INSTITUTE FOR INTERNATIONAL LAW AND JUSTICE
NEW YORK UNIVERSITY SCHOOL OF LAW

International Law and Justice Working Papers

IILJ Working Paper 2006/10
Global Administrative Law Series

Deliberation and Legitimacy in Transnational Environmental Governance

Neil Craik
University of New Brunswick Faculty of Law

ISSN: 1552-6275

New York University School of Law
New York, NY 10012
U.S.A.

Cite as:
IILJ Working Paper 2006/10
(Global Administrative Law Series)
(www.iilj.org)

Deliberation and Legitimacy in Transnational Environmental Governance: The Case of Environmental Impact Assessment

Abstract

by Neil Craik

Transnational environmental governance institutions are facing an escalating legitimacy crisis that comes about in part due to the absence of mechanisms ensuring that decision-makers are democratically accountable to persons affected by their decisions. Most prominently, accountability concerns arise in a transboundary context where decisions made in one state have environmental impacts on persons outside that state whose interests are not democratically represented within the source state. Similar concerns arise in the context of international institutions where the decisions taken and principles developed are directed towards groups, such as indigenous groups or other minorities, whose interests are inadequately represented by the state at the international level. One promising line of inquiry that seeks to bridge this accountability gap concerns the adaptation of deliberative models of democratic governance to transnational contexts. Deliberative models, which emphasize the role of mutual justification through reasoned dialogue as the basis for democratic legitimacy, are not tied to territorial boundaries or existing political structures to the extent that representative democratic models are. In this regard, deliberative democracy may better suit the blurred divisions between domestic/international and public/private settings that characterize transnational environmental issues. However, much of the scholarly work to date surrounding transnational deliberative democracy has been conceptual in nature, with little attention being given to existing mechanisms within governance structures that may promote deliberative processes at the transnational level.

As a means to analyze the strengths and limitations of deliberative democratic processes in the context of transnational environmental decision-making, this paper considers the ability of international commitments to conduct environmental impact assessments (EIAs) to foster public, reasoned and discursive interactions between actors in the transnational sphere. EIAs, as a mechanism to implement international environmental

objectives, have been embraced by international policy-makers in a wide range of contexts, including transboundary pollution, biodiversity, climate change and marine pollution. While the central idea that animates the EIA process is that decisions affecting the environment should be made in light of a comprehensive understanding of their impacts, EIAs go beyond simply requiring the *ex ante* consideration of scientific issues by promoting an information rich and participatory environment for agency decision-making. Moreover, notwithstanding their evaluative mandate, EIA commitments do not impose substantive obligations to avoid environmental harm. Rather the process is self-regulatory and reflexive; requiring decision-makers to account for and respond to the views of affected persons, and justify their decisions in light of their adherence to both right process and prevailing substantive environmental norms. EIAs, in effect, require decision-makers to engage affected persons in a principled and justificatory dialogue and can therefore be viewed as a mechanism to enhance accountability through deliberative practices.

Drawing on domestic and transnational examples of EIA processes related to transboundary pollution, biological diversity and climate change, this paper seeks to contribute to the debate on the suitability of deliberative models of democracy in transnational environmental governance structures by demonstrating how an existing set of institutionalized decision-making processes actually structures interactions between transnational actors and contributes to accountability in transnational environmental decision-making.

Deliberation and Legitimacy in Transnational Environmental Governance: The Case of Environmental Impact Assessment

by Neil Craik

1. Introduction

A prevailing preoccupation among theorists of globalization is the relative absence of democratic institutions in the transnational sphere as compared to the domestic sphere. Indeed, the "democratic deficit" is a shortcoming of transnational governance that is of equal concern to commentators and scholars on both the right and left.[1] With the former objecting to the impact of unaccountable policy makers on national sovereignty and on individual liberties;[2] and the latter expressing concern that international institutions entrench existing power and wealth distributions on a global level, in part because these institutions are impervious to the voices of those most affected by their decisions.[3] Regardless of the underlying political perspective, these criticisms share a number of common premises. Firstly, transnational institutions matter in the most fundamental way: they are capable of affecting the lives of ordinary citizens.[4] Secondly, those who are affected by decisions are entitled to have some say in how those decisions are made. And thirdly, democratic institutions and procedures at the state level and state representation at the international level are insufficient to address the democratic deficiencies of transnational governance structures.

While the democratic credentials of transnational governance structures have been questioned most visibly (and most audibly) in international economic institutions, such as the World Bank and the World Trade Organization, transnational environmental institutions have

---

[1] But see Andrew Moravcsik, "Is there a 'Democratic Deficit' in World Politics? A Framework for Analysis" (2004) 39:2 Government and Opposition 336.
[2] Jeremy Rabkin, *Why Sovereignty Matters* (Washington, DC: AEI Press, 1998). But see, Andrew Moravcsik, "Conservative Idealism and International Institutions" (2000) 1 Chicago J. Int'l L. 291.
[3] Naomi Klein, *No Logo* (New York: Picador USA, 1999) at 129. But see Michael J. Trebilcock, "Critiquing the Critics of Economic Globalization" (2005) 1 J. Int'l L. & Int'l Rel. 213.
[4] While this may appear to some as an obvious, even trite, observation, it remains a contested one: see Joseph M. Grieco, "Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism" in Robert J. Beck, Anthony Clark Arend and Robert D. Vander Lugt, eds., *International Rules: Approaches from International Law and International Relations* (New York: Oxford University Press, 1996) 147.

also given rise to concerns regarding their democratic legitimacy.[5] The emergence of legitimacy concerns is reflective of the changing nature of environmental governance beyond the nation state in an increasingly interdependent world. While states still hold a preeminent position in the regulation of environmental resources, they increasingly share this responsibility with a diffuse collection of governmental and non-governmental actors. In terms of the institutional structure of environmental governance, the use of treaties as the primary mechanism for interstate cooperation is supplemented by less formal approaches to norm creation and implementation, such as trans-governmental networks, epistemic communities, and the extraterritorial application of domestic laws. Even where treaties do form the basis of environmental cooperation, these treaties are more regulatory in their nature, in the sense that the treaty structure may contemplate the development of rules and guidelines by subsidiary bodies, may delegate compliance and dispute resolution functions, and in the cases of some international organizations, may involve significant amounts of bureaucratic decision-making.

An important source of the legitimacy crisis is that state consent as the *conditio sine qua non* of legitimate governance beyond the state is either unavailable or inadequate. As transnational environmental governance structures become more complex and affect more people, more directly, the lines of democratic accountability have become increasingly attenuated.

One promising line of inquiry that seeks to bridge the legitimacy gap in transnational environmental governance is deliberative democratic theory. What distinguishes deliberative democratic theory from other democratic theories is its emphasis on reciprocal justification as the principle basis for legitimacy. Whereas liberal (individualist) theories tend to emphasize the aggregation of fixed interests through voting or other consent granting mechanisms, deliberative approaches emphasize the possibility of persuasion through reasoned and public forms of policy justification. Because deliberative democratic approaches require policy-makers to direct their justifications to those persons who are most affected by their decisions and account for the interests of those affected, deliberative approaches are well suited to the transnational character of many environmental governance structures. However, notwithstanding the theoretical promise of deliberative democracy to address legitimacy concerns arising from environmental governance beyond the state, it should be acknowledged that too little attention has been given to existing

[5] Daniel Bodansky, "The Legitimacy of International Governance: A Coming Challenge for International Environmental Law" (1999) 93 A.J.I.L. 596 [Bodansky]. See also Stephen Bernstein, "Legitimacy in Global Environmental Governance" (2005) 1 J. Intl L. & Intl. Rel. 139.

mechanisms within governance structures that may promote deliberative processes at the transnational level.[6] Put another way, and this goes directly to a central criticism of the extension of democratic theory to the transnational sphere, there is a need to test to plausibility of deliberative democracy as a working policy approach.

With this in mind, this paper has three major objectives. Firstly, I seek to describe the link between forms of environmental governance and forms of legitimacy. The main points presented here are that the emerging transnationalism of environmental governance requires a form of legitimation that is not inextricably tied to territorial boundaries or existing political structures, and that legitimacy must rest on both procedural and substantive norms and address the substantial role of science in environmental policy making.

Secondly, I consider what I refer to as the "theoretical promise of deliberative democracy" to address legitimacy concerns in transnational environmental governance structures. The nature of deliberative democracy itself is a highly contested matter, and, in this regard, I focus on one particular approach to deliberative democratic theory; that put forward by Amy Gutmann and Dennis Thompson.[7] This part of the paper presents a number of key debates within the literature on deliberative democratic theory, as they relate to environmental governance issues: namely, the feasibility of extending deliberative democratic models to the transnational sphere; the extent to which deliberative models can address issues of substantive legitimacy; and the relationship between international legal norms and deliberative democracy. I conclude that deliberate democratic theory has strong theoretical potential to address legitimacy concerns in transnational environmental government structures, but there remain unanswered questions respecting whether deliberative democracy can be successfully translated into a workable strategy for generating policy decisions.

To this end, as a means to analyze the strengths and limitations of deliberative democratic processes in the context of actual transnational environmental decision-making, the third part of this paper considers the ability of international commitments to conduct environmental impact

---

[6] Graham Smith, *Deliberative Democracy and the Environment* (New York: Routledge, 2003) at 6 [Smith] (noting , "[m]uch work on deliberative democracy can be criticized on the grounds that it is purely theoretical and speculative…").

[7] Amy Gutmann & Dennis Thompson, *Why Deliberative Democracy* (Princeton: Princeton University Press, 2004) [Gutmann & Thompson]; Amy Gutmann & Dennis Thompson, *Democracy and Disagreement: Why Moral Conflict Cannot Be Avoided in Politics, and What Should Be Done about It* (Cambridge: The Belknap Press of Harvard University Press, 1996) [*Democracy and Disagreement*].

assessments (EIAs) to foster public, reasoned and discursive interactions between actors in the transnational sphere. EIA, as a mechanism to implement international environmental objectives, has been embraced by international policy-makers in a wide range of contexts, including transboundary pollution, biodiversity, climate change and marine pollution. While the central idea that animates the EIA process is that decisions affecting the environment should be made in light of a comprehensive understanding of their impacts, EIAs go beyond simply requiring the *ex ante* consideration of scientific issues by promoting an information rich and participatory environment for agency decision-making. Moreover, notwithstanding their evaluative mandate, EIA commitments do not impose substantive obligations to avoid environmental harm. Rather the process is self-regulatory and reflexive; requiring decision-makers to account for and respond to the views of affected persons, and justify their decisions in light of their adherence to both right process and prevailing substantive environmental norms. EIAs, in effect, require decision-makers to engage affected persons in a principled and justificatory dialogue and can therefore be viewed as a mechanism to enhance accountability through deliberative practices.

Drawing on domestic and transnational examples of EIA processes, this paper seeks to contribute to the debate on the suitability of deliberative models of democracy in transnational environmental governance structures by demonstrating how an existing set of institutionalized decision-making processes structures interactions between transnational actors and contributes to accountability in transnational environmental decision-making.

2. Legitimacy in Transnational Environmental Governance

This paper makes a purposeful distinction between international governance, on the one hand, and transnational governance, on the other. By focusing on transnational governance structures, I mean to capture, in addition to the norms, rules and institutions created by cooperating national governments and governing the interactions between national governments, those norms, rules and institutions that impact the interactions that occur between sub-state actors and agencies across national borders and between the individuals in one state and public officials in another state. Transnationalism in environmental governance flows from the nature of environmental problems themselves, in which the regulated entities are most often private firms, and the regulatory beneficiaries are individuals and groups.[8] Transnationalism in environmental

[8] The term "governance" here means those arrangements, both formal and informal, used by both individuals and institutions, to manage their common affairs. See Commission on Global Governance, *Our*

matters may not be new in the sense that the dynamic of private polluters affecting discrete groups of individuals across borders is an emerging phenomenon.[9] However, what is becoming more apparent is that there is a greater density of transnational interactions and that consistent forms of transnational governance are becoming more entrenched. It is the recognition of transnational interactions as patterns of governance, as opposed to *ad hoc* arrangements, that gives rise to legitimacy concerns. Given the varied nature of transnational environmental governance structures, I consider below the principal forms of governance that have been identified in this context and the legitimacy concerns to which these forms of governance give rise.

a) Forms of Transnational Environmental Governance[10]

International Institutions. The most prominent form of environmental governance beyond the state remains treaty based regimes and their associated institutional structures. These arrangements themselves are extremely varied in their complexity, but most environmental treaties go beyond the purely consensualist model of treaty-making ordinarily contemplated in international law.[11] These traditional arrangements raise few procedural legitimacy concerns because of their voluntaristic and contractual nature, where no state can be bound by obligations to which it has not specifically consented. The difficulty is that rigid adherence to consent requirements negatively impacts the effectiveness of the international community to address identified environmental ills.[12] Firstly, consent to a set of specific commitments is often difficult to achieve among large groups of state parties. In other areas of international law, this barrier can

---

Global Neighbourhood (Oxford: Oxford University Press, 1995) at 5. See also Thomas Risse, "Transnational Governance and Legitimacy" (Paper presented to the Fifth Pan-European International Relations Conference, September 2004) at 3-4, online: Standing Group on International Relations < http://www.sgir.org/archive/index.htm > [Risse]. This paper does not address purely private forms of governance, such as private contracts.

[9] Most notably in this regard is the *Trail Smelter Arbitration*: *United States v. Canada* (1939) 33 A.J.I.L. 182 and *United States v. Canada* (1941) 35 A.J.I.L. 684 [*Trail Smelter*].

[10] The three principal forms of governance outlined here correspond to three types of globalized administrative regulation identified by Kingsbury, Krisch and Stewart in their examination of global administrative law. Kingsbury, Krisch and Stewart also recognize forms of public private/private regulation and regulatory activities by private bodies, see Benedict Kingsbury, Nico Krisch & Richard B. Stewart, "The Emergence of Global Administrative Law" (2005) 68:3 Law & Contemp. Probs. 15 at 20 [Kingsbury, Krisch & Stewart].

[11] See for example, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679; Geoffrey Palmer, "New Ways to Make International Environmental Law" (1992) 86 A.J.I.L. 259 at 272 [Palmer];

[12] Jutta Brunnée, "COPing with Consent: Law-Making Under Multilateral Environmental Agreements" (2002) 15 Leiden J. Int'l L. 1 [Brunnée].

be partly overcome through the use of reservations, but allowing states to opt out of certain obligations is often more problematic in environmental treaties due to free-rider concerns and "package deal" negotiations.[13] The desire for unanimity is reflected in the broad use of framework conventions that favour inclusive membership by limiting the extent of substantive obligations and opting to move to more precise and formally binding commitments through the negotiation of subsequent instruments.[14] Consequently, environmental treaty-making has been criticized for being time consuming and too often resulting in weak and ambiguous commitments.[15] Secondly, because environmental issues are frequently affected by issues of evolving levels of scientific certainty and technological change, there is a demand for responsive policy-making at the international level that is compromised by the formal treaty making process, which requires state representatives to convene to negotiate solutions and for each state to subject the results of those negotiations to their domestic ratification process. The ratification process itself delays the implementation of agreed upon rules; further reducing the effectiveness of the rule-making process.[16] The costs involved in *ad hoc* treaty making and subsequent treaty amendments are apt to be unacceptably high when compared with the diffuse and uncertain benefits that environmental treaties can deliver.

The structure of international environmental treaty-making has responded to these efficiency concerns by developing mechanisms to circumvent the need for individual and formalized state consent to specific environmental obligations. This has been most commonly achieved through treaty provisions allowing for executive branches of the government to assent to rule changes without recourse to ratification procedures, majoritarian decision-making processes and delegation of administrative powers to committees and treaty-based bureaucracies. This approach to policy-creation at the international level can be described as a governance approach,

---

[13] See, e.g., *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 3, 21 I.L.M. 1261 (entered into force 16 November 1994) [*UNCLOS*]., Art. 309-10. See also *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 U.N.T.S. 107, 31 I.L.M. 849 (entered into force 21 March 1994) [UNFCCC]; *The Vienna Convention for the Protection of the Ozone Layer*, 22 March 1985, 1513 U.N.T.S. 323, 26 I.L.M. 1529 (entered into force 22 September 1988) [*Ozone Convention*]. Article 24 of the UNFCCC and Article 18 of the Ozone Convention prohibit reservations.

[14] This approach, commonly referred to as the "Framework Treaty/Protocol" approach is described in Günther Handl, "Environmental Security and Global Change: The Challenge to International Law" (1990) 1 Y.B. Int'l Env. L. 3 [Handl]; See also Lawrence Susskind & Connie Ozawa, "Negotiating More Effective International Environmental Agreements, in Andrew Hurrell & Benedict Kingsbury, eds., *The International Politics of the Environment* (Oxford: Oxford University Press, 1992) 142.

[15] Palmer, *supra* note 11.

[16] See Wolfgang H. Reinicke & Jan Martin Witte, "Interdependence, Globalization, and Sovereignty: The Role of Non-binding International Legal Accords" in Dinah H. Shelton (ed.), *Commitment and Compliance: The Role of Binding Norms in the International Legal System* (Oxford: Oxford University Press, 2000) 75 at 88.

as distinct from the traditional contractual approach. The legitimacy of these types of mechanisms remains underlain by consent, but here the consent is not to the specific rule, but rather states agree that certain rules may be determined through alternative procedures to treaty amendment.[17] However, the more attenuated the link is between formal state consent and the rule in question, the more difficult it becomes to justify the exercise of authority on the basis of that consent alone.

