4

Fragmentation, regime interaction and sovereignty

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Introduction

The fragmentation of international law is a long-observed phenomenon that demonstrates uneven normative and institutional development and evolution in inter-State relations, with little or no hierarchical order or overall coherence. Separate legal regimes such as the international trade regime and the international regime to mitigate climate change have developed largely independently from one another, often instigated by non-identical groupings of States. Conflicts of norms between these regimes give rise to 'post modern anxieties' about disorder and uncertainty,[1] and in response, the United Nations International Law Commission (ILC), in a seminal study led by Martti Koskenniemi, advocates a toolbox of professional techniques for international lawyers.[2] These techniques seek first and foremost to ascertain the common intention of States parties to the relevant regimes in resolving normative conflicts. In doing so, the techniques promote adherence to sovereign concerns.

Yet even aside from the potential for large-scale conflicts between rules or rule-systems, the fragmented and diversified legal landscape and the plethora of legal regimes give rise to challenges of a more mundane character. Given that issues of global concern such as climate change, fisheries depletion and human rights do not fall neatly into one regime, there is a constant need to mediate and understand the interaction between

[1] Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties', *Leiden Journal of International Law*, 15 (2002), 553.

[2] ILC Study Group, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Conclusions of the Work of the Study Group', A/CN.4/L.702 (18 July 2006); see also Report of the ILC Study Group, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', finalised by Martti Koskenniemi, A/CN.4/L.682 and Corr.1 (13 April 2006).

regimes.[3] Joint work programmes, the common advancement of 'multi-sourced equivalent norms'[4] and shared institutional practices are a routine feature of the implementation of international law. This interaction between regimes sometimes occurs with the full awareness and consent of States parties, but oftentimes it does not. For example, States sometimes allow secretariats of international organisations to enter into memoranda of understanding with other secretariats; at times, institutional co-operation exists without such arrangements. If regime interaction occurs without the apparent consent of States, what is the risk to sovereignty?

The situation is further complicated when one considers the growth of non-traditional legal regimes and 'transnational law' beyond the confines of the State. An example from forestry regulation illustrates this phenomenon. Forested areas are simultaneously governed by States for a range of uses including timber extraction and agricultural plantation; they also form part of complex and localised normative arrangements of indigenous and other communities. Such pluralism is destined to become even more complex. Imminent global attempts to reduce carbon emissions from deforestation and forest degradation (known as 'REDD' programmes) promise to provide public and private entities with opportunities to establish carbon markets, adding a layer of governance that is grounded on State participation and yet dependent on global and 'de-nationalised' authorities. The interaction between these areas of law provides additional challenges to notions of sovereignty. Can States retain control? Should they?

This chapter addresses the dilemma posed for sovereignty by regime interaction. The first part identifies the multiple meanings of 'regime'. The term is useful in drawing attention to specialised areas of practice and institutional development, notwithstanding the risks that accompany such analysis.[5] This part considers the influence of international inter-governmental organisations and non-governmental organisations (NGOs) in these arrangements. Such influence may even exceed the

[3] See generally, Margaret A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, 2012).

[4] Tomer Broude and Yuval Shany, 'The International Law and Policy of Multi-sourced Equivalent Norms' in Tomer Broude and Yuval Shany (eds.), *Multi-sourced Equivalent Norms in International Law* (Oxford: Hart, 2011), 1.

[5] For the risks in defining regimes and theorising their interactions (especially with respect to reductive thinking and essentialising tendencies), see Margaret A. Young, 'Introduction: The Productive Friction between Regimes' in Margaret A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, 2012), 10–11.

influence of States, especially for some privately developed 'transnational regimes'.

The second part focuses on sovereignty and its demands. Traditional conceptions of sovereignty emphasise the full and independent authority of States to govern their citizens and their territory. When States ratify treaties and become members of legal regimes, the delegation of power is seen by some to be a diminution of sovereignty. Perhaps even more keenly felt is the impact on sovereignty of interacting regimes and this part examines examples of international organisations within one regime finding facts and drawing upon law from another regime. Examples from regimes relating to liberalised trade, climate change mitigation and fisheries protection are provided to demonstrate the current practice surrounding intersecting regimes. If such activities go beyond the implied powers of international organisations, sovereignty's demand for State consent in situations of authority and control may go unmet.

The third part provides a normative argument for regime interaction that attenuates the concept of sovereignty to allow for the participation of international organisations and NGOs in regime interaction. It explores ways in which regime interaction satisfies the demands of sovereignty by ensuring legitimacy. Issues such as accountability, transparency and cross-regime scrutiny become important at both a practical and theoretical level. An account of sovereignty that allows international law to confront issues of global concern, even as those issues traverse multiple regimes with disparate (and sometimes non-existing) State membership and differing organisational structures, is a necessary part of an open system of international law.

A 'Regimes' of international laws and institutions

'Regimes' is a term that delineates professional specialisations, treaty and institutional arrangements and subject disciplines bounded by functional, teleological, organisational and geographical domains. The international trade regime, headed by the World Trade Organization (WTO);[6] the climate change regime, led by the Conferences of Parties to the United Nations Framework Convention on Climate Change (UNFCCC);[7] and

[6] Agreement Establishing the World Trade Organization (Marrakesh, 15 April 1994, 1 January 1995), 33 ILM 1143.

