



Hybrid Norms in International Law

Veerle Heyvaert

LSE Law, Society and Economy Working Papers 6/2009

London School of Economics and Political Science

Law Department

This paper can be downloaded without charge from LSE Law, Society and Economy Working Papers at: www.lse.ac.uk/collections/law/wps/wps.htm and the Social Sciences Research Network electronic library at: <http://ssrn.com/abstract=1342366>.

© Veerle Heyvaert. Users may download and/or print one copy to facilitate their private study or for non-commercial research. Users may not engage in further distribution of this material or use it for any profit-making activities or any other form of commercial gain.

Hybrid Norms in International Law

Veerle Heyvaert*

Abstract: The paper analyses the emergence of legal provisions in international law that can neither be categorised as hard law or soft law, but contain elements of both. It identifies such provisions as 'hybrid norms.' The paper examines common but differentiated responsibilities (CBDRs) for financial and technical assistance under the Stockholm Convention on Persistent Organic Pollutants, and argues that the implementation of State responsibilities for assistance through a heterarchical implementation network, involving the cooperation between State and transnational actors, hybridises the international legal framework. While hybridisation is a productive response to the challenge of regulating global risks, it also puts pressure on the adoption of enforcement mechanisms and problematises the communicative role of international law. The paper preliminarily maps out three responses to the challenges of hybridisation: a conservative response, a contractual one, and an administrative response.

INTRODUCTION

International lawyers widely agree that the description of international law as 'the body of binding norms freely entered into between sovereign States' short-changes their field of expertise by some considerable amount.¹ International law is undergoing a transformation affecting both constituent parts of its essence: the role of States as sole authors of international norms, and the binding nature of norms. The first development is spurred by the emergence of 'decentred' forms of international law and regulation, which are no longer the exclusive province of States but in which an assortment of international, regional and local, public and

* Law Department, London School of Economics and Political Science.

¹ S.S. *Lotus* (Fr. V. Turk) 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

private bodies increasingly assume legislative functions.² The second development refers to the growing presence within the landscape of international policy of a teeming variety of aspirational, coordinating or facilitating instruments that only partially correspond to the ideal type of the binding norm enforceable through coercion.³ Together, these developments are pushing the study of international law in new and challenging directions.

This article contributes to the literature on the transformation of international law by defining and discussing ‘hybrid norms,’ a new category of international norm that is situated between our conventional conceptions of ‘hard law’ and ‘soft law.’ The article will show that hybrid norms are a productive response to the challenge of establishing legal duties to tackle complex global problems. At the same time however, hybrid norms put pressures on the effectiveness and legitimacy of international treaty regimes, which need to be explored and addressed. This article takes a first step in the direction of analyzing and responding to the hybridization of international treaty law. Thus, the article illustrates that the transformation of international law is not only happening through the development of decentred instruments alongside traditional treaty instruments, or through the adoption of soft legal instruments complementing and supporting the body of ‘hard international law,’ but is also occurring within the core of international treaty law itself.

THE EMERGENCE OF HYBRID LAW

In the international law context, ‘hard law’ is conventionally understood to refer to norms that States recognize as binding. To be binding, norms require precision, or at least the potential of precision, and delegation of authority for interpretation and implementation.⁴ The binding nature of the norm justifies its enforceability, if necessary through coercion. ‘Hard international law’ has always been a challenging notion, chiefly because States have limited means of coercing each other.

² T. Marauhn, ‘Changing Role of the State’ in D. Bodansky, J. Brunnee & E. Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press, 2007) 727-748; J. Black, ‘Decentering Regulation: Understanding the Role of Regulation and Self Regulation in a “Post-Regulatory” World’ (2001) 54 *Current Legal Problems* 103; E. Brown Weiss, ‘The Rise or the Fall of International Law?’ (2000) 69 *Fordham L. Rev.* 345, 354; M. Herberg, ‘Private authority, Global Governance, and the Law. The Case of Environmental Self-Regulation in Multinational Enterprises’, in G. Winter (ed), *Multilevel Governance of Global Environmental Change* (Cambridge: Cambridge University Press, 2006), 149-178.

³ D. Shelton, *Commitment and Compliance The Role of Non-Binding Norms in the International Legal System* (Oxford: Oxford University Press, 2000); E. Brown Weiss (ed), ‘International Compliance with Nonbinding Accords’ (1997) *Studies in Transnational Legal Policy*, No. 29; A. Schäfer, ‘Resolving Deadlock: Why International Organizations Introduce Soft Law’ (2006) 12 *European Law Journal* 194; H. Hillgenberg, ‘A Fresh Look at Soft Law’ (1999) 10 *EJIL* 499; F. Snyder, ‘Soft Law and Institutional Practice in the European Community’ (1993) *EUI Working Papers (Law)* 93/05 (European University Institute, Florence); P. Weil, ‘Towards Relative Normativity in international Law’ (1983) 77 *AJIL* 413.

⁴ K.W. Abbott and D. Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54:3 *Int’l Org.*, 421.

Nevertheless, when we consider, for instance, the European Convention on Human Rights,⁵ we are clearly dealing with an international legal instrument that the signatory States understand and recognize as binding. State compliance with human rights provisions is mandatory and is policed by an independent authority, the European Court of Human Rights (ECtHR). Even if it remains difficult effectively to coerce member countries to abide by ECtHR rulings, the rulings constitute a means of holding States formally accountable for failing to respect international legal norms. These elements rightly qualify the European Convention as hard law.

The features of hard law have been thrown into sharp relief by the proliferation of a body of international norms that does not respond to the dictates of hard law. 'Soft law' comprises guidelines, recommendations, coordinating measures and other instruments that are not formally binding but nonetheless normative.⁶ Soft law can be a precursor to the adoption of a binding instrument, as in the case of the London Guidelines that constituted the trial basis for the later Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.⁷ Often, soft law instruments give support and direction on the implementation of binding commitments. Thus, the Bonn Guidelines inform the access and benefit sharing provisions in the framework of the Biodiversity Convention.⁸ Other times, the term refers to instruments of self-regulation drawn up by private actors that voluntarily commit to respect mutually agreed terms, or that develop a blueprint for regulation for the instruction of others.⁹

The hard law / soft law distinction has energized the analysis of international law in its richness and diversity. Moreover, understanding the relative pros and cons of soft and hard law options has given policy makers a broader and potentially more effective arsenal of tools to pursue international policy objectives. What the distinction fails to capture, however, is an emerging category of norm that is 'hard' by intent, but 'soft' by execution. These are, to coin an expression, hybrid norms. In international law, a hybrid norm is a prescription to which States formally commit, but for which they cannot effectively be held accountable. This is because responsibility for the implementation of the hybrid norm does not fall on States individually, but is shouldered by a network of State and non-State actors.

The distinction of hybrid norms from both hard law and soft law is important because hybrid norms create a number of challenges that the other groups do not.

⁵ Rome (Italy), 44 Nov. 1950, published on the Internet at: <http://www.echr.coe.int/>.

⁶ See n 3 above.

⁷ Rotterdam (The Netherlands), 10 Sept. 1998 (entered into force 24 Feb. 2004), published on the Internet at: <http://www.pic.int/en/ConventionText/ONU-GB.pdf>. D. Langlet, 'Prior Informed Consent for Hazardous Chemicals Trade – Implementation in EC Law' (2003) 12 *European Environmental Law Review* 292, 293-295.

⁸ Rio de Janeiro (Brazil) 5 June 1992 (entered into force 29 Dec. 1993), (1992) 31 ILM 818. S. Tully, 'The Bonn Guidelines on Access to Genetic Resource and Benefit Sharing' (2003) 12 *RECIEL* 84.

⁹ Eg, G. De Minico, 'A Hard Look at Self-Regulation in the UK' (2006) 17 *European Business Law Review* 183.

This article identifies two challenges: the pressure hybrid norms put on the adoption of enforcement mechanisms, and their potentially detrimental effect on the public communicative function of international law. I will illustrate these challenges and discuss three possible responses; a conservative response, a deregulatory response; and an administrative response. Each opens up a host of opportunities and challenges for the future of international law.

The field of analysis for the present exploration of hybrid norms is international environmental law. Specifically, the hybrid norms under review are a category of common but differentiated responsibilities (CBDRs). Differentiation has become a standard feature of international environmental law and, increasingly, differentiation is accomplished through the adoption of norms that display hybrid characteristics. The analysis below starts with a short review of the role and impact of CBDRs in international environmental law, which is important to gauge the relevance of differentiation in this area. It then reviews differentiation in the framework of one of the key multilateral environmental agreements (MEAs) of the post-1992 era; the Stockholm Convention on Persistent Organic Pollutants (Stockholm Convention or POPs Convention).¹⁰ An analysis of the varied forms of differentiation in the Convention will serve to illustrate that the most important category of CBDRs, the one relating to technical and financial contributions, consists of hybrid norms. The article will then open a discussion on the challenges that hybrid CBDRs pose to the integrity of the Stockholm Convention, and explore ways of addressing these challenges.