The governance approach in international environmental law and policy did not arise fully formed, but was arrived at incrementally, and is still evolving. For example, the *Ramsar Convention on Wetlands of International Importance* uses a list to identify those wetlands subject to the treaty obligations.[18] The list is not formally part of the treaty itself and consequently state parties may add or delete sites from the list without recourse to ratification processes at the domestic level. The use of subsidiary instruments, such as lists and annexes that are subject to different approval processes has since become a staple part of international environmental law-making.[19] Likewise, there are examples of non-unanimous decision making in early treaties, such as the *International Convention for the Regulation of Whaling* and certain fisheries regimes, but these mechanisms were often tempered by opt-out clauses,[20] allowing non-consenting parties to avoid being bound by the decision by affirmatively advising the other parties of their decision not to be bound, or by restriction of majoritarian decision-making to matters perceived as being technical in nature.[21] However, in the *Montreal Protocol* to the *Convention for the Protection of the Ozone Layer,* the parties go further by providing for binding decisions respecting adjustments to control measures for ozone depleting substances to be made on the basis of a doubled-weighted

[17] Bodansky, *supra* note 5 at 604, distinguishing between "general legitimacy and specific legitimacy".
[18] *Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar)*, 2 February 1971, 996 U.N.T.S. 243; 11 I.L.M. 969 (entered into force 21 December 1975). Article 2 requires each contracting party to designate suitable wetlands within its territory for inclusion on the list.
[19] *Convention on Long-Range Transboundary Air Pollution*, 13 November 1979, 1302 U.N.T.S. 217, 18 I.L.M. 1442 (entered into force 16 March 1983); *Ozone Convention*, *supra* note 12; *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 3 March 1973, 993 U.N.T.S. 243 (entered into force 1 January 1975) [CITES]; *International Convention for the Prevention of Pollution from Ships*, 2 November 1973, 1340 U.N.T.S. 184, 12 I.L.M. 1319 (entered into force 2 October 1983) [MARPOL].
[20] *International Convention for the Regulation of Whaling,* 2 December 1946, 161 U.N.T.S. 72 (entered into force 10 November 1948). Article V(3) provides for escape clause from conservation measures adopted by International Whaling Commission by three-fourths majority vote.
[21] E.g. Fisheries Agreements restricting majoritarian decision making to regulations regarding equipment, but not quotas, discussed in Patricia Birnie & Alan Boyle, *International Law & and the Environment* (Oxford, UK: Oxford University Press, 2002) at 653 [Birnie & Boyle].

two-thirds majority vote.[22] A similar arrangement is present in the *Cartagena Protocol on Biosafety to the Convention on Biological Diversity* in relation to modifications to the list of modified living organisms that are subject to transboundary movement restrictions.[23]

A further and still evolving development towards governance approaches in international environmental law is the delegation of policy creation functions to treaty bodies, such as Conferences of the Parties (COPs), as well as to committees and advisory bodies.[24] Jutta Brunnée, in an examination of the law-making functions of the COP in the climate change regime, notes that the *Kyoto Protocol* includes a number of provisions that call for the COP to develop guidelines for the implementation of matters relating to compliance and the various "flexibility mechanisms".[25] At present, the parties have not yet agreed upon voting procedures for the COP, but the draft rules of procedure anticipate at least partial majoritarian decision-making.[26] The institutional structure of the UNFCCC and the *Kyoto Protocol* consists of a myriad of other bodies;[27] some like the Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for Implementation provide advice to the COP, while others such as the Clean Development Mechanism (CDM) Executive Body and the Compliance Committee have particularized decision-making authority. For example, the CDM Executive Board has the authority to accredit operational entities, who are in turn responsible for validating individual CDM projects in accordance with the procedures adopted by the COP.[28] Here the CDM

---

[22] *Montreal Protocol on Substances that Deplete the Ozone Layer*, 16 September 1987, 26 I.L.M. 1550 (entered into force 1 January 1981) [Montreal Protocol]. Article 2(9) sets out the qualification requiring a majority of developed and developing states, respectively, to vote in favour.

[23] *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, 29 January 2000, 39 I.L.M. 1027 (entered into force 11 September 2003). This aspect of the *Biosafety Protocol* is discussed in Brunnée, *supra* note 12 at 22-23.

[24] Brunnée, *supra* note 12; Robin R. Churchill & Geir Ulfstein, "Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law" (2000) 94 A.J.I.L. 623 [Churchill & Ulfstein]; Thomas Gehring, "International Environmental Regimes: Dynamic Sectoral Legal Systems" (1990) 1 Y.B. Int'l Env. L. 35.

[25] Brunnée, *ibid* at 23-24; *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 37 I.L.M. 22 (entered into force 16 February 2005) [*Kyoto Protocol*]. "Conference of the Parties" (known as the COP) is the term used in the UNFCCC; the *Kyoto Protocol* refers to the "Conference of the Parties serving as the meeting of the parties" (known as the COP/MOP) to distinguish between the two. See *e.g.* Articles 2.4, 6.2, and 12.7 of the *Kyoto Protocol*.

[26] "Draft Rules of Procedure of the Conference of the Parties and its Subsidiary Bodies", UN Doc. FCCC/CP/1996/2 (22 May 1996), online: UNFCCC <http://unfccc.int/resource/docs/cop2/02.pdf>

[27] For a comprehensive description, see "A Guide to the Climate Change Convention Process, Preliminary 2nd edition" (Bonn: Climate Change Secretariat, 2002), online: UNFCCC <http://unfccc.int/resource/process/guideprocess-p.pdf> [UNFCCC Guide].

[28] "Modalities and Procedures for a Clean Development Mechanism defined by Article 12 of the Kyoto Protocol", UN Doc. FCCC/CP/2001/13/Add.2, Draft decision-/CMP.1, Annex, s.5, online: UNFCCC, http://unfccc.int/resource/docs/cop7/13a02.pdf#page=20 ["CDM Modalities"]. For a descriptive of CDM,

Executive board looks very much like an administrative decision-maker with implications for both state parties and private actors. The UNFCCC Secretariat itself is extensive, with a budget of over 16 million dollars (U.S.), and providing executive direction and support, as well as supporting the convention's technical programmes.[29] Other environmental treaty regimes, such as the *Convention on Biological Diversity,* and the *Convention on Long Range Transboundary Air Pollution* similarly consist of a complex network of decision-making, advisory and implementation bodies. While formal decision-making authority often (but not always) rests with political bodies, such as COPs, these decisions may bind some parties against their will,[30] but more significantly, given the complex and technical nature of the decisions taken and the sheer volume of matters subject to some form of deliberation by the various treaty bodies, it is inevitable that the locus of authority shifts away from the formal decision-makers and into the hands of these subsidiary bodies. As international environmental governance structures evolve they begin to resemble formal international organizations and take on a bureaucratic character.[31]

The tension that arises from the turn away from a contractual model of international rule making towards a governance model is that as measures are taken to enhance the effectiveness of a treaty regime to solve the environmental issues it was intended to address,[32] those steps often compromise settled forms of procedural legitimacy. Take, for example, the dispensing of the need for ratification of rule changes through the use of simplified procedures for changes to annexes or by delegating those decisions to treaty bodies such as COPs. This streamlines the rule making process considerably, as parties no longer need to wait for a sufficient number of instruments of ratification to be deposited. But, this streamlining occurs at the expense of domestic legislators having authority over whether the rule changes should be adopted; in essence

---

see Meinhard Doelle, *From Hot Air to Action? Climate Change, Compliance and the Future of International Environmental Law* (Toronto: Thomson Carswell, 2005) at 29-35.

[29] See UNFCCC Guide, *supra* note 27.

[30] Rule 40 of the Rules of Procedure for the Convention on Biological Diversity allows for majoritarian decision-making. Secretariat of the Convention on Biological Diversity, *Handbook of the Convention on Biological Diversity Including its Cartagena Protocol on Biosafety*, 3rd ed. (Montreal: 2005) at 66, online: The Convention on Biological Diversity < http://www.biodiv.org/doc/handbook/cbd-hb-all-en.pdf>.

[31] Churchill & Ulfstein, *supra* note 24, describe as "autonomous institutional arrangements"; Brunnée, *supra* note 12, notes that COPs "exercise their functions at the interface of the law of treaties and international organizational law.

[32] Regime effectiveness can be measured in a variety of ways. Here by effectiveness I mean the ability of a regime to solve problems. See Oran Young and Marc Levy, "The Effectiveness of International Environmental Regimes" in Oran Young, ed., *The Effectiveness of International Environmental Regimes: Causal Connections and Behavioral Mechanisms* (Cambridge, Mass.: MIT Press, 1999) 1 (discussing the meaning of regime effectiveness).

leaving the decision to the executive branch of the government.[33] In cases where the rule changes involve highly technical matters the absence of political oversight may be justified on the basis that the decision does not implicate contested values or have allocational consequences within the state. However, this is clearly not always the case. For example, the decisions delegated to the COP under the *Montreal Protocol* or the *Kyoto Protocol*, not only have important consequences for a broad range of domestic actors, but the delegations themselves give the COP very little guidance as to how these powers should be exercised. The delegation of determining the details of the flexibility mechanisms under the *Kyoto Protocol* provides the most striking example, given their centrality to the acceptability of the scheme as a whole.

Environmental governance between states is also structured by the rules and institutions developed by formal international organizations, such as the United Nations Environment Programme, the Commission on Sustainable Development and the Global Environmental Facility. In addition, there are those international organizations whose primary mandate lies outside the field of environmental regulation, but whose decisions are clearly recognized as significantly impacting environmental conditions and policy outcomes, the most prominent among these are the World Trade Organization and the World Bank. Much of the controversy relating to the legitimacy of international economic organizations has centred on the perception that these institutions have unduly ignored environmental values in favour of the neo-liberal economic principles that underlie these agreements.[34] Delegation plays an important role in international institutions, thereby allowing appointed officials such as dispute settlement bodies or senior bureaucrats to determine policy outcomes. In the case of WTO dispute settlement panels, the legitimacy of unaccountable officials making policy decisions is further eroded by the absence of clear 'legislative' policy direction from the parties. The legitimacy concerns here are similar to the separation of powers concerns raised in domestic legal systems relating to

[33] Ratification processes themselves are a matter of internal law and may not always involve the legislative branches of the government. However, even in those cases where ratification is an executive function, it will require some official expression of the government, such as an Order in Council, which in turn is required to be published and is subject to some level of legislative scrutiny.

[34] World Commission on Dams, *Dams and Development: A New Framework for Decision-Making* (London: Earthscan Publications Ltd., 2000), online: World Commission on Dams <http://www.dams.org//docs/report/wcdreport.pdf>; *United States — Import prohibition of certain shrimp and shrimp products* (*Complaint by India et al.*) (1998) WTO Doc. WT/DS58/R (Panel Report), WTO Doc. WT/DS58/AB/R (Appellate Body Report), WTO Doc. WT/DS58/AB/RW (Appellate Body Report), WTO Doc. WT/DS58/RW (Arbitrator's Report), online: WTO <http://www.wto.org/english/tratop_e/dispu_e/ distab_e.htm#r58> [Shrimp / Turtle]; *United States - Restrictions on Imports of Tuna (Complaint by the European Economic Community and the Netherlands*) (1994) GATT Doc. DS29/R, online: WTO <http://docsonline.wto.org/> [Tuna / Dolphin].

constitutional review, insofar as the concerns relate to unaccountable officials determining the legality of state actions with reference to open-ended legal norms. As with treaty based regimes, general consent to the overall structure is not adequate given the direct economic and environmental consequences that flow from the decisions made.

One procedural response to legitimacy concerns is the opening up of international environmental institutions to participation by non-governmental organizations (NGOs).[35] The principal form of participation is achieved through granting NGOs observer status in meetings of treaty bodies and subsidiary bodies and committees.[36] The climate change regime has admitted over 750 NGOs. The COP is the final arbiter of whether an NGO shall be admitted, but it is the UNFCCC Secretariat that determines whether the NGO has met the eligibility requirements.[37] NGO involvement in international environmental regimes includes activities such as providing information to state parties at the negotiating stage, disseminating information regarding negotiations to the broader public, and monitoring compliance.[38] While NGO involvement in international environmental institutions was instituted to alleviate legitimacy concerns,[39] NGO participation has raised legitimacy concerns of its own. Among these concerns are questions about the accountability (or non-accountability) of NGOs themselves. NGOs are not elected to their positions and may represent a very narrow set of interests. The participation by business organizations, such as oil industry or insurance industry groups, in climate change discussions is difficult to criticize on liberal democratic principles, since these entities have a clear interest in

[35] For a general discussion on NGO involvement in international environmental law processes, see Kal Raustiala, "The "Participatory Revolution" in International Environmental Law" (1998) 21 Harv. Envtl L. Rev. 537 ["Participatory Revolution"], and Jonas Ebbeson, "The Notion of Public Participation in International Environmental Law" (1998) 8 Y.B. Int'l Env. L. 51.

[36] Montreal Protocol, *supra* note 22, art.11; UNFCCC, *supra* note 13, art.7. Although, it should be noted that formal and informal participation are not the only avenues of NGO influence in international environmental institutions. There are instances of states turning to NGOs to form part of official state delegations, as was the case with New Zealand including a member of Greenpeace in its delegation to the London Dumping Convention negotiations, and the assistance provided by the Foundation for International Environmental Law and Development (FIELD) to small island states in the climate change negotiations. The International Union for the Conservation of Nature, which is made up of state and non-state actors, has developed influential policy initiatives such as the World Charter for Nature and the Earth Charter, as well doing preparatory work for the Convention on Biological Diversity and the Convention on Trade in Endangered Species, among others. Discussed in Birnie & Boyle, *supra* note 21 at 66-68.

[37] UNFCCC Secretariat, "Standard Admission Process", online: UNFCCC <http://unfccc.int/files/parties_and_observers/igo/application/pdf/adm_proc.pdf>. The accreditation process itself may raise legitimacy concerns since there is no remedy for NGOs who are found not to be qualified by the Secretariat.

[38] See "Participatory Revolution", *supra* note 35. For details on NGO involvement in climate change regime, see also Asher Alkoby, "Non-State Actors and the Legitimacy of International Environmental Law" (2003) 3 Non-State Act. & Int'l L. 23 at 36-41 [Alkoby].

[39] See Alkoby, *ibid.* at 43-44.

the outcomes of international negotiations.[40] However, it does underline the fact that NGOs will not necessarily be public regarding.[41] This is especially true on a global scale, where the majority of NGOs is likely to have their support bases in developed countries. Because the effectiveness of NGOs depends, in part, upon their ability to influence public opinion, those groups with better access to resources are likely to be more influential.

Transgovernmental Networks. In international institutions the interests of each state tend to be represented, as least formally, by the national government. However, many forms of policy coordination and enforcement arise out of interactions between individual state agencies and officials. Anne-Marie Slaughter has detailed these developments, pointing to formal regulatory organizations such as the Basle Committee on Banking Supervision and the International Organization of Securities Commissioners as paradigmatic examples, as well as to more informal cooperation arrangements between agencies with similar mandates.[42] There are numerous transgovernmental networks operating in the environmental field with varying degrees of formality and visibility. Often transgovernmentalism operates within existing international institutions. For example, the Canada – U.S. Air Quality Committee was established under the *Canada – U.S. Air Quality Agreement* as the body responsible for the implementation of the agreement. This body is made up of agency officials not only from the lead environmental agencies of each party, but also from state and provincial environmental agencies. The Air Quality Committee plays an important role in coordinating policy relating to transboundary air pollution and has initiated projects relating to assessing the feasibility of joint emissions trading and to local airshed management strategies.[43] The Air Quality Committee does not have independent regulatory authority, but because of its close association with domestic agencies it is effective in promoting policy initiatives. A similar, although more diffuse, system of environmental cooperation exists between the Mexican and U.S. environmental officials structured around the 1983 *La Paz Agreement,* an environmental cooperation agreement.[44] The most recent initiative implementing the *La Paz Agreement* is a programme called Border 2012,

[40] *Ibid* at 47-50, noting the involvement of the Global Climate Coalition, an energy industry association.
[41] P.J. Simmons, "Learning to Live with NGOs" (1998) 112 Foreign Policy 82.
[42] Anne-Marie Slaughter, "Governing the Global Economy through Government Networks" in Michael Byers, ed., *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press, 2000) 177.
[43] International Joint Commission, *US – Canada Air Quality Agreement 2004 Progress Report*, online: Environmental Protection Agency < http://www.epa.gov/airmarkets/usca/airus04.pdf>.
[44] *Agreement Between the United States and Mexico on Cooperation for the Protection and Improvement of the Environment in the Border Area*, 14 August 1983, 22 I.L.M. 1025 (entered into force 16 February 1984).

which is a framework for policy coordination between the U.S. and Mexican federal environmental regulators, the ten border-states governments and indigenous groups in the U.S. and Mexico.[45] The Border 2012 programme has specific environmental quality goals and includes measures such as regional working groups, education and training initiatives and specific policy forums (on sectoral environmental and environmental health issues).[46]

As the above examples indicate, transgovernmentalism provides an advantage over strictly internationalist approaches where the regulatory authority resides with a sub-state level of government. Instead of routing policy through national foreign affairs bureaucracies, it allows the regulators to deal with their counterparts directly. There are now an increasing number of examples of environmental cooperation agreements and initiatives between provincial and state governments across the Canada-U.S. border, notwithstanding the fact that sub-state entities have no formal status in international law.[47] In a number of cases, participating sub-state governments have concluded inter-agency memoranda of understanding to formalize commitments relating to notification of possible transboundary impacts from proposed activities, the coordination of consultation efforts and the exchange of environmental information.[48]

On a multi-lateral level, Kal Raustiala describes the role of the International Network for Environmental Compliance and Enforcement (INECE) as a mechanism to enhance the compliance and enforcement capacities of domestic environmental regulators.[49] The INECE, through conferences, training programs, exchanges of information on regulatory design and enforcement approaches and by facilitating stronger links of communication between regulatory officials, including judges, seeks to promote best regulatory practices among the 150 states whose officials currently participate in INECE activities. The INECE also draws upon the expertise and

---

[45] *Border 2012: US-Mexico Environmental Program* (2003), online: Environmental Protection Agency <http://www.epa.gov/usmexicoborder/pdf/2012_english.pdf>.
[46] *Ibid.*
[47] See NACEC list of agreements., online: Commission for Environmental Cooperation <http://www.cec.org/pubs_info_resources/law_treat_agree/transbound_agree/Name.cfm?varlan=english&fldname=&fldvalue= >.
[48] Memorandum of Understanding Between the Washington Department of Ecology and the British Columbia Ministry of Environment, Land and Parks (April 1996), online: British Columbia Ministry of the Environment <http://www.env.gov.bc.ca/spd/ecc/documents/bcwamou.pdf>. See also the Environmental Programs of the Conference of New England Governors and Eastern Canadian Premiers, online: <http://www.neg-ecp-environment.org/>; the US-Mexico Border Governors' Conference, online: <http://www.bordergovernorsconference.com>.
[49] Kal Raustiala, "The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law" (2002) 43 Va. J. Int'l L. 1 at 44 [Raustiala].

