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# Levelling Down, Levelling Up, and Governing Across: Three Responses to Hybridization in International Law

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## Abstract

*This article investigates developed countries' financial and technical assistance commitments under the Stockholm Convention on Persistent Organic Pollutants. It shows that their organization is secured through the establishment of a hybrid implementation network, involving the cooperation of state and transnational actors, and argues that institutional hybridization affects the quality and status of treaty norms. The norms defy a classification into either hard or soft law, but contain elements of both. Institutional and normative hybridization is at once a productive response to the emergence of global risks, and a source of new challenges. The article identifies the diffusion of accountability, the complication of enforcement, and the dilution of the communicative role of international law as challenges flowing from hybridization, and develops three responses: 'levelling down', which emphasizes the contractual nature of international agreements; 'levelling up', which strengthens state accountability; and 'governing across', which constitutionalizes the transnational actors in the implementation network. The advantages and drawbacks of each response are reviewed, and suggestions for reform developed.*

## 1 Introduction

International lawyers widely agree that the description of international law as 'the body of binding norms freely entered into between sovereign States' short-changes

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their field of expertise by a considerable amount.<sup>1</sup> International law is undergoing a transformation affecting both constituent parts of its essence: the role of states as sole authors of international norms and the binding nature of norms. Both the proliferation of ‘decentred’ forms of international regulation, emanating from non-state actors<sup>2</sup> and the explosive growth of aspirational, coordinating, or facilitating instruments which only partially correspond to the ideal type of the binding norm enforceable through coercion<sup>3</sup> push the study of international law in new and challenging directions.

This article contributes to the literature on the transformation of international law by investigating the complex relationship between Treaty member states and non-state actors involved in the implementation of international agreements. Increased reliance on non-state actors for the furtherance of Treaty obligations fosters the development of hybrid networks,<sup>4</sup> linking public, intergovernmental, and/or private bodies and resulting in the dispersion and diffusion of accountability. The article will show that the hybrid nature of institutional networks can lead, in turn, to normative hybridization, in that the norms supported by the network defy a classification as either hard or soft law, but combine elements of both. Hybridization is a productive response to the challenge of establishing legal duties to tackle complex global problems. At the same time however, it can problematize the effectiveness and legitimacy of international treaty regimes, and this needs to be addressed. This article takes a first step in the direction of analysing and responding to hybridization in international treaty law.

## 2 Institutional and Normative Hybridization in International Law

In the international law context, ‘hard law’ is conventionally understood to refer to norms which states recognize as binding. To be binding, norms require precision, or at least the potential of precision, and delegation of authority for interpretation and

<sup>1</sup> *SS Lotus (France v. Turkey)* [1927] PCIJ (ser. A) No. 10, at 18.

<sup>2</sup> Marauhn, ‘Changing Role of the State’, in D. Bodansky, J. Brunnee, and E. Hey (eds), *The Oxford Handbook of International Environmental Law* (2007), at 727; Black, ‘Decentering Regulation: Understanding the Role of Regulation and Self Regulation in a “Post-Regulatory” World’, 54 *Current Legal Problems* (2001) 103; Weiss, ‘The Rise or the Fall of International Law?’, 69 *Fordham L Rev* (2000) 345, at 354; Herberg, ‘Private Authority, Global Governance, and the Law. The Case of Environmental Self-Regulation in Multinational Enterprises’, in G. Winter (ed.), *Multilevel Governance of Global Environmental Change* (2006), at 149.

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

<sup>4</sup> See S. Cassese, B. Carotti, L. Casini, M. Macchia, E. MacDonald, and M. Savino (eds), *Global Administrative Law. Cases, Materials, Issues* (2008), at 29–50.

implementation.<sup>5</sup> The binding nature of the norm justifies its enforceability, if necessary through coercion. ‘Hard international law’ has always been a challenging notion, chiefly because states have limited means of coercing each other. Nevertheless, when we consider, for instance, the European Convention on Human Rights,<sup>6</sup> we are clearly dealing with an international legal instrument which the signatory states understand and recognize as binding. State compliance with human rights provisions is mandatory and is policed by an independent authority, the European Court of Human Rights (ECtHR). Although effective coercion remains difficult, the Court’s rulings constitute a means of holding states formally accountable for failing to respect international legal norms.

The features of hard law have been thrown into sharp relief by the proliferation of soft law, which encompasses guidelines, recommendations, coordinating measures, and other instruments which are not formally binding but nonetheless normative.<sup>7</sup> Soft law can be a precursor to the adoption of a binding instrument, as in the case of the London Guidelines which constituted the trial basis for the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.<sup>8</sup> Often, soft law instruments give support and direction to the implementation of binding commitments. Thus, the Bonn Guidelines inform the access and benefit sharing provisions in the framework of the Biodiversity Convention.<sup>9</sup> At other times, the term refers to instruments of self-regulation drawn up by private actors which voluntarily commit to respecting mutually agreed terms, or which develop a blueprint for regulation for the instruction of others.<sup>10</sup>

The hard law/soft law distinction has energized the analysis of international law in its richness and diversity. Understanding the relative pros and cons of soft and hard law options has given policy-makers a broader and potentially more effective arsenal of tools to pursue international policy objectives. Moreover, through the diversification of forms of cooperation between states (the traditional purveyors of hard law) and intergovernmental or transnational private organizations (commonly associated with the production of soft law) the legal landscape is increasingly populated with norms which cannot straightforwardly be classified into either category. This happens when, for instance, a voluntary good practice code is used as a benchmark for compliance with a ‘hard law’ prescription.<sup>11</sup> Or, conversely, when cooperation between state and

<sup>5</sup> Abbott and Snidal, ‘Hard and Soft Law in International Governance’, 54 *Int’l Org* (2000) 421.

<sup>6</sup> Rome (Italy), 4 Nov. 1950, available at: [www.echr.coe.int/](http://www.echr.coe.int/).

<sup>7</sup> See *supra* note 3.

<sup>8</sup> Rotterdam (The Netherlands), 10 Sept. 1998 (entered into force 24 Feb. 2004), available at: [www.pic.int/en/ConventionText/ONU-GB.pdf](http://www.pic.int/en/ConventionText/ONU-GB.pdf). See Langlet, ‘Prior Informed Consent for Hazardous Chemicals Trade – Implementation in EC Law’, 12 *European Environmental L Rev* (2003) 292, at 293–295.

<sup>9</sup> Rio de Janeiro (Brazil), 5 June 1992 (entered into force 29 Dec. 1993), 31 *ILM* (1992) 818. See Tully, ‘The Bonn Guidelines on Access to Genetic Resource and Benefit Sharing’, 12 *RECIEL* (2003) 84.

<sup>10</sup> E.g., De Minico, ‘A Hard Look at Self-Regulation in the UK’, (2006) 17 *European Business L Rev* (2006) 183.

<sup>11</sup> Cf. De Bellis, ‘Global Private Standards and Public Law: the EU Approach to Accounting Harmonization’, in Cassesse *et al.*, *supra* note 4, at 15–19; H. Schepel and J. Falke, *Legal Aspects of Standardisation in the Member States of the EC and EFTA* (2000).

non-state actors softens the formal enforceability of a binding international norm. It is with the latter phenomenon that this article is concerned. It investigates hybridization within the Stockholm Convention on Persistent Organic Pollutants (Stockholm Convention or POPs Convention),<sup>12</sup> which targets the elimination or restriction of 12 pollutants (POPs). The Convention lays down common but differentiated responsibilities (CBDRs) entailing, *inter alia*, the imposition of financial and technical assistance obligations on developed states. After a brief general review of the role and relevance of CBDRs, the article analyses the organization of financial and technical assistance under the POPs Convention. It will be shown that the involvement of transnational implementation networks affects the nature and quality of state accountability for CBDR norms and, by implication, the normative quality of the CBDRs themselves. As a shorthand expression, I will refer to the financial and technical assistance commitments as ‘hybrid norms’, reflecting their connection with both state and non-state actors and their situation between the traditional zones of hard and soft law.

Awareness of the hybridization of both the institutional and normative frameworks of international law is important because it alerts us to a range of challenges and opportunities that undifferentiated networks and norms do not produce. Thus, the linkages between state and non-state actors analysed in this article and their impact on the status of international norms diffuse accountability, put pressure on the adoption of enforcement mechanisms, and have a potentially detrimental effect on the public communicative function of international law. I will illustrate these challenges and discuss three possible responses: levelling down; levelling up; and governing across. Each opens up exciting new vistas for the future of international law and administration.

The discussion is, obviously, relevant for the future of the Stockholm Convention, which is one of the key environmental treaties of the post-1992 era. It is moreover highly pertinent for international environmental law writ large, as CBDRs have become a standard feature of multilateral environmental agreements (MEAs), and increasingly differentiation is expressed in terms of required technical and financial contributions from developed to developing states.<sup>13</sup> Comparable forms of institutional and normative hybridization already characterize a range of existing MEAs,<sup>14</sup> and it is all but certain that they will equally typify future agreements.<sup>15</sup> Moreover, there is growing scope for CBDRs to spill over into other areas of international law. In an era of globalization, the success or failure of the policies one country pursues to,

<sup>12</sup> Stockholm (Sweden), 22 May 2001 (entered into effect 17 May 2004). The Convention text and supporting documents are available at: [www.pops.int](http://www.pops.int).

<sup>13</sup> L. Rajamani, *Differential Treatment in International Environmental Law* (2006), at 108; von Moltke, ‘On Clustering International Environmental Agreements’, in G. Winter (ed.), *Multilevel Governance of Global Environmental Change* (2006), at 415.

<sup>14</sup> The list includes the Convention on Biological Diversity, *supra* note 10; the Convention to Combat Desertification, Paris (France), 17 June 1994 (entered into effect 26 Dec. 1996), available at: [www.unccd.int](http://www.unccd.int); and the Kyoto Protocol, Kyoto (Japan), 10 Dec. 1997 (entered into effect 16 Feb. 2005), 37 ILM (1998) 22.