The discussion is, obviously, relevant for the future of the Stockholm Convention, as well as for other existing and future MEAs that contain similar provisions, but its potential impact goes beyond international environmental law. Processes of globalization lead to the multiplication of what we could call ‘global policy challenges;’ problems that thematically primarily fall under the mandate of States (such as environmental protection, health and safety, financial security), but which depend not only on multi-State but also on multi-actor cooperation for an effective response. These areas, ranging from climate change to international security, are a fertile ground for hybrid norms to flourish.

DIFFERENTIAL TREATMENT IN INTERNATIONAL ENVIRONMENTAL LAW

Common but differentiated responsibilities (CBDRs), or differential treatment, refer to ‘the use of norms that provide different, presumably more advantageous, treatment to some States.’¹¹ They are a constitutive part of the sustainable

¹⁰ Stockholm (Sweden) 22 May 2001 (entered into effect 17 May 2004). The Convention text and supporting documents are published on the Internet at: <http://www.pops.int>.

¹¹ L. Rajamani, *Differential Treatment in International Environmental Law* (Oxford: Oxford University Press, 2006) 1.

development discourse,¹² which has been the leitmotiv of global environmental policy since the publication of the Brundtland Report in 1987 and the adoption of the Rio Declaration five years later.¹³ Sustainable development, we recall, revolves around the premise that environmental protection and development -- whether of an economic or social nature -- can and should go hand-in-hand. Environmental protection ought not to be conceived as a limit to growth, but as a condition of sustainable growth. Sustainable development pursues an agenda of intergenerational equity, in that the needs of the present should be met without compromising the ability of future generations to meet their own needs,¹⁴ and one of intra-generational equity, meaning that global initiatives should respond to affluent regions' interest in environmental protection and to poor regions' need for development and poverty eradication.¹⁵

Differential conditions within MEAs are a direct implementation of sustainable development's intra-generational equity agenda. CBDRs reflect an awareness that the formal equality bestowed on states in international law by virtue of their freedom to decide whether to sign or abstain from treaty participation is insensitive to global political and economic realities that easily reduce this freedom to a dismal choice between accepting either onerous international responsibilities or global marginalization. Moreover, in the field of environmental law and policy, additional factors are at play. Many of today's richest States went through great surges in economic development in a period when the negative environmental effects of industrialization were hardly considered, let alone controlled. Arguably, 'early developers' such as the UK and the USA have already reaped the benefits of their past environmentally irresponsible behaviour. The comparative economic advantage achieved through early, unfettered industrialization now puts these same countries in a position to dictate the terms of development for other countries, terms which are a lot more constraining than the ones that framed their own economic development.¹⁶ On a related but different note, developed countries tend to be disproportionately responsible for contemporary global environmental problems.¹⁷ Developed societies consume more,¹⁸ create more

¹² D. French, 'Developing States and International Environmental Law: The Importance of Differentiated Responsibilities' (2000) 49 Int'l & Comp L Q 35, 36.

¹³ See J. Holder & M. Lee, *Environmental Protection, Law and Policy* (Cambridge: Cambridge University Press, 2007) 217-264.

¹⁴ Report of the World Commission on Environment and Development, *Our Common Future* (Brundtland Report) 43, published on the Internet at: <http://www.un-documents.net/wced-ocf.htm>. See also E. Brown Weiss, *In Fairness to Future Generations: International Law Common Patrimony, and Intergenerational Equity* (Tokyo: UN University, 1989).

¹⁵ Brown Weiss, n 2 above, 369.

¹⁶ Cf French, n 12 above, 48-49.

¹⁷ Cf the G77 proposal for Principle 7 of the Rio Declaration, which emphasized developed countries' contribution to historic & current contamination, in UN Doc. A/CONF.15/PC/WG.III/L.20/REV.1. See also French, n 12 above, 38.

¹⁸ A. Hurrell & B. Kingsbury (eds), *The International Politics of the Environment* (New York: Oxford University Press, 1992) 39.

waste, put more greenhouse gases into the atmosphere,¹⁹ and are overwhelmingly responsible for historic contamination as well as for the creation of new risks, such as nuclear power in the '40s, genetic modification in the '80s, and nanotechnology in the '90s. One might therefore conclude that they should bear a greater responsibility for the control of global environmental problems.

As a mechanism to address the inequalities and resulting unfairness within international law-making, differentiation can draw a wider array of states, representing a broader range of different interests, capacities and national policy priorities, to the negotiation table, thus stimulating the development of binding international instruments. Most obviously, the inclusion of CBDRs can relieve the concerns of developing countries over having to meet excessively ambitious environmental targets,²⁰ for instance, by allowing them longer transition periods for implementation and enforcement, by promising some contracting States flexibility in enforcement,²¹ or by enshrining additional commitments to financial and technical assistance on the part of developed countries.²² The benefits of CBDRs for developed countries are perhaps less obvious, but can be just as significant. The effectiveness of environmental regimes usually hinges on broad-based international support. The Biodiversity Convention,²³ for example, would be fatally crippled if it were not undersigned by the majority of the world's megadiverse countries, many of which are located in the developing world.²⁴ Moreover, for reform-seeking States the incorporation of CBDRs in environmental agreements might be a way to stave off the adoption of lowest common denominator standards.²⁵ A connected advantage of CBDRs relates to their potential impact on the compliance pull of international treaties. Agreements that are perceived as fair, it is argued, elicit a greater willingness to comply on the part of the contracting States.²⁶ Also, CBDRs tend to shift a larger proportion of compliance obligations towards those parties that are better equipped to meet them.²⁷ However, as will be shown later, when CBDRs assume a hybrid form their positive impact on willingness to comply may be neutralized, or even reversed.

¹⁹ The USA produces about 25% of global carbon dioxide emissions. Information available from the US Energy Information Administration, published on the Internet at: <http://www.eia.doe.gov/oiaf/1605/ggcebro/chapter1.html>.

²⁰ C.D. Stone, 'Common But Differentiated Responsibilities in International Law' (2004) 98 AJIL 276, 281.

²¹ See D. Vice, 'Implementation of biodiversity Treaties: Monitoring, Fact-finding and Dispute Resolution' (1997) 29 NYU J. Int'l L. & Pol. 577, 631

²² Cf E. Louka, *International Environmental Law. Fairness, Effectiveness, and World Order* (Cambridge: Cambridge University Press, 2006) 29-30.

²³ n 8 above.

²⁴ Cf French, n 12 above, 57; P. Cullet, 'Differential Treatment in International Law: Towards a New Paradigm of Inter-State Relations' (1999) 10 EJIL 549, 570.

²⁵ French, n 12 above 40. Cf D.G. Webster, 'Leveraging Competitive Advantages: Developing Countries' Role in International Fisheries Management' (2007) 16 *The Journal of Environment and Development* 8.

²⁶ T. Franck, *Fairness in International Law and Institutions* (New York: Clarendon Press, 1995).

²⁷ Cf R. Perkins & E. Neumayer, 'Implementing Multilateral Environmental Agreements: An Analysis of EU Directives' (2007) 7:3 *Global Environmental Politics* 13, 14.

From hazardous waste to climate change, all modern instruments of international environmental law contain some form of differentiation,²⁸ making CDBRs a defining feature of international environmental law.²⁹ This does not mean they are universally supported; discussions on the merits of differentiation,³⁰ and on the appropriate normative basis on which to determine State responsibility in a differentiated framework, are ongoing. For instance, States tend to have sharply different views on whether the fundamental justification for differentiation relates to relative wealth, responsibility for historical pollution, differing levels of risk aversion; sensitivity to global environmental harm, or any other ground. It is unnecessary to enter into the details of this debate, which have been thoroughly analyzed by others.³¹ However, we will revisit the lack of consensus on the right basis for allocating differentiated responsibilities in the context of the first, conservative, response to hybridization.

