Re-visiting old ideas in order to craft an effective modern international environmental law regulatory framework.

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'Re-visiting old ideas in order to craft an effective modern international environmental law regulatory framework'

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Abstract

The most compelling arguments which have explored how effective environmental protection could be secured through regulatory means have arguably been those that have proposed the turn to international environmental organization-style institutions to direct regulatory efforts. Sadly, these proposals have been unable to compel real-world change because states have been unwilling to cede their sovereignty over aspects of the environment falling within their territories to such institutions. I argue that, over time, states have begun to change their attitudes with respect to their sovereignty over aspects of the environment falling within their territories. While this has been occurring, constructivists have presented compelling theories with respect to how effective international regulation can be achieved. These theories have lent greater validity to fundamental assumptions which informed arguments for the turn to international environmental organization-style institutions to direct regulatory efforts. As such, based on what I consider to be states' changing attitudes and drawing from the compelling body of constructivist literature which has focused on what it takes to establish effective international regulatory frameworks, in this paper I reconsider whether the turn to an international environmental organization-style institution may now be feasible in the modern era.

Key words: constructivism; norm; international environmental organization; effective environmental protection.

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1. Introduction

Efforts to improve the capacity of the international environmental law regulatory framework to secure effective environmental protection more consistently have characterised the movement to secure global environmental protection dating back to 1972 when the movement toward regulating environmental protection started in earnest.[1] Decades later, greater consistency in securing effective environmental protection through regulatory means is yet to be achieved. Importantly, the fact that this situation has persisted is not for lack of effort on the part of scholars to formulate ways in which the situation could be addressed.

For instance, writing in 1970, Kennan argued that attaining effective environmental protection was dependent on the creation of an International Environmental Agency as a first step toward the establishment of an International Environmental Authority that would autonomously oversee environmental protection.[2] With respect to its constitution, such an Agency would be fortified with scientific expertise to guide progress and perform a watchdog function.[3] In a similar vein, Levien argued in 1972 that the attainment of effective environmental protection was dependent upon the creation of a World Environmental Organization modelled on the practice of the International Labour Organization to oversee international environmental protection efforts.[4] More than twenty years later, in 1994, Esty similarly argued that a centralised hierarchical Global Environment Organization was essential if effective environmental protection was to be achieved.[5] This Organization would be built on a set of cardinal principles that could be developed over time to incorporate legislative and adjudicative functions, to develop international environmental norms, settle environmental disputes, while harmonising environmental standards.[6]

In addition to this, an expansive body of International Relations Theorists, especially constructivists, has delved into how effective international regulation can be achieved. In

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[1] A.S. Timoshenko, 'Ecological Security: Global Change Paradigm' (1990) 1 *Colorado Journal of International Environmental* 127, 129. G. Palmer, 'New Ways to Make International Environmental Law' (1991) 86 *American Journal of International Law* 259, 260. J. Vogler, *The Global Commons* (John Wiley & Sons: London, 2000) 10. A. Hurrell, and B. Kingsbury, 'Introduction' in A. Hurrell and B. Kingsbury, (eds.) *The International Politics of the Environment* (Clarendon Press: Oxford, 1992) 2. P.S. Thatcher, 'The Role of the United Nations' in A. Hurrell, and B. Kingsbury (eds.), *The International Law of the Environment* (Clarendon Press: Oxford, 1992) 183, 184-185.

[2] G.F. Kennan, 'To Prevent a World Wasteland: A Proposal' (1970) 48 *Foreign Affairs* 401, 412.

[3] *Ibid*. at 408-410.

[4] L.D. Levien, 'Structural Model for a World Environmental Organization: The ILO Experience' (1972) 40 *George Washington Law Review* 464, 465, 470.

[5] D. Esty, *Greening the GATT: Trade, Environment and the Future* (Institute for International Economics: Washington, 1994) 78.

[6] *Ibid*. at 79-83.

very brief terms, constructivists contend that the success of regulatory frameworks is based on norms which impose legitimate behavioural claims on all states.[7] In order for norms to constitute the basis of effective regulatory efforts however, norms need to complete a norm 'life cycle.' In the first phase of this cycle, norms need to be championed by norm entrepreneurs, a body of stakeholders which typically includes individuals, groups and states with motivations covering a wide spectrum that includes self interest, empathy and even altruism. Once this body of norm entrepreneurs gets enough activity and momentum behind a norm, the ensuing phase of the cycle features the norm being pushed to a tipping point. This is a a point where a third of states, or enough strategically placed states, adopt the norm.[8] Following this, the next phase of the norm 'life cycle' is characterised by norm cascading. Where tipping secures a critical mass that leads to recognition and adoption of the norm by about a third of states, cascading refers to the process of adopting the norm by the greater majority of states. An important characteristic of norm cascading is that states are motivated to adopt the emergent norm for varying reasons that may or may not be connected to actual objectives of the norm. In addition, pressure to adopt the norm comes from sources external to states.[9] Here, norm entrepreneurs often rely on processes rooted in international socialization techniques such as emulation, shaming, praise and ridicule, to encourage state participation.[10] Importantly, as norms cascade, it becomes apparent to all concerned that specialist regulatory frameworks based on the norms need to be crafted to ensure that the behavioural claims imposed by the norm are honoured universally and in a consistent manner. However, if such regulatory frameworks should be effective, it is also important that they are perceived to be legitimate so that they attract the acceptance of legal obligations and generate fidelity to the obligations they impose. This fidelity is best viewed as an internalized

[7] G. Goertz, and P.F. Diehl, 'Toward a Theory of International Norms: Some Conceptual and Measurement Issues' (1992) 36 *The Journal of Conflict Resolution* 634, 638. T. Yang, 'International Treaty Enforcement as A Public Good: Institutional Deterrent Sanctions in International Environmental Agreements' (2007) 27 *Michigan Journal of International Law* 1131, 1151-1153. J.E. Alvarez, 'How Not to Link: Institutional Conundrums of an Expanded Trade Regime' (2001) 7 *Widener Law Symposium Journal* 1, 1-2.

[8] T. Risse, and K. Sikkink, 'The Socialization of International Human Rights Norms into Domestic Practices: Introduction' in T. Risse, S.C. Ropp and K. Sikkink (eds.), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge Studies in International Relations: Cambridge, 1999) 15.

[9] R.B. Mitchell, 'Compliance Theory: Compliance, Effectiveness and Behaviour Change in International Environmental Law' in D. Bodansky, J. Brunnee and E. Hey, (eds.) *The Oxford Handbook of International Law* (Oxford University Press: Oxford, 2007) 893, 902. S. Barrett, 'International Cooperation and the International Commons' (2000) 10 *Duke Environmental Law and Policy* 131, 140. H.P. Schmitz, and K. Sikkink, 'International Human Rights' in W. Carlsnaes, T. Risse, and B.A. Simmons, (eds.) *Handbook of International Relations* (Sage Publications: London, 2007) 517, 523.

