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*Edited by Shawkat Alam, Md Jahid Hossain Bhuiyan,
Tareq M.R. Chowdhury and Erika J. Techera*

"Treaty congestion" in contemporary international environmental law

Donald K. Anton

The rapid expansion of international environmental law in recent decades has led to what some commentators have termed "treaty congestion". Arguably the number of international instruments has hampered implementation. In particular, the lack of coordination in the face of proliferation and the lack of capacity challenge the operationalization of international environmental obligations by necessary and sufficient laws, policies, programs and plans. This contribution considers the issue of treaty congestion, and makes suggestions for how it might be overcome.

Introduction

Looking back now, the rapid growth of international environmental conventional norms that took place over roughly the last thirty years of the twentieth century is striking. Few fields have burst on the scene with as much unplanned fecundity. John Lawrence Hargrove was perhaps the only one who thought to ask in 1971, near the beginning of the modern international environmental law enterprise, "How much international law-making is required" to protect the global environment?¹ Answers were few, if any.

Instead, the standard account tells of a piecemeal and *ad hoc* development of international environmental law as a response to particular crises and new challenges and problems.² As treaties increased in number and international environmental law-making gathered steam, just keeping up to date required (and still requires) concerted effort. More significantly, the rapid growth of the law posed "treaty congestion" problems for states and the international system. This contribution is designed to provide, in short compass, a current review of treaty congestion, focusing in particular on its capacity and normative challenges.

1 J.L. Hargrove (ed.) *Law, Institutions and The Global Environment*, NY/Leiden: Oceana Publications/A.W. Sijthoff, 1971, p. 170.

2 United Nations Environment Programme (UNEP), *Training Manual on International Environmental Law*, Nairobi: UNEP, 2006, p. 23.

The phenomenon of treaty congestion

Overwhelmed by treaties

The essence of treaty congestion lies in the appearance of too much law, too fast. For international environmental law, the normative proliferation took place in plain view and was contemporaneously chronicled in an array of treaty collections. Starting in the mid-1970s – and continuing with increasing frequency – an impressive host of general and specialized compilations of the multiplying numbers of multilateral environmental agreements appeared.³ As is well known, by the late 1990s it was estimated that over 1,000 different international environmental legal instruments (hard and soft)⁴ and 139 different major international environmental treaties⁵ were in existence.

As this normative proliferation took place, one was reminded of Cicero's teaching, *summum ius summa iniuria* ("the more law, the less justice").⁶ It also became apparent that the increasing number of treaties and subjects of international environmental obligation posed practical and normative concerns. These concerns were neatly encapsulated in a 1993 critique of contemporary international environmental law by Edith Brown Weiss.⁷

Brown Weiss identified that the surfeit of international environmental law could constitute too much of a good thing. She showed that it is possible that a swiftly expanding corpus of international environmental law might create two major problems. First, as a practical matter, a large number of new international environmental treaties might overwhelm the capacity of states to monitor, implement, and comply with a plethora of new obligations.⁸ As a result, states might find that the impressive edifice of law they had created would prove ineffective in ameliorating the environmental problems addressed.⁹ Second, and more normatively troubling, Brown Weiss highlighted that a large, growing, and uncoordinated body of international environmental law posed a danger of inconsistent obligations, overlapping norms, gaps in coverage, and outright duplication.¹⁰

Brown Weiss coined the term "treaty congestion" as a way to explain these capacity and normative problems.¹¹ She argued, however, that the solution to treaty congestion did not necessarily lie in slowing the process of norm creation, but rather in making the process more manageable and efficient.¹² Since Brown Weiss wrote, the phenomenon of treaty congestion has been widely observed and has garnered notable scholarly and professional attention. It has

3 See the extensive sources cited in an expanded online version of this chapter. D.K. Anton, "Treaty Congestion" in *Contemporary International Environmental Law*, nn. 5–7. Online. Available HTTP: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1988579> (hereafter 'Anton Extended Version').

4 E.B. Weiss, 'Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths', *University of Richmond Law Review*, 1999, vol. 32, p. 1555.

5 United Nations Environment Programme (UNEP), *Register of International Treaties*, UN Doc. UNEP/GC.15/Inf.2 (1989).

6 Cicero, *De Officiis* (Walter Miller, trans.), Cambridge, MA: Harvard University Press, 1913, Bk I, p. 33.

7 E.B. Weiss, 'International Environmental Law: Contemporary Issues and the Emergence of a New World Order', *Georgetown Law Journal*, 1993, vol. 81, 675, pp. 697–702.

8 *Ibid.*

9 *Ibid.* See also 'Anton Extended Version', n. 15.

10 *Ibid.*

11 *Ibid.*, n. 697.

12 Weiss, 'Contemporary Issues', *op. cit.*, p. 697 n. 147. See also 'Anton Extended Version', n. 18.

been treated in a variety of monographs¹³ and is repeatedly mentioned in a voluminous periodic literature.¹⁴

A diminishing normative proliferation?

It should be noted that since approximately 2002 the negotiation and adoption of major global and regional environmental agreements has seemingly slowed. This diminishing trend in environmental treaty negotiation and adoption has been especially noticeable since 2005. The International Environmental Agreements (IEA) Database Project reports the appearance of only seventeen new multilateral agreements (and ten protocols) over the last seven years.¹⁵ This is striking when compared with 348 multilateral treaties and 149 protocols in the years between 1970 and 2004, an average of roughly 100 combined instruments every five years until 2005 – approximately three times more output every five years previous to the last seven.¹⁶

After three decades of international cooperation in establishing treaties, principles and institutions, a noticeable shift towards implementation has taken place.¹⁷ This was prominently reflected in the Plan of Implementation produced at the 2002 World Summit on Sustainable Development.¹⁸ It is also evinced in the increasing adoption of protocols to existing international environmental treaties to provide more operational detail. It could be that this shift of resources to implementation has stanchied norm creation, at least to a degree. However, despite this apparent lessening in environmental norm creation, treaty congestion remains a live aspect of international environmental law. A vast corpus of international environmental law exists that still challenges the capacity for effective implementation and poses at least a latent potential for conflict.