financial support of a number of key international institutions, including UNEP, the World Bank and the OECD.[50]

From a legitimacy standpoint, the activities of transgovernmental environment networks appear to be quite benign. Unlike other regulatory networks in the financial sectors, environmental networks are not expressly oriented towards substantive policy creation.[51] However, Raustiala argues that regulatory export and policy convergence is a likely outcome of transgovernmentalism.[52] In this regard, Raustiala notes that the U.S. Environmental Protection Agency has quite consciously sought to promote adoption of its own regulatory solutions as a way to enhance and improve the efficacy of other regulators, but also to create a demand for U.S. environmental technologies.[53] Dutch authorities have noted an identical motivation for their own regulatory export activities.[54] Trade pressures are another clear source of harmonization demands in light of the potential for domestic environmental regulations to be the sources of comparative advantage. Given that trade related or trade supportive regimes such as the NACEC or the OECD are forums for transgovernmental interactions, their support for policy harmonization at an agency level can be partly explained by competitive pressures.[55] Finally, policy convergence may be a product of socialization among like-minded regulators. In essence, regulators who are bound together by a shared set of professional values, and who face a shared set of common regulatory problems, will be inclined to accept certain solutions or approaches that have strong support within the community of regulators.[56]

---

[50] The INECE's partnerships are described on its website at <http://www.inece.org/overview.html>.
[51] Slaughter makes the distinction between harmonization, enforcement and informational networks, with legitimacy concerns being most acute with the former, although Slaughter concedes that networks will have overlapping functions and in many cases are not easily discernible: Anne-Marie Slaughter, *A New World Order* (Princeton, N.J.: Princeton University Press, 2004) at 51-52 [Slaughter].
[52] Raustiala, *supra* note 49 at 51-56.
[53] *Ibid.* at 46, citing EPA Strategy for Export Promotion
[54] Danish Environmental Protection Agency, "Environmental Exports" online: Danish EPA <http://www.mst.dk/homepage/>
[55] *North American Agreement on Environmental Cooperation*, Canada, the United States and Mexico, 14 September 1993, 32 I.L.M. 1482 (entered into force 1 January 1994) [NAAEC]. Section 10(3) of the NAAEC makes environmental policy harmonization an explicit goal of the CEC Council, noting that Council should strengthen environmental cooperation by "establishing a process for developing recommendations on greater compatibility of environmental technical regulations, standards and conformity assessment procedures in a manner consistent with the NAFTA." Similarly, the OECD has adopted numerous Recommendations regarding common regulatory approaches to environmental issues. See also Raustiala, *supra* note 48 at 46-47, who suggests that concerns over the competitive effects of Mexican under-regulation lead to considerable regulatory export from the United States.
[56] Slaughter, *supra* note 51 at 198-99.

If one accepts that transgovernmental networks will influence environmental policy outcomes, then concerns arise with respect to the responsiveness of transgovernmental networks to those impacted by the policy choices made by transgovernmental networks either directly or through democratically elected representatives. As with international institutions, there is not a complete absence of accountability between agencies acting transnationally and the governments that have empowered them, but rather as policy gets created through more informal channels and in the absence of a diversity of voices, the ability of elected officials and the public to influence outcomes is diminished. Indeed, it is this informality and exclusivity that makes transgovernmental networks attractive to the participants.[57]

A source of regulatory influence in international environmental law and policy closely related to transgovernmental networks is epistemic communities. Peter Haas, the political scientist who pioneered the work on the influence of epistemic communities on international policy processes, describes an epistemic community as "a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue area".[58] Epistemic communities tend to be transnational in nature, being organized along lines of a shared knowledge base and possession of common professional values. They are more broadly constituted than transgovernmental networks in that they are not necessarily made up of governmental actors. Epistemic communities wield influence in international policy creation processes by identifying issues, shaping agendas and by satisfying policy-maker demands for information in policy environments characterized by uncertainty. In issue areas that require technical expertise, the exclusive possession of specialized knowledge by epistemic communities, allows epistemic communities to promote their own values both within domestic and international policy settings.[59] In international environmental governance structures, epistemic communities can be formally constituted, as is the case with the Intergovernmental Panel on Climate Change,[60] but are often loose associations. Because of the centrality of scientific knowledge to the formation and

[57] *Ibid.* at 59-60, 219; see also Robert Keohane and Joseph Nye, "The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy" paper prepared for American Political Science Convention, 2000, online: Kennedy School of Government,. < http://www.ksg.harvard.edu/prg/nye/clubmodel.pdf >.

[58] Peter Haas, "Introduction: Epistemic Communities and International Policy Coordination" (1992) 46 Int'l Org. 1 at 3.

[59] See Peter M. Haas, *Saving the Mediterranean: The Politics of International Environmental Protection* (New York: Columbia University Press, 1990).

[60] The IPCC is not a formal institution of the UNFCCC, but rather was created by UNEP and the WMO to provide an avenue for scientific collaboration and input into policy processes.

evolution of environmental governance structures, epistemic communities are particularly influential in these contexts.

However, epistemic communities raise their own legitimacy issues given that their necessarily restricted membership suggests an elitist and technocratic form of governance. Moreover, because the influence of scientific knowledge is linked to credibility, scientific communities impose strict rules about the kind of information that should qualify as scientific. For example, the requirements for reproducible scientific results and high degree of certainty serve to limit participation to those with highly specialized expertise and technical skills and may reject out of hand views based on alternative methods, such as traditional knowledge maintained by indigenous communities. The price of credibility among a dominant community may be a lack of legitimacy with other affected groups.[61]

Domestic Regulation Beyond the State. There are two principal ways in which domestic governments seek to regulate environmental outcomes outside of its territory. The first is through the enactment of domestic laws with extra-territorial effect. The attempts by the U.S. to place import restrictions on tuna and shrimp that were not harvested in accordance with U.S. environmental standards is one form of extra-territoriality.[62] Here, the marine species that the U.S. sought to protect, dolphins and sea turtles, were not located in or even adjacent to waters under U.S. jurisdiction, rather the U.S. justified these measures on the basis of a right to protect elements of the international environment.[63] A second example is the decision by the U.S. regulatory officials to impose an environmental remediation order against a Canadian company for historic pollution that originated in Canada but migrated across the border into the U.S.[64] Both these examples brought the U.S. regulators into conflict with states affected by the U.S. actions. In the case of the trade restrictions, these actions were challenged by importing states under international trade rules. In the second example, the Canadian government has challenged

[61] For a discussion of the relationship between credibility and legitimacy of scientific knowledge in relation to policy processes, see William Clark *et al.*, "Information as Influence: How Institutions Mediate the Impact of Scientific Assessments on Global Environmental Affairs" (2002) Kennedy School of Government / Harvard University Faculty Research Working Papers Series, online: Social Sciences Research Network < http://ssrn.com/abstract=357521>.
[62] Tuna / Dolphin, *supra* note 34; Shrimp / Turtle, *supra* note 34;
[63] *Ibid.*
[64] *Pakootas v. Teck Cominco Metals, Ltd.*, 59 ERC 1870, 35 Envtl. L. Rep. 20,083, 2004 WL 2578982 (E.D. Wash.) [*Teck Cominco*]; Neil Craik, "Trail Smelter Redux: Transboundary Pollution and Extraterritorial Jurisdiction" (2004) 14 J. Envtl. L. & Prac. 139; Austen L. Parrish, "Trail Smelter Deja Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes" (2005) 85 B.U.L. Rev. 363.

the extraterritorial nature of the U.S. action on the basis of international rules respecting the limits of a state's prescriptive jurisdiction.[65]

In these examples legitimacy concerns run in both directions. For the countries affected by unilateral actions, their domestic industries are made subject to the rules of another state without consent. For the imposing countries, whose domestic rules are being challenged, there are concerns about the limitations that international rules, be they trade rules or jurisdictional rules, place on their domestic regulators. The consideration of legitimacy is further complicated in both these examples by the role of private actors in instigating these proceedings. The trade restrictions on shrimp were actually set in motion by an environmental NGO,[66] and the enforcement of the remediation order in the transboundary pollution example was brought about by private citizens and supported by environmental NGOs on both sides of the U.S.-Canada border.[67]

A second form of regulation that seeks to influence environmental conditions outside the state is domestic regulation of global environmental issues within the territory of the state. In some cases, this form of regulation flows directly from international commitments as a matter of domestic implementation. However, in many cases domestic regulators will address global issues in the absence of international obligations. For example, the U.S., at both the federal and state level, has taken a variety of steps to address issues such as greenhouse gas emission and biological diversity, notwithstanding that it is not a party to either the *Kyoto Protocol* or the *Convention on Biological Diversity*. In this capacity, domestic regulators are clearly acting intra-territorially, but they are also acting on behalf of a broader, even global constituency.[68] In this regard, there are questions about the legitimacy of state officials responding to global environmental issues on their own initiative, since the result may be to subordinate domestic interests to global interests. The issue here becomes one of determining the appropriate constituency to which regulators must respond.[69]

---

[65] *Teck Cominco, ibid.* (*Government of Canada's Amicus Curiae Brief in Support of Appellant and for Reversal of the Order of the District Court*, online: University of Washington School of Law < http: //www.law.washington.edu/Faculty/Robinson-Dorn/TrailSmelter/docs/AmicusBriefGovCanada1.pdf>.) This dispute was settled on June 2, 2006.
[66] *Earth Island Institute v. Warren Christopher*, 942 Fed. Supp. 597 (CIT 1996).
[67] *Pakootas v. Teck Cominco Metals, Ltd.*, (2004) *59 ERC (BNA) 1870. LEXIS 23041* (U.S. District Court).
[68] Kingsbury, Krisch & Stewart, *supra* note 10 at 36.
[69] Nico Krisch, "The Pluralism of Global Administrative Law" 17 E.J.I.L. 247 [Krisch].

One consequence of transnationalism in environmental law is that many environmental norms have equal currency in domestic and international legal processes. Sustainable development, the precautionary principle, the polluter pays principle, the principle of prevention and ecosystem integrity are all norms that are evoked in legal and policy discussions at any level of governance. There is, in essence, a monist tendency inherent to environmental transnationalism that leads to the incorporation of international and foreign (comparative) environmental norms into domestic legal processes.[70] For example, the Supreme Court of Canada has, in recent decisions, relied on international instruments to support its application of both the precautionary principle and the polluter pays principle to domestic environmental matters.[71] The legal status of these principles is never made explicit by the court; instead it seems to operate on the assumption that these are principles of good environmental governance with which domestic policy decisions should conform.

For domestic constituencies, there are concerns regarding the legitimacy of courts and administrative decision makers having recourse to norms and considerations outside of the domestic polity from which they derive their mandate. These concerns have been most evident in debates surrounding the status of international and comparative legal sources in domestic courts,[72] but they apply equally to administrative decision-makers. The issue can be framed as a separation of powers question, in that the use by the unelected branches of the government of norms that are not the emanations of the legislature compromise the sovereign authority of the legislature. However, failure to consider the consequences of domestic decisions on the environment of other states, the global commons or on issues of common concern, such as climate change, raise legitimacy issues of their own, in that those affected by the decision have no democratic recourse against the decision-makers.

b) Legitimacy and Consent in Transnational Environmental Governance

[70] See Harold Koh, "Transnational Legal Process" (1996) 75 Neb. L. Rev. 181 [Koh]. On transjudicialism, see Slaughter, *supra* note 51.
[71] See, respectively, *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, 2001 SCC 40 [*Spraytech*] at paras. 31-32 and *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] 2 S.C.R. 624, 2003 SCC 58 at paras. 23-24.
[72] See Austen Parrish, "Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law" U. Ill. L. Rev. [forthcoming in 2007], online: Social Science Research Network <http://ssrn.com/abstract=891269>.

For present purposes, I adopt Daniel Bodansky's definition of legitimacy as the justification of authority.[73] Authority resides in a decision-maker who can determine outcomes, with or without reference to normative prescriptions. Authority may also reside in a norm, in the sense that a norm may dictate or influence certain outcomes. As touched on above, the prevailing theory of legitimacy in international law has been inextricably tied to consent. The notion of consent as the basis for legitimacy, in turn, finds its origins in the liberal individualist political theory of Hobbes and Locke.[74] In essence, human autonomy demands that each individual retain the right to take whatever steps are necessary to pursue their chosen ends. As applied to the state, states have an inherent right to make their own decisions with respect to their preservation and well-being.[75] Consequently, in order to maintain their autonomy states can be under no obligation except on the basis of freely given consent. From a governance standpoint, where states do not share the collective goals of other states, they cannot be required to participate in cooperative activities to realize those goals against their will. Legitimacy under a specific consent model is unproblematic due to the absence of substantive disagreement among participants.

However, in the environmental field, reliance on specific consent comes at too high a price. Environmental problems, because they are complex, dynamic, involve a variety of actors inside and outside of government and require broad-based cooperation from all community members, militate against the use of purely consensual arrangements. The free-rider problem is especially problematic because hold out states not only get the benefits of environmental measures taken without incurring any costs, but they also undermine collective efforts through their non-participation. The decision not to engage in collective action is not neutral because it has clear consequences for the remainder of the community. As a consequence, transnational environmental policy, if it is to be substantively legitimate, must involve decisions that can bind states against their will. This imperative gives rise to governance structures that rely on general consent to the conditions under which specific consent may be dispensed with. But a governance approach based on the legitimacy of general consent has a number of shortcomings.

---

[73] Bodansky, *supra* note 5 at 601.
[74] For an overview of the concept of legitimacy as it relates to political philosophy, see Richard Flathman, "Legitimacy" in Robert Goodin and Philip Pettit, eds., *A Companion to Contemporary Political Philosophy*, (Oxford: Blackwell, 1993) 527.
[75] The adequacy of the "domestic analogy" is contested as a normative matter, but it nevertheless has clearly exerted influence over prevailing liberal and legal positivist understandings of the international legal system. For a discussion of the contours of this debate see Alkoby, *supra* note 38 at 50-56.

Firstly, it is difficult to justify complex forms of governance where states may be bound against their will in ways that could not have been easily predicted. Where the range of outcomes is known, a state can assess whether the overall benefits of the regime outweigh the possibility of having to be bound by a decision against its interests. However, where the delegation in question involves large amounts of discretion or where that discretion is exercised over an issue area that is subject to change over time, it will be harder to maintain legitimacy on the basis of the original consent alone.[76]

Liberal democratic states, all of which rely on forms of general consent, have several features not present in transnational governance structures; the absence of which make general consent less viable in the transnational sphere. Domestic liberal democracies are underlain by a common commitment to liberal values, such as individual freedoms and a commitment to the rule of law. In social systems where the parties share a common culture and history, they are more likely to accept outcomes that do not reflect their interests as they are still bound to the system as a whole. In the absence of an identifiable "demos", a governance structure is likely to become either unstable, where incompatible interests cannot be overcome by logrolling or side payments, or hegemonic, where the most powerful are able to assert their preferences.[77] At the transnational level, there is no overarching normative sub-structure that ties states and other actors together,[78] and as a result, there is a reduced ability for minorities to accept the legitimacy of collectively binding decisions. The prospect of permanent minorities, where the same states are continually subject to majoritarian demands, was clearly the basis for requiring double weighted majorities to revise annexes to the *Montréal Protocol*.[79]

Secondly, consent based theories fail to account for the range of transnational actors whose interests are implicated in environmental policy-making. Legitimacy through general consent relies on the aggregation of interests at the state level, and as a result, tends to treat state identities and state interests as being unitary. This, however, is clearly not the case, and transnationalism should be understood as a disaggregation of state interests.[80] There is a potential agency problem here, since domestic agencies or other transnational actors will pursue their own

[76] Bodansky, *supra* note 5 at 609, citing legitimacy concerns over authority exercised by Security Council and the European Council.
[77] Flathman, *supra* note 74 at 529.
[78] J.H.H. Weiler, "The Geology of International Law - Governance, Democracy and Legitimacy" (2004) 64 ZaöRV 547.
[79] Montreal Protocol, *supra* note 22.
[80] On disaggregation, see Slaughter, *supra* note 51.

individualized interests, which may not coincide with broader state interests. There is also an agency problem with upward delegations of authority to international organizations, which may themselves develop interests that are autonomous from their creators.[81] Insofar as international environmental organizations can influence decision-making through means such as agenda setting, resource allocation and through the control of information, then these governance structures present particular challenges to a consent-based model. Domestic democracies can control the unauthorized exercise of authority through judicial review, but these legalized forms of accountability are not generally available in the transnational sphere.[82]

Reliance on general consent also fails to account for what political scientists Ruth Grant and Robert Keohane have identified as 'participation accountability', which arises where "the performance of power-wielders is evaluated by those who are affected by their actions".[83] State consent coupled with democratic processes at the state level may better ensure the accountability of transnational actors to those persons who have granted them authority, such as legislators and, indirectly, the electorate (what Grant and Keohane call 'delegation accountability'), but such processes fail to account for circumstances where there are no representative links between those who decide and those who are affected by the decision. At the heart of the legitimacy crisis in transnational governance is, in the words of Thomas Risse, "the lack of congruence between those who are being governed and those to whom the governing bodies are accountable".[84] Transboundary pollution or activities that impact shared resources, such as migratory species, are recurrent examples of decisions that require policy-makers to respond to political communities beyond those who have entrusted power to them.