[10] M. Finnemore, and K. Sikkink, 'International norm dynamics and political change' (1998) 52 *International Organization* 887, 902. A. Florini, 'The Evolution of International Norms' (1996) 40 *International Studies Quarterly* 363. 375.

commitment and not as an externally imposed duty matched with a sanction for non-performance.[11] Legitimacy and fidelity are best achieved when regulatory frameworks meet the criteria of legality. Such criteria include, but are not limited to, 'generality, promulgation, non retroactivity, clarity, non-contradiction, not asking the impossible, constancy, and congruence between rules and official action.'[12] In addition to this, constructivists argue that attaining effective regulation is predicated on the development of a community of practice around the norm and the regulatory framework based on the norm. However, they note that 'when conceiving of a community of practice it is not necessary, or helpful to imagine the existence of a homogenous 'international community' for law to emerge. Rather, all that is required is that states understand what the law requires and why in a manner that ensures that shared understandings 'come to be more widely shared.'[13]

These are compelling arguments. Indeed, constructing an international environmental law regulatory framework in a manner informed and guided by these proposals would arguably lead to the establishment of an international environmental law regulatory framework capable of consistently securing effective environmental protection. Despite this, these proposals have been unable to compel real world change with the result that the approach to regulating environmental protection has largely remained the same, with the international environmental law regulatory framework being incapable of consistently securing effective environmental protection.

I hypothesise that the reason why the incumbent regulatory framework is unable to consistently secure effective environmental protection is rooted in a contextual factor which has characterised the environmental protection movement since its inception. Specifically, the regulatory framework which is still applied today was crafted at a time when states were reluctant to cede meaningful sovereignty over aspects of the environment falling within their territories either, to an empowered independent and objective body of norm entrepreneurs, or, to an international environmental organization-style institution, which would be charged with directing environmental protection regulatory efforts. This context has precluded the turn to a

[11] J. Brunnee, and S.J. Toope, *Legitimacy and Legality in International Law* (Cambridge University Press: Cambridge, 2010) 30, 68. S.J. Toope, 'Torture: Can Law Prevent It?' (2011) *A Lecture at the University of Melbourne*, 5 at http://president.ubc.ca/files/2011/05/umelbourne2011.pdf (last visited 12 December 2014).
[12] Brunnee and Toope, above n. 11 at 6, 310.
[13] Brunnee and Toope, above n. 11 at 64, 86.

framework capable of consistently securing effective environmental protection based on the recommendation of environmental scholars and constructivists.[14]

Beginning from this hypothesis, in this paper I reconsider the traditional issue of how best to achieve environmental protection through regulatory means in the modern era. In seeking to do so, I first explore, and test, my hypothesis that the reason why the incumbent regulatory framework is incapable of consistently attaining effective environmental protection is rooted in contextual factors. Notably, states have been reluctant to cede meaningful sovereignty over aspects of the environment falling within their territories to an international environmental organization-style institution to an empowered, independent, and objective body of norm entrepreneurs. Following from this, I argue that with the passage of time, it is quite reasonable to assume that there have been inevitable changes in states' attitudes with respect to their sovereignty over aspects of the environment falling within their territories. I then consider whether such changes have shaped the context in which environmental protection is regulated. Considering the centrality of context in shaping the approach to regulating environmental protection, I also explore the extent to which these inevitable changes in states' attitudes, and possibly context, could facilitate the turn to an international environmental law regulatory framework which is more capable of consistently securing effective environmental protection.

In pursuing these objectives however, I am mindful of the fact that there is a body of compelling literature by environmental scholars and constructivists which essentially proffered viable alternatives to the international environmental law regulatory framework which would more consistently secure effective regulation but that these proposals failed to compel change because they were proffered in a context in which states were reluctant to cede their sovereignty over aspects of the environment falling within their territories. As such, I do not attempt to proffer some novel proposal with respect to how consistently effective environmental protection could be attained through regulatory means. Instead, by

[14] J.L. Dunoff, 'From Green to Global: Toward the Transformation of International Environmental Law' (1995) 19 *Harvard Environmental Law Review* 241, 243-244. M.E. Keck, and K. Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Cornell University Press: Ithaca, 1998) 123. G. Therborn, 'The World's Trader, the World's Lawyer: Europe and Global Processes' (2002) 5 *European Journal of Social Theory* 403, 405. A. Tokar, 'Something Happened. Sovereignty and European Integration' (2001) 11 *IWM Junior Visiting Fellows Conferences* 1, 2. See for example, UN General Assembly, *United Nations Conference on the Human Environment*, 15 December 1972, A/RES/2994 (Stockholm Declaration) Principle 21 and Declaration of the United Nations Conference on Environment and Development, UN Doc.A/CONF.151/26/Rev.1, Report of the *UNCED*, vol. 1 (Rio Declaration) Principle 3.

way of offering a possible solution I rely significantly on an amalgam of existing proposals which faltered due to contextual issues to craft what I consider to be a contextually relevant approach to regulating environmental protection for the modern era.

2. The importance of context in the approach to regulating environmental protection

Environmental scholars and constructivists have long warned that the extensive participation of states in regulatory efforts can derail such efforts. In environmental protection, such warnings have not been heeded to a significant extent. In this section, using the work of environmental scholars and constructivists, and the aid of noteworthy examples of efforts to regulate environmental protection under the international environmental law regulatory framework, I test my hypothesis that the reason why the incumbent regulatory framework is unable to consistently secure effective environmental protection is rooted in states' reluctance to cede meaningful sovereignty over aspects of the environment falling within their territories either, to an empowered independent and objective body of norm entrepreneurs, or, to an international environmental organization-style institution, which would be charged with directing environmental protection regulatory efforts.

To this end, it is useful to note that there is certainly evidence to suggest that, despite the fact that the international environmental law regulatory framework allows states to hold on to their sovereignty, states have been willing to part with such sovereignty in order to facilitate the progression of environmental protection regulatory efforts. However, and drawing from central aspects of constructivist thought, experience suggests that states have been unwilling to cede meaningful sovereignty to bodies of norm entrepreneurs charged with advancing environmental protection norms.[15] The result has been that while such norm

[15] P. Pattberg, and J. Stripple, 'Beyond the Public and Private Divide: Remapping Transnational Climate Governance in the 21st century' (2008) 8 *International Environmental Agreements* 367, 378-384. K. Stairs, and P. Taylor, 'Non-Governmental Organizations and the Legal Protection of the Seas' in A. Hurrell, and B. Kingsbury, (eds) *The International Politics of the Environment* (Clarendon Press: Oxford, 1992) 110, 111-113. C. Streck, 'Global Public Policy Networks as Coalitions for Change' in Global Environmental Governance' in D. Esty, and M.H. Ivanova, *Global Environmental Governance: Options and Opportunities* (Yale School of Forestry and Environmental Studies: Connecticut, 2002) 121, 123-127. Keck and Sikkink, above n. 14 at 122-126. K. Raustiala, 'The 'Participatory Revolution in International Environmental Law' (1997) 21 *Harvard Envtironmental Law Review* 537, 540.

entrepreneurial bodies have frequently emerged across environmental protection efforts, they typically feature heavy state participation.[16]

Importantly, the inclusion of state actors and agencies and their heavy participation in the body of norm entrepreneurs has not necessarily derailed environmental protection efforts. Instead, to some extent, this has benefitted efforts to ensure the emergence of the environmental protection norm.[17] This is because strategically placed states in the group of norm entrepreneurs have helped to compel other states, otherwise not concerned with environmental protection, to appreciate the importance attaching to environmental protection efforts.[18] As such, these states have played a useful role in developing shared understandings among states with respect to environmental protection in a manner that has led to the norm's ascension to international norm status.[19]

This is a conclusion that is seemingly borne out in practice where state participation in the body of norm entrepreneurs has not compromised the environmental protection norm's progression to a tipping point. From a norm theory perspective, this attainment of a tipping point can be inferred to have been achieved in the international environmental law regulatory framework from the agreement to a multitude of Framework Conventions by states.[20] Such Framework Conventions can be taken to signify the attainment of a tipping point because these Conventions often require ratification by about a third of the body of states before they come into effect. For instance, to come into force the United Nations Framework Convention on Climate Change required ratification by fifty states.[21] The group of states that ratified the

[16] F. Yamin, 'NGOs and International Environmental Law: A Critical Evaluation of their Roles and Responsibilities' (2001) 10 *RECIEL* 149.