Treaty congestion and the capacity challenge

Treaty congestion, especially when proliferating treaties are widely ratified, is invariably accompanied by treaty over-commitment for significant numbers of states. Over-commitment has been a feature of contemporary international environmental law and seriously challenges the capacity of states to implement and comply with their international obligations. This is especially so for states without the requisite human, institutional, and technological resources to deal effectively, if at all, with expanding obligations. Of course, state compliance with international environmental obligations is a necessary (if not always a sufficient) condition of effectiveness in most cases – either in terms of fixing the environmental problem addressed or in successfully changing state behavior in relation to treaty norms.¹⁹

13 See citations in 'Anton Extended Version', n. 19.

14 Ibid., n. 20.

15 See IEA Database Search Results, 'Multilateral Environmental Agreements for the period from 2005 to 2011 (inclusive)'. Online. Available HTTP: <<http://iea.uoregon.edu/>> (accessed 8 May 2012).

16 Ibid.

17 See C. Bruch and E. Mrema, 'UNEP Guidelines and Manual on Compliance with and Enforcement of Multilateral Environmental Agreements', *Proceedings of the Seventh International Conference on Environmental Compliance and Enforcement*, vol. 1, 2005, p. 1.

18 *Johannesburg Plan of Implementation of the World Summit for Sustainable Development*, UN Doc A/Conf 199/20 (2002).

19 For detailed discussions of the meanings of implementation and compliance, especially as they are tied to effectiveness, see 'Anton Extended Version', n. 28.

Over-commitment caused by treaty congestion poses a number of capacity challenges. Three in particular have been the source of concern for international environmental law. First, as noted, the basic ability to *comply* with substantive obligations is undermined by an unmanageable number of commitments. Second, as treaty bodies and institutions proliferate along with the growing corpus of conventions, the capacity of states to meaningfully *participate* in institutional activities to advance their interests is eroded. Third, the ability of states to adequately *monitor and report* on the implementation of their obligations, as international environmental treaties increasingly require, is hampered by treaty congestion. These capacity challenges can be conceptualized as substantive compliance challenges, institutional participation challenges, and monitoring and reporting process challenges. Each of these capacity challenges is explored below, along with strategies the international community has employed to help meet them.

Substantive compliance challenges

Substantive compliance challenges involve treaty congestion impediments that thwart the fulfillment of agreed environmental obligations with fundamental environmental outcomes – that is preventing pollution, reducing emissions, conserving biological diversity, protecting world heritage.²⁰ At bottom, these impediments stem from a lack of human, financial, and technological resources required to effectively implement obligations.²¹ The lack of necessary financial and human capability virtually assures that compliance will be deficient.²²

Even with a robust capacity, however, often additional impediments exist and effective implementation requires a variety of related abilities. These include the ability of a state: (i) to overcome domestic institutional weaknesses in political structures and legal frameworks; (ii) to remove market impediments; (iii) to provide missing incentives or remove perverse incentives; (iv) to effectively manage and coordinate across treaty obligations; (v) to effectively incorporate public participation and private sector involvement; and (vi) to access reliable and necessary information.²³ These capacity challenges are compounded by the complexity of a tangled web of multiple environmental regimes.²⁴

Institutional challenges

Treaty congestion has greatly expanded the number of international environmental institutions that place demands on the attention and resources of states.²⁵ These institutions include

20 See generally *Bali Strategic Plan for Technology Support and Capacity Building*, Governing Council of the United Nations Environment Programme, Note by the Executive-Director, UN Doc UNEP/GC.23/6/Add.1 (23 December 2004).

21 D. Freestone, 'The Challenge of Implementation: Some Concluding Notes', in A. Boyle and D. Freestone (eds) *International Law and Sustainable Development*, Oxford: Oxford University Press, 1999, p. 360.

22 See M. Jänicke and H. Weidner, 'Summary: Global Environmental Policy Learning', in M. Jänicke and H. Weidner (eds) *National Environmental Policies: A Comparative Study of Capacity-Building*, Berlin: Springer, 1997, p. 309.

23 R.T. Watson, J.A. Dixon, S.P. Hamburg, A.C. Janetos and R.H. Moss, *Protecting Our Planet, Securing Our Future: Linkages Among Global Environmental Issues and Human Needs*, UNEP, US NASA, World Bank, 1998, p. 57.

24 P. Sand, *Lessons Learned in Global Environmental Governance*, Washington DC: World Resources Institute, 1990, p. 35.

25 See B.H. Desai, *Institutionalizing International Environmental Law*, Ardsley, NY: Transnational Publishers, 2004, pp. 279–80.

an array of treaty bodies – a plethora of regime-specific secretariats, conferences/meetings of parties, subsidiary bodies, non-compliance mechanisms, and working groups – created by the expanding treaty universe. These treaty bodies make significant capacity and expertise demands on states to engage in further normative development, internal and external compliance monitoring, decision-making regarding regime-specific projects, and decision-making regarding disputes.²⁶ The demands have continued to grow and have resulted in what has been called "institutional overload"²⁷ – the requirement of extensive and intensive party participation beyond capacity.²⁸ The institutional demands created by environmental treaty bodies are exacerbated by competing demands that come from other international institutions.²⁹

Because treaty bodies and institutions exist independently of each other and are largely uncoordinated, the institutional framework is subject to significant administrative inefficiencies. Consider, for instance, the burden imposed on states in terms of human and financial resources just to participate in institutional meetings. The number of meetings that require attendance is enormous. The timing of meetings is largely happenstance. The venues of meetings stretch around the globe. In 2010, for instance, it was reported that there were 63 major institutional and diplomatic meetings in a host of locations.³⁰

Assuming attendance is possible, effective participation in these bodies imposes additional significant demands on the administrative capacity of states. The expertise required to be an effective participant is significant and treaty congestion has spread resources thin.³¹ Of course, non-participation or perfunctory participation in institutional decision-making, compliance, and implementation activities compromises the ability of a state to promote its own interests. Just as importantly, it potentially deprives the institution or regime of ideas or additional options (possibly the best ones) that it might have had available if greater participation had been possible.

