established in Britain has remained constant in terrestrial environments and has increased in the freshwater and marine environment.[174] Further, whilst AT2 was identified as having been met,[175] the integration of 'biodiversity value' into national and local planning processes and national accounting and reporting systems is at a very early stage.

Revisiting the definition of implementation introduced at the beginning of the chapter – 'implementation of international environmental law concerns how real-world behaviour can align with the ideals and values of international environmental law and policy, in other words, not only the creation of legal and policy instruments, but on its "operational effectiveness"' – it is put forward that the UK has largely fulfilled the first aspect of implementation in that it has given practical effect to or executed relevant laws and policies. Further, it is argued that the way the obligations are implemented has in fact strengthened them according to the criteria of interactive law through more participatory decision-making fora, clarifying what action is required, and using systems of review and sometimes compliance mechanisms. Yet neither of the ATs studied has been accomplished; priority invasive species have not been controlled and eradicated, and the integration of biodiversity values into decision-making at national and sub-national levels of governance is only at a very preliminary stage.

Whilst law can play an important role in shifting the status quo in environmental governance,[176] the formal presence of environmental laws and policies may mean little as they struggle to compete against stagnant and entrenched societal attitudes focused on economic growth, at any cost. Thus, opportunities for strengthening socialisation are identified as key to shift actor identities and behaviour; the analysis reveals important opportunities for socialisation of communities of practice at national and local levels in the UK, for example, through LAGs and partnerships, and local government. Key actors in these spaces include norm champions, such as official environmental representatives and charities who can facilitate socialisation and can promote shared understandings in favour of environmental matters at the 'ground level' and facilitate interactions around international environmental law

and policy with relevant actors, through education and persuasion and the introduction of new baselines not just in terms of legal obligations but for societal conduct.

Local action groups and partnerships

LAGs and partnerships draw together relevant communities of practice, and they (1) provide a place for interaction and socialisation around environmental laws and policies; (2) translate laws and policies into concrete action; (3) encourage local partnerships among a wide range of sectors in the community (environmental, volunteers, scientific and technical experts, government agencies, local council, business, and other stakeholders); (4) raise awareness of environmental issues; (5) monitor, evaluate, and learn from actions; and (6) share resources and expertise.

For example, in 2014, DEFRA funded a network of 29 invasive non-native species (INNS) community-led LAGs in England to tackle aquatic and riparian INNS ranging from a single site, such as a pond, to an entire river catchment. The LAGs were set up by charities and relied heavily on volunteers and formed partnerships with landowners. They were successful in mobilising local action, raising public awareness, and securing additional funding from local businesses and authorities.[177]

Controlling IAS is a contested issue,[178] and different values emerge in local groups and partnerships,[179] particularly apparent at local levels, where policies are actioned upon.[180] Interviewee 3(c) commented that: '*Nature conservationists don't like killing things and to achieve AT9 you need to kill things. It is difficult to advocate for such activities*'.

LAGs were successful in at least partially achieving most of the 259 objectives agreed with DEFRA to contribute towards AT9.[181] LAGs raised awareness, facilitated dialogue between stakeholders, exchanged best practices on common issues to better deliver policies, and shared updates on national initiatives.

A key pragmatic restraint to achieving effective implementation concerns inadequate funding to create and support the work of local environmental groups,[182] which reduces interactions within communities of practice to promote environmental matters. For example, lack of funding has been a constraint to LAG's ability to contribute more widely,[183] and their existence is threatened by the withdrawal of funding.[184] Severe underfunding of nature conservation in the UK[185] means the considerable work that needs to be done is conducted by a few over-stretched individuals[186] and diminishes the amount that can be achieved by these individuals, thus relying on volunteers and NGOs to further local action.[187]

That said, LAGs provide an important space for socialisation around laws and policies on INNS to facilitate implementation. These fora and the interactions they stimulate are key to shaping shared understandings through social learning and persuasion, as well as feeding back into policymaking forums. They provide a much-needed bridge between law, policy, and society and are a key part of achieving positive outcomes. At sub-national levels, obstacles to the achievement of environmental outcomes are highly visible, and multiple values emerge and must be reconciled as power dynamics play out.[188] For example, value conflicts regarding the eradication of the ruddy duck in the UK created a politics of resistance from

those opposed to the cull, and collaborative arrangements were vital to socialise diverse actors to the legal and policy norms around invasives.[189] Local levels supply normative actors who contest international norms and provide new baselines which challenge and feed into global regimes.[190]

Activities of local authority biodiversity officers

Local authority biodiversity officers are key actors in socialisation processes who can empower under-represented voices, prioritise environmental issues, and facilitate compromise. They work at local levels (city and county level) to collect biodiversity data, carry out conservation projects, develop local policy, provide advice, and raise awareness. For example, in Wales, biodiversity officers act as a central point of contact to find the best way laws and policies can be implemented, to generate information flow, and to coordinate stakeholders. They consider multiple obligations from international, national, and sub-national environmental laws and policies to deliver in local contexts and 'balance' different requirements.

Interviewee 2(d) commented:

> I am the central point of contact to ensure better information and co-ordination between different stakeholders. I try to balance the different angles. I consider the implementation of all levels of policy from the top levels of the CBD and other UN conventions to Welsh policies and I consider what these mean for the local community. I look at the interfaces and the barriers faced. I feed-back from the volunteers on the ground to the Welsh Government.

They explore and help manage problems of implementation and feedback to national government despite obstacles to operationalisation.

For interviewee 2(d):

> We do a good job saying here is the legislation, here is a way to develop things and they could take place in this way, but we can be overridden by a senior member of staff. There are good policies in practice, but they can be overridden.

Shaping shared understandings which prioritise conservation is a complex and challenging task and one in which the relationships between individuals can make or break successful delivery of policies. Local biodiversity officers can act as norm champions, who can influence and shape shared understandings in favour of biodiversity conservation at this 'ground level'. There are ways to prioritise short-term monetary gain and avoid legal obligations in relation to biodiversity issues or pay only token adherence to them. That said, existing shared understandings may be pushed to allow for normative change as long as the criteria of legality are met and new norms can be introduced, around which new laws can form.[191] Norm champions are key in this respect as they push boundaries of shared understandings and/or

introduce new baselines during implementation which can feed into multiple levels of governance.

The work of civil servants

An opportunity exists to further socialisation of international environmental law and policy through civil servants working in local government. For example, the Welsh programme for sustainable development supports the new Welsh sustainable development legislation and includes efforts to promote change in the behaviour of civil servants to facilitate sustainability in Wales. Training and advice are provided to policy officials and other civil servants in Wales to promote sustainability based on the 'nudge' theory, which aims to influence people to make better decisions through encouragement, positive reinforcement, and promoting good options.[192] Civil servants are trained with new ways to shift their own behaviour in relation to sustainable development, with the aim of gaining reciprocal responses from the Welsh community.[193] The aim being to develop shared understandings amongst civil servants around sustainable development and environmental law, which can influence the understandings within the community of practice.