<sup>15</sup> See, e.g., ‘China Proposes Climate Technology Transfer Plan’, *ENDS Europe Daily*, 7 Nov. 2008.

say, increase the competitiveness of its financial sector, or to combat acts of terrorism, can reverberate across the world. Global interdependence strengthens the case for concerted action and may render it necessary to entice otherwise reluctant parties to the global negotiation table. CBDs, and particularly the promise of financial and technical assistance between states, are one way of accomplishing this goal.<sup>16</sup>

Finally, this article aspires to make a contribution to international law generally as an early case study in institutional and normative hybridization. In a 2002 article, Kal Raustiala persuasively argued that transgovernmental cooperation ('networks') and liberal internationalism ('treaties') are more likely to develop synergistically than competitively.<sup>17</sup> The findings in this article certainly corroborate this prediction. Following this assumption, the linkages between states and transnational actors, between the spheres of hard and soft law, are likely to multiply. Admittedly, the nature of the linkages and the resulting challenges will vary depending on the context. This article does not pretend to patent a universal formula for how linkage challenges can be overcome, but it does offer a hopefully inspiring example of how they can be conceptualized, analysed, and answered.

### 3 Differential Treatment in International Environmental Law

Common but differentiated responsibilities (CBDs), or differential treatment, refer to 'the use of norms that provide different, presumably more advantageous, treatment to some States'.<sup>18</sup> They are a constitutive part of the sustainable development discourse, which revolves round the premise that environmental protection and development – whether of an economic or social nature – can and should go hand-in-hand.<sup>19</sup> Sustainable development pursues an agenda of intergenerational equity<sup>20</sup> and one of intra-generational equity, meaning that global initiatives should respond to affluent regions' interest in environmental protection and to poor regions' need for development and poverty eradication.<sup>21</sup>

Differential conditions within MEAs closely accord with sustainable development's intra-generational equity agenda. They reflect an awareness that the formal equality bestowed on states in international law by virtue of their freedom to contract is

<sup>16</sup> Cf. Stone, 'Common But Differentiated Responsibilities in International Law', 98 *AJIL* (2004) 276, at 277, 285.

<sup>17</sup> Raustiala, 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law', 43 *Virginia J Int'l L* (2002) 1.

<sup>18</sup> Rajamani, *supra* note 13, at 1.

<sup>19</sup> Report of the World Commission on Environment and Development, *Our Common Future* (Brundtland Report), available at: [www.un-documents.net/wced-ocf.htm](http://www.un-documents.net/wced-ocf.htm), at 43; French, 'Developing States and International Environmental Law: The Importance of Differentiated Responsibilities', 49 *Int'l & Comp LQ* (2000) 35, at 36. See J. Holder and M. Lee, *Environmental Protection, Law and Policy* (2007), at 217–264.

<sup>20</sup> The needs of the present should be met without compromising the ability of future generations to meet their own needs. See Brundtland report, *supra* note 19, and E.B. Weiss, *In Fairness to Future Generations: International Law Common Patrimony, and Intergenerational Equity* (1989).

<sup>21</sup> Weiss, *supra* note 2, at 369.

insensitive to global political and economic realities that easily reduce this freedom to a dismal choice between accepting either onerous international responsibilities or global marginalization. Moreover, in the field of environmental law and policy additional factors are at play. In areas such as climate change and waste generation, developed societies' ecological footprints outstrip those of developing states by a staggering margin.<sup>22</sup> The disproportionate contribution to global environmental degradation becomes even more pronounced when we consider historic contamination. For instance, with the exception of India (for DDT), the production of all 12 POPs which are currently covered by the Stockholm Convention took place exclusively in developed countries.<sup>23</sup> Moreover, a significant proportion of the POPs problem in the developing world today is a consequence of past environmental dumping undertaken by developed states.<sup>24</sup> Arguably, with greater contribution comes greater responsibility, implying that developed countries should bear the lion's share of global risk reduction obligations.<sup>25</sup>

The argument for differentiation becomes all the more forceful when we consider that, under undifferentiated conditions, the cost of mitigating global environmental risks would fall predominantly on developing states. To wit, the cost of safeguarding biodiversity will be greater in Brazil than in Belgium. Similarly, effective implementation of the risk reduction targets in the POPs Convention requires far greater efforts from developing countries. In the Member States of the European Union (EU), the production and use of the 12 regulated POPs has long ceased.<sup>26</sup> For the EU, meeting the substantive standards of the Stockholm Convention called for relatively minor changes to the existing regulatory framework. The situation is starkly different in many developing countries, as compliance with the treaty provisions requires major legislative, regulatory, and administrative change and has a profound impact on local agriculture, industry, and economy.<sup>27</sup>

Ethical considerations aside, CBDs are a pragmatic response to developed states' dependence on the participation of developing states for the establishment of effective strategies to control global environmental risks. Developed states' efforts at, say, biodiversity conservation would be futile if they were not matched by a similar commitment

<sup>22</sup> A. Hurrell and B. Kingsbury (eds), *The International Politics of the Environment* (1992), at 39. The USA produces about 25% of global carbon dioxide emissions. Information available from the US Energy Information Administration, available at: [www.eia.doe.gov/oiaf/1605/ggcebro/chapter1.html](http://www.eia.doe.gov/oiaf/1605/ggcebro/chapter1.html).

<sup>23</sup> M.A. Olsen, *Analysis of the Stockholm Convention on Persistent Organic Pollutants* (2003), at 6–8.

<sup>24</sup> *Ibid.*, at 64.

<sup>25</sup> See Chowdhury, 'Common But Differentiated Responsibility in International Environmental Law: From Stockholm (1972) to Rio (1992)', in K. Ginther, E. Denters, and P. de Waart, *Sustainable Development and Good Governance* (1995), at 333.

<sup>26</sup> Yoder, 'Lessons From Stockholm: Evaluating the Global Convention on Persistent Organic Pollutants', 10 *Indiana J Global Legal Studies* (2003) 113, at 120; Hough, 'Poisons in the System: The Global Regulation of Hazardous Pesticides', 3(2) *Global Environmental Politics* (2003) 11, at 20.

<sup>27</sup> See developing countries' National Implementation Plans at <http://chm.pops.int/Programmes/NIPs/Status/tabid/161/language/en-US/Default.aspx>.

in the world's megadiverse countries, most of which are developing.<sup>28</sup> CBDRs can draw and keep these states round the negotiating table by alleviating concerns over having to meet excessively ambitious environmental targets (for example, by allowing developing countries longer transition periods for implementation and enforcement),<sup>29</sup> by promising some contracting states flexibility in enforcement,<sup>30</sup> or by enshrining additional commitments to financial and technical assistance on the part of developed countries.<sup>31</sup> The transboundary nature of the health and environmental risks created by POPs indubitably affected the willingness of developed countries to allow differentiation within the Stockholm Convention. As their name suggests, POPs are persistent, meaning that it takes over 100 years for half of the substance to be degraded.<sup>32</sup> The use of, for instance, heptachlor in agriculture in the 1970s continues to have an ecological impact today. Moreover, POPs are great travellers; the pollutants in a toxic waste dump in Liberia could end up contaminating the shores off the Icelandic coast.<sup>33</sup> Since POPs migrate, developed countries can and do suffer negative health and environmental consequences from the use and disposal of POPs in the developing world, and this obviously creates a strong incentive for the rich to keep the poor round the negotiating table.<sup>34</sup> Throughout the Stockholm negotiation process, it went unchallenged that POPs were of greater concern to developed than to developing countries. Hence, there was broad agreement among developed and developing countries on the need for CBDRs.<sup>35</sup>

From hazardous waste to climate change, all modern instruments of international environmental law contain some form of differentiation,<sup>36</sup> making CBDRs a defining feature of international environmental law.<sup>37</sup> This does not mean that they are universally supported; discussions on the merits of differentiation<sup>38</sup> and on the appropriate normative basis on which to determine state responsibility in a differentiated framework are ongoing. For instance, states tend to have sharply different views on whether the fundamental justification for differentiation relates to relative wealth,

<sup>28</sup> Cf. French, *supra* note 19, at 57; Cullet, 'Differential Treatment in International Law: Towards a New Paradigm of Inter-State Relations', 10 *EJIL* (1999) 549, at 570.

<sup>29</sup> Stone, *supra* note 16, at 281.

<sup>30</sup> See Vice, 'Implementation of Biodiversity Treaties: Monitoring, Fact-finding and Dispute Resolution', 29 *NYU J Int'l L & Politics* (1997) 577, at 631.

<sup>31</sup> Cf. E. Louka, *International Environmental Law. Fairness, Effectiveness, and World Order* (2006), at 29–30.

<sup>32</sup> Olsen, *supra* note 23, at 3.

<sup>33</sup> 'Toxic Traces Found in Arctic mothers-to-be', *ENDS Europe Daily*, 21 June 2005. See Hillman, 'International Control of Persistent Organic Pollutants: the UN Economic Commission for Europe Convention on Long-range Transboundary Air Pollution, and Beyond', 8 *Rev European Community and Int'l Environmental L* (1999) 105.

<sup>34</sup> Cf. Yoder, *supra* note 26, at 146–147. See generally Najam, 'The View from the South: Developing Countries in Global Environmental Politics', in R.S. Axelrod, D.L. Downie, and N.J. Vig, *The Global Environment. Institutions, Law and Policy* (2005), at 225, 232–233.

<sup>35</sup> Yoder, *supra* note 26, at 146–147.

<sup>36</sup> For a list of international instruments and the varieties of CBDRs they contain see Rajamani, *supra* note 13, at 119–121.

<sup>37</sup> Stone, *supra* note 16, at 279.