Monitoring and reporting process challenges

Perhaps the most immediate practical challenge that treaty congestion has raised is the way it can diminish the capacity of states to monitor and report on the implementation of the myriad environmental obligations established over the last 40 years.³² Without an

26 See E. Hey, 'International Institutions' in D. Bodansky, J. Brunnee, and E. Hey (eds) *The Oxford Handbook of International Environmental Law*, Oxford: Oxford University Press, 2007, p. 749.

27 M.A. Levy, R.O. Keohane and P.M. Haas, 'Improving the Effectiveness of International Environmental Institutions', in P.M. Haas, R.O. Keohane and M.A. Levy (eds) *Institutions for Earth: Sources of Effective International Environmental Protection*, Cambridge, MA: MIT Press, pp. 421–2.

28 A. Chayes and A.H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*, Cambridge, MA: Harvard University Press, 1995, p. 283.

29 P. Birnie, A. Boyle and C. Redgwell, *International Law and the Environment*, 3rd edn, Oxford: Oxford University Press, 2009, pp. 58–100.

30 See e.g. meetings covered by International Institute for Sustainable Development (IISD) Reporting Services in 2010. Online. Available HTTP: <<http://www.iisd.ca/meetings/2010.html>> (accessed 8 May 2012).

31 Preparatory Committee for the United Nations Conference on Sustainable Development, Second Session, *Objective and Themes of the United Nations Conference on Sustainable Development, Report of the Secretary-General*, UN Doc. A/CONF.216/PC/7 (22 December 2010), para. 108.

32 Cf. L. Gündling, 'Compliance Assistance in International Environmental Law: Capacity-Building Through Financial and Technology Transfer', *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, vol. 56, 1996, p. 796.

international institutional authority to implement and monitor the treaty performance of states, obligations to monitor and report on activities related to implementation of and compliance with conventional requirements are now commonly imposed on states as an internal supervisory technique.³³ The proliferation of environmental reporting obligations under different treaties (in addition to non-environmental reporting obligations) can significantly overburden the administrative capacity of a state to accurately report or, indeed, to report at all.³⁴

Capacity is challenged by the large number of monitoring and reporting requirements and significant differences in those requirements across regimes.³⁵ It is well known that even with the best of intentions, states – and developing states in particular – often lack, again, the human and financial resources to effectively superintend what are often voluminous international environmental commitments.³⁶ Even where commitments are not overwhelming, a lack of environmental expertise and management skills may still make implementation difficult.³⁷ As a result, states challenged by capacity have been found to limit their ratification to “general declaratory instruments not involving active participation [or] operational aspects” of technical implementation.³⁸

Because subject matter varies greatly across environmental treaties, monitoring and reporting requirements demand a significant range of technology and expertise.³⁹ For instance, monitoring and reporting requirements can range from gathering and interpreting complex statistical details on production, imports, and exports under the Montreal Protocol on Substances that Deplete the Ozone Layer⁴⁰ and the Convention on Persistent Organic Pollutants⁴¹ to accounting for all aspects of transboundary trade and disposal of hazardous wastes, including information on the grant of permits (including criteria) under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes.⁴²

One of the most frequent concerns expressed in relation to implementation and compliance is a lack of human and administrative resources and expertise. In such circumstances, institutions need to be designed (and/or redesigned) to assist in upgrading capacity⁴³ and to

33 R. Wolfrum, ‘Means of Ensuring Compliance with and Enforcement of International Environmental Law’, *Recueil des Cours*, vol. 272, 1998, p. 37.

34 A. Kiss, ‘Reporting Obligations and Assessment of Reports’, in U. Beyerlin, P.-T. Stoll and R. Wolfrum (eds) *Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue Between Practitioners and Academia*, Leiden: Martinus Nijhoff, 2006, p. 245.

35 G. Loibl, ‘Reporting and Information Systems in International Environmental Agreements as a Means for Dispute Prevention – The Role of “International Institutions”’, *Non-State Actors and International Law*, vol. 5, 2005, pp. 13, 15–16.

36 H. Mainhardt, ‘Capacity-Building Strategies in Support of Multilateral Environmental Agreements’, in L.E. Suskind, W. Moomaw, K. Gallagher and E. Corell (eds) *Reforming the International Environmental Treaty-Making System*, Cambridge, MA: PON Books, 2001, p. 183.

37 *Ibid.*

38 P. Sand (ed.) *The Effectiveness of International Environmental Agreements*, Cambridge: Grotius Publications Ltd, 1992, p. 11.

39 See e.g. P. Sands, *Principles of International Environmental Law*, Cambridge: Cambridge University Press, 2003, 2d ed., pp. 832–8.

40 *Montreal Protocol on Substances that Deplete the Ozone Layer*, Art. 7, UNTS, vol. 1522, p. 3 (as amended in 1990, 1992 and 1999).

41 *Convention on Persistent Organic Pollutants*, Art. 15, ILM, vol. 40, p. 532.

42 *Convention on the Control of Transboundary Movements of Hazardous Wastes*, Art. 13, UNTS, vol. 1673, p. 125.