[7] United Nations Framework Convention on Climate Change (New York, adopted 9 May 1992, entered into force 21 March 1994), 31 ILM 849.

the law of the sea regime, dominated by the United Nations Convention on the Law of the Sea,[8] exemplify common descriptions of separate but connected areas of international law.

Such arrangements conform to the idea of regimes as 'sets of norms, decision-making procedures and organisations coalescing around functional issue-areas and dominated by particular modes of behaviour, assumptions and biases'.[9] This definition is a hybrid of terms deployed and developed within international law and international relations (IR) scholarship.[10] In the latter context, 'regime theory' concentrates on normative developments by States (and more specifically, governments) within regimes. Similarly, a growing body of work on 'regime complexes'[11] identifies how narrowly framed regimes devised by States are linked together to address set issues.

A similar preoccupation with the interests of States pervades the understanding of 'regimes' in international law. Early usage of the term 'regimes' by the International Court of Justice combined it with the adjective 'self-contained', to emphasise a system of legal prescriptions (relating to diplomatic law) that contained its own rules on the consequences of breach.[12]

[8] United Nations Convention on the Law of the Sea (Montegobay, adopted 10 December 1982, entered into force 16 November 1994), 1833 UNTS 397.

[9] Young, 'Introduction: The Productive Friction between Regimes', 11, building on Stephen Krasner's seminal definition in his 'Structural Causes and Regime Consequences: Regimes as Intervening Variables' in Stephen Krasner (ed.), *International Regimes* (Ithaca: Cornell University Press, 1983), 3 (regimes are 'sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations'); see also Oran Young, *International Cooperation: Building Regimes for Natural Resources and the Environment* (Ithaca: Cornell University Press, 1989), 1. Note the different use of the term 'regime' to refer to government authority within a state, see e.g. James Crawford, 'Sovereignty as a Legal Value' in James Crawford and Martti Koskenniemi (eds.), *The Cambridge Companion to International Law* (Cambridge University Press, 2012), 127; also exemplified by the genteelism 'regime change' when governmental authority is challenged by intervention in domestic affairs by an external state.

[10] The following overview is a brief summary of the more detailed analysis in Young, 'Introduction: The Productive Friction between Regimes', 4–11.

[11] See e.g. Kal Raustiala and David Victor, 'The Regime Complex for Plant Genetic Resources', *International Organization*, 58 (2004), 277; Robert Keohane and David Victor, 'The Regime Complex for Climate Change', *Perspectives on Politics*, 9 (2011), 7.

[12] *Consular Staff in Tehran (USA* v. *Iran)*, ICJ Reports (1979), para. 86. See further Bruno Simma, 'Self-Contained Regimes', *Netherlands Yearbook of International Law*, 16 (1985), 115 and 117. For criticism of the Court's use of the term, see James Crawford and Penelope Nevill, 'Relations between International Courts and Tribunals: The "Regime Problem"' in Margaret A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, 2012), 235, 259.

The ILC now prefers the term 'special regimes' in its conceptualisation of the operation of *lex specialis* in the context of resolving conflicts of norms arising from the fragmentation and diversification of international law.[13]

Whilst the ILC's use of the term 'special regimes' generally reiterates the centrality of States in regime formation and operation, the third of its three offered definitions hints at a broader conception.[14] If 'regimes' are defined to include bodies of 'functional specialization or teleological orientation', such as environmental law or trade law,[15] arguably a wide number of actors besides States are included in the definition. Specialisation connotes an expertise, and possibly a 'professional mindset',[16] most commonly belonging to technical experts operating within secretariats but also within tribunals, NGOs and other bodies. Understanding the contribution made by these actors to regimes underpins IR scholarship on 'epistemic communities'.[17] It is also part of the broader realisation that the conflict between regimes in international law reflects wider societal conflicts.[18]

Two consequences relevant to the current chapter flow from this broad understanding of regimes. First, the enhanced recognition of the role of non-State actors – especially international inter-governmental organisations and NGOs – in the formation and operation of regimes[19] displaces sovereign States as the sole drivers of regime interaction. Secondly,

[13] See ILC Study Group Analytical Study, 81–2 (para. 152), 248 (para. 492). For definitions, see ILC Study Group Conclusions, 11–12, para. 12.

[14] This usage applies when 'all the rules and principles that regulate a certain problem area are collected together so as to express a "special regime". Expressions such as "law of the sea", "humanitarian law", "human rights law", "environmental law" and "trade law", etc. give expression to some such regimes. For interpretative purposes, such regimes may often be considered in their entirety.' Conclusions, *ibid.*

[15] ILC Analytical Study, 72, para. 136.

[16] On the influence of experts on international law, see Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics', *Modern Law Review*, 70 (2000), 1; David Kennedy, 'The Mystery of Global Governance', *Ohio Northern University Law Review*, 34 (2008), 827. See also Andrew T. F. Lang, 'Legal Regimes and Professional Knowledges: The Internal Politics of Regime Definition' in Margaret A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, 2012), 113.

