Chapter 2
Temporariness and Change in Global Governance

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El amor es eterno mientras dura.
Luis Cardoza y Aragón.

Abstract A crucial aspect of international law is to provide long-term stability and legal certainty. This function presumes that international law-making creates discrete norms and institutions that remain static until they are changed (or replaced) by other discrete institutions. This paper adopts a different point of departure to think about 'temporariness'. It suggests a dynamic of norm creation and institutional change in global governance. Neither norms nor institutions remain static once they become 'permanent'. They adapt, evolve and transform. This contribution argues that this process of change is driven by interaction among institutions and actors, which is the default technology of post-national rule-making. How to start thinking about such interaction? What is the added value of focusing on the process of interaction and not on the allegedly static characteristics of actors themselves? How can this approach provide a different normative and critical framework to think about debates on global governance? In answering these questions, this chapter will explore the interaction between international institutions in order to develop the central tenets of a methodology to think about institutional change in post-national rule-making.

Keywords Change · Global governance · Temporariness · International law · Global regulatory space

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2.1 Introduction

An important role of international law is to provide long-term stability and legal certainty. This function presumes that international law-making creates discrete norms and institutions that remain static until they are changed (or replaced) by other discrete institutions. This paper adopts a different point of departure to think about 'temporariness'. It suggests a dynamic view of norm creation and institutional change in global governance. Neither norms nor institutions remain static once they become 'permanent'. They adapt, evolve and transform. This chapter argues that the idea of temporariness implies a certain theory of change, and that this process of change is, in turn, driven by interaction among institutions and actors. Such interaction, the chapter argues is the default technology of post-national rule making.

While some efforts have been made to explain the role of interaction in the creation of the normative value of international law,[1] much of the literature trying to re-think the overall legal architecture of global governance seems to be oblivious of the important role of inter-institutional interaction in legal change. This article is an effort to start thinking about change in such terms. What is the added value of focusing on the process of interaction and not on the allegedly static characteristics of norms and institutions? How can this approach provide a different normative and critical framework to think about debates on global governance?

To address these questions, the text proceeds as follows. The ability to distinguish between permanent and provisional is crucial to thinking about international law. This ability is based on a particular view of change, which is explored in Sect. 2.2. Section 2.3 contains the central contribution of the article, and explores the dynamics of change in a global regulatory space. Then, Sect. 2.4 explores some of the challenges that this reading of change faces. Finally, Sect. 2.5 concludes.

[1] See, for example, Toope and Brunnée 2010.

2.2 International Law in a Constant Present

As hinted at above, temporariness and permanence are crucial elements of the vocabulary of international law. Some international norms are expressly temporal in their design; for example, most international courts have the *prima facie* jurisdiction to order provisional measures that, most evidently, are intended to be applicable for a limited span of time.[2] On the other side of the spectrum, there are institutions intended to be permanent: international organizations are a good example. States create organizations to stabilise a particular bargain of interests, thus creating a centralized and independent structure that enhances state interaction and the effectiveness of operational activities.[3] These advantages are gained if the organization is permanent (or at least if it is expected to be permanent). To be sure, institutions do change and are dynamic; however, the expectation of their permanence is crucial—otherwise, if the bargain is perceived as temporal, the organization will suffer in its ability to centralise activities, hence affecting its independence and, ultimately, its potential influence.

The ability to make the distinction between 'permanent' and 'provisional' in international law is based on a particular view of change. The idea of 'permanence' implies a negation of change—or at least its pause for a considerable amount of time. Temporariness, on the other hand, suggests the potential of change—'this is temporal' means this is 'subject to change'. Permanent, in contrast, means, closed for change.

To be sure, the idea of permanence as 'closed to change' does not imply total immutability. It is clear that permanence requires certain adjustment and adaptation: the field of organizational ecology as applied to international organizations has developed key insights on the role of marginal adaptation for resilience.[4] And, in a more trivial sense, institutions are actually changing all the time: staffs come and go, budgets rise and diminish, and headquarters open and close. The measure, then, is one of degree: while some change is always present, permanence seems to imply the absence of core change. In the extreme, defining as 'permanent' an international institution whose constituent document, institutional structure, and actual name changes every day is non-sensical.

But this begs the question: when does change stop being marginal? This question points to the central challenge. Despite its importance, the underlying concept of change in international law is hopelessly under-theorized. The first challenge is, then, where to start looking for the deep grammar that makes the idea of temporariness intelligible in international law. For that purpose, it is useful to build on a distinct trend in legal scholarship exploring the idea that an underlying consciousness can be read between the lines of discrete legal rules. Such is the notion of

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[2] See generally Rosenne 2005.

[3] Abbott and Snidal 1998.

[4] For example, Abbott et al. 2013.

langue, as taken by Duncan Kennedy from Saussarian semiotics.[5] Kennedy argues that specific legal rules in a given moment are not discrete occurrences, but are rather connected by an underlying link. The key concept here is the difference between *parole* and *langue*: *parole* is the specific utterance, which may be understood as 'sound bites', while *langue* is the set of resources available at any particular moment to compose such utterances. In a subsequent text, Kennedy refers to *langue* as the legal consciousness of a given time, as a 'vocabulary of concepts and typical arguments'[6] that underlie the 'specific, positively enacted rules of the various countries'.[7]

The purpose here is not to discuss in depth the structuralist insight that meaning is produced by the relations among linguistic terms themselves (and not by an underlying connection to factual history, which lies at the heart of the langue/parole distinction).[8] Instead, this mindset is useful here as it opens another level of engagement with the question of temporariness in international law. While Kennedy's description of succeeding legal consciousness proposes neither an idea of the concept of change within each moment, nor an idea of the process of change from one moment to the next, the notion of legal consciousness allows us to start looking for the deep grammar that defines the frontier of possibilities in international law. The langue/parole distinction opens a space of inquiry where, this article argues, the notion of change lies. Such will be the space explored in what remains of this text.