43 P. Sand, ‘Institution-building to Assist Compliance with International Environmental Law: Perspectives’, *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, vol. 56, 1996, pp. 774–95.

increase efficiencies in international administration, coordination, and integration across environmental regimes.⁴⁴

Addressing the capacity challenge

Building capacity

Capacity-building measures are used as incentives to promote participation in international environmental regimes and to assist overburdened, resource-poor states in complying with and implementing international environmental obligations.⁴⁵ Whether these capacity-building incentives have been developed exclusively in response to treaty congestion is, however, doubtful. Well-worn and frequently copied provisions existed before treaty congestion prompted developed states to "offer assistance with inventories, reporting, training, and an empty promise of technology transfer".⁴⁶ Nevertheless, with the advent of treaty congestion, financing and effective transfer of technology became much more a focus for negotiations between developed and developing states.⁴⁷ By 1992, the "new and equitable global partnership" for sustainable development⁴⁸ was dependent on "new and additional financial resources" and "access to environmentally sound technologies" for developing states.⁴⁹

David Freestone has highlighted research demonstrating that a large range of capacity is crucially dependent on adequate funding.⁵⁰ Building on the growing financing and technology focus, developing countries have insisted on provisions in several treaties that seek to condition the fulfillment of their environmental obligations on the receipt of financial and technological support needed to build capacity in order to meet commitments.⁵¹ Conditionality aside, however, "financial and technical assistance is a necessary, but clearly insufficient, condition to promote capacity."⁵² Indeed, some evidence suggests international financial assistance often fails to drive the environmental policy goals it is designed to accomplish.⁵³ It certainly is not as easy

44 F. Biermann, 'The Emerging Debate on the Need for a World Environment Organization: A Commentary', *Global Environmental Politics*, vol. 1, 2001, pp. 45–55.

45 H.K. Jacobson and E.B. Weiss, 'Assessing the Record and Designing Strategies to Engage Countries', in E.B. Weiss and H.K. Jacobson (eds) *Engaging Countries: Strengthening Compliance with International Environmental Accords*, Cambridge, MA: MIT Press, 1998, p. 546.

46 Mainhardt, *op. cit.*, pp. 184–5.

47 Freestone, *op. cit.*, p. 360.

48 Preamble, para. 3, *Rio Declaration on Environment and Development*, Report of the United Nations Conference on Environment and Development, vol. 1, UN Doc. A/CONF.151/26/Rev.1 (Vol. I) (New York: United Nations, 1993), p. 3.

49 'Overview of Agenda 21 and Implementation Mechanisms', Report of the Secretary-General, UN Doc. A/CONF.151/PC/100/Add.1, reprinted in Nicholas A. Robinson (ed.), *Agenda 21 and the UNCED Proceedings*, vol. 1, (New York: Oceana Publications Inc.), at p. 54.

50 Freestone, *op. cit.*, pp. 361–2.

51 See e.g. *Montreal Protocol on Substances that Deplete the Ozone Layer*, Art. 5(5), as amended by *Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer*, Art. 1(P), Annex II of the Report of the Second Meeting of the Parties, UN Doc. UNEP/OzL.Pro.2/3 (29 June 1990); *United Nations Framework Convention on Climate Change* (UNFCCC), Art. 4 (7), UNTS, vol. 1771, p. 107; Art. 20(4), *Convention on Biological Diversity*, UNTS, vol. 1760, p. 142.

52 M.A. Drumbl, 'Does Sharing Know Its Limits? Thoughts on Implementing International Environmental Agreements', *Virginia Environmental Law Journal*, vol. 18, 1999, p. 287.

53 E.R. DeSombre, 'Encouraging Participation in International Environmental Agreements', in Ho-Won Jeong (ed.) *Global Environmental Policies: Institutions and Procedures*, Basingstoke: Palgrave, 2011, pp. 203–205.

as "leap-frogging" dirty technology that money and access to technology on favorable terms may allow.⁵⁴ Instead, real and long-lasting improvements in human and technological capacity require a much broader approach that also successfully addresses structural deficiencies, institutional weaknesses, managerial hurdles, and problems in capacity retention.⁵⁵ Capacity-building must be integrated in new governance structures at the global level.

At the treaty level, it has been suggested that every instrument ought to establish a holistic "capacity-building management unit" (CBMU).⁵⁶ It is true that the CBMU would add another treaty body to the existing mix. However, unlike the treaty bodies already mentioned, a CBMU would not be a challenge or drain on capacity; just the opposite. It would be responsible for determining capacity-building needs and effectively enhancing participation and implementation across the regime.⁵⁷ In other words, a CBMU's function is to ensure ultimate self-reliance and provide assistance in achieving that goal. Of course, a CBMU would need to be sufficiently resourced, including an ability to provide funding and technology on a recurrent basis if necessary.

Enhancing institutional efficiencies

The fragmented, uncoordinated, and underfunded nature of global environmental governance by international institutions,⁵⁸ such as it is, poses another significant challenge raised by treaty congestion. As new institutions created by new treaties have proliferated, the need to coordinate supervisory responsibilities and administrative requirements has grown.⁵⁹ While a loose set of some cooperative arrangements between some institutions exists, an extensive literature has grown up around advancing international reform that entails a host of institutional proposals.⁶⁰

One central idea is the need to simplify and streamline. In order to accomplish this, the creation of an overarching and unified organization for the environment has been urged. It is postulated that such an organization would reduce the burdens of institutional overload on states by eliminating overlap and redundancy and increasing efficiency. It is also argued that a global environmental organization would have enhanced standing and resources, leading to greater effectiveness.⁶¹

The most recent work on institutional and governance reform is bound up with the 2012 United Nations Conference on Sustainable Development (UNCSD) (Rio+ 20). One of the two

54 Drumbl, *op. cit.*, p. 287.

55 D. Fairman and M. Ross, 'Old Fads, New Lessons: Learning from Economic Development Assistance', in R.O. Keohane and M.A. Levy (eds) *Institutions for Environmental Aid*, Cambridge, MA: MIT Press, 1996, pp. 29, 41–5.

56 Mainhardt, *op. cit.*, pp. 188–91.

57 *Ibid.*

58 See G.C. Bryner, *From Promises to Performance: Achieving Global Environmental Goals*, New York/London: W.W. Norton & Co., 1997, chapter 4.

59 E.R. DeSombre, *Global Environmental Institutions*, Abingdon: Routledge, 2006, p. 2.

60 For a good collection of proposals see D. Hunter, J. Salzman and D. Zaelke, *International Environmental Law and Policy*, New York: Foundation Press, 3rd edn, 2007, pp. 234–48. For more detail see Anton Extended Version, n. 80.

