

1. Introduction

The drama of global environmental change and the extent to which environmental problems threaten to overwhelm our existing forms of political and economic organization make it particularly tempting to devise new schemes of how the world ought to be organized: to put forward arguments about desirable reforms in the way in which states negotiate and co-operate; to argue that sustainability requires both a radical redistribution of the world's wealth and a new form of global democratization.¹

(Andrew Hurrell, 1995)

1. A BRIEF ACCOUNT OF A LONG HISTORY

People depend on the environment for their survival because they rely on environmental goods, services and conditions to sustain life and because they are part of the environment. In the words of Godden and Peel:² 'our knowledge of the world is mediated through the frame of concepts, language and terminology that we employ to describe and analyse the environment – which includes ourselves.' It would clearly be in our best interests not to engage in and perpetuate the self-destructive practices which are eroding the world's ecological capital, which feeds us, or to perpetuate our ever-increasing human-centred socio-economic demands. Yet, despite the clear logic of this symbiotic relationship and the implied thresholds and restrictions it presumably imposes, Hurrell's 'drama of global environmental change' is becoming more tragic every day, and we are gradually bringing about our own demise.³ As Pelletier⁴ puts it:

¹ Hurrell, Andrew (1995), 'International Political Theory and the Global Environment' in Ken Booth and Steve Smith (eds), *International Relations Theory Today*, Cambridge: Polity Press, 150–51.

² Godden, Lee and Jacqueline Peel (2010), *Environmental Law: Scientific, Policy and Regulatory Dimensions*, Melbourne: Oxford University Press, 57.

³ Among the many publications in this respect see Winchester, Brian N. (2009), 'Emerging Global Environmental Governance', *Indiana Journal of Global Legal Studies*, **16**(1), 7–23 at 7–9.

⁴ Pelletier, Nathan (2010), 'Of Laws and Limits: An Ecological Economic Perspective on Redressing the Failure of Contemporary Global Environmental Governance', *Global Environmental Change*, **20**, 220–28 at 220.

Contemporary industrial society consumes a continuous and accelerating throughput of material and energy resources ... These resources are transformed, through the application of various technologies, into the diverse economic goods and services that fuel the metabolic processes of social production and reproduction, as well as a wide range of waste products. Thus, industrial society hinges on access to a material base that is both generous with regards to resource supplies and forgiving in terms of waste assimilation.

It is, however, also true that people have been seeking for many years to regulate their relationship with the environment mainly with a view to maximizing their benefits and arguably to a lesser extent with a view to avoiding or at least postponing their own demise. For this purpose they have designed societal constructs which generally speaking have as their primary objectives to influence, order or control behaviour, to 'shape the flow of events',⁵ and ultimately to solve certain societal problems primarily by means of regulatory interventions such as rules (or norms) expressed in terms of laws.⁶ These rules are in turn executed and enforced by a myriad of actors by way of numerous processes and mechanisms which are popularly referred to as regulation or governance. The deterioration of the environment has been and is increasingly regarded as a major societal problem that requires regulatory intervention if we are to sustain life on earth. Indeed, environmental problems are also social problems because they affect society: 'environmental problems are not just naturally revealed, they are – like conceptions of wealth, knowledge, and politics – socially constructed.'⁷

Regulatory interventions with respect to the environment are not new phenomena.⁸ Braithwaite and Drahos⁹ trace some of the first forms of envi-

⁵ Parker, Christine *et al.* (2004), 'Introduction' in Christine Parker *et al.* (eds), *Regulating Law*, Oxford: Oxford University Press, 1–2.

⁶ The need for rules that create order in society is gloomily explained by Fuller as follows:

To say that man can reshape himself by rules is to confess that he is a creature who has to put a halter on himself before he can live safely with his fellows. If this is something no other animal can do, it is something no other animal needs to do, for mankind is the only species that chooses its own kind as its preferred prey.

Fuller, Lon L. (1968), *Anatomy of the Law*, New York: Frederick Praeger Publishers, 3.

⁷ Hempel, Lamont C. (1996), *Environmental Governance: The Global Challenge*, Washington: Island Press, 52.

⁸ The words environmental problems or issues could mean many things and admittedly refer to many manifestations, temporal scales and degrees of severity. At a very tangible level, environmental problems relate to contaminated air, water and soil, climate change, species extinction and loss of biodiversity, for instance. At a more general theoretical level, they refer to the uncontrolled deterioration of ecological

ronmental regulation to Greece in the 6th Century BC, when Solon the Law-giver proposed measures banning agriculture on steep slopes with a view to combating soil erosion. These measures, ancient as they may be, were obviously intended to change or influence behaviour and arguably involved or were intended to involve some rule-making or norm creation and mechanisms to enforce compliance with these rules.

Of course, there have been many subsequent attempts to influence the behaviour of people in their environment. The history of environmental regulation is well-trodden scholarly ground and literature abounds with detailed elaborations.¹⁰ While this body of literature is too comprehensive to summarize here, the milestones of environmental regulation can be grouped into three distinct phases, according to Bodansky.¹¹ A survey of these phases suggests that there is a clear correlation between how society perceives environmental problems (as being complex and severe, as opposed to being simple and non-threatening) and the manner in which and the extent to which society responds to these environmental problems. A society that perceives environmental problems as complex and particularly challenging and threatening will attempt to devise comprehensive (and often complex) strategies which in its view would be sufficient to address the complexities and deal with the threats that environmental problems pose. Less complex problems would require less complex and comprehensive interventions.

Bodansky terms the period stretching from the latter part of the 19th Century to the middle of the 20th Century as the ‘conservationist stage’. This period was characterized by a strong national or country-specific focus and, as the name suggests, was primarily concerned with nature conservation. The focus was distinctly domestic and was often limited to the protection of fauna

capital caused by social and economic demands resulting in the ecological system’s losing its integrity and its ability to support itself and human beings in a state of health and well-being. This is so from both a quantitative and a qualitative point of view. See also Esty, Daniel C. (2007), ‘Global Environmental Governance’ in Colin I. Bradford and Johannes F. Linn (eds), *Global Governance Reform: Breaking the Stalemate*, Washington, DC: Brookings Institution Press, 109.

⁹ Braithwaite, John and Peter Drahos (2000), *Global Business Regulation*, Cambridge: Cambridge University Press, 256.

¹⁰ See, for example, Birnie, Patricia, Alan Boyle, and Catherine Redgwell (2009), *International Law and the Environment* 3rd edn, Oxford: Oxford University Press, 48–58; Bodansky, Daniel (2010), *The Art and Craft of International Environmental Law*, Cambridge, Massachusetts: Harvard University Press, 18–36; Hierlmeier, Jodie (2002), ‘UNEP: Retrospect and Prospect – Options for Reforming the Global Environmental Governance Regime’, *Georgetown International Environmental Law Review*, **14**, 767–805.