A further difficulty with relying on consent as the basis for legitimacy is that consent-based approaches insufficiently account for the different forms of normative arrangements that transnational actors use to address environmental issues. Because transnational environmental governance structures make frequent use of informal norm creation devices, many governance arrangements will not be subject to the same level of scrutiny as formally binding arrangements. Indeed, soft law instruments may be turned to as a way to get around the need for formal state

[81] Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Ithica: Cornell University Press, 2004) at 20 -29, discussing sources of autonomy of international organizations.
[82] But see Ruth W. Grant and Robert O. Keohane, "Accountability and Abuses of Power in World Politics" (2005) 99 American Political Science Review 29.
[83] *Ibid* at 31.
[84] Risse, *supra* note 8.

consent since state sovereignty is not formally threatened by soft law.[85] A consent based approach to legitimacy relies on the voluntaristic nature of soft law as the basis for its acceptability. However, such an approach fails to understand the more nuanced way in which informal norms influence policy processes. Informal normative arrangements create expectations about future behavior and thereby restrict future courses of action. In this regard, informal arrangements arrived at in transgovernmental networks or by international organizations are not subject to democratic control, yet may nevertheless be called upon in quite specific ways to restrict individual or group activity.

The inadequacy of general consent approaches to generate legitimate transnational environmental governance structures suggests that we look to alternative forms of legitimacy. Consent is a form of procedural legitimacy, as it is concerned with the way in which governance arrangements are arrived at. However, governance arrangements may also be justified in light of their substantive legitimacy.[86] The substantive legitimacy of a particular arrangement is often defined in terms of its problem solving ability. As discussed above, procedural and substantive legitimacy are not necessarily mutually enforcing. Very clearly, the move away from the procedurally legitimate use of specific consent mechanisms was precipitated by the limitations that specific consent placed on effective environmental policy creation. The turn towards governance structures, as opposed to contractual arrangements, in international environmental law is a response to effectiveness demands from states. Transnational arrangements can also be seen in these terms, as sub-state governments and regulatory agencies seek to avoid the restraints that traditional international legal structures place on cooperative efforts. However, it is equally clear, that no governance arrangement can be based on effectiveness criteria alone since effectiveness presumes a level of common agreement over the ends sought. Parties to environmental framework treaties are content to surrender some of their procedural legitimacy because they have reached agreement as to the substantive goals of the regime. However, where substantive goals are contested, recourse to substantive legitimacy cannot be used to justify a particular course of action.

[85] On sovereignty costs, see Kenneth Abbott & Duncan Snidal, "Hard and Soft Law in International Governance" (2000) 54 Int. Org. 421, noting that transgovernmental arrangements are almost always informal because principals are not formally recognized as subjects in international law.
[86] Bodansky, *supra* note 5. This distinction, familiar to lawyers, maps on to a distinction between input legitimacy and output legitimacy made by political scientists, see Risse, *supra* note 8.

Bodansky also points to expert legitimacy as a distinct form of justification in relation to international environmental law based, not on outcomes *per se,* but on the qualifications of the decision-maker.[87] Delegation to experts is often predicated on a pre-existing agreement about substantive goals. Thus, allowing specialized treaty bodies to decide on matters such as equipment regulation or operational rules does not raise the same legitimacy problems as delegating decision-making powers that implicate contested values. But experts, particularly scientists, often exercise influence in policy processes that are value-laden, and, as a result, resort to expertise has the same limitations as effectiveness as a source of legitimacy, and requires expert driven policy processes to draw on process based legitimacy measures. Because expert legitimacy is derived not only from the possession of expert knowledge, but also from the impartiality of the experts, consensual or democratized science is subject to criticism.[88] David Cash *et al.* have argued that the requirements made of scientists in environmental policy processes are often at odds with one another.[89] For example, if scientific processes are to be influential, then scientists must produce information that is salient to policy decisions, which in turn requires experts to be responsive to political processes. Salience can detract from credibility, because responsive to political factors may be viewed by scientific peers as compromising objectivity. Similarly, recourse to open and inclusive scientific processes as a means to enhance legitimacy may draw criticisms for reducing salience by pursuing issues not perceived to be relevant by decision-makers and for reducing impartiality.[90]

To summarize, the fundamental difficulty that arises in transnational environmental governance structures is that environmental imperatives require that authoritative policy-decisions be made. This has both a fairness aspect, insofar as a hold-out state or a recalcitrant group of actors should not be able to prevent or undermine the collective desires of majorities, and an effectiveness aspect, since failure to address environmental problems can have catastrophic consequences. However, environmental decisions involve competing interests and values. Consequently, governance processes must be able to justify decisions that bind actors, both formally and informally, against their will. Put another way, because there will be winners and losers in environmental policy decisions, if legitimacy is to be maintained, the losers must be

---

[87] Bodansky, *supra* n.5 at 619-623.
[88] See Karin Bäckstrand, "Civic Science for Sustainability: Reframing the Role of Experts, Policy-Makers and Citizens in Environmental Governance" (2003) 3:4 Global Envt'l Politics 24 [Bäckstrand].
[89] David Cash *et al.*, "Salience, Credibility, Legitimacy and Boundaries: Linking Research, Assessment and Decision Making" (2002) Kennedy School of Government / Harvard University Faculty Research Working Papers Series, online: Social Sciences Research Network <http://ssrn.com/abstract=372280> [Cash *et al.*]
[90] *Ibid.*

given sufficient reasons to abide by the decision and to continue to engage in subsequent decision-making processes. A further consequence of what might be termed 'environmental pluralism' is that substantive legitimacy and expert legitimacy are necessary, but not sufficient, conditions to justify environmental decisions. It follows that satisfying procedural legitimacy concerns cannot be ignored nor can other forms of legitimacy provide an adequate substitute.

3. The Theoretical Promise of Deliberate Democracy

a) Deliberative Democracy[91]

The prevailing approach to legitimacy, rooted in liberal individualism, is to aggregate preferences in ways that are acceptable to the participants. Fundamental to aggregative approaches is that actor preferences are taken as fixed and not in need of justification.[92] Outcomes are determined through aggregative methods, such as majoritarianism and utilitarianism. Because no one set of substantive preferences can be privileged, aggregative approaches focus on providing fair mechanisms by which different preferences can compete. In order for aggregative methods to be acceptable to minorities, decision-making processes must provide certain minimal assurances. In liberal democracies, these assurances take the form of basic rights and the rule of law. Some of these rights, such as free speech and free association, are necessary to ensure the fair aggregation of preferences, while others are derived from the liberal conception of the individual as free and autonomous. There are, of course, tensions between liberal values and pure democratic values that arise when the popular will clashes with personal freedoms. However, in both cases, legitimacy is maintained because of a shared commitment to the rules of the game. This, in turn, requires a strong sense of political solidarity. In the case of popular democracy, social solidarity is the basis upon which minorities are content to subordinate their interests to the majority. And in the case of liberalism, social solidarity is replaced with a kind of procedural solidarity in the form of a common commitment to individual

[91] As mentioned in the introduction, this paper presents a version of deliberate democracy presented by Amy Gutmann and Dennis Thompson. Their argument is most fully laid out in *Democracy and Disagreement*, *supra* note 7. However, the main points of their arguments are laid out in an accessible and shorter chapter in *Why Deliberative Democracy*. Given the necessarily summary nature of the discussion of deliberate democracy in this article and given that my own arguments are aimed at a non-specialist (in political philosophy) audience, I have chosen to cite principally to this shorter work. Readers interested in Gutmann and Thompson's work may also want to review Stephen Macedo, ed., *Deliberative Politics: Essays on Democracy and Disagreement* (New York: Oxford University Press, 1999), a volume of essays critically evaluating Gutmann and Thompson's theoretical approach.

[92] Gutmann & Thompson, *supra* note 7 at 13.

rights and freedoms. Decisions in aggregative approaches are therefore justified on the basis of the method of aggregation, but not on the basis of the preferences themselves, which remain pre-political and not subject to justification.

Deliberative democracy proceeds from the opposing premise that individual preferences are not fixed or exogenous to political interactions and should therefore be justified through the reciprocal giving of reasons for policy choices. As a result, deliberation over policy decisions should be conducted in public forums and on the basis of reasons that may be accepted as fair and reasonable by the other participants.[93] Like aggregative models, deliberative approaches accept that within any political community there will be a plurality of interests and that very often disagreements over policy will be reasonable.[94] While aggregative models tend to leave policy determinations in these instances to be resolved by bargaining power, deliberation requires that participants and decision-makers be open to persuasion based on the power of the arguments provided.[95] Being open to persuasion does not mean that participants need to surrender their self-interest, but it does require participants to make genuine attempts to arrive a public regarding outcomes. In deliberative models, preferences are capable of change and are not treated as being unaffected by political interactions. Participants in deliberative processes are entitled, at a minimum, to have their views accounted for and responded to. By requiring participants to treat each other's position with a minimum level of respect, deliberative approaches seek to promote the acceptability of decisions taken by all participants.

Reciprocal justification is democratic because it is inclusive. But unlike participatory mechanisms seen in aggregative models, deliberation requires more than a bargaining opportunity for interested parties. Deliberation requires that decision-makers engage affected persons as equals; that is, as deserving of mutual respect. In essence, those affected by decisions taken should have a genuine opportunity for co-authorship of the rules affecting their lives. Gutmann argues that promoting an authorial role in government (self-government) respects individual autonomy because it is only through engagement in shaping the social conditions of collective living that individuals can exercise control over the social aspects of their lives.[96]

---

[93] *Ibid* at 3.
[94] *Ibid* at 14.
[95] Simone Chambers, "Deliberative Democracy Theory" (2003) 6 Annual Review of Political Science 307 at 309 [Chambers].
[96] Amy Gutmann, "Democracy" in Robert E. Goodin & Philip Pettit, eds., *A Companion to Contemporary Political Philosophy* (Oxford: Blackwell Publishing, 1993) 411 at 418.

Conceptions of deliberative democracy differ between theorists, with some theorists, notably Habermas, emphasizing the combining of a highly proceduralized view of legitimacy with stringent conditions for successful deliberation, including outcomes based solely on rational agreement. In contrast, Gutmann and Thompson, have offered more of a working theory of deliberation. Gutmann and Thompson maintain that consensus decision-making is neither necessary nor desirable for successful deliberation to occur. In order for decisions to be justified it is not necessary (nor possible), argue Gutmann and Thompson, for members of a community to reconcile deep differences and come to agreement on a comprehensive common good for the same reasons. It is enough that the reasons given be sufficiently convincing to maintain the continued participation of all members.[97]

This thinner understanding of political communities points to the adjective nature of Gutmann and Thompson's version of deliberate democracy. Unlike the grand theorizing of Rawls or Habermas,[98] Gutmann and Thompson's approach is less a radical alternative to liberal democracy, than an extension of it, based on enhanced democratic accountability through continuing reciprocal justification of decisions.[99] Their position is premised on the presence of pervasive cultural diversity within democratic communities and a belief that attempts to create an overarching common good would likely be hegemonic.[100] Accepting pluralism as a social fact does not negate the possibility of persuasion and reasonable agreement on important policy concerns.[101] It does, however, require that members of a political community seek in good faith to put forward reasons that minimize social divisions.[102]

A further area of controversy for deliberate democrats is the extent to which deliberate democratic theory should be concerned with substantive legitimacy. The objection to substantive legitimacy stems from liberal concerns over imposing an unshared vision of substantive justice contrary to the popular will. Proceduralism is justified on the basis of its neutrality and

---

[97] See also Smith, *supra* note 6 at 59-60.
[98] See Quinton Skinner, ed., *The Return of Grand Theory in the Human Sciences* (Cambridge: Cambridge University Press, 1985).
[99] On this point see Chambers, *supra* note 95 at 308; and Walter Baber and Robert Bartlett, *Deliberative Environmental Politics: Democracy and Environmental Rationality* (Cambridge, Mass.: MIT Press, 2005) at 102 [Baber & Bartlett].
[100] Gutmann & Thompson, *supra* note 7 at 28-29: "A democracy can govern effectively and prosper morally if its citizens seek to clarify and narrow their deliberative disagreements without giving up their core moral commitments. This is the pluralist hope. It is, in our view, both more charitable and more realistic than the pursuit of the comprehensive common good that consensus democrats favor."
[101] But see Baber & Bartlett, *supra* note 99 at 108-111.
[102] What Gutmann & Thompson, *supra* note 7, refer to as "economizing on moral disagreement."

consistency with human autonomy and freedom. However, Gutmann and Thompson argue that assessing the legitimacy of outcomes based on adherence to substantive criteria, such as fairness or justice cannot be neatly separated from procedural legitimacy,[103] and that reciprocal justification is manifestly a substantive exercise:

> Mutual justification means not merely offering reasons to other people, or even offering reasons that they happen to accept (for example, because they are in a weak bargaining position). It means providing reasons that constitute a justification for imposing binding laws on them. What reasons count as such a justification is inescapably a substantive question. Merely formal standards for mutual justification – such as a requirement that maxims implied by law be generalizable – are not sufficient. If the maxim happens to be "maximize self- or group interest", generalizing it does not ensure that justification is mutual. Something similar could be said about all other conceivable candidates for formal standards. Mutual justification requires reference to substantive values.[104]

Treating either procedural or substantive norms as foundational and therefore, not subject to the requirement of prior justification, risks undermining the democratic nature of deliberation as an approach to governance. Gutmann and Thompson avoid this problem by maintaining that substantive criteria, as well as procedural criteria, are provisional in nature and should be open to contestation on reasoned grounds. The goal of deliberation is, in the words of Frank Michelman, "normative justification without ultimate objectivist foundations".[105] Provisionality seeks to achieve that goal by ensuring that even foundational rules are morally justified.[106] Provisionality does not equate to continual deliberation, but only requires that rules be subject to deliberation at some time and that they be open for reconsideration in the future. Once a norm has achieved widespread legitimacy within in a community, there is no moral requirement for deliberation. This does not mean that the norm may be not need to be reconsidered in light of changed circumstances.[107]

b) Deliberative Democracy and Transnational Environmental Governance

---

[103] Gutmann & Thompson, *ibid* at 25: "Procedural principles have substantive content too. If majority rule is better than minority rule, it must be for moral reason reasons. Those reasons refer to such values as free and equal personhood, the same values that support substantive principles."
[104] Gutmann & Thompson, *supra* note 7 at 99.
[105] Frank Michelman, "Traces of Self-Government" (1986) 100 Harv. L. Rev. 4 at 23
[106] The one exception to this is that the requirement that binding decisions be justified by moral reasons cannot be treated as provisional: Gutmann & Thompson, *supra* note 7 at 114-115.
[107] Gutmann & Thompson, *ibid* at 117.

Deliberative democratic approaches are well suited to address some of the persistent legitimacy concerns that arise in the transnational sphere. Because aggregative models must define political communities with reference to formal criteria (in order to know whose preferences are being aggregated), aggregative models do not translate well to the transnational sphere where political communities tend to be fluid and overlapping, consisting of a wide number of different actors that are responsible to different communities and interests.[108] Deliberative democracy addresses this problem by locating legitimacy in the deliberative process itself. It is the quality of political interaction between interested parties that determines the legitimacy of the outcome, as opposed to the method of aggregation. By understanding legitimacy as being determined by the quality of reasons being put forward and the reciprocal nature of justification, deliberative models expand the scope of political accountability.[109] Whereas representative models tend to define accountability in terms of formal membership criteria, deliberative models link accountability to affectedness.[110]

Consider, for example, the problem of transboundary pollution. A source state under a representative model is only accountable to voters within the source state. Those voters may favour pollution because they do not suffer its ill-effects and they reap the benefits of increased economic activity. A deliberative model maintains that the decision to pollute must be justified to both electors and to impacted members of the receiving state. Here the legitimacy of the decision depends on the reciprocal nature of the justifications given and the consideration given to the position of those affected, who must in turn express their reasons in reciprocal terms. The interactions are not restricted to actors who hold a formal right pursuant to international legal rules – in this case the harm principle,[111] and so would include affected individuals and sub-state actors. Because participation in deliberative processes is not defined by formal criteria, the reasons given will not be oriented towards satisfying narrow interests, but will be oriented

[108] Dennis Thompson, "Democratic Theory and Global Society" (1999) 7 J. of Political Philosophy 111 at 112, refers to this as the "problem of many majorities." See also Krisch, *supra* note 69, discussing multiple constituencies.
[109] Thompson, *ibid*. at 120.
[110] What Thompson, *ibid*., refers to as "moral constituents."
[111] The harm principle recognizes that a state has a right not to have its territory be subject to significant environmental harm originating from a source in another state. See Principle 21 of the *Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)*, 16 June 1972, U.N. Doc. A/Conf.48/14/Rev. 1, 11 I.L.M. 1416; Principle 2 of the *Rio Declaration on Environment and Development*, 13 June 1992, UN Doc. A/CONF.151/26 (vol.I), 31 I.L.M. 874 [*Rio Declaration*].

towards public regarding outcomes. Public deliberation may also make logrolling and side deals more difficult to achieve given the plurality of interests that may be involved in deliberations.[112]

Because membership in the deliberative community is dependent upon affectedness, the relevant actors in any given issue will vary in accordance with the configuration of stakeholders. While this has the advantage of flexibility, it raises a number of challenges. First, the parties must be able to agree upon how affectedness is determined. Unlike aggregative models, simply leaving parties to self identify, on the (market based) assumption that those with sufficient interest will become involved is insufficient, as such an approach is likely to benefit those interests that are materially well-off and well-organized.[113] In the environmental context, the primacy of science in the policy process creates its own form of exclusivity, privileging those groups with access to scientific advisors and perhaps even excluding scientists who hold contrarian ideas.[114] Consequently, policy makers should ensure that membership criteria and procedures account for cultural, language based and material differences between potentially interested parties. Ultimately, determining these criteria will itself be the subject of deliberation and should also be subject to re-assessment from time to time on the basis of the principle of provisionality. Institutional mechanisms, such as forms of review or voting criteria (the use of double majorities), can also be used to ensure that minority views are not marginalized.[115]

A related challenge that arises from the fluidity of community membership in the transnational context is the likelihood that participants will not constitute a 'demos', at least as understood traditionally. As noted above, aggregative models of democracy rely on the presence of a shared commitment to substantive or procedural values among community members, which is arguable absent in the transnational sphere.[116] Unquestionably, deliberative approaches require participants to be able to establish a shared basis of reciprocity. In other words, participants must be able to recognize that justifications are publicly oriented. This does not, however, necessitate the presence of a thickly constituted political community that has a common history or political

[112] Eyal Benvenisti, *Sharing Transboundary Resources: International Law and Optimal Resource Use* (Cambridge: Cambridge University Press, 2002), on the role of transparency in promoting public regarding negotiations in the context of international share resources disputes. But see Risse, *supra* note 7 at 17, noting that some scholars have argued that persuasion is more easily achieved in private settings.
[113] Richard B. Stewart, "The Reformation of American Administrative Law" (1975) 88 Harv. L. Rev. 1667.
[114] T.S. Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1962).
[115] In turn, institutionalizing heterogeneity in deliberative processes may assist in overcoming difficulties associated with group polarization, see Cass Sunstein, "The Law of Group Polarization" in James Fishkin and Peter Laslett, eds., *Debating Deliberative Democracy*, (Oxford: Blackwell Publishing Ltd., 2003) 80.
[116] See Anthony McGrew, "Transnational democracy" in April Carter & Geoffrey Stokes, eds., *Democratic Theory Today: Challenges for the 21st Century* (Cambridge: Polity Press, 2002) at 269.

culture.[117] Deliberate democracy, as understood by Gutmann and Thompson requires only a shared commitment to the principle that binding decisions should be justified by moral or principled reasons.[118] Beyond this basic principle, communities are free to determine both the procedural and substantive bases of their justificatory processes. Persuasion is possible because self-governing groups can come to agree upon principles upon which future decisions will be justified. These principles are provisional, but so long as they are themselves accepted as being justified, they can form the basis of future deliberations.