[17] See e.g. Peter Haas, 'Introduction: Epistemic Communities and International Policy Coordination', *International Organization*, 46 (1992), 1.

[18] Andreas Fischer-Lescano and Gunther Teubner, 'Regime-collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', *Michigan Journal of International Law*, 25 (2004), 999.

[19] See Oran Young, 'The Politics of International Regime Formation: Managing Natural Resources and the Environment', *International Organization*, 43 (1989), 353–4.

accounting more clearly for institutions allows for a greater understanding of the changing nature of sovereignty, not only when such institutions facilitate compliance with international law,[20] but also when they facilitate regime interaction.

Institutions are central in efforts to promote interaction within and between regimes. A surprising array of examples document *intra*-regime co-operation. In the human rights field, for example, NGOs have moved far beyond the original expectations which encapsulated their formal consultative status in order to forge normative development and links between UN human rights bodies.[21] In the environmental field, institutional interplay accompanies a great deal of the growth in norms[22] (otherwise termed 'treaty congestion').[23] The trade regime,[24] private property rights and regulation,[25] indigenous peoples' rights[26] and the protection of cultural expression[27] have all undergone further specialisation and internal fragmentation.

Aside from *intra*-regime interaction, a plethora of examples document the growing normative overlap and institutional co-operation *between* regimes. These are too numerous to list in the current chapter,[28] but notable analyses are available on the links between, for instance,

[20] Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1995).

[21] Dianne Otto, 'Institutional Partnership or Critical Seepages? The Role of Human Rights NGOs in the United Nations' in Mashood A. Baderin and Manisuli Ssenyonjo (eds.), *International Human Rights Law: Six Decades After the UDHR and Beyond* (Aldershot: Ashgate, 2010), 317.

[22] Thomas Gehring and Sebastian Oberthür, 'Institutional Interaction: Ten Years of Scholarly Development' in Sebastian Oberthür and Olav Schram Stokke (eds.), *Managing Institutional Complexity: Regime Interplay and Global Environmental Change* (Cambridge, MA: MIT Press, 2011), 25.

[23] Rüdiger Wolfrum and Nele Matz, *Conflicts in International Environmental Law* (Berlin: Springer-Verlag, 2003), 3 and references cited therein.

[24] Jagdish Bhagwati, *Termites in the Trading System: How Preferential Agreements Undermine Free Trade* (Oxford University Press, 2008), 63.

[25] Steven R. Ratner, 'Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law', *American Journal of International Law*, 102 (2008), 475.

[26] Claire Charters, 'Multi-sourced Equivalent Norms and the Legitimacy of Indigenous Peoples' Rights under International Law' in Tomer Broude and Yuval Shany (eds.), *Multi-sourced Equivalent Norms in International Law* (Oxford: Hart, 2011), 289.

[27] Toshiyuki Kono and Steven van Uytsel (eds.), *The UNESCO Convention on the Diversity of Cultural Expressions: A Tale of Fragmentation in International Law* (Cambridge: Intersentia, 2012).

[28] Especially as one considers how the rhetoric of fragmentation has been used strategically throughout history: Anne-Charlotte Martineau, 'The Rhetoric of Fragmentation: Fear and Faith in International Law', *Leiden Journal of International Law*, 22 (2009), 1.

human rights and humanitarian intervention,[29] climate change and human rights,[30] fisheries agreements and trade law,[31] and biodiversity and forests.[32] These regimes are supported by different (and differently empowered)[33] international organisations, have different (or, at the very least, non-identical) members and came into being with laws that were developed at different times and with different functions. Whilst the most obvious clashes between regimes occur during the settlement of disputes,[34] it is clear that the relations between these regimes extend far beyond the headline act of a tribunal forced to identify priority in conflicting norms.[35] Their on-going interactions are often productive for international law and its beneficiaries,[36] yet also present challenges for sovereignty.

The growth of regimes that are detached from sovereign States (but which still conform to the definition of regimes offered at the start of this part[37]) must also be noted. Certain regimes, such as the indigenous legal arrangements relating to the forest, or 'transnational regimes' motivated by sectoral differentiation such as the law of the internet, are not dependent on States and may even be antagonistic to their interests.[38] Clearly, the interaction of regimes in these contexts gives rise to particular

[29] See e.g. Alexander Orakhelashvili, 'The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?', *European Journal of International Law*, 19 (2008), 161.

[30] Stephen Humphreys, 'Introduction: Human Rights and Climate Change' in Stephen Humphreys (ed.), *Human Rights and Climate Change* (Cambridge University Press, 2009), 1.

[31] Margaret A. Young, *Trading Fish, Saving Fish: The Interaction between Regimes in International Law* (Cambridge University Press, 2011).

[32] Harro van Asselt, 'Managing the Fragmentation of International Environmental Law: Forests at the Intersection of the Climate and Biodiversity Regimes', *New York University Journal of International Law and Politics*, 44 (2012), 1205.

[33] Powers relate not only to enforcement (with the WTO regime notably the strongest), but also to the ability of organisations to establish their own administrative arrangements.

[34] For examples, see Crawford and Nevill, 'Relations between International Courts and Tribunals', 235–60.