¹¹ Bodansky, Daniel (2010), *The Art and Craft of International Environmental Law*, Cambridge, Massachusetts: Harvard University Press, 22.

and flora and their habitats.¹² Nature conservation was a straightforward regulatory issue which required few complex interventions because at the time it was not deemed sufficiently complicated to merit detailed, intricate regulatory interventions.

With increased air, soil and water pollution (notably because of industrial pollution and the pollution of the seas through oil spills), the ‘pollution prevention and regulation stage’ soon followed and it enjoyed widespread popularity in the 1960s and early 1970s. The United Nations (UN) Conference on the Human Environment, which was held in 1972 in Stockholm, is considered a crucial part of the first collective response, as having awoken worldwide environmental consciousness, and as constituting ‘the major catalyst in the emergence of international environmental law’.¹³ The United Nations Environment Programme (UNEP) was established, various multilateral environmental agreements were concluded, and a plethora of state and non-state environmental organizations were created as institutional responses to pollution problems in particular, as these had gradually become international concerns.¹⁴ Thus, in addition to an expanded regulatory focus, this period saw a gradual shift from a national, country-focused approach to a supra-national one; an approach which simultaneously involved fast-growing, clearly discernible and more detailed supra-national responses and regulatory interventions specifically with respect to environmental pollution and, more generally, with respect to environmental protection.

¹² As part of the domestic legal response in many countries, nature conservation was mostly accomplished by means of legislation, common law and customary law.

¹³ Bodansky, Daniel (2010), *The Art and Craft of International Environmental Law*, Cambridge, Massachusetts: Harvard University Press, 28 *et seq.* The United Nations Conference on the Human Environment was the first of several global environmental conferences to be convened. While many commentators are sceptical about the impact of these conferences on the success of environmental regulation efforts and the improvement of environmental quality, their overall contribution to the global environmental governance efforts should not be underestimated. As Haas points out:

UN conferences contribute to governance and sustainable development by establishing and reinforcing ... constructivist themes in international relations [including, for example, processes of socialization, education, persuasion, discourse and norm incalculatation] ... international conferences seldom have direct causal influences on member states’ behavior, but their outputs are part and parcel of this broader process of multilateral governance and may contribute to stronger and more effective environmental governance by states.

Haas, Peter M. (2002), ‘UN Conferences and Constructivist Governance of the Environment’, *Global Governance*, 8, 73–91 at 74.

¹⁴ Kanie, Norichika and Peter M. Haas (eds) (2004), *Emerging Forces in Environmental Governance*, Tokyo: United Nations University Press, 1–2.

10 years later, in 1982, the UN General Assembly adopted the World Charter for Nature; in 1987 the World Commission on Environment and Development (the Brundtland Commission) popularized sustainable development¹⁵ by means of its report, *Our Common Future*;¹⁶ and 1992 saw the hosting of the second major global environmental conference, the UN Conference on Environment and Development in Rio de Janeiro. The UN World Summit on Sustainable Development (WSSD) diligently continued with the sustainability topic in 2002 in Johannesburg. As a follow up to all the foregoing conferences, the next major global environmental meeting is the United Nations Conference on Sustainable Development (otherwise referred to as Rio+20) which took place in Rio de Janeiro in June 2012. The official objective of the conference is ‘to secure renewed political commitment for sustainable development, assess the progress to date and the remaining gaps in the implementation of the outcomes of the major summits on sustainable development, and address new and emerging challenges’.¹⁷ Notably, this conference’s central theme and focus remain ‘sustainable development’ and within this context, the issue of the green economy, as a ‘new and emerging challenge’ will be of central importance.

Realizing that the satisfaction of human needs (mostly socio-economic needs) is subject to the limits of available environmental resources, the regulatory focus in this period continues to be predominantly on the interplay between economic, social and environmental concerns and on finding ways to better ensure a balance between these considerations. Not surprisingly, Bodansky¹⁸ describes this period as the ‘sustainable development phase’,

¹⁵ While the term ‘sustainable development’ is the one most often used in literature, I prefer instead to use the term ‘sustainability’. The term ‘sustainable development’ in my view is often abused by some to legitimize socio-economic development and because of this ‘forced’ linkage with development (which usually implies socio-economic development), ‘sustainable development’ reflects only limited ecological considerations. The term ‘sustainable development’ is therefore not adequately representative of ecological interests and is much narrower in focus than the term ‘sustainability’, which at least in theory could better accommodate ecological interests. For similar views see among others Pinto, Moragodage C.W. (1995), ‘Reflections on the Term Sustainable Development and its Institutional Implications’ in Konrad Ginther, Erik Denters and Paul J.I.M. De Waart, *Sustainable Development and Good Governance*, Dordrecht: Martinus Nijhoff Publishers, 72–89; and generally, Bosselmann, Klaus (2008), *The Principle of Sustainability: Transforming Law and Governance*, Aldershot: Ashgate.

¹⁶ World Commission on Environment and Development (1987), *Our Common Future*, Oxford: Oxford University Press.

¹⁷ United Nations, <http://www.uncsd2012.org/rio20/about.html> [accessed 25 February 2012].

¹⁸ Bodansky, Daniel (2010), *The Art and Craft of International Environmental Law*, Cambridge, Massachusetts: Harvard University Press, 30–35.

which sees intensified institutionalization of environmental regulation at various levels and further proliferation of environmental institutions and actors. While it is especially at the international level that treaty regimes mushroom at an impressive rate and the number of state and non-state actors involved with environmental regulation increases exponentially, this period is also characterized by an equally comprehensive development of national and regional environmental laws and environmental agencies. As with the pollution prevention and regulation stage, the scope, depth and complexity of the recognized environmental problems also increase and, as a result, so too do the perceptions of environmental problems and the corresponding regulatory responses to them.

2. ENVIRONMENTAL GOVERNANCE AS CONTEMPORARY REGULATION IN THE 21ST CENTURY

Notably, the ‘sustainable development stage’ also concerns itself with the institutional framework for sustainable development which signals the world’s growing awareness that matters of government and governance are increasingly important in environmental regulation. Thus, with the latter focus on ways to render development more sustainable, especially through a comprehensive institutional response, it is possible to discern a fourth stage in addition to Bodansky’s three-staged development continuum of environmental regulation described above. This fourth stage of environmental regulation arises from the ‘sustainable development stage’, it exists in parallel with the ‘sustainable development stage’, and it could be termed the ‘environmental governance stage’. As with other societal problems and regulatory areas that require society’s attention (for example, the economy and trade),¹⁹ the term ‘governance’ has slowly but surely entered onto the environmental regulatory scene, with the result that the ‘sustainable development stage’ has progressed to the governance level, as it were. The ‘environmental governance stage’ is therefore a continuation and result of, and a reaction to the ‘sustainable development stage’, because it emerges as a strategy to mediate the conflicts that arise from sustainable development in a globalized world. In other words, environmental governance, or the need to ‘govern’ the balance between social, economic and environmental considerations, arises from the nature of the disaggregated global context, including the condition of the states of which it consists. On the one hand, the state supports, offers incentives for, and itself

¹⁹ ‘Corporate governance’ and ‘financial governance’ are two examples.

actively pursues economic development, and it would not want excessive regulation to slow this economic development and prevent the achievement of financial prosperity. On the other hand, for its own future survival the state cannot allow environmental degradation to continue unabated in the name of economic prosperity. Neither can it ignore the social protest against unabated socio-economic development at the cost of ecological capital. It is within this conflicted reality of sustainable development that the need for environmental governance arises, first on the state level and therefore in the global context.