The *langue* of international law features a particular view of change, according to which, ultimately, there is *no change* in international law. That is to say, international law approaches norms and institutions as though they had always been there. Once change occurs, it approaches new (or changed) norms and institutions as if *those* norms had always been there. The underlying idea is that international norms and institutions are discrete events that occur linearly over time, and can be thought not of as continuum, but rather as a collection of discrete points in time that have little interaction with what happened earlier, or later.

This is not to say the langue of international law is based upon the idea that all norms pre-exist their time of creation. On the contrary: the time before the moment of creation (legal enactment, entry into force, and so forth) seems irrelevant for international law. All that matters is what exists now: what came earlier and was changed in order to have what we have now either disappears, or exists as

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[5] Kennedy 2000, at 1175.

[6] Kennedy 2006, at 23. The notion of legal consciousness can be traced back to the 1975 manuscript *The Rise and Fall of Classical Legal Thought,* especially Chapter One: 'Legal Consciousness'. The manuscript was reformatted and published as D. Kennedy, *The Rise and Fall of Classical Legal Thought* (2006), which included the version of Chapter One published as D. Kennedy, Toward a historical understanding of legal consciousness: the case of classical legal thought in America 1850–1940, 3 *Research in Law and Sociology*, 1980.

[7] Kennedy 2006, at 45.

[8] For an introduction to the basic distinction in the context of linguistics, see Lyons 1968. For a map of the different possible implication in legal reasoning, see Kennedy 1985, at 248–270.

currently existing norms that are either in conflict, or are exceptions, or somehow complement the other parts of the currently existing legal landscape.

That is, though, not an accurate description. International law often has to make sense of change. When forced to do that, the answers remain mostly *ad hoc,* focused on thinking about the norm as, again, permanent *for now*. The issue of change emerges in some of the most traditional areas of international law. A succinct look at some *paroles* should give us a sense of international law's underlying *langue* for change. Consider, for instance, the problem of treaty revision, particularly multilateral treaties. As is well known, the Vienna Convention on the Law of Treaties (VCLT) establishes subsidiary rules regulating the amendment of a treaty (Articles 39–41).[9] The VCLT reflects international law's standard approach to change: once an amendment is adopted, it has to be approved by all parties to the treaty. However, under Article 40(4) VCLT, the 'amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement'. As a consequence, the revised treaty will coexist with the unrevised treaty, and will be applicable only to those parties that approved it. In contrast, the unrevised treaty remains in force among parties that did approve the revision.[10] To be sure, this solution makes sense from the perspective of state sovereignty and the need for state consent. However, it also shows that the VCLT reflects a theory of *non-change*: it considers the new treaty as a norm that had always existed; and the old treaty as well. The issue is thus framed as a problem of treaty conflict,[11] and not as an issue of temporality.

Sometimes, treaties change outside the standard process of revision. Here, again, international law features a theory of non-change. A clear example is the debate on subsequent practice as a tool of treaty interpretation. Under Article 31(3)(b) VCLT, interpretation of a treaty can refer to 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. This clause was used by the International Court of Justice (ICJ) in *Namibia*, to explain that the meaning of the term 'concurring vote' included in Article 27(3) UN Charter had changed. The ICJ understood that abstentions in the context of the UN's Security Council should not be regarded as the absence of a concurring vote. Therefore, the abstention of a veto member amounted, in practice, to a concurrent vote.[12] In the Court's words:

> The proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of

[9] 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331 (hereinafter VCLT).

[10] See Yee 2000; Bowman 1995.

[11] Klabbers 2009a.

[12] *Legal Consequences for States of the Continued Presence of South Africa in* Namibia *(South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ, Advisory Opinion, 21 June 1971, at 16.

> resolutions. By abstaining, a member does not signify its objection to the approval of what is being proposed; in order to prevent the adoption of a resolution requiring unanimity of the permanent members, a permanent member has only to cast a negative vote.[13]

To be sure, this interpretation implies an important change of the applicable norm. Beyond the discussion of whether the words are capable of sustaining the Court's interpretation,[14] the relevant point for our purposes here is that, according to the Court's own narrative, this change did not occur at a given moment in time. It was, rather, *incremental*: some state practice would not have sufficed, but the accumulation of state practice (the 'proceedings of the Security Council extending over a long period') triggered this change. However, the Court fails to explain how that changed occurred, or when the scale was tipped. Instead, the ICJ thinks of the new rule ('abstention is not non-concurrence') as if it had existed always. Once again, there is no idea of change here: there is the identification of a norm, without a temporal dimension.

