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**ASSESSING THE STANDARD OF LEGITIMACY IN THE UNITED NATIONS CLIMATE CHANGE
REGIME THROUGH A COMPENSATORY CONSTITUTIONALISM LENS**

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Abstract

The thesis assesses the standard of legitimacy in the United Nations climate change regime through a compensatory constitutionalism lens. The objective of the research undertaken is to recast the narrative surrounding the lack of political will to address climate change into a more constructive framework of identifying legitimacy strengths and deficits.

In order to achieve this objective the thesis places legitimacy, climate change, and constitutionalism at an intellectual crossroads. A key aspect of this is the identification of constitutionalism as a set of shared values amongst states parties which can be used as indicators of legitimacy. This is significant because the cumulative, indivisible, urgent, and global characteristics of the issue of climate change emphasise the need for the United Nations climate change regime to be underpinned by a high standard of legitimacy. For the regime to successfully engage states parties in policy-making at the global level a high standard of legitimacy is essential. In particular the regime must succeed in casting a productive balance between the need for the exercise of authority both at a global and a domestic level. This thesis therefore constructs an analytical framework around three formal and three material features of constitutionalism which it applies to the treaty provisions of the United Nations climate change regime as objective standards of measurement through which to assess states parties' perception of the regime's standard of legitimacy.

Lay Summary

The thesis assesses the standard of legitimacy in the United Nations climate change regime, which consists of the United Nations Framework Convention on Climate Change, the Kyoto Protocol, and the Paris Agreement. Legitimacy is important in the context of the climate change regime because it explains the circumstances that justify the exercise of authority through the treaty regime over states. In order to carry out the legitimacy assessment, the thesis creates an analytical framework through the construction of a compensatory constitutionalism lens.

The goal of assessing the standard of legitimacy through the perspective of the compensatory constitutionalism lens is to recast the narrative surrounding the lack of political will to address climate change into a more constructive framework of identifying legitimacy strengths and deficits. The identification of legitimacy strengths can boost further confidence in the regime. The identification of legitimacy deficits is useful because it makes it possible to consider further developments and improvements to the regime. Considering the catastrophic impacts of unchecked climate change and the increasing urgency with which the issue needs addressing, the continued development of the regime is of the utmost importance.

In order to achieve its research objective, the thesis places legitimacy, climate change, and constitutionalism at an intellectual crossroads. The first part of the thesis defines the meaning and role of legitimacy and constitutionalism in relation to the topic of climate change. Following this, the thesis illustrates the productive interactions between the three themes of legitimacy, constitutionalism, and climate change through the construction of the compensatory constitutionalism lens for the United Nations climate change regime, which consists of three formal and three material features. The presence of these features in the regime is examined in the last part of the thesis and articulated in terms of legitimacy strengths and deficits. The conclusion reflects that, whilst the regime demonstrates a minimal degree of legitimacy strengths, there remains significant scope for improvement regarding the way in which the regime is enabled to exercise authority over states parties.

Declaration

I declare that this thesis has been composed solely by myself and that it has not been submitted, in whole or in part, in any previous application for a degree. Except where states otherwise by reference or acknowledgment, the work presented is entirely my own.

CHAPTER 1 INTRODUCTION

1 Mapping the terrain: identifying the three key themes of climate change, legitimacy, and constitutionalism

The objective of this thesis is to assess the standard of legitimacy in the United Nations climate change regime (CCR) through a compensatory constitutionalism lens (CCL). To this end the three topics of climate change, legitimacy, and constitutionalism are brought together to demonstrate how they intersect at an intellectual crossroads. The purpose of the assessment is to recast the perception that states lack the political will to address climate change into a more constructive narrative which focusses on the identification of real obstacles states parties face in their interactions with the CCR and which may prevent them from accepting further obligations or commitments that would contribute to the achievement of the CCR's objective.

Article 2 United Nations Framework Convention on Climate Change (UNFCCC)¹ states that its ultimate objective is:

“to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”

Article 2 UNFCCC further adds to this that this objective:

“should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.”

The objective of the CCR introduces the first key theme of the thesis, namely climate change. What states parties acknowledge through ratifying the CCR is that climate change presents a challenge which is best addressed collectively. Looking at the negotiation history of the UNFCCC it can be observed that the cumulative nature of the causes of climate change and the fact that its impacts cannot be territorially limited led states parties to adopt the approach of addressing the issue of climate change through a regime that would provide a facilitative platform to develop a long term globally coordinated response.²

¹ United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC).

² Bodansky traces the negotiation background of the UNFCCC extensively and draws attention to the fact that the roots of the CCR lie in the 1985 International Conference on the Assessment of the Role of Carbon Dioxide and of Other Greenhouse Gases in Climate Variations and Associated Impacts organised by the International Council for Science, the World Meteorological Organisation and the United Nations Environmental Programme. See Daniel Bodansky, 'The United Nations Framework Convention on Climate Change: a commentary' (1993) 18(2) *The Yale Journal of International Law* 451, 458. Whilst scientific interest in the topic of climate change can be traced further back (see, for example: International Science Council, 'History: ICSU and climate change' <<https://council.science/what-we-do/our-work-at-the-un/climate-change/history-icsu-and-climate-change/>> accessed 15 July 2020) the conference which Bodansky discusses can be considered a turning point from where the issue started to become increasingly of interest to states in terms of policy rather than remaining a matter of interest to scientists only.

The second part of article 2 UNFCCC cited above highlights the multifaceted interests impacted by climate change governance. Natural adaptation of ecosystems, safeguarding food security, and ensuring sustainable development are but a fraction of the variety of interests at stake for states parties.³ The CCR's task of facilitating the harmonisation of nearly 200 states parties' individual interests into a globally coordinated response to climate change in a manner that is sufficiently persuasive that states parties are willing to set aside competing individual interests demonstrates the need for the regime to be underpinned by a high standard of legitimacy.

The CCR as a legal framework for coordinating, on a global scale, states parties' conduct with the objective of achieving an adequate response to the issue of climate change, leads to the introduction of the second key theme of the thesis: legitimacy. Whilst often perceived as elusive,⁴ legitimacy is a valuable resource in the context of the CCR.⁵ Broadly stated, legitimacy provides an alternative to self-interest and coercion as a means of influencing conduct.⁶ The variety of interests at stake and the intensity of negative consequences of climate change makes self-interest an unreliable incentive. Whilst all states share the long-term self-interest of achieving the CCR's objective their shorter term concerns give rise to reasonable disagreement which cannot be resolved on the basis of self-interest alone.⁷

Neither does coercion provide a simple resolution to the issue of climate change. In the context of international law coercion is channeled through diplomatic means. However, no single coercive power that stands above states exists. Therefore, the type of coercion in which individual actors are forcefully manipulated into adjusting their conduct is absent in the context of international law. For coercion through diplomacy to have traction, the

³ The IPCC Special Report on the impacts of global warming of 1.5°C describes a range of impacts of climate change on a variety of sectors. See especially: O Hoegh-Guldberg and others, 'Impacts of 1.5°C global warming on natural and human systems' in V Masson-Delmotte and others (eds), *Global warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related greenhouse gas emissions pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* IPCC In Press 2018.

⁴ Many authors have commented on the elusiveness of the meaning of legitimacy. For a few examples, see: Hilary Charlesworth and Jean-Marc Coicaud, *Fault Lines of International Legitimacy* (OUP 2009); Martti Koskenniemi, 'Legitimacy, Rights, and Ideology: Notes Toward a Critique of New Moral Internationalism' (2003) 7(2) *Associations* 349; Joseph H H Weiler, 'In the Face of Crisis: Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration' (2012) 34(7) *Journal of European Integration* 825; Christopher A Thomas, 'The Uses and Abuses of Legitimacy in International Law' (2014) 34(4) *Oxford Journal of Legal Studies* 729.

⁵ On the topic of legitimacy as a resource see Christian Reus-Smit, 'International Crises of Legitimacy' (2007) 44 157, 163. Whilst not explaining the meaning of legitimacy as a resource specifically, the same expression is also used in the same way in Weiler 2012 (n 4) 827.

⁶ A few examples of descriptions of legitimacy which fall within this broad, simplified definition can be found in: Cormac Mac Amhlaigh, 'Harmonising Global Constitutionalism' (2016) 5(2) *Journal of Global Constitutionalism* 173; Daniel Bodansky, 'Legitimacy' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds) *The Oxford Handbook of International Environmental Law* (OUP 2008) 705; Thomas 2014 (n 4); Reus-Smit 2007 (n 5).

⁷ On the topic of reasonable disagreement in the context of climate change see: Luke Tomlinson, 'Reasonable Disagreement and Political Deadlock' in Luke Tomlinson, *Procedural Justice in the United Nations Framework Convention on Climate Change: Negotiating Fairness* (Springer Publishing 2015).

channels through which diplomacy is exercised need to be recognised as having a certain degree of legitimacy.⁸

Achieving a high standard of legitimacy is essential to the success of the CCR. This is because legitimacy provides a persuasive incentive for otherwise autonomous, equal, and free actors to act in accordance with what is required of them to achieve a common objective articulated in advance.⁹ It is for this reason that the thesis shines a light on the standard of legitimacy in the CCR specifically. Identifying legitimacy strengths and weaknesses in the CCR makes it possible to identify real obstacles states parties face in their efforts to achieve the objective set out in article 2 UNFCCC. Identifying legitimacy weaknesses in particular highlights areas in which the regime may need to focus further development efforts. Simultaneously, identifying legitimacy strengths provides states parties with the confidence required to make the difficult decisions that are necessary in order to achieve the CCR's objective.

Legitimacy as an alternative resource to coercion and self-interest relies on providing a set of discursive reasons that are sufficiently persuasive that they can account for states parties setting aside (temporary) individual interests and preferences in favour of the common and long-term objective of the CCR.¹⁰ Ideally, this persuasiveness should be integrated into the architecture of the regime. This would ensure both the legitimacy of the original framework and obligations as well as enhance the opportunity for ensuring that future developments of the regime and the establishment of new commitments meet state parties' legitimacy expectations. By structurally embedding legitimacy into the architecture of the CCR it also becomes more likely that it will have, and continue to have, the type of authority which can influence states parties' conduct in a way that enables them to achieve the objective set out above.

This leads to the third key theme of the thesis, namely constitutionalism. As the title of the thesis indicates, the standard of legitimacy of the CCR is assessed through the application of a compensatory constitutionalism lens. Constitutionalism is a familiar means through which the law balances the need for governance with the inherent autonomous, free, and equal nature of individuals. The principle of sovereign equality suggests that, similar to individuals, states can also be described as autonomous, free, and equal actors.¹¹ The function of constitutionalism as a means of addressing the balance between authoritative governance on one hand and inherent autonomy, equality, and freedom of individual subjects of authority indicates that constitutionalism is a suitable means of translating legitimacy expectations into a legal structure. The construction of the CCL as an analytical framework for the assessment of the standard of legitimacy and its application to the CCR provide the original contribution of this thesis. Therefore, two chapters (chapter 3 and 4) are specifically

⁸ See Reus-Smit 2007 (n 5) 163.

⁹ This characteristic of legitimacy is described in various terms such as, for example, compliance, obedience or right to rule. See for examples: Bodansky 2008 (n 6); Mac Amhlaigh 2016 (n 6); Thomas Franck, *The Power of Legitimacy Among Nations* (OUP 1990) 16 and 24; Allan Buchanan, 'The Legitimacy of International Law' in Samantha Besson and John Tasioulas *Philosophy of International Law* (OUP 2010) 79; John Tasioulas, 'The Legitimacy of International Law' in Samantha Besson and John Tasioulas *Philosophy of International Law* (OUP 2010) 97.

¹⁰ Mac Amhlaigh 2016 (n 6).

¹¹ This take on sovereignty as autonomy is further explained in chapter 3.

dedicated to the explanation of how constitutionalism can be translated to the context of the CCR, to explain the process of constructing the CCL, and to explain how constitutionalism provides an insightful perspective on the standard of legitimacy in the CCR.

2 Providing compass points: key terminology explained

Taken individually, each of the three key themes of this thesis provides certain definitional conundrums. The nature of climate change as a “super wicked problem” means that it defies any attempt at simple description.¹² In addition, the CCR itself carries many different labels. It is a multilateral environmental agreement.¹³ It is also a hybrid treaty regime which incorporates both framework elements and substantive obligations.¹⁴ Legitimacy too, is not seldom viewed as an elusive and unwieldy topic.¹⁵ Even constitutionalism, with its longstanding pedigree, has meant different things over time¹⁶ and can accommodate a variety of ideologies and interpretations.¹⁷ This is especially the case in the context of constitutionalism beyond the state which sometimes identifies a global constitution,¹⁸ sometimes seeks to constitutionalise aspects of international law,¹⁹ and or can be used either in integration with domestic constitutions or seek their replacement.²⁰ In order to navigate three such unwieldy topics and tame them into cohesion it is necessary to clarify a few key terms used throughout the thesis from the outset. This section therefore briefly discusses the meaning of some of the key terms applied throughout the thesis. Whilst more detailed definitions of these terms follow in subsequent chapters, this section provides brief explanations of what frequently used terms mean.

¹² Richard Lazarus, ‘Super wicked problems and climate change: restraining the present to liberate the future’ (2009) 94(5) *Cornell Law Review* 1153.

¹³ Daniel Bodansky, ‘The legitimacy of international governance: a coming challenge for international environmental law?’ (1999) 93(3) *The American Journal of International Law* 596; Jutta Brunnée, ‘COPing with Consent: Law-Making Under Multilateral Environmental Agreements’ (2002) 15(1) *Leiden Journal of International Law* 1; Robin Churchill and Geir Ulfstein, ‘Autonomous institutional arrangements in multilateral environmental agreements: a little-noticed phenomenon in international law’ (2000) 94(4) *American Journal of International Law* 623.

¹⁴ Bodansky 1993 (n 2).

¹⁵ See footnote n 4.

¹⁶ For a discussion of the past, present, and future uses of constitutionalism see: Charles Howard McIlwain, *Constitutionalism Ancient and Modern* (Cornell University Press 1947); Jill Harries, ‘Global constitutionalism: the ancient worlds’ in Anthony Lang and Antje Wiener (eds), *Handbook on Global Constitutionalism* (Edward Elgar 2017) 23-34; Dieter Grimm, ‘The Constitution in Historical Perspective’, in Dieter Grimm, *Constitutionalism Past, Present, and Future* (OUP 2016); Stephen Holmes, ‘Constitutions and Constitutionalism’ in M Rosenfeld and A Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (OUP 2012).

¹⁷ Mac Amhlaigh 2016 (n 6), 193-197.

¹⁸ Bardo Fassbender, ‘The United Nations Charter as Constitution of the International Community’ (1998) 36(3) *The Columbia Journal of Transnational Law* 529; Andreas L Paulus, ‘The International Legal System as a Constitution’ in Jeffrey Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance*, (CUP 2009) 69.

¹⁹ For examples, see: Jeffrey Dunoff, ‘The Politics of International Constitutions: The Curious Case of the World Trade Organization’ in Jeffrey Dunoff and Joel Trachtman, *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 178; Neil Walker, ‘Reframing EU Constitutionalism’ in Jeffrey Dunoff and Joel Trachtman, *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 149.

²⁰ For an overview of different approaches to constitutionalism beyond the state see: Christine Schwöbel, ‘Situating the debate on global constitutionalism’ (2010) 8(3) *International Journal of Constitutional Law* 611.

The first term that should be explained is the use of the word *regime* to refer to the UNFCCC, the Kyoto Protocol,²¹ and the Paris Agreement collectively.²² The use of this term is based on Kratochwill and Ruggie's definition.²³ They define a regime as a:

“governing arrangement constructed by states to coordinate their expectations and organize aspects of international behaviour in various issue areas.”²⁴

This description suits the CCR in all aspects. Firstly, through ratification of the UNFCCC states parties have established a set of four core bodies that comprise an autonomous institutional arrangement which coordinates their expectations and exerts influence over their behaviour in relation to greenhouse gas emitting activities. Whilst the establishment of these bodies takes place in the UNFCCC specifically, their role in coordinating states parties' expectations and influencing their conduct extends to the content of the Kyoto Protocol and the Paris Agreement. These four key bodies therefore conduct governing activities throughout the CCR in its entirety as opposed to operating only within the context of the UNFCCC.

The second key term which requires explanation is the use of the descriptor *autonomous institutional arrangement (AIA)* in relation to the four key bodies mentioned above. This term is borrowed from Churchill and Ulfstein who comment on the phenomenon that within multilateral environmental agreements there appears to be a preference for the establishment of AIAs over the creation of new international organisations (IOs).²⁵ They distinguish between an AIA and an IO on the basis of the AIA's ad hoc nature and independence from states parties and existing IOs. They furthermore identify that, generally speaking, AIAs consist of a Conference of the Parties (COP), a secretariat, and one or more subsidiary bodies.²⁶ This is the case in the CCR which establishes a COP,²⁷ a Secretariat,²⁸ a subsidiary body for scientific and technological advice (SBSTA),²⁹ and a subsidiary body for implementation (SBI).³⁰

The reason why they define such institutional arrangements as autonomous is firstly because of their independence from states and existing IOs. Secondly, because these institutional arrangements are thought to have their own law-making powers and compliance mechanisms.³¹ Whilst it is contentious to what extent the activities of the AIA of the CCR can be described as making law, chapter 4 identifies and discusses the specific

²¹ Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162 (Kyoto Protocol).

²² Paris Agreement (adopted 12 December 2015 entered into force 4 November 2016) (Paris Agreement).

²³ Friedrich Kratochwil and John G Ruggie, 'International organization: a state of the art on an art of the state' (1986) 40(4) *International Organization* 753.

²⁴ Kratochwil and Ruggie 1986 (n 23).

²⁵ Churchill and Ulfstein 2000 (n 12).

²⁶ *Idem*.

²⁷ Article 7 UNFCCC.

²⁸ Article 8 UNFCCC.

²⁹ Article 9 UNFCCC.

³⁰ Article 10 UNFCCC.

³¹ Churchill and Ulfstein 2000 (n 12) 623.

scope of the COP's decision-making powers and the authority it has in terms of influencing states parties' conduct. With regard to compliance mechanisms, these are not part of the initial set of four bodies which this thesis describes as the CCR's AIA. However, they do exist within the CCR and are under the supervision of the AIA.³² This demonstrates that it is possible to describe the bodies established within the CCR as an AIA.

Just because it is possible to use the term AIA does not mean that it is necessarily useful. The reason why this thesis chooses to use the term AIA is because it provides a focal point for the assessment of the standard of legitimacy in the CCR as focusing on the relationship between the AIA with a mandate to influence states parties conduct and states parties as sovereign entities. Using the term AIA to provide a focal point for the assessment of the standard of legitimacy in the CCR is helpful because the treaties contain a mixture of framework elements and practical obligations for states parties. Whilst it provides the flexibility required for the CCR to keep up with current developments on the topic of climate change it also makes it more confusing when discussing the legitimacy of the CCR because this could potentially relate to a number of different things. For example, one could discuss the legitimacy of the obligations established for states parties through the three treaties. Or one could discuss the legitimacy of the way commitments are spread amongst states. Or one might even discuss the legitimacy of each of the individual treaties in their own right. By using the terms AIA the thesis clarifies that in assessing the standard of legitimacy in the CCR it is concerned with the relationship between the four key bodies of the CCR and states parties. This to the exclusion of the contemplation of the legitimacy of interstate relationships within the CCR, or the consideration of the legitimacy of states parties commitments within the CCR in light of their relationships with non-state actors such as individuals within their territories or non-governmental organisations. The focus on states parties' perception of the legitimacy of the CCR is explained in further detail in chapter 2.

This leads to the brief explanation of the meaning of the term *legitimacy* in the context of this thesis. Chapter 2 is dedicated entirely to the explanation of the meaning of legitimacy. The description here is therefore limited to a summary of the meaning of legitimacy. For the purpose of this thesis, legitimacy is taken to refer to a set of discursive reasons which are used to persuade a group of autonomous, free, and equal actors to adjust their conduct in accordance with the instructions of an authority claimant. These discursive reasons find traction within the group of authority addressees because they reflect the dominant framework of social norms to which said authority addressees adhere.³³ As chapters 2 and 3 will explain, the legitimacy claimant in this thesis is the AIA of the CCR and legitimacy subjects are states parties.

In addition to the above definition it is necessary to highlight three key points that influence the thesis' understanding of legitimacy. The first is the fact that legitimacy is understood to

³² For example, the Kyoto Protocol Compliance Committee. See Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol, *Report of the Conference of the Parties to the Kyoto Protocol on its first session, held at Montreal from 28 November to 10 December 2005*, UN Doc FCCC/KP/CMP/2005/8/Add.3.

<<https://unfccc.int/sites/default/files/resource/docs/2005/cmp1/eng/08a03.pdf>> accessed 17 July 2020.

³³ This definition is constructed on the basis of numerous accounts of legitimacy which are fully discussed and referenced in chapter 2.

be of issue in any situation which entails an authority relationship between an authority claimant and a group of authority addressees. In legitimacy terms these would be described as legitimacy claimant and legitimacy subjects. This thesis uses both interchangeably. It is possible for an authority relationship to exist between an authority claimant and a single authority addressee. However, for the purpose of assessing the standard of legitimacy in the CCR, authority addressees are states parties and therefore represent a group. Overall the thesis therefore uses the expression authority addressees or subjects of authority in the plural.

The second key point is that this thesis understands legitimacy to exist as a matter of degree. This as opposed to the use of legitimacy as a binary assessment. What this means is that to assess the standard of legitimacy in the CCR is not to conclude that it is either legitimate or illegitimate. Rather, legitimacy perceptions exist on a spectrum and a number of aspects can influence whether the overall legitimacy perception tips the scales in favour of a negative or a positive outcome.

The third key point in relation to the legitimacy assessment of the CCR is that this thesis focusses on evaluating whether the bare necessities of legitimacy can be identified in the CCR. The fact that legitimacy is interpreted as a matter of degree means that legitimacy may never be fully achieved but only approximated. This is because there are always ways in which the legitimacy of an authority relationship might be improved. The purpose of this thesis is therefore not to test whether the CCR displays a perfect degree of legitimacy. Instead, it outlines a first step towards more legitimate global climate governance in the future by assessing whether the CCR meets these minimal expectations of legitimacy as a starting point. If the outcome of this basic legitimacy assessment identifies that the CCR in its current format reveals no legitimacy deficits then this means that the CCR is ready to further enhance its legitimacy. Insofar as the outcome of the legitimacy assessment in this thesis on the basis of minimal legitimacy requirements identifies legitimacy deficits as well as strengths, this means that such deficits would first need to be addressed before further legitimacy enhancements can be undertaken.

Following on from the explanations of legitimacy above, the next term that requires brief clarification is the *compensatory constitutionalism lens*. Chapters 2 and 3 go into detail as to the academic context that provides the backdrop for the construction of the CCL. In order to navigate the content of the thesis prior to reading those chapters this section provides a brief explanation of the term whilst leaving detailed discussions for later. At this point there are two important aspects of the CCL that require a preliminary explanation.