It would be difficult to pinpoint an exact time at which environmental governance first surfaced as a concept. What is clear, as is argued elsewhere in this book,²⁰ is that the idea of governance is as old as humanity itself and, more importantly, that governance grew from the globalization maelstrom in an era which increasingly acknowledges the need to develop descriptive umbrella terms more closely suggesting complex contemporary societal concerns. Governance is a notoriously post-modern, vague, and ‘globalized’ concept, and has even been described as ‘fuzzy’²¹ and ‘slippery’, yet ‘innocent’.²² With governance being added to the environmental regulatory mix, the phrase ‘environmental governance’ thus gradually found its way into the discourse to describe, for example, the need to better understand social interaction with the environment, the effects of human behaviour on the environment, and ways to better respond to environmental problems in an ever more complex world where the importance of national boundaries is less pronounced, the role of the once all-powerful state is gradually changing, non-state actors are becoming increasingly influential in policy making and execution, and environmental problems are intensifying at a rate and with a degree of complexity hitherto unknown. One such example of complex environmental problems with global reach is climate change and the entire climate governance regime which has been developed as a response to the ‘problems’ created by climate change. The climate governance regime consists of numerous laws and guidelines, actors, institutions, processes and mechanisms at the local, national, regional and international levels, which collectively focus on interrelated and highly complex issues ranging through nature conservation, pollution regulation, water resources, food security, desertification, humanitarian issues, migration, financial markets, and state and human security, to name just a few of the relevant issues. Considered thus, it is possible to suggest

²⁰ See Chapters 2 and 3.

²¹ Finkelstein, Lawrence S. (1995), ‘What is Global Governance?’, *Global Governance*, 1, 367–72 at 367.

²² Harlow, Carol (2005), ‘Deconstructing Government?’ in Tom Ginsburg and Robert A. Kagan (eds), *Institutions and Public Law: Comparative Approaches*, New York: Peter Lang Publishing, 143.

that environmental governance is fourth-generation environmental regulation and a contemporary societal response to highly complex environmental problems in a globalized world where problems of nature conservation, the regulation of environmental pollution, and sustainability all converge globally.

The growing prevalence of the notion of environmental governance can easily be discerned in the literature, and environmental lawyers can scarcely be forgiven for not having noticed its recent proliferation.²³ The term adorns the covers of an increasing number of books and it boldly allures potential academic audiences to scholarly gatherings all over the world. Courses on the topic (increasingly multi-disciplinary in nature) are replacing traditional courses on environmental law at numerous higher education institutions and it increasingly forms the focus of various research projects. Its popularity suggests that environmental governance today seems to be what sustainability was in the latter part of the 20th Century, because it permeates virtually the whole of modern environmental discourse.

3. THE CONFUSING CONCEPTUAL LABYRINTH OF ENVIRONMENTAL GOVERNANCE

Yet despite its popularity considerable uncertainty surrounds the nature of the concept. A compelling theoretical description and understanding of the concept remains elusive, especially from the perspective of environmental law. Many seem to use the concept but in various different ways and contexts, and for different purposes. This suggests that continuity, certainty and at least

²³ As illustration, the following are examples of some publications related to the theme: Young, Oran R. (ed) (1997), *Global Governance: Drawing Insights from the Environmental Experience*, Cambridge, Massachusetts: MIT Press; Kanie, Norichika and Peter M. Haas (eds) (2004), *Emerging Forces in Environmental Governance*, Tokyo: United Nations University Press; Chambers, Bradnee W. and Jessica F. Green (eds) (2005), *Reforming International Environmental Governance: From Institutional Limits to Innovative Reforms*, Tokyo: United Nations University Press; Kotzé, Louis J. and Alexander R. Paterson (eds) (2009), *The Role of the Judiciary in Environmental Governance: Comparative Perspectives*, Alphen aan den Rijn: Kluwer Law International; Young, Oran R. (1994), *International Governance: Protecting the Environment in a Stateless Society*, Ithaca, NY and London: Cornell University Press; Esty, Daniel C. (2007), 'Global Environmental Governance' in Colin I. Bradford and Johannes F. Linn (eds), *Global Governance Reform: Breaking the Stalemate*, Washington, DC: Brookings Institution Press; Myint, Tun (2003), 'Democracy in Global Environmental Governance: Issues, Interests, and Actors in the Mekong and the Rhine', *Indiana Journal of Global Legal Studies*, 1(10), 287–314; Akhtarkhavari, Afshin (2010), *Global Governance of the Environment: Environmental Principles and Change in International Law and Politics*, Cheltenham: Edward Elgar Publishing.

some form of agreement on its core content is lacking. It is also unclear whether environmental governance has achieved any normative status and if it actually provides any meaningful framework to allow for systematic analysis of issues pertaining to environmental regulation. It is not clear whether it is used as an analytical concept, a political and legal programme (in the normative sense), or both. It is also unclear what the term 'governance' implies for the regulation of environmental issues in the legal domain, what the implications of differing conceptions of the 'environment' would be for regulation, and what the role of (environmental) law is in the governance scheme of things. If these critical theoretical issues are left unattended, environmental governance could potentially suffer the same fate as 'governance' (its root concept), in the sense that it could become a popular buzzword with indeterminate meaning and therefore dubious analytical and normative value.²⁴ As Curtin and Dekker²⁵ warn:

It cannot however at this stage in the debate be excluded that the notion of 'governance' in the sense it is currently being used will prove no more than a convenient 'catch-phrase' in vogue in a particular context whose days are numbered by zapping politicians (and bureaucrats) whose attention quickly turns to a newer, trendier, 'sound-byte' [sic] to catch their fluid ideas.

More particularly, despite their increased interest in and focus on the topic, environmental lawyers are apparently hesitant at best or unable at worst to understand, systematically to describe, and justifiably to concretize the notion of environmental governance; if the latter achievement is at all possible. The reasons for this are many and varied. In 2009 Fisher *et al*²⁶ raised questions about the maturity, methodology, and quality of environmental law scholarship. The authors identify a non-exhaustive list of four methodological challenges which in their view contribute to the existing 'dearth of critical analysis' in environmental law, which they see as leading to the production of

²⁴ According to Curtin and Dekker: 'the content of the concept of "governance" is not only rather indeterminable but strongly varies in different contexts as well'. Curtin, Deidre M. and Ige F. Dekker (2005), 'Good Governance: The Concept and its Application by the European Union' in Deidre M. Curtin and Ige F. Dekker (eds), *Good Governance and the European Union: Reflections on Concepts, Institutions and Substance*, Antwerp: Intersentia, 5.