For interviewee 1(c):

> This year has seen the term 'behaviour change' become a common feature of all discussions regarding sustainable development and climate change. Cultural change is necessary to achieve the ambitions of the scheme, involving a process of exemplifying, engaging, enabling, and encouraging the Welsh public to adopt more sustainable behaviours.

Opportunities to connect multi-directional processes

Implementation processes of international environmental law and policy are argued to be non-linear, and it is oversimplified to see implementation solely as a journey from the top to bottom or vice versa. The analysis indicates that implementation is a multi-directional process, and different governance levels have the potential to uphold and reinforce international environmental law and to strengthen it during implementation. For example, European processes strengthen international biodiversity law by increasing clarity, through participatory processes in decision-making, and by strengthening processes of review. Additionally, other governance levels can push forward global environmental ambitions; domestic levels can further international processes, where norm champions (such as NGOs, individuals, civil servants) can influence the governments of parties to change their interests and thus direct IOs to institutionalise new norms. Further, non-state actors have direct interactions with state actors at COP or through secretariats and can influence international processes in this way.

Interviewee 2(d) commented that '[they] are trying to get a golden thread from the Aichi targets and European policy to a local level', speaking to the importance of connections between multiple layers of governance. The final part of the analysis uncovers connection points for local to global processes during implementation.

Linking actors

The analysis reveals that certain state and non-state actors can facilitate the development of shared understandings between communities of practice at different levels of governance as their work spans multiple levels of governance.

The four countries' biodiversity group (4CBG) is a forum where the environmental departments of the four governments in the UK work together alongside representatives from the Joint Nature Conservation Committee (JNCC), each government, and additional invited experts to discuss common substantive and policy-development issues in order to meet international biodiversity commitments, including by overseeing work on the UK NBSAP. Some members can be seen as linking actors who are active at the sub-national and national levels as well as in international negotiations, thus providing connections between the different levels of governance. These actors are important as they can feed back on best practices at domestic levels to push forward ambition at international levels of governance.

For example, the 4CBG has the potential to promote the use of natural capital systems to measure and report on biodiversity value. The NCAI (developed in Scotland) is an important approach and lesson learned from its use in Scotland and best practice which has the potential to be incorporated into UK-wide processes and internationally at the CBD.[194]

Another forum hosting linking actors is the GBNNS, which connects actions across governance levels. According to a joint statement by representatives from the three GB governments, the development of IAS law and policy in the UK has pushed forward European regulation:

> The UK Government was also instrumental in successfully arguing for collective action across Europe to address these issues, resulting in the European Union's Invasive Alien Species Regulation, which came into force on 1 January 2015. The Regulation will ensure that for the most invasive and threatening species an EU-wide approach prevents their entry into and spread across the Single Market.[195]

This statement indicates that interactions at the national level (GB), through the GBNNS, led to a more collaborative approach to IAS in the EU, reinforcing the CBD hierarchical approach at the EU level within the regulation. Further, the GBNNS informs CBD UK negotiations on best practices for IAS (informed by stakeholder forums, local action groups, and industry), thus demonstrating the multidirectional flow of implementation, facilitated by linking actors.

National focal points (NFPs) are important linking actors used by the CBD, UNFCCC, and the SDGs. NFPs represent parties and facilitate, coordinate information sharing and planning at the national level to aid implementation who work across different levels of governance. At the CBD, there is no formal mandate for the NFPs; however, their actions may include receiving and disseminating information, ensuring that their country is represented at international institutional meetings, collaborating with other countries to facilitate international implementation, helping translate global negotiations into national implementation, monitoring

national activities that contribute to or negatively affect implementation, promotion of more favourable outcomes through the exchange of information, and the development of public awareness. The activity of NFPs spans international and national levels of government, and NFPs can facilitate implementation both top-down and bottom-up by feeding back on opportunities to strengthen implementation at the national level.[196]

International environmental institutions can expediate processes to support linking actors, by facilitating their involvement in global governance processes.

Sharing best domestic practice in international forums

The CBD uses national experiences and progress to showcase domestic best practices which can influence and shape understandings at the COP. The reporting system adopted by the CBD provides information on best practice by countries. In the UK, CBD national reports are compiled by 4CBG, who formulate a UK-wide response to legal obligations under the CBD. The Global Biodiversity Outlook reports detail progress towards international biodiversity targets and showcase successful implementation examples, such as the use of natural capital accounts in the United Kingdom of Great Britain and Northern Ireland.[197] These case studies go towards shaping shared understandings at the global level, where they highlight domestic best practice to other parties and, in this way, push forward shared understandings at the global level.

The Global Partnership on Local and Subnational Action for Biodiversity, established in 2008 and which has an advisory committee, is another global forum where states can showcase best practice. Peer-review mechanisms also share examples of best practice found at the national level, which feed into global processes. For example, the voluntary peer-review mechanism of the CBD showcased national practices of participating parties at SBI meetings.

Strengthening opportunities for global forums to consider best domestic practice plays an important part of social learning and persuasion in interactive law to introduce new reference points for parties to aspire to.

Joining local politics globally

Local politics can form global partnerships which reinforce positions adopted domestically. For example, sub-national governments, cities, and local authorities at the CBD are recognised as important actors for implementation.[198] At the CBD, in 2008, the Global Partnership on Local and Subnational Action for Biodiversity was established; in 2010, CBD Decision X/22 agreed on a plan of action on sub-national governments, cities, and other local authorities for biodiversity; and in 2014, CBD COP 12 adopted Decision XII/9 on the sustainable urbanisation in cities.

The plan of action on sub-national governments, cities, and other local authorities for biodiversity identifies a list of indicative activities needed to strengthen multi-level governance and possible actions to take. For example, by bringing NBSAPs

into the local context and increasing the representation of sub-national governments, cities, and other local authorities in delegations at international forums. The inclusion of several recommended bounce-back mechanisms within the indicative activities of Decision X/22 demonstrates the importance placed on feedback from sub-national levels of governance to international decision-making.[199] The CBD Edinburgh Process illustrates one way in which local governments can feed back on implementation and lessens the divide between local to global governance processes.[200] The formulation of official processes to incorporate local experiences of implementation is a key opportunity to strengthen international environmental laws and policies.