In the context of transnational environmental governance, accepting the presence of deep and enduring disagreements over values is prudent in light of the deep divisions between developed and developing countries over responsibility for global environmental harm and approaches to global environmental governance.[119] Accepting that core beliefs over the extent to the right to development will continue to contested and must therefore be subject to deliberation strikes the middle ground between the hegemonic imposition of values that are perceived as being favourable to developed country interests and a purely voluntaristic approach based on unmitigated state sovereignty.

As noted, deliberation, at a minimum, requires that the participants treat one another's arguments with respect; that is, with a genuine intention to reach agreement on the basis of reasons that are capable of being mutually acceptable.[120] Risse points out that this requirement may conflict with the obligations of agents to represent the interests of their organization, be it a state, a firm or a non-governmental organization, in deliberations.[121] In the context of policy processes in treaty bodies, states will often limit their negotiators to fixed positions thereby undermining the deliberative intentions of the process. Similar restrictions may apply to any entity that is not engaged in a deliberative process on their own behalf. While this point indicates

---

[117] *Ibid.*, citing Will Kymlicka, "Citizenship in an Era of Globalization: Commentary on Held" in Ian Shapiro & Casiano Hacker-Cordón, eds., *Democracy's Edges* (Cambridge: Cambridge University Press, 1999).

[118] Gutmann & Thompson, *supra* note 7 at 114.

[119] See Obijiofor Aginam, "Saving the Tortoise, the Turtle, and the Terrapin: The Hegemony of Global Environmentalism and the Marginalization of Third World Approaches to Sustainable Development" in Obiora Okafor & Obijiofor Aginam, eds., *Humanizing Our Global Order: Essays in Honour of Ivan Head* (Toronto: University of Toronto Press, 2003) 12.

[120] International relations scholars are divided on the question of whether states are capable of interacting in non-egoistic ways. To a significant degree, these positions come down to broader theoretical questions around the nature of state interests and state identities, and are beyond the scope of this paper. See Beth A Simmons, Walter Carlsnaes, & Thomas Risse, eds., *Handbook Of International Relations* (London: SAGE Publications, 2002), especially contributions in Part One.

[121] Risse, *supra* note 8 at 18.

clear institutional limits to the use of deliberation, it should be understood that even where participants are engaged in positional bargaining they are often required to publicly justify their position and to provide reasons for their rejection of the position of others. Where those justifications are inadequate, those parties are likely to face increased political pressure to reconsider their preferences. Moreover, the informality of many transnational processes lends itself to genuine deliberation since parties are not bound to arrive at decisions with reference to formal legal criteria, but are free to question the adequacy of norms in the context of a particular problem.[122] Finally, the potential for positional bargaining is more likely to occur in issue areas where possible outcomes are predictable since in those circumstances participants can actually calculate the impact of policy choices. What this suggests is that in areas of high uncertainty, such as many environmental problems, persuasion is more likely to occur and is therefore more fertile ground for deliberative processes.[123]

Informality also recognizes the multiple levels on which many transnational actors operate.[124] In the transboundary pollution example, the source state retains the authority to determine its internal environmental policies. However, deliberative models require that decision-makers are accountable in informal terms to those affected by requiring that decisions be subject to public justification. Because deliberative models locate legitimacy in interactions, they are well suited to address governance concerns that arise in a wide variety of forums, including formal international organizations and treaty bodies, as well as less formal avenues of decision-making such as transgovernmental networks and epistemic communities. Consequently, transnational democracy as envisaged by deliberate democrats is not defined by a single form of institutional arrangement, but rather it will be defined by the subject-matter of collective action, the interests implicated and the actors involved.[125]

---

[122] Gutmann & Thompson *supra* note 7 at 101: "The reason-giving process is necessary for declaring a law to be not only legitimate but also just. The process is necessary to give assurance that (substance or procedural) principles that may be right in general are also right in the particular case or rightly applied to this particular case."

[123] Robert Keohane makes a similar point citing game theoretic research: "It is reasonable to hypothesize that under conditions of uncertainty in the real world, the chain of inheritability will be broken, and actor's preferences about future outcomes will not dictate their choice of alternatives in the present." Robert O. Keohane, *Power and Governance in a Partially Globalized World* (London: Routledge, 2002) at 342.

[124] Risse, *supra* note 8 at 18, suggesting the need for feedback loops into domestic processes in order to overcome tensions between delegation (principal-agent) accountability and participation (stakeholder) accountability.

[125] John S. Dryzek, *Rational Ecology: Environment and Political Economy* (New York: Blackwell Publishing, 1987) at 135. See also Oran Young, *The Institutional Dimensions of Environmental Change* (Cambridge, MA: MIT Press, 2002) (linking forms to institutional design to features of specific environmental problems).

A further source of concern is the impact that deliberation will have on efficient decision-making. The requirement for inclusivity would appear likely to increase decision-making costs. These costs may be exacerbated by the need for decision-makers to determine stakeholders in relation to different decisions and to ensure that diffuse interests and vulnerable groups are included in deliberations. The process of deliberation itself can be demanding, requiring the dissemination of complex, often technical, information to large groups and requiring opportunities for participants to respond to one another. These demands are compounded in a transnational context where language differences, geographical remoteness and vastly divergent capacities to effectively participant will impact deliberative processes. Finally, provisionality suggests that decisions when taken may be revisited which raises concerns about finality and stability within a policy creation framework.

Deliberative democrats have several responses to efficiency critiques. Firstly, Gutmann and Thompson make it clear that it is not their expectation that all public decision-making need be deliberative.[126] Secondly, deliberative processes do not require consensus and therefore will need to be supplemented by other forms of decision-making. These other forms of decision-making can bring finality and certainty to policy processes.[127] Because deliberative processes seek to promote legitimacy through accountability, at a practical level deliberative processes do not require the creation of new institutions and forums, but rather the intention is to ensure that existing interactions are justificatory in nature. Finally, provisionality need not result in instability, but can in fact be built into policy processes in a predictability manner. In an environmental context, where scientific knowledge and technical responses to environmental change are constantly evolving, providing for orderly change through adaptive management is recognized as a fundamental organizing principle of policy creation.[128]

Deliberative approaches also appear well suited to address legitimacy concerns related to the role of science in transnational environmental policy-making. The use of experts to legitimize policy processes is dependent on the legitimacy of those processes themselves. While legitimacy is clearly derived in part by the qualifications of experts, this necessarily exclusionary practice

[126] Gutmann & Thompson *supra* note 7 at 56.
[127] *Ibid* at 18.
[128] See Kai Lee, "Appraising Adaptive Management" in John S. Dryzek and David Schlosberg, eds., *Debating the Earth: The Environmental Politics Reader*, 2nd ed. (New York: Oxford University Press, 2005) 104.

creates tensions of its own. The difficulty here is that aggregative approaches to democratic decision-making, such as voting, are not readily transferable to expert inquiry. Moreover the principle justification for expert authority in aggregative models relies heavily on qualifications and on a separation between values and empirical knowledge. But both are contested. Deliberative models suggest a rejection of a bright line division between science and non-science on some *a priori* basis and would subject those boundaries to deliberation. Moreover deliberative theories would also subject the basis of qualification to deliberation.[129] A prominent example of this is the explicit recognition of traditional knowledge as a source of valid scientific knowledge, notwithstanding its failure to adhere to the positivistic scientific methodology that prevails in the scientific community.[130] Perhaps most importantly deliberative models would not exempt scientists and other experts from the requirement to justify their positions in a principled and public fashion. This would require expert communities to present their arguments in ways that are accessible to lay participants. Requiring experts to engage in deliberative processes which may question fundamental methodological and empirical assumptions may also address inherent power differentials between experts and lay people by recognizing the inherently contingent and bounded nature of scientific knowledge.[131]

c) Deliberative Democracy and International Law

It was argued above that one of the implications of transnationalism in international environmental law has been the move away from formal consent as the defining feature of legal normativity. In this regard, there is an increasing interest in the legitimacy of legal norms and processes as a measure or explanation of international law's ability to influence state behavior. This has lead a number of international legal scholars to come to view the formation of international law and state compliance with international law in deliberative terms. For example, Brunnée and Toope have argued that international environmental regimes often arise out of 'contextual regimes', which can be described as shared expectations that converge around a particular issue area as a result of consistent practice and deliberation.[132] Shared expectations

[129] Bäckstrand, *supra* note 88 at 33-34. See also Baber & Bartlett, *supra* note 102 at 186-92.
[130] See *Convention on Biological Diversity*, 5 June 1992, 1760 U.N.T.S. 79, 31 I.L.M. 818 (entered into force 29 December 1993) [*CBD*].
[131] Bäckstrand, *supra* note 88 at 34.
[132] Jutta Brunnée & Stephen J. Toope, "The Changing Nile Basin Regime: Does Law Matter" (2002) 43 Harv. Int'l L.J. 105; Jutta Brunnée & Stephen J. Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39 Colum. J. Transnat'l L. 19 ["Interactional

arise through "processes of reasoning and normative elaboration that help to involve actors and enable them to feel directly implicated in the self-governing they seek to achieve".[133] These expectations can form the basis of broad norms governing state behavior and can in turn crystallize into more precise and binding obligations, although there is nothing inevitable about the progressive deepening of normative commitments. Abram and Antonia Chayes have described state compliance with international legal norms in similar terms:

> The discursive elaboration and application of treaty norms is the heart of the compliance process. The dynamic of justification is the search for a common understanding of the significance of the norm in the specific situation presented. The participants seek, almost in Socratic fashion to persuade each other of the validity of the successive steps in the dialectic. In the course of this debate, the performance required of a party in a particular case is progressively defined and specified. Since the party has participated in each stage of the argument, the pressures to conform to the final judgment are great. "The process by which egoists learn to cooperate is at the same time a process of reconstructing their interests in terms of shared commitments to social norms".[134]

These approaches to international law suggest that deliberative approaches have some descriptive purchase insofar that transnational actors through deliberate processes can generate and sustain norms that are binding. Bindingness arises in a deliberative context, not as a result of formal consent, but as an informal matter – as a sense of felt obligation – where participants come to accept the arguments in support of the norms as being reasonable and that their own (self-interested) position has been adequately accounted for.

The development of rules, guidelines and other prescriptive instruments by treaty bodies that are not subject to specific state consent may nevertheless legitimately influence outcomes where their formation is preceded by sufficiently deliberative processes.[135] Consequently, in policy environments where formal consent may not be achievable, parties may still seek to create binding arrangements through deliberation. In this regard, participants will draw on accepted norms and principles as an important source of persuasion. Persuasion, or at a minimum,

---

Theory"]; Jutta Brunnée & Stephen J. Toope, "Environmental Security and Freshwater Resources: Ecosystem Regime Building" (1997) 91 A.J.I.L. 26.

[133] Jutta Brunnée & Stephen J. Toope, "Interactional International Law" (2001) 3 Int'l L. Forum 186 at 190

[134] Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1998) at 123, quoting Alexander Wendt, "Anarchy Is What States make of It: The Social Construction of Power Politics" (1992) 46 Int'l Org. 391 at 417.

[135] See Brunnée, *supra* note 12.

acceptance of the reasonableness of arguments put forward will be a function of the congruence of those arguments with shared values of both a substantive and procedural nature.[136]

Norms, whether formal or informal, will have persuasive influence outside a purely state to state context, and in this regard deliberative models require that the deliberative community include non-state, and sub-state actors. On this basis, the fairly closed processes of COPs and other subsidiary bodies would appear to fall below the inclusivity requirement of deliberative theories. However, the informal legal rationality of many transnational environmental legal processes ensures that the norms generated are subject to further interpretation and elaboration in domestic and transnational for a and are rarely treated as being beyond contestation in those fora.[137] As a result, Harold Koh argues that norm internalization arises where international legal norms are subject to authoritative interpretations in transnational and domestic legal processes.[138] Koh views these repeated transnational interactions very much in deliberative terms in that interested parties will seek to persuade influential transnational and domestic actors to accept the authoritative nature of international legal norms. Compliance arises where participants accept the authoritative nature of interpretations. In the case of states, internalization may take a variety of forms such as treaty implementation legislation, incorporation of norms into judicial decisions or bureaucratic practices.[139]

The relationship between deliberation and norms is complex because it is the presence of accepted norms within a community that allows for successful deliberation and it is successful deliberation that produces norms. One way to conceptualize this process is that those norms and principles that are commonly accepted will become the basis upon which future deliberations over more precise or elaborated sets of norms will be conducted. As these norms are subject to further deliberations across a number of different contexts they may lose their provisional character and may themselves become the basis of assessing the reasonableness of still further deliberations. The principle of provisionality provides that unsuccessful deliberations may result in a norm losing its accepted character. It follows that the projection of norms into policy-making processes is of paramount importance to the deliberative process.

---

[136] See "Interactional Theory," *supra* note 132.
[137] To be clear, my point is not that deliberative models obliterate the line between formally binding and non-binding norms. Clearly, at the state to state level the distinction remains important and salient. However, as a matter of influence, norms are capable of generating changes in actor behavior regardless of their formal status.
[138] Koh, *supra* note 70; Harold Koh, "Why Do Nations Obey International Law (1997) 106 Yale L.J. 2599.
[139] Harold Hongju Koh, "Bringing International Law Home" (1998) 35 Hous. L. Rev. 623.

d) Conclusion

Like consent based theories of international law, deliberative approaches view international law as self-regulatory, but in a number of ways deliberative approaches would appear to better capture the actual dynamic of transnational environmental governance. Firstly, under deliberative models international legal norms can be properly understood as being binding (having normative influence) upon the full range of transnational actors and across multiple fora. Domestic courts or administrative decision-makers acknowledge the persuasive authority of international environmental norms notwithstanding their unimplemented status because these norms have been subject to debate and deliberation in the transnational sphere. Secondly, deliberative models tend to view international legal normativity as a continuum, as opposed to being binary since the quality of deliberation itself is not a binary proposition. This more accurately accounts for the presence of many influential, but formally non-binding (soft law) instruments in transnational environmental governance structures. Thirdly, deliberative models allow for a more pluralistic understanding of international law. In particular, the principle of provisionality gives those states and those actors that were not active in the creation of existing norms, a basis for continued support of the system as a whole. Provisionality also provides a normative foundation for treating legal norms underlain by scientific knowledge as contingent and subject to reassessment. Finally, international law forms the common metric of transnational deliberation. It is one of the principal bases upon which the reasonableness of future policy decisions shall be assessed by those who are potentially affected by those decisions. As a mechanism for accountability, deliberative approaches accurately conceptualize international law as a bottom up process.

Despite the attractiveness of deliberative democratic theory in abating legitimacy concerns in transnational environmental governance structures, there remain serious questions regarding the practical application of deliberative approaches to actual policy processes. There is an abstract quality around the debate regarding the democratization of the transnational sphere as little attention has been paid to existing institutional mechanisms that promote deliberation. Among the outstanding questions are the following: how might deliberative processes determine membership in a particular deliberative community; how can transnational decision-making processes be structured to promote transparent, discursive, and principled deliberations; are there mechanisms available for sanctioning decision-makers who fail to adequately justify their

decisions; how can deliberative processes interact with scientific practices; and finally, can the requirement for mutual respect (which would seem to require participants to genuinely consider the arguments of others) be operationalized.

As a way to address some of these outstanding questions and to answer the larger, implicit question as to the practical feasibility of institutionalizing deliberative democratic processes in transnational environmental governance structures, the final part of this paper examines the structure and role of environmental impact assessments (EIAs) in transnational environmental governance. To this end, international commitments to conduct EIAs, their sources and their implementation are discussed with a view to assessing whether EIAs possess characteristics that promote principled deliberation over environmental issues in transnational settings. Particular consideration is given to how EIAs can enhance the legitimacy of policy decisions in transnational governance structures.

3. Environmental Impact Assessments as Deliberative Mechanisms

a) Domestic Origins

EIAs were first developed under U.S. federal law as part of the *National Environmental Policy Act* (*NEPA*).[140] The basic objective of *NEPA* is to set out the federal government's environmental policy objectives. These policies are worded as broad expressions of environmental values and do not contain and precise rules or standards.[141] Instead, the Act requires federal decision-makers to use "all practical means and measures" to fulfill these environmental objectives.[142] These means and measures are left unspecified, except for the requirement that all federal government agencies prepare "a detailed statement" describing the potential environmental impacts of any proposed federal action where that proposed action may significantly affect the quality of the human environment.[143] This requirement for a detailed statement, later referred to as an "environmental impact study" (EIS), provides the legislative basis for the modern EIA system. The elements of the EIS set out in *NEPA* require federal

---

[140] 42 U.S.C. §§ 4321-4370(f) (2000)
[141] The policies, which are set out in section 101 (42 U.S.C. § 4331), anticipated many future global concerns and values, such as sustainable development, inter-generational equity, and the impact of new technologies on the environmental.
[142] *Ibid* § 4331.
[143] *ibid* § 4332.

government agencies engaged in decisions that affect the environment to consider the environmental impacts of their proposal along side alternatives to the proposed activity.[144] The agency was also required to consult with other government departments prior to completing the EIS and to make the EIS available to the public.