²⁵ Curtin, Deidre M. and Ige F. Dekker (2005), 'Good Governance: The Concept and its Application by the European Union' in Deidre M. Curtin and Ige F. Dekker (eds), *Good Governance and the European Union: Reflections on Concepts, Institutions and Substance*, Antwerp: Intersentia, 20.

²⁶ Fisher, Elizabeth *et al.* (2009), 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship', *Journal of Environmental Law*, **21**(2), 213–50 at 228.

environmental law scholarship of questionable quality. One of these challenges is ‘the heavy reliance in environmental law on a diverse range of governance arrangements’.²⁷ They explain that:

The methodological challenge raised by governance regimes is that such [governance] regimes require [environmental law] scholars to take a ‘more diverse view of state authority and its exercise’ but, in doing so, it is not clear what form such a ‘diverse view’ should take and how it differs from existing scholarly approaches. *Indeed, the concept of governance is much admired and referred to in worshipful tones but rarely scrutinised and deconstructed by environmental law scholars.*²⁸

The theory of ‘governance’ and its increased prevalence in the environmental law domain is therefore one of the methodological challenges which makes environmental law scholarship in the authors’ view ‘darn difficult as an intellectual enterprise’. This is so because, *inter alia*, governance is a catch-all term; it deals with legal and non-legal issues; it involves novel forms of authority; issues of environmental governance are not confined only to environmental law, but also require a broader trans-disciplinary legal view that straddles the traditional boundaries of environmental law; and environmental governance derives from a multi-disciplinary foundation, which suggests that while it contains some legal elements it also heavily relies on a range of other disciplines (for example, ecology, ethics, sociology, politics and economics).²⁹ Considering this sobering reality, one can scarcely blame environmental lawyers for restricting their theoretical-analytical interactions with environmental governance to worshipful references instead of thoroughgoing scholarly analysis.

To concede defeat, however, would be tantamount to ignoring valid arguments that urge us to engage more fully with important theoretical concepts which are foundational to contemporary environmental law and regulation. Notably, ignorance would also result in a missed opportunity for seeking clarity on ‘fuzzy’ yet theoretically significant descriptive scientific terms which are important for informing our analytical endeavours and regulatory

²⁷ The others include the speed and scale of regulatory change; inter-disciplinarity; and the multi-jurisdictional nature of environmental law regimes. Fisher, Elizabeth *et al.* (2009), ‘Maturity and Methodology: Starting a Debate about Environmental Law Scholarship’, *Journal of Environmental Law*, **21**(2), 213–50 at 228–43.

²⁸ Fisher, Elizabeth *et al.* (2009), ‘Maturity and Methodology: Starting a Debate about Environmental Law Scholarship’, *Journal of Environmental Law*, **21**(2), 213–50 at 235. Emphasis added.

²⁹ Fisher, Elizabeth *et al.* (2009), ‘Maturity and Methodology: Starting a Debate about Environmental Law Scholarship’, *Journal of Environmental Law*, **21**(2), 213–50 at 235–9.

responses as we attempt to deal effectively with contemporary environmental problems. As Finkelstein³⁰ argues, '[I]t is not wrong to wish to understand ... phenomena [such as governance]'; indeed it seems imperative to do so if one intends to make any meaningful contribution to the environmental discourse and cause. Important as they have been for the development of environmental regulation, and critical as they remain for regulatory efforts, the world has now moved beyond the nature conservation, pollution regulation and sustainability phases to the more complex and all-encompassing environmental governance phase of regulation which, for reasons set out throughout the course of this book, is better able to address environmental problems in a globalized world today.

4. AN UNCOMFORTABLE MARRIAGE

Environmental governance is a central concern of modern regulation in the legal context and it is becoming increasingly important and relevant for lawyers, legal discourse and, more specifically, the environmental law sub-discipline. Yet it is a concept which fits uncomfortably in the legal domain and as such it is one which requires to be more closely scrutinized. In addition to those already offered there are other reasons for looking closely at the concept of environmental governance.

First, environmental governance derives from the governance paradigm, which is an extra-legal concept but which is nevertheless interesting and relevant to lawyers, because it contains some legal elements and characteristics which could have legal effects. Governance, therefore, because it is a construct of social science that deals with regulation, is very close to law. In a sense, lawyers have always busied themselves with issues of governance, but only recently have environmental lawyers been forced to grapple with issues of governance in the environmental context. While this does not mean that environmental lawyers would necessarily be more comfortable or even better equipped to venture into scientific fields unknown to them and littered with quasi-legal landmines, it does suggest that lawyers require a better understanding of the interplay between legal, quasi-legal and non-legal concepts in the regulatory arena which, in the environmental field, often have a definite reciprocal relationship and interdependence and collective applicability to environmental problems. Moreover, as a prerequisite to the foregoing, lawyers must be able to understand the concept of governance and how it manifests in

³⁰ Finkelstein, Lawrence S. (1995), 'What is Global Governance?', *Global Governance*, 1, 367–72 at 368.

the environmental and legal context, which is by no means an easy task. Kooiman³¹ helpfully captures the complexity and incredibly wide scope of the governance phenomenon as follows:

... governance of and in modern societies is a mix of all kinds of governing efforts by all manner of social-political actors, public as well as private; occurring between them at different levels, in different governance modes and orders. These mixes are societal 'responses' to persistent and changing governing 'demands', set against ever growing societal diversity, dynamics and complexity. Governing issues generally are not just public or private, they are frequently shared, and governing activity at all levels (from local to supra-national) is becoming diffused over various societal actors whose relationships with each other are constantly changing.

The varying contexts in which the phrase is used and the different meanings ascribed to it, as is illustrated later in this book,³² suggest that environmental governance similarly is a highly complex construct which is equally vague, diverse and dynamic. Its increased popularity despite this theoretical confusion thus requires us to attribute a more concrete and uniform meaning to it for the sake of terminological consistency and clarity.

Second, the evolution of environmental regulation requires a broader view from environmental lawyers because '[T]oday law is no longer centre stage but simply one instrument among others in the environmental regulator's toolkit.'³³ Conversely, governance has the potential to broaden legal perspectives on environmental law-making, implementation, enforcement and regulation. Clearly, the changing face of environmental problems gives rise to many divergent and highly complex social, economic and ecological challenges which law alone cannot solve, but which instead demand a wider descriptive context, infused by multi- and trans-disciplinary perspectives where 'conventional boundaries between disciplinary areas of study are dissolving and reforming as interdisciplinary areas focused on broader topics like regulation or governance'.³⁴ The governance concept fulfils a specific scientific function in this respect because it can act as a useful bridging concept (*Brückenkonzept*) between different disciplines.³⁵ It could therefore function as a theoretical

³¹ Kooiman, Jan (2003), *Governing as Governance*, London: Sage Publications Limited, 3.

³² See Chapter 3 and further.

