Introduction

Effectiveness of international environmental law lies in the international relations domain. While legal, institutional and policy instruments remain the driving force behind good global environmental governance, their effectiveness rests with non-legal factors such as lobby groups, the media, market processes, domestic politics and international policy bargaining. The question challenging the very crux of international environmental law ponders why the green crisis continues despite more than 500 legally binding and thousands of other multilateral environmental agreements (MEAs) being negotiated? This paper argues that this is due in no small part to the inappropriateness of present day approaches in international environmental law-making that fail to accommodate the variety of legal, political and human dimensions of different environmental issues. This paper is specifically concerned with two issues: i) effectiveness related to the choice of the legal format of an international instrument, in particular legally binding MEAs as opposed to soft law; and ii) institutional fragmentation in international environmental governance.

1 Trainee Lawyer, Zagreb, Croatia; PhD (pending 2005), Faculty of Law, University of Sydney, Australia. The author was one of the participants of the 2005 University of Joensuu – UNEP Course on International Environmental Law-making and Diplomacy.


3 Hereinafter also referred to as treaties.
It has become evident that parties at the negotiating table are often misinformed about the advantages and the disadvantages of the available formats of international environmental norms. Namely, the principle two formats of environmental regulation that have emerged are soft law, as non-legally binding principles and standards, and instruments of hard law that constitute legally binding norms. MEAs can be of a hard law as well as a soft law character. States often insist on one or the other based on the misconception that soft law is inevitably without legal effect and therefore ineffective. This is not surprising when even academics offer opinions ranging from comparing the authority of soft law to a business card that states ‘B.A. Oxford (failed)’ to others criticising such sceptics for not looking hard enough to realize the true extent of the legal effects of soft law.

Ultimately, it is submitted in this paper that while it is favourable that legally binding MEAs are instituted as instruments of global environmental governance wherever possible, their legally binding character is not the pillar or the guarantee of effectiveness either in terms of insuring compliance or in terms of the accomplishment of the environmental goals pursued. One must look at the reasons why states obey international norms in the first place and, in the context of each individual environmental issue area, decide what would be the most effective and timely instrument to induce the necessary environmental change. Apart from the hard law vs. soft law debate, this paper is concerned with institutional disintegration in international environmental law, which creates unnecessary administrative costs, confuses states parties and deters third party participation, hence undermining the effectiveness of MEAs. The paper calls for additional coherence in the institutional machinery in charge of the further development of established MEAs and their enforcement as a fundamental prerequisite of good global environmental governance.

**Effectiveness of International Environmental Law**

International legislative activity began to flourish in the field of environmental law in the aftermath of the 1972 Stockholm Declaration which brought the world’s attention to the environmental question. Modern MEAs have evolved beyond a compendium of rules and regulations into international environmental regimes (IERs), viewed by Young and Levy as the ‘social institutions consisting of agreed upon principles, norms, rules, procedures, and programs that govern the interac-

---

tions of actors in specific issue areas. Legal discourse concerning effectiveness of MEAs and IERs spans across two decades, drawing from the rich scholarship that has evolved around international relations regime theory. Effectiveness of international regimes as a concept may assume many different meanings as numerous methods exist for assessing regime effectiveness. Commonly, the following are the two key evaluating factors of effectiveness: the impact of an international regime on the problems that it sets out to addresses; and employing the authority of a regime as a measurement of effectiveness – successful enforcement and compliance.

Similar evaluating criteria are employed when analysing the effectiveness of individual MEAs. Chambers, for instance, accentuates as the principal measurement of MEA-effectiveness evaluation of the forecasted changes in the targeted behaviour and ultimately in the environment, while also nominating the following critical points of effectiveness: i) the level of compliance without enforceability through a system of sanctions and penalties; ii) the presence and successfulness of supplementary non-legal instruments that enhance enforcement (capacity-building); iii) treaty linkages, in particular conflicts with other international instruments that may impede upon effectiveness. All of the above criteria are also valid assessment criteria for IER effectiveness. Furthermore, the difficulty in evaluating the criteria to measure the level of impact lies in the challenge of distinguishing the many external influences that may have accounted for change in the regime’s target group or activity from the actual consequences of the regime’s rules and policies. The following questions must be resolved: How can one measure what has been achieved by a particular international regime? How can one relate an international regime’s achievements to the standards that have emerged through the regime in question?