Conclusion

The outcomes of the analysis show how international environmental law is 're-interpreted' and 're-shaped' whilst they are implemented. The interactive analysis of AT9 and AT2 during implementation in the UK has shown that, despite room for improvement, internalised laws and policies in the EU, UK, and its devolved administrations better fulfil interactive legal requirements; in particular, they offer greater clarity as to what is required both in language used and supplementary guidance. This is important, as clarity is a key requirement of the internal criteria for legality. EU law-making procedures and policymaking procedures in the UK offer opportunities for a wide range of actors to comment and shape shared understandings which form the basis of obligations and are thus more inclusive than international environmental law-making, which is constrained by consensus decision-making. Systems of accountability are in place either through domestic and EU legal procedures, and for policies, there are systems of reporting and review. There are opportunities for socialisation around legal and policy obligations, particularly at local levels, facilitated by norm champions.

The examples presented show a mix of state and non-state actors playing important roles in operationalisation and socialisation of international environmental law. For example, biodiversity partnerships, local action groups, the work of civil servants, and local biodiversity officers. Despite the beginnings of an interactive legal system being evident during implementation in the UK, there are improvements that could be made during the implementation process, such as strengthening systems of reporting and review, better publicising legal requirements in relation to biodiversity, supporting the work of projects such as LAGs, and empowering under-represented actors in decision-making and implementation processes, all of which require significantly more funding and resources.

Failure to achieve the objectives of internalised global targets can be largely explained by the lack of congruence with society and the legal and policy obligations. Conflicts of interest are particularly apparent at local levels of governance, with diverse actors holding different values and power, yet these interactions are key to the success or failure of implementation and should be an essential point of focus for efforts to further implementation. Interactions within these often-fractious groups can educate actors and persuade of the importance of environmental issues.

Norm champions play an important role and work to facilitate solutions between diverse actors and push forward ambitions for biodiversity and aid socialisation of communities around legal norms yet are severely under-resourced and underfunded.

Reciprocity with international environmental law and policy can be facilitated by initiating and strengthening opportunities for socialisation around internalised international environmental law, where different actors with divergent interests and values interact to operationalise international environmental law and policy supported by individuals championing nature. It is at this intersection of multiple values at the ground level that solutions can be found and lessons learned to feed back and strengthen implementation process through supporting linking actors who interact across governance levels, sharing best practice within international forums, and by strengthening opportunities for local and sub-national governments to contribute to shared understandings in international arenas.

Implementation is in constant motion and neither solely top-down nor bottom-up. Whilst it is maintained that the development and strengthening of interactive legal and policymaking processes at all levels of environmental governance are important, the analysis highlights the role of domestic practices which provide a particular opportunity to further ambition in international decision-making processes, which are based on and informed by domestic practices. Domestic processes are intertwined with global processes, and in this way, domestic practices can become internationalised and push forward ambition at the global level.

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Organization (ICAO), the International Maritime Organization (IMO), the International Plant Protection Convention (IPPC), the International Union for the Conservation of Nature (IUCN), the World Customs Organization (WCO), the World Organisation for Animal Health (OIE), and the World Trade Organization (WTO).
The 1995 World Trade Organisation Agreement on the Application of and Phytosanitary Measures, which aims to protect human, animal, and plant life or health from certain risks, including risks from imported pests and diseases. Trade is a key point of entry and spread of IAS, and controlling the introduction and spread of IAS through international trade is paramount to reduce the spread of invasives. The SPS agreement deals with invasives to some extent but has a different perspective to the CBD. As a trade agreement, it is aimed at minimising the impact of trade measures taken to ensure food safety and animal and plant health and the avoidance of their use as an excuse for protectionism – shielding producers from competition from imports, rather than protecting biodiversity and trade restrictions, are seen as a last resort. The 1997 International Plant Protection Convention (IPPC) aims to secure common and effective action to prevent the spread and introduction of pests of plants and plant products and to promote appropriate measures for their control. The IPPC sets the *International Standards for Phytosanitary Measures*, including those relating to the protection of biodiversity.

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96 GBF TARGET 6: *Eliminate, minimize, reduce and or mitigate the impacts of invasive alien species on biodiversity and ecosystem services by identifying and managing pathways of the introduction of alien species, preventing the introduction and establishment of priority invasive alien species, reducing the rates of introduction and establishment of other known or potential invasive alien species by at least 50 percent, by 2030, eradicating or controlling invasive alien species especially in priority sites, such as islands*.

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133 The intrinsic value of biodiversity is not mentioned in the CBD 2050 vision or the 2011–2020 strategic plan but referenced in the preamble to the CBD itself, and the Post-2020 GBF refers to ecocentric concepts, such as 'Mother Earth–centric actions'.
134 Natural capital consists of the world's natural assets, which include geology, soil, air, water, and all living things. Natural capital provides ecosystem services which make human life possible, such as food, water, plant materials used for fuel, building materials, and medicines, biodiversity's role in climate regulation and providing natural flood defences, and cultural ecosystem services, such as inspiration from wildlife and the natural environment.
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Duty to conserve biodiversity:
1. [The] public authority must, in exercising its functions, have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving biodiversity.
2. In complying with subsection (1), a Minister of the Crown [or government department] must in particular have regard to the United Nations Environmental Programme Convention on Biological Diversity of 1992.
3. Conserving biodiversity includes, in relation to a living organism or type of habitat, restoring or enhancing a population or habitat.

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1. Seek to maintain and enhance biodiversity in the exercise of functions in relation to Wales, and in so doing promote the resilience of ecosystems, so far as consistent with the proper exercise of those functions.
2. In complying with subsection (1), a public authority must take account of the resilience of ecosystems, in particular the following aspects –
   a. diversity between and within ecosystems.
   b. the connections between and within ecosystems.
   c. the scale of ecosystems.
   d. the condition of ecosystems (including their structure and functioning).
   e. the adaptability of ecosystems.

151 Nature Conservation (Scotland) Act 2004 (NCSA).
S1:
1. It is the duty of every public body and officeholder, in exercising any functions, to further the conservation of biodiversity so far as is consistent with the proper exercise of those functions.
2. In complying with the duty imposed by subsection (1) a body or officeholder must have regard to –
   a. any strategy designated under section 2(1), and
   b. the United Nations Environmental Programme Convention on Biological Diversity of 5 June 1992 as amended from time to time (or any United Nations Convention replacing that Convention).

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The Biodiversity Partnership I inherited was a very fractious group. There were a lot of arguments about controlling non-native species and not much consensus. I was trying to find a way to gain agreement, trying to find a reasonable approach.
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There used to be a full-time post in my local authority but now it is part time, 3 days a week. This is quite good compared to other counties where the post may be only ½ or 1 day a week, this means there is less distinction between delivering on biodiversity and delivering more generally for a local authority.
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198 CBD (COP-09) in Bonn, in 2008, recognised the importance of cities in implementation.
199 Indicative activities in CBD Decision X/22 that recognise the importance of subnational levels of governance include:

h. Encourage the participation of LRA in national delegations and official events of the CBD,
j. Organise regular consultation of LRA in the preparation of COPs of the CBD,
k. Support the use of the Singapore Index on Cities' Biodiversity, and
l. Organise forums for dialogue back to back with meetings for preparing the next COP.