[17] Florini, above n. 10 at 375. Yang, above n. 7 at 1140.

[18] R.B. Mitchell, 'International Environment' in W. Carlsnaes, T. Risse, and B.A. Simmons, (eds.) *Handbook of International Relations* (Sage Publications: London, 2007) 500, 503-504. Finnemore and Sikkink, above n. 10 at 897. M. Finnemore, and K. Sikkink 'Taking Stock: The Constructivist Research Program in International Relations and Comparative Politic' (2001) 4 *Annual Review of Political Science* 391, 401. A. Dan Tarlock, 'The Role of Non-Governmental Organizations in the Development of International Environmental Law' (1992) 68 *Chicago-Kent Law Review* 61, 63.

[19] H.H. Koh, 'How is International Human Rights Law Enforced?' (1999) 74 *Indiana Law Journal* 1397, 1401-1402. Goertz and Diehl, above n. 7 at 639. J. Hart, 'Three Approaches to the Measurement of Power in International Relations' (1976) 30 *International Organization* 289, 291. D.A. Lake, 'Anarchy, Hierarchy and the Variety of International Relations' (1996) 50 *International Organization* 1, 19-20. J.E. Thomson, 'Explaining The Regulation of Transnational Practices: A State-Building Approach' in J.N. Rosenau and E. Czempiel (eds.), *Governance Without Government: Change and Order in World Politics* (Cambridge University Press: Cambridge, 1991) 195, 216.

[20] R.B. Mitchell, 'International Environmental Agreements Database Project (Version 2012.1)' (2002-2012) Available at: http://iea.uoregon.edu/page.php?query=static&file=publications.htm (last visited 12 December 2014).

[21] United Nations Framework Convention on Climate Change, 31 *ILM* (1992) 851.

Convention consisted of strategically placed states such as the United Kingdom, Germany, France and the United States. It is perhaps important, in regarding these numbers, to note that in various sub-fields of environmental protection such as the trans-boundary movement of hazardous waste and its disposal, not all states are active participants in regulated activities. As such, the requisite third of states may often be fulfilled based on the total number of states affected by regulatory efforts or partaking in certain activities, rather than the entire body of states. Alternatively, a tipping point in the norm 'life cycle' of environmental protection norms in fields in which there is vast agreement by states on the need for formal regulation can also be achieved despite the fact that less than a third of affected states would have ratified a Framework Convention. Often, as in the case of the Basel Convention, such smaller numbers suffice because the process of negotiating the treaty would have established states' willingness to ratify a Convention once it is crafted.[22]

Beyond this, state participation in the body of norm entrepreneurs has also not compromised the international environmental law regulatory framework's attainment of legality to the extent that, following the creation of Framework Conventions, Protocols meeting the criteria of legality such as the Montreal Protocol, the 1988 Protocol Concerning the control of Emissions of Nitrogen Oxides or their Transboundary Fluxes,[23] and the Kyoto Protocol[24] and its successor, have frequently been agreed to by states. Furthermore, and in spite of state participation in the body of norm entrepreneurs, these Protocols have widely inspired fidelity, largely because they are perceived as legitimate, a likely consequence of the fact that these Protocols are created on the basis of unanimous consent. In addition, there is evidence to suggest that communities of practice also develop around such Protocols. This can be inferred from the fact that a significant number of states in both, the developed and the developing world, carry extensive environmental protection regulatory frameworks which are guided by efforts to regulate environmental protection on the international level.[25] To the extent that these national environmental protection regulatory frameworks are intended to give effect to international prescriptions, this suggests that most states understand what the

[22] Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel), 28 *ILM* (1989) 657.
[23] Protocol to the Convention on Long-Range Transboundary Air Pollution Concerning the control of Emissions of Nitrogen Oxides or their Transboundary Fluxes (Sofia) 27 *ILM* (1988) 698.
[24] Protocol to the Framework Convention on Climate Change (Kyoto), 37 *ILM* (1998J) 22.
[25] P. Birnie, A. Boyle, and C. Redgwell, 3rd edn *International Law and the Environment* (Oxford University Press: Oxford, 2009) 159. M.J. Kelly, 'Overcoming Obstacles to the Effective Implementation of International Environmental Agreements' (1997) 9 *Georgetown International Environmental Law Review* 448, 454.

law requires, and why, in a manner which has ensured that shared understandings have 'come to be more widely shared' by the community of states.[26]

A useful example of all this can be found in the ozone protection movement. From 1974 to 1985, scientific evidence mounted that ozone depletion was increasing and was a real threat to life.[27] Scientists and states, in the role of norm entrepreneurs, would go on to generate the public concern and political support required to move the ozone protection norm to a tipping point. This was achieved with the coming into force of the 1985 Vienna Convention on the Protection of the Ozone Layer which recognized a duty on the part of signatories to protect human health and the environment from ozone-depleting substances.[28] Further, the Convention promoted cooperation among signatories in scientific research on the ozone depletion problem. It also established a procedural and administrative framework both for the Convention's implementation and for dispute resolution concerning its interpretation.

Despite this, nationalistic and interest group factionalism characterised by industry's reluctance to support ozone protection efforts led to a situation in which there was insufficient political support to establish a Protocol meeting the requirements of legality.[29] It was only after the Convention was prepared for signature that British scientists reported finding a seasonal, but significant, diminution of the ozone layer over the Antarctic and these findings were widely publicized as the 'ozone hole' phenomenon that ozone protection acquired an apocalyptic hue. This created significant public alarm in a manner that inspired civil society to assume a more visible norm entrepreneurial role. Closely aligned with this, industry began to back away from its former reluctant position to tackle ozone protection. This saw them join the norm entrepreneurial effort through offering substitutes for ozone depleting substances.[30] This change in industry's attitude and their joining of the norm entrepreneurial effort would provide sufficient impetus for the turn to the Montreal Protocol which met the requirements of legality and featured a system of controls which effectively

[26] Brunnee and Toope, above n. 11 at 64, 86.
[27] For a brief history see, B.A. Green, 'Lessons From the Montreal Protocol: Guidance for the Next International Climate Change Agreement' (2009) 39 *Gal Green Doc*. 253, 256-268 (available at: https://law.lclark.edu/live/files/17328-39-1green) (last visited 12 December 2014).
[28] Convention for the Protection of the Ozone Layer (Vienna), *UKTS* 1 (1990) Cm. 910. B.K. Bucholtz 'Coase and the Control of Transboundary Pollution: The Sale of Hydroelectricity Under the United States-Canada Free Trade Agreement of 1988' (1991) 18 *BC Envtl Aff. L. Rev.* 279, 283.
[29] Protocol on Substances that Deplete the Ozone Layer, (Montreal) *UKTS* 19 (1990) Cm. 977. Bucholtz, above n.28 at 283-284.
[30] Bucholtz, above n.28 at 286.