[35] See also Jeffrey L. Dunoff, 'A New Approach to Regime Interaction' in Margaret A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, 2012), 136.

[36] Young, 'Introduction: The Productive Friction between Regimes'.

[37] See above n. 9 and associated text.

[38] See Gunther Teubner and Peter Korth, 'Two Kinds of Legal Pluralism: Collision of Transnational Regimes in the Double Fragmentation of World Society' in Margaret A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, 2012), 23.

challenges for sovereignty, especially when private legal regimes seek a global, unifying reach that mirrors aspects of constitutionalism.[39]

The ILC Study Group noted the growth in 'quasi-autonomous normative sources' arising at the international level,[40] and the complexity associated with non-governmental participants and other actors.[41] While its recommendations were addressed to States and accorded with a traditional conception of sovereignty (whereby situations of conflict or interpretation were to be resolved by seeking to ascertain the intentions of States parties), it also concluded its pioneering study by calling for further work to be done on 'the notion and operation of "regimes"'.[42] This wider task animates the present chapter, and the next part considers in greater depth the impact on sovereignty wrought by regime interaction.

B Sovereignty and its demands

The concept of sovereignty, though contested,[43] contains a 'presumption of full governmental authority over a polity and territory'.[44] Sovereignty has historically evolved to attach only to States. Regimes are made up of more than just States: as set out above, they include institutions and those actors possessing relevant functional expertise. Though these non-State actors are central to regime interaction, they do not possess sovereignty. Even less relevant to them is sovereign equality, especially considering the wildly divergent concentrations of power and interests they represent.

Modern sovereignty is currently said to be in crisis, with national authority struggling to retain control over challenges presented by an increased trans-boundary movement of people, capital, information and goods.[45] The establishment of regimes, in part to address the challenges of globalisation, is argued to be a specific threat to sovereignty, given the delegation of power from States to collective agreements.[46] The

[39] See, generally, Christian Joerges, Inger-Johanne Sand and Gunther Teubner (eds.), *Transnational Governance and Constitutionalism* (Oxford: Hart, 2004).

[40] ILC Analytical Study, 249. [41] *Ibid.*, 252. [42] *Ibid.*, 249.

[43] Hent Kalmo and Quentin Skinner, 'Introduction: A Concept in Fragments' in Hent Kalmo and Quentin Skinner (eds.), *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (Cambridge University Press, 2011), 1.

[44] Crawford, 'Sovereignty as a Legal Value', 132.

[45] See Richard Joyce, *Competing Sovereignties* (Abingdon: Routledge, 2013), 1–2, and sources therein; see also Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press, 1999), 3.

[46] Thomas M. Franck, 'Can the United States Delegate Aspects of Sovereignty to International Regimes?' in Thomas M. Franck (ed.), *Delegating State Powers: The Effect of Treaty*

counter-argument is that States may (and do) withdraw from regimes, and thus retain their sovereignty in the face of new and emerging international law. In addition, sovereignty may be reinforced by the establishment of regimes that enable States to achieve long-term aims that would otherwise be elusive.[47]

When regimes interact, sovereignty is challenged in a related but slightly different way. At its heart, the challenges posed to sovereignty by regime interaction go to a loss of authority and control by States. If States have ratified the agreements that underpin the interacting regimes, or have otherwise consented to the interaction, sovereignty is not unduly affected. But if the States have not, even *impliedly*, permitted international secretariats to share information, work together, assist in the drafting of new rules, interpret norms or otherwise be influenced by other international regimes, threats to sovereignty may be said to arise. Similar pressures arise when international tribunals within particular regimes take into account laws and material from other regimes in their decisions.

The following examples of regime interaction illustrate the variability of its impacts on sovereignty. Regime interaction apparently most reverential to sovereignty arises if States are members of the relevant regimes before they interact. This situation is promoted by some interpretations of Article 31(3)(c) of the Vienna Convention on Law of Treaties (VCLT),[48] which provides that a treaty may be interpreted with reference to:

> (c) any relevant rules of international law applicable in the relations between the parties.

Though not a mainstream view, a notorious WTO Panel has ruled that Article 31(3)(c) requires overlapping membership between the treaty being interpreted and the treaty (or 'relevant rules') that is said to form the context.[49] According to that Panel, the WTO legal agreements may only be interpreted with reference to other rules of international law, if all

Regimes on Democracy and Sovereignty (New York: Transnational Publishers, 2000), 1. See also Oona Hathaway, 'International Delegation and State Sovereignty', *Law and Contemporary Problems*, 71 (2008), 115.

47 Hathaway, 'International Delegation and State Sovereignty', 141–5.

48 Vienna Convention on the Law of Treaties (Vienna, adopted 22 May 1969, entered into force 27 January 1980), 1155 UNTS 331.

49 Panel Report, *EC – Measures Affecting the Approval and Marketing of Biotech Products* WT/DS291/R, WT/ DS292/R, WT/DS293/R (circulated 29 September 2006), para. 7.68. See further Margaret A. Young, 'The WTO's Use of Relevant Rules of International Law: An Analysis of the *Biotech* Case', *International and Comparative Law Quarterly*, 56 (2007), 907.