³³ Gunningham, Neil (2009), 'Environmental Law, Regulation and Governance: Shifting Architectures', *Journal of Environmental Law*, 21(2), 179–212 at 179.

³⁴ Godden, Lee and Jacqueline Peel (2010), *Environmental Law: Scientific, Policy and Regulatory Dimensions*, Melbourne: Oxford University Press, 2.

³⁵ Schuppert describes governance as possessing the ideal characteristics to act as this bridging concept because it can connect various sub-disciplines and discourses as well as their scientific results:

bridge to traverse disciplinary boundaries in instances where it is both useful and necessary to marry unlikely partners with a view to seeing scientific problems through a common lens and to finding answers to problems posed in a multi-disciplinary context. The environment poses many such problems to society, which cannot be solved by law alone. The multiplicity, scope, depth and nature of environmental problems today are such that their solutions require a comprehensive multi-disciplinary approach, ranging from the natural sciences to the humanities. Governance could act as a bridging concept between law, political science, environmental sciences, management theory and sociology, for instance, enabling us to find answers to questions and solutions for problems related to the environment. Governance, or more specifically, environmental governance, connects these disciplines, and if understood and properly employed it could be useful to lawyers who seek to understand and solve complex contemporary environmental problems.

Third, the nature, scope and complexity of environmental problems and the concomitant responses devised in the political regulatory milieu have changed to such an extent that ‘environmental governance, though sometimes touted as a “best” solution to multiple problems, may be most suited to dealing with “wicked” problems of such complexity that few if any other options seem viable’.³⁶ Climate change is one example of the many multi-dimensional and complex environmental problems which require a comprehensive, hybrid approach to devise regulatory solutions that consist of a whole range of legal and non-legal norms, processes, actors, and mechanisms at various levels.³⁷

... der Governance-Begriff [ist] ein geradezu idealer Kandidat, um als *Brückenbegriff* zwischen den Disziplinen zu fungieren, wobei wir unter Brückenbegriffen ... solche Begriffe verstehen, die die Eigenschaft haben, verschiedene disziplinäre Fachdiskurse und ihre Ergebnisse miteinander zu verknüpfen, also auf einander zu beziehen und nicht einfach nur in berührungsloser Parallelität nebeneinander zu führen.

Schuppert, Gunnar Folke (2007), ‘Was ist und wozu Governance?’, *Die Verwaltung: Zeitschrift für Verwaltungsrecht und Verwaltungswissenschaften*, **40**(1), 463–511 at 506.

³⁶ Gunningham, Neil (2009), ‘Environmental Law, Regulation and Governance: Shifting Architectures’, *Journal of Environmental Law*, **21**(2), 179–212 at 210.

³⁷ Young emphasizes the issue of complexity in regulating environmental problems such as climate change:

When we turn to the complex environmental problems that confront us now (for instance, climate change or the loss of biological diversity), moreover, the barriers to the achievement of effective governance are far more severe than they appear to be in the simple scenarios commonly used to illustrate the basic logic of collective action. It is often difficult to frame the problems to be solved appropriately, much less to design and operate governance systems that are both acceptable to all the major actors involved and likely to prove effective in practice.

As the complexity of environmental problems increases, so too do the complexity and variety of the regulatory responses, making the need to find collective terms to properly describe and understand these regulatory responses that answer to environmental complexity even more pressing. Governance, and indeed, environmental governance, is a way of approaching complexity in regulating human behaviour and the multiple effects of human behaviour on the environment. If environmental governance constitutes the contemporary fourth-generational manifestation of environmental regulation, then its content and conceptual underpinnings should be understood and described for the sake of promoting theoretical clarity and improving the practical application of the theory to everyday environmental problems.

Fourth, in the current globalized world, traditional forms of regulation are giving way to newer, more flexible forms of regulation that collectively resort under the terminological umbrella of governance. The term ‘governance’ suggests that there has been a ‘shift away from a certain traditional mode of governing associated with [the term] “government”’;³⁸ it is experimental and innovative; decentralized and more diverse; more flexible and revisable; it allows for improved participation and the coordination of multiple levels of government; and it fosters greater deliberation.³⁹ Contemporary governance arguably is everything that the orthodox state-centred, Westphalian concept of government is not, and environmental governance is an example of such a new form of governance, as is argued later in the book.⁴⁰ Gunningham⁴¹ describes ‘new environmental governance’ as follows:

This enterprise involves collaboration between a diversity of private, public and non-government stakeholders who, acting together towards commonly agreed (or mutually negotiated) goals, hope to achieve far more collectively, than individually. It relies heavily upon participatory dialogue and deliberation, devolved decision-making, flexibility rather than uniformity, inclusiveness, transparency and institutionalised consensus-building practices.

Young, Oran R. (1994), *International Governance: Protecting the Environment in a Stateless Society*, Ithaca, NY and London: Cornell University Press, 18.

³⁸ Armstrong, Kenneth and Claire Kilpatrick (2007), ‘Law, Governance, or New Governance? The Changing Open Method of Coordination’, *The Columbia Journal of European Law*, 3(13), 649–77 at 651.

³⁹ Trubek, David M. and Louise G. Trubek (2006), *New Governance and Legal Regulation: Complementarity, Rivalry, or Transformation*, University of Wisconsin Law School Legal Studies Research Paper Series No 1022, 5–6 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=908229 [accessed 4 January 2012].

⁴⁰ See Chapters 3–6.

⁴¹ Gunningham, Neil (2009), ‘Environmental Law, Regulation and Governance: Shifting Architectures’, *Journal of Environmental Law*, 21(2), 179–212 at 203.

The author concurs with the opinion that environmental governance is an evolving concept and that its precise architecture remains open to debate. While we might be familiar (comfortable even) with the Westphalian concept of government and its traditional, state-centred characteristics and elements, the same cannot necessarily be said of governance and its application in specific contexts such as the environment. The reality and inevitability of the development of 'new' forms of regulation in an era of globalization therefore would require a more complete and precise description of the characteristics of these new forms of regulation as they pertain to the environment in the 21st Century.

Fifth, from an abstract theoretical point of view, there is a need to transpose the environmental governance construct into the sphere of legal thinking for the sake of creating a frame of reference for those who use it. This is especially true if the purpose of the transposition is to better understand our increasing need to consolidate scientific and governance activities in the environmental field in a more systematic and exact way. Environmental governance could then serve as an aid in the theoretical consideration, interpretation and the systematization and clarification of the vague, ambiguous, general, fluid, amorphous mass of regulatory arrangements which cumulatively resort under the broad banner of environmental governance. Mindful of Young's⁴² warning that we are running the risk of 'choking on the cascade of conceptual distinctions social scientists have devised to frame questions and guide analysis concerning interactions between human users and natural resources and environmental services', it seems an opportune moment not necessarily to expand on these but rather to carefully reflect on existing concepts such as environmental governance with a view to clarifying them and navigating the conceptual labyrinth we find ourselves in. This should allow for the creation of an appropriate scientific frame of reference for environmental lawyers that could guide them in their efforts to understand and solve increasingly complex environmental problems.