The first is the use of constitutionalism in the format of a lens. The purpose of doing this is to emphasise that constitutionalism is used as a perspective rather than discussed as an end in itself. This distinguishes the use of constitutionalism in this thesis from uses of constitutionalism beyond the state which discuss whether specific treaty regimes, such as the EU or the WTO, for example, are experiencing a process of constitutionalisation or discussion of the extent to which such regimes can be classified as constitutional orders. It also distinguishes the use of the CCL from approaches within constitutionalism beyond the state which use constitutionalism as a means of identifying a global constitution which exists either in addition to or to replace the constitutions of states. The purpose of this

thesis is not to discuss whether or not the CCR is or ought to be constitutional or constitutionalised as a goal to be achieved for its own merit. Instead, chapter three identifies that constitutionalism represents a set of shared values amongst states parties which can be used to describe the dominant framework of social norms in which legitimacy's persuasive power can be anchored. The use of constitutionalism as a lens furthermore emphasises that the focus of the thesis' evaluation lies on the standard of legitimacy rather than on the degree of constitutionalisation of the CCR. The features of constitutionalism of which the CCL is constructed are all selected on the basis of the fact that they can provide specific insights regarding legitimacy expectations which states parties have in regard to the exercise of authority through the CCR. How the features of constitutionalism can be used in this way is discussed in chapter 4.

The second preliminary explanation relates to the use of the word 'compensatory' in relation to the constitutionalism perspective on the CCR. In adding this word to the description of the constitutionalism lens the thesis highlights that the discussion of features of constitutionalism in relation to the CCR does not aim to replace those features in the domestic legal order. Instead, the use of the word compensatory indicates that the purpose of the use of constitutional features in the assessment of the standard of legitimacy in the CCR is based on Peters' account of constitutionalism beyond the state. According to Peters, the use of constitutionalism beyond the state should provide a means of safeguarding key constitutional features which support the architecture of the state and on the premise of which its sovereignty is constructed. Where the global nature of certain issues, such as climate change, place a strain on individual states' constitutional commitments, the notion of compensatory constitutionalism demonstrates that constitutionalism beyond the state can be used to ensure that these features are also safeguarded at the international level. That way, if law-making on a global topic takes place, as might be necessary, at the global rather than the domestic level, the degree of constitutionalism which the state normally provides is not lessened or weakened.

Having highlighted the meaning of legitimacy as a persuasive quality in the authority relationship over otherwise autonomous, equal, and free actors it remains necessary to explain the use of the term *authority relationship* when discussing the position of states parties and the CCR. As chapter 2 will explain, the authority relationship which is examined in this thesis exists in the interaction between the AIA of the CCR and states parties thereto. In essence what this thesis looks at is the ability of the AIA to influence the conduct of states parties. The ways in which the AIA may influence the conduct of states parties more specifically is discussed in chapter 5. The types of activities which the AIA is able to carry out and which amount to exerting an influence over states parties' conduct may not be classified by all as amounting to the exercise of 'authority' specifically. This will depend on what definition is attached to authority. However, in order to prevent conducting the type of linguistic gymnastics that would be necessary if the description 'activities the AIA is enabled to carry out which amount to exercising influence over states parties conduct' were used, this thesis will instead use the term 'authority relationship' and acknowledge that the extent to which the AIA's powers amount to authority may be disputed.

Lastly, it remains necessary to provide a brief explanation of the meaning attached to sovereignty in this thesis. It is well known that the term sovereignty can cover a range of

different meanings. Diverging from Krasner's classic classification of sovereignty,³⁴ this thesis uses sovereignty to highlight the autonomous nature of the state.³⁵ Focusing on the autonomous nature of the state brings to the foreground certain aspects of sovereignty, such as non-interference and states being formally equal. It furthermore highlights that states, as well as individuals, can be characterised as autonomous, free, and equal actors. This is important because it explains the need for the AIA's ability to exercise authority over states parties to be legitimated.

3 Situating climate change, legitimacy, and constitutionalism at an intellectual crossroads

In order to carry out the assessment of the standard of legitimacy of the CCR this thesis brings together the CCR, legitimacy, and constitutionalism and places them at an intellectual crossroads. This section explains how these three themes are related and mutually supportive.

The first point of navigation when identifying the crossroads between the thesis' three themes is climate change. This is because the establishment of the CCR and the need for it to be legitimate only arise in response to the identification of climate change as a problem to be addressed by international law.³⁶ If left unchecked, climate change presents an existential threat to human life and wellbeing.³⁷ If states are unable to protect against these existential threats their existence may become obsolete.³⁸ Furthermore, the negative impacts of climate change pose a threat to the rule of law and democracy within states.³⁹ Since these features underpin the legitimacy of the state as a sovereign entity climate change therefore threatens the structure and the existence of the sovereign state directly.

In addition to the difficulty of responding to that scale of threat, the cumulative and indivisible nature of climate change's causes and consequences mean that it is inherently impossible for states to adequately respond in the absence of global, or near-global, cooperation. To this end, states established the CCR as a platform for the facilitation of the global coordination of climate change policies. Yet the establishment of the AIA as a means of enabling states parties' conduct to be guided towards the achievement of the overall objective of the CCR means that an authority relationship has come into existence which

³⁴ Stephen Krasner, *Sovereignty Organized Hypocrisy* (1999 Princeton University Press).

³⁵ See also Martin Loughlin, 'Sovereignty' in Martin Loughlin, *The Idea of Public Law* (2004 OUP 72 and Martin Loughlin 'Why Sovereignty?' in Richard Rawlings, Peter Leyland and Alison Young, *Sovereignty and the law: domestic, European and international perspectives* (2013 OUP) 34.

³⁶ On the transition from climate change as a scientific issue, towards climate change as a policy issue to be addressed by means of international law, see Bodansky (n 2).

³⁷ António Guterres, 'Secretary-General's remarks on Climate Change [as delivered] 10 September 2018 available at <<https://www.un.org/sg/en/content/sg/statement/2018-09-10/secretary-generals-remarks-climate-change-delivered>> accessed 15 July 2020.

³⁸ On the role of the state to protect and promote the wellbeing of its citizens see Thomas Hobbes, *The Clarendon Edition of the Works of Thomas Hobbes, Vol. 2: De Cive: The English Version* (Howard Warrender ed. OUP 1983) 157.

³⁹ Phillip Alston, *Climate change and poverty report of the special rapporteur on extreme poverty and human rights* A/HRC/41/39 available at <<https://digitallibrary.un.org/record/3810720?ln=en#record-files-collapse-header>> accessed 15 July 2020.

requires legitimation. This is the first step in identifying the intellectual crossroads between climate change, legitimacy, and constitutionalism.

By choosing to address climate change through international legal means and establishing the CCR states parties brought a new actor onto the scene, the AIA. In granting the AIA powers to influence states parties conduct a new authority relationship came into being. Considering the importance and increasing urgency of addressing climate change, it is of the utmost importance that the CCR demonstrates a high standard of legitimacy. A key aspect of this is that states parties must perceive the actions of the AIA to be legitimate. Only if this is the case can the AIA's activities provide the necessary persuasive power to make states parties set aside their individual interests in favour of the shared, long term interests all states share in achieving the objective of the CCR set out above. This highlights the intersection between climate change and legitimacy.

The next coordinate on the crossroads relates to the theme of constitutionalism. Constitutionalism intersects both with climate change and with legitimacy. As chapter 3 explains, there exists an intersection between climate change and constitutionalism because the latter is specifically suited to address the collective action aspect of the climate change challenge. Constitutionalism provides a familiar construct through which autonomous, equal, and free actors can coordinate their varying interests in order to achieve a common objective they are unable to achieve individually.

The groundwork for explaining the intersection between constitutionalism and legitimacy is done in chapters 2 and 3 which provide explanations of the meaning of legitimacy and constitutionalism. At the heart of the intersection between legitimacy and constitutionalism lies the overlap between the two concepts concerning the justification of authority. In the context of legitimacy this comes to the foreground when it is explained that legitimacy gains traction where it reflects the dominant framework of social norms in a society which can be exploited to provide a set of discursive reasons which can persuade autonomous, equal, and free actors to adjust their conduct in the absence of coercion or self-interest. Chapter 3 then highlights that constitutionalism represents a set of shared values amongst states parties. As a result, constitutionalism provides a link to the legitimacy of the CCR because it can be used as a means of identifying a framework of social norms in the community of states parties to the CCR. Chapter 4 ties these threads together by mapping out specifically how constitutionalism can be used to as a means of drawing out legitimacy expectations which states parties have of the CCR.

The identification of the crossroads discussed in this section is important, because it highlights the roadmap of this thesis' argument. It is in the identification of this crossroads that the journey of assessing the standard of legitimacy in the CCR through the viewpoint of a constitutionalism lens begins.

4 A roadmap of the thesis

Sections 1-3 of this chapter have laid out the key concepts which support the objective of the thesis. This section closes the chapter by providing an overview of the structure and content of the thesis' argument. Providing further information on the content of the

individual chapters serves to anchor the contribution of each of the individual chapters towards the overall objective of the thesis.

The assessment of the standard of legitimacy of the CCR through a CCL must begin with an explanation of the meaning of legitimacy (chapter 2) and an explanation of the use of constitutionalism in relation to the CCR (chapter 3). This is because both legitimacy and constitutionalism present a certain degree of ambiguity which mean that to use them productively requires a delineation of the way in which each is defined. The next preparatory step that needs to precede the assessment of the standard of legitimacy in the CCR is the construction of the CCL (chapter 4). It is the use of the CCL as a means of identifying and articulating legitimacy strengths and deficits in the CCR that provides this thesis' original contribution. This means that each step in the construction of the CCL needs to be explained, justified, and contextualised against the relevant existing academic literature on the topics of legitimacy, constitutionalism, and the CCR. Being the centre chapter in the architecture of the thesis, chapter 4 also represents the turning point in the construction of the thesis' argument. Chapters 2 and 3 are more explanatory in nature and lay the groundwork for the thesis' analysis by defining the meaning and use of legitimacy and constitutionalism. Chapter 4 provides an original contribution in its construction of the CCL. The execution of the assessment of the standard of legitimacy of the CCR is then carried out in chapters 5 and 6. Chapter 5 applies the formal features of the CCL to the CCR. Chapter 6 then applies the material features of the CCL to the CCR. Ultimately, chapter 7 draws together the key points and contributions of each chapter to discuss the findings of the thesis' assessment of the standard of legitimacy in the CCR through a CCL.

CHAPTER 2 THE MEANING OF LEGITIMACY AS A CONCEPT AND IN RELATION TO THE CLIMATE CHANGE REGIME

1 Identifying the multiple axes of legitimacy

The meaning of legitimacy is notoriously elusive.¹ Behind this perceived elusiveness hides a useful explanatory power. To pierce through legitimacy's multiple layers of meaning is to reveal the richness of understanding it has the capacity to offer in relation to the multitude of authority relationships that co-exist in ever increasing complexity ranging from the local to the global sphere. It is exactly this capacity that makes legitimacy well suited as a means of analysing the climate change regime (CCR), which deals with the complex global, interconnected, and far-reaching impacts of climate change. In order to best capture the versatility of legitimacy its meaning is first explained in the abstract. Setting out a comprehensive account of the meaning of legitimacy serves to dispel concerns that the perceived elusiveness renders legitimacy talk of little value.² From there on, the context and characteristics of the CCR are used to fill in the abstract meaning and explain how it is used in this thesis.

In order to demonstrate that the variability of legitimacy is an asset rather than an issue, it is helpful to introduce from the outset three sets of distinctions which function as aids in unpacking the meaning of legitimacy. The first set of distinctions separates accounts of legitimacy on the basis of whether they discuss the word, the concept, or the conceptualisation.³ The second set of distinctions differentiates between the object of, the subjects of, and the grounds for legitimacy.⁴ This three way distinction is used to identify the perspective from which a legitimacy claim is being discussed and the type of reasons that might support different authority relationships. The third set of distinctions identifies a prescriptive and a descriptive aspect of legitimacy.⁵

¹ Many authors have commented on the elusiveness of the meaning of legitimacy. For a few examples, see: Hilary Charlesworth and Jean-Marc Coicaud, *Fault Lines of International Legitimacy* (OUP 2009); Martti Koskenniemi, 'Legitimacy, Rights, and Ideology: Notes Toward a Critique of New Moral Internationalism' (2003) 7(2) *Associations* 349; Joseph H H Weiler, 'In the Face of Crisis: Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration' (2012) 34(7) *Journal of European Integration* 825; Christopher Thomas, 'The Uses and Abuses of Legitimacy in International Law' (2014) 34(4) *Oxford Journal of Legal Studies* 729; Daniel Bodansky, 'Legitimacy in International Law and International Relations' in Jeffrey Dunoff and Mark Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2013) 321.

² Koskenniemi 2003 (n 1).

³ This distinction is first introduced by Applbaum in: Arthur Applbaum, 'Legitimacy in a bastard kingdom' [2004] John F. Kennedy School of Government Center for Public Leadership Working Papers 73, 80 available at <http://dspace.mit.edu/bitstream/handle/1721.1/55927/CPL_WP_04_05_Applbaum.pdf?sequence=1&isAllowed=y> accessed 30 April 2020. The same distinction is picked up and elaborated by Thomas in Thomas 2014 (n 1).

⁴ Thomas 2014 (n 1).

⁵ For an example of this distinction see Fabienne Peter, 'Political Legitimacy' in Edward Zalta (ed) *The Stanford Encyclopaedia of Philosophy* (Summer 2017 Edition) available at <<https://plato.stanford.edu/archives/sum2017/entries/legitimacy/>> accessed 14 July 2020.

The initial set of distinctions entails that, while some definitions of legitimacy refer to the *word* itself, others are actually defining the *concept* or the *conceptions* of legitimacy.⁶ Depending on what type of definition is being proposed or discussed, the meaning would naturally vary. The meaning of legitimacy employed by this thesis is constructed on the basis of these distinctions as well. First, section 2 explains the meaning this thesis ascribes to the word legitimacy based on a discussion of existing definitions found in dictionaries, encyclopaedias, and academic publications. Defining the word legitimacy provides direction for the discussion of the meaning of legitimacy as a concept. Three versions of the concept of legitimacy exist and are explained in section 3, which also explains the account of the concept of legitimacy that is best suited for the context of the CCR. This sets the scene for the discussion of the third facet of the distinction, the conceptions or conceptualisations of legitimacy, in section 4.

With relation to the third facet this thesis chooses to refer to components instead of conceptions or conceptualisations. The reason behind the change in terminology serves to highlight two points. These are that legitimacy, broadly understood, can refer to a spectrum of legitimacy components, and that the legitimacy of any given authority relationship should be seen as a matter of degree rather than a binary question of legitimacy versus illegitimacy. Which legitimacy components are prioritised under certain circumstances is dependent on the type of authority relationship being assessed. The meaning of legitimacy in the abstract should not identify a single component of legitimacy as providing the sole legitimising ground for all authority relationships. Rather, legitimacy in the abstract should include a wide range of legitimacy components for subjects and objects of legitimacy to call upon to challenge or support legitimacy claims as relevant to the context. This allows for legitimacy assessments to be sensitive to the specific circumstances and characteristics of the authority relationship in question.

The need for legitimacy in the abstract to be defined broadly enough that it can be adapted to the characteristics of the authority relationship in question provides a segue to the second set of distinctions, namely that between the object of legitimacy, subjects of legitimacy, and grounds for legitimacy. This set of distinctions contributes to the meaning of legitimacy by identifying the perspective from which a legitimacy claim is being viewed as well as the context within which it is assessed. The object of legitimacy refers to the actor who exercises authority over otherwise free, equal, and autonomous actors. The latter are the subjects of legitimacy. It is from their perspective that the object's legitimacy claim must be validated. The grounds of legitimacy refer to the set of discursive reasons which justify the exercise of authority over the subjects of legitimacy as otherwise free, equal, and autonomous actors.

In the abstract, there are many potential candidates for the role of object and subjects of legitimacy. For example, the object of legitimacy can be a rule, a ruler, a regime, an institution, the outcome of a decision-making procedure, the decision-making procedure itself, etc.⁷ For the purpose of this thesis, the object of legitimacy refers to the autonomous

⁶ Thomas 2014 (n 1).

⁷ Thomas 2014 (n 1).

institutional arrangement (AIA) of the CCR.⁸ This refers to the four key bodies established by the United Nations Framework Convention (UNFCCC)⁹ which collectively are responsible for the continued development and operation of the CCR.¹⁰

The term subjects of legitimacy, too, can cover a range of actors such as individuals, states, or others.¹¹ For the purpose of this thesis, the subjects of legitimacy are states parties to the CCR. There are four reasons why the standard of legitimacy of the CCR is being assessed specifically from the perspective of states parties. These reasons are set out in section 6.1 below.

The third facet of this distinction refers to the grounds for legitimacy. These reflect that legitimacy functions as a set of discursive reasons which persuade subjects that they ought to comply with the instructions of the object of legitimacy.¹² The grounds for legitimacy furthermore reveal the connection between legitimacy perceptions and the dominant framework of social norms that operates in a community of legitimacy subjects.¹³ Therefore, their content may vary depending on the type of authority relationship being assessed. The grounds of legitimacy can also be linked to the topic of legitimacy components.

The third set of distinctions separates prescriptive from descriptive uses of legitimacy. To clarify, the prescriptive dimension of legitimacy explains how an authority relationship ought to be. The descriptive dimension of legitimacy refers to its ability to provide for an assessment of the de facto legitimacy of an existing authority relationship.¹⁴ As Bodansky points out, the meaning of legitimacy necessarily includes both aspects.¹⁵ This is because the ability to evaluate and provide a descriptive account of whether an authority claim is legitimate, presupposes the existence of a prescriptive understanding of legitimacy. To describe whether an authority claim can be described as meeting standards of legitimacy, a descriptive account of what an authority claim ought to look like in order to be considered to achieve legitimacy is necessary.¹⁶ It is nonetheless a useful distinction because it identifies different ways in which legitimacy can be used. Knowing this can help clarify misconceptions about the elusiveness of legitimacy.

The distinction between prescriptive and descriptive uses of legitimacy is further of special interest because the same distinction exists within constitutionalism, the second key theme

⁸ The term autonomous institutional arrangements is borrowed from Robin Churchill and Geir Ulfstein, 'Autonomous institutional arrangements in multilateral environmental agreements: a little-noticed phenomenon in international law' (2000) 94(4) *American Journal of International Law* 623.

⁹ United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC). What these bodies are and why they are considered to be autonomous institutional arrangements is briefly addressed in chapter 1 and further explained in chapter 3.

¹⁰ See, for example, article 7 UNFCCC which provides the mandate for the COP, which is the supreme body of the AIA.

¹¹ Thomas 2014 (n 1).

¹² Cormac Mac Amhlaigh, 'Harmonising Global Constitutionalism' (2016) 5(2) *Journal of Global Constitutionalism* 173.

¹³ This is further discussed in section 6.3 below.

¹⁴ See Peter 2017 (n 5).

¹⁵ Daniel Bodansky, 'Legitimacy' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds) *The Oxford Handbook of International Environmental Law* (OUP 2008) 705.

¹⁶ *Idem*.

of this thesis. This suggests that the prescriptive/descriptive qualities of legitimacy and constitutionalism are one of the coordinates where the two concepts meet at an intellectual crossroads.

2 Defining the word legitimacy

Steiner writes that there exists no single, authoritative, definition of legitimacy in the social sciences.¹⁷ This lack of default definition contributes to the perceived elusiveness of the meaning of legitimacy.¹⁸ This section takes the first step towards dispelling that elusiveness by looking for the meaning of the word legitimacy as it is generally understood. The general meaning of the word legitimacy is then expanded on by looking at specific legal and international law uses of the word legitimacy. This section finishes by providing a definition of the word legitimacy that will function as the foundation for the discussion of the concept and the components of legitimacy and how these can be related to the context and characteristics of the CCR.

The reason to begin by searching for the definition of the word legitimacy, rather than diving straight into the meaning or components of the concept legitimacy is as follows. The meaning of the word legitimacy provides the foundations upon which the concept and conceptualisations can be built. The first place to look for the general meaning of a word in the English language is the Oxford English Dictionary (OED). While this chapter explains the meaning of legitimacy in the context of international law, and therefore might have good reasons to develop a definition that is specific to the discipline, the ordinary meaning is nonetheless the most appropriate starting point. This is especially the case considering that legitimacy gets discussed in a wide variety of contexts and disciplines. There is no reason to assume that a philosopher, a politician or a specialist in international relations would use the word legitimacy to mean the exact same thing. Since it is impossible to isolate the meaning of legitimacy in the context of international law from other, existing uses thereof, it is helpful to develop the meaning of legitimacy for this thesis from a starting point of common ground.

The ordinary meaning of legitimacy provides a generic, common ground between the different uses of legitimacy. The OED defines legitimacy as: “Conformity to the law, to rules, or to some recognised principle; lawfulness. Also: conformity to sound reasoning; logicity; justifiability.”¹⁹ Two interesting observations can be made in response to this definition. The first observation is the ordinary meaning of the word legitimacy links it to the law. It can therefore be observed that, even in its ordinary meaning, there exists an inherent, linguistic, connection between the legitimacy and law.²⁰ This connection has an etymological explanation. The word legitimacy entered the English language through the Latin word ‘*legitimus*,’ which translates into ‘lawful’.

¹⁷ Kristian Steiner, *Strategies for International Legitimacy. A Comparative Study of Elite Behaviour in Ethnic Conflicts* (Lund. Lund University Press 1996) 24.

¹⁸ See footnote 1 of this chapter.

¹⁹ “Legitimacy n.” in, *Oxford English Dictionary Online* (OUP 2020) available at <<http://www.oed.com.ezproxy.is.ed.ac.uk/view/Entry/107111?redirectedFrom=legitimacy#eid>> accessed 17 July 2020.

²⁰ A similar observation is made in Mac Amhlaigh 2016 (n 12).

The second observation relates to the reference this definition makes to justifiability. If legitimacy were merely a matter of lawfulness, then a legitimacy claim could be assessed on the basis of a binary evaluation. Something is either lawful or it is not lawful. Yet the reference to 'justifiability' suggests that an assessment of a legitimacy claim can be a matter of degree. After all, justifiability implies scope for interpretation, contestation, and discussion. Therefore, it seems that even in its 'ordinary' meaning as provided by the OED, the *word* legitimacy reflects the distinction between legitimacy's descriptive and prescriptive dimensions. On the one hand there is an element of binary evaluation that describes whether something lawful or unlawful. On the other hand, there is scope for discussion and interpretation as to the justifiability of a situation. This evaluation of what might be considered justifiable demonstrates the prescriptive aspect of legitimacy.

While the ordinary meaning of legitimacy according to the OED demonstrates that there is, and always has been, a connection between legitimacy and the law, it does not necessarily give a definition of the word legitimacy that can be used by lawyers. The definition of 'legitimacy' according to the Oxford Dictionary of Law and the Blackstone Law Dictionary refers instead specifically to the legal status of a child born to parents who were married at the time of the birth.²¹ This demonstrates that the word 'legitimacy' is accorded a very specific, legal, meaning in the context of the British legal system. This meaning is distinct from the ordinary meaning.