WTO members have signed up to those rules. If there is explicit consent by all parties to both sets of regimes, interaction does not unduly affect States parties' rights and duties, and the traditional notion of sovereignty appears to prevail.[50] Yet, like many arguments surrounding sovereignty, the real question is 'whose sovereignty?'[51] On one view, sovereignty is threatened rather than preserved by a rigid prescription of parallel membership. At least notionally, the requirement that regimes have common membership before they share norms grants those States which are *not* members of the relevant regimes a power of veto over the evolution of international law.[52]

A second example also demonstrates apparent fidelity to sovereignty in regime interaction. States often agree that regimes will influence one another, even if they are not parties to all relevant regimes. Rules that allow observer status to international organisations – in negotiations or on-going committee work – are a common feature in bodies such as the WTO, the Food and Agriculture Organisation (FAO) and the Conference of the Parties to the Convention on the International Trade in Endangered Species (CITES).[53] Common membership by States is not a prerequisite to regime interaction, but State consent is.

[50] The domestic analogue to this is a presumption of full policy co-ordination within state agencies, with the state then presenting a united and coherent front to all international regimes. For examples demonstrating the fiction behind such ideals, see Young, *Trading Fish, Saving Fish*, 249–53.

[51] The following statement by the Permanent Court of Justice is often pointed to as a founding argument for sovereignty: 'International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law . . . Restrictions upon the independence of States cannot therefore be presumed.' See *SS Lotus Case (France* v. *Turkey)*, Judgment, 7 September 1927, PCIJ Series A, No. 10 (1927), 18. Yet, as James Crawford points out, the presumption is lessened in external affairs, since the equal rights of other States must be taken into account: James Crawford, 'The Criteria for Statehood in International Law', *British Yearbook of International Law*, 48 (1976), 108. In the *Lotus* case, the Permanent Court was concerned with the freedoms of Turkey (in prosecuting a French officer of the watch after a collision between a French and a Turkish steamship). At Cambridge, we students of James Crawford were prompted to consider how the jurisdictional issue would have been resolved had France's freedoms been at issue.

[52] Margaret A. Young, 'Regime Interaction in Creating, Implementing and Enforcing International Law' in Margaret A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, 2012), 85, 95–6.

[53] Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington, DC adopted 3 March 1973, entered into force 1 July 1975), 983 UNTS 243. See further *ibid.*, 96–7.

A third set of examples of regime interaction has a less certain link with State consent, and therefore with sovereignty. In one example, the WTO Appellate Body referred to the law of international environmental regimes when interpreting WTO norms in the *US–Shrimp* dispute, notwithstanding a lack of parallel membership.[54] Its secretariat also issued a directive for the submission of *amicus* briefs during highly controversial asbestos litigation between Canada and the European Union – an act that foreshadowed the receipt of information from a range of sources, including NGOs from public health regimes.[55] In determining threats to marine species, the CITES secretariat has collaborated with the FAO on scientific and research data, and ultimately entered into a memorandum of understanding on how CITES may protect such species. Finally, the World Bank's Forest Carbon Partnership Facility has forged links with a range of States and non-State entities to develop capacity in forestry governance, despite the absence of a multilateral forestry convention. These activities are part of attempts to establish programmes to reduce emissions from deforestation and forest degradation (the 'REDD' programmes identified above) through incentives paid by States and funding bodies to particular governments.[56] The World Bank's efforts can be viewed as part of an 'assemblage' that includes local forest dwelling and indigenous communities, merchant banks, agricultural companies, environmental NGOs, satellite remote-sensing experts and State regulators.[57]

These examples may satisfy the direct demands of sovereignty if the relevant international organisations are acting within their powers. According to international law, as developed from the early *Reparations* case,

[54] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/AB/R (circulated 12 October 1998); the Appellate Body was following norms of interpretation in the VCLT, especially Art. 31(1); see further Young, *Trading Fish, Saving Fish*, 189–240.

[55] Duncan Hollis, 'Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty', *Boston College International and Comparative Law Review*, 25 (2002), 235.

[56] See International Bank for Reconstruction and Development, *Charter Establishing the Forest Carbon Partnership Facility* (March 2010), Recital B ('[T]he Forest Carbon Partnership Facility [aims] to build partnerships among developed and developing countries, public and private sector entities, international organizations, non-governmental organizations, forest-dependent indigenous peoples and forest dwellers to prepare for possible future systems of positive incentives for REDD, including innovative approaches to sustainable use of forest resources and biodiversity conservation').

[57] William Boyd, 'Climate Change, Fragmentation, and the Challenges of Global Environmental Law: Elements of a Post-Copenhagen Assemblage', *University of Pennsylvania Journal of International Law*, 32 (2010), 457.

international organisations have international legal personality and certain powers may be implied.[58] It may be argued that in situations of legal fragmentation, international inter-governmental organisations impliedly possess relevant powers to interact with other regimes in certain circumstances where such interaction is functionally necessary (just as the United Nations was implied to possess the power to bring an international claim for reparations on behalf of itself and its slain agent). As such, international organisations acting independently of their members in particular circumstances of legal fragmentation do not threaten the sovereignty of their members.