Sixth, lawyers have an irresistible urge to define the concepts with which they work. This need for definition arguably arises from the fact that lawyers often busy themselves with issues of liability, which is an exercise that requires an estimation and description of boundaries, limits and scope. This requires law and the interpretation of laws to be exact, consistent and clear. Law is also about language and the meaning of words, which is a further consideration in lawyers' propensity for definition:

⁴² Young, Oran R. (2007), 'Rights, Rules, and Common Pools: Solving Problems Arising in Human/Environment Relations', *Natural Resources Journal*, 1(47), 1–16 at 1.

Definition, as the word suggests, is primarily a matter of drawing lines or distinguishing between one kind of thing and another, which language marks off by a separate word. The need for such a drawing of lines is often felt by those who are perfectly at home with the day-to-day use of the word in question, but cannot state or explain the distinctions which, they sense, divide one kind of thing from another.⁴³

Or in Scholte's⁴⁴ words:

Definitions fundamentally shape descriptions, explanations, evaluations, prescriptions and actions. In other words, they affect our entire understanding of a problem. If a core definition is slippery, then the knowledge built upon it is likely to be similarly loose and, in turn, the policies constructed on the basis of that knowledge can very well be misguided.

Lawyers thus tend to define concepts with a view to clarifying ambiguities for the sake of uniformity and ultimately to enhance legal certainty. They also seek to define concepts with a view to understanding what it is they are working with. The manner in which lawyers would define environmental governance and the theoretical sub-components thereof (notably including the environment, governance and law), would also inform the design of regulatory legal interventions that seek to direct human behaviour towards the environment. For lawyers, the urge to define environmental governance is therefore almost intuitive.

5. THE PURPOSE OF THIS BOOK

The foregoing observations are meant to describe the motivation behind the writing of this book. They might understandably be considered as verging on the edge of ivory tower pomposity and hence as being the justification for yet another futile exercise in semantics. One cannot, however, ignore the fact that uncertainty is often cited as the main culprit and sometimes the excuse for the failures of our regulatory efforts in the environmental domain.⁴⁵ While 'uncertainty' in this context obviously signifies scientific uncertainty, it is reasonable

⁴³ Hart, H.L.A. (1994), *The Concept of Law* 2nd edn, Oxford: Clarendon Press, 13–14.

⁴⁴ Scholte, Jan Aart (2000), *Globalization: A Critical Introduction*, London: Macmillan Press, 42.

⁴⁵ Bodansky, Daniel, Jutta Brunnée and Ellen Hey (2007), 'International Environmental Law: Mapping the Field' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law*, Oxford: Oxford University Press, 7.

to expect that normative and analytical uncertainty concerning the conceptual underpinnings of the foundational theoretical constructs of modern environmental regulatory efforts would only augment our regulatory failures.⁴⁶ It is in this context that the purpose of this book must be understood: it is an attempt to understand environmental governance; to situate 'governance' in the environmental regulatory domain, and to understand the role of law as part of the environmental governance effort. The book therefore seeks to provide a point of departure that should enable environmental lawyers to engage more critically with environmental governance. In doing so, its central aim is to aid environmental lawyers to scrutinize environmental governance and to attempt to understand the interplay between law, governance and the environment.

6. GLOBAL ENVIRONMENTAL GOVERNANCE

It is entirely likely that the nature of environmental governance could be described in a variety of different ways and from a number of different perspectives. One could, for example, describe the concept as it manifests nationally in a specific country, regionally as it occurs in the structures of the European Union (EU), or internationally as it manifests in supra-national structures such as those of the UN. Yet, considering the realities of fourth-generational environmental regulation, the interconnected nature of the environment, the global nature of contemporary environmental problems, and the collective global regulatory responses to these problems, it seems more useful to focus on the global aspects of environmental governance or, to put this differently, to focus on *global environmental governance*.

While global environmental governance includes international or supra-national environmental governance, it also concerns itself with the effects of and relationships between national and supra-national governance. It should be noted that global environmental governance is not exclusively international. 'Global' in this context is something of an all-inclusive term which refers to governance occurring simultaneously at various levels and executed by various state and non-state actors through a multitude of 'hard' and 'softer' legal arrangements. An extended view of the 'global' thus allows one to consider general trends in an interconnected, globalized world where there is considerable causality in their occurring at one level and their having

⁴⁶ Biermann, Frank (2007), "'Earth System Governance" as a Crosscutting Theme of Global Change Research', *Global Environmental Change*, **17**, 326–37 at 329–30.

trans-level repercussions.⁴⁷ In other words, global environmental governance describes governance that is supra-national, but also governance that occurs at all other levels as well, through the agency of state and non-state actors. While the sub-national and national remain important for domestic interventions, the world has become less local and has taken on a decidedly global character which permeates the regulatory responses to environmental problems that occur everywhere and affect everyone. Clearly then, the term ‘global’ is used here to signify its spatial characteristics and as a causal category which applies in the context of globalization.

In most cases today, because the environment is a holistic integrated phenomenon that demands a global, universal, or holistic view, one must also approach environmental problems in an equally holistic, integrated or global manner. The notion of the Anthropocene provides a useful point of departure for an analysis of the ‘global’ in the context of a holistic environment and the global environmental governance paradigm, because it relates to the ways in which to change and make an impact on human behaviour. The term ‘Anthropocene’ describes the geological time period in which people dominate the earth and influence it to the extent that the dynamics and functioning of the earth are being changed.⁴⁸ Viewing the global environmental *problématique* through the lens of the Anthropocene is a new approach that contributes to our ‘understanding of nature and society as a governable domain’; it provides an integrated and holistic opportunity for the ‘reinvention of the boundaries between nature and society and the political space for government intervention’.⁴⁹ Indeed, it seeks to understand ‘the planetary life-support system as an integrated whole’,⁵⁰ with the result that the holistic character of the Anthropocene could be considered as a semantic precondition for global regulatory interventions, including global environmental governance. For example, climate change is truly a global problem with global repercus-

⁴⁷ A very tangible example here is the important role that national governance organizational units play in transposing international legal obligations into national laws to the extent that ‘[N]ational administrative bodies serve as the nodes of transnational environmental policy frameworks.’ Haas, Peter M. (2002), ‘UN Conferences and Constructivist Governance of the Environment’, *Global Governance*, **8**, 73–91 at 85.

⁴⁸ For a more elaborate survey of the Anthropocene see Zalasiewicz, J. *et al.* (2011), ‘The Anthropocene: a New Epoch of Geological Time?’, *Philosophical Transactions of the Royal Society*, **369**, pp. 835–41.

⁴⁹ Lövbrand, Eva, Johannes Stripple and Bo Wiman (2009), ‘Earth System Governmentality Reflections on Science in the Anthropocene’, *Global Environmental Change*, **19**, 7–13 at 7, 8.