One last illustration can be found in customary international law. One interesting challenge in the construction of custom is the possibility of a subsequent objector; that is, a state that objects the formation of a customary rule *after* the rule has been established. This possibility, however, is closed. While the idea of a persistent objector is accepted on the basis of the required state consent,[15] the possibility of a state opting-out of an established customary rule is generally rejected.[16] For the International Law Association,

> [t]here is fairly widespread agreement that, even if there is a persistent objector rule in international law, it applies only when the customary rule is in the process of emerging. It does not, therefore, benefit States which came into existence only after the rule matured, or which became involved in the activity in question only at a later stage … In other words, there is no 'subsequent objector' rule.[17]

The problem appears when a state decides to opt-out of an established rule (say, Norway opting out of the rule that establishes a 10 nautical miles closing line for bays) and slowly succeeds in gaining the acquiescence of others state—which was the approach actually taken by the ICJ in the *Anglo-Norwegian Fisheries Case*. Two possibilities appear at that point: first, states acquiesce to the sole objector's opt-out of the norm (and hence we have a persistent objector); or, second, the other states join the objector, triggering new practice that points to the emergence of a new customary rule. In the latter case, are we facing a breach, or a new norm? International law has no vocabulary to tackle with that moment in the middle.

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[13] Ibid., at 22.

[14] For doubting that they do, see Brownlie 2008, at 187.

[15] *Anglo–Norwegian Fisheries Case (United Kingdom v. Norway)*, ICJ, Judgment of 18 December 1951.

[16] Shaw 2008, at 91.

[17] International Law Association, Committee On Formation Of Customary (General) International Law, Statement of principles applicable to the formation of general customary international law, 2000, at 27.

Either it reads it as a breach, hence assuming that the old customary rule is permanent; or it reads it as a new customary norm, that will coexist with the old one, thus triggering a network of legal relations similar to the case of treaty revision discussed earlier. Once again, the point here is not that the new rule is preferable to the old rule,[18] or that the possibility of a 'subsequent objector' is a threat for the international rule of law.[19] The point is rather that the vocabulary of international law fails to recognize the process of incremental change. It takes two discrete moments of the process, and frames each as permanent. If conflicts arise, they are conflicts of norms, and not moments in a continuum.

It is possible to think differently of international law in terms of dynamic change. This article is an effort in that direction. The problem, though, is that the current international legal consciousness seems to build on the idea of the constant present. As can be seen in the above examples, the problem is not that the *langue* of international law lacks a theory of change. Many disciplines are struggling with the same challenge; in international relations, for example, realists believe that the only relevant source of change is the relative capability of states, while liberals and constructivists point to other sources of change, such as knowledge and culture, among others.[20] So, the problem is not an absence of a theory of change. The problem is that international law *does* have a specific theory of change that, like is often the case with the deep grammar of law, remains unspoken. According to this theory, change is the sudden and complete replacement of the old by the new, which in turn implies the complete disappearance of the old. As a result of change, then, all looks as if nothing had ever changed: the norms and institutions that we have now look permanent, and completely unconnected to what came before them. Ultimately, international law's theory of change is one of a constant present.

This narrative has at least three distinct consequences. First, international law accommodates change by acknowledging new normative utterances as permanent. There is, in this sense, an important political dimension to this constant present: if change is the complete replacement of the old by the new, then it becomes relevant to explore who decides on the replacement. That is, there is very little guidance in the norms that are being replaced, or in the ones that replace them, on how or why the process of replacement should occur. International legal change becomes, then, a conceptual problem similar with a structure parallel to the right/exception dichotomy in human rights, which has been discussed widely by critical scholars.[21] Just as there is no inherent normative guidelines to decide when an exception should apply instead of the rule (making the issue *political*, by definition), so does the complete replacement of a norm by a 'posterior' norm implies a political question that needs to be considered.

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[18] Bradley and Gulati 2010.

[19] Cogan 2006.

[20] Holsti 2004, at 4–14.

[21] Koskenniemi 2001, at 84–85; Kennedy 2002, at 118–119. The key insight is, of course, Schmittian: 'Sovereign is he who decides on the exception.' Schmitt 2005, at 5.

Second, the narrative of constant present makes it difficult to normatively engage with change in international law. In a constant present, it is hard to question the pathways that brought the current *status quo*, and ask: what were the forces that triggered these changes? Is it normatively desirable that, for example, power or economic pressure trigger the changes that create the current international system? What kind of standards can we use to judge whether a change is good or bad, fair or unfair? These kinds of questions are occluded by international law's theory of change, which forces us to remain on a descriptive mode. To be clear, the constant present does not imply that the langue of international law builds on the notion of pre-existing norms or institutions. Rather, it posits that norms are discrete utterances that occur in a given moment in time (a basic positivist tenet) and, *at the same time,* it treats such utterances as outside time once (unless otherwise explicitly provided). They become part of the constant present, until they disappear. Such is the paradox that occludes the questions posed above.

The third effect of this constant present is that it obscures the complex colonial heritage of international law. A now robust body of scholarship has shown that international law that we have today is part of the complex institutional and ideological offspring of the colonial encounter.[22] Thinking in terms of a constant present obscures the relevance of this heritage, and neutralises the critical power of shedding lights on such lineage.

2.3 Change and Temporariness

As a result of this theory of (non-)change, it is quite difficult to grasp the dynamics of temporariness in international law. In an awkward turn, what is temporal is also part of the constant present. Provisional norms and institutions are, by definition, temporal, but they exist *today* as if they were permanent. It is as if we were taking photos of a column of smoke, one each hour, for three hours. When we look at the photos, the smoke exists in each photo as permanent—even though it is, by definition, temporal.