<sup>38</sup> *Ibid.*; Biniaz, 'Remarks', 96 *ASIL Proc* (2002) 359.

responsibility for historical pollution, differing levels of risk aversion, sensitivity to global environmental harm, or any other ground. It is unnecessary to enter into the details of this debate, which have been thoroughly analysed by others.<sup>39</sup> However, we will revisit the lack of consensus on the right basis for allocating differentiated responsibilities in the context of the second, ‘levelling up’, response to hybridization.

#### 4 Differentiation in the Stockholm Convention

Differentiation in the Stockholm Convention occurs in a variety of guises. Some provisions, such as Article 3 on the elimination of releases from intentional production and uses of POPs, create an opportunity to seek exemption from the duty to ban certain POPs for certain uses. Although universally worded, the exemption was clearly inserted for the benefit of developing states.<sup>40</sup> Other provisions contain what Daniel Magraw refers to as ‘contextual norms’, which modulate the interpretation of commitments with reference to the socio-economic context in which they are applied.<sup>41</sup> The Convention’s definition of best available techniques (BAT) to combat unintentional pollution, which stipulates that such techniques are ‘accessible to the operator and ... developed on a scale that allows implementation in the relevant industrial sector, *under economically and technically viable conditions*, taking into consideration the costs and advantages’ constitutes a contextual norm, as do the repeated exhortations that efforts undertaken to foster public information, awareness raising, and education (Article 10), as well as research, development, and monitoring (Article 11), should be carried out ‘within the capabilities of the Parties’. Finally, and most importantly for the purposes of this article, differentiation is expressed through the repeatedly confirmed expectation in the POPs Convention that developed states will offer financial and technical assistance to the developing world.

Financial and technical assistance provisions feature prominently in Articles 12 to 14 of the Convention. A first point to observe is that Articles 12 and 13 allude to a tit-for-tat strategy which conditions the implementation of Convention requirements by developing countries upon effective support by developed countries.<sup>42</sup> I preliminarily note

<sup>39</sup> Ramanjani, *supra* note 13; French, *supra* note 19; Weisslitz, ‘Rethinking the Equitable Principle of Common But Differentiated Responsibility: Differential Versus Absolute Norms of Compliance and Contribution in the Global Climate Change Context’, 13 *Colorado J Int’l Env’t’l & Pol’y* (2002) 473; Harris, ‘Common but Differentiated Responsibility: The Kyoto Protocol and United States Policy’, 7 *NYU Env’t’l LJ* (1999) 27.

<sup>40</sup> Cf. Stone, *supra* note 16, at 277. See UNEP/POPs/CONF/INF/1/Rev.3, listing, *inter alia*, Algeria, Bangladesh, Brazil, Cameroon, Ethiopia, Iran, Madagascar, Venezuela, and Zimbabwe among exemption-seeking countries.

<sup>41</sup> Magraw, ‘Legal Treatment of Developing Countries: Differential, Contextual and Absolute Norms’, 1 *Colorado J Int’l Env’t’l & Pol’y* (1990) 69, at 74–76.

<sup>42</sup> See POPs Convention, *supra* note 12, Art. 12(1): ‘[t]he Parties recognize that rendering of timely and appropriate technical assistance in response to requests from developing country Parties and Parties with economies in transition is essential to the successful implementation of this Convention’; and Art. 13(4): ‘the extent to which developing country Parties will effectively implement their commitments under this Convention will depend on the effective implementation by developed country Parties of their commitments under this Convention relating to financial resources, technical assistance and technology transfer’.

that this structure contains the seed for the development of a contractual, or 'levelling down' response to hybridization, to which we will return later. As to the nature of the actual commitments, both Articles 12 and 13 give developed countries a clear legal duty to assist. After affirming a general obligation on Convention Parties to 'cooperate to provide technical assistance', Article 12 continues that, for developed countries, this obligation *shall* include, 'as appropriate and as mutually agreed', technical assistance for capacity building. Other signatory states must offer assistance 'in accordance with their capabilities'. Article 13 on financial resources and mechanisms follows a similar structure by confirming each Party's commitment to provide, 'within its capabilities', financial support, and then firming up the obligation with regard to developed countries, which '*shall* provide new and additional resources to enable developing country Parties and Parties with economies in transition to meet the agreed full incremental costs of implementing measures'.<sup>43</sup>

Developed states bear the legal obligation to assist, but the fulfilment of this task is organized through collectively supported mechanisms, namely, the establishment of regional and subregional centres for technical assistance and the operation of a financial mechanism for financing. The hybrid nature of the obligation of financial and technical assistance resides precisely in the discrepancy between how responsibility is formally assigned and how it is executed. For a full understanding of this phenomenon in the context of CBDs, the following paragraphs explore the operationalization of technical and financial assistance in greater detail.

### *A Technical Assistance*

The provision of technical assistance under Stockholm will be organized primarily through a network of centres responsible for the regions and subregions of Africa, Asia and the Pacific, Central and Eastern Europe, Latin America and the Caribbean Region, and Western Europe and other regions.<sup>44</sup> The regional and subregional centres (RSCs) should be legally independent of the hosting institution and of the government of the country in which they are located.<sup>45</sup> Following the Terms of Reference decided upon by the second Conference of the Parties (COP) in 2006,<sup>46</sup> every RSC needs to establish a work plan to be reviewed and approved by the member countries in the region served by the RSC. The RSCs are also expected to report to ordinary COP meetings and answer to the COP for activities undertaken in pursuit of the Convention objectives. The COP has adopted a set of RSC performance evaluation criteria.<sup>47</sup> These are of a rather generic, boiler-plate variety, though it is interesting to note that, in addition to obtaining concrete results in terms of capacity building and technological development,

<sup>43</sup> *Ibid.*, Art. 13(2).

<sup>44</sup> The POPs Secretariat has received nominations for 11 centres covering the 5 regions, which will be reviewed and decided upon at the 2009 COP. See [www.pops.int/scrc/nomination/default.htm](http://www.pops.int/scrc/nomination/default.htm).

<sup>45</sup> Terms of Reference for Regional and Subregional Centres for Capacity Building and Transfer of Technology, Annex I to Decision SC2-2/9 in Doc. UNEP/POPS/COP.2/30.

<sup>46</sup> *Ibid.*

<sup>47</sup> Annex II to Decision SC2-2/9 in Doc. UNEP/POPS/COP.2/30.

a successful centre is expected to manage its affairs efficiently, effectively, and transparently. Also, while the Global Environment Facility (GEF) will undoubtedly be the RSCs' chief source of funding (see the next paragraph), RSCs are expected to identify additional financial resources and other donors to fund activities.<sup>48</sup> The Document further exhorts the RSCs to identify synergies with other MEAs, including the Rotterdam Convention,<sup>49</sup> the Basel Convention,<sup>50</sup> and the Montreal Protocol.<sup>51</sup>

To obtain funding for their work programme, the primary port of call of the RSCs is the financial mechanism.<sup>52</sup> Article 14 appoints the GEF as the interim financial mechanism under the POPs Convention. RSCs submit project proposals to the GEF, including *inter alia* a workplan, a budget, an evaluation plan, information on additional sources of funding, and a letter of endorsement from the intended beneficiary countries.<sup>53</sup> This arrangement has two important implications. First, it means that in many instances the applicant to the financial mechanism will not be the beneficiary country, but an independent regional or subregional centre. Hence, the effectiveness of developing countries in meeting their obligations under the Convention will be strongly influenced by the RSC's success in securing funding. Secondly, it implies that developed countries' obligations regarding technical and financial assistance are intimately linked, as the quality of technical assistance provided crucially hinges on the sufficiency of funds and the smooth operation of the financial mechanism, to which we now turn.

## B *Financial Assistance*

Financial assistance under the POPs Convention is channelled through a complex institutional network which needs to internalize an impressive variety of operating procedures and rules of practice.

For the foreseeable future, the GEF is entrusted with the organization of financial assistance under the Stockholm Convention. The GEF, as much a brainchild of the sustainable development discourse as CBDs, was established as a multilateral trust fund in the early 1990s by the World Bank as its 'green branch'. Its first mission was to organize contributions to fund the implementation of the recently negotiated UNFCCC<sup>54</sup> and Biodiversity Convention.<sup>55</sup> In its brief but turbulent history,<sup>56</sup> the GEF has seen its mission expand to six focal areas: biodiversity, climate change,

<sup>48</sup> Guidance on technical assistance and transfer of environmentally sound technologies, Annex to Decision SC-1/15 in UNEP/POPS/COP.1/31.

<sup>49</sup> *Supra* note 8.

<sup>50</sup> Basel (Switzerland), 22 Mar. 1989 (entered into force 5 May 1992), available at: [www.basel.int/](http://www.basel.int/).

<sup>51</sup> Montreal (Canada), 16 Sept. 1987 (entered into force 1 Jan. 1989), available at: [www.unep.org/ozone/pdfs/Montreal-Protocol2000.pdf](http://www.unep.org/ozone/pdfs/Montreal-Protocol2000.pdf).

<sup>52</sup> Terms of Reference for RSCs, Annex I to Decision SC-2/9 in UNEP/POPS/COP.2/30.

<sup>53</sup> Terms of Reference for the Selection of RSCs, Annex to Decision SC-3/12 in UNEP/POPS/COP.3/30.

<sup>54</sup> Rio de Janeiro (Brazil), 4 June 1992 (entered into force 21 Mar. 1994), 31 ILM (1992) 849.

<sup>55</sup> *Supra* note 9.