In the same way that the word legitimacy has a specific meaning in the context of British law, it is also used distinctively by those writing about international law. However, compared to British law, no single authoritative source provides a universal definition of the word legitimacy.²² It is therefore not surprising that accounts of the meaning of the word legitimacy vary. They can be phrased as issues of compliance,²³ of obedience,²⁴ of the right to govern,²⁵ and of acceptability or justification of authority.²⁶ Another commonality in the definition of legitimacy is the way in which it gets contrasted against coercion and self-interest as a means of influencing conduct.²⁷ In essence then the word legitimacy is used by

²¹ Law J and Martin E, 'Legitimacy' in *A Dictionary of Law* (OUP 2020) and Black's Law Dictionary, 'What is legitimacy' in *Black's Law Dictionary Free Online Legal Dictionary 2nd Ed* available at <<https://thelawdictionary.org/legitimacy/>> accessed 14 July 2020.

²² The Encyclopaedic Dictionary of International Law does not include the word 'legitimacy'. See Grant, J and Barker J. (eds), *Encyclopaedic Dictionary of International Law* (OUP 2009) Available at <<http://www.oxfordreference.com/view/10.1093/acref/9780195389777.001.0001/acref-9780195389777>> accessed 17 July 2020.

²³ Thomas Franck, *The Power of Legitimacy Among Nations* (OUP 1990) 24.

²⁴ Mac Amhlaigh 2016 (n 12) Franck 1990 (n 23) 16.

²⁵ Allan Buchanan, 'The Legitimacy of International Law' in Samantha Besson and John Tasioulas *Philosophy of International Law* (OUP 2010) 79; Bodansky 2008 (n 15); Franck 1990 (n 23); John Tasioulas, 'The Legitimacy of International Law' in Samantha Besson and John Tasioulas *Philosophy of International Law* (OUP 2010) 97; Mac Amhlaigh 2016 (n 12).

²⁶ Koskeniemi 2003 (n 1) 353; Euan Macdonald, 'Counterproductive constitutionalization' (2018) 16(4) *International Journal of Constitutional Law* 1232.

²⁷ Mac Amhlaigh 2016 (n 12) 182; Ian Hurd, 'Legitimacy and Authority in International Politics' (1999) 53(2) *International Organization* 379; Christian Reus-Smit, 'International Crises of Legitimacy' (2007) 44, 157; Bodansky phrases the distinction as one between legitimacy, power, and persuasion. See Bodansky 2008 (n 15).

international lawyers to describe a situation which has two specific characteristics. Firstly, that there exists a situation in which one actor claims authority over other actors. Secondly, that this assertion is based on a form of normative persuasion which is distinct from coercion or self-interest. The definition of the word legitimacy, as used by international lawyers, can be summarised as: the set of discursive reasons²⁸ which give impetus to an authority claim²⁹ and which are grounded in the dominant framework of social norms³⁰ of those addressed by it.

The importance of legitimacy referring to a set of *discursive* reasons is to capture the reality that legitimacy is not static. Rather, as it is related to the dominant framework of social norms it must be discursive for two reasons. The first is that the dominant framework of social norms can change over time. For example, where divinity once provided for the framework of social norms through which authority could justify itself, this was no longer the case after the ideological shift occasioned by the Enlightenment.³¹ The framework of social norms which legitimacy claims were based on shifted and therefore claims to authority had to either adapt or falter.³²

The second reason why legitimacy must refer to discursive reasons is because the authority claim is most likely made towards a group of addressees which is not entirely homogenous (as such communities are relatively rare). The use of the descriptor 'dominant' in relation to the framework of social norms indicates that not every individual addressee of the authority claim may ascribe to the framework of social norms on the basis of which the claim operates. Whilst an authority claim can be successful if it pleases the majority of those it addresses, its stability and continuity is served if there is a built-in opportunity for the framework of social norms to be challenged. Those who may not agree with the framework of social norms which is in operation may challenge it and try to persuade other addressees of authority to consider alternative frameworks of social norms.³³

3 Describing the concept of legitimacy

The definition of the word legitimacy provides the outer parameters for explaining the meaning of legitimacy more broadly conceived. It outlines a space within which legitimacy as a concept can be developed. As legitimacy has been conceptualised from a variety of different angles and from within different disciplines, it is possible to acknowledge that more than one meaning can be ascribed to the concept of legitimacy. A common approach is to distinguish between two accounts of the concept of legitimacy.³⁴ The descriptors used

²⁸ Mac Amhlaigh 2016 (n 12).

²⁹ This phrasing captures the essence of the variety of terminology used in other definitions, such as obedience, compliance, governance, and authority.

³⁰ Reus-smit 2007 (n 27).

³¹ This example has been used before, for example, in Bodansky 2008 (n 15) and Weiler 2012 (n 1) 826-827.

³² Reus-Smit in his description of legitimacy crises explains that where shifts in the dominant framework of norms occur authority claimants must either invest in coercion as an alternative, adapt to the shift in the dominant framework of social norms, or collapse. See Reus-Smit 2017 (n 27).

³³ Mac Amhlaigh 2016 (n 12).

³⁴ Thomas offers a succinct overview of the various descriptors used in recent academic work on legitimacy. The overview references distinctions used both in the field of political sciences and law. See Thomas 2014 (n 1) 734.

to distinguish between these two accounts varies amongst authors. The essence of the distinction, however remains the same.³⁵ The descriptors this thesis uses to make the same binary distinction are subjective and objective legitimacy. This section provides an overview of the accounts of legitimacy and explains why the objective account of legitimacy is used in the assessment of the standard of legitimacy in the CCR.

3.1 Subjective legitimacy

Subjective legitimacy coincides with what others have described as empirical, sociological, social, de facto, popular, or descriptive legitimacy.³⁶ It refers to whether the addressee of an authority claim perceives that claim to be legitimate. It refers to the internal state of mind of the addressee of an authority claim. This approach to legitimacy is therefore not linked from the outset to any type of ideology or objectively identifiable standards of measurement. To discover whether or not an authority claim is perceived to be legitimate a survey would need to be carried out of all the addressees of the authority claim. Such a survey would only need to consist of a single question, namely: 'do you perceive the authority claim to be legitimate or not?' It is subjective because it refers only to the perception of legitimacy held by the addressee of an authority claim.

The descriptor 'subjective legitimacy' is preferable to that of 'descriptive legitimacy' in the context of this thesis because it prevents conflation or confusion with the distinction explained in section 1 between prescriptive and descriptive uses of legitimacy. That distinction refers to uses of legitimacy. It demonstrates that legitimacy in two ways. Firstly, it can be used to describe whether an authority claim is legitimate. Secondly, it can be used to explain the set of normative aspirations against which an authority claim must measure up in order to be perceived as legitimate.

Subjective legitimacy is further preferable over the descriptors social, sociological, popular, or empirical legitimacy, because it signals clearly that it is grounded in the *perception* of legitimacy as held by addressees of an authority relationship. Any measurement of assessment of subjective legitimacy therefore requires an enquiry as to the internal state of mind of each individual addressee of the authority claim. Whilst third party actors who are not involved in the authority relationship in question can carry out said survey to discover what the legitimacy perception is, subjective legitimacy can only be formed by those who are addressees of the authority claim.

The descriptor 'de facto' would be able to capture the 'it is what addressees of an authority claim think it is' essence of this account of legitimacy. However, the term 'de facto' is frequently used to contrast with the term 'de jure'. This habitual use of the terms 'de facto' and 'de jure' should not be confused with the two accounts of the concept of legitimacy presented here.³⁷ The second reason not to use the descriptor 'de facto' is in order to signal

³⁵ Or as stated neatly by Thomas: "These categories are often allocated different labels, but the functional distinction is similar in each case" See Thomas 2014 (n 1) 734.

³⁶ As gathered and summarised by Thomas in: Thomas 2014 (n 1)

³⁷ An additional account of the concept of legitimacy is described by Thomas as legal, formal, or de jure legitimacy, which is closely related to legal validity. See Thomas 2014 (n 1) 734; Joseph H H Weiler, 'The transformation of Europe' in Joseph H H Weiler, *The constitution of Europe Do the New Clothes have an*

clearly that the second account of legitimacy departs from early accounts of legitimacy which use legitimacy and legal validity interchangeably. Using the descriptor 'de facto legitimacy' would imply using the counterpart of de jure legitimacy to describe the second account. In order to signify the departure from accounts of legitimacy which conflate it with legal validity the use of 'de jure legitimacy' is preferably avoided here.³⁸

Accounts of subjective legitimacy are generally traced back to the sociologist Weber's work on legitimacy.³⁹ He initiated the subjective account when he defined legitimacy as a "belief by virtue of which persons exercising authority are lent prestige."⁴⁰ He further explains the crucial role of the belief in legitimacy as being "at the basis of every system of authority, and correspondingly of every kind of willingness to obey."⁴¹

Weber's account with his emphasis on the 'belief' therefore emphasises the importance which the subjective account attaches to the internal state of mind of addressees of authority. Weiler's description of this account of legitimacy, labelled by him as 'social legitimacy', stresses that it "is empirical, assessed or measured with the tools of social science. It is a subjective measure, reflecting social attitudes."⁴²

The focus in subjective legitimacy on the internal state of mind to be measured with tools of social sciences makes it less suited for this thesis' assessment of the standard of legitimacy in the CCR, which approaches that assessment as a normative question. The reason for focusing on legitimacy as a normative rather than an empirical question follows from the nature of the CCR's architecture as a collection of treaties between states. States themselves are constructs designed to enable governance of national communities within delineated territories. As such states do not have the sentient capacity to form a subjective belief in the legitimacy of the CCR. For this reason, it is more practical to approach the legitimacy of the CCR as a normative rather than an empirical question. Phrasing the assessment of the standard of legitimacy in the CCR as a normative question makes it possible evaluate to what extent its architecture can co-exist with and complement the normative project of the state.⁴³

3.2 Objective legitimacy

The second approach to developing the concept of legitimacy is the counterpart to subjective legitimacy. Where the first account refers to subjective perception held by

Emperor? And Other Essays on European Integration (CUP 1999) 80; Joseph Raz, 'Legitimate Authority' in Joseph Raz, *The authority of law: Essays on law and morality* (OUP 2009) 5-6; Mac Amhlaigh also mentions this in footnote 59 on pages 182-183 of Mac Amhlaigh 2016 (n 12).

³⁸ See Koskeniemi 2003 (n 1) 358.

³⁹ For example, see Mac Amhlaigh 2016 (n 12) and Peter 2017 (n 5).

⁴⁰ Max Weber, *The theory of social and economic organization* (Talcott Parsons 1964) 382. Cited also in: Peter 2017 (n 5).

⁴¹ *Idem*.

⁴² Joseph H H Weiler, 2012 (n 1) 826.

⁴³ That states themselves are normative projects follows from the fact that they did not simply spring into existence but, in their current state, came to be as intentional political projects resulting from enlightenment thinking. See, for example, Chris Thornhill, 'The enlightenment and global constitutionalism' in Anthony Lang and Antje Wiener (eds), *Handbook on Global Constitutionalism* (Edward Elgar 2017) 60, 73.

individual addressees of an authority claim, objective legitimacy refers to a set of normative standards of measurement against which an authority relationship can be measured. This means that objective legitimacy is not truly objective. Rather, the normative standards of measurement can be traced back to ideological stances on the question of how authority relationships ought to take shape. Yet this second account of the concept of legitimacy can be described as objective because it provides a set of standards against which a claim to legitimate authority can be measured without needing to ask each individual addressee whether they experience the claim to be legitimate. Instead of enquiring into the internal, subjective, sentiments of individual addressees, objective legitimacy identifies the dominant framework of social norms in a society and measures authority claims against this framework. This means that even objective legitimacy is inherently connected to beliefs regarding the justifiability of authority. However, in objective legitimacy such beliefs have been standardised into a set of common markers of legitimacy. This makes it possible to assess the legitimacy of an authority claim on the basis of predictable indicators of legitimacy. Whilst these remain grounded in subjective perceptions of how authority ought to be exercised they have been removed from the sphere of mere opinion whether something is experienced as legitimate or not. In this objective legitimacy is more normatively coloured than subjective legitimacy. Objective legitimacy assesses authority claims on the basis of pre-established normative accounts of how authority relationships ought to take shape.

The second account of the concept of legitimacy is therefore objective in the sense that it does not reflect any individual's opinion about the legitimacy of authority but instead reflects the value standards set out by ideological reflections on authority relationships. The descriptor 'objective legitimacy' is chosen here for two reasons. One, it is a natural counterpart to the descriptor 'subjective' used to indicate the initial account of the concept of legitimacy set out above. Secondly, the word 'normative' is used frequently in the discussion of the conceptions of legitimacy and in the discussion of the role of constitutionalism. Therefore, using a different descriptor here maintains a clearer distinction between the two accounts of the concept of legitimacy and other normative aspects of legitimacy and constitutionalism. To summarise, objective legitimacy can be defined in contrast to its counterpart of subjective legitimacy. Where subjective legitimacy is measured according to a subjective standard, objective legitimacy is assessed on the basis of objectively identifiable standards which are mainly derived from political theory.⁴⁴ These normative standards are naturally not entirely objective, as they reflect ideological, moral, and ethical considerations.⁴⁵

3.3 A third account of the concept of legitimacy in international law

The above descriptions of subjective and objective legitimacy demonstrate the concept's interdisciplinary nature. Subjective legitimacy originates in the field of sociology. Objective legitimacy resides comfortably in the field of political sciences. For this reason, perhaps, those in the field of international law have adapted accounts of legitimacy to suit the needs

⁴⁴ Weiler 2012 (n 1) 826.

⁴⁵ Weiler 2012 (n 1) Peter 2017 (n 5).

of international law resulting in what can be described as mixed accounts of legitimacy.⁴⁶ Mixed accounts of legitimacy point to the fact that for legitimacy to be meaningful it must to some extent be able to satisfy both subjective and objective accounts of legitimacy. The example that can be brought forward to illustrate this point is the difference between the Weimar Republic and Nazi Germany. Whilst the former could be described as meeting the standards of objective legitimacy it failed to gain traction and never achieved proper subjective legitimacy. Nazi Germany, however, failed to meet most objective accounts of legitimacy but managed to gain traction in a way that indicates it met required standards of subjective legitimacy.⁴⁷

Mixed accounts of legitimacy therefore incorporate both subjective and objective standards of legitimacy in their assessments. They are therefore not conceptually distinct from the original two accounts. The innovativeness of mixed accounts of legitimacy lies not in its content but in its application. The content of the mixed account is simply subjective legitimacy plus objective legitimacy. The reason behind combining subjective and objective accounts of legitimacy is to make it possible to assess the long-term viability of a legal order. The emphasis is thereby placed on the role of legitimacy in influencing conduct of addressees of authority to suit the purpose of the authority claimant. This can be described as legitimacy's influence on obedience or compliance. It can also be described as legitimacy's role in providing rational persuasion.⁴⁸ The focus of the mixed account is therefore not on what legitimacy is but what it can be used for. This resonates with the thesis' assessment of the standard of legitimacy in the CCR. As explained in chapter 1 the purpose of applying a compensatory constitutionalism lens (CCL) to the CCR is to identify obstacles states parties face in their efforts to address climate change. This carries with it the implication that the improving potential legitimacy deficits in the CCR can be used as a strategy for improving states parties' ability to achieve their common objective as set out in article 2 United Nations Framework Convention on Climate Change (UNFCCC).⁴⁹ In the background of the thesis' legitimacy assessment therefore exists a desire to use legitimacy as a means of improving the CCR which is common in the mixed accounts of legitimacy.

In summary, the third approach is a hybrid of subjective and objective legitimacy, in which the two are seen not as mutually exclusive, but rather supplementing each other in establishing a high standard of legitimacy and ensuring its continuity. Most of the contemporary literature in the field of international law follows the hybrid approach to legitimacy.⁵⁰

⁴⁶ Mac Ahmlaigh 2016 (n 12) Bodansky doesn't state this as explicitly as Mac Ahmlaigh does but his account of legitimacy would fall within this description. Bodansky 2008 (n 15).

⁴⁷ This example has been used before, for example, in: Bodansky in Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93(3) *American Journal of International Law* 596, 602. See also Weiler 2012 (n 1) 8226-827.

⁴⁸ Mac Ahmlaigh 2016 (n 12).

⁴⁹ United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC).

⁵⁰ To mention just a few, see: Daniel Bodansky, 'The United Nations Framework Convention on Climate Change: a commentary' (1993) 18(2) *The Yale Journal of International Law* 451 and Bodansky 2008 (n 15); Karlsson-Vinkhuyzen and Vihma, 'Comparing the legitimacy and effectiveness of global hard and soft law: an analytical framework' (2009) 3(4) *Regulation and Governance* 400; Weiler 2012 (n 1).

3.4 Identifying the most suitable account of legitimacy for the CCR

The above subsections identified that objective legitimacy and mixed accounts of legitimacy are potentially suitable accounts for the assessment of the standard of legitimacy in the CCR. Mixed accounts of legitimacy resonate with the purpose of the thesis because they focus heavily on the use of legitimacy as a means of assessing and improving the ability of a legal order to exercise authority for the achievement of a specified purpose. In the case of the CCR the purpose of exercising authority through the AIA is articulated in article 2 UNFCCC which states that:

“The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.”⁵¹

However, it is necessary to take into consideration that the mixed account of legitimacy uses both objective and subjective approaches. The subjective aspect is potentially problematic in the context of the CCR because of states parties’ lack of sentient capacity to hold any particular belief.⁵² However, in the mixed account, the subjective element of legitimacy is limited to an acknowledgement that, for the assessment of the standard of legitimacy to contribute an insight into its persuasive powers, the objective legitimacy components used in the analysis must reflect the relevant dominant framework of norms. The instrumental focus of the subjective element of the mixed account therefore removes the need to identify on an individual basis the subjective state of mind of each addressee of authority.

Taking the above observations regarding the subjective element of the mixed account into consideration, the thesis takes the following approach to the concept of legitimacy. Similar to the mixed account, it acknowledges that legitimacy must acquire sufficient traction in order for it to fulfil its instrumental role of improving the CCR’s ability to guide states parties’ conduct in a way that aids them in achieving their common objective as cited above. However, in light of the fact that the addressees of the CCR are limited to states, the thesis uses components of legitimacy as objective standards of measurement to assess the legitimacy of the CCR from states parties’ point of view. In order to secure a subjective element in addition to the objective approach, the thesis links the content of the objective standards of measurement, the legitimacy components, to normative expectations states have regarding the exercise of authority within an international legal framework. Whilst states may not have the capacity to be described as ‘believing’ that the CCR is legitimate, they share certain normative preferences. These normative preferences are not drawn from internal, subjective states of mind of states parties. Rather these normative preferences are

⁵¹ Article 2 UNFCCC.

⁵² As discussed above in section 3.1 of this chapter.

drawn from the constitutional architectures of states parties. The constitutional principles on which states parties are based are taken here to reflect the normative preferences which substitute the need for a 'belief' in legitimacy.

4 Identifying legitimacy components

The components of legitimacy provide the building blocks on which the overall perceived legitimacy of a claim to authority of an autonomous, equal, and free actor rests. They do this both in a descriptive and a prescriptive manner. Legitimacy components can be utilised descriptively to explain the specific discursive reasons that are persuasive within a given context. For example, one could identify an authority relationship which enjoys legitimacy and ask the subjects of authority within that relationship to describe what makes the exercise of legitimacy legitimate in their circumstances. This would essentially amount to a legitimacy assessment which is based on a purely subjective account of legitimacy.

Legitimacy components can also be used prescriptively to explain the legitimacy status of an authority relationship. In this scenario a set of legitimacy components is pre-selected which describe what a legitimate authority relationship ought to look like. The authority relationship in question is then measured against this set of pre-selected legitimacy components to identify strengths and shortcomings. Where the authority relationship demonstrates that it adheres to all expectations of subjects of authority as captured by the legitimacy components the conclusion will be that the authority relationship will be perceived as legitimate. Where the authority relationship does not meet the standards set out in the pre-selected set of legitimacy components this provides an explanation as to its legitimacy deficits, resulting in a negative legitimacy perception.

The use of legitimacy components in this thesis follows the second, prescriptive use. It identifies a set of legitimacy components that is present in current scholarship on legitimacy and uses these as objective standards of measurement for legitimacy. In order to tie the assessment of the legitimacy components to the experience of states parties of the CCR chapter 4 constructs a compensatory constitutionalism lens (CCL). The CCL converts the subjective aspects of legitimacy expectations into a familiar legal structure which makes it possible to measure the standard of legitimacy on the basis of a mixed account of legitimacy in the context where the subjects of authority are states parties which lack the sentient capacity to hold autonomous legitimacy 'beliefs'.

Considering that this thesis understands legitimacy of an authority relationship as a matter of degree, rather than a binary quality that is either present or absent, it is important to acknowledge that the composition of legitimacy components can vary both in relation to the type of authority relationship being assessed and according to context. The type of authority relationship under examination in this thesis is one between the AIA of the CCR and states parties thereto. As explained, it transforms legitimacy expectations into legal standards by using a CCL to assess the standard of legitimacy in the CCR. The legitimacy components this chapter identifies are therefore based in the standard legitimacy components that exist within the context of the legitimacy of the constitutional state. To what extent each of these legitimacy components translates well to the specific context of the CCR is further discussed in chapter 4. The element of context influences the

representation of legitimacy components in an authority relationship because of the connection between the meaning of legitimacy and the dominant framework of social norms within which the authority relationship operates. The dominant framework of social norms can change over time. For example, in medieval times the dominant framework of social norms in Europe was heavily influenced by religion. Therefore, the legitimacy components that provided persuasive reasons for subjects of authority to comply will have reflected religious perceptions. The enlightenment occasioned a shift in the dominant framework of social norms away from religiously inspired persuasive reasons towards the ideologies provide the persuasive reasons for authority in the form of the state on the basis of constitutionalism. For an authority relationship to increase its chances of longevity and survival in light of potential future shifts in the dominant framework of social norms it is important that it incorporates a variety of legitimacy components into its foundation. If the architecture of the authority relationship incorporates a variety of legitimacy components from the outset it can adapt more easily in accordance to shifts in the dominant framework of social norms by shifting emphasis from one component to another without needing to introduce unfamiliar elements into its architecture at a point of crisis.

The use of legitimacy components that are rooted in the legitimacy of the authority relationship of the state is helpful in the context of the CCR for two reasons. Firstly, since states are founded on the basis of these legitimacy components it is necessary that the CCR can mirror the legitimacy components that support the authority of the state. Where the legitimacy components of the CCR would be significantly different from that of the state it would be difficult to reconcile the interests and concerns of states parties with the architecture of the CCR. This would not be constructive to the assessment of the standard of legitimacy of the CCR from the perspective of states parties. Secondly, the legitimacy components that contribute to the legitimacy of the state, which are reflected in features of constitutionalism, represent a framework of social norms which enjoys a positive connotation around the world. The connection between legitimacy perceptions and constitutionalism as a global, positively experienced blueprint for the authority of the state is further discussed in chapters 3 and 4.