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7 Learning the lessons
Implications for policy

Introduction

This chapter takes key messages from the book to make post-2020 policy recommendations for public and private actors at multiple levels of governance who shape the implementation of international environmental law and policy. The aim of the recommendations is to facilitate interactive and effective systems around international environmental law and policy from global to local.

The recommendations presented are relevant to international public actors from party delegates and member states; European civil servants, the European Council, and Commission; public actors at national levels of governance, including devolved administrations, such as heads of state, government ministers, and other civil servants, including those from the conservation sectors, such as national focal points for environmental and sustainable development issues but equally those from production sectors, such as agriculture, fisheries, forestry, tourism, and development; at the local level, councillors, mayors, local authority officials, including those responsible for planning and development; at all levels of governance private, actors such as NGOs, groups such as youth, women, indigenous peoples and local communities, voices for nature, animals, business, finance, civil society, landowners, and stakeholders. Together these actors hold the ability to create and uphold interactive international environmental law and thus play a crucial role in the potential for transformative governance.

The benefits of implementing the policy recommendations from the book and developing interactive international environmental law during the implementation process can be perceived from multiple perspectives: (1) from economic/market-based perspectives, a healthy environment is fundamental to a healthy economy; (2) from ecosystem services, natural capital, and nature-based solutions perspectives, a healthy environment is linked to human health, provides services such as carbon sequestration, pollinators for food production, and sources of pharmaceuticals and forms the world's stocks of natural assets essential for human well-being; (3) the environment has strong spiritual and cultural values; (4) intrinsic value and nature's right including animals to exist in itself unrelated to human valuation systems.

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Points for practitioners

Recommendation 1: facilitate 'just, fair, and inclusive' decision-making around international environmental law and policy at multiple governance levels

Interactive legal obligations are created through the 'just, fair, and inclusive' interaction of all relevant actors who influence the scope and content of international environmental law, and in turn, the institutions shape the context of interactions and the identities of the actors themselves.

International environmental law and policy decision-making processes can focus on achieving 'just, fair, and inclusive' participation of all relevant actors. Due to the unbalanced and power-laden dynamics in international environmental institutions and the predominant use of consensus decision-making, international environmental law and policy often reflect the dominant views and understandings of certain privileged actors and their priorities. Alternative decision-making models, such as majority decision-making, unanimity, and less-strict consensus decision-making, offer 'fairer' alternatives.

Examples of good practice:

> The SDGs adopted an alternative decision-making model led by co-chairs and supported by the secretariat. Whilst this process restricted individual state party power to some extent, in other ways, it promoted 'just, fair, and inclusive' decision-making due to the confidence and political trust in the chair's understanding of topics, the party positions, as well as other stakeholders' views, and it allowed decisions to be pushed forward.
>
> The Montreal Protocol adopts simple majority voting to agree on the scope, amount, and timing of adjustments of controlled substances, requiring a simple majority from both (1) developing and (2) developed countries to agree to any veto. This reduces the ability of a few high-chlorofluorocarbon-producing countries to block new, tighter adjustments and focuses on scientifically led goals rather than politically agreed goals.

To overcome obstacles at international levels of governance, opportunities during implementation can allow for furthering 'just, fair, and inclusive' interactions around international environmental law and policy during implementation.

Examples of good practice:

> The European Biodiversity Strategy (EBS) 2020 underwent extensive consultation with EU institutions, member states, environmental NGOs, biodiversity user groups (agriculture, forests, business, and fisheries sectors), professional associations, trade and business associations, companies/

groups, academia, research institutes and think tanks, and international/intergovernmental organisations, although biodiversity user groups were less well represented than NGOs. The involvement of a range of stakeholders, including production sectors and the general public, in the design process of EBS 2020, strengthening shared understandings around international biodiversity targets.

Great Britain's 2015 British invasives strategy was developed through participatory processes, including a working group of key stakeholders from industry, NGOs, representatives from English, Scottish, and Welsh governments, and working groups, public consultation, a programme board, and risk analysis panel, moving towards more participatory approaches during implementation, thus strengthening interactions around international biodiversity law.

Recommendation 2: empower actors who represent diverse environmental values during the implementation of international environmental law and policy

Interactive decision-making in international environmental law and policy prioritises environmental issues to address the escalating multiple environmental crises.

It is recommended that actors who can represent diverse environmental values, such as indigenous peoples and local communities, youth, women, NGOs, environmental 'norm' champions, representatives of nature and animals, are empowered in decision-making forums.

Examples of good practice:

In CBD Article 8j, working groups, representatives of indigenous peoples, and local communities have equal standing to parties. Improving opportunities for IPLC and other groups throughout international environmental law and policy decision-making processes would improve the prioritisation of environmental issues.

'Rights of nature' approaches can empower IPLC during implementation processes and recognise the intrinsic value of nature though legal mechanisms, ranging from local law, soft-law declarations, to constitutions. The CBD Post-2020 Global Biodiversity Framework acknowledges 'Mother Earth–centric action', and countries such as Ecuador, Bolivia, New Zealand, India, and the United States have legal means of recognising the rights of nature.

Corporate governance initiatives can be important for implementation of international environmental law and policy. Corporations such as 'Faith in Nature' and the House of Hackney have a non-executive director to represent nature on its board. Means of holding boards to account need to be carefully thought through to avoid 'greenwashing'.

Recommendation 3: empower secretariats within international environmental institutions

Secretariats interact with public and private actors from global to sub-national levels of governance and play an important role in co-ordination, hold institutional memory and technical expertise, and can work towards equalising the uneven power dynamics in international environmental law and policy.

Secretariats can push forward ambition for environmental issues and further 'just, fair, and inclusive' processes to steer ambition and good practice for both public and private actors.

Parties can empower secretariats through the use of soft-law provisions to expand their mandates or accept their actions through the shared understandings developed within international environmental institutions.

Examples of good practice:

> The CBD and UNFCCC secretariats play important roles in facilitating 'just, fair, and inclusive' decision-making, mobilising the actions of non-state actors, providing coordination and technical expertise, and encouraging parties to prioritise environmental issues.