<sup>56</sup> The details fall outside the confines of this article, but see Boisson de Chazournes, 'The Global Environment Facility (GEF): A Unique and Crucial Institution', 14 *RECIEL* (2005) 193; Z. Young, *A New Green Order. The World Bank and the Politics of the Global Environment Facility* (2002).

international waters, land degradation, ozone layer protection, and now POPs. The funding of the GEF is organized through large replenishment drives, which take place every three to four years.<sup>57</sup> The level of contribution pledged by each donor country is subject to intense political negotiation between the 177 members of the GEF Participant Assembly. Donor countries make overall contributions to the GEF, which the GEF Council then allocates to focal areas. The POPs' focal area currently receives about 10 per cent of the GEF budget. The GEF Council, consisting of 18 beneficiary and 14 donor countries, is also the body which approves or rejects applications for funding.<sup>58</sup> In its decision-making, the GEF Council is informed by resource allocation criteria, set out in the Resource Allocation Framework adopted by the GEF Council in 2005.<sup>59</sup> The Framework, the adoption of which was strongly endorsed by donor countries, links the award of GEF resources to a country's potential to generate *global* environmental benefits, as well as its performance, in terms of both delivery of environmental outcomes and adherence to good governance standards.<sup>60</sup>

In determining funding for POPs projects, the GEF must additionally take into account the guidance offered by the Stockholm Convention COP.<sup>61</sup> A Memorandum of Understanding (MoU) between the COP and the GEF Council asserts that GEF funding decisions must be taken in accordance with 'policy, strategy, program priorities and eligibility criteria established by the COP'. Funding requests therefore undergo a 'double vetting' process; one according to internal GEF criteria, and a second with reference to COP criteria.<sup>62</sup> Moreover, if a Stockholm member state considers that a GEF decision regarding POPs clashes with the decision-making criteria set out by the COP, the latter will consider the complaint and, if appropriate, engage in an exchange with the GEF to discuss the funding approval or rejection. Ultimately, the COP may decide to 'request the GEF to propose and implement a course of action to address the concerns regarding the project in question'.

The COP has committed to supplying the GEF with assessments of the funding needs for effective implementation of the Convention which, one assumes, should inform GEF Council decisions relating to the percentage of the GEF budget to be allocated to POPs. The organization of needs assessment, including the appointment of assessors and the determination of their relationship to the COP, is currently pending.<sup>63</sup>

The COP also undertakes to review the effectiveness of the financial mechanism.<sup>64</sup> The review exercise will be facilitated by regular reports that the GEF Council has

<sup>57</sup> The GEF currently operates on its fourth replenishment fund.

<sup>58</sup> Soroos, 'Global Institutions and the Environment: An Evolutionary Perspective', in Axelrod *et al.*, *supra* note 34, at 38.

<sup>59</sup> Boisson de Chazournes, *supra* note 56, at 198.

<sup>60</sup> *Ibid.*

<sup>61</sup> COP Guidance to the Financial Mechanism, Annex to Decision SC-1/9 in UNEP/POPS/COP.1/31.

<sup>62</sup> *Ibid.*

<sup>63</sup> Summary report of the Stockholm Convention Meeting of the Bureau, 19 and 20 May 2008, available at: <http://chm.pops.int/>.

<sup>64</sup> Terms of Reference for the Review of the Financial Mechanism, Annex to Decision SC-1/10 in Doc UNEP/POPS/COP.1/31.

committed to provide to the COP. An independent evaluator will assess the GEF's effectiveness against a series of benchmarks articulated by the COP, including: responsiveness of the GEF to guidance, recommendations, and decisions emanating from institutions operating under the Stockholm Convention; transparency and timeliness of the project approval process; adequacy and availability of funding; and level of stakeholders' involvement. Interestingly, one of the performance criteria refers to the findings and recommendations of the GEF Office of Monitoring and Evaluation and the Facility's Third Overall Performance Study, thus incorporating the GEF's internal assessment mechanism into the Stockholm Framework.<sup>65</sup>

To enhance continuity, the Convention Secretariat and the GEF Secretariat are expected regularly to communicate, cooperate, and consult. In particular, the Convention Secretariat will be invited to comment on project proposals which the GEF is considering within the POPs focal area.

## 5 CBDRs as Hybrid Norms

In many respects, the technical and financial assistance CBDRs resemble 'hard law' norms. They are incorporated in an explicitly binding legal instrument, and are expressed in uncompromisingly imperative language. Convention Parties are required to report on their implementation in both national implementation plans (NIPs) and follow-up reports. One can hardly dispute the intention of the Parties to present the Convention's provisions on technical and financial assistance as binding legal obligations rather than moral expectations.

Yet other features detract from the image of financial and technical commitments as hard law. Article 17 provides for the establishment of an enforcement mechanism to secure compliance with the Convention,<sup>66</sup> but this will not cover breaches of Article 13 on financial assistance. The draft Decision on non-compliance asserts that the mechanism is intended to *complement* the support offered through the financial mechanism.<sup>67</sup> This is in line with older MEAs such as the Montreal Protocol,<sup>68</sup> which also exclude financial assistance from the remit of the enforcement mechanism.<sup>69</sup> The case is less clear for the technical assistance requirement, however the close ties between technical and financial assistance illustrated in the previous section reduce the likelihood of Article 12 being the subject of a non-compliance procedure.

<sup>65</sup> *Ibid.*

<sup>66</sup> See [Non-Compliance] [Compliance] Procedures under Art. 17 of the Stockholm Convention, Annex to Decision SC-3/20 in Doc UNEP/POPS/COP.3.30.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Supra* note 51.

<sup>69</sup> Cf. Victor, 'The Operation and Effectiveness of the Montreal Protocol's Non compliance Procedure', in D. Victor, K. Raustiala, and E.B. Skolnikoff, *The Implementation and Effectiveness of International Environmental Commitments* (1998), at 138; and Yoshida, 'Soft Enforcement of Treaties: The Montreal Protocol's Noncompliance Procedure and the Functions of Internal International Institutions', 10 *Colorado J Int'l Env't'l & Pol'y* (1999) 95, at 106. Yoshida points out that the legal text of the Montreal Protocol is silent on the matter, but that there is no evidence of multilateral fund operations ever being reviewed under the non-compliance mechanism.

Moreover, even if it were the Convention's intention to subject Articles 12 and 13 to the forthcoming non-compliance mechanism, it is difficult to see how this would be practically accomplished, given the institutional and operational structure of the financial mechanism. At the moment, accountability for failure to provide sufficient technical and financial assistance is not easily traced back, let alone attributed to individual Convention Parties, which are the only entities over which the envisaged POPs non-compliance committee will have authority. Technical and financial support are channelled through a transnational, multilateral, and interdependent network connecting a variety of public and private actors, including POPs member states, the GEF, RSCs, NGOs working with RSCs, financing mechanisms operating in the remit of alternative MEAS such as the Basel Convention,<sup>70</sup> etc. The effectiveness of technical and financial support is therefore determined by an interplay of institutions, decisions, and circumstances surpassing the capacity and authority of the individual actors within the network. The availability of resources for capacity building in, say, Vietnam not only depends on the level of funding pledged to the GEF by individual developed countries, or even by the collectivity of developed countries subjected to the Stockholm Convention; it also hinges on the GEF Council's determination of the percentage of overall funds to be assigned to the POPs focal area, on GEF decision-making on individual project applications submitted by Vietnam or by the Asian subregional centre (in China), and, in that case, on the latter's effectiveness in preparing projects, identifying additional funding sources and extracting firm commitments from them, and executing capacity building projects.

Finally, the language and logistics of the CBDR norms must be understood within the financial contribution culture where they find application. Historically, technical and financial contributions to green development were chiefly conceived as an act of goodwill on the part of developed countries, and this view dominates to date. The USA, which, although its share has relatively declined over the past seven years, is a key contributor to the GEF fund,<sup>71</sup> frequently underlines the voluntary character of its donations.<sup>72</sup> The spirit of voluntarism also resonates in the terminology surrounding the GEF: the POPs Convention may express itself in mandatory terms, but the language of both the POPs guidance documents and GEF documents is one of 'donor countries', 'aid', and 'support'. None of these terms is easily reconciled with the notion of a binding obligation conveyed within the treaty text. The collision between the mandatory character of the Convention's norms and the voluntary nature of the implementation network propels the technical and financial assistance commitments towards a zone of normative ambiguity.

In sum, a representation of the examined CBDRs as 'hard law' would ignore their distinctiveness in terms of implementation and enforcement. Yet a soft law label would belie the clear intention of the Parties to present and treat the CBDRs as binding. The

<sup>70</sup> *Supra* note 50.

<sup>71</sup> Cf. Cléménçon, 'Funding for Global Environment Facility Continues to Decline', 16 *J Environment and Development* (2007) 5.

<sup>72</sup> Victor, *supra* note 69, at 145.

norms are neither hard nor soft; they contain elements of both. They are, in other words, hybrid.

## 6 Hybridization Challenges in the Context of the Stockholm Convention

The identification of CBDRs for technical and financial assistance as hybrid norms is the outcome of an analytical exercise. Whether it is also the diagnosis of a problem is a different question. It is certainly possible to argue that the hybrid nature of the reviewed financial contribution arrangements is, itself, a pragmatic response to the careful balance which must be struck between developing countries' call for mandatory contributions in exchange for their allegiance to MEAs' environmental risk reduction objectives, developed countries' interests in publicizing their willingness to contribute, and, on the other hand, their apprehension about being held to previously made commitments which, in light of changed economic circumstances, are no longer achievable. And, although the sufficiency of funding provided through the financial mechanism is hotly contested,<sup>73</sup> it undeniably succeeds in channelling certain resources from richer to poorer countries for the furtherance of POPs control projects.<sup>74</sup>

Moreover, the heterarchical implementation network developed under the auspices of the POPs Convention arguably boosts regulatory and administrative accountability. In addition to reviewing the performance of member countries, the POPs Convention bodies engage in direct exchanges with the GEF and the RSCs, check their performance with reference to pre-established performance criteria, and if appropriate identify weaknesses and issue recommendations for improvement. Such direct accountability does not occur under conditions where MEA member countries are 'jointly and severally' accountable for implementation. Traditionally, domestic implementing bodies are accountable to the state, but are shielded from direct international scrutiny and sanction. A further consideration is that the performance criteria drawn up by the Convention bodies for transnational institutions such as the GEF and the RSCs increasingly emphasize the need for transparency and stakeholder involvement in decision-making, thus establishing or solidifying lines of accountability between transnational public authority and civil society.