61 The various models of reform and arguments pro and con are extensively canvassed in F. Biermann and S. Bauer (eds) *A World Environment Organization: Solution or Threat for Effective Environmental Governance?*, Aldershot/Burlington: Ashgate, 2005.

major themes of UNCSD will be "the institutional framework for sustainable development".⁶² During the preparatory process for the Conference, UNEP was involved on a number of fronts, including convening the Consultative Group of Ministers or High-level Representatives on International Environmental Governance which produced the *Nairobi-Helsinki Outcome* in November 2010.⁶³ The *Outcome* focuses the international community's attention on six institutional/governance issues: (i) strengthening capacity in the "science-policy interface" to facilitate cooperation in management, analysis, use, and exchange of environmental information; (ii) developing a system-wide strategy for the environment in the UN system to "increase effectiveness, efficiency and coherence"; (iii) locating synergies between international environmental treaties in order to jointly deliver "common multilateral environmental agreement services with the aim of making them more efficient"; (iv) creating a stronger link between policy-making and financing; (v) developing a system-wide capacity-building network "to ensure a responsive and cohesive approach to meeting country needs"; and (vi) strengthening engagement at the regional level by "increasing the capacity of UNEP regional offices".⁶⁴

The Consultative Group also recognized in the *Outcome* the need to further develop five options for broader institutional reform previously identified by UNEP. These options include: (i) enhancing UNEP; (ii) establishing a new umbrella organization for sustainable development, (iii) establishing a specialized agency such as a world environment organization, (iv) reforming ECOSOC (the Economic and Social Council) and the CSD (Commission for Sustainable Development); or (v) enhancing institutional reforms and streamlining existing structures.⁶⁵ It remains to be seen what the institutional/governance outcome of UNCSD will be. However, following the second UNCSD preparatory commission in March 2011, Steven Bernstein and Jutta Brunnée were retained to prepare a consultant report on *Options for Broader Reform of the Institutional Framework for Sustainable Development* (IFSD).⁶⁶ It assesses the structural, legal, and financial implications of options for reform identified in the *Nairobi-Helsinki Outcome*. Perhaps most importantly for treaty congestion, the IFSD report places significant attention on ways and means to enhance capacity and emphasizes the need to simplify and streamline the current institutional framework.

Treaty congestion and normative challenges

The large and heterogeneous collection of international environmental treaties and the corpus of law they contain pose normative challenges. The great expansion of international environmental norms raises the prospect that different norms governing the same issue will run up against each other in conflict and incoherence.

62 GA Res. 64/236, UN Doc. A/RES/64/236 (24 December 2009), at para. 20(a).

63 UNEP Governing Council Decision SS.XI/1, UN Doc. UNEP GC/SS.XI/1 (26 February 2010); *Nairobi-Helsinki Outcome*, Second Meeting of the Consultative Group of Ministers or High Representatives on International Environmental Governance, Espoo, Finland, 21-23 November 2010. Online. Available HTTP: <<http://www.unep.org/environmental-governance/Portals/8/documents/Events/NairobiHelsinkiFinalOutcomeEdited.pdf>> (accessed 8 May 2012).

64 *Ibid.*, para. 7.

65 *Ibid.*, paras 11-13.

66 The IFSD analysis. Online. Available HTTP: <<http://www.uncsd2012.org/rio20/content/documents/322IFSD%20FIVE%20OPTIONS%20REPORT%20-%20FINAL%20VERSION%201%20NOV%20for%20posting.pdf>> (accessed 8 May 2012).

Overlap and conflict

Brown Weiss highlighted that treaty congestion has the potential to create a conflict of norms because of the overlap of substance and coverage of different treaty regimes.⁶⁷ Much of the normative overlap has been without incident and is, perhaps, mostly benign.⁶⁸ However, the potential for serious conflict tends to undermine overall effectiveness by creating uncertainty about interpretation and application and because international law can only imperfectly resolve such conflicts.⁶⁹

Institutional competition

Institutional proliferation can be viewed as a form of congestion creating rivalries over competence and jurisdiction.⁷⁰ This sort of competition can take place between treaty bodies or the adjudicative fora available under a growing number of international environmental treaties.⁷¹ Normative overlap and the potential conflict in interpretation has been of greatest concern, even though accommodation is perhaps more common.

Take the well-known potential for friction between World Trade Organization (WTO) norms and various international environmental treaties, for example.⁷² The provisions of the Montreal Protocol on Substances that Deplete the Ozone Layer⁷³ restrict trade with non-parties⁷⁴ and appear to offend prohibitions on quantitative restrictions and discrimination between like products established by the 1994 General Agreement on Tariffs and Trade (GATT)⁷⁵ – a situation ripe for conflict. However, a GATT trade expert and the Secretariat of the Montreal Protocol expressed compatible views that the restrictions were justified GATT exceptions and that the exceptions' "disguised restrictions" limitation did not apply.⁷⁶

Similarly, in the *MOX Plant* litigation, four different actions were launched in different jurisdictions (three by Ireland and one by the European Commission),⁷⁷ under four different

67 Weiss, 'Contemporary Issues', op. cit., pp. 699–700.

68 T. Stephens, *International Courts and Environmental Protection*, Cambridge: Cambridge University Press, 2009, p. 272.

69 R. Wolfrum and N. Matz, *Conflicts in International Environmental Law*, Berlin: Springer, 2003, p. 3.

70 T. Gehring, 'Treaty-Making and Treaty Evolution', in D. Bodansky, J. Brunnee and E. Hey (eds) *The Oxford Handbook of International Environmental Law*, Oxford: Oxford University Press, 2007, pp. 475–6.

71 C.P.R. Romano, *The Peaceful Settlement of International Disputes: A Pragmatic Approach*, The Hague/London/Boston: Kluwer Law International, 2000, pp. 91–2.