Recommendation 4: facilitate international environmental law and policy during implementation that meets the internal criteria of legality

Interactive international environmental law/policy and corresponding domestic law/policy meet Fuller's internal criteria of 'moral' law to draw compliance. Fuller's criteria[1] are similar to the more familiar SMART (specific, measurable, achievable, relevant, and time-bound) criteria widely understood but often unachieved in international environmental policymaking.

The language of law and policy is a key element of developing interactive law and policy. The wording of targets is often ambiguous, unquantifiable, overly complex, and contains redundant text. To avoid ambiguity, certain wording should be avoided, for example, 'as appropriate', 'where feasible', 'significantly', 'substantially', minimised', "taken steps to achieve", as they make the target highly subjective, provide significant wiggle out room for countries and targets, and are not measurable. To be clear, targets should define key terms to ensure implementation efforts are comparable, for example, 'ecologically or biologically significant areas'. To be clear, targets should avoid being overly complex or containing redundant or contradictory provisions.

Examples of best practice targets:

> **Paris Agreement, Article 2(a)**
>
> Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature

increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change.

Post-2020 GBF TARGET 18

Identify by 2025, and eliminate, phase out, or reform, incentives, including subsidies, harmful for biodiversity, in a proportionate, just, fair, effective, and equitable way, while substantially and progressively reducing them by at least $500 billion per year by 2030, starting with the most harmful incentives, and scale up positive incentives for the conservation and sustainable use of biodiversity.

SDG Target 3.1

By 2030, reduce the global maternal mortality ratio to less than 70 per 100,000 live births.

Recommendation 5: strengthen compliance and accountability mechanisms

Interactive law relies upon the adoption of compliance and accountability mechanisms to facilitate implementation and develop practices of legality around international environmental law and policy through processes of accountability, reinforcement, social learning, and persuasion.

'Interactive' implementation mechanisms do not prescribe a particular mechanism but require (1) just, fair, and inclusive systems of target and indicator setting; (2) transparent review processes; (3) targeted feedback and support through capacity building, resource mobilisation.

Agreement to strengthened interactive implementation mechanisms at multiple levels of governance to achieve transformative change requires increased political and societal will.

Compliance and accountability mechanisms for international environmental law and policy do not generally meet the interactive criteria: the CBD review process lacks transparency of individual country progress and has no ratchet mechanism to increase party ambition; the SDGs operate a purely voluntary review process; under Article 15, the Paris Compliance Committee can take measures in cases of non-compliance with legal obligations, such as the communication of mandatory information, yet this does not address the failure of parties so far to commit to sufficient ambition towards the global target.

Even where enforcement measures exist, such as for the Convention on International Trade in Endangered Species (CITES), the use trade sanctions for non-compliance in relation to lack of national implementing legislation, non-submission of annual reports, and non-designation of scientific authorities are rare.

Compliance, review, and accountability mechanism can be developed during implementation to further interactive law.[2] For example:

Great Britain's 2015 British Invasives Strategy assesses progress towards delivery of the strategy's actions every four months. Following review, representatives from British governments and their agencies identify and agree on priorities, facilitate delivery and assess delivery mechanisms, coordinate research, exchange information and experience, increase public awareness, and encourage the development of guidelines and codes of conduct with industry.

The review process identifies where funding should be targeted. For instance, the Department for Environment Food and Rural Affairs (DEFRA) funded a network of 29 invasive non-native species (INNS) community-led local action groups (LAGs) in England to help tackle aquatic and riparian INNS ranging from a single site, such as a pond, to an entire river catchment. The LAGs were set up by charities and relied heavily on volunteers and formed partnerships with landowners. They were successful in mobilising local action, raising public awareness, and securing additional funding from local businesses and authorities.

Best practice at national to local levels can feed into and influence international governance. The GB INNS secretariat informs CBD UK negotiations on best practices for invasive alien species (informed by stakeholder forums, local action groups and industry) and supports relevant government agencies when requested and is therefore an important actor spanning local to international governance processes.

Recommendation 6: support norm champions during the operationalisation of international environmental law and policy

Norm champions play vital roles in the operationalisation and socialisation of international environmental law and policy and should be supported through resource allocation and capacity building.

Norm champions are actors that educate and persuade society to change their behaviour to align with international environmental obligations and can facilitate shifts in shared understandings.

Norm champions, such as sub-national public official actors and NGOs, facilitate interactions between diverse stakeholders and promote environmental objectives to further efforts toward the objectives, goals, and targets of international environmental law. Norm champions can educate actors and persuade of the importance of environmental issues and promote ways in which to achieve their aims.

Norm champions can feed back to international environmental arenas on lessons learned during operationalisation.

In the UK, local government officials play a crucial role in the operationalisation of international environmental law and policy yet are underfunded and under-resourced. Increasing resource mobilisation and support for local government environment officials is key. In 2023, Northern Ireland doubled

funding for local biodiversity action to €3 million. Local authorities can apply for this funding to deliver local biodiversity projects.

National focal points are mobile actors spanning multiple governance levels and have the potential to improve implementation on international environmental law and to push forward ambition in global forums, sharing lessons learned during implementation. Increased support of NFPs and a means of coordinating action between climate, biodiversity, and SDG NFPs can facilitate implementation.

Notes

1 (1) general, (2) prohibiting, requiring or permitting certain conduct, (3) promulgated and accessible to the public, (4) not retroactive but prospective, (5) clear, avoid contradiction, (6) be realistic and not demand the impossible, (7) constant, (8) congruence between legal obligations and the actions of officials operating under the law.

2 J Miller Smallwood, *Biodiversity COP 15: Thinking Beyond Just the Global: Strengthening Mechanisms of Multi-Level Accountability for Transformative Change*, SSRP Policy Brief (2022).

Conclusion

This research seeks to understand when international environmental law and policy can be effective and instigate transformative actions at multiple levels of governance. It is put forward that understandings of international environmental law itself should shift to better enable the transformative actions needed. To some, this may be a radical approach, but in times when international environmental law and policy are desperately needed to initiate changes globally, new perspectives are urgently needed. It is clear that despite the array of international environmental law and policy agreed,[1] they are not achieving enough to address the multiple global environmental crises we are facing, including biodiversity loss and climate change. The analysis and application of interactive law in this book provide a deeper understanding of the challenges and opportunities for international environmental law and policy during its creation and implementation and provide policy recommendations to contribute to the toolkits urgently needed for transformative environmental governance.

The focus of the book is not only on existing multilateral environmental agreements (MEAs) and the Sustainable Development Goals (SDGs) but also on the outputs of their corresponding international institutions. It is important to capture the work of international environmental and sustainability institutions because they are highly productive, deciding global environmental goals, targets, decisions, recommendations, and guidance; they do invaluable work to provide a response to global environmental issues, yet their outputs are difficult to place, and the legal nature of their decisions disputed.