addressed the dangers posed by ozone depletion largely due to the communities of practice which developed around the Protocol.[31]

Thus, consistent with my earlier assertion that sovereignty has not always precluded the turn to effective international environmental law regulatory frameworks, the success of the ozone protection example highlights that states' inclusion in the body of norm entrepreneurs has not necessarily derailed efforts at regulating environmental protection. However, it is useful to note when regarding this example that 'unique scientific and technological circumstances surrounded the formation and ratification of the ozone protection regulatory framework in a manner which encouraged the creation of a varied and comprehensive group of norm entrepreneurs consisting of states, civil society, and industry and not just states.'[32] While states certainly played a central role in this effort, a keen interest and commitment to the process by civil society and industry meant that states' major contribution to ozone protection was in not derailing efforts to secure effective regulation. That states did not derail these efforts was secured through an approach to regulating ozone protection which focused on minimising the extent to which regulatory efforts would infringe upon sovereignty. For instance, rather than specify an exact amount of reductions for each Ozone Depleting Substance, the Montreal Protocol set an overall quota that could be met in a variety of ways at the discretion of each state.[33] In addition, a common but differentiated responsibility approach was adopted in terms of which developing states were granted a ten year grace period during which they could delay compliance with the Protocol's control measures. Further, developed states were placed under an obligation to help developing states comply with the dictates of the Protocol through the provision of technical assistance to such states. In addition, a sophisticated funding mechanism headlined by the Multilateral Fund was established to encourage reluctant states to participate.[34] These techniques ensured that consensus was achieved by states, and as a consequence, laws were widely regarded as legitimate and inspired fidelity.

Importantly, most efforts to regulate environmental protection do not feature the same scientific and technological circumstances which prompted the turn to a norm entrepreneurial

[31] *Ibid*. at 285.
[32] *Ibid*. at 279-280, 316.
[33] Green, above n. 27 at 274-275.
[34] N.E. Bafundo, 'Compliance with the Ozone Treaty: Weak States and the Principle of Common bu Differentiated Responsibility' (2006) 21 *American University Law Review* 461, 464. Green, above n. 27 at 256-268.

group as varied and as interested as that seen under the ozone protection effort.[35] A very basic example of this can be found in efforts to regulate the norm surrounding the control of trans-boundary air pollution. The norm achieved a tipping point with agreement to the 1979 Geneva Convention on Long-Range Transboundary Air Pollution. Following from this, norm entrepreneurs attempted to push states to craft an effective Protocol to govern air pollution. However, without the benefit of extensive civil and industry participation in the body of norm entrepreneurs in the manner seen under efforts to advance the ozone protection norm, a lack of commitment to the process by sovereign states, who were not under the same pressure they had faced in the effort to regulate ozone protection, hampered such efforts. As such, what emerged was the 1988 Protocol Concerning the control of Emissions of Nitrogen Oxides or their Transboundary Fluxes which, while broadly meeting aspects of legality criteria, is a broad compromise on ecocentric needs.[36] Consequently, while communities of practice have developed among states, the regulatory framework is incapable of consistently securing effective environmental protection.

Another particularly interesting example of what more commonly occurs in environmental protection can also be observed in the climate change movement. For all intents and purposes, there has been agreement among states that climate change is a common concern issue. Indeed, much of the scientific community believes that the global warming trend is affected by human activities, but, as was the case with ozone depletion, uncertainty exists as to the extent that human activities are affecting and influencing the climate as well as to many details of the threat, possible solutions, and potential effects.[37] Despite this, concern over this issue has led to the climate change norm progressing to a tipping point, manifest through agreement to the United Nations Framework Convention on Climate Change.

However, in distinction to the ozone example, while there has been increasing public awareness of the predictions of the consequences of the greenhouse effect which include rising sea levels, heightened strength of weather patterns, adverse effects on ecosystems and wildlife due to loss of habitat, and increased difficulty and potential inability to raise crops, the climate change effort has not benefitted from an 'ozone hole' type of scientific discovery

[35] Bucholtz, above n.28 at 316.
[36] J.B. Skjaerseth, O. Schram Stokke and J. Wettestad, 'Soft Law, Hard Law, and Effective Implementation of International Environmental Norms' (2006) 6 *Global Environmental Politics* 104, 109.
[37] Green, above n. 27 at 268.

to 'shock the world into taking action.'[38] Indeed, the participation of civil society in the norm entrepreneurial effort has not been as significant in efforts to regulate climate change as it was in efforts to regulate ozone depletion. Similarly, and in contrast to the ozone effort, industry, a major emitter of the green-house gases that lead to climate change, has been reluctant to join in the norm entrepreneurial effort through offering alternatives and techniques to combat climate change in the manner they did for ozone protection.[39]

Despite this, several strategically placed states have worked as a norm entrepreneurial group to advance the development of the climate change norm. To this end, similar techniques to those used to advance the ozone protection norm have been relied on to encourage state consensus. Most notably perhaps, stemming from the argument that one state's unilateral actions will not alone solve the problem, and what matters is the collective decline of average emissions, the same common but differentiated responsibility principle, used to good effect under the Ozone Framework, has been adopted.[40] In addition, a comprehensive funding mechanism, akin to the Multilateral Fund under the ozone regime, headlined by the Global Environmental Facility and eventually, the Green Climate Fund has been established.[41]

Such techniques have culminated in the turn to the Kyoto Protocol and its successor, both of which meet the requirements of legality and have, arguably, inspired fidelity.[42] Interestingly however, in distinction to the ozone protection effort, muted civil society and industry participation in the body of norm entrepreneurs has laid the groundwork for greater state participation in norm entrepreneurial efforts. Predictably, this has seen political considerations colour the approach to regulating climate change in a manner which has compromised the capacity of the regulatory framework to effectively combat climate change.[43] For instance, state prominence in regulatory efforts has meant that the turn to a common but differentiated responsibility approach, used to good effect under the ozone protection movement, has been used as the basis for inaction under the climate change

[38] *Ibid*. at 269.
[39] R.A. Rinkem, 'Environmental Agreements, Non-State Actors, and the Kyoto Protocol: A "Third Way" for International Climate Action' (2014) 24 *U. Pa. J. Intl. Econ. L.* 729, 744-746.
[40] *Ibid*. at 730.
[41] S. Bracking, 'The Anti-Politics of Climate Finance: The Creation and Performativity of the Green Climate Fund' 3, Antipode, doi: 10.1111/anti.12123.
[42] Rinkem, above n. 39 at 730.
[43] Green, above n. 27 at 269.

regime.[44] To this end, some sectors of the developed world refuse to participate in the climate change framework unless the BRICS bloc of states take on binding obligations under the Protocols.[45] Conversely, developing states frequently resist making even voluntary commitments to combat climate change largely because they view the issues of development and the eradication of poverty as taking priority to environmental concerns, with economic growth through expanded use of fossil fuels being advocated as a primary strategy for accomplishing those goals.[46] In addition, while developed states have made significant funding commitments to the Green Climate Fund, the fund has been dogged by questions regarding what it should be for, who should be in charge, how money would be raised and how it would be spent.[47] This has essentially removed the financial incentive for reluctant states to participate in the climate change effort which was instrumental in getting state participation under the ozone framework.[48] Combined with other issues, these factors have worked together to ensure that while legality and communities of practice have emerged around the climate change regulatory framework based on the climate change norm, the framework is incapable of securing climate change.