DIFFERENTIATION IN THE STOCKHOLM CONVENTION

The 2001 Stockholm Convention,³² which entered into force on 17 May 2004, targets the elimination or restriction of twelve pollutants (POPs) through the establishment of a cradle-to-grave approach to risk control. The Convention requires participating countries to eliminate deliberate POPs production and reduce as far as possible unintentional POPs emissions, to refrain from international trade in POPs for purposes other than environmentally sound disposal, to ban the use of POPs (mostly in industrial production and agriculture), and to adopt national measures for dealing with stockpiles and POPs waste in an environmentally responsible manner. The Convention additionally sets out obligations of information provision and awareness raising, calls for States to develop national implementation plans and periodic reports to be submitted to the Convention Secretariat, and lays down a procedure for adding additional POPs to its roster. It is generally considered a modern and successful treaty with a good likelihood of effectiveness.³³ It advocates a precautionary approach,³⁴ has a clearly circumscribed mission, enjoys widespread support from State and non-State

²⁸ For a list of international instruments and the varieties of CDBRs they contain, see Rajamani, n 11 above, 119-121.

²⁹ Stone, n 20 above, 279.

³⁰ *ibid*; S. Biniaz, *Remarks* (2002) 96 ASIL PROC. 359.

³¹ Ramanjani, n 11 above; French, n 12 above; M. Weisslitz, 'Rethinking the Equitable Principle of Common But Differentiated Responsibility: Differential Versus Absolute Norms of Compliance and Contribution in the Global Climate Change Context' (2002) 13 *Colo. J. Int'l Envtl. L. & Pol'y* 473; P.G. Harris, 'Common but Differentiated Responsibility: The Kyoto Protocol and United States Policy' (1999) 7 *NYU Envtl. L.J.* 27.

³² n 10 above.

³³ A.J. Yoder, 'Lessons From Stockholm: Evaluating the Global Convention on Persistent Organic Pollutants' (2003) 10 *Ind. J. Global Legal Stud.* 113, 148.

³⁴ See S. Maguire & J. Ellis, 'Redistributing the Burden of Scientific Uncertainty: Implications of the Precautionary Principle for State and Nonstate Actors' (2005) 11 *Global Governance* 505.

actors,³⁵ and is backed up by an ever expanding set of guidelines and supporting documents to foster member State implementation. And it contains common but differentiated responsibilities (CBDRs), to which we now direct our attention.

The Stockholm Convention was a fertile soil for the negotiation of CBDRs. The Convention is a spiritual child of the Rio Summit,³⁶ which was the venue of the formal recognition of CBDR as one of the guiding principles for the development of international environmental regimes. Chapter 19 of Agenda 21, UNCED's programme for action for the implementation of the Rio principles, calls for actions furthering the environmentally sound management of toxic chemicals, including the phasing out or banning of chemicals that pose an unreasonable and otherwise unmanageable risk to the environment and those that are toxic, persistent and bio-accumulate.³⁷ Together with the Rotterdam Convention,³⁸ the Stockholm Convention constitutes the key legal implementation to Chapter 19.

Additional factors characterizing the field of international chemical risk regulation strengthen the case for the differentiation of commitments within the Convention. With the exception of India (for DDT), the production of all twelve POPs that are currently covered by the Convention took place exclusively in developed countries.³⁹ Arguably, the developed world is therefore disproportionately responsible for the health and environmental risks posed by POPs. According to some, this means developed countries should bear the lion's share of global risk reduction obligations.⁴⁰ Under undifferentiated conditions, the POPs Convention would end up doing exactly the opposite and require a far greater effort on the part of developing countries. In most developed countries, such as the Member States of the European Union (EU),⁴¹ the production and use of the 12 regulated POPs has long ceased. For the EU, meeting the substantive standards of the Stockholm Convention called for relatively minor changes to the existing regulatory framework; the legal changes amounted to a consolidation rather than a reform exercise.

Other arguments invoked to justify differentiation within the context of the Stockholm Convention relate to past prejudicial trading tactics. Until recently, much of the trade in POPs between the developed and developing world

³⁵ The POPs Convention is one of the few international environmental agreements to be signed by the USA in this millenium (although its enthusiasm has not yet extended to ratification). See <http://www.pops.int/reports/StatusOfRatifications.aspx>.

³⁶ C. Vanden Bilcke, 'The Stockholm Convention on Persistent Organic Pollutants' (2002) 11:3 RECIEL 328; M.A. Olsen, *Analysis of the Stockholm Convention on Persistent Organic Pollutants* (Dobbs Ferry, NY: Oceana Publications, 2003) 60.

³⁷ Published on the Internet at: <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21chapter19.htm>.

³⁸ n 7 above.

³⁹ Olsen, n 36 above, 6-8.

⁴⁰ See S.R. Chowdhury, 'Common But Differentiated Responsibility in International Environmental Law: From Stockholm (1972) to Rio (1992)' in K. Ginther, E. Denters & P. de Waart (eds), *Sustainable Development and Good Governance* (The Hague: Kluwer, 1995) 333.

⁴¹ Yoder, n 33 above, 120; P. Hough, 'Poisons in the System: The Global Regulation of Hazardous Pesticides' (2003) 3:2 *Global Environmental Politics* 11, 20.

amounted to a thinly veiled case of environmental dumping. When tighter regulation in the home state threatened the marketability of hazardous chemicals domestically, manufacturers would try to offload existing stock on developing countries that had fewer, or less rigorously enforced regulatory restrictions. Similarly, when holders of toxic waste were confronted with a choice between paying for expensive, highly regulated waste treatment at home, and shipping the waste to another country at a much reduced price (but, obviously, without any guarantees of environmentally responsible disposal), the latter option often won out. Marco Olsen relates that, in 1988, Guinea-Bissau, which then had a GDP of US\$ 150 million, was offered a contract worth US\$ 600 million to allow 15 million tonnes of toxic waste to be imported into their country from European and American waste brokers over a period of five years.⁴² The waste brokers benefited enormously from this transaction, as it was much cheaper to export the waste than dispose of it domestically.⁴³ It is also easy to see how, from Guinea-Bissau's point of view, this was an offer it could not afford to refuse. Thus, industrialized countries could capitalize on the dire economic circumstances in which developing countries found themselves, forcing the latter to prioritize immediate economic relief over future health and environmental threats. The fact that developing countries tended to be far less informed about the risks associated with POPs, and therefore not in a position fully to evaluate the pros and cons of introducing POPs into their farming and industrial processes or of accepting POPs waste, makes these transactions particularly pernicious.

Finally, an important, perhaps even dominant, consideration in explaining the level of differentiation within the Stockholm Convention relates to the global nature of the health and environmental threats posed by POPs. As the name suggests, the chemicals are persistent, meaning that it takes over 100 years for half of the substance to be degraded.⁴⁴ The use of, for instance, heptachlor in agriculture in the seventies continues to have an ecological impact today. Moreover, POPs are great travellers; the pollutants in a toxic waste dump in Liberia could end up contaminating the shores off the Baltic coast. We regularly hear reports about traces of persistent pollutants being found in the breast milk of Inuit mothers, even though no POPs are produced or processed anywhere near the Arctic region.⁴⁵ Since POPs migrate, developed countries can and do suffer negative health and environmental consequences from the use and disposal of POPs in the developing world, and this obviously creates a strong incentive for the rich to keep the poor around the negotiating table, if necessary by the prospect

⁴² Olsen, n 36 above, 64.

⁴³ *ibid.* Generally, the average cost of waste disposal in Africa is between US\$ 2.5 and US\$ 50 per tonne. In most industrialized countries, between US\$ 100 and 2000 per tonne.

⁴⁴ *ibid.* 3.

⁴⁵ 'Toxic Traces Found in Arctic mothers-to-be' ENDS (Environment Daily), Issue 1904, 21/06/05. Populations whose diet consists of traditionally caught food, such as fish and marine mammals, are particularly at risk. See K. Hillman, 'International Control of Persistent Organic Pollutants: the UN Economic Commission for Europe Convention on Long-range Transboundary Air Pollution, and Beyond' (1999) 8:2 *Review of European Community and International Environmental Law* 105.

of preferential treatment.⁴⁶ In fact, throughout the Stockholm negotiation process, it went unchallenged that POPs were of greater concern to developed than to developing countries. Hence, there was a broad agreement among developed and developing countries on the need for CBDRs.⁴⁷ However, States did not all see eye to eye on the varieties and extent of differentiation required. Circumstances characterized by an agreement in principle to be bound, but disagreement on the extent of commitment required, are particularly conducive to hybridization.

The 2001 Stockholm Convention confirms its commitment to CBDRs squarely in the preambles, which refer to Principle 7 of the Rio Declaration and assert that the contracting States take into account ‘the circumstances and particular requirements of developing countries, in particular the least developed among them, and countries with economies in transition, especially the need to strengthen their national capabilities for the management of chemicals, including through the transfer of technology, the provision of financial and technical assistance and the promotion of cooperation among the Parties.’