Yet, in other ways the network suffers an accountability deficit. The POPs COP may have a broader portfolio of institutions to engage with, but its tools effectively to control them are limited. As to the accountability of POPs member states, under current circumstances it is prohibitively difficult – not to mention politically dicey – for an

<sup>73</sup> Compare Boisson de Chazournes, *supra* note 56, at 193 and Miles, 'Innovative Financing: Filling the Gaps on the Road to Sustainable Environmental Funding', 14 *Rev EC and Int'l Environment'l L* (2005) 202, at 202–203.

<sup>74</sup> Between 2001 and 2004, the GEF funded more than US\$141 million worth of POPs projects, with co-financing of US\$91 million. Information available at: [www.gefweb.org/](http://www.gefweb.org/). Funding under the fourth replenishment cycle amounts to US\$300 million: see Report of POPs COP-3, UNEP/POPS/COP.3/30.

intergovernmental body such as the COP to single out individual participating states and determine the adequacy of funding pledged. Hence, member state accountability for compliance with Articles 12 and 13 is marginal at best.<sup>75</sup> The accountability of the GEF itself and of the RSCs *vis-à-vis* the Convention bodies is also constrained. In policing the performance of the GEF or the RSCs, the POPs COP can either issue recommendations to the GEF or to the RSCs, as provided in the Memorandum of Understanding between the GEF and the COP and in the Terms of Reference on the Establishment of RSCs, or terminate the relationship between the designated financial mechanism or regional centre and the Convention. The former may not have enough bite effectively to influence the *modus operandi* of the financial and technical institutions; the latter is most likely to be too disruptive to contemplate in any but the most extreme cases of compliance failure. What is missing is the middle section of the enforcement pyramid.<sup>76</sup>

Moreover, the hybrid character of the CBDR norms is the most likely cause of obstruction to the agreement on a planned enforcement mechanism. As mentioned before, Article 17 of the Stockholm Convention provides for the development of a non-compliance mechanism, but its establishment is proving unexpectedly difficult. In spite of the expressly stated intention of COP-3, and notwithstanding drawn out negotiations within the Working Group on Non-compliance continuing right up to the closure of proceedings, the COP failed to adopt a non-compliance mechanism at its Third Meeting in Dakar in 2007.<sup>77</sup> In this context, it is useful to recall Andrew Guzman's theory of the conditions under which treaty member states will or will not sign up to credible enforcement mechanisms. Briefly, if the advantages of Convention parties A to Y being policed by an enforcement mechanism outweigh, or at least equal, the risk for party Z of itself being subjected to the enforcement mechanism, Z will have an incentive to sign up. If, on the other hand, Z considers that the risk of facing non-compliance proceedings is greater than the predicted benefits of A to Y being held accountable for non-compliance, Z has an incentive to opt out.<sup>78</sup> Following Guzman, the tribulations surrounding the adoption of the Stockholm non-compliance mechanism may well be indicative of developing countries' awareness that two pivotal obligations imposed on the developed member countries – those for technical and financial assistance – will not be policed through the mechanism, which vitally affects the risk/benefit assessments contracting parties make when deciding on the adoption and terms of an enforcement mechanism. Observations in the Report on COP-3, noting that 'for many countries, the issues of technical assistance and compliance are closely linked' and that, within the Non-Compliance Working Group, 'some representatives had strongly favored the

<sup>75</sup> Similar conditions characterize the GEF's relationship with its donor countries. The GEF Council obviously does not have the authority to determine minimum contribution levels for each country and, more importantly, has very limited means to police failure to transmit pledged funds. See Instrument for the Establishment of the Restructured Global Environment Facility (Mar. 2008), at 28–35, available at: [www.gefweb.org/uploadedFiles/GEF\\_Instrument\\_March08.pdf](http://www.gefweb.org/uploadedFiles/GEF_Instrument_March08.pdf).

<sup>76</sup> Cf. I. Ayres and J. Braithwaite, *Responsive Regulation* (1992).

<sup>77</sup> 'Deal on POPs Treaty Enforcement Rules Elusive', *ENDS Europe Daily*, 7 May 2007.

<sup>78</sup> Guzman, 'The Design of International Agreements', 16 *EJIL* (2005) 579.

inclusion of a reference to common but differentiated responsibilities; others, while voicing support for that principle in general, questioned its inclusion in the proposed procedures', lend further support to the argument that the hybrid nature of the CDBRs is putting pressure on agreements about enforcement.

Sceptics might counter that the failure swiftly to erect a non-compliance mechanism is, in itself, hardly problematic, since compliance with international law is achieved mainly through coordination, facilitation, and transnational management, rather than through the threat of condemnation and enforcement.<sup>79</sup> However deserving, this observation does not, in my view, dispose of the issue. First, although solid evidence on compliance with international agreements is hard to come by, what data there are suggest ample room for improvement.<sup>80</sup> Given the likelihood of severe compliance deficits, it would be irresponsible to dismiss the contributions of enforcement mechanisms, however modest, offhand. Secondly, the challenges which institutional and normative hybridization pose to the development of enforcement mechanisms are not a self-standing problem, but are symptomatic of a deeper and more significant concern over normative equivalence between 'hard law' and hybrid provisions. If we take CDBRs seriously as instruments to balance out rights and responsibilities between the rich and the poor, this concern, too, should be taken seriously.

Lastly, hybridization in the form studied in this article is problematic when we consider law's communicative role. The adoption of laws and regulations, whether domestic or international, informs the public about governmental policies and priorities, arguably in a more reliable way than election programmes and manifestos. Thus, they are instruments of public accountability. Here, the formally binding character of financial and technical assistance obligations risks misleading civil society about the true extent of its governments' commitments, as it is only when we plunge down the rabbit hole and follow the trails of the implementation network that the hybrid nature of CDBRs becomes entirely clear. In an age when transparency and inclusiveness have matured into the primary pillars of good governance,<sup>81</sup> law can no longer be the province of a select group of *cognoscenti*, but must aim to communicate its means as well as its ends effectively and accurately.

<sup>79</sup> O. Young, *The Institutional Dimensions of Environmental Change. Fit, Interplay, and Scale* (2002), at 38; Haas, 'Choosing to Comply: Theorizing from International Relations and Comparative Politics', in Shelton, *supra* note 3, at 58; A. and A. Handler Chayes, *The New Sovereignty. Compliance With International Regulatory Agreements* (1998).

<sup>80</sup> See M. Pallemaerts, *International and European Regulation of Toxic Substances as Legal Symbolism* (2003) on compliance with international law governing trade in toxic substances, pesticides, and toxic waste; E.B. Weiss and H.K. Jacobson, *Engaging Countries. Strengthening Compliance with International Environmental Accords* (1998), at 511–554 on biodiversity protection; also reported in Vogel, 'Trading Up and Governing Across: Transnational Governance and Environmental Protection', 4 *JEPP* (1997) 567; and Perkins and Neumayer, 'Implementing Multilateral Environmental Agreements: An Analysis of EU Directives', 7(3) *Global Environmental Politics* (2007) 13, on compliance with EU environmental law.

<sup>81</sup> See Kingsbury, Krisch, and Stewart, 'The Emergence of Global Administrative Law', 68 *L & Contemporary Problems* (2005) 15, at 37–42; Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law', 115 *Yale LJI* (2006) 1490, at 1530–1534; European White Paper on Governance, COM(2001)428 final, 25 July 2001.

## 7 Levelling Down, Levelling Up, and Governing Across: Responses to Hybridization

How then can we respond to the hybrid nature of the reviewed CBDRs and overcome the identified tensions? This article identifies three possible responses: (A) 'levelling down', which lowers expectations of compliance with treaty commitments and emphasizes the contractual features of international agreements; (B) 'levelling up', which structures and articulates member states' accountability for compliance with collectively implemented commitments; and (C) 'governing across', which here refers to the introduction of administrative standards to strengthen the legitimacy of non-state actors involved in the implementation and realization of international legal commitments. It is argued that the Stockholm Convention contains traces of all three approaches in embryonic form. The discussion below indicates what mature developments of each approach would look like, reviews the advantages and drawbacks of the different responses and the synergies between them, and identifies productive first steps towards implementing them.

### A *Levelling Down*

The tensions caused by the differences in enforceability of the obligations weighing on, respectively, developed and developing states could be reduced by lowering expectations of compliance for those member countries which currently find themselves at higher risk of being held in violation of their treaty commitments ('levelling down').<sup>82</sup> This could be accomplished through an undertaking, included in the text on a non-compliance mechanism,<sup>83</sup> that this mechanism will be invoked only *vis-à-vis* developed country Parties to the Stockholm Convention or, less radically, that the planned non-compliance body would only review developing country compliance with select and agreed upon categories of binding provisions. For instance, developing countries might submit to non-compliance review with regard to the timely submission of NIPs, but not insofar as the adoption of substantive chemical risk reduction measures was concerned. A more flexible, arguably more attractive, variant of this approach would link the enforceability of developing country obligations to the level of technical and financial assistance effectively received. A finding of non-compliance with the Convention's risk reduction requirements would then be conditional upon evidence that the developing member state received funding within the framework of the Convention to undertake an implementation project, and either failed to use the funds to that effect or manifestly misused the available funds, thus rendering the proposed risk control measures wholly ineffective.