Returning to the discussion of legitimacy components in the abstract, subsections 4.1-4.5 provide an overview of the key legitimacy components that exist in current scholarship on the topic of legitimacy and law. Subsection 4.1 begins with the component of legal legitimacy in order to clarify any misconceptions about legal legitimacy and legal validity from the outset. Subsection 4.2 then discusses the role of expert legitimacy. Whilst expert legitimacy is not always emphasised as strongly in the context of the constitutional state it is of particular relevance to the context of the CCR. This is because the ability of states parties to achieve the objective of the CCR is intimately tied up with their ability to have access to relevant expert information on the topic of climate change. Subsection 4.3 discusses the component of procedural legitimacy and the strong persuasive power it has within the context of authority relationships in the abstract. Subsections 4.4 and 4.5 discuss the more traditional components of input and output legitimacy. These are discussed last in order to tie them into the discussion of the relationship between legitimacy components and democracy in section 5 of this chapter.

4.1 Legal legitimacy

Thomas defines legal legitimacy as “a property of an action, rule, actor, or system which signifies a legal obligation to submit to or support that action, rule, actor or system.”⁵³ In other words, it is the legal nature of a rule from hence its authoritative nature stems. Authority may be perceived as legitimate if it is established on the basis of rules which are recognised as having the ability to establish the type of authority claimed and if the exercise of authority takes place in accordance with the rules of the legal order within which the authority operates.⁵⁴

This means that if the rule that establishes the authority or on the basis of which the authority acts came about in a way that does not respect the law-making procedures of the legal framework in which it exists, or if it is applied in a way that is not in accordance with the legal framework, it loses its claim to legitimate exercise of authority. The outcome of the exercise of authority in question would then no longer be perceived as a legitimate or binding upon its addressees. In this respect, legal legitimacy is very similar to the binary evaluation of legal validity.⁵⁵ It is therefore not surprising to observe that some authors, especially outside the legal field, conflate legal legitimacy and legal validity.⁵⁶

However, this conflation is not wholly unproblematic. This is because even if legal legitimacy were limited to legal validity, the question of legal validity in itself is not straightforward.⁵⁷ In order to avoid any confusion it is therefore necessary to briefly clarify this point. For the purpose of this thesis the component of legal legitimacy is based on Raz’s formal account of the rule of law. Thomas’ description of legal legitimacy cited above as “a property of an action, rule, actor, or system which signifies a legal obligation to submit to or support that action, rule, actor or system”⁵⁸ matches well with Raz’s formal approach to the rule of law. Both legal legitimacy and the rule of law focus on the ability of the law to influence behaviour. This means that law and law-making should be prospective, clear, and open. The judiciary must be independent and accessible. Lastly, discretionary powers of enforcement cannot be allowed to undermine the purpose of the law.⁵⁹ The connection between Raz’s formal take on the rule of law and legal legitimacy is explained in further detail in chapters 4 and 6.

Taking legal legitimacy to refer to these factors means that the focus of the legal legitimacy component lies not so much on ensuring whether the CCR’s treaties were established in accordance with general principles of international law. Rather, the component of legal legitimacy in the context of the CCR looks at the extent to which the CCR is comprised of rules which display the types of characteristics that are generally thought to have the capacity to influence and guide states parties’ conduct.

⁵³ Thomas 2014 (n 1) 7.

⁵⁴ Thomas 2014 (n 1) 7.

⁵⁵ Thomas (n 1) 7.

⁵⁶ Thomas (n 1). See also Koskenniemi 2003 (n 1)

⁵⁷ Thomas (n 1).

⁵⁸ Thomas, (n 1).

⁵⁹ Joseph Raz, ‘The Rule of Law and its Virtue’ in Joseph Raz, *The authority of law: Essays on law and morality* (OUP 2009) 214-219.

4.2 Expert legitimacy

Expertise is another component that can contribute to the legitimacy of an authority relationship.⁶⁰ Expert legitimacy can be explained in terms of the common-sense observation that if a matter requires specific knowledge, those that possess that knowledge should be involved in the decision-making. The premise is that in certain situations decision-making requires technical input instead of a value judgement.⁶¹ In such scenarios the making of the decision would best be left to the person with the relevant technical expertise. For example, in deciding whether a person either acted in accordance with the law or committed a crime, it is necessary to have relevant knowledge of the law. The decision in the given example should therefore be taken by someone with the relevant legal expertise, such as a judge in a court or someone with relevant legal training.⁶² Another example that demonstrates the way in which expert legitimacy encourages acceptance of the instructions given is that of the doctor-patient relationship. It is generally true that patients act in accordance with the medical advice they receive from a doctor. In this scenario, the doctor's medical advice is accepted solely on the basis of their expertise in the field of health management.⁶³ In the words of Bodansky: "It simply requires accepting that the expert has special knowledge, which entitles her decisions to deference."⁶⁴ This in contrast to deferring to the doctor's instructions for other reasons, such as religious reasons, or because the patient agrees with the rationale behind the doctor's decision.⁶⁵

The fact that an expert's opinion can be seen as a relatively objective statement also works in favour of expert legitimacy. Relying on expert legitimacy to some extent seeks to remove the political element of a given decision. It makes the conduct in question in part acceptable because of its objectivity. The answer to the question is no longer considered a matter of value, principles, or culture. Instead, the decision-making process is defined by the objective truth as identified by the expert. Implied in the acceptance of authority on the basis of expertise, is the assumption that some matters are, at least in part, binary in nature.⁶⁶ This means that there is a presumption that a certain decision in a given context can be right or wrong on the basis of scientific evidence.⁶⁷ Questions such as deciding which ozone-depleting substances can be substituted, or what loadings of acid deposition an ecosystem can tolerate, illustrate that some questions are indeed of a binary nature and to these science can provide clear answers.⁶⁸ In such cases it would be imprudent to disregard the 'hard', scientific truth. Yet the reality is that most questions are not that straightforward.

There are therefore two problems with the presumption that decisions can be made on the basis of a binary model and purely on the basis of scientific or technical information. The

⁶⁰ Bodansky 2008 (n 15), 718; Fritz Scharpf, 'Political Democracy in a Capitalist Economy' in Fritz Scharpf, *Governing Europe: Effective and Democratic?* (OUP 1999) 6.

⁶¹ Bodansky 2008 (n 15), p. 718.

⁶² The example of the expert legal knowledge is used by both Scharpf and Bodansky in their writing on expert legitimacy. See Bodansky 2008 (n 15) 718 and Scharpf 1999 (n 59) 15 and 21.

⁶³ Bodansky 2008 (n 15).

⁶⁴ Bodansky 2008 (n 15) 718.

⁶⁵ Bodansky 2008 (n 15) 720.

⁶⁶ Bodansky 2008 (n 15) 718.

⁶⁷ *Idem.*

⁶⁸ Bodansky 2008 (n 15) 718-720.

first problem is that a scientific conclusion can be controversial. One reason for the emergence of controversy may be that, as knowledge advances, expert opinions can change. Another reason why the decision of an expert can be controversial is because the matter to be decided on allows for a certain scope of interpretation. There are several reasons why this might be the case. For example, this can be because of an inherent uncertainty in the matter, because of lack of relevant information needed to make a more accurate analysis, or because differences in scientific method. The bigger the scope for interpretation is, the more vulnerable the expert's decision is to contestation. If different experts give different answers to supposedly binary questions, this then raises the question which of the experts is right? A related problem is how to choose what expert is best suited to taking the decision. Is it realistic to expect a layman to be able to identify someone with the necessary and relevant expertise? If the question of appointment is referred to other experts, how can their choice be scrutinised? By deferring a choice to an expert, a measure of accountability is lost, because it becomes increasingly difficult to verify the expert's actions.⁶⁹

In addition to the difficulties of scientific uncertainty and appointing the correct expert, there is another challenge. This is that many decisions cannot be reduced to binary questions. For example, science can be relied on to identify risks. However, it cannot replace the evaluation needed to answer the question what level of risk should be considered acceptable or what level of risks should be considered dangerous.⁷⁰ Both 'acceptable' and dangerous are value laden terms. The answer to the question what constitutes 'dangerous anthropogenic interference with the climate system?' can therefore not be answered on the basis of scientific expertise alone. In summary, expert legitimacy has its uses, but it cannot be the sole legitimising factor of a treaty regime such as the CCR. Instead, the component of expert legitimacy is supplemental in nature.⁷¹

Considering that the standard of legitimacy is measured as a matter of degree it can nonetheless make a relevant contribution to the CCR's legitimacy. In the context of the CCR the role of expert legitimacy may be significant for two reasons in particular. Firstly, to adequately address climate change a certain degree of scientific knowledge is required. As with the example of the legal expert and the medical expert above, developing adequate climate change policies requires a certain degree of scientific and technical know-how. In the absence of any scientific input it might be difficult to defend any authoritativeness of

⁶⁹ This point is also raised in Danielle Rached, 'The Concept(s) of Accountability: Form in Search of Substance' (2016) 29 *Leiden Journal of International Law* 317. On the difficulty of verifying expert input Rached also makes a useful reference to Onora O'Neill, 'The quest for trustworthiness' in Onora O'Neill, *Autonomy and Trust in Bioethics* (CUP 2009) 118. One of the ways in which this can be countered is by linking expertise input with accountability mechanisms. For a detailed discussion on the link between expertise, accountability, and legitimacy see Claudia Landwehr and Matthew Wood, 'Reconciling credibility and accountability: how expert bodies achieve credibility through accountability processes' (2019) 20(1) *European Politics and Society* 66.

⁷⁰ Bodansky 2008 (n 15) 719- 721.

⁷¹ In a similar vein, Scharpf argues that the benefits of expert legitimacy can only exist in the context of three forms of 'reassurance' which arise from its co-existence with mechanisms that exist in the context of input legitimacy. Particularly worth highlighting here is his observation that if the flow of decisions influenced or made on the basis of expertise "should clearly violate the intense preferences of broad majorities, electorally accountable office holders would still be able to override the expert judgement." See Scharpf 1999 (n 60) 16.

the CCR. Having experts involved in the operation of the CCR can therefore add to its overall standard of legitimacy.

In addition, the variety of interests at stake for states parties in the matter of climate change further indicate that the CCR most likely will need to operate in a context within which there is significant scope for reasonable disagreement.⁷² Faced with the challenge of exercising authority in the face of such reasonable disagreement might indicate that states parties will attach greater value to expert legitimacy in the context of the CCR than they may attach to it in other circumstances. The variety of interests at stake and the scope for reasonable disagreement within the context of the CCR may, however, also be cause for states parties to be cautious towards expert legitimacy. The development of climate change policies is inextricably linked to value-based choices and present as an inextricably political as well as scientific challenge. With the wide variety of interests at stake for different states parties the role of expert legitimacy could therefore remain limited to ensuring the provision of sufficient information in order to enable informed decision-making. It is therefore equally possible that states parties may attach little value to the component of expert legitimacy and instead scrutinise the presence of legitimacy components relating to input legitimacy, legal legitimacy, and procedural legitimacy.

4.3 Procedural legitimacy

At the heart of procedural legitimacy lies the idea that fair procedures increase the acceptability of the outcomes they produce. In other words, if authority is exercised on the basis of principles and rules all addressees consider to be fair then they are more likely to comply with it, regardless of whether they are subjectively in favour of the consequences of the exercise of authority or not.⁷³ This connection between procedural fairness and acceptance is based on the research Thibault and Walker.⁷⁴ This demonstrates that procedural legitimacy can contribute to the deep acceptance which Weiler speaks of and which is essential for the long term legitimacy of an authority. The acceptability or perceived fairness of a procedure depends on the participants' historical, political, and cultural background.⁷⁵ For example, in liberal western constitutional democracies values such as transparency, participation, and accountability are generally thought to contribute to procedural fairness.⁷⁶ This suggests that the use of transparency, participation, and accountability measures as they present in the context of constitutionalism can contribute to a positive legitimacy perception. This signposts towards one of the ways in which legitimacy and constitutionalism meet at an intellectual crossroads.

⁷² Luke Tomlinson, 'Reasonable Disagreement and Political Deadlock' in Luke Tomlinson, *Procedural Justice in the United Nations Framework Convention on Climate Change: Negotiating Fairness* (Springer Publishing 2015) 29.

⁷³ Tomlinson 2015 (n 72), 72. See also Weiler who comments contrasts legitimacy against popularity and describes it instead as a "deeper form of acceptance of the political regime" Weiler 2012 (n 1), 826.

⁷⁴ Thibaut and Walker, *Procedural justice: A psychological analysis* (Hillsdale, N.J.: L. Erlbaum Associates 1975).

⁷⁵ Mac Amhlaigh 2016 (n 12). This also resonates with the notion of legitimacy being tied to the dominant framework of social norms of the subjects of authority as described in Reus-Smit 2017 (n 27).

⁷⁶ For example, Matthias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15(5) *European Journal of International Law* 907, 926.

An example of the importance of procedural legitimacy can be found in the history of the negotiations for the continued development of the CCR. In December 2009 the COP of the UNFCCC met in Copenhagen to discuss the next steps to be taken to tackle climate change.⁷⁷ At the time it was reported that the lack of procedural values was a factor that caused several states to feel discontented about the negotiations and the resulting Copenhagen Accord.⁷⁸ This indicates that rules of procedure are considered an important contributing factor to the legitimacy of the CCR. It also signposts that states parties can identify rules of procedure as a shared value. This is further discussed in chapter 6 which explores the rules of procedure of the CCR as a material feature of constitutionalism on the basis of which legitimacy as a persuasive force can gain traction.

Procedural legitimacy is sometimes equated with input legitimacy⁷⁹ or democratic legitimacy⁸⁰. In this case, however, procedural legitimacy is based on the assumption that fair procedures are democratic procedures. The discussion then centres on the question what democratic procedures entail exactly and why. As discussed in the introduction to section 4 this thesis favours an approach that does not focus on the democratic aspects of the CCR. Instead it argues that procedural legitimacy ought to be seen specifically as separate from democratic legitimacy. Whilst democratic legitimacy is a potential legitimacy component that may be relied on in other authority relationships it is not necessarily the most suitable legitimacy component for the CCR with its global reach and exclusive state-based membership.

Where democratic legitimacy is focussed on the organisation of authority within a democratic order, procedural legitimacy focusses on principles of procedure which can be applied to any type of authority-based decision-making. Where democracy focusses on specific forms of representation, procedural legitimacy focusses instead on transparency, participation, and accountability. Whilst these may feature within a democratic order, these principles can also be applied to other forms of decision-making.

4.4 Input legitimacy

The term input legitimacy was first coined by Scharpf.⁸¹ To him, input legitimacy existed specifically in the context of a democratic political system. As a result, the original meaning of the component of input legitimacy seeks to justify the authority of a democratic political system. However, sticking with Scharpf's original definition it is also possible to take a more abstract approach to the meaning of input legitimacy. When separated from its meaning in relation to democracy, input legitimacy can be described as referring, generically, to the justification of the exercise of authority by a political system on the basis of its organisational structure.⁸² According to Scharpf, in order for democratic representation to

⁷⁷ See *Copenhagen Climate Change Conference – December 2009 The Copenhagen Accord* available at <http://unfccc.int/meetings/copenhagen_dec_2009/meeting/6295.php> accessed 15 July 2020.

⁷⁸ Navroz Dubash, 'Copenhagen: Climate of Mistrust' (2009) 44(52) *Economic and Political Weekly* 8.

⁷⁹ Weiler 2012 (n 1).

⁸⁰ Weiler 2012 (n 1); Peter 2017 (n 5).

⁸¹ Fritz Scharpf, *Demokratietheorie zwischen Utopie und Anpassung* (Konstanzer Universitätsreden 1970) 25. This translates into 'Democratic Theory between Utopia and Adaptation'.

⁸² *Idem*.

be legitimate, the political system must accommodate government by the people through its organisational structure. In other words, to measure input legitimacy is to ask the question whether the political system is organised and structured in a way that provides adequate opportunities for the people to engage.⁸³ Ideally, the political system should reflect inasmuch as possible government by the people.⁸⁴ In the case of the CCR, however, the component of input legitimacy would focus on whether the organisational structure sufficiently respects the sovereignty of states parties and whether it accommodates sufficiently the input of states parties in the coordination and development of a global strategy in response to the existential threats of climate change.

4.5 Output legitimacy

Output legitimacy is best explained in contrast with input legitimacy. While input legitimacy refers to government by the people, output legitimacy focusses on government for the people.⁸⁵ In the context of the CCR this would naturally be government for states parties instead, since states parties are the sole addressees of the CCR. It is sometimes also referred to as result legitimacy⁸⁶ or outcome legitimacy.⁸⁷ According to Scharpf, output legitimacy can be measured in terms of whether the regime is successful in promoting and securing the common welfare of its addressees.⁸⁸ Bodansky also explains that if a regime is seen as doing a good job of achieving its goals, then it is easy for its addressees to accept the exercise of authority.⁸⁹ The exercise of authority becomes more controversial when addressees are not satisfied with the results of the decision-making processes. Weiler too, explains that output legitimacy is measured on the basis of a regime's success in realising its objectives and the contentment this creates among the addressees.⁹⁰ However, the difficulty with output legitimacy is that it raises the contentious question about how to measure success. There are various ways of assessing a treaty's effectiveness that the literature on output legitimacy fails to engage with on a substantive level.⁹¹

Measuring the impact of output legitimacy on the overall perception of the legitimacy of the CCR is further complicated because of the scope of reasonable disagreement which the issue of climate change presents. This, taken together with the wide variety of interests at stake for states parties would make it extremely difficult to assess the legitimacy of the CCR if a heavy emphasis were laid on the scrutiny of the component of output legitimacy.

5 Situating the selection of legitimacy components in the context of democracy discussions

⁸³ Idem.

⁸⁴ Scharpf 1970 (n 81), 7.

⁸⁵ Scharpf 1970 (n 81).

⁸⁶ Weiler 2012 (n 1), 828.

⁸⁷ Bodansky 200 (n 47); Kumm 2004 (n 76).

⁸⁸ Scharpf 1970 (n 81) 11.

⁸⁹ Bodansky 2008 (n 15) 710.

⁹⁰ Weiler 2012 (n 1) 828.

⁹¹ Daniel Bodansky, 'Is International Environmental Law Effective?' in Daniel Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press 2001). Also Vinkhuyzen and Vihma 2009 (n 50).

It should be clear that each of the legitimacy components discussed above does not support the legitimacy of an authority relationship in isolation. Rather, the overall perception of the legitimacy will rely on the aggregate outcome of the extent to which an authority relationship reflects each of the expectations of subjects of authority as captured in the individual legitimacy components. The way in which the various components are presented as relating to each other depends on the emphasis placed on the importance of each component in the framework of social norms that is dominant in the context of the authority relationship in question. Furthermore, the importance attached to individual legitimacy components is also often times tied to perceptions of the role of democracy in the context of the authority relationship under assessment. To illustrate: Scharpf builds his approach to legitimacy on the two components of input legitimacy and output legitimacy, which both serve to create an ideal form of democratic governance. Both input legitimacy and output legitimacy can then be broken down into further subcomponents. For example, he considers independent expertise and electoral accountability to be mechanisms of output legitimacy.⁹² Weiler, on the other hand, presents legitimacy as being composed of three components: procedural legitimacy (akin to input legitimacy), result legitimacy (akin to outcome legitimacy), and telos legitimacy.⁹³

This example highlights that there are essentially two approaches. The first approach is to consider democratic legitimacy as a legitimacy component in its own right. This would allow input legitimacy to take on the meaning required to suit the actors involved in the authority relationship in question and still ensure that whatever the type of authority relationship being examined, democratic principles are upheld. The second approach is to consider democracy as a form of input legitimacy. Input legitimacy as defined above is relatively abstract and leaves room for interpretation according to the characteristics of the authority relationship in question. In the context of the legitimacy of the state the component of input legitimacy may therefore amount to standards of democratic governance. Democracy is then not treated as a goal in itself but as a means of achieving input legitimacy. In the context of the CCR it should be examined whether this approach is equally desirable or whether the meaning of input legitimacy is better tailored to the type of authority relationship that arises in the interaction between sovereign states parties within the framework of the CCR. This means that input legitimacy could instead focus on issues such as participation and consent.

5.1 Democracy as a legitimacy component in its own right vs democracy as a form of input legitimacy

In the abstract definition of legitimacy as pursued so far, the use of democracy as a component of legitimacy in its own right does not from the outset exclude any particular take on democracy. A starting point for discussing the meaning of democracy as a legitimacy component in its own right would therefore be to focus on a generic definition of democracy. An example of such a definition is democracy as “a political system with

⁹² Scharpf 1970 (n 81), 14-16.

⁹³ Weiler 2012 (n 1), 828. Weiler describes telos legitimacy as being achieved “neither by process nor output but by promise, the promise of an attractive promised land.”

popularly-elected, representative bodies and majority decision-making.”⁹⁴ This definition was proposed by Bodansky and taken up by Brunnée in her work on international environmental law.⁹⁵ While Bodansky is no pure theorist, he does have relevant expertise in the field of international environmental law. In addition, his definition is sufficiently general that it can be used without excluding at the outset any particular conception of democracy.⁹⁶ Considering the focus on the standard of legitimacy of the CCR, which has certain comparable features with the multilateral environmental agreements that Bodansky and Brunnée discuss, it could be useful to anchor the definition of democracy as a legitimacy component in existing approaches to the meaning of democracy.

Such a generic definition of democracy leaves the problem of the fact that democracy can mean a variety of different things unresolved. Whilst there are numerous aspects of legitimacy which are intentionally defined at an abstract level in order to accommodate its use in a variety of different authority relationships, this is not possible for the definition of democracy as a component of legitimacy. For it to fulfil the role of objective standard of measurement it must be possible to identify what democracy entails. Therefore, it is necessary to understand first what different roles can be attributed to democracy in relation to legitimacy before explaining what the most appropriate definition is of democracy as a component of legitimacy.

Some authors see democracy as a means to an end.⁹⁷ To them, democratic decision-making procedures are a way of enhancing legitimacy. This point of view can be described as democratic instrumentalism.⁹⁸ In this view, the main question is whether the outcome is legitimate.⁹⁹ If democracy contributes to the achievement of legitimate outcomes, then it is beneficial to legitimacy. However, from this point of view, it is also conceivable that a legitimate outcome may be achieved without democracy.¹⁰⁰ In other words, this view considers democratic legitimacy to be but another component alongside the other components of legitimacy, without attaching any particular emphasis to it.

On the other side of the spectrum are those authors who believe legitimacy can only be achieved through democracy. There are two main approaches to this variety of democratic legitimacy. The first is the pure proceduralist conception of democratic legitimacy. According to pure proceduralists, the focus of evaluation should be on the procedure. Whether an outcome is legitimate depends solely on the question whether the procedure that brought about the outcome was legitimate.¹⁰¹ How to approach the question which

⁹⁴ Bodansky 1999 (n 47), 614 and Bodansky 2008 (n 15) 715. Brunnée uses this definition as well, in Jutta Brunnée, ‘COPing with Consent: Law-Making Under Multilateral Environmental Agreements’ (2002) 15(1) *Leiden Journal of International Law* 1, 11.

⁹⁵ Brunnée 2002 (n 97), 11.

⁹⁶ As evidenced by the fact that Bodansky goes on to discuss various conceptions of democracy in relation to the definition he provided. See Bodansky 1999 (n 47), 614.