While acknowledging that indeed the true proof of effectiveness lies in the question of whether a treaty has caused change in the behaviour of the targeted actors,
or has stopped the deterioration of the environment at the anticipated rate, this paper does not allow for an in-depth analytical assessment of the success of each individual MEA or an IER in this sense. The central case for this study is the second evaluation level: the authority of an MEA or an IER as measured by enforcement and compliance. For the purpose of this discussion, compliance is understood as states meeting their assumed obligations under MEAs, while enforcement relates to the implementation of the consequences of non-compliance with the adopted treaty obligations. One must add that implementation is comprised within the notion of enforcement, and specifically refers to incorporating international norms into domestic law through 'legislation, judicial decision, executive decree or other process.'

International Law-making for the Environment

Multilateral environmental agreements (MEAs)

International law commonly rests on either treaties or international custom. Before the 1900s, international rules concerning the protection and preservation of the environment predominately related to resource management and exploitation and were found in treaties that were not inherently environmental. From the 1911 Convention on the Preservation and Protection of the Fur Seals onwards, however, specialized global international agreements dealing specifically with environmental matters began their assent. In this first period of international environmental law-making, international agreements predominately regulated issues of over-exploitation of living resources, as well as pollution of the marine environment. A clear link can be established between the negotiated treaties and the environmental disasters that prompted their negotiations, conveying the intrinsically reactive nature of international environmental law.

A continuous increase in the intensity of international environmental law-making can be noted since the 1972 Stockholm Declaration, which affirmed the urgent need for an overarching strategy in global environmental governance. For

---

15 Sources of international law as per Article 38, Statute of the International Court of Justice (ICJ), www.icj-cij.org/servlet/ibasicdocuments/ibasictext/ibasicstatute.htm.
16 Convention establishing Uniform Regulations concerning Fishing in the Rhine between Constance and Baselle, 9 December 1869, 9 IPE 4695.
18 For a more detailed overview of the link between environmental disasters and the creation of environmental regimes, see the paper by Ed Couzens in the present Review.
instance, Perrez and Roch claim that over 60 percent of existing MEAs were negotiated after 1972, and only the 1990-1994 period yielded some 35 MEAs. As stated above, MEA’s have also now developed into international environmental regimes (IERs). Some examples of IERs include: i) the IER in place to prevent depletion of the ozone layer established under the 1985 Vienna Convention for the Protection of the Ozone Layer and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer; ii) the climate change regime created through the 1992 UN Framework Convention on Climate Change (UNFCCC) and the 1997 Kyoto Protocol to the UNFCCC; iii) the IER related to vessel-sourced pollution of the marine environment by tanker ships established by a network of conventions negotiated under the auspices of the International Maritime Organization (IMO); iv) the IER concerning the movement and disposal of transboundary waste provided in the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and the 1999 Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 22 March 1989, in force 24 May 1992, 28 International Legal Materials (1989) 657, www.basel.int/text/con-e.htm.

Their Disposal,\textsuperscript{27} and v) the biodiversity protection and preservation regime found in the 1992 Convention on Biological Diversity (CBD)\textsuperscript{28} and the 2000 Cartagena Protocol.\textsuperscript{29}

**International soft law**

Despite the fact that the traditional understanding of international law does not recognize non-binding norms or so called soft-law as a legitimate source, this concept is firmly embedded in international environmental regulation. Given that states are more inclined to compromise their self-interest and find accord in a non-legally binding format, soft norms have been ground-breaking instruments in the evolution of international environmental law. The 1972 Stockholm Declaration and the 1992 Rio Declaration on Environment and Development\textsuperscript{30} were surely pioneers in global environmental governance as they set an overarching framework for global environmental policy and law for the future. Unlike legally binding agreements, soft law is not in conflict with the interstate community that prioritizes sovereignty and state self-interest.

There exist numerous forms of soft law. Usually soft norms either formulate separate international instruments or they are incorporated into legally binding agreements.\textsuperscript{31} The latter could be, for instance, treaty provisions that call on parties to ‘endeavour to strive to co-operate.’\textsuperscript{32} As for separate soft international instruments, these predominately take the form of declarations, resolutions, statements of principles and other hortatory documents. One must note that non-binding international instruments have long evolved from unenforceable statements of policies and principles into target-setting documents that more often than not are accompanied by various surveillance mechanisms supervising their enforcement. Examples of such instruments include resolutions of the Antarctic Treaty Consultative Meetings (ATCM) administered and surveyed through a system of inspections established under the Antarctic Treaty and its Environmental Protocol under the


\textsuperscript{31} As per Baxter, ‘[T]here are norms of various degrees of cogency, persuasiveness, and consensus which are incorporated in agreements between States but do not create enforceable rights and duties.’ See R. R. Baxter, ‘International Law in Her Infinite Variety’ 29 International and Comparative Law Quarterly (1980) 549. See also C.M. Chinkin, ‘Challenge of Soft Law: Development and Change in International Law’ 38 International and Comparative Law Quarterly (1989) 850.