The book begins with an exploration of multidisciplinary theories of law and policymaking and compliance/accountability mechanisms which move beyond conventional understandings of legal theories of compliance. It is argued that positivist and rationalist approaches to international environmental law and policy do not sufficiently explain why their outputs can be normative and achieve compliance, or how autonomous activity within international environmental institutions can be incorporated into concepts of legal legitimacy.

Interactive law is presented as an alternative understanding which proposes the conditions under which international environmental law and policy are adhered to and embraces the role of non-state actors in international environmental governance.

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The four requirements for interactive law are: (1) international environmental law and corresponding internalised laws and policies meet Fuller's internal criteria of 'moral' law; (2) decision-making and implementation processes enable 'just, fair, and inclusive' interactions between all relevant actors empowering under-represented actors and values; (3) compliance and accountability mechanisms form a continual practice of legality; and (4) socialisation processes are facilitated and connected at multiple levels of governance.

In important and necessary ways, interactive law is a significant departure from traditional understandings of international law. Firstly, interactive law sees that the legitimacy of international environmental law is more complex than solely formal sources of law and horizontal or vertical understandings of legitimacy. The involvement of state actors at international and domestic levels is recognised as indispensable: without 'buy-in' from state parties, the process of implementation and feedback to international decision-making would be limited because law and policy provide hooks and are more recognised than non-legal routes. That said, interactive law sees that autonomy in decision-making processes for international environmental law and policy is desirable at all levels of governance. Participation of a broad range of actors in 'practices of legality' is key because new shared understandings can be created which influence actors to behave in a certain way because of a sense of legal obligation. International actors go on to participate in practices of legality that internalise international environmental obligations at the domestic level, which themselves are opportunities to further the requirements of interactive law.

Interactive law thus promotes the inclusion of state and non-state actors in international environmental decision-making to facilitate shared understandings that prioritise environmental protection. To what extent can non-state actors be incorporated before the practice of legality is undermined and states do not recognise the legality of the obligations? This book stresses that parties remain the key actors in decision-making; nonetheless, the effect of non-state actors is not to be underestimated, and their influence on decision-making is important. They can provide legitimacy and push shared understandings and ambition forward in international environmental institutions. Values which prioritise environmental protection can be heightened though the empowerment of certain under-represented actors by enhancing opportunities for their participation at multiple governance levels.

Achieving interactive law is not straightforward, but moving towards more interactive processes, with a particular focus on domestic levels of governance, is seen to be achievable in the short time scales required to avoid further overreaching core global tipping points.[2] Several tipping elements are already active; crossing more will seriously impact earth system functioning, with highly detrimental impact on all the species on our planet, including humans.[3] In 2018, the International Panel on Climate Change warned that urgent action is needed by 2030 to avoid environmental catastrophe.[4] Thus, urgent and transformative solutions are needed, and adopting interactive international environmental legal systems is suggested as an important way to contribute to instigating such change.

Agreeing interactive international environmental law

The key findings from this book are presented in the following sections, highlighting obstacles and opportunities for achievement of interactive international environmental law.

Decision-making models

The nature of strict consensus decision-making, frequently employed within international environmental institutions, means that only one party can block otherwise generally accepted shared understandings; thus, consensus decision-making model can be highly problematic for the creation of interactive law. That said, the Paris Agreement facilitated ambitious shared understandings between parties underpinning the agreement, showing that political will has infrequently been developed within international consensus decision-making.

Alternative decision-making models are more suitable for achieving interactive environmental law. For example, majority decision-making, employed by the Montreal Protocol, better fulfils the requirements of interactive law. A simple majority of 'developed' and 'developing' parties is required to pass decisions; this model provides an equal voice in decision-making to each party irrespective of funding and resources and is fairer at representing the shared understandings of the majority of parties.

Another possibility is employing less strict interpretations of consensus decision-making. This was the case for the Sustainable Development Goals (SDGs) and, more recently, the Post-2020 Global Biodiversity Framework (Post-2020 GBF). For the SDG 2015 negotiations, the chairs and secretariat 'held the pen', deciding the text, upon consideration of different party positions; thus, allowing shared understandings to form more ambitious and fair outcomes for global sustainability, this required significant trust in the chairs.[5] In the Post-2020 GBF negotiations, the chairs, supported by the secretariat, developed the final proposed 'take-it-or-leave it' text after parties failed to agree on numerous issues following the five working groups held and COP 15. This departed from the strict consensus decision-making model.[6]

Dynamics of participation

Interactive law calls for broader participation in international environmental institutions, paying careful attention to dynamics to ensure that decision-making is 'just, fair, and inclusive' and prioritises environmental issues. The research behind this book finds that whilst CBD consensus decision-making may be seen as somewhat 'inclusive' to all parties and the COP welcomes input from non-state actors, it is not 'just' or 'fair' and does not prioritise environmental issues. The unbalanced dynamics of participation in consensus decision-making find richer and better-resourced parties more able to influence the decision-making process.

Unbalanced dynamics in CBD decision-making lead to a dominant understanding of the environment in human-orientated terms, where the environment is seen either as a resource to be continually exploited, an ecosystem service, or a natural capital. In particular, neoliberal models are argued as fundamentally flawed in trying to achieve environmental protection, as the environment is not a finite resource.[7] Some progress has been made to recognise alternative values of nature, for example, the CBD's Post-2020 Global Biodiversity Framework (Post-2020 GBF) references Mother Earth–centric actions and intrinsic value of nature.

To achieve interactive law, participation in consensus decision-making in international environmental institutions should be carefully thought out and be 'inclusive', 'just', and 'fair'. To facilitate this, less-dominant actors should be empowered in decision-making processes, as their values can prioritise environmental protection and environmental justice. For example, by ensuring time and space for certain actors to make representations during party negotiations. The research behind this book finds that indigenous peoples and local communities (IPLC) have an elevated status at the CBD, where they have equal footing to parties in the Article 8j working group. In turn, this special status impacts their role in consensus decision-making, where time is made to hear their representations and they are taken seriously by parties. There are opportunities to extend this status further during decision-making.

A further opportunity is proposed to better balance the dynamics of decision-making through the expansion of the role of secretariats. The analysis finds that secretariats can balance decision-making dynamics to some extent through their deep understanding of ongoing tensions in negotiations, institutional memory, appreciation of the urgency of environmental action, and their technical expertise. The UNFCCC and CBD secretariats mobilise non-state actors in international environmental arenas, thus raising the profile of less-dominant environmental values.