72 See e.g. P.K. Rao, *The World Trade Organization and the Environment*, New York: St Martin's Press, 2000.

73 UNTS, vol. 1522, p. 3.

74 Ibid., Arts 4 and 4A (as amended).

75 General Agreement on Tariffs and Trade (revised to 1994), UNTS, vol. 55, p. 187, reprinted as amended, GATT Secretariat, *Legal Instruments – Results of the Uruguay Round*, Geneva, Switzerland: GATT Secretariat, 1994.

76 See R.E. Benedick, *Ozone Diplomacy: New Directions in Safeguarding the Planet*, Cambridge, MA: Harvard University Press, 1991, p. 91; D. Pruzin, 'Ozone Depletion: Trade Measures Under Montreal Pact Justified, Secretariat Tells Trade Body', *International Environment Daily*, Washington DC: Bureau of National Affairs, 30 June 1999.

77 The four judicial bodies concerned with the matter included the International Tribunal for the Law of the Sea (ITLOS), an UNCLOS Annex VII arbitral tribunal (under the auspices of the Permanent Court of Arbitration (PCA)), an arbitral tribunal convened under the Convention for the Protection of the Marine Environment of the North East Atlantic (OSPAR Convention) (under ICSID auspices), and the European Court of Justice. For relevant disposition of the cases, see 'Anton Expanded Version' at n. 100.

regimes,⁷⁸ against the United Kingdom over activities associated with a nuclear reprocessing plant located on the Irish Sea in north-west England.⁷⁹ An underlying jurisdictional tension ran throughout the litigation but was resolved without contradictory jurisprudence.

The initial action started in June 2001 with a request by Ireland for the establishment of an arbitral tribunal under the OSPAR Convention. Ireland claimed the UK had violated OSPAR by failing to provide access to information on the MOX plant as required by Article 9. In October 2001, Ireland commenced Annex VII proceedings under UNCLOS against the UK, asserting more direct environmental breaches under a number of the Convention's marine environmental protection provisions. Ireland also foreshadowed that it intended to commence action in the European Court of Justice (ECJ) for alleged breaches of the EC Treaty and EURATOM treaty. On 15 November 2001, pending the constitution of the UNCLOS Annex VII arbitral tribunal (and one month before the plant was due to be commissioned), Ireland requested the indication of provisional measures by ITLOS against the UK. It was determined by ITLOS that the Annex VII tribunal had *prima facie* jurisdiction and the provisional measures were prescribed on 3 December 2001. In July 2003, the OSPAR arbitral tribunal found in favor of the United Kingdom. In the meantime, before Ireland could act in the ECJ, the European Commission successfully initiated action against Ireland in the same court, asserting that the Irish claims pending before the UNCLOS Annex VII tribunal violated the exclusive jurisdiction of the ECJ.

Three interesting competing institutional aspects of jurisdiction were in high relief in this litigation. First, the wide choice of litigation options available to Ireland allowed a certain degree of strategic "forum shopping" for remedies tailored to needs (i.e. for information, for provisional measures, and for prevention of environmental harm). One can see little harm in this case, but one can easily imagine situations where an applicant's expediency might be used to thwart justice.⁸⁰

Second, whenever ITLOS prescribes provisional measures in a case whose merits are to be decided by arbitration under Part XV of UNCLOS, differing views and tensions about merits jurisdiction are possible. In the *MOX Plant* litigation both ITLOS and the arbitral tribunal were in accord about the presence of merits jurisdiction. But this is not invariable and one is reminded of the prescription of provisional measures after finding *prima facie* jurisdiction in the *Southern Bluefin Tuna* dispute by ITLOS⁸¹ and the subsequent dismissal of the same case for want of jurisdiction by the Annex VII tribunal.⁸²

Third, if the UNCLOS Annex VII tribunal had not suspended the hearing of the merits until the ECJ could rule on competence and then terminated the proceedings with consent of the parties, real conflict over jurisdiction could have become live. Indeed, the possibility of an inconsistent ECJ judgment and Annex VII award was present. For now, though, it appears

78 United Nations Convention on the Law of the Sea, UNTS, vol. 1833, p. 3; OSPAR Convention, reprinted in ILM, 1993, vol. 32, p. 1069; Treaty Establishing the European Economic Community (EC Treaty), UNTS, vol. 298, p. 11 (as amended); Treaty Establishing the European Atomic Energy Authority (EURATOM treaty), UNTS, vol. 298, p. 169 (as amended).

79 For an overview see N. Lavranos, 'Epilogue in the MOX Plant Dispute: An End Without Findings', *European Energy and Environmental Law Review*, 2009, vol. 18, p. 180.

80 Stephens, *op. cit.*, pp. 275–9.

81 *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan)* (Cases Nos 3 & 4), ITLOS, Order of 27 August 1999 (provisional measures), reprinted in ILM, 1999, vol. 38, p. 1634.

82 *Southern Bluefin Tuna Case (Australia and New Zealand v Japan)*, Annex VII Arbitral Award on Jurisdiction and Admissibility, August 4, 2000, reprinted in ILM, 2000, vol. 39, p. 1359.

that the ECJ has exclusive jurisdiction over EC members in cases that may overlap with treaties that have higher environmental standards than the EC Treaty.

These two examples highlight the potential for institutional conflict that treaty congestion can create. When one considers the vast institutional environmental structure in place, it appears, though, that these institutions operate with a basic level of at least understanding co-existence. What are needed now are more formal structures of coordination to allow for faster progress in meeting the challenge of international environmental problems.