\textsuperscript{32} See D. Shelton, 'Introduction', supra note 14, at 10.
The Choice of Packaging: Legally Binding vs. Soft Law

While an international approach in environmental regulation is still clearly warranted, the question arises whether creating comprehensive and legally binding global MEAs is indeed a prerogative for achieving effective international environmental governance, and whether other types of international instruments, such as those of a soft law nature, are more appropriate in certain cases.

Legally binding MEAs: advantages and shortcomings

The primary difference between legally binding MEAs in comparison to international soft law is that states parties are legally bound to comply solely with the former. The most commonly invoked advantage of treaty law relates to a range of non-compliance mechanisms, enforcement measures, trade sanctions and dispute resolution procedures that are characteristic of legally binding instruments, and that traditionally do not complement international soft law. Non-compliance mechanisms chiefly encompass procedures, instruments and separate organs that promote compliance, address cases of non-compliance, and in general offer uniform interpretation of a treaty regime. Most of the legally binding MEAs and IERs employ the formula of a framework convention followed by a more detailed protocol which is more subject-specialized and comprehensive in comparison to the convention. A number of such regimes have evolved following the 1972 Stockholm and 1992 Rio Declarations, in particular in response to at the time new environmental problems such as climate change, ozone layer depletion, desertification and others. The framework conventions negotiated to address these issues have gained overwhelming support. The UNFCCC has 189 parties, the Kyoto Protocol has 156 parties and the Vienna Convention has 190 parties. For comparison, there were 191 members of the UN as at 15 October 2005. Another advantage of treaty law over soft international instruments are remedies that are readily available to

35 Such mechanisms are for instance the Compliance Committee and Compliance Procedures adopted in accordance with Article 34 of the Cartagena Protocol, or the 1998 Non-compliance Procedure established following Article 8 of the Montreal Protocol.
36 See www.untreaty.un.org/.
those suffering damages pursuant to the violation of legally binding norms, remedies which are usually not available as a result of non-compliance with soft law.

However, neither the broad participation of the international community in a treaty regime nor a high level of compliance guarantee effectiveness of a legally binding MEA in the fundamental sense of resolving the environmental issues that it pursues. For example, the 2002 Assessment Panel concerning the depletion of the ozone layer stated that ‘[e]ven with full compliance of the Montreal Protocol by all Parties, the ozone layer will remain particularly vulnerable during the next decade or so.’

Moreover, a legally binding MEA is not as flexible as soft law in considering the non-state actors that it targets; states parties are often unable to compel compliance by non-state entities under their jurisdiction that are subjected to the treaty regime. For instance, the OECD Report on non-compliance in the international law of marine pollution emphasized that non-compliance with environmental regulations is still profitable for the shipowner and operator and that nearly half of vessels inspected [by port authorities] violate at least one aspect of the international environmental rules concerning the stowage and disposal of oil.

In sum, the effectiveness of legally binding MEAs and IERs may be weakened on account of several different factors.

**Limitations in the scope of state commitments and concrete target-setting**

Crossen warns that the obligations within global MEAs reflect ‘no more than current domestic policies.’ It is unlikely that the scope of legally binding rules will ever be strengthened to the necessary extent in a hard law agreement given that its legally binding nature implies potential state responsibility for non-compliance.

**Leaving outside the regime states that are among the primary sources of the activity detrimental to the environment in the given issue area**

This is the case with the non-participation of the United States, which accounts for 20 percent of world’s greenhouse gasses emissions, in the Kyoto Protocol.

---

the Kyoto Protocol may be effective in its authoritative role across states parties, its true effectiveness will solely be conveyed after the time limits for the completion of the targets set thereunder expire, and the impacts of US non-participation can be comparatively assessed.

Absence of effective non-compliance mechanisms
Most MEAs do not establish non-compliance mechanisms but even when they do, diplomatic means dominate as the preferred method of exerting compliance from states parties. Sanctions and the invocation of the responsibility of a defaulting state are rarely employed, if ever. The lack of a tradition of litigation among states in the sphere of international environmental law can generally be attributed to the high costs associated with international adjudication, as well as the resolve of states to settle disputes principally through diplomacy. Moreover, the proliferation of international courts and tribunals towards the end of the 20th Century was followed by treaty parallelism and concurring jurisdiction of various dispute resolution procedures. Therefore the availability of the rich institutional and procedural infrastructure for the invocation of state responsibility repelled rather than attracted states to adjudication.