⁹⁷ See for example Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford Clarendon Press 1995).

⁹⁸ Peter 2017 (n 5) section 4.

⁹⁹ *Ibid.* Also Thomas 2014 (n 1).

¹⁰⁰ Peter 2017 (n 5); Joseph H H Weiler, ‘The Geology of International Law – Governance, Democracy and Legitimacy’ (2004) 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 547.

¹⁰¹ Thomas 2014 (n 1).

procedure can be considered as legitimate, then depends on whether one favours the approach of aggregative or deliberative democracy.¹⁰² The pure proceduralist account of legitimacy would suggest that aggregative or deliberative democracy is the only legitimacy component that should matter in the assessment of the standard of legitimacy. This approach would therefore not treat legitimacy components as building blocks. Rather, it would collapse the meaning of legitimacy into the meaning of aggregative or deliberate democracy. This approach is not helpful for the assessment of the standard of legitimacy in the CCR which is not designed to deliver either aggregative or deliberative democratic governance. Therefore, this account of democracy and legitimacy is not further discussed in this thesis.

The pure proceduralist approach can be contrasted against rational procedural approach. The latter considers democracy to represent specific procedures which provide one, amongst multiple, considerations that contribute to legitimacy. This approach reflects the same idea as applied in this thesis, which considers legitimacy components as aggregative contributions to the overall legitimacy of an authority relationship. For example, in addition to taking into consideration the democratic procedures by which decisions are made, the rational proceduralist approach also considers the quality of the outcome.¹⁰³ This is in order to prevent the occurrence of outcomes that do not meet qualitative expectations but managed to tick all procedural boxes.¹⁰⁴ This means that rational proceduralists acknowledge that democratic legitimacy co-exists with output legitimacy.

5.2 Democracy as a form of input legitimacy

The second way of situating democracy in the discussion of the meaning of legitimacy is to consider it as one, amongst multiple, interpretations of the meaning of input legitimacy. In this scenario it is not necessary to pin down which meaning democracy must have beyond a generic definition. This is because one can simply line up the multiple approaches to democracy alongside any other possible interpretations of input legitimacy and explain at the start of one's legitimacy assessment which meaning is chosen for what reasons for the assessment of the standard of legitimacy at hand.

This thesis takes the stance that democracy in any of its meanings is not the most suitable form of input legitimacy to assess the standard of legitimacy in the CCR. Even using a general definition as the starting point, a number of obstacles stand in the way of democracy as input legitimacy in the context of the CCR. Firstly, because the CCR is a treaty regime and not a state two presumptions are necessary to justify defining input legitimacy on the basis of democratic principles. The first presumption is that the exercise of authority in the CCR can be cast as democratic.¹⁰⁵ The second presumption is that to design the exercise of authority in the context of the CCR would be desirable.

The first presumption is problematic because it appears to assume that democracy at the level of international law is possible in the first place. Numerous authors doubt whether

¹⁰² Thomas 2014 (n 1).

¹⁰³ Peter 2017 (n 5).

¹⁰⁴ Peter 2017 (n 5).

¹⁰⁵ For a discussion of this question, see Brunnée 2002 (n 97).

international democracy is genuinely possible, due to the lack of demos at the international level.¹⁰⁶ This is especially relevant for the component of input legitimacy. Scharpf describes input legitimacy requiring a belief in a 'thick' sense of collective identity.¹⁰⁷ He then describes how this requirement poses a difficulty in the context of legitimacy of decision-making procedures at the European level. At the European level, the historical, linguistic, cultural, ethnic, and institutional diversity stands in the way of there being such a thick sense of collective identity.¹⁰⁸ If these differences pose such difficulties at the European level, then they must seem insurmountable on the global scale represented by the membership of the CCR.

In addition to the lack of demos, there is also the problem that it is not straightforward who democracy at the international level is aimed to represent. Do the decision-making procedures established by the framework treaty need to represent the interests of the states that are party to the treaty? Or do they need to represent the interests of individuals? If the latter is the case, then the lack of demos at this point in time would be an obstacle.¹⁰⁹ If the former is the case, then the principle of sovereignty might stand in the way of true solidarity developing among states. After all, one of the consequences of sovereignty is that states are not to interfere in another state's business. This idea of non-interference might hinder states developing into a community of mutual understanding and trust as would be necessary for them to develop into a demos fit to support a democracy.

On the relationship between sovereignty and the possibility of developing democratic practices in international law Weiler makes some practical observations. He points out that international law is in theory and practice based on the terminology of sovereignty and sovereign equality, not democracy, and points towards a growing literature that is sceptical about the use of democracy in the international discourse.¹¹⁰ Weiler describes his observation about democracy and international law as follows.

"It is, in some ways, the opposite of democracy, since it is based on the legal premise, even if at times a fiction, that the collectivity has neither the power nor, certainly, the authority to impose its will on individual subjects other than through their specific or systemic consent, express or implied. Put differently, it is based on the premise, an extreme form of which claims that there is no collectivity with normative power, and, in less extreme form claims that even if there is such a collectivity, there is an inherent power of opting out [...] This, of course, is the opposite of any functioning notion of democracy which is based on the opposite premise, however justified in political theory, that a majority within a collectivity, a demos, has the authority to bind its individual members, even against their will."¹¹¹

¹⁰⁶ See for example, Neil Walker, 'Taking Constitutionalism Beyond the State' (2008) 56(3) *Political Studies* 519-523; Bodansky 2012 (n 15), 714.

¹⁰⁷ Scharpf 1970 (n 81).

¹⁰⁸ Scharpf 1970 (n 81), 9.

¹⁰⁹ Although that is not to say that a sense of global demos could never develop.

¹¹⁰ Weiler 2004 (n 100), 548. In a similar vein Andreas Follesdahl raises numerous questions regarding the desirability of democratising at the international level in Andreas Follesdahl, 'Constitutionalization, not Democratization' in Nienke Grossman and others (eds) *Legitimacy and International Courts* (OUP 2018) 307.

¹¹¹ Weiler 2004 (n 100), 548.

These observations are relevant in the context of the CCR. The CCR counts just under 200 states parties. Its decision-making procedures generally favour consensus over any style of majority voting.¹¹² Furthermore, for decisions of the COP to create binding obligations under international law for states parties, ratification remains a requirement. This indicates that the component of input legitimacy in the CCR is best understood in terms of setting out requirements for the participation and acquisition of consent by individual states parties.

5.3 Democracy as legitimacy and the CCR

The above has set out two accounts of incorporating democracy in the assessment of the standard of legitimacy. The second account, to consider democratic legitimacy as a form of input legitimacy is not suited for the context of the CCR. This is because the subjects of authority in the context of the CCR are sovereign states. The sovereign nature of states parties means that there are more adequate ways of measuring input legitimacy in the context of the CCR that focus on participation and consent over representative decision-making.

The initial account of democracy as an additional component of legitimacy would be a more appealing option. However, the concerns raised by Weiler with regard to the topic of democracy in relation to international law-making stand true also with regard to the first approach. In the relationship amongst states parties, and between states parties and the AIA of the CCR, there are better means of legitimising authority that do not amount to international democracy. In terms of considering the relationship of non-state actors to the CCR it would perhaps be possible to identify a way of achieving a form of democracy. However, the CCR in its current form does not address non-state actors. Therefore, to consider whether there exists a democratic deficit in the relationship between the CCR and non-state actors falls outside the scope of this thesis' assessment.

6 Problematising legitimacy in the climate change regime

The above has described in detail the meaning of legitimacy in the abstract on the basis of three separate distinctions. In particular the above focussed on the distinction between the word legitimacy, the concept legitimacy, and the components of legitimacy. Overall, legitimacy now can be summarised as being a quality of an authority relationship which provides a set of discursive reasons that have a persuasive ability to influence the conduct of otherwise autonomous, free, and equal actors. This abstract definition must now be situated in the question of the assessment of the standard of legitimacy in the CCR. In order to anchor the thesis' legitimacy assessment this section identifies which actors and concerns fulfil what roles in the three-way distinction between subjects, object, and ground of legitimacy. In doing so this section also identifies what type of legitimacy issues can arise, or potentially be problematic in the context of the CCR, and how this thesis' assessment contributes to such issues being overcome.

6.1 Subjects of legitimacy in the CCR

¹¹² This is discussed and referenced in detail in chapters 5 and 6.

Chapter 1 already pointed out that the question of legitimacy can take many forms. For example, what can states parties legitimately expect from each other in their common struggle against climate change? What forms of constraint can the CCR legitimately impose on states parties? What types of commitments can states parties legitimately subscribe to in light of pre-existing constitutional commitments to their citizenry? In assessing the standard of legitimacy of the CCR this thesis focusses on the point of view of states parties. Naturally, other perspectives are possible. Yet choosing the state as the focal point of the assessment is justified for four reasons.

Firstly, in its current format states parties are the only addressees of the CCR. This makes states parties the first point of call when assessing the legitimacy of the CCR. To assess the standard of legitimacy in the CCR is to focus on the legitimacy of the authority relationships that arise within the CCR. Such relationships can currently only manifest directly between states parties and the AIA that carries out the governing activities of the CCR. Whilst non-state actors might be impacted by the interactions between states parties within the CCR the legitimacy of such impacts cannot be examined as a direct relationship between non-state actors and the AIA of the CCR because no such direct relationship exists. Instead, the impacts on non-state actors that follow from commitments states parties make within the context of the CCR must be legitimised in the authority relationship between the non-state actor in question and the state. The state will need to take its responsibilities and accountability to other actors into account when engaging with other states parties in the CCR and with the AIA of the CCR. The task of the CCR is to provide a platform where states parties can raise all the concerns and interests they represent insofar as these are related to the issue of climate change. Through the AIA the CCR then harmonises these interests into a globally coordinated climate change strategy. Therefore, the interests of non-state actors in the context of the CCR are not negligible but cannot be taken into consideration in the assessment of the standard of legitimacy of the CCR as it currently stands.

The focus on states parties' perceptions of the standard of legitimacy of the CCR further highlights that the approach of this thesis is to reflect on the CCR in its current format rather than to suggest an ideal and hypothetical means of addressing climate change through international law. Such suggestions may propose to include non-state actors as addressees of the imagined international response to climate change from the outset. The ambition of this thesis is more limited. It uses the assessment of the standard of legitimacy in the CCR as a means of identifying strengths and weaknesses of the existing regime. This is helpful in order to articulate obstacles states parties encounter in their efforts to work towards achieving the CCR's objective.

Secondly, states provide a good focal point for the assessment of the standard of legitimacy in the CCR because they are key players on the axis where local and international interests, needs, and concerns meet. States parties to the CCR have responsibilities within their territories that make them suitable actors for representing local interests at the international level. Most importantly, states have a responsibility to promote and protect the capacity of its citizens to co-exist securely as autonomous, equal, and free actors. In addition, a large number of states have constitutional commitments to provide for a healthy

environment.¹¹³ Whilst a right to a healthy environment potentially encompasses a wider range of concerns than climate change alone, two are inextricably connected.¹¹⁴

In addition to their domestic responsibilities and insights, a defining characteristic of the state is also its ability to negotiate and coordinate, with other states, commitments and obligations through international law. As key actors in the post-Westphalian, state-centric model of international law, states also have a unique position to coordinate at the international level strategies that serve communal long-term interests and commit to these through ratifying treaties. As such, states are well positioned to coordinate the local needs and interests with overarching international strategies that contribute to achieving the CCR's common, long-term objective. This makes them a suitable focal point for the assessment of the standard of legitimacy because they have law-making powers at the national and the international level. They also have responsibilities at the national and international level. As mediators of national interests and law-makers at the international level, states are uniquely well suited for the assessment of the standard of legitimacy in the CCR which requires mediation of local and international needs.

Thirdly, states parties experience an existential threat in the light of climate change. This existential threat exists both with regard to the purpose of their existence and with regard to the constitutional architecture which legitimises their authority in the domestic context. Looking at the first type of existential threat climate change poses to the state it is useful to remember that the state exists to secure the ability of individuals to co-exist as autonomous, free, and equal actors. If climate change is left to develop unchecked, it is expected to negatively impact on human survival.¹¹⁵ Were this scenario to materialise then states will have allowed their existence to have become obsolete. If the state is unable to provide security for its citizens, it cannot justify its sovereign position and monopoly of force. In order to ward off the existential threat to human survival and fulfil the function for which it was created it is essential that states parties achieve the CCR's objective.

The second existential threat posed by climate change to the state relates to the architecture of the state. The United Nations special rapporteur on extreme poverty and human rights has drawn attention to the negative consequences of climate change on essential principles of the constitutional state, including the rule of law, democracy, and protection of fundamental human rights.¹¹⁶ This indicates that for states climate change poses a direct existential threat. This is because some of the key principles underpinning the architecture of the constitutional state are threatened by climate change. To achieve the CCR's objective is therefore of crucial for the ongoing legitimation of the authority of the state and its defining characteristic of sovereignty.

¹¹³ James May and Erin Daly, *Global Environmental Constitutionalism* (CUP 2014).

¹¹⁴ Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani, *International Climate Change Law* (OUP 2014) 5.

¹¹⁵ António Guterres, *Secretary-General's remarks on Climate Change [as delivered]* available at <<https://www.un.org/sg/en/content/sg/statement/2018-09-10/secretary-generals-remarks-climate-change-delivered>> accessed 15 July 2020.

¹¹⁶ Phillip Alston, *Climate change and poverty report of the special rapporteur on extreme poverty and human rights A/HRC/41/39*, 17 July 2019 available at: <https://www.ohchr.org/Documents/Issues/Poverty/A_HRC_41_39.pdf> accessed 15 July 2020.

6.2 Object of legitimacy

The term object of legitimacy is borrowed from Thomas' three-way distinction between subjects, objects, and grounds of legitimacy.¹¹⁷ The definition of the object of legitimacy in this thesis differs from that provided by Thomas. Thomas uses the term to refer to the role of legitimacy claimant. He identifies actions, norms, actors, and systems as being different object types.¹¹⁸ Here a more literal definition is accorded to the term object of legitimacy. The object of legitimacy is taken to mean the thing of which the legitimacy is being examined. In essence this means that, in the abstract, the object of legitimacy refers to the authority relationship which requires legitimation. An authority relationship will arise where one actor exerts influence over the conduct of otherwise autonomous, free, and equal actors. Identifying the object of legitimacy therefore requires the identification of such autonomous, free, and equal actors; and the identification of an actor claiming to have the authority to exert influence over their conduct. The former are called authority addressees or subjects of the legitimacy claim. The latter is best described as the actor exercising authority or as the legitimacy claimant.

The section above already identified states parties as the addressees of the CCR and thereby the subjects of the legitimacy claim. That states parties are autonomous, equal, and free actors, follows from their status as sovereign entities.¹¹⁹ This leaves the identification of the legitimacy claimant. In the context of the CCR this is the AIA. This is because the AIA influences the conduct of states parties. It does this by further developing the content of the CCR and by supervising states parties' implementation thereof.¹²⁰ The exact scope of the authority of the AIA is further discussed in chapter 5.

6.3 Grounds of legitimacy

Chapter 1 signposted that legitimacy is a means aside from coercion and self-interest that can persuade autonomous, equal, and free actors to adjust their conduct. This persuasive aspect of legitimacy ties in with the last part of this three-way distinction, namely grounds of legitimacy. 'Grounds of legitimacy' refers to the types of reasons that will have the persuasive impact which legitimacy generates. Considering the multitude of authority relationship that can arise, the grounds of legitimacy are not necessarily always the same. Rather, the grounds of legitimacy will be closely related to the authority relationship under scrutiny. At the abstract level Reus-Smit captures the essence of the grounds of legitimacy very well when he writes:

“[...] legitimacy is also inextricably linked to, and dependent upon, social communication. Actors establish their legitimacy, and the legitimacy of their actions, through the rhetorical construction of self-images and the public justification of priorities and practices, and other actors contest or endorse these representations through similar rhetorical processes. Establishing and maintaining legitimacy is thus

¹¹⁷ Thomas 2014 (n 1), 746.

¹¹⁸ Idem.

¹¹⁹ Sovereignty can mean a number of different things. A detailed explanation of the meaning of sovereignty as it is used in this thesis can be found in chapter 3.

¹²⁰ Article 7 UNFCCC.

a discursive phenomenon, and the nature of this discursive phenomenon will depend heavily upon the prevailing architecture of social norms.”¹²¹

This indicates that the type of reasons that can gain traction in a community of subjects of legitimacy will depend on the shared values of that community. Most communities will display a variety of value systems which are also capable of shifting over time. For this reason, this thesis speaks of a dominant framework of social norms to capture legitimacy’s connection to and use of social norms and discursive reasoning. The identification of values that can gather traction in the ‘community’ of states parties to the CCR is discussed further in chapters 3 and 4. In essence, these chapters identify constitutionalism as a common denominator in the variety of frameworks of social norms that operate within states parties of the CCR and explain why the features of constitutionalism are able to draw out the expectation aspect of legitimacy in the context of states parties as subjects of legitimacy.

7 Concluding remarks

This chapter has done the preliminary work of the assessment of the standard of legitimacy in the CCR by explaining first in the abstract how the meaning of legitimacy can be deconstructed and then explaining the meaning of legitimacy in the assessment of the CCR. It identified that in the abstract legitimacy refers to the set of discursive reasons which persuade otherwise autonomous, equal, and free actors to change their conduct in accordance with the instructions of a legitimacy claimant. Legitimacy therefore provides an alternative resource to coercion and self-interest that can influence the conduct of otherwise autonomous, equal, and free actors.

This chapter further unpacked the multiple axes of legitimacy on the basis of three sets of distinctions. These made it possible to identify that in the assessment of the standard of legitimacy in the CCR the object of legitimacy is the authority relationship between the AIA and states parties. It further identified the AIA as the legitimacy claimant and states parties as the subjects of legitimacy. It also suggested that constitutionalism could represent a shared framework of social norms in the community of states parties to the CCR. This claim is further elaborated in chapter 3. It also identified that the assessment of the standard of legitimacy uses both descriptive and prescriptive aspects of legitimacy. It is descriptive to the extent that it describes the CCR in its current format rather than imagining an ideal means of addressing climate change through international law. It is prescriptive in that it bases the assessment of the standard of legitimacy on a normative account of legitimacy rooted in the features of constitutionalism.¹²²

Lastly, it remains relevant to highlight that the assessment of the standard of legitimacy is based on the extent to which the CCR reflects the components of legitimacy cumulatively, and that the standard of legitimacy is measured as a matter of degree, rather than in terms of a binary evaluation.

¹²¹ Reus-Smit 2007 (n 27), 163.

¹²² Which is further explained in chapter 3 and 4.

CHAPTER 3: THE ADDED VALUE OF ASSESING THE CLIMATE CHANGE REGIME'S STANDARD OF LEGITIMACY THROUGH A COMPENSATORY CONSTITUTIONALISM LENS

1 Introduction

Constitutionalism, much like legitimacy, carries with it a positive connotation. The positive perception of constitutionalism is, amongst other indicators, visible in its global spread. At the time of writing, 195 states have adopted a form of constitutionalism and can be described as constitutional orders.¹ The global acceptance of constitutionalism has taken place in spite its historically Western roots.² Whilst constitutionalism in the abstract refers to the conditions of a constitutional order its widespread acceptance does not imply that there exists a uniform understanding regarding the necessary and sufficient conditions of identifying a constitution³ or a shared understanding of the proper definition of such features. In fact, it would be most accurate to describe constitutionalism as presenting a certain degree of ambiguity.

The observation that constitutionalism is popular yet ambiguous serves to highlight a key point which provides the backdrop for the content of this chapter. The ambiguity is of particular interest here because it makes it possible to consider the various meanings constitutionalism may take on in a variety of contexts. Especially, it makes it possible to reflect on the most appropriate meaning of constitutionalism in the context of the climate change regime (CCR). The ambiguity regarding the 'right' meaning of constitutionalism provides a space within which this chapter can explain and clarify the added value of constitutionalism in the context of the CCR as well as the analogy with modern constitutionalism upon which the construction of the constitutionalism lens relies.

¹ At the time of writing 195 nation states have a constitution that is in force. See <https://www.constituteproject.org/search?lang=en&status=in_force> accessed 15 July 2020. This is the number of constitutions currently in force according to the information provided by constitute project. This includes all member states of the United Nations, see: <<https://www.nationsonline.org/oneworld/states.htm>> accessed 15 July 2020.

² On the western origin of the modern constitution see Cormac Mac Amhlaigh, 'Harmonising Global Constitutionalism' (2016) 5(2) *Journal of Global Constitutionalism* 173, Anne Peters, 'The Merits of Global Constitutionalism' (2009) 16(2) *Indiana Journal of Global Legal Studies* 397. Schochet states: "There is hardly a modern state that does not have a formal constitution that purportedly establishes and defines its governmental institutions." Gordon Schochet, 'Introduction: constitutionalism, liberalism, and the study of politics' (1979) 20 *Nomos* 1, 5. Grimm writes: "it is striking that the constitutional idea has grown beyond its countries of origin and become a globally recognized concept." Dieter Grimm, 'The Function of Constitutions and Guidelines for Constitutional Reform' in Dieter Grimm, *Constitutionalism: Past, present, and future* (OUP 2016) 131. See also Dieter Grimm, 'The Achievement of Constitutionalism and its Prospects in a Changed World' in Petra Dobner and Martin Loughlin, *The Twilight of Constitutionalism?* (OUP 2010) 3; Martin Loughlin, 'The Constitutional Imagination' (2015) 78(1) *Modern Law Review* 1, 1-2.

³ In a similar vein Dyzenhaus comments that while all legal orders have a constitution, it is not clear what they share in having a constitution. David Dyzenhaus, 'The Idea of a Constitution' in David Dyzenhaus and Malcolm Thornburn, *Philosophical Foundations of Constitutional Law* (OUP 2016) 9. See also Mac Amhlaigh 2016 (n 2) 187. Barber writes "The principles of constitutionalism [...] do not seek to produce a single model of a constitution." See Nicholas Barber, 'Introduction: Constitutionalism' in Nicholas Barber, *The Principles of Constitutionalism* (OUP 2018) 1. Klabbers writes "while there is no exact definition of constitutionalism – and such precision would probably be impossible at any rate" Jan Klabbers, 'Constitutionalism Lite' (2004) 1(1) *International Organizations Law Review* 31, 32.

These clarifications are necessary exactly because there is not a uniform definition of the correct meaning of constitutionalism. They furthermore serve to highlight the novelty of using a constitutionalism lens to assess the standard of legitimacy in the CCR. Since this has never been done before, and since the meaning of constitutionalism is ambiguous, this chapter sets the scene for the construction of the compensatory constitutionalism lens (CCL) in chapter 4 by explaining the specific role of constitutionalism in this thesis. Section 2 focusses on the intersection of the three key themes of the thesis whereby it specifically hones in on the relationship between constitutionalism and climate change. Section 3 explains the added value of constitutionalism in the context of the CCR and explains the constitutional analogy. Sections 4 and 5 situate the use of constitutionalism in the assessment of the standard of legitimacy in the CCR through reference to constitutionalism beyond the state and critical responses thereto.