Normative conflict

Outside of institutional proliferation, the normative aspect of treaty congestion, in particular, has been increasingly analyzed under the banner of "fragmentation"⁸³ or, in older parlance, "conflicts"⁸⁴ in international law. The recognition of the basic problem, however, goes back to at least the Congresses of Vienna.⁸⁵ By the early twentieth century international jurisprudence had started to confront the issue⁸⁶ and scholarship about normative conflict begins with the advent, in significant numbers, of major multilateral treaties⁸⁷ and the appearance of the Draft Articles on the Law of Treaties.⁸⁸

In the contemporary world of international environmental law, treaty congestion has meant that the international community faces topic-specific and specialized regimes in greater and greater numbers at sub-regional, regional, and global levels. This is coupled with nominal vertical coordination in the international legal system and the appearance of so-called functionally "self-contained" systems.⁸⁹ Functionally isolated normative regimes can be seen to challenge the coherence of an international legal system. They also heighten the possibility of conflict between international environmental legal norms applicable to the same act or omission and across different subject matter areas of international law such as human rights, trade and investment law, the laws of war and humanitarian law, and others. International law does not currently provide an adequate means for the satisfactory resolution of conflict beyond the limited operation of Articles 30, 53, and 59 of the 1969 Vienna Convention on the Law of Treaties.⁹⁰

83 See the extensive sources cited in 'Anton Extended Version', n. 106.

84 Ibid., at n. 107.

85 See G. Binder, *Treaty Conflict and Political Contradiction: The Dialectic of Duplicity*, New York/Connecticut/London: Praeger, 1988, chapter 3.

86 Ibid.

87 See e.g., C.W. Jenks, 'The Conflict of Law-Making Treaties', *British Yearbook of International Law*, 1953, vol. 30, p. 401; P. Cobbett, *Cases on International Law*, 1947, vol. 1 Peace, p. 368; Q. Wright, 'Conflicts Between International Law and Treaties', *American Journal of International Law*, 1917, vol. 11, p. 566.

88 See Report on the Law of Treaties, *Yearbook of the International Law Commission*, 1953, vol. II, pp. 156-9, UN Doc. A/CN.4/63 (1953); Second Report on the Law of Treaties, *Yearbook of the International Law Commission*, 1954, vol. II, pp. 133-9, UN Doc. A/CN.4/87 and Corr.1 (1954); Third Report on the Law of Treaties, *Yearbook of the International Law Commission*, 1958, vol. II, pp. 41-5, UN Doc. A/CN.4/115 and Corr.1 (1958); Fourth Report on the Law of Treaties, *Yearbook of the International Law Commission*, 1959, vol. II, pp. 61-2, UN Doc. A/CN.4/120 (1959).

89 See *Prosecutor v Tadic*, Case No. IT-94-1-I, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, 11 (2 October 1995), reprinted in ILM, 1996, vol. 35, pp. 32, 39.

90 UNTS, vol. 1155, p. 331. See D.R. Rothwell, 'Relationship Between the Environmental Protocol and UNEP Instruments', in D. Vidas (ed.) *Implementing the Environmental Protection Regime for the Antarctic*, Dordrecht: Kluwer Academic Publishers, 2000, pp. 230-32.

Conflict, or potential conflict, between competing international environmental norms can be resolved in a number of ways. First and no doubt hardest, it is possible, in theory at least, for states to establish a general hierarchy of treaties or norms, as a matter of positive law, in which treaties are ranked according to their objects and normative content. This model of reconciliation focuses on areas of regulation as such and ranks them in order of importance. The more important the norm or goal at stake, the more priority it has.⁹¹ This, of course, is precisely what the policy-oriented New Haven school aspires to achieve with the value of human dignity as polestar.⁹²

If such a value-laden exercise was possible, whether environmental protection would be accorded a high-level trumping value in this sort of hierarchy is questionable. Moreover, a formal fix by states does not appear on the foreseeable horizon. In this situation and in a structurally horizontal legal world of treaty congestion it seems that the ideas of cross-fertilization and legal pluralism may assist in bolstering environmental protection at institutional centers (the likely site of the most intense competition) and normative margins (at least as between competing environmental norms).

Cross-fertilization and legal pluralism

Cross-fertilization

Cross-fertilization can assist treaty congestion to overcome the anxiety created by the isolation of the norms and institutions of diverse, functionally oriented regimes – the isolation of so-called "self-contained systems". Cross-fertilization provides the potential for the infusion of concepts, principles, and rules from one area of law into another.⁹³ Cross-fertilization occurs when new legal solutions to existing problems are proffered using rules or principles from other areas of international law. Cross-fertilization may result in the creation of new or the adaptation of existing legal principles, norms, and rules. Law, in this sense of transplantation from one field of law to another (or, indeed, from one legal system to another),⁹⁴ is parasitical. It is much like how a living language appropriates outside nomenclature and grammar for its own.⁹⁵ Optimally, cross-fertilization uses and embroiders on extrinsic material in order to adapt and thrive. It "shows an assimilative power which, to all appearance, grows by what it feeds on".⁹⁶

91 Such normative hierarchies are well anchored in municipal legal systems. See R. Pound, 'Hierarchy of Sources and Forms in Different Systems of Law', *Tulane Law Review*, 1933, vol. 7, p. 475.

92 M.S. McDougal, H.D. Lasswell and W.M. Reisman, 'The World Constitutive Process of Authoritative Decision', in M.S. McDougal and W.M. Reisman (eds) *International Law Essays: A Supplement to International Law in Contemporary Perspective*, Mineola, NY: Foundation Press, 1981, pp. 191, 201.

93 See J. Fawcett, 'Cross-Fertilization in Private International Law', *Current Legal Problems*, 2000, vol. 53, p. 303 (defining cross-fertilization as the process by which 'rules in one area of . . . international law influence the rules in another area'.)

94 For a variety of reasons, legal transplants do not always go well or take as anticipated. See e.g. W.L. Andreen, 'Environmental Law and International Assistance: The Challenge of Strengthening Environmental Law in the Developing World', *Columbia Journal of Environmental Law*, 2000, vol. 25, pp. 17, 26–32.