⁵⁰ Lövbrand, Eva, Johannes Stripple and Bo Wiman (2009), ‘Earth System Governmentality Reflections on Science in the Anthropocene’, *Global Environmental Change*, **19**, 7–13 at 7.

sions; what happens at the sub-national and national levels affects the supra-national and *vice versa*. It affects people, water, land, the air, fauna, flora, and cultural and social issues, and everything else, in all countries. Climate change and its effects cannot therefore be viewed from an exclusively domestic point of view and based on a single environmental medium. For the same reasons climate change is also not an exclusively international environmental problem. Instead, regulating climate change involves all levels of governance and a widely diverse range of state and non-state actors at all of these levels; and it provides a hybrid mix of legal, financial and other quasi-legal environmental governance mechanisms including for example emission limits, carbon trading schemes and voluntary initiatives. It also provides for a multitude of normative legal arrangements at all of these levels. It is therefore an example of a truly global manifestation of environmental governance in the Anthropocene. Yet other less obviously global environmental problems fit equally well under the umbrella of global environmental governance in the Anthropocene. The pollution of a river in a specific country could have trans-boundary effects, and it could affect the resilience of communities, a fact which could in turn have devastating socio-economic and health consequences for a country. Because of the interconnectivity of the world, these events could also affect other countries and/or people in other countries. To be sure, in the context of the Anthropocene, the idea of a holistic environment and an encompassing conception of the global, today arguably few environmental problems do not resort under the umbrella of global environmental governance.

Focusing on global environmental governance thus helps one to understand the complexity of the governance phenomenon as it manifests in the context of globalization in the environmental regulatory domain, and it simultaneously provides the opportunity to distil generic insights on the content, purpose and objective of the societal construct of environmental governance. Notably, a focus on global environmental governance acknowledges the interconnected, universal, holistic and transnational facets, characteristics and problems of a globally conceived environment, and it informs the type, content, extent and design of regulatory responses to these globally conceived environmental problems. The current globalized age, the realities of the Anthropocene and the global environmental *problématique* demand nothing less.

7. A MULTI-DISCIPLINARY APPROACH

Due to the complexities of the nature of the concept, any study that purports to contribute to clarifying global environmental governance cannot, from a methodological point of view, confine itself to the boundaries of the law. Earlier in this chapter the case was made that environmental governance is

diverse, multi-faceted and amorphous; qualities which raise daunting methodological challenges. Any attempt to describe global environmental governance must also borrow from non-legal but nevertheless law-related disciplines such as political science. While political scientists are far better equipped to pronounce on global environmental governance from their own perspective, this book will attempt to view global environmental governance from an environmental lawyer's perspective and through a political science lens insofar as the latter is necessary and possible. Undoubtedly, global environmental governance can also be described from various other disciplinary perspectives, such as those of economics and management theory. (In the latter instances it is frequently referred to as 'environmental management'.) This book, however, focuses on only the political science and legal domains, given the already large scope of the enquiry and the undeniable symbioses between law, politics and governance on the one hand, and political science's ability to inform conceptual theoretical frameworks dealing with global regulation on the other.

This multi-disciplinary approach is both intuitive and logical because, as Laferrière and Stoett⁵¹ remind us: '[F]ew serious scholars or policy makers believe, in our day and age, that the connection between environmental problems and international relations ... can be ignored.' Moreover, from a methodological point of view, Slaughter⁵² suggests that:

... seeing familiar terrain from an unfamiliar angle is often the key to unlock legal creativity. [It] is analogous to shifting intellectual gears, allowing the analyst to incorporate different sets of assumptions about what he or she is actually observing and what the likely outcome will be.

The complexity of environmental problems today is such that it demands a high level of legal creativity, which in turn would require environmental lawyers to wander onto unfamiliar disciplinary terrain as this book does.

8. THE USE OF TERMS AND CONCEPTS

This chapter deliberately does not include a section dealing with the definition and clarification of terms and concepts. Those terms and concepts that are important for the global environmental governance paradigm and that are part

⁵¹ Laferrière, Eric and Peter J. Stoett (2006), 'Introduction: Exploring International Ecopolitical Theory' in Eric Laferrière and Peter J. Stoett (eds), *International Ecopolitical Theory: Critical Approaches*, Vancouver: UBC Press, 3.

⁵² Slaughter, Anne-Marie (2001), *Recueil des Cours, Collected Courses of the Hague Academy of International Law, 2000: International Law and International Relations*, The Hague: Martinus Nijhoff Publishers, 192.

of the discourse are instead explored throughout this book. However, for the sake of consistency it is useful to point out at this stage that the terms 'governance' and 'regulation' are used interchangeably as meaning the same thing unless the contrary is indicated. The term 'global' refers not only to the international level of governance (as some commentators tend to use it), but throughout this book includes the national, regional and international levels of governance. The 'global' is thus considered to be a space or a context rather than a level. Unless indicated otherwise, the term 'law' is similarly used in its widest sense to include traditional 'harder' or formal forms of state-made law such as treaties and statutes, and also 'softer' non-state yet law-like rules such as voluntary corporate standards and codes of practice. As Chapter 8 explains, the term 'environment' is used to denote a holistic and all-encompassing notion of the environment, which includes but is not limited to the natural environment and its resources; fauna and flora; the environmental media, consisting of water, the air and the soil; all forms of life, including biological and chemical processes; socio-cultural environmental properties; and the man-made environment.

9. OBJECTIVES AND CHRONOLOGY

The previous sections highlighted the need for a comprehensive theoretical treatise on environmental governance, the production of which would no doubt be a daunting scholarly enterprise. This book is more modest in its aims in that it seeks to contribute to clarifying environmental governance by providing a synthesizing analysis of this concept as it manifests globally in the 21st Century in its fourth generational regulatory guise as global environmental governance. In doing so, it has eight specific objectives.

First, the study reflects in Chapter 2 on the phenomenon of globalization as an important informative setting and descriptive context for law, governance, environmental regulation and global environmental governance. It is argued in this chapter that global environmental governance on the one hand is a result of globalization and on the other, conversely, that it contributes to globalization. There is accordingly an inextricable link between globalization and global environmental governance and despite the general view that globalization is 'old hat' it remains a valuable interpretative setting that provides an important context for the sufficient appreciation of contemporary societal constructs and governance phenomena against the realities of a globalized world. This is so because globalization is changing our perceptions about governance and the manner in which we seek to devise and apply regulatory strategies to address global environmental problems. A focus on globalization also permits a broader view of global environmental problems and the link

between globalized processes such as increased trade and consumption and the environment. Globalization as the context for global environmental governance is further useful to explain the rise of the global governance phenomenon, the changing role of the state, the emergence of global governance institutions, and the changing role of law in global (environmental) governance.