Since its inception in 1970, the requirements for an EIS and the associated consultation and publication requirements have been substantially elaborated upon, but the essentially structure remains unchanged. EIAs require that agency decision-makers must consider the environmental impacts of their undertakings where there is a likelihood that the undertaking may have a significant impact on the environment. A determination of whether the threshold of 'significant environmental harm' (called screening) is generally made by the agency in its discretion, but notice must be given for the screening decision. In furtherance of this requirement the agency is required to consider not only the impacts of its proposed undertaking, but it must also consider alternatives to the undertaking and their impacts. These findings form the basis of the EIS. A scoping process, similar to determining the terms of reference of a study, is used to focus the study as much as possible on those environmental issues that are likely to have significant environmental effects. The consultation process itself varies but may include public consultation with respect to screening, scoping and on the range of alternatives considered. The EIS is subject to further public and agency consultation and will generally include a requirement for the lead agency to respond to comments with written reasons. The final decision itself must not be made before the EIA process is complete and must identify the basis upon which the decision was made. However, *NEPA* does not require that a lead agency adopt the most environmentally desirable alternative or that it avoid or mitigate activities that are found to a have a significant environment impact.

The process is self-regulatory in that the lead agency retains the discretion to move ahead with the project notwithstanding the results of the EIA. In the words of the U.S. Supreme Court, "*NEPA* merely prohibits uninformed – rather than unwise – agency action".[145] However, the distinction between process and substance is not as clear as the Supreme Court suggests. Despite

[144] *NEPA* § 4332 (s.201)(2)(c)), requires agencies to consider the following: (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

[145] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989) at 351.

not requiring decision-makers to arrive at particularized environmental outcomes, EIA processes are not ambivalent about the kinds of values and principles decisions-makers should account for in arriving at their decisions. The essential structure of *NEPA* is a unique combination of well defined procedural rules aimed at careful deliberation and public involvement coupled with a strong statement of environmental values, which despite being open-ended is clearly meant to influence outcomes by requiring decision-makers to publicly account for those values and justify their decisions in light of them.

EIA processes have been rapidly adopted by countries throughout the globe, with an estimated one hundred countries having domestic EIA legislation.[146] EIAs have been similarly adopted by international policy-makers across a broad spectrum of issue areas and institutional contexts. EIAs themselves are a good illustration of the globalization of domestic environmental law and policy, with U.S. officials playing a catalytic role in the creation of international EIA policy.[147] EIA processes adopted in other countries and in transnational contexts have maintained the proceduralist structure of *NEPA*, but like *NEPA*, the distinction between process and substance is blurred, with EIAs principal task being to ensure that transnational environmental values are accounted for.

b) Sources of Transnational EIA Commitments

International EIA commitments exist across a variety of contexts and institutional arrangements. Most prominent perhaps are transboundary EIA obligations such as those contained in the *Convention on Environmental Impact Assessment in a Transboundary Context* (the "*Espoo Convention*"),[148] and the European Community Directive on EIAs (the EIA

[146] *Indicators and Environmental Impact Assessment,* UNEP CBD SBSTTA, 7th Meeting, UNEP/CBD/SBSTTA/7/12 (2001), online: CBD < http://www.biodiv.org/doc/meetings/sbstta/sbstta-07/official/sbstta-07-12-en.pdf>.

[147] For example the first meeting of the Working Group developing the *UNEP EIA Goals and Principles* met in Washington at the invitation of the U.S. with U.S. State Department officials and heard presentations on the U.S. experience with *NEPA.* See Will Irwin, "Impact Assessment – First Session of the Working Group of Experts" (1984) 13 Envtl. L. & Pol'y J. 51 at 52.

[148] 25 February 1991, 1989 U.N.T.S. 309, 30 I.L.M. 802 (entered into force 10 September 1997) [*Espoo Convention*]. The *Espoo Convention* was negotiated under the auspices of the UNECE and is open to UNECE members only. However, the Parties to the *Espoo Convention* agreed in February 2001 to amend the convention to allow for non-UNECE members to become party to the convention with the approval of the membership, providing for the possibility that the *Espoo Convention* may become more of a global treaty. See *Amendment to Espoo Convention,* Meeting of the Parties to the Convention on Environmental Impact Assessment in a Transboundary Context, *Report of the Second Meeting,* UN Doc. ECE/MP.EIA/6, 13 September 2004, Decision II/14, (the proposed amendment is not yet in force).

Directive).[149] Obligations to conduct EIAs reflect existing customary obligations to prevent transboundary harm and to cooperate with potentially impacted states through notification and consultation of potential impacts.[150] While the principal interactions that are subject to transboundary EIA commitments are conducted at a state to state level, the *Espoo Convention* requires that the affected members of the public also be directly included in consultation processes.[151] Transboundary EIA commitments address all manner of environmental impacts, so long as they are transboundary in nature.[152] Issues impacting the global commons are also the subject of EIA obligations. The *Antarctic Protocol*, which governs the "comprehensive protection" of the Antarctic environment includes detailed EIA obligations, addressing virtually all human activities conducted within the Antarctic.[153] Similarly, the *United Nations Convention on the Law of the Sea* requires states to conduct EIAs where planned activities under their control may cause significant environmental impacts to the marine environment.[154] Because there is no single state that is impacted by environmental change to global commons resources both *UNCLOS* and the *Antarctic Protocol* provide for some institutional mechanisms in order to engage the broader community.[155] The assumption in both cases is that there is no affected public *per se*, and as a result, there are no provisions for allowing for formal non-state participation in the EIA processes under either *UNCLOS* or the *Antarctic Protocol*.[156] A final set of international environmental issues that make use of EIA processes are issues of global common concern, such as biological diversity and climate change. Unlike transboundary or global commons impacts, issues of common concern impact other states less directly in that the impacts themselves may be purely domestic. Nevertheless, international agreements place obligations on states to assessment project impacts on biological diversity or climate change in

[149] EC, *Council Directive* 85/*337 of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment*, [1985] O.J. L 175/40, as am. by EC, *Council Directive* 97/11, [1997] O.J. L. 73/5, and by EC, *Council Directive* 03/35.
[150] For a discussion of relationship between harm principle, the duty to cooperate and EIAs, see Handl, *supra* note 14. But see John Knox, "The Myth and Reality of Transboundary Environmental Impact Assessment" (2002) 96 A.J.I.L. 291 [Knox].
[151] *Espoo Convention*, *supra* note 148, arts. 2(6), 3(8) and 4(2).
[152] *Ibid*., art. 1 defines the impacts that require assessment broadly across all environmental media and including impacts on cultural heritage or socio-economic conditions resulting from environmental change.
[153] See Article 8 and Annex 1 of the *Protocol to the Antarctic Treaty on Environmental Protection*, 4 October 1991, 30 I.L.M. 1461 (entered into force 14 January 1998) [*Antarctic Protocol]*.
[154] See Article 206 of the *UNCLOS*, *supra* note 13.
[155] In the case of *UNCLOS*, *ibid.*, Art. 205 requires states to provide assessments to "the competent international organizations" that in turn are required to make assessments available to all states. In the case of the *Antarctic Protocol*, *supra* note 153, it is the Committee on Environmental Protection of the Antarctic Treaty Consultative Meeting.
[156] Although, the *Antarctic Protocol* does require that the parties make EIA documents publicly available, *ibid*, Annex 1, Art. 3(3).

recognition of the universal character of the problem itself,[157] although these obligations do not extend notification and consultation requirements beyond the state.

Most international EIA commitments contemplate that the implementation of international obligations will occur through domestic EIA processes, as opposed to a distinct international process. Transboundary obligations are implemented by extending, assessment, notification and consultation requirements beyond the state. For example, those responsible for carrying out EIAs are required to assess impacts to the environment without regard for national boundaries, and to engage foreign agencies and foreign members of the public on the same basis as domestic agencies and citizens. International agreements on transboundary EIA ensure reciprocity between states by imposing minimum standards for transboundary EIA.[158] In a similar fashion, EIA commitments in the *Convention on Biological Diversity* (*CBD*) require states to ensure that domestic EIA processes consider the impacts of planned activities on all levels of biological diversity. Despite being an entirely domestic process, the resulting interactions are transnational in the sense that the *CBD* requires deliberation over the applicability of internationally generated environmental norms in specific domestic contexts.

As noted above, in circumstances where the interests of a group of states are implicated, EIA commitments may utilize international institutions to coordinate consultation processes. International institutions may also employ EIA process to their own decision-making processes. Here the most developed example is the use of EIA processes by the World Bank and other international development banks to ensure that bank financed activities are "environmentally sound and sustainable".[159] The World Bank requirements require consideration of local, transboundary and global environmental issues and include requirements for extensive public consultation. Here the interactions are not state to state or state to individual, but rather involve

---

[157] *CBD*, *supra* note 130, Article 14; UNFCCC, *supra* note 13, Art. 4(1)(f).
[158] The inability for the U.S. and Mexico to agree on reciprocal levels of EIA coverage has been cited as the chief factor preventing an agreement on transboundary EIA in North America, see Knox, *supra* note 150.
[159] World Bank, *Operational Policies – Environmental Assessment*, January 1999, OP 4.01 [OP 4.01]; World Bank, *Banking Procedures – Environmental Assessment*, January 1999, BP 4.01 [BP 4.01], online: The World Bank Group < http://www4.worldbank.org/legal/legen/legen_assessment.html>. OP 4.01 sets out the banks principle policies respecting environmental assessment, while BP 4.01 sets out the banks internal processes for conducting and reviewing environmental assessments. Regional development banks that require EIAs to be conducted for projects involving bank assisted financing include the Asian Development Bank, the African Development Bank, the European Bank for Reconstruction and Development and the Inter-American Development Bank, see M. Sornarajah, "Foreign Investment and International Environmental Law" in Sun Lin and Lal Kurukulasuriya, eds., *UNEP's New Way Forward: Environmental Law and Sustainable Development* (Nairobi: UNEP, 1995) 283 at 288.

interactions between international organizations, affected states and affected members of the public regarding the acceptable levels of environmental impact. An emerging area of EIA application in the transnational sphere is their use by treaty bodies in internal decision-making procedures, such as the EIA requirements as a condition of approval for projects under the Clean Development Mechanism in the climate change regime.[160]

EIA obligations also vary considerably in their normative strength. The *Espoo Convention* and the *Antarctic Protocol* are formally binding and quite precise in the obligations they impose, leaving states with less discretion over how to implement these requirements. On the other hand, the obligations under the *UNCLOS* and the *CBD* are qualified by phrases such as "as far as practicable" and "as far as possible and as appropriate",[161] and do not contain a precise set of requirements. Given that it is anticipated that international EIA commitments are to be implemented into domestic EIA processes, it is not surprising that states have retained for themselves discretion as to the particular modalities of implementation. Under the *CBD*, the COP endorsed a set of draft guidelines for incorporating biodiversity related issues into EIA processes.[162] A similar use of guidelines is adopted in respect of the Arctic environment.[163] EIA guidelines are intended to act as "adaptation rules",[164] which provide direction to states on how to incorporate the assessment specific environmental problems or address unique procedural questions that arise in relation to a specific ecosystem or environmental goal. So in the Arctic context, there is an emphasis on issues that are unique to that regime, such as how to involve remote indigenous populations in the EIA process, the integration of traditional knowledge into EIA and the implications of the particular fragilities of the Arctic environment. Likewise the *CBD EIA/SEA Draft Guidelines* set out strategies for adapting EIA processes to account for issues

[160] "CDM Modalities," *supra* note 28, s.37.
[161] *UNCLOS*, *supra* note 13, Art. 206 and *CBD*, *supra* note 130, Art. 14, respectively.
[162] Guidelines for incorporating biodiversity-related issues into environmental impact assessment legislation and/or processes and in strategic environmental assessment, *Report of the Sixth Meeting of the Conference of the Parties to the Convention on Biological Diversity*, U.N. Doc. UNEP/CBD/COP/6/7, Annex. These guidelines are the subject of continuing discussion among the parties, for details see online: CBD, < http://www.biodiv.org/programmes/cross-cutting/impact/default.asp >.
[163] The Arctic environment is the subject of a diffuse set of international commitments structured through the Arctic Council, a coordinating organization of the eight Arctic states. These states concluded the non-binding *Arctic Environmental Protection Strategy* (*AEPS*) that sets out environmental objectives and identifies key environmental problems. The Arctic EIA Guidelines were developed under the *AEPS*. See *1997 Guidelines for Environmental Impact Assessment in the Arctic*, adopted by the Arctic Council in the Alta Declaration on the Protection of the Arctic Environmental Protection Strategy, 13 June 1997, online: UNECE < http://www.unece.org/env/eia/documents/Arctic%20EIA%20guide.pdf > [*Arctic EIA Guidelines*].
[164] This term is taken from Timo Koivurova, *Environmental Impact Assessment in the Arctic: A Study of International Legal Norms* (Hampshire, England: Ashgate Publishing, 2002).

that are unique to the biodiversity regime. For example, the guidelines address the measurement of "significance" in the context of biodiversity and seek to ensure that assessments consider impacts at the different levels of biodiversity, (e.g. genetic, species, ecosystem).

The varying scope, institutional settings, and normative structure of EIA commitments reflects the diversity of problem structures into which EIA processes are pressed into service. But despite this diversity, the core structure of EIA processes is retained at the transnational level. At its heart is the use of open and discursive interactions over specific policy decisions into which the substantive goals of the particular environmental regime are projected. The substantive goals tend to be abstracted to the level of principle, but the contextualized nature of their application in relation to specific projects allows potentially affected groups to interpret and elaborate on the meaning of international environmental principles, such as the harm principle, the protection of biodiversity or of unique and fragile ecosystems, in relation to a specific factual basis. Because the elaboration of environmental principles is difficult in the abstract, EIA processes substitute substantive specificity for procedural specificity – seeking to create an information rich and inclusive decision-making environment. From an accountability standpoint, EIAs seek to hold policy-makers to account by ensuring that decisions are made in accordance with well-defined procedural requirements and in full contemplation of prevailing environmental norms. From a deliberative aspect, the efficacy of EIAs to hold decision-makers to account can be assessed in light of the ability of EIAs to promote policy processes that are inclusive, information rich, discursive, principled and provisional.

c) Deliberative Aspects of Transnational EIA Processes

Inclusive. A central question within deliberative democratic theory is determining the membership of the deliberative community. This determination presents two particular challenges in the transnational environmental context. First, if membership is based on the principle of affectedness, on the basis of what criteria is affectedness to be determined? Second, there may be an agency problem insofar as states may not adequately represent the views of individuals affected.

The first challenge is addressed in the *Espoo Convention* through the identification of a common standard for determining affectedness – likelihood of "significant adverse transboundary

impact".[165] This threshold maps on to the threshold for determining whether the customary obligations of harm prevention and the duty to cooperate are engaged and also mirrors the threshold for determining whether to conduct an EIA in most domestic EIA legislation.[166] "Significance" as a threshold is not by itself a particularly helpful criteria. However, international instruments have adopted a variety of methods to further refine the "significance" threshold. For example, the *UNEP Goals and Principles of Environmental Impact Assessment* indicate that states categorize certain activities, geographic areas or resources that are likely to give rise to significant impacts. The *Espoo Convention* makes use of this approach by listing activities that are required to be subject to an initial determination of significance and by providing a further list of criteria by which significance can be determined.[167] The *CBD EIA Guidelines* provide a further set of screening criteria related specifically to determining significance in relation to impacts to biodiversity. A further innovative approach to determining significant transboundary impacts is the use of geographic criteria. The "Draft North American Agreement on Transboundary Environmental Impact Assessment" (prepared by the Commission for Environmental Cooperation under the NAFTA) specifies that identified projects within 100 kilometres of a border shall be subject to a transboundary EIA.[168] While the Draft TEIA Agreement was never completed, the 100 kilometre criterion has been adopted as the basis for notification procedures under the *U.S. Canada Air Quality Agreement*.[169]

Because the determination of significant impact and its extent effectively defines the deliberative community, some ability for excluded groups to challenge the determination is desirable. This is especially important in light of the fact that screening and initial notification decisions are determined in the proponent's discretion. Transnational EIA processes respond to this need in two ways. The screening process and final determination may be the subject of public consultation itself. In keeping with domestic EIA processes, consultation on screening decisions is never mandatory, but some transnational EIA processes do anticipate public consultation prior to the making of a screening decision. The *Espoo Convention* provides for notification to be made "as early as possible and no later than when informing its own public

[165] *Espoo Convention*, *supra* note 148, art.2.
[166] See Christopher Wood*: A Comparative Review, 2nd ed.* (Harlow: Prentice Hall, 2002), see especially chps. 9 & 16.
[167] *Espoo Convention*, *supra* note 148, Appendix I & Appendix III.
[168] Online: CEC <http://www.cec.org/pubs_info_resources/law_treat_agree/pbl.cfm?varlan=english>.
[169] *Agreement between the United States and Canada on Air Quality*, 13 March 1991, Can. T.S. 1991 No.3, 30 I.L.M. 678 (entered into force upon signature). The 100 kilometre criteria is not found in the agreement itself, but is used by the Air Quality Committee set up under the agreement.

about that proposed activity".[170] Thus, in instances where domestic EIA processes require notification and consultation on screening, this should occur at the transboundary level as well. Additionally, the *Espoo Convention* provides a procedure for states not notified but which considers that they may be affected by a significant adverse transboundary impact to request information from the source state and engage in discussion regarding whether the threshold has been made.[171] In the event of a continued disagreement, either party may submit the question of the threshold to an inquiry commission held in accordance with procedures set out in the *Espoo Convention*.[172] The World Bank EIA process is subject to a similar review through the Bank's Inspection Panel procedures.[173] A final mechanism of potential review is the availability of judicial review in domestic legal settings to challenge screening decisions. The use of domestic administrative remedies has been bolstered by the extension of rights of judicial review of environmental decisions to non-citizens under the principle of non-discrimination generally, and more specifically through the *Aarhus Convention*.[174]

The effect of the availability of these procedures on the deliberative process is two-fold. Firstly, review procedures ensure that the threshold for triggering transnational EIA processes is subject to deliberation itself. Notably, the *Espoo Convention* inquiry procedure allows for intervention by other interested states, suggesting an open and community based approach to determining "significance". Put another way, decision-makers can be held accountable for their screening determinations. Accordingly, review mechanisms provide affected states or individuals with some leverage through delay and publicity to "sanction" decision-makers who fail to adhere to procedural requirements.[175] Review procedures also enhance the legitimacy of the threshold determination by increasing the impartiality of that determination.