95 See L.M. Friedman, *A History of American Law*, New York: Simon & Schuster, 1973, pp. 13–14.

96 F. Pollock, *The Genius of the Common Law*, New York: Columbia University Press, 1912, p. 77.

In international law, the use of cross-fertilization as a technique or stratagem harks back to the legal system's natural law foundations.⁹⁷ An attentive reading, for instance, of the authorities and sources employed by Franciscus de Vitoria in his 1532 *De Indis recenter inventis relectio prior*, or Alberico Gentili in his 1598 *De iure belli libri tres*, or Grotius in his 1625 *De jure belli ac pacis libri tres*, shows the free use of precepts and ideas from the Old and New Testament, Aristotle, the "Fathers of the Church", theologians, canonists, glossators, and commentators. In medieval Europe, in an age without modern national legal systems, "[c]ross-fertilization was the order of the day, because the law was seen as a vast treasure house from which kings and nations could pick and choose what suited them."⁹⁸

Before the close of World War II, cross-fertilization took place, for the most part, within largely self-contained legal systems, and occasionally families of legal systems.⁹⁹ Following World War II, and with increasing frequency since, the judicial borrowing across fields, jurisdictions, and even disciplines has continued apace.¹⁰⁰

Cross-fertilization in the international legal system must account for the consensual nature of international law. This makes borrowing and applying rules of decision outside of consent more difficult. Major multilateral agreements sometimes allow for cross-fertilization in one form or another.¹⁰¹ However, Article 31(3)(c) of the Convention on the Law of Treaties is more generally relevant. This provision allows for consideration of "any relevant rules of international law applicable in the relations between the parties".¹⁰² This is important not as a matter of hierarchy or priority in case of conflict, but as a matter of cross-fertilization by interpretation.¹⁰³ Provided an outside norm is relevant and applicable, other rules of international law outside the treaty have an informative, possibly mediating, role to play when taken into account as required by the law of treaties. This, of course, does not dictate environmentally friendly results even when relevant and applicable environmental norms are brought to bear under Article 31(3)(c). It does mean, however, that at least such a result is possible.

Legal pluralism

Legal pluralism can be thought of as the counterpart to cross-fertilization. It accepts an institutional and normative fragmentation with the multiplicity of competing institutions

97 See generally, P. Allott, *The Health of Nations*, Cambridge, Cambridge University Press, 2002, pp. 410–11.

98 R.C. van Caenegem, *European Law in the Past and the Future: Unity and Diversity over Two Millennia*, Cambridge: Cambridge University Press, 2002, pp. 1–2.

99 R. David and J.E.C. Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law*, London: Stevens & Sons, 3rd ed., 1985, p. 25; D. Williams, 'Courts and Globalization', *Indiana Journal of Global Legal Studies*, 2004, vol. 3, pp. 57, 66.

100 See e.g. F.G. Jacobs, 'Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice', *Texas International Law Journal*, vol. 38, p. 547.

101 See e.g. *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Art. 3.2, Annex 2 to the Agreement Establishing the World Trade Organization, UNTS, vol. 1867, p. 401; Arts 293, 297(1)(b), 301, 304, UNCLOS, UNTS, vol. 1833, p. 3.

102 UNTS, vol. 1155, pp. 331, 340.

103 See C. Brown, 'The Cross-Fertilization of Principles Relating to Procedure and Remedies in the Jurisprudence of International Courts and Tribunals', *Loyola of Los Angeles International and Comparative Law Review*, 2008, vol. 30, pp. 219, 232–3; P. Sands, 'Treaty, Custom and the Cross-Fertilization of International Law', *Yale Human Rights & Development Law Journal*, 1998, vol. 1, pp. 85, 102–105.

brought forth by treaty congestion. However, instead of seeing only disadvantage in such a situation, legal pluralism embraces the diffusion of power that competing institutions entail.¹⁰⁴

If all or most normative and institutional control is unitary and rests at the centre of a system, then very limited (perhaps only one) opportunity exists to influence activities, decisions, policies, programs, and so on. Disenchantment with outcomes can be much more profound and lasting in such a system. In a more normatively and institutionally variegated system, like the present one, disenchantment with outcomes will still arise. But these disappointments have the potential to be offset by other outcomes at other centers of power and decision-making involved in international environmental issues.

So long as this diffuse power operates within the basic framework of international law, then diversity and difference can be healthy for international law. Anne-Marie Slaughter writes about this diversity as a principle of "legitimate difference", which "enshrines pluralism as a basis for, rather than a bar to, regulatory cooperation, leaving open the possibility of further convergence . . . but not requiring it".¹⁰⁵

In a world of treaty congestion accompanied by fragmentation, legal pluralism offers the possibility of a development of international law to improve conditions on Earth through interaction by a wide range of institutions engaged in the international law enterprise. Legitimate differences and the dialogue enabled by cross-fertilization in interpretation, application, and development of international law might even lead to better decisions¹⁰⁶ and strengthen compliance.¹⁰⁷

Conclusion

Treaty congestion has been a fact of modern international law for a number of decades. As greater international cooperation is required to address global problems, the need for more law to implement cooperation accompanies. The response to fragmentation and conflict arising from the proliferation of norms that accompanies environmental treaty congestion has ranged from that of the despairingly alarmist to the overly optimistic. Between these extremes it is necessary to accept that a realistic appraisal must take account of the current limitations imposed by the international legal system.

While improving governance structures and coordination functions may help improve the situation, those with strong environmental values must be on guard to limit the extent of environmentally unfavorable interpretation and application of competing norms. It is likewise important to attempt to ensure that the institutional treatment of environmental norms first of all takes place, and secondly, adheres to the environmental purpose and objective of the norms. It is inevitable that there will be failures and disappointments, but increased coordination and synergies across normative boundaries and enhanced capacity-building will help minimize them.

104 See W.T. Worster, 'Competition and Comity in the Fragmentation of International Law', *Brooklyn Journal of International Law*, 2008, vol. 34, p. 119.

105 A-M. Slaughter, *A New World Order*, Princeton, NJ: Princeton University Press, 2004, p. 249.

106 Worster, *op. cit.*, p. 141

107 W. Burke-White, 'International Legal Pluralism', *Michigan Journal of International Law*, 2004, vol. 25, pp. 963, 978-9.