Thinking about temporariness requires, then, to think differently about change in international law. To do that, a useful starting point is to underscore that, in the long term, everything (a norm, an institution, a building or a state) is *always* provisional. Nothing is truly permanent—all decays and ultimately disappears. This is, of course, obvious. However, when we think of temporality in international law, we are not thinking in those terms. The point of reference is not *time* as such: short term or long term thinking is, in this context, irrelevant. Rather, the notion of permanence in international law seems to be relational: international norms and institutions are 'permanent' or 'provisional' in comparison to *other* international norms and institutions.

[22] See Koskenniemi 2012a and Anghie 2005.

This relational quality means that temporariness in international law is neither objective, nor completely subjective. On the one hand, it does not refer to an objective standard that differentiates permanent from provisional. While international instruments do refer constantly to an institution being 'permanent' or 'provisional', these statements seem to provide very little insight as to the temporal dynamics of international law. For example, one would be mistaken to write off the Provisional Protocol for the Application of the General Agreement on Trade and Tariffs (GATT) as 'provisional', thus failing to recognize the temporal implications of it giving legal stability to almost fifty years of trade negotiations.[23] However, temporariness is not just in eye of the beholder; it is not wholly based on perception. While it does seem reasonable for individuals to think of temporariness as perception-based ('The Beatles have been here forever'—'no, they have not'), this subjective character is less straightforward in the case of international law. It would make little sense to think, for instance, of the International Criminal Tribunal for the Former Yugoslavia (ICTY) as 'permanent' in the same sense as the International Criminal Court (ICC) is 'permanent'. Even if the ICTY can be perceived by one person as 'permanent' (it is surely perceived as 'permanent' by Milomir Stakić, who was sentenced to forty years in prison),[24] it is still 'provisional' from the perspective of the vocabulary of international law. From this latter perspective, comparison (and not perception, nor 'facts') is the key to think about temporariness. We will refer to this idea as the *comparative* concept of temporariness.

The comparative concept of temporariness means that norms and institutions are provisional relative to other norms and institutions. In this context, it starts making sense to speak of the ICJ's provisional measures as 'temporary', because they are so in comparison to, say, the decision on merits. If we take this line of reasoning one step further, we find that all institutions are provisional. Indeed, if it is true that temporariness is relative, then it becomes a relevant question to ask whether there are any truly permanent norms or institutions. The comparative concept of temporariness suggests there are none: there will always be other institutions or norms that can be read as more permanent, thus making all institutions provisional. This, I suggest, is not only a way of giving content to the concept of temporariness in international law, but also the point of entry for an alternative theory of change.

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[23] See Hansen and Vermulst 1988. The GATT 1947 was temporal, but somehow stable, as it provided the framework for the reduction of tariffs across the board for five decades. Temporariness in international law is neither objective, nor completely subjective, but rather is relational. As will be discussed later on, the point is not that all of international law is temporary, but rather that some norms and institutions are more temporary than others—hence, the *comparative* concept of temporariness proposed here.

[24] See *Prosector v. Stakic (Prijedor)*, Appeals Chamber, Judgment, Case No. IT-97-24, 22 March 2006, at 141.

2.3.1 Change and Temporariness in a Global Regulatory Space

A central advantage of the comparative concept of temporariness is that it makes us think of international norms and institutions in reference to *other* norms and institutions. This is particularly valuable, because it leads us to think of norms, not as discrete utterances, but rather as part of a wider landscape in which the temporal and the permanent help define each other. What is the shape of this wider landscape? After more than a decade of debates about fragmentation[25] and regime-collision in international law,[26] it seems clear that the structure of the international legal system is one of overlapping normativity. Scholarship that recognises such proliferation seem focused, though, on considering them as discrete actors that compete, cooperate or dominate each other—a dynamic that has been observed in international relations,[27] transnational business governance,[28] environmental governance,[29] and domestic regulation.[30] Even critical work that underscores the importance of hegemony still depicts each regime as a self-standing unit eager to dominate other self-standing regimes.[31]

However, these norms and institutions do not appear in a vacuum; they are not discrete utterances of law. Quite on the contrary, they are expressions, and form part, of a changing global regulatory space, in which they interact. This approach, I suggest, provides the basis for a different conceptualisation of change in international law, which will in turn help us think differently about temporariness in international law.

Perhaps the best way to think about it is by clarifying the image of a global regulatory space. The notion of a 'regulatory space' was suggested as a reaction to the narrow reading of the (domestic) regulatory process in terms of a conflict between public authority and private interests.[32] Against this view, the regulatory process within the nation state can be better understood as a 'space', where it becomes possible to explore the 'complex and shifting relationships between and within organizations at the heart of economic regulation.'[33] The key is 'to understand the nature of this shared space: the rules of admission, the relations between occupants, and the variations introduced by differences in markets and issue arenas.'[34]

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25 Koskenniemi and Leino 2002.