The 'levelling down' approach emphasizes the contractual dimension of international agreements.<sup>84</sup> The Convention serves as a platform for the conclusion of specific

<sup>82</sup> Cf. Guzman, *supra* note 78.

<sup>83</sup> Art. 17 of the Convention on non-compliance is sufficiently generic not require amendment to accommodate differentiated expectations of compliance.

<sup>84</sup> See Abott and Snidal, *supra* note 5, at 424.

transnational agreements through which the collectivity of developed countries purchases compliance from developing countries,<sup>85</sup> predominantly through the brokerage of the RSCs and the GEF. The formula responds to the normative justifications for differentiation,<sup>86</sup> and can help to ensure that developed countries do not experience a convenient change of heart about their respective responsibility and corresponding duty to contribute after ratification. Moreover, recalling the tit-for-tat clause of Article 13(4) of the Stockholm Convention, as well as the repeated reminders raised in the context of the COP-3 negotiations on the adoption of a non-compliance mechanism that compliance and technical assistance are and should be intimately linked, one could argue that the 'levelling down' approach reflects the spirit of the Convention.<sup>87</sup> Finally, pragmatically speaking, levelling down could facilitate non-compliance assessments because it shifts their focus to the fulfilment of specific implementation projects, most of which will have been developed and detailed through the international funding application process administered by the RSCs and the GEF. The success or failure of a government to carry out a circumscribed and well-documented project is easier to gauge than its overall success in, say, eliminating PCBs. From this perspective, levelling down could boost the relevance of enforcement as a compliance-enhancing feature of international environmental law.

Yet the approach raises a number of serious concerns. It trivializes the role of law as an instrument for global environmental change since the environmental impact of MEAs is no longer determined by the treaty provisions which the member countries have committed to, but by the vibrance of the markets for compliance that develop under their remit. Since under the POPs Convention, as in many other international environmental agreements, the greatest improvements in environmental protection must be accomplished in the developing world, a levelling down approach would render the expected environmental gain from treaty-making even harder to predict than it already is. Ultimately, increased uncertainty over expected environmental gains, combined with the massive effort that treaty-making involves, could beg the question whether it were not better to dispense with treaty-making altogether, and simply fund environmental risk reduction and control projects on a voluntary basis, through the GEF or an alternative financial mechanism.

Moreover, the suggestion that developing countries should be expected to uphold environmental treaty commitments only to the extent that they have obtained funding for implementation may harmonize nicely with the principle of differentiation, but it distinctly clashes with the notion of 'commonality' which constitutes the first pillar of the concept of common but differentiated responsibilities, as it implies that developing

<sup>85</sup> Cf. Whalley and Zissimos, 'What Could a World Environmental Organization Do?', 1 *Global Environmental Politics* (2001) 29, at 30, who discuss the prospect of a World Environment Organization conceived as a bargaining context where deals can be struck between parties with interests in particular aspects of the global environment on both the 'custody' and 'demand' sides.

<sup>86</sup> Cf. French, *supra* note 19, at 38, 48–49; Hurrell and Kingsbury, *supra* note 22, at 39.

<sup>87</sup> Similar developments characterize the non-compliance assessments under the Montreal Protocol, *supra* note 51. See Yoshida, *supra* note 69, at 130.

countries have no autonomous responsibility towards global environmental protection beyond what developed countries pay for.<sup>88</sup> Developed countries may question the normative desirability of this message, for obvious reasons.<sup>89</sup> However, developing countries too would be poorly served by a reductionist interpretation of their role and stake in global environmental protection. The main motivation for developing countries to take part in MEA negotiations is to create opportunities to enhance the domestic framework for environmental protection. Opportunities blossom, for instance, in the collective articulation of environmental norms, in the emergence of transnational institutional networks which can guide and support regulatory and voluntary environmental protection initiatives, in the dissemination of information and the exchange of regulatory know-how, and, not least, in the availability of financial and technical assistance. Achieving very little of the targeted environmental improvement, but being absolved of responsibility for failure, is a decidedly second-best outcome.

Finally, a levelling down approach may alleviate tensions with regard to the credibility and legitimacy of enforcement mechanisms, but it further widens the gap between the imperative language of treaty provisions and their much more fluid, flexible interpretation in practice, since, now, both technical and financial assistance obligations *and* developing country commitments are *de facto* unenforceable unless they are contractually linked.

## B Levelling Up

Instead of removing developing states' risk reduction commitments from the ambit of the non-compliance mechanism,<sup>90</sup> the Convention parties might consider the inverse strategy of 'levelling up'. Here, the COP would expand the field of application of the non-compliance mechanism to cover individual state responsibility for financial and technical assistance. Concretely, if requirements for technical and financial assistance were specified and quantified on a country-by-country basis, individual states' compliance with the mandatory prescriptions of Articles 12 and 13 of the POPs Convention could be assessed in a reasonably straightforward manner. Thus, the financial and technical assistance commitments would acquire the same 'hard law' status as risk reduction obligations, both formally and in application. This development would send assurances to developing countries that they had as much to gain as to lose from a strict enforcement strategy. It would also be an incontrovertible signal that developed countries do, indeed, take differentiation seriously.

The decisive advantage of a levelling up over a levelling down approach is that the former addresses the accountability deficit, the discrepancies in enforcement, and the dissonance between the phrasing and the execution of treaty commitments. The mandatory language of the Treaty fosters a public expectation that mechanisms to hold signatory states accountable for failures to meet agreed upon standards exist and are

<sup>88</sup> Cf. French, *supra* note 19, at 45.

<sup>89</sup> Cf. Stone, *supra* note 16, at 281.

<sup>90</sup> Unless these commitments are confirmed in specific implementation projects funded through technical and financial assistance; see sect. 7A above.

operational, even if their effectiveness is debatable. The levelling up approach validates this expectation. The greatest challenge, however, lies in overcoming the formidable hurdles on the path to a workable determination of individual national financial and technical commitments.

Such determination would require, first, a thorough assessment of the ‘agreed full incremental costs’ which must be met to support developing countries in their fulfilment of Conventional obligations. As Daniel Bodansky observed in the context of the UNFCCC,<sup>91</sup> however clear in principle, the identification of incremental costs is supremely difficult in practice.<sup>92</sup> Often, no discernible baseline exists from which to measure incremental costs, and expenditures made in the pursuit of treaty objectives are impossible to disentangle from those aimed to serve different but related purposes.<sup>93</sup>

The determination of costs then gives way to the equally fraught task of setting state-based technical and financial commitment standards. Should countries contribute according to their capabilities and, if so, how are those most accurately measured? Should past and/or present contribution to POPs contamination be a factor, or should commitments alternatively be determined on the basis of each Convention party’s willingness to pay?<sup>94</sup> Divergent views on the appropriate basis on which to determine state responsibility were a recurrent obstacle during the climate change negotiations under the Kyoto Protocol;<sup>95</sup> they could likewise keep the members of the Stockholm Convention occupied for decades to come.<sup>96</sup> When determining national contribution levels, the Convention members would moreover need to consider the question of new treaty accessions. If developed countries must enable developing countries to meet ‘the full incremental costs of implementing measures’, as stipulated in Article 13(2), each accession of a developing country should cause a re-negotiation of member state contributions. Conversely, accession of developed countries should trigger a downward adjustment. This represents a considerable extra burden; however, not adjusting member countries’ contributions might deter developing countries from joining at a later date, and might incentivize developed countries to engage in a game of chicken and hold off accession or ratification until member countries’ contributions have been determined.

Finally, the determination of state-based responsibilities for financial and technical assistance would require the Convention parties to rethink the mechanism through which funds are administered. The GEF’s internal decision-making dynamics on overall replenishment and allocation to focal areas, of which POPs control is one, are hard

<sup>91</sup> *Supra* note 54.

<sup>92</sup> Bodansky, ‘The United Nations Framework Convention on Climate Change: A Commentary’, 18 *Yale J Int’l L* (1993) 451, at 526.

<sup>93</sup> Does a state subsidy to upgrade the technology used in domestic pulp and paper mills, aimed to increase the efficiency and production output of the sector as well as reduce dioxin emissions, constitute an incremental cost of Treaty compliance?

<sup>94</sup> Cf. Stone, *supra* note 16, at 285–288.

<sup>95</sup> *Ibid.*, .

<sup>96</sup> Cf. French, *supra* note 19, at 48.

to reconcile with strengthened and individualized state accountability.<sup>97</sup> The benefits of establishing country-by-country contributions could easily be undone if they all streamed towards the general GEF replenishment pool, intermingled with resources committed to other GEF focal areas such as land degradation and climate change, and were then reshuffled in the GEF resource allocation process.

The formidable is, however, not insurmountable. While an overnight sea-change to the status, implementation, and enforcement of CBDRs is unrealistic, it is possible to devise a range of productive intermediate steps which pave the way towards significantly enhanced state accountability for financial and technical assistance.

The initial phase of generating information about the incremental cost of POPs control, we recall, was launched under the Convention during COP-3 in 2007.<sup>98</sup> The Terms of Reference for needs assessment provide that this assessment will primarily be based on the information supplied in NIPs,<sup>99</sup> and will be undertaken by a team of 'up to three independent experts'. At its first intersessional meeting in May 2008, the Bureau of the COP urged the Parties to submit the information needed for the assessment.<sup>100</sup> Efforts are at an early stage, but we can already observe that the exercise is progressing more slowly than anticipated, indicating that more initiatives to enable or persuade Convention Parties to cooperate are desirable. Secondly, the choice to have the needs assessment performed by independent experts may avoid time-consuming debates between Convention Parties on incremental costs, but such assessment may not have sufficient legitimacy to constitute a fundamental stepping stone towards the establishment of individual state responsibility for technical and financial assistance.<sup>101</sup> The determination of incremental costs as part of a levelling up approach vitally affects the rights and responsibilities of all signatory states and, by implication, the level of global environmental improvement that can be pursued under the Convention. A strong case can therefore be made that the determination process should not be wholly expert-dominated, but should be conducted in a transparent and participatory manner, observing the emerging principles of good global governance.<sup>102</sup>

The second stage promises to be at least as challenging as the first but, again, productive intermediary steps are conceivable. The POPs Convention already expects developed country parties to supply information on technical and financial assistance, both in NIPs and in country progress reports.<sup>103</sup> Presently, most states comply with

<sup>97</sup> See GEF Instrument, *supra* note 75; and Boisson de Chazournes, *supra* note 56.