These two examples, which are more reflective of efforts to regulate environmental protection generally than the more outlier ozone protection example suggest, in a manner consistent with my hypothesis, that states do cede aspects of their sovereignty over aspect of the environment falling within their territories. However, states have also been reluctant to cede meaningful sovereignty to facilitate the turn to effective environmental protection with three consequences. First, such state reluctance has precluded the turn to an international

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[44] D. Zaelke, and J. Cameron, 'Global Warming and Climate Change: An Overview of the International Legal Process' (1990) 5 *American University Journal of International Law and Policy* 249, 280. P. Sands, 'Enforcing Environmental Security' in P. Sands, *Greening International Law* (Earthscan Publications: London, 1993) 50, 60. Thatcher, above n. 1 at 193.

[45] K. Lieberthal, and D. Sandalow, 'Overcoming Obstacles to U.S.-China Cooperation on Climate Change' (2009) *Brookings*: available at: http://www.brookings.edu/reports/2009/01_climate_change_lieberthal_sandalow.aspx (last visited 12 December 2014).

[46] Green, above n. 27 at 273. Bucholtz, above n.28 at 286. The Climate Group (2008) *China's Clean Revolution*: available at: http://www.theclimategroup.org/_assets/files/Chinas_Clean_Revolution.pdf (last visited 12 December 2014).

[47] Bracking, above n. 40 at 3.

[48] I.F.I. Shihata, 'Implementation, Enforcement and Compliance with International Environmental Agreements-Practical Suggestions in the Light of the World Bank's Experience' (1996) 9 *Georgetown International Environmental Law Review* 37, 47-49. Yang, above n. 7 at 1157. Y. von Schirnding, W. Onzivu and A.O. Adede, 'International Environmental Law and Global Public Health' (2002) 80 *Bulletin of the World Health Organization* 970, 972. E.B. Weiss, 'The Vienna Convention for the Protection of the Ozone Layer and The Montreal Protocol on Substances that Deplete the Ozone Layer' (2009) *United Nations Audio Visual Library of International Law* available at: http://legal.un.org/avl/ha/vcpol/vcpol.html (last visited 12 December 2014).

environmental organization-style institution as advocated by scholars such as Kennan, Levien, and Esty. Second, state reluctance to cede meaningful sovereignty has led to norm entrepreneurial bodies being characterised by heavy state participation in their efforts.[49] Third, and following from this, the inclusion of states in the body of norm entrepreneurs has led to the political considerations of states compromising the independence and objectivity of this body of norm entrepreneurs. Most commonly, this has curtailed the capacity of the body of norm entrepreneurs to craft laws which can consistently secure effective environmental protection.[50] Instead, and consistent with constructivist thought, state inclusion in the body of norm entrepreneurs has ensured that, while norm entrepreneurs can fashion regulatory frameworks based on environmental protection norms which meet the requirements of legality and are perceived as legitimate in a manner that inspires fidelity, these frameworks are unable to consistently secure effective environmental protection because they are concessionary to sovereignty.[51] Being concessionary to sovereignty thus means that such frameworks typically carry lowest common denominator laws, the application of which cannot reasonably lead to the consistent attainment of effective environmental protection, even if they should be fully complied with.[52]

Importantly, and consistent with my hypothesis, this all suggests that the context in which environmental protection regulatory efforts have been undertaken, which is characterised by state reluctance to cede meaningful aspects of the sovereignty they hold over aspects of the environment falling within their territories, has played a central role in compromising the capacity of the international environmental law regulatory framework to consistently secure effective environmental protection. Despite this, it is also quite apparent

[49] M. Pallemaerts, 'International Environmental Law from Stockholm to Rio: Back to the Future?' in P. Sands, *Greening International Law* (Earthscan Publications: London, 1993) 17. M. Poustie, 'Environment' in E. Moran *et al* (eds.) *Stair Memorial Encyclopaedia Reissue* (Butterworths: London, 2007) para 21, 24.

[50] Skjaerseth, Schram Stokke and Wettestad, above n. 36 at 109. S. Karlsson, 'The North-South Knowledge Divide: Consequences for Global Environmental Governance' in D. Esty, and M.H. Ivanova, *Global Environmental Governance: Options and Opportunities* (Yale School of Forestry and Environmental Studies: Connecticut, 2002) 53, 54. J. Whalley, and B. Zissimos, 'Making Environmental Deals: The Economic Case for a World Environmental Organization' in D. Esty and M.H. Ivanova *Global Environmental Governance: Options and Opportunities* (Yale School of Forestry and Environmental Studies: Connecticut, 2002) 163, 169. J. Gupta, 'Legitimacy in the Real World: A Case Study of the Developing Countries, Non-Governmental Organizations and Climate Change' in J.M. Coicaud and V. Heiskanen, *The Legitimacy of International Organizations* (2001) 482, 495.

[51] A. Cassesse, 'The Role of Legal Advisers in Ensuring that Foreign Policy Conforms to International Legal Standards' (1992) 14 *Michigan International Law Journal* 139, 156. T.M. Franck, *The Power of Legitimacy Among Nations* (Oxford University Press: Oxford, 1990) 199. Florini, above n. 10 at 375, 382. K. Kline and K. Raustiala, 'International Environmental Agreements and Remote Sensing Technologies' (2000), 14 at http://sedac.ciesin.columbia.edu/rs-treaties/rs-treaties_bckgnd.pdf (last visited 12 December 2014).

[52] Skjaerseth, Schram Stokke and Wettestad, above n. 36 at 109.

from the preceding discussion that, over time, sovereign states have managed to find ways in which to build the requisite levels of solidarity among themselves needed to establish environmental protection regulatory frameworks even though such frameworks may be incapable of consistently securing effective environmental protection.[53] Such a progression is an interesting development if it should point to a change in the context in which environmental protection is sought to be regulated may have similarly changed considering that it is contextual consideration which have compromised the international environmental law regulatory framework's capacity to consistently secure effective environmental protection and shaped the approach to regulating environmental protection.

3. A sway in attitude and context?

Four changes in states' attitudes with respect to their sovereignty over aspects of the environment falling within their territories at different levels of the regulatory chain are worth exploring in an analysis into whether changes in states' attitudes point to a change in the context in which the global regulation of environmental protection is pursued.

First, at the international policy and goal-making level, states have seemingly become amenable to qualifying their sovereignty over aspects of the environment falling within their territories even to the detriment of development pursuits. At the most basic, that there has been a sway in states' attitudes can be inferred from an almost global acceptance by states of a duty to pursue sustainable development.[54] In many ways, this suggests that states have increasingly accepted the need to qualify sovereignty and the pursuit of development based on environmental protection considerations.

Admittedly, sustainable development is a problematic example.[55] Certainly, sustainable development creates global responsibility over the environment in a manner which challenges the autonomy that states hold over resources within their jurisdiction that is

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[53] U. Beyerlin, and T. Marauhn, *International Environmental Law* (Hart Publishing: Oxford, 2011) 35. R. St. J. Macdonald 'Solidarity in the Practice and Discourse of Public International Law' (1996) 8 *Pace International Law Review* 259, 259-260.