The agency problem refers to the possibility in transnational EIA processes that deliberative representatives may not adequately represent the views of all affected persons. This is recognized in the *Espoo Convention* which provides that participation not be restricted to state parties, but should also include "an opportunity to the public in the areas likely to be affected to

[170] *Espoo Convention*, *supra* note 148, Art 3.
[171] *Ibid*, Art.3(7).
[172] The inquiry commission procedures are contained in *ibid*, Appendix IV. To date only one matter, the "Bystroe Project", has been referred to the inquiry procedure.
[173] See Resolution No. IRBD 93-10; Resolution No. IDA 93-6, creating the Inspection Panel in 1993.
[174] Article 9 of the *Convention on Access to Information, Public Participation in decision-making and Access to Justice in Environmental Matters*, 28 June 1998, 2161 U.N.T.S. 447, 38 I.L.M. 517 (entered into force 30 October 2001).
[175] See Grant and Keohane, *supra* note 82, discussing the role of sanctioning in accountability mechanisms.

participate in relevant environmental impact assessment procedures".[176] Consequently, even where the affected state may not have concerns regarding the transboundary impacts of a proposed project, there is still opportunity for affected individuals and groups to participate in the decision-making process. Other transnational EIA processes, notably the *Arctic EIA Guidelines* explicitly recognize the vulnerability of indigenous groups to environmental change and provide specific strategies for ensuring the participation of these groups in EIA processes.[177] The World Bank's EIA process goes even further in that its procedures not only requires broad based participation, but extend rights of review to individuals through the Inspection Panel process.

For domestic EIA processes that consider trransboundary and global environmental issues, EIA processes may become an avenue for environmental groups to advocate for environmental policy change. In the early days of *NEPA*, groups such as the Sierra Club, the National Audubon Society, the National Wildlife Federation and the Natural Resources Defense Council were instrumental in legal challenges aimed at making *NEPA* more responsive to environmental considerations.[178] While environmental advocacy groups have been active in a broad spectrum of domestic environmental issues, they have also been instrumental in seeking the application of *NEPA* to extraterritorial effects.[179] In Canada, environmental groups involved in a legislative review of *CEAA* made submissions that EIA processes must better account for Canada's international obligations, particularly under the *CBD* and the *UNFCCC*, when considering the impacts of planned activities.[180] Environmental advocacy groups have supported

---

[176] *Espoo, supra* note 148, art.2(6).

[177] *Arctic EIA Guidelines, supra* note 163 at 37. The recognition of the special position of indigenous people is in keeping with Principle 22 of the *Rio Declaration*, *supra* note 111 and Articles 15 and 16 of the ILO's 1989 *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, 28 I.L.M. 1382 (entered into force 5 September 1991), pointing to a specialized duty to consult. See also *CBD EIA Guidelines, supra* note 162, at para. 28, recognizing the importance of including minority groups in participation.

[178] These groups are cited by Serge Taylor as playing an important early role in *NEPA*, see Serge Taylor, *Making Bureaucracies Think: The Environmental Impact Statement Strategy of Administrative Reform* (Stanford, Ca.: Stanford University Press, 1984) at 47, 238-39. Anyone with even a passing familiarity with *NEPA* jurisprudence will be aware of the significant role that environmental advocacy groups played in the first fifteen years of *NEPA's* existence. The best source for understanding the vast case law associated with *NEPA* is Daniel Mandelker, *NEPA Law and Litigation*, 2d ed. (Minnesota: West Group, 1998).

[179] *Environmental Defense Fund. Inc. v. Massey*, (1993) 986 F.2d 528 (D.C. Cir.), (application of *NEPA* to activities in the Antarctic); *Natural Resources Defense Council v. Department of the Navy*, 2002 WL 32095131 (C.D. Cal. Sept. 17, 2002), (application of *NEPA* to marine environment in EEZ); see also *Center for Biological Diversity v. National Science Foundation*, 2002 WL 31548073 (N.D. Cal. Oct. 30, 2002) (application of *NEPA* to impacts on marine mammals outside U.S. jurisdiction).

[180] See e.g. *CEAA* Five Year Review Submissions by The David Suzuki Foundation, Feb. 2, 2000; West Coast Environmental Law Association and Sierra Legal Defence Fund, March 31, 2000; online: <http://www.ceaa-acee.gc.ca/013/001/0002/0004/0001/wcel_e.htm>.

these calls for formal recognition of the importance of international environmental commitments through appeals to international norms in EIA processes themselves. For example, Canada's international commitment to reduce greenhouse gas levels has been cited by environmental groups in support of their concerns regarding the impacts on climate change from various fossil fuel extraction projects.[181] Incorporating the concerns of indigenous groups has also been given prominence in the Canadian EIA process, with specific steps being undertaken to incorporate traditional knowledge into the EIA process and to ensure that the rights and land claims of indigenous groups are accounted for in the EIA process.[182] There is also some indication that NGOs groups are looking to the *Espoo Convention* as a possible vehicle to pursue environmental concerns by seeking standing to evoke the non-compliance procedures.[183] Finally, in the context of developing countries, NGOs have been integral to the development of the World Bank's EIA procedures and continue to be involved in these processes.[184]

It should be noted that those seeking to promote a particular international norm through transnational political, legal and administrative channels are not restricted to non-governmental organizations. In the context of EIAs, government agencies, and individuals within agencies, acting as "administrative entrepreneurs", have been credited with shaping the policy direction of the decision-making framework.[185] Environment Canada, the federal agency responsible for

---

[181] See *Report of the EUB-CEAA Joint Review Panel Cheviot Coal Project* September 2000, at section 5.2.2, online: <http://www.ceaa-acee.gc.ca> [Cheviot Coal EIA]. See also similar concerns raised by the Sierra Club of Canada in respect of an oil sands extraction project, *Report of the Joint Review Panel Established by the Alberta Energy and Utilities Board and the Government of Canada: Decision 2004-009; Shell Canada Limited, Applications for an Oil Sands Mine, Bitumen Extraction Plant, Co-generation Plant and Water Pipeline in the Fort McMurray Area* (Calgary: Alberta Energy and Utilities Board, 2004) at 15.3, available online: <http://www.ceaa-acee.gc.ca> [Jackpine Mine Project].

[182] See for example, *Report on the Proposed Voisey's Bay Mine and Mill Project* (Ottawa: Government of Canada, 1999) at 118-24 [Voisey's Bay EIA] and *Environmental Impact Statement Final Terms of Reference for the Mackenzie Gas Project*, online:<http://www.ceaa-acee.gc.ca> at 5-6 [MacKenzie Pipeline EIA Final Terms of Reference].

[183] This information is contained in a report from the Implementation Committee under the *Espoo Convention*, which notes the receipt of a letter by the *Espoo Convention* Secretariat from an NGO raising non-compliance issues. The Implementation Committee declined to act on the complaint, although some members indicated that non-compliance issues should be pursued regardless of their source, see *Report of the Fifth Meeting of the Implementation Committee*, April 8, 2004, U.N. Doc. MP/EIA/WG.1/2004/4, online: <http://www.unece.org/env/documents/2004/eia/wg.1/mp.eia.wg.1.2004.4.e.pdf>.

[184] Richard Haeuber, "The World Bank and environmental assessment: The role of nongovernmental organizations" (1992) 12 Envt'l Impact Assessment Rev. 331.

[185] Geoffrey Wandesforde-Smith, "Environmental Impact Assessment, Entrepreneurship, and Policy Change" in R.V. Bartlett ed., *Policy Through Impact Assessment: Institutionalized Analysis as a Policy Strategy* (New York: Greenwood Press, 1989) 155.

environmental regulation, for example, has been actively involved in raising climate change issues in a variety of federal EIA processes.[186]

Information Rich. The deliberative quality of any policy process is highly dependent upon the quality of information available to the participants. To this end, all EIA processes prescribe specific and rigourous minimum requirements for the EIA documentation and require that this information be exchanged in advance of consultations.[187] In the transboundary context, a difficulty lies with the fact that often it is the affected state that is in possession of the best baseline environment information respecting their domestic environment. Consequently, the *Espoo Convention* provides not only obligations on the source state to provide information, but also on the affected state to provide "reasonably obtainable information" at the request of the source state. Other transnational EIA procedures recognize the instrumental value of participation in providing additional sources of information about the environment.[188]

A further challenge to the successful incorporation of scientific knowledge into policy processes is ensuring that the information that is the subject of policy deliberations is credible to the participants and salient to the policy problem under deliberation.[189] Exposing the scientific analysis underlying an EIA to public scrutiny provides reassurance that the scientific methods and analysis used by the project proponent are sound and may be reasonably relied upon. This credibility enhancing role is furthered by rules requiring the EIA documents to be accompanied by a non-technical summary. The requirement that the information subject to deliberation be in a publicly accessible form is integral to the deliberate process. Gutmann and Thompson explain:

> A deliberative justification does not even get started if those to whom it is addressed cannot understand its essential content. …
>
> Citizens often have to rely on experts. This does not mean that the reasons, or the bases of the reasons, are inaccessible. Citizens [and governments] are justified in relying on experts if they describe the basis for their conclusions in ways that citizens can understand; and if the citizens have some independent basis for believing the experts to be trustworthy.[190]

---

[186] Environment Canada's role discussed in Rick Lee, "Climate Change and Environmental Assessment" (Ottawa: CEAA Research and Development Monograph Series, 2001).
[187] See, e.g.., *Espoo Convention*, *supra* note 148, Appendix II.
[188] *Arctic EIA Guidelines*, *supra* note 163 at 37
[189] See Cash et al, *supra* note 89.
[190] Gutmann & Thompson, *supra* note 7 at 4-5.

The recognition of specific types of knowledge, particularly traditional knowledge that may not otherwise be represented in the scientific process also enhances the credibility of the factual basis upon which decisions are made by ensuring that a particular community's knowledge is not marginalized. EIA processes also seek to ensure the salience of scientific information through an iterative and participatory scoping process, although international EIA commitments, such as the *Espoo Convention* and the *Antarctic Protocol* fall short of requiring public consultation prior to the completion of the EIA document.[191] The underlying understanding of science inherent to EIA processes is that scientific understandings will be contingent on social understandings and values and, as a result, will be contested. By subjecting the actual EIA report to deliberation, EIA processes provide opportunity for reflection over scientific norms.

Very clearly, EIA processes are not solely technical exercises. If they were, then there would be no reason for EIA processes to allow for decision-makers to deviate from the scientific findings and recommendations of experts. Instead EIAs contemplate that policy decisions will inevitably involve trade offs and the reconciliation of competing social goals. The need for reconciliation is particularly apparent in the transboundary context where the dynamic is one of competing sovereign rights – the right to develop and the right to be free from environmental harm. Ultimately, resolving these competing claims requires a form of contextual balancing, an approach recognized by the International Law Commission's *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, where the ILC recommends that transboundary pollution prevention may require an equitable balancing of interests.[192] The transnationalism of EIA commitments extends this balancing of interests to include a broader collection of interests beyond those of states.

Discursive. The iterative nature of EIA processes varies, but where the screening and scoping requirements include consultation, the result is that the affected state is involved in identifying the environmental issues and the alternatives to the proposal. Even in cases where public consultation is limited to reviewing a draft EIA report and providing comments, the structure retains a discursive element because the affected state still has an ability to provide

[191] *Espoo Convention*, *supra* note 148, Arts. 3(1), 4(1); *Antarctic Protocol*, *supra* note 153, Annex 1, Arts.3(3)-(6).
[192] International Law Commission, "Commentaries to the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities", in *Report of the International Law Commission, Fifty-third Session*, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001) 377.

comments on the EIA to which the state of origin is required to respond.[193] Under the *Espoo Convention*, it is expressly contemplated that the parties shall enter into consultations, in effect mandating that the legitimate concerns of an affected state cannot be ignored.[194]

The nature of the consultation required under EIA processes is explicitly justificatory. The discursive requirements go beyond simply providing interested parties with an opportunity to be heard. Consistent with Gutmann and Thompson's conceptualization of deliberative democratic processes, EIA does not proceed from the perspective that participants will set aside their self-interest in favour of community goals.[195] However, if they are to be successful they must frame their justifications in terms that will be accessible and meaningful to the other participants. Consequently, participants seek to publicly justify their positions in light of the scientific evidence that has been brought forward and in light of accepted environmental norms. Again in Gutmann and Thompson's words:

> Deliberation is more likely to succeed to the extent that the deliberators are well informed, have relatively equal resources, and take seriously their opponents' views. But even when the background conditions are unfavourable (as they often are), citizens are more likely to take a broader view of issues in a process in which moral reasons are traded than in a process in which political power is the only currency.[196]

EIA processes respond to the need for desirable deliberative conditions in a number of ways. Firstly the requirement to examine alternatives tends to sharpen the discourse over appropriate outcomes. Alternatives help create contradictions by demonstrating that project objectives can be achieved in ways that better adhere to environmental values. These contradictions can, in turn, be exploited to generate reflection and change. Alternatives may also be a way for deliberators to operationalize the "principle of the economy of moral disagreement" by providing a systematic way for participants to arrive at outcomes that minimize their differences. Secondly, EIA processes are generally oriented toward government decision-making.[197] This is not to say that a private project will not be subject to EIAs, but usually only where those projects require a government approval. Government decision-makers are subject to unique constraints that promote public regarding decision-making. Importantly, governments are

[193] *Espoo Convention*, *supra* note 148, Art.6(1); *Antarctic Protocol*, *supra* note 153, Annex 1, Art.3(6).
[194] *Espoo Convention*, *ibid*, Art.5.
[195] Gutmann & Thompson, *supra* note 7at 10-11.
[196] *Ibid* at 11.
[197] In some jurisdictions EIA processes will apply to purely private decision-making. For a comparative discussion of the coverage of EIA processes, see Wood, *supra* note 166 at c.7.

repeat participants in deliberative processes and are both generators and recipients of environmental harm. Transboundary EIA processes are underlain by a broad principle of non-discrimination that requires states to treat environmental impacts on areas outside its jurisdiction no differently from those impacts that occur within its jurisdiction.[198] As repeat participants it will be more difficult for states and state agencies to hold contradictory positions depending on the nature of their interest in a particular EIA process.[199] Thus, EIA processes are oriented towards promoting public regarding behavior from those actors most inclined to behave cooperatively.

The public regarding nature of government decision-makers is reinforced by the international legal duty for states to cooperate in good faith. The requirement of good faith is an express part of the duty to cooperate in relation to transboundary harm and informs state interactions more generally. In the *Gulf of Maine* case, the panel described the duty to negotiate in good faith as entailing "a genuine intention to achieve a positive result".[200] Similarly, the I.C.J., in the *North Sea Continental Shelf Case,* held that negotiation must be something more than "a formal process" instead it must be "meaningful", which in turn requires a willingness to genuinely consider the position of others.[201] In the context of consultation, the panel in the *Lac Lanoux* arbitration also links good faith with an obligation not to treat consultations as "mere formalities".[202] EIAs, as a means to implement the duty to cooperate, also institutionalize the deliberative requirement that interactions be conducted in a genuine, as opposed to in a formal or perfunctory, manner. The requirement of genuineness suggests that a state that proposes a planned activity must consider objections with an open mind and on a principled basis. From a more instrumental standpoint, as repeat participants in a highly interdependent environment, states, and indeed other transnational actors, will be concerned with their community standing. Thus, failure to act in good faith may have negative reputational consequences.

Assessing good faith necessarily involves a consideration of the adequacy of the reasons given for a decision. This, in turn, points to the importance of shared substantive norms to the deliberative process, as substantive norms will form the shared basis upon which the rationality of reasons and decisions are judged. Gutmann and Thompson argue that deliberative outcomes are

[198] See Knox, *supra* note 150.
[199] This point is consistent with game theoretical models that show that repeat participants in Prisoners' Dilemma type game will show a greater tendency towards cooperation than one time participants.
[200] [1984] I.C.J. Rep. 292 at 299.
[201] [1969] I.C.J. Rep. 3 at 47.
[202] *Lac Lanoux Arbitration,* (France v. Spain) (1957), 24 I.L.R. 101 at 119.

more likely to be accepted as legitimate where the participants can, at a minimum accept the reasonableness (or moral merit) of the decision.[203] Good faith and the reasoned deliberation promote mutually respectful decision-making.