<sup>98</sup> Revised terms of reference for work on the assessment of funding needs for Parties which are developing countries or countries with economies in transition to implement the Convention over the 2010–2014 period, Annex to Decision SC-3/15 in UNEP/POPS/COP.3/15.

<sup>99</sup> *Ibid.* Additional sources of information include, *inter alia*, the country reports submitted in compliance with the reporting duties set out in Art. 15 of the Convention; information supplied by the GEF and alternative funding mechanisms; data from NGOs and other stakeholders; and information issued by the Secretariats of other MEAs.

<sup>100</sup> *Supra* note 63.

<sup>101</sup> Cf. Esty, *supra* note 81, at 1511–1514.

<sup>102</sup> *Ibid.*

<sup>103</sup> POPs Convention, *supra* note 12, Arts 7 and 15.

the reporting requirements, but many do so in a distinctly tight-lipped manner.<sup>104</sup> Yet financial data supply requirements could be articulated further, so that the information provided enabled the COP, or a committee set up under its auspices, to sketch a preliminary overview of the overall amount of resources contributed and of the contribution rate per country. Such overview could constitute a basis for more systematic negotiations about the appropriate level and allocation of technical and financial assistance duties per country. Arguably, it would be easier to forge agreement on the specification of such commitments starting from existing practices, rather than purely by reference to different allocation principles such as historic responsibility, ability to pay, or willingness to pay. The question of treaty accession would remain a sticking point, but the context within which demands for additional funds or the availability of new resources must be accommodated would at least benefit from a higher level of transparency and specificity.

Thirdly, supporting measures must be taken to avoid the gains in transparency and specification of both incremental costs and state responsibility being dissipated within the implementation network, as currently happens because of the organization and decision-making structure of the GEF. Full transparency would require an adaptation of the GEF's operating procedures, so that the sums contributed in compliance with Article 13 of the POPs Convention remain earmarked and traceable.<sup>105</sup> This would, it must be acknowledged, signify a radical departure from both the prevailing philosophy and operating procedures within the GEF, as well as a considerable curtailment of its decision-making autonomy.<sup>106</sup> The GEF Instrument does seek to accommodate the GEF's role as para-statal cooperative funding mechanism with its role in the implementation of MEAs by stipulating that, where the GEF operates the financial mechanism for the implementation of a Convention, it shall 'function under the guidance of an be accountable to the COP'.<sup>107</sup> However, productive as this accommodation may be in terms of strengthening the accountability of the GEF as a transnational actor, it does not further the individual accountability of the contributing states themselves. Fully to accomplish the latter, a reconceptualization of the GEF, or alternatively the designation of a separate financial instrument, as provided for in Article 14 of the Stockholm Convention, would be indicated.

To sum up, the establishment of individual state responsibility for technical and financial assistance, so that (non-)compliance can be effectively assessed and established,

<sup>104</sup> Several states confine themselves to reporting the overall sum of contributions pledged to the GEF. See, e.g., NIPs submitted by Australia, France, and Germany. The Japanese NIP is altogether silent on technical and financial assistance. See <http://chm.pops.int/Programmes/NIPs/Status/tabid/161/language/en-US/Default.aspx>.

<sup>105</sup> It would be tempting to assume that, as long as the resources the GEF dedicates to the POPs focal area match the agreed incremental costs for the corresponding period, the contributing states have fulfilled their financial assistance commitments. However, this is a flawed assumption since, on the one hand, some GEF donors have not ratified the POPs Convention and, on the other, developed states party to the POPs Convention have the option of committing resources via alternative financing mechanisms.

<sup>106</sup> See the GEF Instrument, *supra* note 75.

<sup>107</sup> *Ibid.*

is a daunting but not impossible mission. Felicitously, the POPs Convention framework and the implementation network already contain some of the essential seeds of change, facilitating the determination of incremental costs, the individualization of member states' responsibility, and a reconceptualization of the financial mechanism. Moreover, precedents exist for each of the required reform steps. Under the London Amendments to the Montreal Protocol,<sup>108</sup> a list of categories of incremental costs was established.<sup>109</sup> In fact, the Montreal multilateral fund offers many points of inspiration for the development of a levelling up approach. The Protocol provides for the establishment of a separate financial mechanism exclusively dedicated to funding ozone-related initiatives.<sup>110</sup> Developed country contributions to the fund are determined on a state-by-state basis, using the UN Scale of Assessments as a primary point of reference.<sup>111</sup> This set-up makes it possible to identify those parties that are not meeting their contribution commitments, thus laying the foundation for state accountability for technical and financial assistance. Undeniably, determinations of incremental cost and national contribution levels remain very difficult and contentious. Also, the Parties to the Protocol have stopped short of the final step of establishing enforcement mechanisms to procure payment from recalcitrant member states.<sup>112</sup> Nonetheless, the financing arrangements under the Montreal Protocol are a valuable example of an international, hybrid regime which does allow the individualization of required state contributions and which would, if pushed to its logical conclusion, accommodate assessments of state accountability.

### ***C Governing Across: Strengthening the Accountability of Non-state Actors***

A third response is to govern across by strengthening the accountability of non-state parties *vis-à-vis* the Convention bodies and civil society. Governing across responds to the growing demand that, when transnational actors become enmeshed in the development, implementation, or enforcement of international regulation, they uphold principles of good global governance. The analysis below will concentrate on the extent to which the GEF, being currently the key transnational administrator in the CBDR implementation network, respects governance principles, and will explore avenues further to strengthen the GEF's commitment to good global governance.

<sup>108</sup> *Supra* note 51.

<sup>109</sup> Bodansky, *supra* note 92, at 526.

<sup>110</sup> Bove, 'A Study of the Financial Mechanism of the Montreal Protocol on Substances that Deplete the Ozone Layer', 9 *The Environmental Lawyer* (2002–2003) 399.

<sup>111</sup> *Ibid.*, at 407. Negotiations under the Kyoto Protocol and under the EU emissions trading regime have further familiarized governments with the task of negotiating country-by-country targets for carbon emission reductions. See Berk and den Elzen, 'Options for Differentiation of Future Commitments in Climate Policy: How to Realise Timely Participation to Meet Stringent Climate Goals?', 1 *Climate Policy* (2001) 465; Grubb, Betz, and Neuhoff (eds), 'National Allocation Plans in the EU Emissions Trading Regime', 6 *Climate Policy* (Special Issue, 2006).

<sup>112</sup> Bove, *supra* note 110, at 440.

Governing across alleviates linkage problems because it offers some compensation for the state accountability deficits occurring as a consequence of hybridization. Thus, enhanced opportunities for developing states to monitor, interact with, and challenge the functioning of the financial mechanism may lower apprehensions about the effectiveness of financial and technical assistance. It also narrows the gap between the public image of the Treaty as a binding instrument and its real impact, and creates access points for direct public participation in the implementation of international norms.<sup>113</sup> Finally, a highly attractive feature of governing across is that it does not offer itself as a strict alternative to levelling down or levelling up, but can work together with and even enhance the impact of either approach. Particularly, efforts to strengthen individual state accountability for financial and technical assistance are greatly furthered by the simultaneous development of good governance standards for transnational actors.

In the past five years, great strides have been made in mapping out the field of global administrative law. A burgeoning body of scholarship tackles the growing phenomenon of regulation beyond the state, which escapes traditional mechanisms of public accountability and control.<sup>114</sup> Global administrative law scholars aim to identify and analyse the patterns through which regulation beyond the state, or 'decentred' regulation, develops, to conceptualize the relationship between decentring and the legitimacy of regulatory action, and to design and assess functional global equivalents for state-centric good governance standards and control mechanisms. In other words, global administrative law seeks to constitutionalize what Kingsbury, Krisch, and Stewart have charted as the 'global administrative space'.<sup>115</sup> It is within the context of this scholarship that the following proposals for the furtherance of global good governance principles and standards for the GEF can be situated.

It is, first, important to acknowledge the governance standards that the GEF already observes. The GEF foundational charter demands a high level of accountability from its executive bodies and implementing agencies *vis-à-vis* its constituent members.<sup>116</sup> Voting rules, reporting requirements, and transparency policies aim to guarantee a faithful implementation of the GEF mandate, at the behest of the 177 member countries which constitute the GEF Assembly. The establishment of a GEF Evaluation Office which reviews the effectiveness of GEF projects and programmes, and the recent addition of a Conflict Resolution Commissioner further solidify the channels of accountability within the GEF.<sup>117</sup>

The limitation of the above-described arrangements for the purposes of global administrative law is that they chiefly focus on creating an *intra-institutional* form of

<sup>113</sup> Cf. Craik, 'Deliberation and Legitimacy in Transnational Environmental Governance', Institute for International Law and Justice 2006/10 (Working Paper Series).

<sup>114</sup> See Cassese *et al.* *supra* note 4; Kingsbury, Krisch, and Stewart, *supra* note 81; Krisch and Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order', 17 *EJIL* (2006, Special Issue) 1; Esty, *supra* note 81.

<sup>115</sup> Kingsbury, Krisch, and Stewart, *supra* note 81, at 25.

<sup>116</sup> See GEF Instrument, *supra* note 75.