[54] D.B. Magraw, and L.D. Hawke, 'Sustainable Development' in D. Bodansky, J. Brunnee, and E. Hey, *The Oxford Handbook of International Environmental Law* (Oxford University Press: Oxford, 2007) 613, 623. J. Martens, and K. Schilder, 'Sustainable Development' in J Krieger *et al* (2ed) *Oxford Companion to World Politics* (Oxford University Press: Oxford, 2001) 813, 814.

[55] A. Rieu-Clarke, *International Law and Sustainable Development: Lessons from the Law of International Watercourses* (IWA Publishing: London, 2005) 53. *Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia)* 37 *ILM (*1998) 162.

preserved under the sovereignty-centric international law paradigm.[56] However, several studies have highlighted that the ambiguity surrounding the definition of the concept allows states to disregard environmental protection in the pursuit of development.[57]

Despite this, when considered alongside other examples, the significance of the increasing acceptance of sustainable development as a guiding concept, principle, or goal becomes more apparent. For instance, in addition to accepting sustainable development, that states are increasingly amenable to qualifying sovereignty is apparent in states' greater acceptance of the fact that protection of some environmental phenomena is a matter of common concern.[58] This has seen states accept diminution of their sovereignty in order to facilitate the pursuit of common environmental protection goals as is apparent in efforts to regulate ozone protection, and climate change, discussed above.[59] Similarly, the precautionary approach to environmental deterioration has increasingly grown to be a major policy-making tool and various states in both the developed and the developing world have seemingly elevated the precautionary principle to the status of customary international law.

Second, and at the global lawmaking level, states' turn to accepting the limitation of their sovereignty over aspects of the environment falling within their territories has been captured through their turn to making Conferences of the Parties a central feature of environmental treaties. These Conferences of the Parties reflect a turn away from a traditional approach to international environmental lawmaking in terms of which laws were made by sovereign states on the basis of unanimous consent. Instead, in what has increasingly grown to be the preferred approach, Conferences of the Parties are vested with extensive powers to take decisions through majority voting and in some cases make decisions which enter into

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

[57] S. Oberthur, and T. Gehring, 'Reforming International Environmental Governance: An Institutionalist Critique of the Proposal for a World Environment Organisation' (2004) 4 *International Environmental Agreements: Politics, Law and Economics* 359, 360. P Birnie, A Boyle and C Redgwell, above n.25 at 125-126. S.C. Schreck, 'The Role of Nongovernmental Organizations in International Environmental Law' (2006) 10 *Gonzaga Journal of International Law* 252, 256. A.E. Utton, 'International Environmental Law and Consultation Mechanisms' (1973) 12 *Columbia Journal of Transnational Law* 56, 66. Martens and Schilder, above n.54 at 813-814. T. Scovazzi, 'State Responsibility for Environmental Harm' in G. Ulfstein, and J. Werksman, (eds) *Yearbook of International Environmental Law* (Oxford University Press: Oxford, 2001) 43, 51. Magraw and Hawke, above n.54 at 615.

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

[59] Green, above n. 27 at 253.

force without ratification by all the parties.[60] For instance, under Article 2 of the Montreal Protocol, Conferences of the Parties could adjust the Protocol's substantive requirements by a two-thirds majority vote of present parties. Similarly, Article 15 of the Climate Change Convention and Article 29 of the Biodiversity Convention allow for amendments based on three-fourths and two-thirds majority decisions respectively. As such, Conferences of the Parties carry extensive law-making powers.[61] The effect of this progression to amending the law based on majority voting, rather than unanimous consent, has been to limit the role played by sovereignty in lawmaking so that environmental protection objectives are achieved in an easier manner.

Third, at the regional level, states have increasingly begun to accept intrusions into their sovereignty over aspects of the environment falling within their territories by regional bodies. Perhaps this is best exemplified in the European Union where the Union affects domestic politics, policies, plans, programmes and projects with the vast majority of national environmental policies and laws having their origins in European Union law.[62] This was not always the case. Environmental policy did not appear in the original 1957 Treaty of Rome that established the European Economic Community.[63] It was only after the development of Europe's Internal Market and starting in 1967 with the Directive for harmonised classification and the labelling of dangerous chemicals that, in 1987, environmental protection objectives and principles were finally given their own chapter in the Treaty establishing the European Union. Since then, European Union environmental laws are based

[60] G. Ulfstein, 'Treaty Bodies' in D. Bodansky, J. Brunnee and E. Hey, *The Oxford Handbook of International Environmental Law* (Oxford University Press: Oxford, 2007) 877, 879. D. Caron, 'Protection of the Stratospheric Ozone Layer and the Structure of International Environmental Lawmaking' (1991) 14 *Hastings International and Comparative Law Review* 755. Palmer, above n. 1 at 273.

[61] Ulfstein, above n. 60 at 888-889. D. Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law' (1999) 93 *American Journal of International Law* 596, 607-610.

[62] S. Scheuer, 'EU Environmental Policy Handbook: A Critical Analysis of EU Environmental Legislation, Making it accessible to environmentalists and decision makers' 8, available at: http://www.eeb.org/?LinkServID=3E1E422E-AAB4-A68D-221A63343325A81B (last visited 12 December 2014). T.B. Fischer, 'The EU and its Regulatory Role in Environmental policy and Assessment,' Paper prepared for the Conference-'The Evolution of Integration in Europe 20 Years after the Fall of the Berlin Wall' held at the Viessmann Academy, Viessmann Corporation, Allendorf a.d. Eder, Hessen, Germany, October 11-14, 2009 available at: http://viessmanncentre.ca/wp-content/uploads/2011/06/Fischer.pdf (last visited 12 December 2014).

[63] C. Damro, I. Hardie, and D. MacKenzie, 'The EU and Climate Change Policy: Law, Politics and Prominence at Different Levels' (2008) 4 *Journal of Contemporary European Research* 179, 181.

on internal market rules, and this restricts Member States from going beyond a prescribed level of protection.[64] Indeed, Jordan notes that:

> 'Member states are no longer politically or legally separate from EU environmental policy. In fact, they have undergone a progressive change ('Europeanisation') through their involvement in EU policy making. In other words, the member states have created an institutional entity to perform certain tasks which has, in turn, deeply affected the way they perceive and act against environmental problems.'[65]

Importantly, it seems that to achieve this, 'the European Union has relied on the communality among its states, which stems from historical and cultural perceptions, to encourage resource management of a commons through social pressure and a spirit of cooperation. Such an approach requires sufficient cultural and historical bases that give rise to shared perceptions and values about the benefits that accrue to all by protection of the commons. Without these, the leverage of social pressure is unavailable.'[66]

It is perhaps due to the success of this model that other regional groupings such as the Organization of American States and the Association of South East Asian Nations, among the most comprehensive in purpose and regional membership, have similarly attempted to direct the environmental protection efforts of their member states. To this end, they serve as key policy making and enforcement entities which affect states' traditional sovereignty over aspects of the environment falling within their territories.[67] Certainly, other regions do not carry the same cultural and historical bases as the European Union which give rise to shared perceptions and values about the benefits that accrue to all by protection of the commons and this limits the available social pressure.[68] However, there is evidence in the work of these regional groupings of states of a change in the way in which states perceive their sovereignty over aspects of the environment falling within their territories.