The inclusion of non-environmental sectors and business in international institutions is contentious, but it is proposed as necessary to tackle global environmental issues. The research finds that some groups of actors are 'missing' from the shared understandings at CBD COP, and these actors include state actors from non-environmental departments, such as trade, agriculture, tourism, and business actors. It is argued that their involvement is necessary, as the dynamics in international environmental institutions can shape actor identity and behaviour, thus can educate and persuade those most responsible for environmental degradation to understand the urgency of action. Yet the greater involvement of actors from production sectors and business must be very carefully considered to alleviate the risk of reduced environmental standards and 'greenwashing'.

Internal legality

A further requirement of interactive law is that the obligations agreed fulfil Fuller's internal criteria of legality to attract compliance: (1) general; (2) prohibiting, requiring, or permitting certain conduct; (3) promulgated and accessible to the public; (4) not retroactive but prospective; (5) clear, avoid contradiction; (6) be realistic

and not demand the impossible; (7) constant; (8) congruence between legal obligations and the actions of officials operating under the law.

The book finds limitations in relation to these requirements for the Aichi Targets (ATs) and the SDGs, which often lack 'clarity' and are difficult to measure, particularly in relation to targets addressing the indirect drivers of biodiversity loss. Further, politically agreed goals and targets, rather than scientifically based, may 'contradict' the overall objectives of international environmental law and policy, as achieving them may not lead to the necessary environmental improvement aimed for. For example, it is questionable if the requirements of action target 3 that 30% land and sea is in protected areas by 2030 is sufficient to avert the biodiversity crisis.[8]

The actions required to comply with goals and targets may not be 'realistic' in the time scales set.[9] Climate goals may now be unachievable, and the world should prepare for a 3–4ºC rise in temperatures as a best-case scenario.[10] That said, transformative action is required to tackle the global environmental crises, which will involve a reconsideration of societies' priorities post-2020. Implementing and complying with international environmental law and policy is possible; there is sufficient funding, capacity, and resources globally to tackle environmental crises if the political will to do so can be raised quickly.[11]

Developing interactive practices of legality through international environmental compliance and accountability mechanisms

Interactive law emphasises the importance of reinforcing and revisiting international environmental obligations in a continual process through the adoption of compliance and accountability mechanisms. Implementing global compliance and accountability systems encourages the international community of practice to interact and to discuss compliance issues. They can motivate individual parties at the national level to consider their obligations and to reason with international environmental obligations as they review their progress on implementation and compliance.

Interactive law does not prescribe any one means of achieving compliance and/or accountability, yet it is key that global mechanisms trigger domestic processes of revisiting and reinforcement to create an interactive and ongoing practice of legality. The adoption of compliance and accountability mechanisms varies according to the shared understandings developed in international environmental institutions.

Paris Agreement 'report, review, and ratchet' mechanism

The Paris Agreement employs a reporting, review, and ratcheting system that can facilitate an interactive accountability and compliance mechanism through its incorporation of a transparent and robust review system at international and domestic levels and the adoption of the Paris Agreement Implementation and Compliance Committee (PAICC). The enhanced transparency framework (ETF) is designed to inform the global stocktake process of implementation of the Paris

Agreement, including tracking progress of implementation and achievement of Article 4 Nationally Determined Contributions (NDCs). NDCs should detail how targets will be reached and include details on systems to monitor and verify progress; they are designed to be reviewed by parties, and commitment increased every five years. Due to the ability to track individual party progress, a 'naming and shaming' approach is possible, with clear recognition of equity and differential capabilities of countries. The PAICC is non-adversarial and non-punitive and seeks to facilitate the communication of and to ensure the maintenance of NDCs and also contributes to developing the practice of legality for the global climate goal. NDC ambitions are currently less than required to meet the global climate goal. Expedient and more frequent use of reviews and the PAICC presents an opportunity to create a system of interactive law that raises ambition of NDCs and facilitate their implementation.

CBD 'report and broad review' system

For the CBD, there is no compliance mechanism, but a reporting and review and a voluntary peer-review mechanism are in place. Due to lack of transparency in global reporting on individual party progress, the CBD review process lacks transparency and limits the ability for the CBD to create a practice of legality. The voluntary peer-review mechanism (VPRM) is not connected to party progress towards targets but relates to the development of National Biodiversity Strategies and Action Plans (NBSAPs) for implementation. The generality of the approach of the CBD review mechanism is problematic for achieving interactive law; there is little incentive for parties to 'revisit' their actions towards global biodiversity goals.

The CBD secretariat has developed the CBD report and review mechanism within the boundaries of its capabilities by developing the way in which national reports are submitted and the detail they contain, to encourage parties to think about how they are implementing the targets, rather than a box-ticking exercise. The way reports are written has become much clearer, as the reporting system has developed, and this helps the CBD move slowly towards a more interactive approach.

Incremental steps were made at CBD COP 15 to strengthen the reporting and review mechanism, although overall a general review approach remains, which falls short of the interactive criteria. If the review system was transparent to individual party progress, approaches such as 'naming and not shaming' could be adopted. Such an approach need not be negative but could aim to support parties struggling to reach the biodiversity targets, triggering a compulsory peer-review mechanism and resource and capacity building through the new Global Environment Facility Biodiversity Fund and support from the secretariat.

An obstacle towards more transparent processes for the CBD are technical challenges. Measuring progress towards the biodiversity targets is complex, and global indicators have only recently been introduced for the Post-2020 GBF and are under-developed.[12] At the domestic level, countries may lack the resources to gather and process data for national indicators,[13] a challenge also relevant for climate and the SDG indicators.

Non-state actors play an important role in 'filling the gaps' of inadequate accountability mechanisms at international and domestic levels of governance. At the CBD, NGOs increased transparency by formulating their own review on individual party progress towards the Aichi Targets, reporting the results at CBD COP 13.[14]

SDG 'voluntary reporting and review' process

The SDG voluntary review process is designed to be 'robust, transparent, and participatory'. The reporting and review system, as it stands, is limited in developing a practice of legality, as the system is voluntary, reports lack uniformity, and member states are not clear on how reviews should be organised or the methods used.[15] Domestic accountability mechanisms for the SDGs are lacking, as well as processes to engage stakeholders.[16] Global feedback from the High-Level Political Forum (HLPF) is designed to be general and merely synthesises key messages from voluntary national reviews. Non-state actors play a role through developing monitoring systems for the SDGs, which exist interpedently of the official review process of the HLPF.[17]

Opportunities exist for global accountability and compliance mechanisms to focus on developing robust and transparent systems of reporting, review, and/or compliance in order to strengthen practices of legality and interactive international environmental law. Revisiting and reinforcing international environmental obligations is key to achieve interactive law yet often difficult to achieve due to the need for global consensus to agree compliance and accountability mechanisms. NGOs can play a key role in international and domestic forums to fill gaps in transparency towards targets.