26 Teubner and Fischer-Lescano 2004.

27 Abbott et al. 2013.

28 Eberlein et al. 2014.

29 Oberthür and Gehring 2011.

30 Uruena 2012a.

31 Koskenniemi 2012b.

32 Hancher and Moran 1989.

33 Ibid.

34 Ibid.

These dynamics can be observed in global governance. Global interactions can be seen as part of an emergent 'global administrative space', which has been defined as 'a space, distinct from the space of inter-state relations governed by international law and the domestic regulatory space governed by domestic administrative law, although encompassing elements of each.'[35]

This image of a 'regulatory space' aptly captures some of the dynamic interactions between international norms and institutions that characterise global governance. Most important for our purposes, it is also useful to think differently about change in international law. As was discussed earlier, international law fails to register the process of incremental change. Instead, it focuses on discrete events occurring in particular moments of time, and frames each of them as permanent. Incremental change, then, is the notion that the *langue* of international law is unable to express. I suggest that the idea of a 'regulatory space' helps to think about the process of incremental change. To do so, we must engage in a thought experiment. Let us imagine for a minute that norms and institutions exist in the global regulatory space, much like planets and other great masses exist in the actual physical space. To be sure, we can think of each planet independently; we often do, and such is our usual practice. However, many of the realities that affect our daily life are not just the mere product of our independent planet, but are rather a function of *other* planets and masses in space. For instance, think of seasons, or sea tides: Earth spins in one way and not another, at a certain angle and not the other, not only because events that happen on Earth, but rather due to the relative equilibrium of gravitational forces around it, which include, of course, its own mass and gravitational force.

This is just an image. My argument is not that the global regulatory space is an actual space with actual forces.[36] It is useful, though, to illustrate the kind of dynamics triggered by institutional interaction in the global regulatory space, and its impact in our idea of change. International norms and institutions seem to have a 'mass' that exerts a certain pull towards them. This 'pull' has been observed before. A similar 'pull', exerted by international norms, has been famously discussed by Thomas Frank, in his theory of legitimacy. In his groundbreaking study, Franck understood legitimacy as

> a property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively, because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.[37]

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[35] Kingsbury et al. 2005.

[36] But see Hornstein 2005. The image of the international legal architecture as a 'universe' with 'planets' has been explored earlier in Simma and Pulkowski 2006. Their argument, though, is an intervention in the fragmentation debate, and proposes a narrative of multiple self-contained regimes that exist at the same moment of time, and clash against each other. This narrative is part of the 'constant present' consciousness in international law, which this article critically engages with.

[37] Franck 1990, at 25.

This pull is only marginally related to our discussion: Franck's agenda with legitimacy is to walk the road between positivism and naturalism that is able to explain the puzzle of compliance with international legal norms. However, it is useful to think in terms of degree in international law, and not of mere binaries. To do that, Franck engages with Anthony D'Amato and denounces the stark division between law and non-law in the international legal order. Instead of focusing on the enforcement issue (the so-called 'Austinian challenge'), Franck proposes that the key issue is whether the subjects of a given rule believe themselves obliged, despite their countervailing self-interest, to act in accordance with the law. This is where legitimacy enters the scene: the problem is not law/non-law, Franck would say, it is the independent pull to compliance that matters.[38] Compliance pull is a matter of degree; that is, while a rule simply is or is not binding, it may be more or less legitimate.[39]

My goal here is not to discuss the question of legitimacy and Franck's almost psychological explanation for it. His 'pull', though, is useful here to see the kind of dynamics that my own explanation seeks to describe. We can think of the pull that international norms and institutions exert over each other in similar terms, without going into the discussion of legitimacy. Each norm and institution draws toward it whatever is around: it exerts a sort of 'gravitational pull' that attracts other norms and institutions. The situation of norms and institutions in the global regulatory space is, therefore, the result of a relative equilibrium of all the 'gravitational pulls', as exerted by each and all norms or institutions.

One example of this process is the World Trade Organization. It is a well-established institution and carries considerable weight in the global regulatory space. Other regimes and institutions tend to gravitate towards it. Thus, environmental norms have been pulled towards it: a well-known example is the precautionary principle, which the WTO has failed to apply (and then applied) on several occasions.[40] This issue has been framed as a problem of fragmentation, and is also part of the wider 'trade and environment' debate, which is now part of the mainstream of international legal scholarship.[41] However, these readings seem to imply that the WTO has remained static, 'colliding' with environmental values, whereas in fact the WTO has changed its approach to the precautionary principle: while the Appellate Body in *EC—Hormones* expressly rejected the status of precautionary principle as a binding customary international rule,[42] it incrementally changed its position.[43] While its weight has attracted the issue towards its dispute resolution mechanism, the WTO has also changed as it interacted with the precautionary principle.

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[38] Ibid., at 47.

[39] Ibid., at 49.

[40] Cheyne 2007. See generally Sustein 2005.

[41] For a summary of the debate, see Howse 2002.

[42] *European Communities—Measures Concerning Meat and Meat Products*, Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998, adopted by DSB 13 February 1998 (hereinafter *EC—Hormones*).

[43] For the patterns of incremental change since *EC—Hormones*, see Wirth 2013.

Not only formal inter-governmental organizations such as the WTO exert a 'gravitational pull'. Also less structured regimes of governance, such as international investment law, exert their own pull. International investment law regime has grown to be a crucial part of the framework of global governance. A tightly-knit net of almost 5500 international investment agreements (IIA) covers the planet.[44] An important aspect of the current IIA wave is its decentralised nature. Unlike the WTO, investment deals are commonly stricken on a bilateral basis: there is no single decision-making centre to follow. However, the sheer amount of international investment agreements,[45] on the one hand, and the impacts (both financial and reputational) that an arbitration award may have on a host state,[46] on the other, make adjudication by investment tribunals a matter of importance of domestic constituencies.