Prolonging international legal response
Comprehensive MEAs are not solely difficult to achieve with regard to an adequate overarching scope, but are also often not the timely solution to the environmental issues that they address. Their legally binding character inevitably prolongs the negotiations of an international environmental instrument or even ultimately prevents it from being ratified and coming into force. For instance, the minimum period for a treaty’s metamorphosis from adoption to entering into force for IMO conventions on marine pollution ranges between 5-8 years. To this one may add at least 2-5 years for the negotiation process itself. These delays in ratification are often attributable to slow domestic administrative procedures which can be the result of a change in diplomatic representatives responsible for a particular treaty, or because a more pressing issue has taken priority in the relevant government department. However, the said delays may also be the result of external pressures by other powerful non-signatory states, various domestic or transnational lobby groups, public polls or the media. Moreover, states often wait for one another to ratify a treaty, carefully choosing the timeframe for it to come into force. Smaller

42 Over the last two decades, 16 courts, both global and regional, have been established across the world. See C. Romano, ‘The proliferation of international judicial bodies’ 32 New York University Journal of International Law and Policy (1999) 709-749.
43 See K.R. Fuglesang, The International Association of Independent Tanker Owners (INTERTANKO), The Need for Speedier Ratification of International Conventions, www.oecd.org/document/37/0,2340,en_2649_34367_33943141_1_1_1_1,00.html.
states often rely on the guidance of strong states. In most cases, political bargaining between states on different common multilateral and bilateral issues is always the final judge of the success or failure of any treaty regime.

Not engaging targeted non-state entities likely to be effected by the treaty regime

The traditional conception of international environmental law-making focusing on states and their relations has evolved to acknowledge the many local, domestic and regional non-state stakeholders as being decisive elements of a treaty’s effectiveness. These non-state actors may include different lobby groups from the global, regional and domestic levels, public polling, domestic market prognosis of economic growth and changes in political power in the participating states.

This non-legal machinery is central in shaping a MEA in the first place, and it may prolong or disable its implementation and successful enforcement. It is therefore pertinent to consult the various stakeholders, especially those targeted by a treaty, all throughout a treaty’s life-cycle.

Regional legally binding MEAs

One cannot overlook the relevance of regional regulation as a form of international environmental treaty-making. Regional instruments have emerged as a potential alternative to global environmental regimes since states agree easier on environmental matters when they have a vested interest in the protection of a particular region, for example, rather than when a matter has global effects not noticed in a certain region. The many regional seas conventions in place at the moment attest to this. Compared to global measures, these regional instruments are more easily agreed upon in a legally binding form, and they often incorporate instruments of liability that are seldom found in legally binding global MEAs. A regional hard law MEA is more likely to be effective across its states parties and in view of the environmental targets that it sets than a global one. The difficulties in regionally developing environmental rules relate to the fact that environmental issues are predominately interlinked and go beyond particular regions; often not all states that are the sources of regional environmental concerns are bound by regional regimes. An example of this are ships sailing in a region subject to a regional treaty regime, without having to abide by the rules of the regime as a result of them flying the flag of third countries and/or flags of convenience (FOC) countries.


45 The term participating states is used in this paper to convey any category of state involvement in the international law-making process, whether as a negotiating or signatory state or a state party.

46 For more information on the UNEP Regional Seas Programme, see www.unep.org/regionalseas/About/default.asp.
International soft law

Soft international instruments are not hindered by issues intrinsic to a legally binding format. Specifically, some of the advantages of developing soft international norms instead of mandatory ones include the following: i) it is easier to reach global accord since states have complete control over the type and level of commitment assumed under a soft law instrument; ii) there are less delays in negotiations compared with legally binding MEAs; iii) it is easier to fulfil principles and targets set in soft law since states are allowed to adopt a more customized approach to the choice of instruments for incorporating norms in domestic regimes and for their enforcement; iv) soft law bridges North-South differences more successfully as it leaves more room for dialogue and alternative ways of achieving environmental goals tailored to the specific needs of participating states; v) generally there is a greater level of global interstate dialogue and focus on co-operation that furnishes legally binding environmental instruments on bilateral or regional levels; vi) soft law enables greater participation of non-state actors such as industry and NGOs.