Such a construction, however, does not conform to the current majority view within international institutional law. The International Court of Justice has held that, in construing the implied powers of international organisations, regard will be had to what is functionally necessary given that international organisations have specific specialisations: according to this construction, the World Health Organisation was held *not* to have implied powers to request an advisory opinion on the legality of nuclear weapons, given that this remained the realm of the Security Council.[59] On this view, international competences are parcelled up appropriately as between international organisations, and it will not be necessary for them to interact even as new global issues traversing multiple regimes arise (or at least, if such issues do arise, States parties need to directly consent to inter-regime competences in addressing them).

Apart from the uncertainties surrounding the legal capacity of institutions acting independently from States in situations of regime interaction, threats to sovereignty arise from the enhanced role of experts. These experts are a necessary part of regime interaction (when, for example, data on the decline of fish stocks is sought by the FAO from the CITES secretariat; or when satellite technology and climate modelling is needed by the World Bank to determine REDD recipients). Yet managerial procedures and the resultant decision-making by the privileged and isolated few who are proficient in modes of exchanges between regimes may be part of a wider phenomenon of what has been called a 'technicalisation' of

[58] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, ICJ Reports (1949), 174. See further James Crawford, 'International Law as an Open System' in James Crawford, *International Law as an Open System: Selected Essays* (London: Cameron May, 2002), 19–22.

[59] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 8 July 1996, ICJ Reports (1996), 79.

international affairs.[60] Significant risks may arise from allowing experts within regimes greater latitude in regime interplay. The resultant regime interaction may suggest a rational and coherent resolution of global problems, but in fact may be reinforcing a dominant set of preferences that simply further the agenda of particular regimes.[61] While the interests of some powerful States may well be satisfied by this interaction, the interests – and sovereignty – of others are clearly strained.[62] This seems to replay the historical engagement between power and technology that established early forms of sovereignty and territory through mapping and other techniques.[63]

Yet amongst all these pressures on established notions of sovereignty, it must be recognised that the expertise and interests held by non-State actors are often necessary to confront global issues that cross over many regimes. As James Crawford notes, whilst States maintain some monopolies, such as the collective capacity to determine peremptory norms, 'we now reject other claims to State monopoly formerly associated with the doctrine of sovereignty, in particular the monopoly of rights and the monopoly of representation'.[64] Moreover, even if the interests pursued by non-State actors are *not* considered representative of a citizen majority, they may provide useful perspectives for deliberation and debate.[65] Affected stakeholders are often in the best position to review information.[66] Open participation leads to better implementation

[60] Koskenniemi, 'The Fate of Public International Law'; see also Martti Koskenniemi, 'International Law: Constitutionalism, Managerialism and the Ethos of Legal Education', *European Journal of Legal Studies*, 1 (2007) (online reference: see www.ejls.eu/1/4UK.pdf); Stephen Toope, 'Emerging Patterns of Governance and International Law' in Michael Byers (ed.), *The Role of Law in International Politics* (Oxford University Press, 2000), 106.

[61] Martti Koskenniemi, 'Hegemonic Regimes' in Margaret A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, 2012), 305.

[62] For an analysis of how powerful states maintain their dominance in conditions of fragmentation, see Eyal Benvenisti and George W. Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law', *Stanford Law Review*, 60 (2007), 595.

[63] Michael Biggs, 'Putting the State on the Map: Cartography, Territory, and European State Formation', *Comparative Studies in Society and History*, 41 (1999), 399.

[64] Crawford, 'International Law as an Open System', 38.

[65] See e.g. the call for NGO participation in WTO decision-making to ensure the inclusion of ideas that are 'overlooked or undervalued by governments': Steve Charnovitz, 'WTO Cosmopolitics', *NYU Journal of International Law and Politics*, 34 (2002), 343.

[66] Michael Dorf and Charles Sabel, 'A Constitution of Democratic Experimentalism', *Columbia Law Review*, 98 (1998), 267.

of rules,[67] and promotes learning, information-exchange, peer review and cross-forum experimentation across a range of international organisations.[68] The challenge is therefore to identify how the demands of sovereignty can be met through the participation of a multitude of actors besides States in regime interaction.

C How regime interaction can satisfy the demands of sovereignty

This chapter has pointed to the involvement of a range of actors in global issues that traverse the boundaries of multiple international regimes. These include non-State actors advancing divergent interests and expertise in subject areas such as public health (in the case of the *amicus* briefs at the WTO), marine species preservation (in the case of the CITES secretariat), forest subsistence (in the case of indigenous communities) and even wealth maximisation (in the case of merchant banks involved in REDD projects). Their involvement demonstrates that international law is not simply an inter-State system but instead can be viewed as a multiplicity of State and non-State actors participating in a range of globalising processes.[69]

In some examples, States explicitly or impliedly consent to regime interaction, thus satisfying a pure, positivist conception of sovereignty. But in others, non-State actors appear to be participating independently of the wishes of sovereign States. When these actors shape the production of knowledge, determine facts and draw upon law, they join States parties in controlling the intersections between regimes and their outcomes. Can the demands of sovereignty be satisfied in these situations? This part argues in the affirmative, by setting out the necessary legal conditions for international law to address issues of real complexity that cover multiple fields of functional and professional specialisation whilst retaining legitimacy.