Principled. It follows that in order for processes to result in legitimate deliberations, they should project norms into deliberative interactions. As discussed earlier, EIA processes are directed towards the achievement of a broadly defined environmental end. In transboundary EIA commitments that end is to prevent transboundary environmental harm.[204] In the *CBD*, EIAs are expressly stated to be conducted with the intent of avoiding or minimizing significant adverse effects to biological diversity.[205] The assessment procedures under *UNCLOS* have as their objective the prevention of marine pollution, while the Antarctic and Arctic regime require EIAs in furtherance of the preservation of the polar ecosystems. As in domestic EIA systems, the substantive ends to which international EIA commitments are directed are open-ended, raising questions about their utility in mediating deliberative processes. Such a view is in keeping with the prevailing proceduralist understanding of EIAs. In many cases, EIA processes may be able to draw on more precise standards and rules in order to elaborate on more ambiguous principles. For example the *CBD EIA Guidelines*, cite resources identified in both the *Ramsar Convention on Wetlands of International Importance*[206] and the *Convention on Migratory Species*[207] as being a basis by which states can make screening decisions.[208] The intended result is that the requirements of these conventions are implemented in domestic legislation by ensuring that activities undertaken do not have adverse impacts on the resources that are the subject of the convention, e.g. a listed wetland under the *Ramsar Convention*. As an example, the *Canadian Environmental Assessment Act* (*CEAA*) clearly anticipates the listing or description of a feature in an international convention will contribute to a determination of significance under *CEAA*.[209]

---

[203] Gutmann & Thompson, *supra* note 7 at 11.
[204] See *Espoo Convention*, *supra* note 148, Art.2(1).
[205] *United Nations Convention on Biological Diversity*, (1992) 31 I.L.M. 818, (in force 29 December 1993), Art.14(1)
[206] 996 UNTS 245; 11 ILM 963 (1971) (in force Dec. 21, 1975).
[207] 19 ILM 15 (1979) (in force 1 Nov. 1983).
[208] *CBD EIA Guidelines*, *supra* note 162, paras. 8-17; Appendices I & II.
[209] Discussed in Pauline Lynch-Stewart, "Using Ecological Standards, Guidelines and Objectives for Determining Significance: An Examination of Existing Information to Support Decisions Involving Wetlands" (Ottawa: CEAA Research and Development Monograph Series, 2000) (listing *Ramsar*, the *Migratory Birds Convention* and the *Canada- United States Great Lakes Water Quality Agreement* as ecological benchmarks to determine significance).

A related example of the integration of pre-existing standards into international EIA processes is the use of pre-existing standards to elaborate on a transboundary impact. For example, in an EIA assessment process relating to an electrical generating facility (the "Sumas 2 Generating Station") in the State of Washington that had air quality impacts on neighbouring British Columbia, the environmental impact statement prepared by the proponent, considered the impact of the project on air quality on both sides of the Canada-U.S. border. In doing so, the EIS had regard for U.S. federal and state air quality regulations and objectives, as well as, Canadian, federal and provincial objectives.[210] While the standards referred to here are domestic in origin, their application elaborates on the international obligation to prevent transboundary harm through the implication that affected state air quality standards are a relevant indicator for determining significant harm. Very often recourse is to standards or principles contained in instruments that are not themselves formally binding. This, however, points to a potential strength of EIA process tied to the non-determinative nature of EIA processes. Because the use of standards in EIA processes does not result in any formally binding result, the value of these sources is not in their normative status, but rather in their ability to persuade. Take, for example, the use of Canadian based air quality standards in the Sumas Energy EIS, these standards are in no way binding, but they are clearly persuasive because they indicate levels of acceptable air quality as determined by the authorities of the affected state.

In many cases, however, decision-makers may be unable to draw more specific standards as a basis of justification. But here EIA processes can overcome substantive specificity through the application of norms to concrete policy decisions. The EIA process allows participants to generate normative consensus over time through the application of open-ended norms to specific contexts. Through these repeated interactions addressing a variety of contexts, parties can come to better understand the full implications of the principles, which may lead to future elaboration of commitments or their normative strengthening.

The integration of climate change considerations into the Canadian federal EIA process provides an instructive example of how the projection of international norms into processes that require the participants to consider the norm in relation to highly specific context may lead to increased acceptance of those norms, particularly at the bureaucratic level. As early as 1988, Environment Canada raised concerns with respect to the impact of climate change on the

[210] Washington State Energy Facility Site Evaluation Council, *Sumas Energy 2 Generating Facility, Final EIS*, (February, 2001), online: <http://www.efsec.wa.gov/sumas2.html>.

forecasting of sea levels in connection with the EIA for the Confederation Bridge, (a fixed link traversing the Northumberland Strait between New Brunswick and Nova Scotia). Despite the fact that climate change remained an emerging issue during this time period and the science regarding global warming trends was uncertain, the design standard for predicted changes in sea levels was increased from 0.3 m to 1.0 m over the life of the structure.[211] Through the 1990's Environment Canada, in consultation with the project proponent and responsible authority, raised climate change issues in a number of major projects where global warming could affect water levels, precipitation, evapotranspiration and permafrost.[212] The early application of climate change considerations in EIAs were all driven by concerns that global warming would result in future conditions that would either affect the integrity of the project design itself, or would result in unforeseen environmental consequences unless accounted for.

In a 1999 Environmental Assessment Panel Report on the Voisey's Bay Nickel Mine and Mill Project, the panel conducting the review recommended that the proponent develop an air pollution prevention plan through the reduction of fossil fuel combustion. This recommendation was partially justified on the basis of Canada's *Kyoto Protocol* commitments, notwithstanding that the *Kyoto Protocol* was not ratified at the time.[213] In this instance, the concerns switched from the more technical concerns regarding how to account for climate change considerations in project design and assessment forecasts to the more normative concern of the impacts of human activities on climate change. Similar concerns regarding the impact of a proposal on climate change were raised in a 2000 panel report on a coal-mining project, the Cheviot Coal Mine, in Alberta. Here the concerns were raised by a coalition of environmental groups.[214] Canada's international commitment to reduce greenhouse gas levels was cited by the environmental groups in support of their concern, but the panel noted that there was no existing regulatory program to cap greenhouse gas emissions.[215] Similarly, in an EIA panel review on a proposed oil sands project, the Jackpine Mine Project, the Sierra Club of Canada indicated that it would be opposed to the project on the basis of climate change concerns alone, (although it had other concerns).[216]

---

[211] Project details discussed in Rick Lee, "Climate Change and Environmental Assessment" (Ottawa: CEAA Research and Development Monograph Series, 2001) at 18-20.
[212] *Ibid.*
[213] *Voisey's Bay EIA*, *supra* note 182 at 35. It is unclear from the report who raised the issue of climate change, although the discussion itself is made in the context of the federal government's air quality standards under the *Canadian Environmental Protection Act*, a statute administered by Environment Canada.
[214] *Cheviot Coal EIA*, *supra* note 181 at s.5.2.2.
[215] *Ibid* at s.5.2.3.
[216] *Jackpine Mine Project*, *supra* note 181 at 15.3.

Here the concern was broader in that the Sierra Club indicated its opposition to the approval of fossil fuel extraction projects on the basis that bring additional fossil fuels to market was fundamentally bad policy in light of the contribution fossil fuels make to global climate change.

The direct influence of projecting climate change norms into EIAs on domestic policy is difficult to discern, especially since there were a wide range of policy initiatives relating to climate change ongoing over this time period.[217] However, a number of observations can be drawn from this example. Firstly, climate change norms, which are derived from international sources, have clearly shaped the policy discourse within EIA processes by framing the issues relating to climate change and by providing normative justifications to policy entrepreneurs, such as Environment Canada and environmental advocacy groups. In at least one case, the *UNFCCC* and the *Kyoto Protocol* were expressly noted in support of addressing climate change issues, although, raising the issue of climate change and addressing greenhouse gas reductions in EIA processes has preceded the ratification of the *Kyoto Protocol*, its coming into force, and any legislative response to the issue. The science driven concerns of Environment Canada were sufficient to allow for the introduction of climate change issues in advance of international agreement on the subject.

Secondly, by providing a specific context for the examination of climate change considerations, EIA processes are able to concretize an otherwise abstract set of normative prescriptions. For example, EIA processes require policy makers to confront the practical implications of climate change on project design and on relevant environmental inputs, which in turn serves to legitimize the need to address the causes of global climate change. By framing climate change considerations in terms of the impacts on the project, the material interests of the proponent and the responsible authority must be reassessed in light of this new information.

From a deliberative perspective, this example supports the idea that deliberation can lead to broader community acceptance of once contested norms. Throughout the period where climate change was considered in Canadian federal EIA processes, there was a divergence of opinion regarding the scientific evidence in support of climate change and the appropriate policy

[217] Some of these policies and their interaction with international climate change norms are discussed in Steven Bernstein, "International Institutions and the Framing of Domestic Policies: The Kyoto Protocol and Canada's Response to Climate Change" (2002) 35 Policy Science 203.

response.[218] However in 2003, the Canadian Environmental Assessment Agency adopted a non-binding document directed towards EIA practitioners providing guidance in incorporating climate change considerations into EIA processes.[219] This document does not provide defined parameters for assessing climate change considerations, but it unequivocally asserts that climate change is occurring and that it is attributable to human activities.[220] Given that this starting point has itself been controversial, the guidance document plays an important role in ensuring that climate change considerations are not ignored. Social learning does not arise through a single interaction. Instead, it is the product of multiple iterations conducted over time.

Provisionality. Where deliberative participants come to accept normative and factual propositions as justified, these norms and facts no longer need to be the subject of future deliberation, but instead can become the basis for justification in future deliberations. The form of reasoning that arises is not formal in the sense that outcomes are derived logically from principles and rules. Rather, because norms and facts are contingent and provisional they must be continually reassessed in light of new factual information and competing norms.

Here too EIAs can be seen as institutionalizing a critical aspect of deliberative democracy, although in a more emergent fashion. Traditionally, the *ex ante* and predictive nature of EIA has been subject to criticism on the basis that it assumes a decision making environment where information is abundant, certain and inexpensive, whereas in reality scientific knowledge is "typically scarce, costly to assemble, highly uncertain and variable in quality".[221] While this criticism clearly retains some bite, EIA procedures in both the domestic and transnational levels have moved towards the recognition of the precarious nature of scientific knowledge through post-project monitoring, adaptive management techniques and through the use of feedback mechanisms.

---

[218] Rick Lee, "Climate Change and Environmental Assessment" (Ottawa: CEAA Research and Development Monograph Series, 2001) at 28.
[219] Canadian Environmental Assessment Agency, *Incorporating Climate Change Considerations in Environmental Assessment: General Guidance for Practitioners* (Ottawa: CEAA, 2003), available online at <http://www.ceaa-acee.gc.ca>.
[220] *Ibid* at s.1.0 (noting "the Earth's climate system has demonstrably changed on both global and regional scales over the past century. An increasing body of observations gives a collective picture of a warming world and other climate system changes. There is now new and stronger evidence that most of the warming observed over the past 50 years is attributable to human activities such as the burning of fossil fuels for industrial use, transportation, electricity generation and land clearing, which have resulted in increased atmospheric concentrations of greenhouse gases (GHGs)").
[221] See Bradley Karkkainen, "Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance" (2002) 102 Colum. L. Rev. 903 at 926.

EIA processes, by retaining the discretion of the decision-maker, ensure that decisions can be carried out, despite residual objections. But in recognition of the fallibility of the predictive process, domestic EIA systems are beginning to require that approvals be subject to requirements to conduct some form of "post-project analysis", usually in the form of monitoring.[222] The inclusion of a weak obligation to engage in "post-project analysis" suggests that under certain conditions states may have on-going obligations to ensure that their activities once constructed and operating do not cause significant adverse transboundary impacts.[223] Post-project analysis is described in the *Espoo Convention* as including, the surveillance of the activity and the determination of any adverse transboundary impact and may be undertaken for the following objectives:

> a) Monitoring compliance with the conditions as set out in the authorization or approval of the activity and the effectiveness of mitigation measures,
> b) Review of an impact for proper management and in order to cope with uncertainties,
> c) Verification of past predictions in order to transfer experience to future activities of the same type.[224]

The regulatory nature of post-project analysis is evident in the references to monitoring compliance with conditions and proper management, both of which suggest an ongoing attempt to maintain agreed upon environmental standards. The acknowledgement that uncertainties may need to be addressed is also important as it addresses the criticism that EIA processes rely too heavily on limited predictive capabilities. Post-project analysis compensates for this limitation by allowing for new information regarding actual impacts to feed into ongoing environmental management of the project, a process referred to as adaptive management. Finally, the stated objectives indicate that monitoring can also provide a valuable feedback mechanism whereby predictive methods and proposed mitigation measures can be continually refined in light of information respecting past activities. Perhaps what is most remarkable about the post-project analysis requirement is the further stipulation that:

> When, as a result of post-project analysis, the Party of origin or the affected Party has reasonable grounds for concluding that there is a significant adverse transboundary impact or factors have been discovered which may result in such

[222] See Wood, *supra* note 166 at c.14.
[223] *Espoo, supra* note 148, Art. 7. See also *Antarctic Protocol, supra* note 153, Art.5.
[224] *Ibid,* Appendix V.

> an impact, it shall immediately inform the other Party. The concerned Parties shall then consult on necessary measures to reduce or eliminate the impact.[225]

The presence of post-project procedures can promote acceptability of final decisions because on a project basis, they retain the possibility of future deliberations where environmental impacts exceed predicted levels. Over multiple decisions, to the extent that predictive failures can be feed into future EIA processes, there are possibilities for participants to challenge accepted methods and received scientific knowledge. At present EIA processes fall short of the deliberative ideal, but there is a discernible trend towards incorporating greater provisionality.

4. Conclusion

In this paper I have argued that states and other actors are likely to face increased pressure to enhance the legitimacy of their decision-making processes as policy authority is transferred from purely domestic to transnational actors and institutions. Fundamental to the legitimacy challenge in transnational environmental governance is adapting forms of accountability to bridge the widening gap between decision-makers and those affected by their decisions. To this end, I have argued that deliberative democratic theory has much promise in addressing legitimacy concerns in transnational environmental governance structures in large measure because deliberative approaches incorporate a more informal legal rationality that is not premised on foundationalist understandings of what constitutes right process or right outcomes. Instead, deliberative models require that political interactions, whether vertical or horizontal, be oriented towards the public justification of decisions through the reciprocal giving of reasons. Deliberative processes were compared with EIAs, an existing form of policy-making in transnational environmental governance structures, with a view to demonstrating that deliberative processes can be successfully and usefully institutionalized in the transnational sphere.

Deliberative approaches are not bound to a territorially defined polity, since the requirement of justification relates in a universal way to political decision-making, they have broad application across different political contexts. The EIA processes discussed demonstrate this point aptly. EIAs are incorporated into state to state interactions over transboundary and global commons issues, into the decisions of international organizations and subsidiary bodies within treaty frameworks, and domestically, are sites for deliberation over the application of

[225] *Ibid*, Art. 7(2).

international environmental norms to domestic policy questions. As a corollary, deliberative processes are well suited to the polycentric decisions that characterize environmental policy questions. Again, EIAs are a good demonstration of the ability for policy processes to be structured so as to include a multiplicity of state, sub-state and non-state actors. The membership of the deliberative community is determined on the basis of affectedness. Practical difficulties are addressed through the identification of points of contacts in foreign countries,[226] the use of existing international structures for dissemination of information,[227] and the identification of environmentally vulnerable communities.[228]

The application of democratic theory to transnational governance by scholars has been questioned on the basis that there is no international or transnational demos. Consider Joseph Weiler's unequivocal view:

> But there is no convincing account of democracy without demos. Demos is an ontological requirement of democracy. There is no demos underlying international governance, but it is not even easy to conceptualize what that demos would be like?[229]

I make no claims of resolving this difficulty here, but I have argued that the deliberative approach of Gutmann and Thompson provides a sound theoretical basis for democratizing existing transnational environmental governance structures. Importantly, Gutmann and Thompson accept the presence of deep divisions over moral issues is an enduring social fact, as is the unequal distribution of material wealth. Both these systems characteristics are present and must be accounted for in transnational environmental governance. Indeed, the latter forms the basis (along with the recognition of different levels of responsibility for causing environmental problems) of the institutionalization of differential environmental commitments between developed and developing states.

In light of pervasive disagreement, Gutmann and Thompson argue that an important democratic goal providing members of a political community with sufficient justification for authoritative decisions to ensure their continued participation in future decision-making processes. Transnational EIA processes provide insights into how this justificatory process can

[226] Espoo Convention, *supra* note 148, Art. 3
[227] *Antarctic Protocol*, Annex 1, circulation to Committee on Environmental Protection of the Antarctic Consultative Meeting
[228] Arctic; CBD; see also Porcupine Caribou Treaty
[229] Weiler, *supra* note 78 at 560.

be operationalized beyond the state. At the heart of the EIA process is an elaborate set of procedural requirements aimed at promoting deliberation over both facts and norms in relation to a known context. EIA processes by requiring decision-makers to account for environmental values and to justify their decisions in light of those values seeks to promote principled policy-making. Because these environmental values arise from existing commitments they represent at least some provisional agreement at a principled level over environmental ends sought. However, the EIA process requires deliberation over the norm's application to the specific decision, providing an opportunity for both further contestation and solidification of the norm within the deliberative community. The elaboration of climate change norms with the Canadian federal EIA process indicates that deliberation over time can result in norm elaboration and internalization. Provisionality applies equally to facts and, to this end, EIA processes again show how expert knowledge can be both projected into policy processes, allowing decision-makers to derive legitimacy from the impartiality and specialized knowledge of experts without unduly sacrificing the credibility and saliency of that scientific knowledge.

To be clear, I do not seek to hold out EIA processes as a panacea to legitimacy concerns in transnational environmental governance. Indeed, my analysis suggests some serious limitations to the use of EIAs. For example, the requirement for context makes EIAs well suited to policy decisions respecting physical projects for which a high degree of detail can be determined, but makes it is less well suited to decisions regarding policies and programmes.[230] However, very often programmatic decisions, for example regarding energy policy, may severely limit the possible range of alternatives at the project level. Deliberative theory suggests that language differences among participants, literacy levels and communication infrastructure will be important factors in determining the success of EIAs. Finally, there is no reason to think that EIA processes will not be subject to the same substantive legitimacy problems affecting other forms of environmental decision-making arising from efficiency problems.[231]

My central argument however is more modest. Legitimacy in environmental decision-making takes a number of forms – I have focused on procedural, substantive and expert legitimacy. The success of EIA processes in generating legitimate decisions is in their ability to

[230] In this regard, the need for contextualized decision-making calls into question the effectiveness of strategic environmental assessment, which looks at the environmental impacts of policies, plans and programmes.
[231] It must be noted that EIA policy makers and practitioners are aware of these shortcomings and continue to address them.

draw upon and structure these different forms of legitimacy. In recognizing the limitations of science, shared environmental goals and process on their own to bring about legitimate decisions, EIAs recognize the fluid boundaries between these forms of legitimacy and bring each to bear on the other. The adoption of this policy strategy within an increasing number of transnational contexts suggests that deliberative democratic processes can usefully inform institutional design to enhance legitimacy of environmental decision-making beyond the state.