2 The intersection of climate change and constitutionalism

This chapter contributes to the assessment of the standard of legitimacy in the CCR by setting the scene for the construction and application of the CCL in the following chapters. This section specifically hones in on the intersection of climate change as a global, cumulative, interconnected issue, and constitutionalism as a familiar instrument used to address collective action problems. Chapter 1 introduced the three key themes of the thesis by placing them at an intellectual crossroads. It also explained that this thesis' argument of using a constitutionalism lens to identify and articulate legitimacy deficits and strengths within the CCR is constructive because it provides insight into the obstacles states parties face in engaging with the regime. Such obstacles provide unnecessary interference with states parties' efforts to achieve the objective of the CCR by means of global cooperation and coordination on the issue of climate change. In light of the time sensitive nature of climate change and the need to mitigate and adapt becoming increasingly urgent, it is of interest that any obstacles to cooperation and policy-making be identified and addressed.⁴ Therefore, this thesis aims to recast the narrative from that of 'lack of political will' to a more constructive debate around the actual obstacles states face in cooperating through the CCR.

The journey towards identifying the legitimacy strengths and deficits of the CCR starts by identifying the type of problem climate change presents. As chapter 1 explained, climate change as a "super wicked"⁵ problem presents states with a range of challenges. In particular, the cumulative and indivisible nature of climate change requires cooperation amongst states. In order to provide a platform for such cooperation, states established the CCR. This moves the issue of climate change into the territory of international law. Bringing climate change into the remit of a treaty based regulatory regime operated by an

⁴ See P Forster and others, 'Mitigation pathways compatible with 1.5°C in the context of sustainable development' in V Masson-Delmotte and others (eds), *Global warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5 °C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (IPCC In Press 2018).

⁵ Richard Lazarus, 'Super wicked problems and climate change: restraining the present to liberate the future' (2009) 94(5) *Cornell Law Review* 1153.

autonomous institutional arrangement (AIA) raises the issue of legitimacy.⁶ This is because states parties' status as sovereign actors requires the legitimation of the authority relationship that arises from the establishment and enablement of the AIA within the CCR and their membership thereto. To bridge the question of legitimacy in the CCR constitutionalism provides normative common ground amongst all states parties to the CCR. This is the first intersection between climate change and constitutionalism.

In the CCR states parties articulated their common objective on the issue of climate change as follows:

“to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.”⁷

What amounts to dangerous anthropogenic interference is not specified in the United Nations Framework Convention on Climate Change (UNFCCC)⁸ itself. Article 2(1)(a) of the Paris Agreement, however, gives an indication of what might amount to dangerous anthropogenic interference by articulating that states parties, in enhancing the implementation of the Convention, including its objective, aim to:

“strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty including by: (a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change”

The global nature of the issue of climate change further means that broad participation in the CCR is necessary in order for the regime to function productively. Broad participation, however, also means that states parties bring a large variety of interests that are at stake to the negotiation of climate governance. Considering the divergence of interests at stake for states parties and the variety of realities faced by different states parties, it is necessary for the CCR to demonstrate a high standard of legitimacy in order to convince each participant that the compromises made are necessary and fair. Only if the CCR is able to demonstrate a high level of legitimacy will it be able to unite states parties with their diverging interests and variety of contexts into a globally coordinated climate strategy that is able to achieve the ultimate objective set out in article 2 of the UNFCCC.

The tension between individual interests of states parties and their common objective as set out above provides the second intersection between climate change and constitutionalism.

⁶ An explanation of why the CCR can be described as having an AIA can be found in chapter 5.

⁷ Article 2 United Nations Framework Convention on Climate Change (UNFCCC).

⁸ United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC).

This is because constitutionalism as it is known in the context of the modern constitution provides the compass with which individuals within a state navigate their individual endeavours with the constraints that arise from communal living. Through constitutionalism, individuals within a legal order balance their autonomy whilst benefitting from the security provided by having the state protect and promote their status as autonomous, free, and equal actors. Similarly, constitutionalism can provide the architecture to legitimate the authority relationship in the CCR by balancing the autonomous nature of states parties with their need for constraints in order to achieve the common objective. An important role of the constitutionalism lens is therefore that it addresses the tension between the need for constraints and the principle of sovereignty. This demonstrates a point at which the topics of constitutionalism and climate change meet at an intellectual crossroads.

Having brought together the issue of climate change and constitutionalism one last clarification remains to be made before the remainder of the chapter can explain the added value, the analogy, and the academic context of the construction and application of the constitutionalism lens. This clarification is that the constitutionalism lens is being used in order to identify legitimacy deficits and strengths in the CCR as it currently exists. This means the point of the thesis is not to argue that the CCR is or is not constitutional. Rather, it instrumentalises the features of constitutionalism in order to draw out the 'expectation' aspect of legitimacy. The CCL is used to evaluate the extent to which the CCR demonstrates that it reflects states parties' legitimacy expectations as articulated through constitutionalism as a shared framework of social norms. The finding that constitutionalism represents near-universal normative common ground is significant because it makes it possible to construct a framework of analysis for the assessment of the standard of legitimacy. This lies at the crux of this thesis' original contribution which brings together legitimacy, constitutionalism, and climate change in order to constructively identify ways in which the globally coordinated response to climate change can be further improved.

Following on from chapters 2 and 3, which set out the concepts of legitimacy and constitutionalism, chapter 4 explains the construction of the CCL. The application of the CCL in chapters 5 and 6 brings the de facto legitimacy strengths and deficits of the CCR to light. This makes it possible for chapter 7 to conclude with an overall assessment of the standard of legitimacy in the CCR, providing a platform for discussion for future improvements of states parties' efforts to address climate change.

3 Viewing the climate change regime through a compensatory constitutionalism lens

A common understanding of constitutionalism is based on the concept of the modern constitution, which operates within the confines of the nation state. Prior to constructing the CCL in chapter four, it is therefore necessary to clarify what added value there is in using constitutionalism as a means of assessing the standard of legitimacy in the CCR. Considering the novelty of applying a constitutionalism lens to the CCR it is necessary to explain in greater detail the constitutional analogy on the basis of which this is done.

As noted in section 1, constitutionalism is an inherently ambiguous concept and there are different ways in which it can manifest. Explaining the function of constitutionalism is

therefore a conducive starting point for the discussion of the added value of assessing the standard of legitimacy in the CCR through the CCL which this thesis constructs in chapter 4. The way in which this chapter explains the core function of a constitution in abstract terms is grounded in existing approaches to constitutionalism but novel in the way it casts constitutionalism as an interaction between three constitutional elements. In order to explain fully, section 3.1 begins by setting out that constitutionalism is designed to address problems that require collective action and restraint of the exercise of individual autonomy by otherwise autonomous, free, and equal actors. The casting of the constitutional architecture into the triad of constitutional object, constitution, and constitutional subjects, is explained in subsection 3.2.

3.1 The added value of constitutionalism in light of state sovereignty

A constitutional approach is suitable when a group of autonomous and formally equal actors face two challenges in the realisation of a common long-term objective. The first challenge is that the realisation of the common long-term objective requires mutual cooperation. The second challenge is that the achievement of the long-term common objective is at risk of being frustrated by actors prioritising individual, short term interest over the common long-term interest.

The objective of the CCR is articulated in article 2 UNFCCC. It states that:

“The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.”

The preamble of the UNFCCC also notes that states parties acknowledge that “change in the Earth’s climate and its adverse effects are a common concern of humankind”⁹ and that “the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response”¹⁰. Such phrases are not included in the preamble of the Kyoto Protocol.¹¹ The preamble to the Paris Agreement,¹² does, however, echo similar sentiments in stating that states parties acknowledge “that climate change is a common concern of humankind.”¹³ Whilst it doesn’t go further to include additionally any explicit reference to the necessity of cooperation by

⁹ See the preamble to the UNFCCC, available at <<https://unfccc.int/resource/docs/convkp/conveng.pdf>> accessed 1 May 2020.

¹⁰ Idem.

¹¹ Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162 (Kyoto Protocol).

¹² Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) (Paris Agreement).

¹³ See the preamble to the Paris Agreement, available at <https://unfccc.int/sites/default/files/english_paris_agreement.pdf> accessed 1 May 2020.

all countries, the nature of it being a “common concern of humankind” implies that states parties should cooperate. After all, each state party is responsible to protect and promote the wellbeing of its citizens, who are inevitably a part of humankind. As such, if climate change is a common concern of humankind it is also a common concern of states parties.

As these phrases are specifically part of the preambles of the UNFCCC, the Kyoto Protocol, and the Paris Agreement, they do not create binding obligations. However, they do indicate that states parties are conscious of the fact that to address climate change, mutual cooperation is required. This indicates that states parties to the CCR perceive climate change to be an issue which requires mutual long-term cooperation. As such, climate change demonstrates the first type of challenge which invites a constitutional approach.

The second type of challenge is also relevant in the context of the CCR. Progress towards achieving its objective is likely to be frustrated if states parties prioritise national short-term interests. This is because of the cumulative nature of the concentration of greenhouse gas emissions in the atmosphere. If one of the states parties chooses to prioritise its own interests and conducts activities which result in greenhouse gas emissions, then this frustrates the ability of all states parties to achieve the common long-term objective. That states parties struggle to prioritise the common objective over their individual interests can in part be explained as a by-product of sovereignty.¹⁴

Considering the variety of meanings that can be attributed to sovereignty,¹⁵ a brief clarification as to its definition in the context of this thesis is necessary. For the purpose of the investigation of the authority relationship between the institutional arrangement of the CCR and states parties thereto, sovereignty refers to the autonomous nature of the state.¹⁶ The state is autonomous in its exercise of authority both internally and externally.¹⁷ Sovereignty as autonomy, however, does not imply that the sovereignty of the state is absolute. For example, the constitution imposes constraints on the state. Furthermore, a sovereign state can create binding obligations for itself in the context of international law. Sovereignty as autonomy therefore implies the ability of the state to bind itself, rather than its inability to be bound by legal obligation.

Nonetheless, the sovereign nature of the state and the importance of sovereignty for the existence both of the state itself and of international law, mean that any claim to authority over the state requires legitimation.¹⁸ For the state to be able to fulfil its purpose of protecting and promoting the interests of its citizens it must be able to act with a degree of

¹⁴ See also Tom Bingham, *The Rule of Law* (Penguin Books 2011), 116.

¹⁵ Stephen Krasner, *The Persistence of State Sovereignty. In International Politics and Institutions in Time* (OUP 2017).

¹⁶ Martin Loughlin, ‘Sovereignty’ in Martin Loughlin, *The Idea of Public Law* (OUP 2004 72). See also Martin Loughlin, ‘Why Sovereignty?’ In Richard Rawlings, Peter Leyland and Alison Young, *Sovereignty and the Law: Domestic, European and International Perspectives* (OUP 2013) 34.

¹⁷ Loughlin 2013 (n 16), 35.

¹⁸ For the importance of sovereignty for the existence of the state see for example, Nicholas Barber, ‘Sovereignty’ in Nicholas Barber, *The principles of constitutionalism* (OUP 2018) 21.

For the importance of sovereignty for the existence of international law see for example Matthias Kumm, ‘The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law’ (2013) 20(2) *Indiana Journal of Global Legal Studies* 605.

autonomy.¹⁹ Arbitrary interference with the internal matters of the state by other entities, be it other states, international organisations, or autonomous institutional arrangements of multilateral treaty regimes, can undermine the state's claim to sovereignty and with it the claim to protect and promote the interests of its citizens. Climate change presents a threat to the sovereignty of the state because the consequences of emissions producing activities of one state cannot be territorially limited and impact on the realities of other states. States must therefore either lose autonomy and suffer the impact of other states' activities in their territory, or maintain influence by cooperating globally.

However, since states exist in order to protect and promote a limited set of interests, the interests of their own citizens, states are naturally, and justly, suspicious of the motivations of other states.²⁰ The responsibility of a nation state does not extend to include the interests of citizens of other states. As a result, state A has no reason to expect state B to act in a way that is compatible with the protection and promotion of the interests of the citizens of state A. Indeed, state A might expect state B to act in a way that goes against the interests of the citizens of state A, if this brings a benefit to the citizens of state B. After all, the purpose of the state is to protect and promote the wellbeing of its own citizens, without regard to the interests of others outside its territory and jurisdiction.²¹ The nature of sovereignty therefore clashes with the need for cooperation on the issue of climate change. Yet it is nonetheless the responsibility of states to also protect and promote their citizens' interests in the light of the threats posed by climate change. Tension therefore exists between the states' responsibilities arising out of sovereignty and the consequences of its sovereignty which lead it to prioritise individual interests over communal ones.

In order for states to overcome their natural suspicions regarding the motivations and intentions of other states, the CCR needs to present constraints on the conduct of states parties in order to ensure that individual interests are not prioritised over the common

¹⁹ Dworkin comments that the legitimacy of the state is tied up with, amongst other things, its ability to "protect those over whom it claims a monopoly of force from the invasions and pillage of other peoples." The existential threat of climate change is in some way also a result of the pillaging by other peoples of natural resources, resulting in dangerously high concentrations of greenhouse gasses in the atmosphere. See Ronald Dworkin, 'A New Philosophy of International Law' (2013) 41(1) *Philosophy and Public Affairs* 2, 17.

²⁰ See Martin Loughlin, 'Governing' in Martin Loughlin, *The Idea of Public Law* (OUP 2004) 5, 6. This is also captured by Bingham who, writing on the topic of international environmental regulation and specifically including the emission of carbon into the atmosphere, states that: "In areas such as these the interests of different states are, in one sense, inherently antithetical. All states want to maintain prosperous fishing fleets, free to catch what they can. All wish to encourage profitable activity without restrictive environmental controls. All wish to maintain, and preferably enhance, their prosperity and the living standards of their people." Bingham 2011 (n 14) 116.

²¹ This in accordance with the traditional Westphalian model of sovereign states and international order. In contrast to the traditional model, Dworkin suggests a new philosophy of international law which attempts to accommodate the realities of the interconnectedness of states in the international order. Dworkin's proposal, while interesting, especially in the context of climate change law, does not represent the mainstream account of international law and the principle of state sovereignty at the time of writing. This thesis remains grounded in the mainstream approach and seeks to identify ways in which a bridge can be built towards a future understanding of international law which can accommodate the interconnectedness of a post-globalised international order. It does not, however, seek to propose quite as innovative an account of the international order as seen in Dworkin's proposal of a new philosophy of international law. See Dworkin 2013 (n 19).

objective.²² This means that to achieve the CCR's objective it is necessary to establish what the constraints ought to be and to establish a body that is separate from states parties which can supervise the implementation of the constraints. The consequences of state sovereignty, as described above, therefore demonstrates the characteristics of the second type of challenge which invites a constitutional approach. This is that individual actors, in the absence of constraints, face the temptation to prioritise individual interests over the common interest, even if this has a detrimental impact on the overall ability to achieve the common interest which the individual actors each share.

As has been stressed before, the global nature and cumulative aspect of greenhouse gas concentrations in the atmosphere makes it an empirical impossibility to stabilise greenhouse gas emissions in the atmosphere at levels that would achieve the objective set out in article 2 UNFCCC. The variety of interests at stake for states parties in the development of climate change policies, combined with the inherent suspicion amongst states parties, highlights the need for objective intervention in the interactions between states. The CCR provides for this intervention by establishing an institutional arrangement through which global climate policy is negotiated. Considering the sovereign nature of states parties the exercise of authority by this institutional arrangement must demonstrate that it is legitimate.

3.2 The constitutional analogy

Having acknowledged the usefulness of constitutionalism in the context of the CCR, the next step is to consider the way in which a constitutional analogy can be made. In abstract terms a constitutional arrangement consists of three elements. These are the constitution, the subjects of the constitution, and the object of the constitution.²³ The subjects of the constitution create the constitution. The constitution in turn creates the object of the constitution. The constitution furthermore regulates the interaction between its subjects and its object. In the context of the modern constitution, the subjects of the constitution are individuals and the object of the constitution is the state. In the CCR, the provisions of the UNFCCC together with the provisions of the Kyoto Protocol, and the Paris Agreement, represent the constitution. The subjects of the constitution are states parties. The object of the constitution is the autonomous institutional arrangement (AIA) of the CCR. The way in which these roles are allocated in the context of the CCR can be explained in more detail. With regards to the subjects of the constitution in the context of the CCR it suffices to be brief. The subjects of the constitution in the context of the CCR are those states who are states parties to the UNFCCC, the Kyoto Protocol, and the Paris Agreement. This is because the states parties are the actors who created the CCR and consented, through ratification, to be bound by the obligations arising from it. Since an international treaty only has binding effect on those states that have become states parties to the treaty, states parties are the subjects of the CCR.

²² This point is neatly summarised by Bingham when he writes: "each state knows (or ought to know) that other states will not take the stringent steps necessary to control climate change if it does not." Bingham 2011 (n 14), 116.

²³ Section 3.2.2 below explains how the object of the constitution is distinct from the object and purpose of a treaty.

3.2.1 Constitutional provisions

The constitution can exist either in a written or unwritten form. For this reason, the term 'constitutional provisions' is used, instead of the term 'constitution', throughout the remainder of this thesis. This refers to the content of the constitution rather than to a form. Whether the provisions are unwritten, a collection of written and unwritten rules, or written rules, the term provisions covers all possible scenarios. The Oxford Legal Dictionary describes the constitution as consisting of "the rules and practices that determine the composition and functions of the organs of central and local government in a state and regulate the relationship between the individual and the state."²⁴ Wade and Bradley's definition also includes reference to a "collection of rules which establish and regulate or govern the government."²⁵ Similarly, Dicey describes the constitution as a set of "rules which directly or indirectly affect the distribution or exercise of the sovereign power in the state."²⁶

The constitution as a set of rules is further envisioned as a form of "contracts drawn up by 'the people' to establish and limit the powers of governing institutions."²⁷ By way of analogy it is possible to identify the provisions of the UNFCCC, the Kyoto Protocol, and the Paris Agreement as the set of rules, which states parties have drawn up in order to establish and limit the powers of the institutional arrangement of the CCR. The analogy of treaty provisions as a set of rules that states parties have drawn up can, of course, be applied to any treaty. However, the analogy in question goes further than merely identifying the reaching of agreement between states on specific rules they are to follow. The CCR not only creates a set of rules that indicate obligations for states parties. It also establishes an institutional arrangement through which the continued development of the substantive content of the regime takes place. In doing so, CCR is not only a set of rules drawn up by states, but specifically a set of rules drawn up to establish and limit the powers of the institutional arrangement of the CCR. Thus fulfilling the description of a constitution as a contract drawn up to establish and limit the powers of governing institutions.

It must be noted that Loughlin's definition refers specifically to governing institutions. This means it is necessary to qualify whether the provisions of the UNFCCC, the Kyoto Protocol, and the Paris Agreement establish governing institutions. According to Loughlin, "as a general phenomenon, the activity of governing exists whenever people are drawn into association with one another."²⁸ Continuing the analogy that states parties to the CCR play the role of individuals (or as Loughlin describes it 'peoples') then it is possible to say that states parties are drawn into association with one another through the CCR.

The UNFCCC, being a framework convention, establishes most of the CCR's institutional arrangement. In particular, it establishes the four key bodies which represent the CCR's AIA. Nonetheless, the Kyoto Protocol and the Paris Agreement should also be considered as part

²⁴ J Law and E Martin, 'Constitution' in *A Dictionary of Law* (OUP 2014).

²⁵ E Wade and others (eds), *Constitutional and administrative law* (tenth edn Longman 1993), 4-5.

²⁶ Albert Dicey, *Introduction to the study of the law of the constitution*. (Eighth edn Macmillan 1915), 22-30.

²⁷ Martin Loughlin, 'The Constitutional Contract' in Martin Loughlin, *Foundations of Public Law* (OUP 2010) 275.

²⁸ Martin Loughlin 2004 (n 16), 5.

of the constitutional provisions. While the Kyoto Protocol and the Paris Agreement rely to some extent on the institutional arrangement put in place by the UNFCCC, they also contribute to the enablement and constraint of the regime's institutional arrangement, create obligations for states parties, and further develop the content of the CCR. The way in which the Kyoto Protocol and the Paris Agreement do this is discussed in chapter 5. To leave out examination of the Kyoto Protocol and the Paris Agreement in favour of isolating the UNFCCC would therefore not provide a complete picture of the CCR. This demonstrates that to look at the UNFCCC in isolation would be to neglect the full scope of the CCR. Therefore, this thesis considers the provisions of all three treaties of the CCR in its constitutional analogy.

3.2.2 Object of the constitution

The AIA of the CCR can be identified as the object of the constitution. The term object of the constitution is borrowed from Grimm, who describes the emergence of the state as providing a suitable object for the constitution.²⁹ The term object therefore refers to the institutional bodies which, taken together, provide for the governing activities of the constitutionalised order. The use of the term object of the constitution should not be confused with the object and purpose of a treaty.

In the case of the constitution of the nation state the object of the constitution is the state and the mode of governance it creates.³⁰ One critique against constitutionalism beyond the state is the claim that the absence of a state means there is no suitable constitutional object beyond the context of the state.³¹ This thesis argues that the AIA put in place by the CCR can be identified as an object of constitutionalisation. Returning to the example of the modern constitution, it is important to note that the state, which is the object of the constitution, is comprised of governing institutions and governing entities.³² The Oxford Concise Dictionary of Politics describes the state as a “distinct set of political institutions whose specific concern is with the organization of domination, in the name of the common interest, within a delimited territory.” Both the state and the CCR therefore demonstrate institutional arrangements which are established to act for the purpose of a common interest. In the case of the state it is the protection and promotion of the wellbeing of citizens, in the case of the CCR it is the organisation and coordination of policies that lead to the stabilisation of greenhouse gas concentrations in the atmosphere.³³

²⁹ Dieter Grimm, 'Conditions for the Emergence and Effectiveness of Modern Constitutionalism' in Dieter Grimm, *Constitutionalism: Past, Present, and Future* (OUP 2016) 41.

³⁰ See Dieter Grimm, 'The Origins and Transformation of the Concept of the Constitution' in Dieter Grimm, *Constitutionalism Past, Present, and Future* (OUP 2016) 3.

³¹ See Grimm 2016 (n 29).

³² Peter Burnham, 'State', in Peter Burnham, *The Concise Oxford Dictionary of Politics and International Relations* (OUP 2018) available at

<http://www.oxfordreference.com.ezproxy.is.ed.ac.uk/view/10.1093/acref/9780199670840.001.0001/acref-9780199670840-e-1311> accessed 15 July 2020.

³³ "Stabilization of greenhouse gas concentrations in the atmosphere" is paraphrased from article 2 UNFCCC which is cited in full on page 3 of this chapter. The cooperation and coordination aspect follows from the near universal membership of the CCR.

Importantly, the CCR creates a platform for the ongoing cooperation between states in order to facilitate the pursuit of the regime's objective. The CCR is therefore more than a treaty that identifies an objective and distributes rights and obligations regarding the achievement of this purpose. In order to facilitate this ongoing cooperation, the CCR creates what Churchill and Ulfstein describe as an AIA.³⁴ AIAs exist to develop the normative content of the regulatory regime established by treaty agreement and to supervise the states parties' implementation of and compliance with that regime.³⁵ The role of the AIA within the CCR is discussed in detail in chapters 5 and 6.