[67] See e.g. David Victor, Kal Raustiala and Eugene Skolnikoff, 'Introduction and Overview' in David Victor, Kal Raustiala and Eugene Skolnikoff (eds.), *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (Cambridge, MA: MIT Press, 1998), 21–4.

[68] See e.g. the need for a wide range of inter-governmental organisations, besides the ones with traditional mandates for fisheries, to co-operate on sustainability: Young, *Trading Fish, Saving Fish*, 275.

[69] On multiplicity of actors, see further Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press, 2006), 340.

Without direct consent, sovereignty can be satisfied by determining the representative or deliberative credentials of non-State actors according to known public law traditions for assessing accountability.[70] The assessment differs as between international inter-governmental organisations and NGOs. The substance and mode of development of the relevant intersecting norms will also determine the legitimacy of regime interaction. There will be times when legitimacy is not satisfied and it will not be appropriate for international organisations and NGOs to control the interaction between regimes, as set out below.

For international organisations mediating the boundaries between regimes, there is a constant and continuous need for inter-regime scrutiny, not just of the relevant norms but also of the actors conveying those norms. For example, when the CITES secretariat collaborates with the FAO about the status of fish stocks, its recommendations to list species will be subject to a vote by CITES parties.[71] When a WTO Panel draws upon norms developed by international standard-setting bodies, it must determine that the relevant body was open to all WTO members.[72] There are examples when international organisations will determine that the requisite standards for regime interaction are not met. Consider, for example, the World Health Organisation's decision to restrict the involvement of tobacco lobbies in the development of the Framework Convention on Tobacco Control: whilst those lobbies represent 'affected stakeholders', their lack of open, transparent and ethical practices were grounds to deny them participation.[73]

This legal framework for regime interaction posits a kind of gatekeeper role for relevant international organisations to use norms that are exogenous to their own regime. International organisations are empowered to have regard to whether there is a high degree of international consensus

[70] The following is developed from what I have argued to be a 'legal framework for regime interaction' in the context of fisheries governance: see Young, 'Regime Interaction in Creating, Implementing and Enforcing International Law', 98–109. See further, Young, *Trading Fish, Saving Fish*, 241–306.

[71] Young, *Trading Fish, Saving Fish*, 278.

[72] Relatedly, standard setting bodies are also encouraged to operate with open, impartial and transparent procedures: see WTO Doc. G/TBT/1/Rev.8 (Decision of the TBT Committee on Principles for the Development of International Standards, Guides and Recommendations), discussed in Young, *Trading Fish, Saving Fish*, 279.

[73] World Health Organisation, Report of the Committee of Experts on Tobacco Industry Documents, 'Tobacco Company Strategies to Undermine Tobacco Control Activities at the World Health Organization' (July 2000), 244, cited in Young, *Trading Fish, Saving Fish*, 283–4.

to those norms. This may include inquiries into whether the norm has been agreed by a range of developing countries as well as developed countries. The substance of the norm will also dictate its relevance: for example, where norms developed by transnational regimes exhibit a 'tunnel vision' that disregards broader questions of public interest more commonly absorbed in the norms of national legal systems, this may lessen its relevance.[74] Moreover, whether the norm was *itself* developed in an open and accessible way is relevant in a decision to accord it influence.[75]

The gatekeeper role of international organisations also requires them to assess the deliberative credentials of NGOs wishing to influence regime interaction. Such assessment will have regard to an NGO's relevant functions, constituencies and intended beneficiaries and also ask whether it operates in an open, accessible, transparent and participatory way.[76] Disclosure of funding, as required by some but not all international organisations, would seem necessary in this process.[77] Private bodies that seek to accredit NGOs[78] can provide evidence of good practice, in a tantalising example of sovereignty being strengthened by non-State processes.

This suggestion of a mediating role for international organisations accords with sociological theories of Gunter Teubner and others who support polycentric constitutionalism, where State-based norm-generative processes are supplemented and sometimes supplanted by processes within particular regimes.[79] As has been observed within those theories, the State continues to play an important role in such processes.[80] Sovereignty remains important even if it is somewhat hidden under layers

[74] Teubner and Korth, 'Two Kinds of Legal Pluralism'.

[75] *Cf.* the OECD, which is a closed group representing only thirty developed countries; see further Young, *Trading Fish, Saving Fish*, 282.

[76] See Sasha Courville, 'Understanding NGO-based Social and Environmental Regulatory Systems: Why We Need New Models of Accountability' in Michael W. Dowdle (ed.), *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge University Press, 2006), 271.

[77] The United Nations, for example, requires NGOs to provide details about funding, but the World Intellectual Property Organisation does not. See further Young, *Trading Fish, Saving Fish*, 282–3. The guidelines issued by the WTO Appellate Body in the *EC-Asbestos* appeal (see above n. 55 and surrounding text) required *amicus* briefs to state the nature of their interest.

[78] See e.g. the International Social and Environmental Accreditation Alliance (ISEAL Alliance), available at www.isealalliance.org.