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[64] *Ibid*. at 181.
[65] A. Jordan, (ed.) *Environmental Policy in the European Union*, (Earthscan Publishing: London, 2005).
[66] Bucholtz, above n.28 at 314.
[67] For a discussion of these organizations' impact on environmental policies of member states see, A.R. Harrington, 'Regional Commons: An Assessment of the Impact of the Framework Convention and Kyoto Protocol on the Organization of American States and the Association of South East Asian Nations and Suggestions for the Role of Regionalism in International Environmental Law' available at: http://works.bepress.com/cgi/viewcontent.cgi?article=1012&context=alexandra_harrington (last visited 12 December 2014).
[68] Bucholtz, above n.28 at 314.

Fourth, the fact that changes in states' attitudes have shaped context is also apparent at the national level. Here, it is useful to note that 'successful environmental protection is brought about by a complex interaction of influences and not by a single, isolated factor; a favourite instrument; a single type of actor or a particular framework condition or institution.'[69] However, the universality of states' shift in attitude with respect to their sovereignty can be inferred when the various national environmental protection regulatory frameworks in different states at different levels of development such as the United States of America, Japan, and the United Kingdom, states regarded as economies in transition such as the BRICS bloc of states, and developing states such as Malaysia and Zimbabwe are considered. To this end, the national environmental protection regulatory frameworks in these states typically feature dominant policies on which regulatory efforts are based.[70] Further, these states carry integrated framework legislation on the basis of which other subsidiary laws are crafted.[71] The task of overseeing the implementation of policies and laws is typically left to centralised state agencies.[72] Lastly, national environmental protection regulatory

[69] M. Janicke, and H. Weidner, (eds.), *National Environmental Policies: A Comparative Study of Capacity-building* (Springer-Verlag Publishing: Germany, 1997) 4.

[70] For instance, in the United States, the policy aims to protect the environment for future generations while interfering as little as possible with the efficiency of commerce or the liberty of the people and to limit inequity in who is burdened with environmental costs. Similarly, in India, the National Environment Policy of 2006 identifies the pursuit of sustainable development as a major goal of environmental protection efforts. In Zimbabwe, the core environmental principle is the promotion of ecological sustainable development.

[71] See, The Basic Environment Law in Japan. Notable examples in the United States include the Clean Air Act, Marine Mammal Protection Act, Oil Pollution Act, and the Toxic Substances Control Act. The basis of the Brazilian environmental laws is established in the 1988 Federal Constitution. Section 255 of the Constitution grants to everyone the right to a clean environment and highlights that the environment is an asset of common concern. In India, Article 48-A of the Constitution places an obligation on the State to protect and improve the environment and to safeguard the forests and wildlife of the country.[71] In addition to the Constitution, India also carries an umbrella Environment (Protection) Act, 1986. See too, The National Environmental Management Act in South Africa and The Environmental Management Act in Zimbabwe. Also see, The 1974 Environmental Quality Act in Malaysia.

[72] See for example, the Environment Agency in Japan which was upgraded to cabinet ministry level, becoming the Ministry of the Environment. In the United States, responsibilities for the administration of environmental laws are divided between numerous federal and state agencies with varying, overlapping and sometimes conflicting missions. The Environmental Protection Agency is the most well-known federal agency, with jurisdiction over many of the country's national air, water and waste and hazardous substance programs. In the United Kingdom, notable examples of such agencies include, the Environment Agency, Natural Resources Wales, Scottish Environmental Protection Agency, Department of the Environment in Northern Ireland. The Brazilian Ministry of the Environment is the lead 'agency' in charge of coordinating, supervising and controlling the Brazilian Environmental Policy. Responsibility for environmental protection in India is vested in The Ministry of Environment and Forests. In South Africa, since 2009, the administration of environmental matters has fallen to the Ministry of Water and Environmental Affairs which houses the Department of Water Affairs and the Department of Environmental Affairs. In addition, the National Environmental Management Act makes provision for two advisory and coordinating bodies to be established: the National Environmental Advisory Forum and the Committee for Environmental Coordination. In Zimbabwe, responsibility for overseeing the regulation of environmental protection in Zimbabwe has been vested in various institutions such as the Ministry of Environment and Natural Resources Management, the National Environmental Council, the Environmental Management Agency, and the Environmental Management Board. In Malaysia, responsibility

frameworks are commonly predicated on the internationally recognized polluter pays principle with other techniques assuming a complementary role.

Importantly, this progression suggests that, where states formerly cherished their sovereignty and regulated environmental protection autonomously, the present the context is one in which states' approaches to crafting domestic environmental protection regulatory frameworks have been extensively shaped and informed by international objectives, standards and prescriptions even where these objectives, standards and prescriptions may limit their unfettered enjoyment of their sovereignty.

In sum, based on the preceding discussion I consider that there have been clear changes in states' attitudes with respect to aspects of the environment falling within their territories. Furthermore, these changes are hardly superficial. Instead, they are of such a kind that they necessarily point to a change in the context in which environmental protection is pursued. Perhaps this is most apparent from the fact that these changes in states' attitudes point to states being more amenable to the pursuit of environmental protection as an end in itself and, more importantly, they also suggest that states find it more acceptable in the modern era to qualify the pursuit of development based on environmental protection considerations. Furthermore, this has not only been accepted in an abstract manner. Rather, it is something that has even grown to be reflected in states' approaches to regulating environmental protection within their jurisdictions. All this suggests, if the goal is to craft a regulatory framework capable of consistently securing effective environmental protection, that it may be possible in the modern era to reconsider the approach to regulating environmental protection. This would be an essential first step in turning to an international environmental law regulatory framework capable of more consistently securing effective environmental protection.

4. Possible changes to the regulatory approach

In considering possible approaches to regulating environmental protection in the modern era, two things are worth noting. First, the argument that change has occurred to the context in which regulation is pursued must necessarily be balanced against modern realities. This only makes sense considering that it has been argued that it was formerly contextual issues which

for regulating environmental protection has been vested in the Department of Environment which was established in 1975 under the provisions of the Environmental Quality Act 1974.

derailed past proposals from compelling real world change in the approach adopted to regulating environmental protection. Second, it is also important to bear in mind that these same proposals have already explored this issue but failed to compel real world change due to contextual issues rather than the quality of the arguments. Combined, these factors suggest that there may not be a need to formulate an entirely new proposal for the modern era. Instead, there is greater value in leaning on sound aspects of past proposals to formulate a context-sensitive solution for the modern era.