Differentiation in the actual treaty provisions occurs in a variety of guises. We discern a weak form of differentiation in some of Stockholm’s risk reduction norms, which are universally worded and apply across-the-board, but materially affect developed and developing countries in significantly different ways.⁴⁸ For example, Article 3 requires participating countries to take all measures necessary to eliminate releases from the intentional production and uses of POPs. Production and use of DDT can continue for the purposes of disease vector control, but is prohibited for any other purpose. The POPs regime further foresees the possibility for member countries to apply for exemptions from the ban, for instance, to continue using DDT for other purposes than disease vector control. While neutrally worded, it is clear that the allowances regarding DDT and the exemption regime will be much more practically relevant for developing than developed states. The overwhelming majority of countries that intend to continue using DDT are developing or in transition.⁴⁹

A second form of differentiation occurs in what Daniel Magraw refers to as ‘contextual norms’⁵⁰ provisions that refer to the socio-economic context in which the treaty will be applied, and allow member States to take such considerations into account in their interpretation and implementation of international commitments. Contextual norms are often achieved through the insertion of qualifiers such as ‘reasonably,’ ‘equitably,’ and ‘within the limits of their capabilities’ in treaty articles. The Stockholm Convention is well stocked with

⁴⁶ Cf Yoder, n 33 above, 146-147. See generally A Najam, ‘The View from the South: Developing Countries in Global Environmental Politics’ in R.S. Axelrod, D.L. Downie & N.J. Vig (eds), *The Global Environment. Institutions, Law and Policy* (Washington: CQ Press, 2005) 232-233.

⁴⁷ Yoder, n 33 above, 146-147.

⁴⁸ Stone, n 20 above, 277.

⁴⁹ See UNEP/POPs/CONF/INF/1/Rev.3, listing, *inter alia*, Algeria, Bangladesh, Brazil, Cameroon, Ethiopia, Iran, Madagascar, Venezuela and Zimbabwe among exemption seeking countries.

⁵⁰ D.B. Magraw, ‘Legal Treatment of Developing Countries: Differential, Contextual and Absolute Norms’ (1990) 1 Colo. J. Int’l Env’tl. L & Pol’y 69, 74-76.

contextual norms. Article 5 restricts unintentional production of POPs (for example, through air emissions of dioxins as side-effects of industrial production). The gold standard is for signatory countries to use best available techniques (BAT) in combating unintentional pollution. Article 5(f)(iii) clarifies that available techniques are ‘accessible to the operator and (...) developed on a scale that allows implementation in the relevant industrial sector, *under economically and technically viable conditions*, taking into consideration the costs and advantages’ (emphasis added). The reference to economic and technical viability constitutes a contextual norm, as options that are economically workable in the UK might not be in Benin. Additionally, most of the measures that are aimed to support the risk reduction commitments, such as those calling for public information, awareness raising and education (Article 10), and provisions on research, development and monitoring (Article 11), qualify that these endeavours should be carried out ‘within the capabilities of the Parties.’ Article 11(2)(c) pushes the envelope further in the direction of formal differentiation by stipulating that member States must ‘within their capabilities, take into account the concerns and needs, particularly in the field of financial and technical resources, of developing countries and countries with economies in transition and cooperate in improving their capability to participate.’ The participation of developing countries must be fostered both in the development of international research, data collection and monitoring programmes and networks (Article 11(2)(a)), and in ongoing national and international scientific research (Article 11(2)(b)). Article 11 introduces an expectation that developed countries will support and enable other Convention signatories to fulfill their commitments, if necessary through financial and technical contributions. Thus, we have arrived at the most explicit, and most advanced form of CBRD in international environmental law: the expectation of financial and technical assistance from the developed to the developing world.

Provisions on financial and technical assistance are an increasingly widespread application of CBDRs.⁵¹ In the context of POPs, they feature prominently in Articles 12 to 14 of the Convention. A first point to observe is that Articles 12 and 13 allude to a tit-for-tat strategy which conditions the implementation of Convention requirements by developing countries upon effective support by developed countries. I preliminarily note that this structure contains the seed for the development of a contractual, or deregulatory response to hybridization, to which we will return later. Article 12(1) on technical assistance confirms: ‘The Parties recognize that rendering of timely and appropriate technical assistance in response to requests from developing country Parties and Parties with economies in transition is essential to the successful implementation of this Convention.’ Article 13(4) on financial assistance repeats that ‘the extent to which developing country Parties will effectively implement their commitments under this Convention will depend on the effective implementation by developed country

⁵¹ K. von Moltke, ‘On Clustering International Environmental Agreements’ in G. Winder (ed) *Multilevel Governance of Global Environmental Change* (Cambridge: Cambridge University Press, 2006) 415.

Parties of their commitments under this Convention relating to financial resources, technical assistance and technology transfer.’

As to the nature of the actual commitments, both Articles 12 and 13 give developed countries a clear legal duty to assist. After affirming a general obligation on Convention Parties to ‘cooperate to provide technical assistance,’ Article 12 continues that, for developed countries, this obligation *shall* include, ‘as appropriate and as mutually agreed,’ technical assistance for capacity building. Other signatory States must offer assistance ‘in accordance with their capabilities.’ Article 13 on financial resources and mechanisms follows a similar structure by confirming each Party’s commitment to provide, ‘within its capabilities,’ financial support, and then firming up the obligation with regard to developed countries, which ‘*shall* provide new and additional resources to enable developing country Parties and Parties with economies in transition to meet the agreed full incremental costs of implementing measures which fulfill their obligations under this Convention as agreed between a recipient Party and an entity participating in the (financial) mechanism’ (emphasis added).⁵² The compulsory nature of the provision is brought home by the subsequent subsection, which by contrast lays down that developed countries, and others in accordance with their capabilities, ‘*may* provide’ assistance through other bilateral, regional and multilateral sources (emphasis added).

Developed States bear the legal obligation to assist, but the fulfillment of this task is organized through collectively supported mechanisms, namely, the establishment of regional and subregional centres for technical assistance and the operation of a financial mechanism for financing. It is precisely the discrepancy between how responsibility is formally assigned, and how it is executed, that turns legal obligations into hybrid norms. For a full understanding of this phenomenon in the context of CBDRs, the following paragraphs explore the operationalization of technical and financial assistance in greater detail.

TECHNICAL ASSISTANCE

The provision of technical assistance under Stockholm will be organized primarily through a network of centres responsible for the regions and subregions of Africa, Asia and the Pacific, Central and Eastern Europe, Latin America and the Caribbean Region, and Western Europe and other regions.⁵³ The regional and subregional centres (RSCs) should be legally independent from the hosting institution and from the Government of the country in which they are located.⁵⁴ Following the Terms of Reference decided upon by the second Conference of the

⁵² Article 13(2) SC.

⁵³ The POPs Secretariat has received nominations for 11 covering the 5 regions, which will be reviewed and decided upon at the next COP. See <http://www.pops.int/scrc/nomination/default.htm>.

⁵⁴ Terms of Reference for Regional and Subregional Centres for Capacity Building and Transfer of Technology, Annex I to Decision SC2-2/9 in Doc. UNEP/POPS/COP.2/30.

Parties (COP) in 2006,⁵⁵ every RSC needs to establish a work plan to be reviewed and approved by the member countries in the region served by the RSC. The RSCs are also expected to report to ordinary COP meetings and answer to the COP for activities undertaken in pursuit of the Convention objectives. To assess their performance, the COP has adopted a set of performance evaluation criteria.⁵⁶ These are of a rather generic, boiler-plate variety, though it is interesting to note that, in addition to obtaining concrete results in terms of capacity building and technological development, a successful centre is expected to manage its affairs efficiently, effectively, and transparently. Also, while GEF will undoubtedly be the RSCs' chief source of funding (see below), RSCs are expected to identify additional financial resources and other donors to fund activities. In this context, the Guidance Document on Technical Assistance identifies intergovernmental organizations, developed countries through their bilateral development agencies, NGOs and civil society, and research institutions and universities as potential sources of assistance.⁵⁷ The Document further exhorts the RSCs to identify synergies with other MEAs, including the Rotterdam Convention,⁵⁸ the Basel Convention,⁵⁹ and the Montreal Protocol.⁶⁰

To obtain funding for their work programme, the primary port of call of the RSCs is the financial mechanism.⁶¹ Article 14 appoints the Global Environment Facility (GEF) as the interim financial mechanism under the POPs Convention. RSCs submit project proposals to GEF, including *inter alia* a workplan, a budget, an evaluation plan, information on additional sources of funding, and a letter of endorsement from the intended beneficiary countries.⁶² This arrangement has two important implications. First, it means that in many instances the applicant to the financial mechanism for funding under the Stockholm Convention will not be the beneficiary country, but an independent regional or subregional centre. Thus, the effectiveness of developing countries in meeting their obligations under the Convention will be strongly influenced by the RSC's success in securing funding. Second, it implies that developed countries' obligations regarding technical and financial assistance are intimately linked, as the quality of technical assistance provided crucially hinges on the sufficiency of funds and the smooth operation of the financial mechanism, to which we now turn.