Non-binding international norms will have a greater level of persuasiveness and hence be more effective when they are part of an IER, in particular when legally binding agreements have already been established in the same issue area or when soft law has been produced in a regional IER. One area where legally binding MEAs arguably have an advantage is in the realm of enforcement and compliance. This stems from the general presumption that soft law is not appropriate for achieving timely and concrete environmental targets since states are not compelled to obey it under threat of sanction. One needs to ask, however, how relevant the instruments of coercive enforcement and compliance for compelling obedience with international environmental norms are. The question of why nations obey international law has often been raised by legal and international relations scholars, and the answer has never been one-sided.47

Effectiveness through enforcement and compliance: the hard law vs. soft law dilemma

As Charney states, ‘No study has determined, however, whether the rate of compliance with an international law norm is greater than that of non-legally binding international norms, ‘soft’ norms.’48 The statement directly supports the notion submitted in this paper that there is little difference between soft and hard international instruments in view of their effectiveness as measured by compliance and enforcement. The connection between effectiveness and the enforcement of and

the degree of compliance with an international instrument is self-evident. An international norm that is not enforced or complied with has failed. Effectiveness in achieving environmental goals as well as effectiveness as measured by compliance is attained through processes originating predominately from the realm of internal relations and external to international law; the role of coercive enforcement instruments is of subsidiary relevance in compelling obedience with international norms. Namely, states rarely and reluctantly resort to methods such as dispute resolution procedures, invocation of state responsibility, or trade and other sanctions, to compel obedience from defiant states. While the threat of sanctions may be an incentive for a state to act in line with an international instrument, this cannot be the primary means for exerting obedience. From the perspective of legal theory, Koh reasons that ‘voluntary obedience, not forced compliance, must be the preferred enforcement mechanism.’ One must note that the basis of legally as well as non-legally binding agreements is an accord across the appropriate number of states. It is the processes that lead to this international accord, and those following from it, that offer the most effective instruments for ensuring compliance therewith. As a general rule, Kiss emphasises that ‘states that have voluntarily negotiated, drafted, and adopted an international instrument comply with the agreement which is the final product of their efforts.’

What then are the alternative instruments that exert compliance with international norms but do not involve coercive enforcement? Some of the means of compelling obedience as viewed by A. Chayes and A.H Chayes as well as by Franck, include the following:

If Nations must regularly justify their actions to treaty partners […] they are more likely to obey it. If nations internally “perceive” a rule to be fair […] they are more likely to obey it

Therefore, two of the primary instruments for enforcement of international law include using pressure from other participating states in the same MEA or IER, and effective incorporation of an international instrument into domestic regimes as a process of legitimizing international norms. For the former, there are many ways in which a participating state may instigate ratification from another state, and later compel obedience with a legally binding agreement or soft law norm. Pressure can be exerted through political bargaining by a system of concessions.

and reprisals in various areas of interstate co-operation, especially in trade issues. This technique is particularly popular among the countries of the industrialized North.

As for the internalization of MEAs, effective implementation of a treaty or the incorporation of soft law principles into domestic law requires establishing linkages between various elements of the domestic system, each of which may hinder the success and speed of implementation. This includes the judiciary, public prosecutors, the police and customs officers, the justice department, the media, industry and other actors that are likely to be affected by the new regulations. Another element of the effective internalization of international rules is the development of domestic liability and redress regimes that deter non-compliance of non-state actors targeted by the international instrument. In general, there exists a consensus among scholars that effective integration of international law into domestic systems is among the primary instigators of compliant behaviour.\(^{53}\)

Additionally, Chayes and Chayes include the following in the list of potential non-forceful mechanisms for compelling obedience: transparency; reporting and data collection; verification and monitoring; dispute settlement; capacity-building; and strategic review and assessment.\(^{54}\) One may also add that monitoring should be performed by impartial observers in the form of either NGOs or IGOs.\(^{55}\) Furthermore, one must also acknowledge that compliance by both targeted states and non-state targeted actors will depend on the cost effectiveness ratio. As the OECD report illustrated in view of international regulation of marine pollution, it remains cheaper to pollute the marine environment than to comply with strict environmental standards. If the disobedient targeted non-state actor is also a powerful lobby group in one of the participating states, it is likely that the state in question will allow such disobedience and hence be itself in violation of the international instrument.\(^{56}\)

Finally, the responsiveness of the international instrument to the differences between the developed North and the developing South also counts towards its effectiveness, in particular in view of the difficulties that the South faces in en-

---


\(^{55}\) Kiss, ‘Commentary and Conclusions’, *supra* note 34, at 240.