To this end the constitutional provisions of the CCR³⁶ establish four bodies which constitute an AIA. Articles 7-10 of the UNFCCC establish the Conference of the Parties (COP)³⁷, the Secretariat,³⁸ the Subsidiary Body for Scientific and Technological Advice (SBSTA),³⁹ the Subsidiary Body for Implementation (SBI),⁴⁰ and a financial mechanism.⁴¹ The COP also acts as the Meeting of the Parties for the Kyoto Protocol and for the Paris Agreement.⁴² These bodies are all tasked with different aspects of developing the regime's normative content and supervising and facilitating the regime's implementation and member parties' compliance with it. As such, the AIA can be said to constitute a distinct set of bodies whose concern is the organisation of activities towards a common interest.

Churchill and Ulfstein explain that the word 'autonomous' is used to indicate that the institutional arrangements in question are freestanding from states parties and existing IGOs.⁴³ An additional element of autonomy can be noted in the fact that these institutional arrangements generally speaking can be observed to have their own law-making powers

³⁴ Robin Churchill and Geir Ulfstein, 'Autonomous institutional arrangements in multilateral environmental agreements: a little-noticed phenomenon in international law' (2000) 94(4) *American Journal of International Law* 623.

³⁵ *Idem*.

³⁶ As discussed above, these are comprised of the provisions of the UNFCCC, the Kyoto Protocol, and the Paris Agreement.

³⁷ Article 7(1) UNFCCC "A Conference of the Parties is hereby established."

³⁸ Article 8(1) UNFCCC "A secretariat is hereby established."

³⁹ Article 9(1) UNFCCC "A subsidiary body for scientific and technological advice is hereby established to provide the Conference of the Parties and, as appropriate, its other subsidiary bodies with timely information and advice on scientific and technological matters relating to the Convention. This body shall be open to participation by all Parties and shall be multidisciplinary. It shall comprise of government representatives in the relevant field of expertise. It shall report regularly to the Conference of the Parties on all aspects of its work."

⁴⁰ Article 10(1) UNFCCC "A subsidiary body for implementation is hereby established to assist the Conference of the Parties in the assessment and review of the effective implementation of the Convention. This body shall be open to participation by all Parties and comprise government representatives who are experts on matters related to climate change. It shall report regularly to the Conference of the Parties on all aspects of its work."

⁴¹ Article 11(1) UNFCCC "A mechanism for the provision of financial resources on a grant or concessional basis, including the transfer of technology, is hereby defined. It shall function under the guidance of an be accountable to the Conference of the Parties, which shall decide on its policies, programme priorities and eligibility criteria related to this Convention. Its operation shall be entrusted to one or more existing international entities."

⁴² Article 13(1) Kyoto Protocol "The Conference of the Parties, the supreme body of the Convention, shall serve as the meeting of the Parties to this Protocol". Article 16(1) Paris Agreement "The Conference of the Parties, the supreme body of the Convention, shall serve as the meeting of the Parties to this Agreement."

⁴³ Their article discusses a number of autonomous institutional arrangements from a variety of multilateral international environmental agreements, including the CCR. See Churchill and Ulfstein 2000 (n 34).

and compliance mechanisms.⁴⁴ Whilst it remains debatable whether the COP of the CCR can be described specifically as having law-making powers, it certainly has decision-making powers which it can use to influence the conduct of states parties and supervise their implementation of the CCR. For example, the COP has significantly expanded the scope of the CCR by developing a score of further bodies which aim to promote effective implementation of the treaty. In addition to the bodies listed above which are established through the treaty provisions of the CCR, the COP created: the Adaptation Committee (AC)⁴⁵, the Standing Committee on Finance (SCF)⁴⁶, the Paris Capacity Building Committee⁴⁷, the Technology Mechanism (consisting of a Technology Executive Committee and a Climate Technology Centre and Network⁴⁸), the Consultative Group of Experts on National Communications from non-Annex I Parties (CGE)⁴⁹, and the Least Developed Countries Expert Group (LEG)⁵⁰. In addition, the COP established four additional bodies in its role as COP/MOP to the Kyoto Protocol. These bodies exist specifically in relation to the Kyoto Protocol. They are: The Compliance Committee⁵¹, the Joint Implementation Supervisory Committee⁵², the Executive Board of Clean Development Mechanism (EBCDM)⁵³, and the

⁴⁴ Churchill and Ulfstein 2000 (n 34).

⁴⁵ Conference of the Parties, 'Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010' UN Doc FCCC/CP/2010/7/Add.1 (FCCC/CP/2010/7/Add.1) available at <<https://unfccc.int/sites/default/files/resource/docs/2010/cop16/eng/07a01.pdf>> accessed 14 July 2020. See page 5 paragraph 20.

⁴⁶ FCCC/CP/2010/7/Add.1 see page 18, paragraph 112.

⁴⁷ Conference of the Parties, 'Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015' UN Doc FCCC/CP/2015/10/Add.1, Decision 1/CP.21 available at <<https://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf#page=10>> accessed 14 July 2020, see page 10 paragraph 71.

⁴⁸ FCCC/CP/2010/7/Add.1 see page 19 paragraph 117.

⁴⁹ Originally established through Conference of the Parties, 'Report of the Conference of the Parties on its fifth session held at Bonn from 25 October to 5 November 1999' UN Doc FCCC/CP/1999/6/Add.1 <<https://unfccc.int/sites/default/files/resource/docs/cop5/06a01.pdf>> accessed 14 July 2020, see page 19 paragraph 3. In order to improve national communications (NCs) and the Biennial Update Reports (BURs) from developing country Parties through technical advice and support, in 1999 the COP further established the Consultative Group of Experts on National Communications from non-Annex I Parties (CGE). See The Conference of the Parties, 'Work of the Consultative Group of Experts on National Communications from Parties not included in Annex I to the Convention' UN Doc FCCC/CP/2013/10/Add.2/Rev.1, Decision 19/CP.19 available at <http://www.ciesin.columbia.edu/repository/entri/docs/cop/FCCC_COP19_dec19.pdf> accessed 14 July 2020.

⁵⁰ Conference of the Parties, 'Report of the Conference of the Parties on its seventh session, held at Marrakesh from 29 October to 10 November 2001, UN Doc FCCC/CP/2001/13/Add.4 (2002), Decision 29/CP.7' available at <<https://unfccc.int/resource/docs/cop7/13a04.pdf#page=14>> accessed 1 May 2020. See page 14. See also Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, 'Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its first session, held at Montreal from 28 November to 10 December' UN Doc FCCC/KP/CMP/2005/8/Add. 3 (FCCC/KP/CMP/2005/8) available at <<https://unfccc.int/sites/default/files/resource/docs/2005/cmp1/eng/08a03.pdf>> accessed 14 July 2020. See page 93 Roman Numeral II. At CMP1, the procedures and mechanisms relating to compliance under the Kyoto Protocol were adopted (in decision 27/CMP.1).

⁵² Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, 'Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its first session, held at Montreal from 28 November to 10 December' UN Doc FCCC/KP/CMP/2005/8/Add.2, Decision 10/CMP.1 available at

<<https://unfccc.int/resource/docs/2005/cmp1/eng/08a02.pdf>> accessed 14 July 2020. See page 14.

⁵³ Article 12 Kyoto Protocol.

Adaptation Fund Board⁵⁴. In light of these powers it remains relevant to describe the institutional arrangement of the CCR as being an AIA rather than merely a collection of bodies with limited powers. The identification of the key bodies which together constitute the AIA of the CCR is discussed in chapter 5.

3.3 The constitutional analogy and legitimacy

To summarise the above, the constitutional roles in the case of the CCR can be allocated as follows. States parties to the CCR can be identified as the subjects of the constitution. The role of constitution is fulfilled by the provisions of the UNFCCC, the Kyoto Protocol, and the Paris Agreement. These treaties articulate the objective of the CCR and establish the AIA, which in turn fulfils the role of the object of the constitution. Explaining the constitutional analogy on which this thesis relies contributes towards the thesis' overall goal of assessing the standard of legitimacy in the CCR by identifying the specific authority relationships that require legitimation as the role of the AIA in constraining and influencing the conduct of otherwise autonomous, equal, and free states parties. Identifying that states parties in their capacity as sovereign entities are subjects of the constitution highlights that they are subject to the constitutional provisions of the CCR. It also highlights that states parties and the AIA stand in an authority relationship to each other. The authority of the AIA over states parties to the CCR manifests in two ways. The first is the AIA's responsibility to further develop the the commitments states parties have under the CCR. Secondly, the AIA is tasked with the oversight of the implementation of the treaty and the supervision of states parties' compliance. In abstract terms these two activities would indicate that the AIA has a certain degree of authority over states parties. Chapters 5 and 6 take a closer look at the extent to which there is a substantive exercise of authority by the AIA over states parties and the degree to which this can be described as being 'autonomous' from the specific consent of states parties.

The constitutional analogy further builds on the content of the previous chapter by clarifying that in the context of the CCR the AIA is the legitimacy claimant, states parties are the subjects of legitimacy, and constitutionalism may provide for the grounds of legitimacy (the latter is further developed in chapter four). In doing so this section has brought together the three themes of the thesis.

4 Criticism against constitutionalism as legitimacy in authority relationships beyond the state

Using the compensatory constitutionalism lens, the construction and content of which are explained in chapter 4, to assess the standard of legitimacy in the CCR presumes that the use of constitutionalism's literature is helpful and appropriate in the context of the CCR. The helpful aspect of this presumption has already been explained in section 3.1. This section focusses on the appropriateness of using constitutionalism in the context of the CCR. In order to do this, subsection 4.1 highlights some of the main critiques of the use of

⁵⁴ Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol 'Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its third session, held in Bali from 3 to 15 December 2007' UN Doc FCCC/KP/CMP/2007/9/Add.1, Decision 1/CMP/3 available at <<https://unfccc.int/resource/docs/2007/cmp3/eng/09a01.pdf>> accessed 14 July 2020.

constitutionalism beyond the state. This is followed up in subsections 4.2-4.4 with three different types of responses to such criticisms. Engaging with the critique against the different uses of constitutionalism beyond the state serves to justify the use of constitutionalism in the context of the CCR. Simultaneously, it also serves to situate the construction of the CCL within the wider literature on constitutionalism beyond the state. This highlights the intellectual parentage of the CCL whilst also identifying why it is innovative. Contextualising the use of constitutionalism as a means of assessing the standard of legitimacy in the CCR provides the foundation for the further explanation of the constructive overlap where constitutionalism and legitimacy meet on an intellectual crossroads in chapter 4.

The use of constitutionalism as a means of legitimation in international law is not new. The trend has been observed and commented on repeatedly. For example, Weiler has noted, in the context of the European Union (EU) that “The idea of a constitution is presented as indispensably part and parcel of a legitimating reform package”.⁵⁵ Similarly, Klabbers comments on the trend in writing that “the very term constitution, and its derivatives, (constitutionalism, constitutionalisation) also carries with it an element of legitimacy: a constitutional regime is a legitimate regime.”⁵⁶ Whilst Weiler and Klabbers both observe this trend, they also both remain highly sceptical of constitutionalism’s ability to act as a vehicle to bring legitimacy to authority relationships beyond the state. They are not alone in their scepticism in this regard.⁵⁷ According to d’Aspremont “constitutionalism-bashing scholarship dramatically outweighs literature promoting constitutionalist thinking” in the discussions thereof among international lawyers.⁵⁸ To justify its use in relation to the CCR therefore means it is unavoidable to engage from the outset with the concerns articulated in the criticism leveraged against the various proposals for constitutionalism beyond the state.

4.1 Two initial responses to the critics: definitions and relevance

Those who criticise the use of constitutionalism as a means of legitimation in a non-state context do not categorically deny the possibility of the existence of a connection between constitutionalism and legitimacy. Rather, they argue that the specific circumstances which imbue constitutionalism with legitimacy in the state context are absent in the international context. For example, Weiler describes Europe’s constitutional architecture as being “a

⁵⁵ Joseph H H Weiler, ‘In defence of the status quo: Europe’s constitutional Sonderweg’ in Joseph H H Weiler and Marlene Wind (eds), *European Constitutionalism Beyond the State* (CUP 2003) 7.

⁵⁶ Klabbers 2004 (n 3) 47.

⁵⁷ For a summary of the illegitimacy critique against constitutionalism beyond the state see Neil Walker, ‘Taking Constitutionalism Beyond the State’ (2008) 56(3) *Political Studies* 519. For more in-depth discussion of the sceptical position see also Cormac Mac Amhlaigh, ‘Who’s Afraid of Suprastate Constitutional Theory? Two Reasons to be Sceptical of the Sceptics’ in Wojciech Sadurski, Michael Sevel and Kevin Walton (eds), *Legitimacy: The State and Beyond* (OUP 2019).

⁵⁸ Jean d’Aspremont, ‘International Legal Constitutionalism, Legal Forms and the Need for Villains’ in Anthony F Lang and Antje Wiener (eds), *Handbook on Global Constitutionalism* (Edward Elgar 2017) 155. Also cited by in Mac Amhlaigh 2019 (n 57).

constitution without some of the classic conditions of constitutionalism.”⁵⁹ If the context which lends constitutionalism its connotations with legitimacy is absent, then there exists a danger that constitutional language could be used to artificially create an illusion of legitimacy.⁶⁰ This leads to the observation that, considering the lack of the specific circumstances beyond the nation state that are used to legitimate constitutionalism within the nation state, “The aspiration contained in the concept of constitutionalism can therefore not even be approximately realised on the global level.”⁶¹

There are three ways in which this critique can be countered. The first is to identify what specifically the critique considers to be critically absent in the context of constitutionalism beyond the state compared to the concept of the modern constitution and argue that the supposedly critical feature is in fact present beyond the nation state. This response boils down to disagreement about definitions. The critic will most likely adhere to narrow definitions which only capture the existing status quo of constitutionalism within the state. This is then countered by a proponent of constitutionalism beyond the state who sees in the definition a core value, the peripheries of which are not strict and confining but flexible and adaptable to the emergence of new types of authority relationships. A template of this approach is seen, for example, in Walker’s article ‘Taking Constitutionalism Beyond the State’.⁶² There, Walker categorises the various ways in which scholars attempt to discredit the use of constitutionalism beyond the state and proposes arguments through which these criticisms can be countered.⁶³ A similar approach is taken in Peters’ article ‘The Merits of Global Constitutionalism’, which identifies and responds to ten different critiques against constitutionalism beyond the state.⁶⁴

The second type of response is to argue that the specific circumstance which is necessary for legitimacy through constitutionalism within the state is simply not relevant to the conceptualisation of constitutionalism beyond the nation state. An example of this approach is found in Teubner’s work, who specifically warns his audience of the inadequacy of measuring the international against yardsticks of the national.⁶⁵

Ultimately, these two responses to the illegitimacy critique do not resolve whether constitutionalism can be used as a vehicle to import legitimacy in a non-state context. This is because at the heart of the debate lies a disagreement regarding the proper definition and boundaries of constitutional terminology. These discussions nonetheless remain useful. That is because they highlight the ambiguity noted in the introduction of this chapter as to what

⁵⁹ Joseph H H Weiler, ‘Federalism Without Constitutionalism: Europe’s Sonderweg’ in Kalypso Nicolaidis and Robert Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United Nations and the European Union* (OUP 2003) 9.

⁶⁰ Deborah Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (OUP 2005); Also cited by Peters in Peters 2009 (n 2) 400.

⁶¹ Dieter Grimm ‘The Constitution in the Process of Denationalization’ (2005) 12(4) *Constellations*, 447, 460.

⁶² Neil Walker, ‘Taking Constitutionalism Beyond the State’ (2008) 56(3) *Political Studies* 519.

⁶³ According to Walker most critiques can be reduced to four types of objection, which he terms inappropriateness, inconceivability, improbability, and illegitimacy. See Walker 2008 (n 62) 520.

⁶⁴ Peters 2009 (n 2).

⁶⁵ Günther Teubner, ‘Global Bukowina: Legal Pluralism in the World Society’ in Günther Teubner, *Global law without a state (Studies in modern law and policy)* (Aldershot 1996) 4.

exactly a constitution entails and ways in which these ambiguities can be constructively exploited.

Highlighting the ambiguity that exists regarding the conceptualisation of the constitution is further useful because it serves as a reminder that constitutionalism demonstrates the ability to adapt to the circumstances within which it is called to operate. This adaptability can be seen as a strength. Seen from this perspective, the ambiguity regarding the appropriate definition of constitutionality is a tribute to constitutionalism's adaptability and usefulness in a variety of contexts. Open-mindedness regarding the 'proper' definitions of constitutionalism, as displayed by the first type of response to the criticism against constitutionalism beyond the state, ought therefore to be embraced. Furthermore, a review of the literature on constitutional discourse provides a reminder that various uses have existed throughout the history of law.⁶⁶ As such, it is possible to determine past, present, and prospective conceptualisations of the constitution, constitutionalism, and the processes of constitutionalisation that these entail. For these reasons this thesis aligns itself with those who interpret constitutionalism to represent a solid core meaning with a flexible periphery that remains responsive to the needs of a variety of potential contexts. This approach is also further explained in chapter 4 where the construction of the CCL focusses on necessary features of constitutionalism without identifying sufficient features of constitutionalism.

4.2 A third response: compensatory constitutionalism

The third response turns the tables on the critics. Rather than arguing shortcomings in the context beyond the state that would make constitutionalism unsuitable, this approach identifies shortcomings within the context of the state which reveal that it no longer can achieve the expectations set out by constitutionalism. These shortcomings arise as global issues place considerable strain on the state constitution.⁶⁷ The focus of the third approach therefore uses constitutionalism beyond the state as a means of addressing legitimacy shortcomings in the domestic constitution rather than arguing for legitimacy through constitutionalism beyond the state on its own merits, as if separate from domestic constitutionalism. The third approach follows from Peters' work and is aptly named 'compensatory constitutionalism'. It argues that where global problems place a strain on the state and its ability to achieve the expectations set out by constitutionalism, a global dimension of constitutionalism ought to kick in.⁶⁸ Global issues can contribute to the de-legitimation of the state where scenarios arise within which individual states are not capable of living up to the expectations of constitutionalism. The answer to globalised problems needs to arise from a globalised take on constitutionalism.

⁶⁶ On the topic of the use of constitutional language prior to the modern constitution see: Charles Howard McIlwain, *Constitutionalism Ancient and Modern* (Cornell University Press 1947); Jill Harries, 'Global constitutionalism: the ancient worlds' in Anthony Lang and Antje Wiener (eds), *Handbook on Global Constitutionalism* (Edward Elgar 2017) 23-34; Dieter Grimm, 'The Constitution in Historical Perspective', *Constitutionalism Past, Present, and Future* (Oxford University Press 2016) 89; Stephen Holmes, 'Constitutions and Constitutionalism' in M Rosenfeld and A. Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 189.

⁶⁷ Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19(3) *Leiden Journal of International Law* 579.

⁶⁸ Speaking of compensatory constitutionalism generally, without referring specifically to climate change, Peters makes this point in Peters 2006 (n 67).

The shift in perspective situates the ‘problem’ within the state rather than the lack of specific circumstances beyond the state. Peters argues that “state constitutions are no longer ‘total constitutions’.” The solution she proposes is to ask for “compensatory constitutionalism on the international plane.”⁶⁹ Compensatory constitutionalism therefore does not need to prove that it can demonstrate all the circumstances that are present in the context of the modern constitution in order for it to be used as a legitimising strategy. Rather, it relies on the combined circumstances of the state and the international plane. This provides a more realistic approach to using constitutionalism as a legitimating strategy. To rely only on the circumstances of the state provides an incomplete picture because the state exists entwined with others in the international community. To rely on a legitimating strategy, modern constitutionalism, which does not fully acknowledge the impacts of such entwinement is to set up unrealistic legitimacy expectations.

Compensatory constitutionalism allows the constitution of the state to maintain its primacy by focusing on ways in which the international can compensate for shortcomings arising at the level of the state constitution. As the source of legitimacy deficit arises in the context of the modern constitution, which was not designed to respond to global problems such as climate change, compensatory constitutionalism provides a legitimisation strategy which allows the state to continue to rely on its constitution and the sovereignty it confers upon the state. This means that the state remains the central focus.

In the creation of the constitutionalism lens, this thesis follows Peters’ approach of compensatory constitutionalism. This approach responds to the criticism discussed above by engaging with the circumstances that are considered to imbue the state constitution with legitimacy and identifying that these circumstances have changed in the light of global problems. Peters points out that the rise of global problems which require governance activities on a globalised scale defeat the state constitution’s claim to being able to create a comprehensive legal order.⁷⁰ Climate change is one of these global problems. The cumulative nature of the greenhouse gas concentrations in the atmosphere requires a globally contrived response. In order for the creation of this response to be legitimate, it is necessary that the CCR is able to protect and enhance constitutional principles, especially where these are strained at the domestic level.⁷¹ Using Peters’ approach to compensatory constitutionalism beyond the state furthermore helps this thesis further develop the literature by identifying constitutionalism as a shared normative value amongst all states parties to the CCR and using this finding to draw out objective standards of measurement which reflect the legitimacy expectations of states parties.

By basing the constitutionalism lens used in this thesis on a form of compensatory constitutionalism, the danger of using constitutionalism as a smokescreen to obscure legitimacy deficits is avoided.⁷² Instead, the compensatory approach brings legitimacy

⁶⁹ Peters 2006 (n 67) 579.

⁷⁰ Peters 2006 (n 67).

⁷¹ Speaking of compensatory constitutionalism generally, without referring specifically to climate change, Peters makes this point in Peters 2006 (n 62).

⁷² The reason the CCL is referred to as a form of compensatory constitutionalism here is because it is different from Peters’ use of compensatory constitutionalism, which looks at international law in its entirety. In

questions to the foreground. Peters draws attention to the fact that the modern constitution was not developed with a globalised world in mind.⁷³ Therefore, it makes sense to consider the ways in which constitutionalism must adapt in order to continue to provide the legitimating role it plays in the context of the state. The compensatory approach therefore highlights that, even in the aftermath of globalisation and increased interdependencies among states, the sovereign state remains a central concept in law and international law. Compensatory constitutionalism plays a role in bringing the role of the state as a legitimate actor to the foreground and seeks to enhance the status of the sovereign state in light of contemporary challenges it faces, such as climate change.⁷⁴

4.3 Constructing the constitutionalism lens in light of the critical perspectives

The construction of the CCL takes all the above into consideration but especially emphasises the compensatory aspect promoted by Peters. Nonetheless, However, it also reflects the approach which argues that the definitions of the features of constitutionalism ought not to be interpreted so narrowly as to make the modern constitution the only means of achieving a constitutional order. This aspect specifically comes to the foreground in chapters 5 and 6 where a definition of each of the necessary features of constitutionalism is provided. Each of these definitions focus on the meaning of the individual features of constitutionalism at an abstract level arguing that even amongst states parties these features manifest differently within their constitutional order. Based on this then, there is an element of Teubner's approach incorporated in that each necessary feature of constitutionalism is defined in a way that is appropriate to the context of the CCR

5 Modern constitutionalism, constitutionalism beyond the state, and global environmental constitutionalism as stepping stones towards the compensatory constitutionalism lens for the climate change regime

The construction of the CCL is built on, and yet distinct from, existing scholarship relating to the modern constitutionalism, constitutionalism beyond the state, and global environmental constitutionalism. Whilst the construction of the CCL is informed by each of these bodies of literature, the original contribution of this thesis is that it constructs the CCL specifically to address the context of the CCR as a treaty regime which is designed to assist states to globally cooperate on the complex issue of climate change. The continuities between the content of the CCL and aforementioned bodies of literature can be explained by two factors. Constructing the CCL for the CCR on the basis of these bodies of literature presents a natural progression in academic endeavours. Modern constitutionalism provides the starting point because it represents the current approach to legitimate authority in the coordination of autonomous, equal, and free actors towards a common objective which

comparison, the way this thesis constructs the CCL is specific to the more limited context of the CCR. This does not exclude the possibility to further develop the CCL, in future, to become applicable for a wider range of contexts.