⁵⁵ *ibid.*

⁵⁶ Annex II to Decision SC-2/9 in Doc. UNEP/POPS/COP.2/30.

⁵⁷ Guidance on technical assistance and transfer of environmentally sound technologies, Annex to Decision SC-1/15 in UNEP/POPS/COP.1/31.

⁵⁸ *n* 8 above.

⁵⁹ Basel (Switzerland) 22 Mar. 1989 (entered into force 5 May 1992), published on the Internet at <http://www.basel.int/>.

⁶⁰ Montreal (Canada) 16 Sept. 1987 (entered into force 1 January 1989), published on the Internet at: <http://www.unep.org/ozone/pdfs/Montreal-Protocol2000.pdf>.

⁶¹ Terms of Reference for RSCs, Annex I to Decision SC-2/9 in UNEP/POPS/COP.2/30.

⁶² Terms of Reference for the Selection of RSCs, Annex to Decision SC-3/12 in UNEP/POPS/COP.3/30.

FINANCIAL ASSISTANCE

Financial assistance under the POPs Convention is about as far removed from simple one-to-one contributions between developed and developing countries as possible. Instead, funding is channeled through a complex institutional network that needs to internalize an impressive variety of operating procedures and rules of practice.

For the foreseeable future, GEF is entrusted with the organization of financial assistance under the Stockholm Convention. GEF, as much a brainchild of the sustainable development discourse as CBDs, was established as a multilateral trust fund in the early '90s by the World Bank as its 'green branch.' Its first mission was to organize contributions to fund the implementation of the recently negotiated UNFCCC⁶³ and Biodiversity Convention.⁶⁴ In its brief but turbulent history,⁶⁵ GEF has seen its mission expand to six focal areas: biodiversity, climate change, international waters, land degradation, ozone layer protection, and now POPs. The funding of GEF is organized through large replenishment drives, which take place every three to four years.⁶⁶ The level of contribution pledged by each donor country is subject to intense political negotiation between the 165 members of the GEF Participant Assembly. Donor countries make overall contributions to GEF, which the GEF Council then allocates to focal areas. The POPs focal area currently receives about ten per cent of the GEF budget. The GEF Council, consisting of 18 beneficiary and 14 donor countries, is also the body that approves or rejects applications for funding. Unanimity in decision-making is favoured, but in the absence of a consensus the Council falls back on a double majority rule, conditioning approval on a positive majority in the Council representing at least 60 per cent of all contributions.⁶⁷ In its decision-making, the GEF Council is informed by resource allocation criteria, which are set out in the Resource Allocation Framework adopted by the GEF Council in 2005.⁶⁸ The Framework, the adoption of which was strongly endorsed by donor countries, especially the USA, links the award of GEF resources to a country's potential to generate *global* environmental benefits, as well as its performance, both in terms of delivery of environmental outcomes and adherence to good governance standards.⁶⁹

⁶³ Rio de Janeiro (Brazil) 4 June 1992 (entered into force 21 March 1994), (1992) 31 *ILM* 849.

⁶⁴ n 8 above.

⁶⁵ The details fall outside the confines of this article, but see L. Boisson de Chazournes, 'The Global Environment Facility (GEF): A Unique and Crucial Institution' (2005) 14:3 *RECIEL* 193; Z. Young, *A New Green Order: The World Bank and the Politics of the Global Environment Facility* (London: Pluto Press, 2002).

⁶⁶ The GEF currently operates on its fourth replenishment fund.

⁶⁷ M. S. Soroos, 'Global Institutions and the Environment: An Evolutionary Perspective' in Axelrod *et al.*, n 46 above, 38.

⁶⁸ Boisson de Chazournes, n 65 above, 198.

⁶⁹ *ibid.*

In determining funding for POPs projects, GEF must furthermore take into account the guidance offered by the Stockholm Convention COP.⁷⁰ A Memorandum of Understanding (MoU) between the COP and the GEF Council asserts that GEF funding decisions must be taken in accordance with ‘policy, strategy, programme priorities and eligibility criteria established by the COP.’ Thus, funding requests undergo a ‘double vetting’ process; one according to internal GEF criteria, and a second with reference to COP criteria.⁷¹ Moreover, if a Stockholm member State considers that a GEF decision regarding POPs clashes with the decision-making criteria set out by the COP, the latter will consider the complaint and, if appropriate, engage in an exchange with GEF to discuss the funding approval or rejection. Ultimately, the COP may decide to ‘request GEF to propose and implement a course of action to address the concerns regarding the project in question.’

In addition to guidance on project selection, the COP has committed to supplying GEF with assessments of the funding needs for effective implementation of the Convention which, one assumes, should inform GEF Council decisions relating to the percentage of the GEF budget to be allocated to POPs. Decisions about whom will perform the assessments are still pending. At the 2007 COP, several member countries opined that the POPs Secretariat might lack the necessary expertise and that, therefore, the assessment should be performed by an independent expert.

The COP also undertakes to review the effectiveness of the financial mechanism.⁷² The review exercise will be facilitated by regular reports that the GEF Council has committed to provide to the COP pursuant to the MoU. The MoU further calls for the Convention Secretariat and the GEF Secretariat to communicate, cooperate and consult each other regularly. In particular, the Convention Secretariat will be invited to comment on project proposals that GEF is considering within the POPs focal area. As to the performance review of the financial mechanism, it will be conducted by an independent evaluator, who will assess GEF’s effectiveness against a series of benchmarks articulated by the COP. These include: the responsiveness of GEF to guidance, recommendations and decisions emanating from institutions operating under the Stockholm Convention; the transparency and timeliness of the project approval process; the adequacy and availability of funding; and the level of stakeholder involvement. Interestingly, one of the performance criteria refers to the findings and recommendations of the GEF Office of Monitoring and Evaluation and the Facility’s Third Overall Performance Study, thus incorporating GEF’s internal assessment mechanism into the Stockholm Framework.⁷³

⁷⁰ COP Guidance to the Financial Mechanism, Annex the Decision SC-1/9 in UNEP/POPS/COP.1/31.

⁷¹ *ibid.*

⁷² Terms of Reference for the Review of the Financial Mechanism, Annex to Decision SC-1/10 in UNEP/POPS/COP.1/31.

⁷³ *ibid.*

CBDRS AS HYBRID NORMS

To understand the hybrid nature of the technical and financial obligations, and their impact on the integrity of the Convention, a comparison with the Convention's risk reduction norms is most instructive. The latter are mandatory, reasonably precise, clearly determined, and imposed on all Convention member States. National implementation is fostered by the development of guidance documents and national implementation plans (NIPs). Member countries are required to draw up and submit NIPs that detail the steps, including the adoption of legal and regulatory measures, to secure compliance with the Convention's risk reduction objectives. The NIPs facilitate implementation, both by setting out a structural approach or road map toward implementation for the benefit of member countries, and by improving opportunities for accountability. Moreover, implementation will be backed up by a non-compliance mechanism, foreseen under Article 17 of the POPs Convention. The establishment and organization of the non-compliance mechanism is currently under negotiation, but it will most likely adopt a gradual enforcement approach, going from informal negotiation and facilitation of non-compliant parties to formal determinations of infraction by a non-compliance committee authorized under the Convention.⁷⁴ All together, the risk reduction provisions amount to a set of rules that is about as close to 'hard law' as norms get in an international environmental treaty context.⁷⁵

The situation is different for Articles 12 and 13. On the one hand, there can be no doubt about the intention of the Parties to present the Convention's provisions on technical and financial assistance as binding legal obligations rather than moral expectations. The language of Articles 12 and 13 is uncompromisingly imperative. The mandatory nature of the contributions expected from developed country Parties is further underscored by the distinction Article 13 makes between developed countries, that '*shall* provide new and additional financial resources' (emphasis added), and other Parties, that are expected to contribute within their capabilities. Furthermore, as part of their reporting duties Stockholm member States must include information on implementing measures regarding technical and financial support in their NIPs. Admittedly, the data provided under this heading by developed countries tends to be very succinct. Regarding contributions to the financial mechanism, for example, several States confine themselves to reporting the overall sum of contributions pledged to GEF.⁷⁶ Nonetheless, the expectation to include information on Articles 12 and 13 in the NIP is another confirmation that CBDRs are considered binding.