\(^{56}\) See OECD, *Costs saving from Non-Compliance*, *supra* note 38.
forcement, compliance and even negotiating an MEA. Specifically, developing countries and countries with economies in transition often sign or adhere to treaties without having the right domestic infrastructure or the know-how to implement and enforce them. In this case again, enforcement is not exerted forcefully but through financial and technical support by the North to the South with the objective of strengthening the latter's regulatory and institutional capacity. This is done through legal and technical assistance, training and promotion of education in environmental law matters and environmental law information. The difficulty underpinning the current environmental discourse is the on-going North-South debate in which the industrialized North advocates stringent environmental protection and resource management at the expense of economic growth, while the developing South is cautious in adhering to ambitious environmental rules that may impede upon their economic development. In recognition of these fundamental differences, the principle of common but differentiated responsibility emerged, which includes the commitment on the part of the industrialized North to help the implementation and enforcement of international environmental instruments in the South.  

57 All of the above enforcement and compliance mechanisms are already widely employed both with regard to soft and hard international law. The availability of hard law instruments of enforcement as the final resort for compelling obedience from defiant states is unquestionably significant, and these instruments should be instituted wherever possible. On the other hand, the same type of stronger instruments are to an extent already available for exerting compliance with soft law norms, in particular if they originate from legitimate international organizations such as the UN, IERs such as the ATS, or even from individual states' policies. One can take as an example the UN resolutions imposing a complete ban of high seas driftnet fishing leading the United States, as an advocate of this ban, to secure compliance by threatening trade sanctions against uncooperative states.  

58 What is more, the issues commonly invoked as impeding upon soft law compliance may also hinder obedience with hard law. This concerns the question of whether legal obligations are conveyed clearly rather than in a general and residual manner and whether international norms can be transmitted into the domestic realm. Most importantly, it is argued that it is interstate co-operation, efforts in preserving and achieving international accord and ultimately diplomatic means of pressure that hold the key to compliance with MEAs whether of hard law or soft law character. Therefore, soft law is not per se less effective than hard law in tackling environmental issues. Its lack of legally binding character transforms into ineffectiveness solely when it is not accompanied by adequate compliance machinery.

57 See Principle 7, Rio Declaration.
This may either be intrinsic to the IER that the soft law is a part of, to the body that facilitated its negotiations or it can also be established separately.

**Making the right choice for forests**

It is submitted that legally binding MEAs should continue to be developed as a primary instrument of international environmental governance. Soft law should in principle be used as a subsidiary means for harmonizing differing state behaviour and for setting progressive targets. This will advance environmental governance either through resort once again to soft law or by creating the right climate for the negotiations of a legally binding agreement. Nevertheless, negotiations of a legally binding MEA should only be pressed for when widespread support and comprehensive commitments can be secured in the hard law format, and when there are no doubts concerning compliance. In certain instances, such as in the development of an international agreement on forests, it must be recognized that choosing a legally binding format may permanently halt negotiations. In the case of an international agreement on forests, it seems that the targets placed on the negotiating table were unrealistic and did not convey the established behaviour either in the domestic regimes of negotiating states or in the international domain.\(^59\)

When reminded of the common legal progression of international environmental treaty law to embrace a framework convention – protocol formula, it would seem counterintuitive to try to reach consensus on concrete stringent targets already at the initial stages of negotiations. In the first legally binding agreement in a specific issue area, hard law instruments rarely go beyond the framework contents. Furthermore, contrary to some environmental issues such as pollution of areas beyond national jurisdiction, forest degradation does not have an immediately apparent level of urgency that would justify compromising state self-interest and adherence to a legally binding agreement; negotiating states are not under pressure from domestic or international media or public opinion to negotiate or adhere to such a treaty.

All this considered, and in light of the five years of unsuccessful negotiations on an agreement on forests, the option of a legally binding environmental instrument related to forests could be realized in a framework and residual hard law format. Such a framework treaty could then serve as the basis for developing a protocol with concrete targets for deforestation negotiated in the second stage. Alternatively, states could look to a soft law option. The discussion thus far has illustrated that soft international instruments, when accompanied by supervisory organs for overseeing compliance with them, offer a viable alternative to legally binding MEAs and may be just as effective in both exerting obedience with stringent environmental norms as well as in having an impact on the respective

---

\(^{59}\) For more information on the proposals for an international agreement on forests, see [www.un.org/esa/forests/](http://www.un.org/esa/forests/).
environmental issue. Several soft law international instruments specifically related to forests are already available: the 1992 Forest Principles\(^{60}\) and Chapter 11 of *Agenda 21*.\(^{61}\) However, neither of them is presently accompanied by effective enforcement and non-compliance mechanisms.