The investment regime features a specialized set of norms, a distinct institutional architecture (including courts), a distinct epistemic community and a particular rationale. It can, therefore, be read as independent enough as to exert a pull on its own right. As a result, many other norms and institutions have been attracted to the investment regime. Most evidently, this attraction has been felt by human rights and environmental standards, but also by international law of armed conflict,[47] among others. These regimes have been influenced by the very existence of the international investment regime: in their interaction with the latter, human rights, environmental law and the law of armed conflict have been transformed. Once again, the point here is not fragmentation, but rather that the investment regime carries a weight in the regulatory space, and that such a weight pulls other norms and institutions towards it. The investment regime, in turn, is not let unaffected by this dynamics: its approach to human rights rules, for example, may change over time as the interaction continues,[48] particularly under the ever-changing form of the fair and equitable standard.[49]

Thinking about the architecture of international law in these terms allows us to think about interaction when collusions occur, and also when collusions are not occurring. Most of legal scholarship that factors in the challenges of the multiplicity of legal orders in international law seems to be biased towards focusing on events of conflict; that is, when two international norms provide conflicting solutions to similar cases, or when two institutions collide when exercising their powers.[50] It assumes that the principle is non-interaction, and the exception is interaction, which triggers collision and incoherence. This bias is understandable, as instances of collision are clearer, and seem more politically important. Against

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[44] UNCTAD, Developments in international investment agreements in 2005, 2006, at 1.

[45] See Elkins et al. 2008.

[46] Khamsi and Alvarez 2009.

[47] Hernández 2013.

[48] Dupuy 2009.

[49] Kingsbury and Schill 2009.

[50] See, for example, Pauwelyn 2003.

this view, I suggest that the opposite is true: international norms and institutions are *all the time* in interaction with each other. While collisions do exist, they tell us little of the day-to-day workings of international law. In contrast, thinking in terms of a global regulatory space allows us to consider the interactions that result, not in conflict, but rather in the practice of international law.

2.3.2 Thinking About Change in the Constant Present

The idea of a global regulatory space where international norms and institutions exercise different gravitational forces is useful to conceptualise change and temporariness in international law differently. To do so, one might start by considering the relative 'weights' of the different norms and institutions that interact, which in turn will determine their own pull, and ability to resist the pull of other norms or institutions. This starting point is crucial, considering that the dynamics of the global regulatory space is not governed by a notion of sovereign equality. Quite on the contrary, the last couple of decades have seen the emergence of global regulation without the medium of treaties, treaty-based institutions, international customary law, or, more fundamentally, the traditional expression of state consent. Regulatory networks (such as the Basel Committee on Banking Supervision),[51] public-private entities (such as the International Organization for Standardization (ISO)),[52] and purely private entities (such as the Fédération Internationale de Football Association (FIFA))[53] or privatised public utilities at the transnational level,[54] among many others, have become crucial players in determining the distribution of global regulatory power today. Domestic agencies, such as the US Environment Protection Agency, also emerged as influential actors in regulating issues which are of global concern. These networks, entities and agencies reveal a transformed global regulatory landscape that features, for instance, private actors exercising public powers, informal norms that carry the weight equivalent to that of formally binding instruments, and decentralised networks of regulation. However, their weight is not equal: some have more 'mass' than others, and therefore exert more pull than others.

Relative differences in weight, and the dynamics of the 'gravitational pull', imply that the possibility of permanence in international law stops making sense. The global regulatory space is dynamic: each and all norms and institutions are exerting their pull over the others. Each norm and institution is always 'moving' towards others, or is remaining still because it is resisting the pull of others. The point is that the principle of the global regulatory space is movement and change; there is nothing static, only constant movement.

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51 Slaughter and Zaring 2006.

52 See Klabbers 2005.

53 See Casini 2010.

54 See Morgan 2011.

The idea of permanence becomes, in that context, difficult to maintain. Even the most permanent of institutions (say, the United Nations) is exerting its pull; thus moving, or resisting moving, in dynamic terms. Note, however, that the impossibility of permanence is not related to the idea of the long-term as a time horizon. The argument is not that nothing is permanent because in the long term all will be gone: such was the starting point for our exploration. The argument made here is that institutions that *right now* seem permanent are actually moving, and thus cannot be thought of as permanent in any significant sense. The opposite, however, is not true. Thinking in these terms does not make the 'temporal' become 'permanent'. The reasoning here is focused on the impossibility of permanence—which is triggered by the constant movement of all the objects in the global regulatory space.

2.4 Normative Challenges

Thinking about change in these terms does not imply a radical transformation of the *langue* of international law. This view of change is not a rebuttal of the 'constant present' view discussed earlier. The deep grammar of international law will still consider norms and institutions as discrete events. However, this view of change helps to unpack each of these discrete norms, and looks for the dynamic in what is presented as static. By doing so, it allows us to destabilize the sense that what seems permanent right now is a necessity. In contrast, it suggests that the 'permanent' is only one particular point of incremental change. The advantage, then, is that thinking of change in terms of the global regulatory space forces us to consider the *process* of constant change.

This view poses an important normative challenge, because it risks perpetuating the *status quo*. When thinking about the pull that one norm or institution exerts over others, one is simply describing such movement. However, this view provides no vocabulary to perform a critique of the reasons behind such a powerful pull, or a normative standard to discuss whether the fact that one institution or norm carries so much weight is appropriate or not. In this sense, the description that is proposed here could be subject to critique in terms of ideology, understood as 'the ways in which meaning serves to establish and sustain relations of domination.'[55] Thus understood, ideology is part of the legal consciousness of a given time or, more precisely, the legal consciousness of a given time uses ideology to perpetuate the *status quo* it represents. In our case, the idea of incremental change could sustain an unequal distribution of power by occluding the normative dimensions of the 'gravitational pull'. Specifically, there are at least two normative challenges in thinking in terms of incremental change in the global regulatory space: (a) tunnel vision; and, (b) regulatory capture.