⁷⁴ See [Non-Compliance] [Compliance] Procedures under Article 17 of the Stockholm Convention, Annex to Decision SC-3/20 in UNEP/POPS/COP.3.30.

⁷⁵ Cf Abbott & Snidal, n 4 above.

⁷⁶ Eg, NIPs submitted by Australia, France, and Germany. The Japanes NIP is altogether silent on technical and financial assistance. See <http://www.pops.int/documents/implementation/nips/submissions/default.htm>.

On the other hand, several factors mitigate the image of CBDs as genuinely binding norms. Breaches of Article 13 are not covered by the impending non-compliance mechanism.⁷⁷ The draft Decision on non-compliance asserts that the mechanism is intended to *complement* the support offered through the financial mechanism. This is in line with older MEAs such as the Montreal Protocol,⁷⁸ which also exclude financial assistance from the remit of the enforcement mechanisms.⁷⁹ The case is less clear for the technical assistance requirement, however the close ties between technical and financial assistance illustrated in the previous section reduce the likelihood of Article 12 being the subject of a non-compliance procedure. Moreover, even if it were the Convention's intention to subject Articles 12 and 13 to the forthcoming non-compliance mechanism, it is difficult to see how this would be practically accomplished given the institutional and operational structure of the financial mechanism. Accountability for failure to provide sufficient technical and financial assistance is not easily traced back, let alone attributed to individual Convention Parties, which are the only entities over which the envisaged POPs non-compliance committee will have authority. Technical and financial support are channeled through a transnational, multilateral and interdependent network connecting a variety of public and private actors, including POPs member States, GEF, RSCs, NGOs working with RSCs, financing mechanisms operating in the remit of alternative MEAs such as the Basel Convention,⁸⁰ etc. The effectiveness of technical and financial support is determined by an interplay of decisions and circumstances surpassing the capacity and authority of individual actors within the network. The availability of resources for capacity building in, say, Vietnam does not only depend on the level of funding pledged to GEF by individual developed countries, or even by the collectivity of developed countries subjected to the Stockholm Convention; it just as much hinges on the GEF Council's determination of the percentage of overall funds to be assigned to the POPs focal area, on GEF decision-making on individual project applications submitted by Vietnam or by the Asian sub regional centre (in China) and, in that case, on the latter's effectiveness in preparing projects, identifying additional funding sources and extracting firm commitments from them, and executing capability building projects.

The existence of a heterarchical implementation network multiplies and diffuses accountability. To an extent, the network could be seen as creating an accountability surplus. In addition to reviewing the performance of member countries, the POPs Convention bodies engage in direct exchanges with GEF and the RSCs, check their performance with reference to pre-established performance criteria, and if appropriate identify weaknesses and issue recommendations for improvement. Such direct accountability does not occur under conditions where

⁷⁷ n 74 above.

⁷⁸ n 60 above.

⁷⁹ Cf D. Victor, 'The Operation and Effectiveness of the Montreal Protocol's Non compliance Procedure' in D. Victor, K. Raustiala & E.B. Skolnikoff, *The Implementation and Effectiveness of International Environmental Commitments* (Cambridge MA: MIT Press, 1998) 138.

⁸⁰ n 59 above.

MEA member countries are ‘jointly and severally’ accountable for implementation. Traditionally, domestic implementing bodies are accountable to the State, but are shielded from direct international scrutiny and sanction. A further consideration is that the performance criteria drawn up by the Convention bodies for transnational institutions such as GEF and the RSCs increasingly emphasize the need for transparency and stakeholder involvement in decision-making, thus establishing or solidifying lines of accountability between transnational public authority and civil society.

Yet, in other ways the network suffers an accountability deficit. The POPs COP may have a broader portfolio of institutions to engage with, but its tools effectively to control them are limited. As to the accountability of POPs member States, it is prohibitively difficult – not to mention politically foolhardy – for an international body such as the COP to make legitimate value judgments about the adequacy of funding pledged by individual countries. Hence, Member State accountability for compliance with Articles 12 and 13 is marginal at best. Incidentally, a similar observation can be made in the context of GEF’s relation with its donor countries. The GEF Council obviously does not have the authority to determine minimum contribution levels for each country and, more importantly, has very limited means to police failure to transmit pledged funds.⁸¹ The accountability of GEF itself, and of the RSCs, vis-à-vis the Convention bodies is also constrained. In policing the performance of GEF or the RSCs, the POPs COP can either issue recommendations to GEF or to the RSCs, as provided in the Memorandum of Understanding between GEF and the COP and in the Terms of Reference on the Establishment of RSCs, or terminate the relation between the designated financial mechanism or regional centre and the Convention. The former may not have enough bite effectively to influence the modus operandum of the financial and technical institutions, the latter is most likely too disruptive to contemplate in any but the most extreme cases of compliance failure. What is missing is the middle section of the enforcement pyramid.⁸²

Finally, the language and logistics of CBDR norms must be understood within the financial contribution culture where they find application. Historically, technical and financial contributions for green development were understood as an act of goodwill on the part of developed countries, and this view dominates to this day. Contributions to GEF, and other multilateral environmental mechanisms such as the 1972 UNEP Environment Fund, were of a completely or predominantly voluntary nature.⁸³ This, of course, explains the relative powerlessness of GEF vis-à-vis defaulting contributors (see above). In the GEF context, fairness considerations that motivate contributions allude to burden

⁸¹ See Instrument for the Establishment of the Restructured Global Environment Facility (March 2008), 28-35, published on the Internet at: http://www.gefweb.org/uploadedFiles/GEF_Instrument_March08.pdf.

⁸² Cf I. Ayres & J. Braithwaite, *Responsive Regulation* (Oxford: Oxford University Press, 1992).

⁸³ French, n 12 above, 42-43.

sharing, echoing a general idealistic message that those who can do good, should do good, rather than to the legal, contractual notion of a duty to repay developing countries for either suffering the transboundary consequences of pollution, or for over-exploitation of the global commons. The perceived voluntariness of GEF funding is still pervasive in the terminology that surrounds GEF. The POPs Convention may express itself in mandatory terms, but the language of both the POPs guidance documents and GEF documents is one of ‘donor countries,’ ‘aid’ and ‘support.’ The USA which, although its share has relatively declined over the past seven years, is a key contributor to the GEF fund,⁸⁴ frequently underlines the voluntary character of its donations.⁸⁵ In sum, the strong CBDRs of the Stockholm Convention are formally binding norms that fall outside the purview of the envisaged non-compliance mechanism, that give rise to multiple and diffuse accountability, and that operate within an environment of voluntariness rather than obligation.

Articles 12 and 13 fall short by some way of the conventional definition of ‘hard law,’ which requires precision, or at least the potential for precision, and the delegation of authority for the interpretation and implementation of the norm,⁸⁶ which in turn implies enforceability with a credible threat of coercion. However, simply to cast the Convention’s CBDRs as soft law⁸⁷ by default is not a satisfactory response since, in my view, this qualification seriously underplays the express intent of the Convention Parties to make the commitments binding, and to have them accepted as such. It also underplays the counterbalancing impact of having several avenues for accountability which, although not amounting to a threat of State coercion, does increase the Convention bodies’ opportunities for control. The norms are neither hard nor soft; they contain elements of both.⁸⁸ They are, in other words, hybrid. Thus, the regular integration of CBDRs within binding MEAs, the increasingly frequent inclusion within CBDRs of developed country commitments to technical and financial contribution, and the growing propensity of contracting States to express these commitments as formally binding, result in the hybridization of international environmental law.

THE FUTURE OF HYBRID NORMS

The identification of CBDRs for technical and financial assistance, and by association of the international agreement in which they are located, as hybrid norms is the outcome of an analytical exercise. Whether it is also the diagnosis of a

⁸⁴ Cf R. Cléménçon, ‘Funding for Global Environment Facility Continues to Decline’ (2007) 16:1 *Journal of Environment and Development* 5.

⁸⁵ Victor, n 79 above, 145.

⁸⁶ Cf Abbott & Snidal, n 4 above, 421-422.

⁸⁷ D. Shelton, ‘Law, Non-Law and the Problem of “Soft Law”’ in Shelton, n 3 above, 1-18.