**Fragmentation of International Environmental Law: Overcoming Institutional Chaos**

MEAs, and IER's in particular, are supplemented by various types of institutional arrangements that facilitate further development of treaty regimes and also supervise their implementation and enforcement. While such institutional underpinning is characteristic of international hard law and involves the establishment of separate IGOs or secretariats within existing IGOs,\(^{62}\) today MEAs are dominated by what Churchill and Ulfstein refer to as ‘autonomous institutional arrangements.’\(^{63}\) Autonomous institutional arrangements include Conferences of the Parties (COP) or Meetings of the Parties (MOP) which have legislative and decision-making powers; they may also comprise a secretariat, and a number of other bodies such as technical and scientific liaison and expert groups. Soft international instruments can also enjoy such institutional support, in particular when negotiated by one of the institutions that also prescribes international hard law.

The end result is a “forest” of different secretariats, IGOs, COPs and MOPs that are predominately un-coordinated. Ghering rightly notes that international environmental regimes have ‘develop[ed] into comparatively autonomous sectoral legal systems.’\(^{64}\) Some linkages do exist on the scientific level between different international instruments and their underpinning institutions. For example, the Liaison group on the biodiversity related conventions was created to enhance co-operation and maximize the utility of the treaty regimes in protecting biodiversity.\(^{65}\) Other synergies refer to the many Memoranda of Understanding (MOU) between

---


62 IMO is the host institution for MARPOL and a long list of other international conventions related to marine pollution; International Oil Pollution Funds (IOPC Funds) administers the 1992 Liability and Fund Conventions; International Whaling Commission.


various environmental agencies such as UNEP and IUCN, between different MEA secretariats, as well as between different IERs themselves.\textsuperscript{66}

Still, MEAs continue to hold separate institutional arrangements despite the recognized need for institutional clean up. Looking at the different conventions related to biodiversity, the Convention on Biological Diversity (CBD), CITES\textsuperscript{67}, the Convention on Migratory Species (CMS)\textsuperscript{68} and the Ramsar Convention\textsuperscript{69} have their own secretariats, whereas the World Heritage Convention\textsuperscript{70} has the equivalent institution in the form of the World Heritage Committee, which functions under the auspices of the World Heritage Centre within the United Nations Educational, Scientific and Cultural Organization (UNESCO). All of these hold separate COPs, they are all supplemented by additional bodies such as the CITES and CMS Standing Committees and the Ramsar Convention’s Bureau, and they have all established a vast range of scientific committees.

This lack of co-ordination between independent institutional arrangements inevitably detracts from the effectiveness of the treaty or international regime that they support. Reasons for this include the following: lack of co-ordination hinders information exchange, which is particularly important between the various treaty regimes that refer to similar issue areas; inefficient use of funds allocated for capacity-building in developing countries due to unnecessary and high administrative costs related to the functioning of each separate unrelated institutional arrangement, funds that could be invested in actual target programmes; slow bureaucratic procedure; diminished transparency given the enormous number of beneficiaries in the international environmental sphere; and difficulty in ensuring active participation of states parties to the different regimes due to the number of meetings. Only from September to December 2005, some 43 meetings of various supplementary bodies of MEAs and environmental IGOs have been recorded on the UNEP website.\textsuperscript{71} Most of these meetings are at least a week long, they are held all around the globe, and their schedules often overlap. Ultimately, institutional fragmenta-

\textsuperscript{66} See, for example, 2000 Memo of Co-operation on the Global Biodiversity Forum between IUCN and the Ramsar Convention Bureau. In 1996 the Secretariats of the Ramsar Convention and the CBD also signed a Memorandum of Co-operation.


\textsuperscript{71} See hq.unep.org/Calendar, as at 1 October 2005.
tion both confuses and deters states from participating in treaty regimes that appear overly complex and costly.\textsuperscript{72}

The financial aspects of institutional fragmentation and the inefficient use of allocated funds is particularly problematic, given that each MEA must establish channels through which to finance the operation of their secretariats, capacity-building programmes and other activities.\textsuperscript{73} UNEP recognizes that funds are predominately secured through the use of traditional mandatory and voluntary trust funds that may be established either by an MEA or separately for specialized purposes. Other examples of sources of funding include the Multilateral Fund for the Montreal Protocol (MLF), the Global Environment Facility (GEF) and the Kyoto Protocol climate-related mechanisms.\textsuperscript{74}