A second objective of this book is to describe and understand governance, because governance is a vague, amorphous and dangerously malleable concept. It has the potential to create and exacerbate theoretical uncertainty (as it does in the environmental governance and law context). Governance is a much debated and frequently investigated concept, as the burgeoning body of especially political science literature on the topic suggests. Because the mere repetition of this voluminous body of work would be pointless, this book instead aims to provide a broad understanding of governance which could be useful in the environmental regulatory context. It does so in Chapter 3 primarily by means of a multi-disciplinary literature review of the governance construct. The review aims to scrutinize the nature of governance and to establish those of its features and characteristics that would be useful in describing and understanding governance as it manifests in the global environmental context.

Third, proceeding from the description of globalization and governance, the book investigates and describes in Chapter 4 the manner in which governance manifests globally as global governance. It does so by unpacking the general theory of global governance and by focusing on some of its central features, including institutionalism and institutions, regimes, organizations, networks and the many actors involved in global governance. While it does not intend to exhaustively venture on the analytical theories and frameworks of international relations theory (this has been done extensively by others far better equipped to do so) this chapter does seek to provide a succinct review and description of the nature, parameters and foundational building blocks of global governance, and eventually the concept of global governance itself. The chapter is premised on the hypothesis that a comprehensive treatment of the theory of global governance as the fulcrum around which global environmental governance revolves would be key to formulating a proper understanding of global environmental governance.

Chapter 5 discusses the relationship between law and governance and the role that law plays in governance. It reflects on the social function of law, its relationship with other social constructs such as governance, and the manifestation of law in a globalized context. As it deals with the book's fourth objective, it is the primary aim of this chapter to highlight the constitutive, regulative and legitimizing role of law and its steering effect in governance, as well as the rise of more informal and 'softer' versions of non-state law and

law-like rules in addition to formal or 'hard', state-based law. For the latter purpose, it extensively discusses the increased pluralization and hybridization of law and emphasizes that globalization and governance require a considerably extended view of law.

Departing from the theory of global governance contained in Chapter 4, Chapter 6 focuses on distinct aspects of global environmental governance. This chapter again highlights the 'globalness' of global environmental governance and it explains the difference between environmental management and environmental governance. As a foundation for the remainder of the chapter, it then seeks to provide a generic description of environmental governance, whereafter it investigates the orthodox legal doctrinal aspects, the public and private aspects, the hybrid aspects, and the multilevel aspects of global environmental governance.

A literature review of current manifestations of global environmental governance is conducted in Chapter 7. This part of the book essentially aims to map the definitional field of global environmental governance with a view to providing a consolidated description of the construct of global environmental governance.

Chapter 8 focuses on the role of regulatory norms, and more specifically law in global environmental governance. Here the study endeavours to fulfil its seventh objective by focusing on the function of law in relation to the environment and the broader global environmental governance effort. It specifically discusses how ideas of the environment influence our idea of law's functions in the context of global environmental governance. This chapter also investigates the steering, legitimizing and constitutive functions of law in relation to global environmental governance and law as a product of global environmental governance. In addition, the chapter investigates the role of 'softer' normative arrangements such as codes of conduct and guidelines as additional and increasingly influential forms of regulatory norms in the domain of global environmental governance. The chapter finally endeavours to provide an account of 'global environmental governance law', which it considers a recently emerging sub-discipline of law and a natural successor to international environmental law.

The final objective of this book is to draw from the insights distilled in the foregoing chapters with a view to proposing in Chapter 9 a consolidated and reconstructed theoretical description of global environmental governance. It concludes that global environmental governance has become a popular concept that has now gained widespread endorsement and is in common use. The concept is based on the pervasive concepts of governance and global governance, and the way it manifests today suggests that the term is used to describe and to make sense of the countless (and growing) institutional arrangements at the international, regional, sub-regional, national

and sub-national levels that are responsible for responding to environmental problems. Global environmental governance is also normative to the extent that it consists of intricate political and diplomatic processes; a plethora of legal and law-like instruments such as treaties and their regimes; regional, sub-regional, national and sub-national laws and soft-law arrangements; numerous state and non-state actors; and a host of monitoring, research, information sharing, enforcement and dispute-resolution mechanisms. The primary objective of global environmental governance is to change behaviour with respect to the environment through the foregoing collective mass of institutional arrangements, with the long-term and overarching yet idealistic goal of achieving sustainability.

10. SOME CAVEATS

The book's approach and focus opens numerous angles of enquiry and critique. To fulfil its objectives described above, its approach is descriptive and the enquiry is a meta-theoretical one. The enquiry is also normatively biased towards a critique of environmental governance which is informed by an expectation that environmental governance *should* advance the goal of sustainability. Notably, this expectation figures strongly in a later description of the objectives of environmental governance, which it is argued, are of a pragmatic and idealistic nature.⁵³ While the pragmatic objective of environmental governance is to change human behaviour *vis-à-vis* the environment, it idealistically seeks to achieve the goals of sustainability.

Notably, this enquiry does not venture on *how* best environmental governance should achieve its objectives, nor does it propose strategies to ameliorate the current environmental governance response. Instead, it accepts that the current environmental governance is probably ineffective to the extent that it does not seem to be able to adequately achieve sustainability and comprehensively to change human behaviour towards the environment.⁵⁴ In other words,

⁵³ See Chapters 6 and 9.

⁵⁴ The majority of commentators situates the failures of environmental law and governance among various causes and consequences including: the fragmentary growth of international laws and their concomitant governance structures; the lack of compliance with and enforcement of environmental laws, norms and standards; the lack of or the inadequate participation of civil society in governance and law-making processes; a general lack of good governance practices; the continued prevalence of environmental injustice and the lack of access to justice; the lack of legitimacy of the actors and the democratic deficits in decision-making structures; the obstacles presented by state sovereignty, unilateral decision-making, abuse of authority and the serving of self-interests by states; the difficulties of holding private entities such as

environmental governance is ineffective to the extent that it does not answer to the dictates of what is perceived to be an effective governance system: '[A]n effective governance system is one that channels behavior in such a way as to eliminate or substantially to ameliorate the problem that led to its creation. A governance system that has little behavioral impact, by contrast, is ineffective.'⁵⁵ The book nevertheless attempts to provide a better conceptual understanding of environmental governance which should enable other commentators to expand on the important issue of effectiveness.

transnational corporations to account for their environmental wrongs; the lack of core ecological and ethical values; and the non-existence, and/or lack of adherence to and enforceability of universal, fundamental environmental rights. Among the many authorities on the failures of environmental governance, see, Chambers, Bradnee W. and Jessica F. Green (eds) (2005), *Reforming International Environmental Governance: From Institutional Limits to Innovative Reforms*, Tokyo: United Nations University Press; DeSombre, Elizabeth R. (2006), *Global Environmental Institutions*, New York: Routledge; Esty, Daniel C. (2007), 'Global Environmental Governance' in Colin I. Bradford and Johannes F. Linn (eds), *Global Governance Reform: Breaking the Stalemate*, Washington, DC: Brookings Institution Press.

⁵⁵ Young, Oran R. (1994), *International Governance: Protecting the Environment in a Stateless Society*, Ithaca, NY and London: Cornell University Press, 30.