⁸⁸ Cf S.J. Toope, ‘Formality and Informality’ in D. Bodansky *et al*, n 2 above, 114-115 on the formal and informal influences shaping international environmental law.

problem is a different question. It is certainly plausible to argue that the hybrid nature of international environmental law is, itself, a pragmatic response to the careful balance that must be struck between developing countries' call for mandatory contributions in exchange for their allegiance to MEAs' environmental risk reduction objectives, developed countries' interests in publicizing their willingness to contribute, and on the other hand their apprehension about being held to previously made commitments that, in light of changed economic circumstances, are no longer achievable. Also, in terms of output, at first sight the financial mechanism 'delivers.' Between 2001 and 2004, GEF funded more than US\$ 141 million POPs projects, with co-financing of US\$ 91 million,⁸⁹ and funding under the fourth replenishment cycle amounts to US\$ 300 million.⁹⁰ Opinions on what such numbers represent are however divided, with some authors arguing that GEF is a crucial contributor to environmental improvement in the focal areas within its mission,⁹¹ and others depicting GEF support as paltry.⁹² Similar divisions characterize the Stockholm COP meetings,⁹³ and will probably continue to do so at least until the POPs Secretariat manages to produce assessments of needed funds that are credible and find broad-based acceptance among developed and developing country parties to the Convention. For the time being, justifications of the hybrid nature of the POPs Convention on the basis that 'it works,' are premature.

More problematically, the mix between 'hard law' and hybrid provisions in the Convention is the most likely cause of obstruction to the agreement on a planned enforcement mechanism. As mentioned before, Article 17 of the Stockholm Convention foresees the development of a non-compliance mechanism, but its establishment is proving unexpectedly difficult, particularly when taking into account the broad-based support the Convention enjoys. In spite of the expressly stated intention of COP-3, and notwithstanding drawn out negotiations within the Working Group on Non-compliance continuing right until the closure of proceedings, the COP failed to adopt a non-compliance mechanism at its Third Meeting in Dakar last year. In this context, it is useful to recall Andrew Guzman's theory of the conditions under which treaty member States will or will not sign up to credible enforcement mechanisms. Briefly, if the advantages of Convention parties A to Y being policed by an enforcement mechanism outweigh or at least equal the risk for party Z of itself being subjected to the enforcement

⁸⁹ Information available at: <http://www.gefweb.org/>.

⁹⁰ Report of POPs COP-3, UNEP/POPS/COP.3/30.

⁹¹ Boisson de Chazournes, n 65 above, 193.

⁹² K. Miles, 'Innovative Financing: Filling the Gaps on the Road to Sustainable Environmental Funding' (2005) 14 *Review of European Community and International Environmental Law* 202-203.

⁹³ The Report of the Third Meeting of the COP notes that: 'Many developing country representatives stated that the existing quantity, quality, timeliness, modalities and target areas of technical assistance, technology transfer and capacity-building were inadequate to meet the urgent needs of developing countries with respect to their implementation of the Convention. Others said that there were significant and expanding resources for technical assistance and capacity-building activities, particularly through the Global Environment Facility, and argues that the issue was how to spend that money as effectively as possible.' (UNEP/POPS/COP.3/30).

mechanism, Z will have an incentive to sign up. If, on the other hand, Z considers that the risk of facing a non-compliance procedure is greater than the predicted benefits of A to Y being held accountable for non-compliance, Z has an incentive to opt out.⁹⁴ Following Guzman, the tribulations surrounding the adoption of the Stockholm non-compliance mechanism may well be indicative of developing countries' awareness that two pivotal obligations imposed on the developed member countries will not be policed through the mechanism, which vitally affects the risk/benefit assessments contracting parties make when deciding on the adoption and terms of an enforcement mechanism. Observations in the Report on COP-3, noting that 'for many countries, the issues of technical assistance and compliance are closely linked' and that, within the Non-Compliance Working Group, 'some representatives had strongly favoured the inclusion of a reference to common but differentiated responsibilities; others, while voicing support for that principle in general, questioned its inclusion in the proposed procedures,' lend further support to the argument that the hybrid nature of the CBDRs is putting pressure on agreements about enforcement.

One possible reply is that, even if we accept the connection between hybrid norms and enforcement strategies, this does not make hybrid norms significantly problematic. Enforcement and dispute resolution mechanisms, it has been said, are not particularly relevant for international law, and international environmental law in particular. Compliance is fostered through coordination, facilitation and transnational management, rather than through the threat of condemnation and enforcement.⁹⁵ Moreover, in MEAs that do have a functioning non-compliance mechanism, the impact has arguably been very small. While deserving, such observations do not, in my opinion, dispose of the issue. Solid evidence on compliance with international agreements is hard to come by, but what data there is, suggests ample room for improvement. Marc Pallemmaerts' detailed study of the international legal regime governing trade in toxic substances, pesticides and toxic waste paints a bleak picture of the member countries willingness to comply.⁹⁶ In *Engaging Countries*, Edith Brown Weiss and Harold Jacobson reach a similar conclusion that, particularly for international treaties governing biodiversity protection, non-compliance by developing countries is a common occurrence.⁹⁷ Arguably the most compelling indications of the weak compliance pull of transnational environmental agreements come from the European Union. In spite of the relative homogeneity of the participating countries, and notwithstanding of

⁹⁴ A. Guzman, 'The Design of International Agreements' (2005) 16 EJJIL 579.

⁹⁵ O. Young, *The Institutional Dimensions of Environmental Change. Fit, Interplay, and Scale* (Cambridge, MA: MIT Press, 2002) 38; Peter Haas, 'Choosing to Comply: Theorizing from International Relations and Comparative Politics' in Shelton, n 3 above, 58; A. & A. Handler Chayes, *The New Sovereignty. Compliance With International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1998).

⁹⁶ M. Pallemmaerts, *International and European Regulation of Toxic Substances as Legal Symbolism* (Oxford: Hart, 2003).

⁹⁷ E. Brown Weiss & H. K. Jacobson, *Engaging Countries. Strengthening Compliance with International Environmental Accords* (Cambridge MA: MIT Press, 1998) 511-554; also reported in D. Vogel, 'Trading Up and Governing Across: Transnational Governance and Environmental Protection' Vol. 4 JEPP (1997) 567.

the high level of credibility and determinacy of the EU legal regime, Member State non-compliance with EU environmental prescriptions is a persistent and pervasive problem.⁹⁸ Given the likelihood of severe compliance deficits, it would be irresponsible to dismiss the contributions of enforcement mechanisms, however modest, offhand. Moreover, the challenges that hybrid norms pose to the development of enforcement mechanisms are not a self-standing problem, but are symptomatic of a deeper and more significant concern over the normative equivalence between 'hard law' provisions and hybrid norms. If we take CBDRs seriously as instruments to balance out rights and responsibilities between the rich and the poor, this concern, too, should be taken seriously.

Lastly, hybridization in its current form is problematic when we consider law's communicative role. The adoption of laws and regulations, whether domestic or international, inform the public about governmental policies and priorities, arguably in a more reliable way than election programmes and manifestos. Thus, they are an instrument of public accountability. Here, the formally binding character of hybrid norms risks misleading civil society about the true extent of their governments' commitments, as it is only when we plunge down the rabbit hole and follow the trails of the implementation network that the hybrid nature of CBDRs becomes entirely clear. In an age where transparency and inclusiveness have matured into the primary pillars of good governance,⁹⁹ law can no longer be the province of a select group of cognoscenti, but must aim to communicate its means as well as its ends effectively and accurately.

How then can we respond to the hybrid nature of international environmental law and overcome the identified tensions? This article identifies three possible responses: strengthening member State accountability; reinforcing the contractual nature of MEAs; and extending formal accountability to non-State actors. It is argued that the Stockholm Convention contains traces of all three approaches in embryonic form. The discussion below indicates what mature developments of each approach would look like, and gauges the challenges ahead.

STRENGTHENING MEMBER STATE ACCOUNTABILITY

An obvious first response to the discrepancy between formal State responsibility for technical and financial assistance and the multiple and diffuse accountability within the implementation network would be to tilt the scales back in favour of individual member State accountability. Theoretically, Convention Parties could determine specific and quantified requirements for technical and financial assistance on a country-by-country basis, and subject these requirements to a treaty-based non-compliance mechanism. In this way, CBDRs would acquire the same 'hard law' status as risk reduction obligations, which in turn would send assurances to developing countries that they have as much to gain as to lose from

⁹⁸ Cf Perkins & Neumayer, n 27 above, 13.

⁹⁹ See B. Kingsbury, N. Krisch & R. Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law & Contemporary Problems* 15, 37-42.

a strict enforcement strategy. It would also be an incontrovertible signal that developed countries do, indeed, take differentiation seriously.