<sup>117</sup> See information on monitoring, evaluation, and conflict resolution at [www.gefweb.org](http://www.gefweb.org).

accountability. As observed by Grant and Keohane, the accountability and transparency standards observed by intergovernmental organizations tend to be formatted on a model of delegated responsibility.<sup>118</sup> But to enhance the legitimacy of the GEF in the eyes of, first, developing states as the designated beneficiaries of the financial mechanism under the Stockholm Convention, and, in second order, civil society, what must be strengthened is its representative accountability; the type of responsiveness created through engagement with the outside world.<sup>119</sup> Hence, the following paragraphs review the representative accountability provisions observed by the GEF generally, and those which are specifically developed under the auspices of the Stockholm Convention to regulate its responsiveness to the Stockholm COP.

In recent years the GEF has shown keen awareness of the desirability of boosting its representative credentials. On the transparency front, information on the GEF's organizational structure, its operating principles, decision-making procedures, and project assessment criteria is readily electronically available. GEF implementing agencies release annual monitoring reports on funded programmes and projects, which are made publicly available. The participatory dimension of the GEF's accountability is enhanced through some provision for external stakeholder involvement, at the GEF Council decision-making level as well as at the individual project level.

As to the GEF's relationship with and accountability to the Stockholm Convention specifically, we recall the requirement, set out in the Memorandum of Understanding, of regular GEF reporting to the COP, and the expectation of regular communication between the respective secretariats of the organizations.<sup>120</sup> The relations between the GEF and the Convention are further tightened through the 'double vetting' process funding requests must pass, requiring the GEF Council to measure funding applications both against internal selection criteria and against those formulated by the POPs COP. Moreover, the MoU provides for the establishment of a rudimentary complaints procedure<sup>121</sup> enabling Treaty members to question the compatibility of a GEF decision with the decision-making criteria developed under the Convention. The COP can review a contested decision and, if appropriate, formulate a request for reconsideration.

The transparency and accountability norms observed by the GEF form a positive foundation for the development of a good global governance ethos. But fully to accomplish this goal, provisions could be elaborated and firmed up, so that the respect of good global governance standards transforms from a quasi-voluntary, self-regulatory enterprise into a globally binding norm. What is lacking, at the moment, is a degree of rigour. To conduct a liberal information policy is very different from being bound

<sup>118</sup> Grant and Keohane, 'Accountability and Abuses of Power in World Politics', 99 *American Political Science Rev* (2005) 29, at 30–33. Cf. Krisch, 'The Pluralism of Global Administrative Law', 17 *EJIL* (2006) 247, at 253–256.

<sup>119</sup> Grant and Keohane note that strong reliance on delegated accountability within a transnational organization can, in fact, deepen its representative accountability deficit: Grant and Keohane, *supra* note 120. Cf. Chayes and Chayes, *supra* note 79, at 22.

<sup>120</sup> *Supra* note 61.

<sup>121</sup> Cf. Esty, *supra* note 81, at 1536.

by access to information requirements, which demand specific justification for refusals to communicate. Releasing monitoring reports prepared for the GEF Council is a very different exercise from drawing up customized information for the instruction of outsiders. For instance, readily accessible data on the number of funding applications submitted within the POPs focal area, the approval to rejection ratio, and the reasons for rejection<sup>122</sup> would be enormously helpful for the Convention members, the RSCs, intended beneficiary states, NGOs, and other stakeholders to gauge the extent to which the financial mechanism contributes to the satisfaction of agreed incremental costs.

Current participation provisions, too, could be more rigorous. The GEF Council prides itself on its open door policy *vis-à-vis* NGOs, but gives little indication of the weight it attributes to stakeholder comments.<sup>123</sup> Moreover, there is no avenue to address concerns that stakeholders' comments have been sidelined, let alone an opportunity for review.

The more robust arrangements for accountability between the GEF and the Stockholm COP amend the above-listed weaknesses to some extent, but not entirely. First, GEF decision-making processes should arguably enjoy a more continuous supervision and review provision than can be arranged within the context of multi-annual Conferences. Secondly, the provision that, ultimately, the review process may cause the COP to request the GEF to rethink its decision has little 'bite' and is of a nature hardly to reassure those with serious concerns about the legitimacy of the GEF as a global decision-maker. Thirdly, the COP may take issue with individual funding decisions or decision-making policies, but it is doubtful whether it can legitimately engage with the overarching question of the overall level of funding allocated to POPs control. The obligation to meet agreed full incremental costs is borne by the Convention parties, not by the financial mechanism. Moreover, the Stockholm Convention explicitly provides that developed states may channel resources and assistance through alternative mechanisms. Hence, a shortfall between the incremental costs and GEF funding is not necessarily indicative of a compliance deficit on either the developed states' or the GEF's part. Finally, we may question whether the COP is the right forum for determining the GEF's observance of COP guidelines. In the event of a clash between COP guidelines and GEF decision-making criteria,<sup>124</sup> the COP hardly seems the appropriate body to make determinations on GEF adherence to good global governance standards, unless one qualifies the review process as a deliberation between the parties to a MoU instead of an impartial assessment. Deliberation processes are valuable, but they are no substitute for an independent review of the extent to which the GEF meets its obligations as the dominant financial mechanism under the Stockholm Convention. Such review provision is still lacking.

<sup>122</sup> *Ibid.*, at 1529.

<sup>123</sup> M. Blagescu and R. Lloyd, *2006 Global Accountability Report: Holding Power to Account* (2006).

<sup>124</sup> Cf. Lake, 'Finance for the Global Environment: the Effectiveness of the GEF as the Financial Mechanism to the Convention on Biological Diversity', 7 *RECIEL* (1998) 68, at 70.

Naturally, the establishment of independent review would require a considerable effort, and would unleash a slew of organizational and legitimacy challenges. To name a few, the nomination of an existing or composition of a new review body, the determination of appropriate review procedures, the status of the review body's decisions, and its own accountability are all thorny matters.<sup>125</sup> Nonetheless, the provision of independent review could significantly enhance the representative accountability of non-state actors such as the GEF. It enables the contemplation of access to justice criteria for parties other than the Treaty member states, such as RSCs and/or NGOs. Its jurisdiction could be extended to all instances where financial mechanisms function as a link in the implementation of Treaty commitments,<sup>126</sup> thus amplifying the impact of its determinations on the growing corpus of global administrative law. Finally, the provision of independent review would create a space where developing states can engage with the financial mechanism explicitly in their role as beneficiaries of financial and technical assistance commitments, rather than in their distinct role as either GEF or Convention members.<sup>127</sup> Notwithstanding the challenges, it is a move worth considering.

## 8 Conclusion

The organization and implementation of CBDRs under the Stockholm Convention produce a dense layer of interaction between treaty organizations and transnational bodies. I have argued that the linkages between states and non-state actors within the framework of the Convention and, consequently, those between different normative paradigms governing expectations of accountability and enforcement, on the one hand create opportunities for pursuing the effectiveness of multilateral environmental agreements, but on the other hand produce challenges associated with the hybridization of international norms.

This article focused on the challenges of assigning accountability, adopting credible enforcement mechanisms in the wake of hybridization, and validating the public communicative function of international agreements. It proffered three responses. In reverse order, the 'governing across' approach taps into the rapidly developing body of global administrative law. Unlike the 'levelling down' response, which limits the circumstances under which treaty norms will be considered binding and, hence, hard law, or the 'levelling up' approach, which pushes hybrid norms towards the hard side of the legal spectrum, governing across does not directly recast hybrid norms as hard or soft law, but alleviates the tensions related to hybridization through the development and imposition of standards for the behaviour of transnational actors which are functionally equivalent to the administrative law guarantees that national public

<sup>125</sup> Cf. M. Shapiro, *Who Guards the Guardians: Judicial Control of Administration* (1988).

<sup>126</sup> The GEF is entrusted with the operation of the financial mechanism under the Biodiversity Convention, *supra* note 9, and the Climate Change Convention (UNFCCC), *supra* note 54. Rajamani, *supra* note 13, at 109–110, gives an overview of financial mechanisms operating outside the GEF.

<sup>127</sup> Cf. Grant and Keohane, *supra* note 119, at 31.

authorities must uphold. In recent years, promising foundations have been laid for such a constitutionalization of transnational actors, which can be further built on to strengthen the representative accountability of transnational actors and enhance their positive contribution to the realm of international treaty law. The progress made in this direction is encouraging and sobering at once. Existing transparency, participation, and accountability provisions were evidently insufficient to allay developing countries' concerns with regard to the impact of the proposed non-compliance mechanism under Stockholm. This may signal a call for a further structuring of the global administrative space, but it is also suggestive of the notion that good global governance is a vital complement but not a substitute for state accountability.<sup>128</sup>

The levelling down and levelling up responses directly confront the issue of state accountability for treaty commitments, either by conditionalizing compliance for developing countries or by strengthening individual accountability for developed states. The Stockholm Convention makes inroads in both directions at once, which affords a considerable measure of flexibility but sends mixed messages and is prone to creating confusion and conflict between the parties. It is therefore desirable for the Convention parties to consider both approaches, weigh the respective pros and cons, and make an informed choice, so that a cohesive, concerted strategy for attaining the preferred option can be developed. Ultimately, this may trickle down to a choice between a workable but reductionist approach to international law and a laborious but normatively ambitious one. In my opinion, taking into account both its stronger affirmation of the role and potential for international law in the management of existing and emerging global risks, as well as the scope for enhancements in state accountability and good global governance to develop in a synergistic and mutually reinforcing manner, the hard road towards the latter option may in the end prove more rewarding.

<sup>128</sup> It is interesting to note that the multilateral fund under the Montreal Protocol, which scores fairly low on a number of global administrative standards such as representation and inclusiveness, but is stronger on state accountability, is by and large considered a successful, well-functioning and credible mechanism. Cf. Bove, *supra* note 110, at 411–419.