[55] John Thomson, *Ideology and modern culture*, Polity, Cambridge, 1990, at 56, quoted in Marks 2001, at 110.

First, the suggested view of change seems to lack an overarching narrative of the public good in the global regulatory space. Perhaps the main challenge is the issue of 'tunnel vision'.[56] Each institution and norm acting in the global regulatory space has a particular mandate, or exists in order to regulate a certain area of global politics or production; that is, they are only concerned with that specific issue, and not necessarily with wider societal concerns. The climate change regime will be concerned with climate change and not with, say, the rights of women. And human rights regime institutions will be focused on that specific issue, and not on economic development, or the environment. Each of these institutions may talk in terms of 'common good'; however, when these norms and institutions 'pull' towards them, they pull towards their own structural bias[57]—leaving the common good to be sorted out by the competition among norms and institutions in the global regulatory space. Talking in terms of a 'gravitational force' creates the risk of losing sight of an overarching narrative of a 'good' society.

Moreover, international norms and institutions are not static objects to be found in nature. Instead, they are put together in order to achieve a goal that is not given by the norm or institutions in itself, but rather by external political forces that see international law as one more of their tools to achieve their needs.[58] An international norm or institution will most likely play the part intended for it by the powerful. What is more, institutions themselves may have hegemonic ambitions, in the sense that they seek to expand their world-view, placing their goal as more important (or universal) in detriment of the goals of others. Thinking about change in these terms could obscure important differences of power and, in fact, could perpetuate as neutral the structure of the global regulatory space, which is a specific creation of those in power. This move, in turn, could end up empowering the narrowly defined experts that decide what the objective of the norm or institutions is. Because the mindset of regimes is wholly instrumental, a certain transnational elite that acts outside democratic or legal checks of accountability could end up being empowered by global specialized regimes.[59] Thus, the idea of neutral 'gravitational forces' could play into this expert-power base, legitimizing as 'change' what is only the result of the (functional) agenda of domination.

A second important normative challenge is regulatory capture. Framing the dynamics of change in terms of 'gravitational pulls' in the global regulatory space opens spots for private parties to engage actively with the decision-making process in the regulatory space. Private parties will use the different patterns of influence and change among institutions as a tool to achieve their goal. This, in turn, could have normatively desirable results, or could further empower global actors that are already mighty, as they hold the expertise to read the patterns of influence and 'gravitational pulls' described in this contribution.

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[56] Teubner and Korth 2012, at 37.

[57] Koskenniemi 2005, at 600.

[58] See, generally, Koskenniemi 2007; Uruena 2012b, at 74–77.

[59] See Kennedy 2005.

An example of a desirable outcome is the engagement of activists with the human rights regulatory space. As has been explored by Kathryn Sikkink, transnational networks of activists have played a fundamental role in the transformation of human rights governance in Latin America.[60] During the era of massive human rights violations and authoritarian regimes, Sikkink explains, local activists learned to use a 'boomerang effect' where non-state actors, faced with repression at home, would seek help in international courts and organizations, in order to bring pressure to their respective government from above. The goal of activism in this context was to bypass the failed domestic judiciary, and get a hierarchically superior order by the IACtHR against a state.[61] In this way, global human rights activists achieve their desired political output, and they also transform the structure of the regulatory space applicable to human rights, bringing new layers of complexity and opportunity.

In contrast, thinking in terms of change and the 'gravitational pull' could end up opening spaces for powerful private actors to take over the regulatory process. An example is dairy regulation. Dairy regulation is an exercise of global governance, characterized by interaction between several institution, and bodies of norms: the WTO, the Organization for Economic Cooperation and Development (OECD), the World Health Organization (WHO), the International Organization for Standardization (ISO), the World Organization for Animal Health (OIE), among many others. Each of these institutions carries a particular weight, exerting a particular pull over the others. The International Dairy Federation (IDF), in turn, is a private industrial organization that represents the dairy sector worldwide, by providing a source of scientific expertise in support of the development of quality milk and dairy products.[62] IDF is well known for its scientific expertise, and often provides background information and scientific support to different international organizations.

In the universe of possibilities, the IDF engages with several institutions in different ways. However, the key issue in regulation is food standards. Thus, when the IDF entered the space of global dairy regulation, it was attracted by the Codex Alimentarius Commission, which is the institution that carries more weight in that area of regulation.[63] The attraction grew to be quite close, and the IDF ended

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[60] Sikkink and Booth Walling 2007; Sikkink 2002; Sikkink 2005.

[61] Sikkink and Risse 1999; Sikkink and Keck 1998.

[62] See www.fil-idf.org. Accessed 5 July 2014.