It is clear that synergies between various MEAs and IERs must go beyond co-operation on the scientific level, and ought to involve simplifying the existing institutional arrangements and creating solid institutional linkages between different treaty regimes, thus avoiding and resolving potential overlap between them.\textsuperscript{75} UNEP was the first step in ensuring effective global governance through institutional integration. Established following the 1972 Stockholm Declaration,\textsuperscript{76} UNEP was confirmed in the 1997 Nairobi Declaration as the ‘leading global environmental authority that sets the global environmental agenda.’ For example, UNEP presently facilitates 17 MEA secretariats, and has numerous programmes for improving what it calls the four Cs: Co-ordination, Coherence, Compliance and Capacity-building in relation to the MEAs.\textsuperscript{77} Another step in institutional unification was the creation of the Global Ministerial Environment Forum (GMEF) in 1999, which gathers environment ministers in an attempt to provide a harmonized global environmental policy that can be implemented on the domestic level. GMEF also addresses ways of enhancing the role of UNEP.\textsuperscript{78}

\textsuperscript{72} Gehring also warns that in the present institutional arrangements the technical aspects of implementation and legislative and political authority, such as treaty-making powers, are not separated. See T. Ghering, ‘International Environmental Regimes’, supra note 64 at 2.
\textsuperscript{73} UNEP, \textit{Multilateral Environmental Agreements}, supra note 2.
\textsuperscript{74} \textit{Ibid}. The report also identifies the World Bank, Regional Development Banks, bilateral arrangements with donor countries, foundations such as the UN Foundation, private sector donors, and NGOs.
\textsuperscript{76} For a more detailed account of the birth of UNEP, see the paper by Donald Kaniaru in the present Review.
\textsuperscript{77} See UNEP Proposal, in UNEP, \textit{Multilateral Environmental Agreements}, supra note 2 at 1.
\textsuperscript{78} Report of the Secretary General on Environment and Human Settlements, GA Res. 53/242, 10 August 1999.
Furthermore, the need for integration of the international mechanisms for financing capacity-building in the South was partly met by the establishment of GEF in 1991.\textsuperscript{79} It provides funding for programmes and projects related to biodiversity, climate change, international waters, land degradation, the ozone layer and persistent organic pollutants.\textsuperscript{80} Nonetheless, the MEAs related to the six environmental areas covered by GEF continue with their own independent institutional machinery for all other matters. What is more, GEF funds can be administered through projects implemented by UNEP, the United Nations Development Programme (UNDP) or the World Bank. Even in this sense, difficulties can be caused by overlap and competition between these three organizations regarding the allocation of GEF projects.

Considering all this, an overarching reform in the institutional arrangements for the enforcement and further development of international environmental law is warranted. Some of the means by which to overcome the present-day piecemeal approach in international environmental governance and to achieve greater institutional coherence include: i) establishing GEF as the central international environmental financial mechanism to assist implementation of MEAs and global environmental policies; ii) strengthening the role of UNEP, in particular UNEPs Governing Council and GMEF as the key co-ordinating bodies between the different MEAs and IERs, providing a permanent forum for dialogue between the different treaty regimes; and iii) creating an independent World Environment Organization that could adopt UNEP as its nucleus and incorporate the facilities provided by other existing IGOs.

Conclusions

This paper has illustrated that there exists no uniform one-fits-all solution in developing effective international instruments of global environmental governance. While legally binding MEAs should remain the primary option given their back-up system of enforcement measures and non-compliance regimes, it has been proven that the availability of such mechanisms is not a guarantee of favourable and notable environmental change or of effectiveness. Global, comprehensive and legally binding instruments should be developed only when the negotiating states are truly capable of implementing the adopted measures in their domestic law, as well as solely when parties are confident that they can exert compliance. On the other hand, soft law can also create commitments for the participating states and can be effective in inducing environmental change. The many advantages of soft

\textsuperscript{79} For a more detailed account of GEF and its role in financing international environmental regimes, see the paper by Ahmed Djoghlaf in the present Review.

law are based on the fact that it is not incompatible with an international order grounded in the principle of national sovereignty – an intrinsic clash when dealing with legally binding agreements. As such, international soft law can be both an alternative and/or a supplement to legally binding international agreements.

Additionally, the problem of institutional fragmentation in global environmental governance is an issue that will continue to require consideration given that it causes notable delays and financial expense in the functioning of MEAs and IERs. These could be avoided by developing greater synergies between the existing regimes as well as by attributing greater authority to one central agency, be it the existing UNEP or an entirely new one. In sum, effective international environmental governance is best achieved through the functioning of international environmental regimes incorporating both soft and hard law instruments, rather than singular legally binding MEAs. It is further necessary to provide uniform, simplified and effective institutional arrangements for the financing of the activities of IERs, facilitating their implementation and enforcement, as well as bridging North-South differences. In essence, ‘a new international environmental governance structure would have to be not only visionary and ambitious, but also pragmatic and modest.’