[79] See Gunther Teubner, 'Constitutionalizing Polycontexturality', *Social and Legal Studies*, 20 (2011), 210.

[80] Gert Verschraegen, 'Hybrid Constitutionalism, Fundamental Rights and the State: A Response to Gunther Teubner', *Netherlands Journal of Legal Philosophy*, 40 (2011), 216.

of other legal – or even constitutionalising – activities. However, sovereignty may be said to rise to the surface in some particular situations of normative conflict. For example, when intersecting regimes involve indigenous norms, the resulting clashes between the social embeddedness of legal systems of indigenous societies and the formal law of modern international regimes are not resolvable through general conflict rules.[81] Instead, institutionalised and proceduralised protection of the basic rights of those groups that are otherwise marginalised is more appropriate. In mediating regime interaction in REDD policies, for example, the inclusion of the interests of indigenous and forest-dwelling communities must, at the very least, require prior informed consent and benefit-sharing. While such guarantees are beginning to be located in international regimes,[82] the fulfilment of such rights for indigenous peoples often depends once again on laws and processes within sovereign States.

These arguments for a legal framework of regime interaction seek to safeguard an attenuated form of sovereignty. The framework prioritises administrative law-type procedures of openness, transparency and reason-giving,[83] although these procedures operate at the level of regimes rather than within internal regulatory agencies.[84] The emphasis on inclusivity in situations of polycontextuality also follows existing literature on transnational governance, which rests an ideal of democratic legitimacy on the involvement of a broad sphere of actors.[85] An extension of these ideas could even found a renewed set of sovereign responsibilities, which require States to be *other-regarding* in their dealings with intersecting

[81] Teubner and Korth, 'Two Kinds of Legal Pluralism'.

[82] See Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity, foreshadowed in Teubner and Konth, 'Two Kinds of Legal Pluralism', 52; see also the United Nations Declaration on the Rights of Indigenous Peoples, A/RES/61/295, 2 October 2007 and UNFCCC Cancun Agreement, Decision 1/CP. 16, FCCC/CP/2010/7/Add. 1 (2010), Appendix I.

[83] For related attempts to locate accountability structures in non-traditional sites of globalised law-making, see Benedict Kingsbury, Nico Krisch and Richard Stewart, 'The Emergence of Global Administrative Law', *Law and Contemporary Problem*, 68 (2005), 15.

[84] On the classification of norms from global administrative law, see Teubner, 'Constitutionalizing Polycontexturality', 219.

[85] Patrizia Nanz, 'Democratic Legitimacy and Constitutionalisation of Transnational Trade Governance: A View from Political Theory' in Christian Joerges and Ernst-Ulrich Petersmann (eds.), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Oxford: Hart, 2006), 80; see also Inger-Johanne Sand, 'Polycontextuality as an Alternative to Constitutionalism' in Christian Joerges, Inger-Johanne Sand and Gunther Teubner (eds.), *Transnational Governance and Constitutionalism* (Oxford: Hart, 2004), 41.

regimes.[86] The promotion of structures of accountability for States and non-State actors is necessary within an enriched theory of sovereignty that allows international law to better address global complexity.

Conclusion

While noting the stability and continuity of sovereignty as a key notion of international law, James Crawford also recognises that in times of vast political change, international law will change. He notes, '[t]he difficulty is to envision appropriate forms of change, and at the same time to hold to those aspects of international law which embody the stable outcomes of the interaction between peoples, societies and their governments over many years'.[87] This chapter demonstrates that the modern phenomenon of fragmentation, which has seen international law develop into myriad regimes of different specialisations, norms, memberships and scope, leads to challenges for sovereignty. Global problems do not fall neatly into existing regimes, and international organisations and other actors must often work together, or at least concurrently, on global issues. If sovereignty demands that the consent of States underlies the flow of norms and the shaping of knowledge between regimes, such activities cannot be accounted for. Nor can a purely positivist conception of sovereignty account for situations of normative pluralism when the relevant intersecting regimes include private transnational arrangements, or indigenous systems, some of which have developed separately from, or specifically without, national support.

This chapter has argued that these challenges to sovereignty can be met by structures of accountability that ensure the accessibility and participation of a range of State and non-State actors. Such a system builds on already established roles of international organisations, and provides them with guidance in mediating the norms and practices of exogenous regimes. It also acknowledges situations where participation is legitimately denied, if international organisations and NGOs fail to demonstrate requisite credentials and credibility. Furthermore, for special situations of indigenous systems, substantive protections may also be necessary. In current and

[86] For one examination of whether sovereigns must incorporate in their decision-making the concerns of those they affect, see Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders', *American Journal of International Law*, 107 (2013), 295.

[87] James Crawford, 'Democracy and International Law', *British Yearbook of International Law*, 63 (1993), 113, 133.

emerging situations of regime interplay, including between forestry governance and carbon markets, health and trade and fisheries management and conservation, State sovereignty may co-exist, and even be strengthened, by such arrangements. The interaction of regimes in situations of legal fragmentation, if based on an open, but rigorous, conception of membership and participation, can ensure the viability and application of international law to the issues of our day.