For instance, it certainly seems that, in the present context, states may be more amenable to the creation of a modern day international environmental organization-style institution to direct environmental protection regulatory efforts so that effective environmental protection can be achieved. Drawing guidance from the existing bodies of work by scholars who have looked into necessary qualities and attributes of international environmental organization-style institutions as well as constructivist theory, it is reasonable to consider that in the modern era, such an international environmental organization-style institution would need to be staffed by norm entrepreneurs of different kinds.[73] The major caveat in this respect would be that these norm entrepreneurs would independently and objectively pursue the advancement of environmental protection through regulatory means.[74] This is because norm entrepreneurs rely on persuasion, rather than coercion, to advance a norm until it forms the basis of regulatory efforts.[75] Thus, if norm entrepreneurs are seen as advancing certain interests that are not objectively framed, their ability to persuade states to accept the new norm is compromised.[76] Alternatively, another justification for ensuring independence and impartiality can be found in Granovetter's argument that the greatest transmission of novel information among individuals, groups or communities, of states for instance, typically occurs where there are weak ties between the parties involved. This can be contrasted to the observation that stronger ties facilitate transmission of information with

[73] Kennan, above n. 2 at 401-402. Levien, above n. 4 at 470. Esty, above n. 5 at 79-83.
[74] Finnemore and Sikkink, above n. 18 at 402-403.
[75] S.J. Toope, 'Formality and informality' in D. Bodansky, J. Brunnee and E. Hey, (eds.) *The Oxford Handbook of International Law* (Oxford University Press: Oxford, 2007) 107. S. Charnovitz, 'Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices' (1994) 9 *American University Journal of International Law and Policy* 751, 805. Finnemore and Sikkink, above n. 18 at 402. Tarlock, above n. 18 at 65.
[76] Therborn, above n. 14 at 405. Z. Maoz, and D.S. Felsenthal, 'Self-Binding Commitments, the Inducement of Trust, Social Choice and the Theory of International Cooperation' (1987) 31 *International Studies Quarterly* 177, 197.

which parties would already be familiar.[77] By this logic, independence and impartiality foster weak ties that allow norm entrepreneurs' message to reach a wider audience.

Separately, being independent and objective would also place norm entrepreneurs in a position in which they could build a set of cardinal principles that would form the basis of a 'constitution' on international environmental law which would establish necessary general principles of governance and of international environmental law. Further these principles would incorporate legislative and adjudicative functions, to develop international environmental norms, settle environmental disputes, while harmonising environmental standards.[78]

Importantly however, and despite the aforementioned changes in state attitudes toward sovereignty suggesting that there may be room for what would be an ideal transition to an international environmental organization-style institution to direct environmental protection regulatory efforts, it remains true in the modern era that states are reluctant to yield some aspects of the sovereignty they hold over aspects of the environment falling within their territories. As such, while it may be reasonable, it is also premature to argue that the creation of an international environmental organization is now feasible based on the presumption that states will be willing to yield their sovereignty to such an organization to an extent that the organization would be sufficiently empowered to direct effective regulatory efforts. Instead, there is need, in the present, to explore more context-sensitive solutions which could reasonably be implemented as a means of addressing the international environmental law regulatory framework's inability to consistently secure effective environmental protection. Ideally, such solutions would serve as a first step toward the turn to an ideal international environmental organization-style institution to direct environmental protection regulatory efforts.

To this end, it is worth considering, based on an analysis of constructivist theory and the contributions of scholars who have delved into this issue that, in the immediate, the central issue which needs to be addressed if consistently effective environmental protection is to be achieved is the problematic politicization of the body of environmental protection norm entrepreneurs. This could be addressed through a concerted effort to develop the independence and objectivity of norm entrepreneurship by ensuring that the body of norm entrepreneurs features limited state involvement.

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[77] M.S. Granovetter, 'The Strength of Weak Ties' (1973) 78 *American Journal of Sociology* 1360.
[78] Esty, above n. 5 at 79-83.

In addition, and considering the history of politicization of the body of norm entrepreneurs, it would also be important for that body to rely quite extensively on objective standards, such as science and scientific expertise, to frame the environmental protection message. Framing is a reference to the processes that determine what issues get on the agenda and how they progress through the policy process. Thus, 'successful framing makes environmental concerns more salient to those not otherwise interested.'[79] In environmental protection, framing is particularly difficult because environmental issues often need to be addressed from a precautionary perspective.[80] As such, framing environmental protection objectives in an objective manner becomes particularly important because this precautionary approach is significantly based on predictive scientific findings.[81] And importantly, effective framing would allow the environmental protection message to reach the widest possible audience without the motivations behind such message being disputed, or questioned, in a manner that will derail global efforts to regulate environmental protection as has been the case with the present body of norm entrepreneurs.

Furthermore, it has become critical, in the modern era, for the body of norm entrepreneurs to focus on relaying the environmental protection message, not only to states but, to citizens. This is because, in an increasingly democratising, and globalizing world, in which public participation has been advocated and celebrated, these citizens have assumed a greater role in directing policy measures which inform choices by states at the international level. With time, using such an approach is likely to lead to a situation in which it may be possible to press for the, as yet unrealisable, turn to an ideal international environmental organization-style institution which would be charged with directing regulatory efforts in their entirety.

5. Conclusion

The context in which the incumbent international environmental law regulatory framework was crafted was one in which states were reluctant to cede their sovereignty over aspects of the environment falling within their territories as part of pursuing effective environmental

[79] Mitchell, above n. 18 at 503-504.

[80] Kelly, above n. 25 at 465, 480. C. Boyden Gray, and D.B. Rivkin, 'No Regrets: Environmental Policy' (1991) 83 *Foreign Policy* 47, 48-49.

[81] *Ibid*. at 50. D. Bodansky, J. Brunnee, and E. Hey, 'International Environmental Law: Mapping the Field' in D. Bodansky, J. Brunnee and E. Hey, *The Oxford Handbook of International Environmental Law* (Oxford University Press: Oxford, 2007) 1, 7.

protection. Importantly, such state reluctance to cede aspects of their sovereignty precluded the turn to an international environmental organization-style institution which, for decades, commentators have agreed would more consistently secure effective environmental protection. Furthermore, states' reluctance to cede their sovereignty also saw them actively participate in the body of environmental protection norm entrepreneurs which sought to cultivate and elevate the environmental protection norm. This has had the effect of politicizing efforts to secure effective environmental protection. In turn, such politicization has led to an international environmental law regulatory framework that is characterised by lowest common denominator laws and which, despite its merits, cannot reasonably be expected to consistently secure effective environmental protection.

I have argued that, with the passage of time, states' attitudes and the context in which the regulation of environmental protection is pursued have changed. While states retain aspects of their traditional approach to sovereignty, they have also shown signs of being open to relinquishing some of that sovereignty so that common environmental protection objectives can be achieved. This is apparent in various ways. At the international policy level, states have increasingly begun to qualify their age-old pursuit of development based on environmental protection considerations through acceptance of sustainable development and according the status of common concern issues to some environmental phenomena. Similarly, at the regional level, states have begun to accept intrusions by regional bodies and regional laws into their governance structures based on environmental protection considerations. Furthermore, states' changing attitudes have also been reflected in their embracing of national environmental protection regulatory frameworks which recognize the need to protect the environment in a manner that has seen these national regulatory frameworks seemingly converge. Importantly, since contextual factors compromised the capacity of the international environmental law regulatory framework to consistently secure effective environmental protection, changes in the context in which environmental protection is pursued which have occurred over time suggest that it may be possible to reconsider the approach to regulating environmental protection.

In conclusion, and following from the preceding discussion, it seems that, states are more amenable to an international environmental organization-style institution charged with directing environmental protection efforts than they were before. However, in light of the fact that states also remain committed to their sovereignty in environmental protection, it still remains unlikely that, in the present context, an international environmental organization-

style institution charged with overseeing the regulation of environmental protection could realistically be agreed to by states. As such, it may be the case that, under the present circumstances, the key to achieving consistently effective environmental protection through regulatory means lies in entrusting the steering of the environmental protection effort to an objective body of norm entrepreneurs. This could be the first step in the transition toward a much needed international environmental organization-style institution charged with overseeing the regulation of environmental protection if consistently effective environmental protection should be achieved.