[63] Part of the Codex's 'weight' derives, in turn, from its close contact with the World Trade Organizations. Article 3 of the WTO's SPS Agreement provides, in essence, that domestic food regulations that conform to international standards are presumed to be in compliance with that Agreement and GATT; in contrast, WTO members that depart from international standards must provide scientific justification to do so. Section 3(a) of Annex A of the SPS Agreement, in turn, defines international standards for food safety as those created by Codex Alimentarius, among others. Therefore, member states of the WTO that comply with the (voluntary) standards of the Codex are presumed to comply with the (mandatory) dispositions of the SPS Agreement and the GATT. In practice, such reference to the Codex, as included in the SPS Agreement, implies that States have an important incentive to follow the Codex: although remaining formally voluntary, adopting the Codex does substantially reduce the risk of WTO litigation. Livermore 2006.

embedded into the Codex itself. The purpose of the Codex is to protect consumers and facilitate fair practices in the trade of food through the definition of detailed product specifications and minimum requirements.[64] The governing body of the Codex is the Codex Alimentarius Commission, which features an Executive Committee, seven Commodity Committees, and nine General Subject Committees. The point of entry for the IDF to the regulatory space was the Codex Committee on Milk and Milk Products, hosted by New Zealand. The IDF became the only private organization formally recognized in the Codex Procedural Manual as being responsible for providing first drafts of Codex standards for a group of food commodities; similarly, it also contributes expert input throughout the development of new standards until their final adoption and monitors all the other Codex Committees that influence the dairy sector. The IDF thus became an integral part of the global space of dairy regulation.

Neither of these examples shows a particularly exceptional dynamics: the IDF is an industrial organization seeking to influence regulatory standards applicable to its sector. In turn, human rights activists are trying to achieve their own goal. But consider these examples from the perspective of the architecture of regulation applicable to dairy, or to human rights. From that perspective, we see a group of different institutions that have overlapping power over a particular issue, or a particular set of products. Private parties then enter the regulatory space—first as target to the regulation, but then become part of the regulatory process. This dynamic is not only a matter for lobbyists, but also transforms the architecture of the regulatory process that is being influenced. They are trying to influence such institutions but, by doing so, they lend more weight to some institution over the others. At the end, the weight of each institution or set of norms (the Codex Commission, or the Inter-American System of Human Rights) is changed, boosted by the 'gravitational pull' of private institutions such as of the IDF or human rights NGOs.

All of these are important challenges. A way to address them is to think of an overarching normative criterion to assess the patterns of certain 'gravitational' pulls. This approach would use the advantages of thinking in dynamic terms about change in international law, and at the same time steer clear of a reading that simply perpetuates the *status quo*. One example of such normative criteria could come from Thomas Franck's work, for whom the normative pull that characterises legitimacy in the community of states features four indicators: (a) determinacy, meaning the literary (text-based) quality of a rule that 'makes its message clear';[65] (b) symbolic validation, that occurs when 'a signal is used as cue to elicit compliance with a command';[66] (c) coherence, meaning the attribution whereby 'distinctions in the treatment of "likes" be justifiable in principled terms';[67] and, finally, (d) adherence, referring to the 'quality of being validated by an infrastructure of

[64] FAO/WHO, Codex Alimentarius Commission procedural manual, 2004.

[65] Franck 1990, at 52.

[66] Ibid., at 92.

[67] Ibid., at 144.

rules about rules.'[68] Or we could consider Benedict Kingsbury's attempt to fill a parallel void, by arguing that not all practices of global governance can be interpreted as 'law'.[69] Instead, only those practices that fulfill the requirement of 'publicness' can be considered law, and thus entitled to the benefits of using such language (publicness, for his purpose, is 'the claim made for law that it has been wrought by the whole society, by the public, and the connected claim that law addresses matters of concern to the society as such').[70] Finally, one last strategy could be along the lines of global constitutionalism; that is, evaluating interaction among institutions and their 'gravitational pull' through the prism of certain core legal standards, just as a national constitution limits the exercise of authority in a domestic setting.[71]

Many other options are available. It seems important, though, to underscore that this contribution's suggestion of reading change in dynamic terms requires a normative standard that complements this enhanced description of the mechanics of global governance. Such standard, in turn, is also part of the global regulatory space, and carries weight as well, thus attracting other norms and institutions towards it. Note, however, that this normative standard needs not to be the source of validity of the other norms or institutions in the global regulatory space—it is not a *Grundnorm*. It just needs to carry enough weight, and thus enough 'gravitational pull'. The greater the weight it carries, the more successful it will be in serving as true normative standards in global governance.

2.5 Conclusion

The notion of temporariness is central in international law. However, its deep grammar assumes that international law-making creates discrete institutions that remain static until they are changed (or replaced) by other discrete institutions. As was discussed, change is the complete replacement of the old by the new. As a result of change, then, all looks as if nothing had ever changed: the norms and institutions that we have now look permanent, and completely unconnected to what came before them. International law's theory of change is one of a constant present.

This chapter proposes a different approach, focusing on the dynamics of change in the global regulatory space. This approach has certain advantages, as it helps us communicate the constant movement of 'permanent' norms and institutions, providing a vocabulary to describe the incremental change that remains hidden in the standard view of change in international law. The challenge, though, is that this new vocabulary may be lacking in critical potential—it may end up working as an

[68] Ibid., at 184.

[69] Kingsbury 2009.

[70] Ibid., at 31.

[71] For a description of the trends, see, generally, Klabbers 2009b.

ideological device that justifies the reality it describes. This, I think, is no reason to reject it. It is not the case that the phenomena it describes will stop occurring because we have no conceptual way of grasping it. However, this challenge does point to the need to think of ways to enhance the incipient vocabulary of change in global governance. But we need to build that vocabulary in the first place. This chapter is an effort to that effect.

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