Furthering interactive international environmental law during implementation

This book stresses the importance of the journey of implementation to domestic spheres and sees opportunities at domestic levels to expediate progress towards interactive international environmental law. Understanding international environmental law and policy as a holistic, interconnected process spanning multiple governance levels moves away from the often-unfruitful circular debate concerning state practice and normative aspirations within international environmental institutions. This is particularly pertinent as parties to MEAs and the SDGs are generally unwilling to agree to binding international environmental law, move away from consensus decision-making models, or adopt interactive global compliance and accountability mechanisms in the short time available to meaningfully address global environmental issues.[18]

This book presents opportunities to address this dilemma through processes at domestic levels which both internalise international environmental obligations and form the seeds that create them. Domestic levels can bolster progress towards the achievement of interactive international environmental law by strengthening shared understandings in relation to environmental issues and better fulfilling

the requirements of interactive law without the restraints of multilateral agreement. Further, strengthened domestic shared understandings can feed back up to international decision-making arenas to strengthen and influence global shared understandings.

At each 'stepping stone' during the journey of implementation, international environmental obligations are considered by a different community of practice (see Figure 6.1). The proposal made is that each particular community of practice can shape international environmental law and policy to make it more or less interactive. Interactions around international environmental law and policy at one level can influence the actions of other communities of practice. In this way, all the stepping stones are connected as well as forming unique spaces for interactions at particular levels of governance.

Multi-directional, non-linear journey

An illustration of this complex journey is highlighted by the analysis of the implementation journey of CBD Aichi Target 2 (AT2) and Aichi Target 9 (AT9) in the UK. The findings show how the influence of interactive law can travel from the bottom up and its multi-directional flow. The research findings suggest that Great Britain strongly influenced and pushed forward the European negotiations for EU Regulation 1143/2014 and subsequently at the CBD COP, which contributed to the agreement of AT9. Further, the pioneering Natural Capital Asset Index (NCAI) system accounts for natural capital in Scotland, showcasing a means for incorporating natural capital in decisions of different sectors and mainstreaming biodiversity across society in Scotland, and offers a template for the other devolved countries and internationally.

Strengthening interactive law at domestic levels

The research uncovers opportunities for international environmental obligations to be strengthened during implementation. In the EU and the UK, AT2 and AT9 are formulated in more specific ways with guidance on implementation, in formal laws or through environmental policies. When these are incorporated into formal law, there are opportunities for internalised international environmental to be upheld through established legal practices, although it can be difficult to identify cases of non-compliance and bring cases to court. For example, it is hard to identify incidents of the unlawful release of invasive alien species, and it is unclear what public bodies need to do to fulfil their statutory biodiversity duties. Policies can also form the basis of interactive law when the interactive requirements are fulfilled. For example, the EU Biodiversity Strategy (EUBS) and individual-country NBSAPs go some way to forming interactive systems: they are agreed with the input of a diverse range of actors, provide detailed guidance for implementation, and are subject to systems of review and encourage ongoing dialogue around policy obligations and facilitate a learning process, thus keeping international environmental law and policy alive. Whilst domestic systems of review can be developed further,

for example, more frequent reviews, with specific guidance on improvements needed, they provide some form of accountability and further practices of legality around AT2 and AT9.

Domestic socialisation practices and interactive international environmental law

An immense body of international environmental law and policy has been agreed,[19] and its successful implementation would go a significant way towards living within planetary boundaries rather than exceeding them.[20] The analysis reveals that the achievement of interactive international environmental law can be escalated by supporting and developing socialisation practices around internalised international environmental obligations at domestic levels. Socialisation practices are seen as key towards achieving the much-needed 'outcomes' and 'impacts' of the implementation process, which in turn will lead to the necessary socio-ecological change to achieve the aims, objectives, goals, and targets of international environmental law and policy

In the UK, local action groups and partnerships are found to draw together relevant communities of practice, and they (1) provide a place for interaction and socialisation around environmental laws and policies; (2) translate laws and policies into concrete action; (3) encourage local partnerships among a wide range of sectors in the community, including environmental, volunteers, scientific and technical experts, government agencies, local council, business, and other stakeholders; (4) raise awareness of environmental issues; (5) monitor, evaluate, and learn from actions; and (6) share resources and expertise.

The importance of such spaces, where actors can interact to both influence international environmental law and policy and be exposed to processes that can shape and influence their actor identity, is emphasised. In spaces at domestic levels where actors can deliberate, reason, and interact with international environmental obligations, solutions and motivation can be inspired to operationalise international environmental law and policy in local contexts. Norm champions are found to play a key role in persuading and educating of the need and value of environmental action and find solutions considering the needs of multiple stakeholders.

Resource mobilisation

The yawning gap between policy and practice is especially apparent at sub-national levels of governance; therefore, interaction and socialisation here are key to adopt environmentally positive solutions during operationalisation of international environmental law and policy. Despite the clear value of interactions around international environmental law and policy during implementation, in the UK there is severe under-funding of public bodies at the national and sub-national levels. Environmental public bodies such as Natural England have a history of underfunding;[21] many local authorities no longer have resources to employ a dedicated biodiversity or environmental officer, or their hours have been cut (see Chapter 6),

and environment agencies lack the funding and resources to pursue enough prosecutions.[22] These are key impediments to the implementation of interactive international environmental law.

Greater focus on resource mobilisation to enable 'place-based' environmental action to facilitate interactive environmental law requires strong political leadership to support new governance models for local communities and partnerships.[23] Societal understandings around environmental issues are developing, environmental movements challenge business as usual,[24] and media coverage of environmental issues is increasing.[25] Developing a critical mass of support for positive environmental action is essential and can influence political choices.

Connecting multiple governance levels

Increasing support for domestic initiatives which implement and operationalise international environmental law and policy, in turn, can influence global politics. Lessons learned during implementation and operationalisation of international environmental law and policy are key to interactive processes. Opportunities exist to better connect communities of practice from local to global, for example, by supporting and facilitating the role of actors that spans multiple governance levels, such as national focal points, local government, and NGO representatives, thus facilitating the greater involvement from local initiatives within international environmental institutions. These actors bring together local to global processes and can feed into interactive international environmental law at different levels.

To conclude, international environmental law and policy are an important tool that have the potential to influence, change, and shift societies to more sustainable behaviours which prioritise environmental issues when the laws and policies agreed are interactive. Words on paper can mean very little, and this book looks closely into what makes international environmental law and policy effective, stressing the importance of implementation and the development of interactive processes at multiple governance levels. Urgent transformations are needed for a more harmonious existence with nature animals, and our environment, which ultimately underpins the future existence of ourselves and our fellow species; it is hard to envision a higher priority for life on earth.

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