The challenges in accomplishing individual member State accountability are, however, formidable. Even leaving aside speculation on whether developed countries would enter into MEAs if they could effectively be held to contribution commitments, --which leads towards endless discussions on whether it is better to have a flawed MEA than none – strengthening member State accountability would first of all necessitate the development of a separate financial mechanism for the administration of Convention CDBRs, since the determination of fixed sums for, in this case, POPs risk reduction is difficult to reconcile with the GEF's internal decision-making dynamics on overall replenishment and allocation to focal areas. Article 14 of the Stockholm Convention, it should be noted, does provide the option of a dedicated financial instrument, although this is unlikely to be taken up in the foreseeable future. Second, Convention parties would need to tackle the fraught task of setting State-based technical and financial commitment standards. Should countries contribute according to their capabilities and, if so, how are those most accurately measured? Should past and/or present contribution to POPs contamination be a factor, or should contributions alternatively be determined on the basis of each Convention party's willingness to pay?¹⁰⁰ This question alone could keep intergovernmental negotiating committees occupied for decades.¹⁰¹ Finally, the Convention members would need to consider the difficult question of new treaty accessions. If developed countries must enable developing countries to meet 'the full incremental costs of implementing measures,' as stipulated in Article 13(2), each accession of a developing country should cause a re-negotiation of member State contributions. Conversely, accession of developed countries should trigger a downward adjustment. This would create an enormous extra burden, however not adjusting member country contributions might deter developing countries from joining at a later date, and might incentivise developed countries to engage in a game of chicken and hold off accession or ratification until member country contributions have been determined.

REINFORCING THE CONTRACTUAL NATURE OF MEAS

Instead of subjecting technical and financial assistance provisions to a non-compliance mechanism, Convention parties might relax application of the mechanism to the risk reduction and ancillary obligations listed in the treaty. This could result in the across-the-board transformation of the POPs Convention into an instrument of *de facto* soft law. Less drastically, member countries might opt only to police those implementation measures in developing countries that have been supported by technical and financial assistance. In this scenario, the Convention structure is effectively reduced to a shell for the organization of

¹⁰⁰ Cf Stone, n 20 above, 285-288.

¹⁰¹ Cf French, n 12 above, 48.

transnational contractual relations in which the collectivity of developed countries would 'buy compliance' from developing countries, through the brokerage of GEF and the RSCs. This approach promises to be easier to administer than the first. To an extent, the Stockholm Convention already contains the seed of a contractual structure in the tit-for-tat clause of Article 13(4). Also, the repeated suggestions about connecting non-compliance to technical assistance seem to advocate a conditional approach to enforcement.

On the other hand, the risk reduction obligations are currently expressed in universal terms, and warrant against interpreting Article 13(4) as a mechanism to absolve developing states from the duty to comply. A fully contractual approach would therefore require a careful rewording of the treaty language to express the conditional nature of member State obligations. More problematically, however, it would remove even the theoretical possibility of achieving environmental goals through international law; the environmental impact of MEAs is no longer dependent on the risk reduction obligations they contain, but on the vibrancy of the markets that develop under their reimits. Moreover, the contractual approach is at odds with the notion of 'commonality' encapsulated in the concept of common but differentiated responsibilities, as it implies that developing countries have no autonomous responsibility towards environmental protection beyond what developed countries pay for.¹⁰² The normative acceptability of this message is highly dubious.

STRENGTHENING THE ACCOUNTABILITY OF NON-STATE ACTORS

A third response to hybridization in international law is to strengthen the accountability of the variety of actors within implementation networks vis-à-vis the Convention bodies and in their relation with civil society. In the framework of the Stockholm Convention, this is the direction in which most progress has been made. We recall the reporting, assessment and review provisions that structure the relations between the POPs COP, GEF and the RSCs, and the inclusion of transparency and inclusiveness requirements among the criteria against which GEF and RSC performance is measured. The possibility for review of project decisions made by the GEF Council following a complaint could be a first building block in the development of an appeals procedure, and the option of calling in experts to conduct the performance assessments could be a first step towards the delegation of interpretative authority. However, existing accountability arrangements are still rudimentary, mostly internal, and only leave a narrow choice between policing instruments that are either too feeble or too blunt. To overcome the accountability deficit, we must wade into the still mostly uncharted territory of structuring what Kingsbury *et. al.* have termed 'the global administrative space'.¹⁰³ This implies the development and confirmation of international administrative and

¹⁰² *ibid* 45.

¹⁰³ Kingsbury *et al.*, n 99 above, 25.

adjudicatory authority under the auspices of which the performance of actors in implementation networks can be independently assessed, stakeholder complaints can be reviewed, and conflicts between implementing bodies can be resolved.

The burgeoning corpus of EU administrative law could serve as an example of a transnational regime for the governance and regulation of both States and non-State actors that are jointly (though not severally) responsible for the implementation of hybrid norms.¹⁰⁴ EU administrative law contains normative principles for sound decision-making,¹⁰⁵ it recognizes mechanisms for administrative review (for instance, through the office of the EU Ombudsman),¹⁰⁶ and lays down avenues for the adjudication of disputes before the European Courts. However, the example of the EU is also indicative of the level of transnational integration required to support the development of a global regime of multi-actor accountability for the implementation of hybrid norms in MEAs. The creation of an independent, internationally acceptable and authoritative mechanism for administrative review and adjudication may be beyond what is presently achievable or desirable in the context of international environmental law. Finally, the EU example also cautions that international authority, once enshrined, is tenacious and itself difficult to control. The establishment of an international administrative review mechanism may boost the accountability, and hence legitimacy, of the actors in the implementation network, but it does not really solve the accountability deficit as much as shifting it to a different, more centralized level that is even farther removed from public scrutiny.¹⁰⁷ Inevitably, the creation of new guardians raises old questions.¹⁰⁸

CONCLUSION

Hybrid norms are formally expressed as having the same status as other ‘hard law’ provisions adopted within a treaty context, but differ from the latter in terms of enforceability. The hybrid norms identified in this article are developed countries’ obligations to offer technical and financial assistance to developing countries, as part of their common but differentiated responsibilities under international environmental law. Increasingly, differentiation includes requirements to offer such assistance, and there is a growing consensus that this obligation does not only

¹⁰⁴ P. Craig, *EU Administrative Law* (Oxford: Hart Publishing, 2006); G. de Burca & J. Scott (eds) *Law and New Governance in the EU and the United States* (Oxford: Hart Publishing, 2006); C. Harlow, *Accountability in the European Union* (Oxford: Oxford University Press, 2002); European Commission, *White Paper on Governance* COM(2001)428 final.

¹⁰⁵ Cf K. Lenaerts, “‘In the Union We Trust’ Trust-Enhancing principles of Community Law’ (2004) 41:2 *Common Market Law Review* 317.

¹⁰⁶ I. Harden, ‘When European Complain: the Work of the European Ombudsman’ (2001) 3 *Cambridge Yearbook of European Legal Studies* 199.

¹⁰⁷ Cf N. Krisch, ‘The Pluralism of Global Administrative Law’ (2006) 17 *EJIL* 247.

¹⁰⁸ M. Shapiro, *Who Guards the Guardians: Judicial Control of Administration* (Athens, Georgia: University of Georgia Press, 1988).

create a moral, but also a legal imperative. Hence, it is likely that future MEAs will also display a level of hybridization. Moreover, processes of globalization fuel the emergence of transnational non-State institutions that assume an increasingly visible profile in the negotiation and implementation of international agreements in areas beyond environmental protection. Wherever institutional differentiation occurs with regard to the implementation of formally binding norms within an international agreement, hybridization will be the result. On the positive side, hybrid norms offer a pragmatic response in situations where States want to confirm their intention to be bound by a treaty obligation, but effectively depend on the cooperation of others to fulfill this commitment. More challenging are the pressures that hybridization places on the development of compliance mechanisms, and on the reliability of treaty documents as instruments of communication with civil society.

The final sections of this article identified three modes of response. The first, to boost the accountability of the State, is an essentially conservative response in that it aims to reclaim international law as the province, and the sole responsibility of the nation State. The second, to reinforce the contractual nature of MEAs, is an application in the environmental context of a 'lowest common denominator' or deregulatory approach, as this response aims to adjust the enforceability of the treaty's 'hard law' provisions downwards rather than pushing the enforceability of hybrid norms upwards. The third option, to develop the accountability of non-State actors, could be labeled an administrative, or global administrative response, as it fosters the development of transnational regimes for the regulation, control and sanctioning of non-State actors in implementation networks. Of the three contemplated approaches, only the administrative response enables treaty parties to retain the formally binding character of hybrid norms without foregoing the support and flexibility of implementation networks. However, it does entail the establishment of yet another, highly centralized, level of regulatory authority that all too soon may face accountability and legitimacy deficits of its very own.