⁷³ Peters 2006 (n 67).

⁷⁴ Chapter 4 looks at the specific threats sovereign states experience in light of the issue of climate change and how the CCL can be used to identify legitimacy strengths and deficits in order to identify what the CCR does to prevent these threats from materialising.

cannot be achieved by them individually.⁷⁵ However, as Peters points out, modern constitutionalism becomes strained in light of globalisation processes and the increased interdependencies between sovereign states that follow therefrom. This, amongst other reasons, has inspired a rich body of literature on the topic of constitutionalism beyond the state.⁷⁶

Constitutionalism beyond the state has, for many years, envisioned a multitude of approaches through which legitimate authority can be maintained in increasingly internationalised contexts. All of these approaches take modern constitutionalism as their starting point and continue to envision a variety of ways in which to expand it beyond the state context for a variety of reasons. The result is a wildly diverse body of literature that falls within the category of constitutionalism beyond the state.⁷⁷ This diversity demonstrates the inherent ambiguities that can exist within the notion of constitutionalism. It also demonstrates that such ambiguities are a conceptual asset, because it makes it possible to rely on the normative strengths of constitutionalism and the legitimacy benefits it provides in the myriad of authority relationships that may arise in the contemporary, globalised, interconnected, and interdependent world.

In addition to modern constitutionalism and constitutionalism beyond the state, global environmental constitutionalism provides a useful resource. Taking inspiration from domestic environmental constitutionalism and constitutionalism beyond the state in its various forms, global environmental constitutionalism seeks to elevate environmental care to the constitutional sphere.⁷⁸ In doing so, global environmental constitutionalism integrates environmental care into the dominant framework of social norms, which the constitution seeks to protect, promote, and reflect.

Global environmental constitutionalism provides relevant insights for the construction of the CCL because there is a certain overlap with the concerns deliberated in global environmental constitutionalism and the context of the CCR. Climate change is after all an aspect of the environment.⁷⁹ Furthermore, both the CCL and global environmental constitutionalism seek to instrumentalise constitutionalism in order to achieve a certain objective. Importantly, though the goal of the CCL is to identify legitimacy strengths and deficits in the authority relationship between the CCR's AIA and states parties. This goal is distinctively more narrow than the ambitious goal of global environmental constitutionalism which seeks, amongst other goals, to elevate environmental care into the dominant framework of social norms.⁸⁰ In doing so global environmental constitutionalism essentially seeks to transform legitimacy expectations so that in future the exercise of authority is only

⁷⁵ As evidenced by the observations in section 1 that all states parties to the CCR are constitutional states.

⁷⁶ For an overview of the various branches of constitutionalism beyond the state Christine Schwöbel, 'Situating the debate on global constitutionalism' (2010) 8(3) *International Journal of Constitutional Law* 611.

⁷⁷ Referred to by Cormac as a 'global constitutional cacophony' See Mac Amhlaigh 2016 (n 2).

⁷⁸ For example, see Louis Kotzé, 'Global Aspects of Constitutionalism' in Louis Kotzé, *Global Environmental Constitutionalism* (Hart Publishing 2016); James May and Erin Daly, *Global Environmental Constitutionalism* (CUP 2014); Klaus Bosselman, 'Global environmental constitutionalism: mapping the terrain' (2015) 21(17) *Widener Law Review* 172.

⁷⁹ Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani, *International Climate Change Law* (OUP 2014) 5.

⁸⁰ Kotzé 2016 (n 78), May and Daly 2014 (n 78), Bosselman 2015 (n 78).

legitimate insofar as the exercise of authority takes environmental care into consideration in all of its activities.⁸¹

Subsections 5.1-5.3 elaborate in further detail how the use of the CCL in the context of the CCR relies on and yet distinguishes itself from these three bodies of literature.

5.1 Distinguishing the compensatory constitutionalism lens for the climate change regime from modern constitutionalism

Since the application of the constitutionalism lens does not serve the purpose of arguing that the CCR exists as a comprehensive legal order identical to that of the nation state, it need not necessarily live up to the exact same constitutional standards of the nation state. The consequence of this specific, limited, and instrumental application of the constitutionalism lens is that it makes it possible to argue that certain constitutional features are more relevant, or less relevant, for the identification of legitimacy strengths and deficits in the CCR than others. In brief, since the CCR does not aspire to create a comprehensive legal order to the same extent that the nation state does, it need not live up to the same constitutional standards of the nation state.⁸²

Attaching more value to certain constitutional features over others in the context of the CCR is not an act of cherry-picking. Firstly, the features included in the CCL are selected on the basis of the legitimising merit they can supply in the context of global climate governance and specifically the AIA's role in influencing the conduct of states parties and supervising their implementation of the CCR. Section 2.2.2 of this chapter highlighted that there exist sufficient similarities between the authority relationship within the CCR and the authority relationship within the state to support an analogy.⁸³ Nonetheless, the CCR does not amount to a constitutional state. For example, the objective of the CCR is more limited in scope than that of a nation state.⁸⁴ Whilst addressing the issue of climate change is complex in its wide-reaching impacts on all sectors of society,⁸⁵ the scope of the CCR's objective is not comparable to that of protecting and promoting the wellbeing of a group of autonomous, free, and equal individuals. A second difference is that the CCR is specifically designed to integrate with other legal orders, in particular the domestic legal orders of its states parties. The same cannot be said for the constitutional order of the state. These differences indicate that whilst it is possible to draw an analogy, the authority relationship arising within the context of the CCR is not identical to the authority relationship between the state and its citizens. These differences justify that the constitutional features can play out differently in the context of the CCR compared to the nation state.

⁸¹ Kotzé 2016 (n 78), May and Daly 2014 (n 78), Bosselman 2015 (n 78).

⁸² This demonstrates the incorporation of the second type of response to the criticism against constitutionalism beyond the state and heeds Teubner's warning in Teubner 1996 (n 65).

⁸³ See also chapter 2 which problematises legitimacy in the CCR on the basis of the authority relationship between sovereign states parties and the AIA.

⁸⁴ Article 2 UNFCCC states the objective of the CCR and is cited on page 3 of this chapter.

⁸⁵ Richard Lazarus, 'Super wicked problems and climate change: restraining the present to liberate the future' (2009) 94(5) Cornell Law Review 1153.

This does not mean that the CCR is unsuitable to be viewed through a constitutionalism lens.⁸⁶ It merely means that an appropriate use of constitutionalism in the CCR needs to take into consideration the peculiarities of that context.⁸⁷ One example of this is that the objective of the CCR differs significantly in scope from that of the nation state. The enablement of the AIA through the CCR serves to enable states parties to achieve the objective set out in article 2 UNFCCC. Paraphrasing, the objective of the CCR is to stabilise greenhouse gas concentrations in the atmosphere at levels that would prevent dangerous, anthropogenic, interference with the climate system.⁸⁸ Whilst strategies to achieve this objective may impact all sectors of society, as an objective it does not compare in scope to the purpose of the sovereign, constitutional, nation state. The latter's objective is summarised in this thesis as protecting and promoting the welfare of its subjects whilst also protecting and promoting their status as autonomous, free, and equal actors. This demonstrates that the scope of the obligation of the state is much broader and more open ended than that articulated in article 2 UNFCCC. Therefore, the nature of the authority relationships arising within the context of the nation state may need to be mediated to a different extent than those arising within the context of the CCR. This supports the approach that the constitutionalism lens, whilst built on the constitutional features that are known within the context of the modern constitution of the nation state, need not provide an identical mirror image for a successful assessment of the standard of legitimacy in the CCR.

Having concluded that the compensatory constitutionalism lens through which the standard of legitimacy in the CCR is to be assessed does not need to be identical to the constitutional standards of the nation state, the actual selection of relevant and necessary features of constitutionalism for the context of the CCR is discussed in chapter 4.

5.2 Distinguishing the compensatory constitutionalism lens for the climate change regime from existing approaches of constitutionalism beyond the state

In addition to building on modern constitutionalism, the CCL also borrows from the literature on constitutionalism beyond the state. This is necessary, because the CCR is a treaty regime. Constitutionalism beyond the state comes in many guises.⁸⁹ From the outset it is possible to distinguish the construction and use of the CCL from those arguments which

⁸⁶ Unless one takes a narrow interpretation of constitutionalism which is limited to the concept of modern constitutionalism and its existence in relation to the nation state specifically. However, varying uses of constitutionalism can be identified and traced throughout the history of law. This justifies the conclusion that there is no inherent reason to reduce constitutionalism to modern constitutionalism. See Giovanni Sartori, 'Constitutionalism: A Preliminary Discussion' (1962) 56(4) *American Political Science Review* 853; Graham Maddox, 'A Note on the Meaning of 'Constitution'' (1982) 76(4) *The American Political Science Review* 805; Howard McIlwain, *Constitutionalism Ancient and Modern* (Cornell University Press 1947); Jill Harries, 'Global constitutionalism: the ancient worlds' in Anthony Lang and Antje Wiener (eds), *Handbook on Global Constitutionalism* (Edward Elgar 2017) 23-34; Dieter Grimm, 'The Constitution in Historical Perspective', *Constitutionalism Past, Present, and Future* (Oxford University Press 2016) 89; Stephen Holmes, 'Constitutions and Constitutionalism' in M Rosenfeld and A. Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 189.

⁸⁷ See also Teubner 1996 (n 65), see also Kotzé 2016 (n 78)

⁸⁸ For a full citation of article 2 UNFCCC see page 3 of this chapter.

⁸⁹ For an overview of the various branches of constitutionalism beyond the state see Schwöbel 2010 (n 76).

propose a global constitution of international law.⁹⁰ Three strands of constitutionalism beyond the state in particular inform the construction of the CCL, the details of which are explained in chapter 4. These three strands are constitutionalism as legitimacy,⁹¹ compensatory constitutionalism,⁹² and the international regulatory regime approach.⁹³ Whilst the construction and application of the CCL demonstrates a degree of overlap with the content of these three strands of constitutionalism beyond the state it is also distinct from each one. This subsection explains the special relevance of each of the three strands of constitutionalism beyond the state as well as its limitation with regard to the needs of the CCL.

In using constitutionalism as a means of assessing the standard of legitimacy in the CCR this thesis falls within the category of approaches which Mac Amhlaigh describes as ‘constitutionalism as legitimacy’.⁹⁴ In short, constitutionalism as legitimacy refers to the trend to consider questions of legitimacy through the various conceptions of constitutionalism that exist within the Western constitutional tradition.⁹⁵ Naturally, the use of a constitutionalism lens as a means of assessing the standard of legitimacy in the CCR falls within the category of constitutionalism as legitimacy. However, the construction of the CCL also goes beyond the description of constitutionalism as legitimacy.

Constitutionalism as legitimacy describes the general trend of using constitutionalisation as a means of importing legitimacy to certain scenarios in the context of international law. It focusses on the general connection between constitutionalism and legitimacy. This is helpful for the construction of the CCL. However, it is not a blueprint for the construction of the CCL because it does not engage specifically with the question of what features of constitutionalism may provide legitimation in relation to global cooperation and coordination of climate change adaptation and mitigation policies. By using the connections between constitutionalism and legitimacy brought to the foreground by Mac Amhlaigh in his description of the trend of constitutionalism as legitimacy this thesis incorporates his work into the construction of the CCL. Yet it is distinct from constitutionalism as legitimacy by providing a more tailored explanation of which features of constitutionalism specifically have the ability to communicate legitimacy expectations in the context of the CCR.⁹⁶

The usefulness of Peters’ compensatory constitutionalism has been discussed in section 4.2. The overlap with Peters’ work can be found in the way in which the CCL integrates the compensatory aspect of her work into the assessment of the standard of legitimacy in the CCR. Yet the construction and application of the CCL is also distinct from Peters’ original work in two ways. Firstly, Peters argues for compensatory constitutionalism which considers

⁹⁰ Therefore, it can be distinguished from those arguments which identify, for example, The United Nations Charter as a potential global constitution. See Bardo Fassbender, ‘The United Nations Charter as Constitution of the International Community’ (1998) 36(3) *The Columbia Journal of Transnational Law* 529, Andreas Paulus, ‘The International Legal System as a Constitution’ in Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World? Constitutionalism, international law and Global Governance* (CUP 2009) 69.

⁹¹ Mac Amhlaigh 2016 (n 2).

⁹² Peters 2006 (n 67).

⁹³ Kotzé 2016 (n 78) 106.

⁹⁴ Mac Amhlaigh 2016 (n 2).

⁹⁵ Mac Amhlaigh 2016 (n 2) 205.

⁹⁶ This is discussed in further detail in chapter 4.

the constitutionalisation of international law as a whole. As has been pointed out, the CCL is constructed to be applied to the CCR specifically. Whilst there is potential for the CCL to be tweaked for application to other international regulatory regimes, this thesis focusses specifically on its usefulness in light of the characteristics of the CCR. What it is not suitable for, is the contemplation of international law as a whole as a singular, comprehensive, constitutionalised order. In this the CCL is therefore distinct from and more limited than Peters' notion of compensatory constitutionalism. The CCL is furthermore distinguishable from Peters' work by providing a greater level of detail as to the way in which the compensatory aspect of each of the necessary features integrates with the same feature of constitutionalism which exists in the domestic constitutional orders of states parties.

Lastly, to view the CCR through a constitutionalism lens also falls within the approach described by Kotzé as the regulatory regime approach.⁹⁷ Academic endeavours within this category are described as tracing constitutionalism in "increasingly autonomous clustered regimes of international law that are organised around a specific issue area such as global trade, ocean governance and climate change."⁹⁸ Naturally, the application of the CCL to the CCR falls within this description. It is nonetheless distinct from other examples Kotzé provides of this category, because the CCR establishes an AIA rather than an international organisation.⁹⁹ The way in which the CCL is distinct from global environmental constitutionalism is discussed in further detail in subsection 5.3 below.

Defining the constitutionalism lens in relation to compensatory constitutionalism and constitutionalism as legitimacy is significant for two reasons. Firstly, by building on the notion of compensatory constitutionalism, it becomes possible to address the concerns that exist regarding the lack of certain circumstances in the international context as compared to the context of the state. Since the constitutionalism lens compliments the constitutionalism of the nation state it does not need to replicate all the circumstances which legitimise constitutionalism at the state level in the international context. Rather, the focus lies on integrating existing constitutional commitments of states parties into the operation of the CCR. The CCL focusses on integrating constitutionalism at the level of the CCR with existing constitutional commitments in the domestic legal orders of states parties. This means that compensatory constitutionalism finds its legitimisation in its function of protecting and enhancing constitutional principles which legitimise the authority of the state. This is relevant where these commitments might be threatened and strained as a result of the impacts of climate change. Secondly, the use of constitutionalism as legitimacy engages with the concern that constitutional discourse could be taken out of context to invoke a false sense of legitimacy. This is because constitutionalism as legitimacy engages directly with the legitimising aspects of the features of constitutionalism and explains how these can be translated to the constitutionalism lens.¹⁰⁰

⁹⁷ Mac Amhlaigh 2016 (n 2).

⁹⁸ Kotzé 2016 (n 78) 106.

⁹⁹ See Kotzé 2016 (n 78) 106. For the distinction between the establishment of an AIA and the creation of an international organization see Churchill and Ulfstein who write: "These institutional arrangements usually comprise a conference or meeting of parties (COP, MOP) with decision-making powers, a secretariat, and one or more specialist subsidiary bodies. Such arrangements, because of their ad hoc nature, are not intergovernmental organizations (IGOs) in the traditional sense." Churchill and Ulfstein 2000 (n 34) 623

¹⁰⁰ A topic which is explained in further detail in chapter 4.

The fact that the construction of a constitutionalism lens to assess the standard of legitimacy in the CCR is this thesis' original contribution explains why it is necessary to rely on several approaches of constitutionalism beyond the state whilst also being distinct from each of these approaches. Since none of the existing strands of constitutionalism beyond the state cover the specific characteristics of constitutionalism in the context of the CCR this thesis needs to construct the CCL from a variety of building blocks and develop further ideas which present appropriate stepping stones.

5.3 Distinguishing the compensatory constitutionalism lens for the climate change regime from global environmental constitutionalism

Whilst the chapter so far has focussed on modern constitutionalism and constitutionalism beyond the state, this subsection brings the additional body of literature, namely that of global environmental constitutionalism, into the fold. The literature on global environmental constitutionalism is of particular relevance as it has already considered the specific role of constitutionalism and constitutional features that are well suited for the characteristics of environmental protection at the global level. Whilst the denominator 'environmental' casts a wider net than climate change does, the latter falls within the category of the former.¹⁰¹ The deliberations in considering the value and usefulness of constitutionalism in the context of environmental protection therefore presents an overlap with the deliberation of relevant features of constitutionalism to be included in the construction of the CCL as discussed in chapter 4 and applied to the CCR in chapters 5 and 6.

Whilst the overlap between global environmental constitutionalism and the use of a constitutionalism lens to assess the standard of legitimacy in the CCR can inform the construction of the CCL, it is also necessary to highlight relevant differences between the two approaches. As was the case with modern constitutionalism, it is not possible to simply copy and paste the features considered to be relevant in global environmental constitutionalism into the constitutionalism lens. Firstly, the descriptor 'environmental' covers a wider range of governance concerns than the CCR incorporates. On the one hand this is useful, because it indicates a certain overlap between environmental constitutionalism and the use of a constitutionalism lens in the CCR. This supports the approach of using the literature on environmental constitutionalism to inform the construction of the CCL for the specific context of the CCR. On the other hand, the broader scope of governance concerns covered by environmental constitutionalism presents a similar issue as discussed above in the comparison between modern constitutionalism and the use of constitutionalism in the context of the CCR. The broader the scope of the authority relationships being legitimised through constitutionalism, the more extensive the presence of constitutional features becomes. The more limited scope of the objective of the CCR therefore indicates that not all constitutional features that are considered relevant in the context of either the modern constitution or global environmental constitutionalism need to feature to the same extent in the CCR. Highlighting the difference in scope between global environmental constitutionalism and the application of a CCL to the CCR serves the purpose of bringing to the foreground the way in which the use of the CCL in the context of

¹⁰¹ Bodansky, Brunnée Rajamani 2014 (n 79) 5.

the CCR provides an original contribution to the existing body of literature on the topic of constitutionalism beyond the state.

On the topic of distinguishing CCL from the existing approach of global environmental constitutionalism it is important to highlight a number of key differences in the motivation behind the global environmental constitutionalism and the more limited scope of the CCL's ambition. It has already been mentioned that the purpose of the latter is to identify legitimacy strengths and deficits in the authority relationship arising in the CCR between states parties thereto and its AIA. This is constructive because it demystifies what is often perceived as a 'lack of political will' on behalf of states to engage more productively in the CCR. By identifying potential legitimacy obstacles to sovereign states' participation in, engagement with, and commitment to the CCR it becomes possible to address these issues, improve the CCR and clear the path towards the achievement of the overall objective.

To contrast this against the scope of ambition of global environmental constitutionalism, this section relies on a summary of those intentions provided by Kotzé. Importantly, key points of his summary include (but are not limited to)¹⁰²:

“Environmental constitutionalism recognizes the importance of environmental care and expresses this juridically at the highest possible level that law is able to offer, thus working to bring the environment under the protective umbrella of a constitution.”

“Environmental constitutionalism redefines the relationship between the environment, the state and the people in a state”

“Environmental constitutionalism sets environmental care as a condition for all other functions of the state, the law and of society, and renders environmental care a primary obligation and function of the state.

Each of these above conclusions about the nature and purpose of environmental constitutionalism highlight a stark contrast to the nature and purpose of the constitutionalism lens constructed in this thesis. Working back from the last citation, it should be obvious from the discussion of the role of sovereignty and the compensatory nature of the constitutionalism lens that the CCL in no way intends to transform the function of the state.

Rather, the CCL is designed in order to enable states parties to perceive the CCR as a means of protecting, and possibly enhancing, their position as sovereign actors in light of the challenges posed by climate change. It does this by recasting the assumption that states parties simply lack the political will to address climate change into a series of genuine challenges states parties may face in their interaction with the CCR, despite any good intentions they may have. Chapter 4 discusses what obstacles states parties realistically face in their engagement with the CCR and highlights how selected features of constitutionalism

¹⁰² Here only those points which contrast against the approach taken by the constitutionalism lens in this thesis are cited. For a full list of the conclusions Kotzé draws from the body of literature on environmental constitutionalism see Kotzé 2016 (n 78).

can clarify ways in which the CCR already provides solutions to these obstacles and where it may need to develop strategies to overcome persisting obstacles. In other words, the CCL draws out legitimacy strengths and deficits of the CCR through which it becomes possible to identify real obstacles states parties may face in their interaction within the CCR. Instead of changing the function of the state, this therefore thesis acknowledges that the state exists to promote and protect the welfare of its subjects. Whilst this is widely accepted to include the provision of a liveable environment,¹⁰³ the constitutionalism lens specifically does not intend to shift the function of the state from protecting and promoting the wellbeing of its subjects towards protecting and promoting the wellbeing of the environment.

Rather, the thesis seeks to demonstrate that, provided the CCR demonstrates a high standard of legitimacy, it actually acts to enable states to increase their capacity to fulfil the commitments to which end they are granted the status of sovereignty. The purpose of the CCL is therefore to highlight ways in which the CCR, through constitutionalism as legitimacy, can enable and enhance the ability of sovereign states to fulfil their primary function of promoting and protecting the wellbeing of their subjects. The constitutionalism lens does not seek to change the dominant framework of social norms to include environmental care. Rather, the constitutionalism lens works with existing legitimacy expectations held by states parties as autonomous, equal, and free actors as reflected through the features of constitutionalism.

The second key objective Kotzé attributes to global environmental constitutionalism also does not apply to the construction or application of the CCL. Where global environmental constitutionalism is concerned with the relationship between the environment, the state, and the people in a state, the CCL only looks at the relationship between the AIA of the CCR and states parties thereto. In this way, the CCL is reflective of traditional approach to international law, namely that it is state-centric. Not only is this the traditional approach, it is currently also the most relevant approach in the context of the CCR. This is because the CCR has only states as its subjects. Chapter 6 on the material features of constitutionalism explains that, whilst regional economic integration organisations can also become party to the CCR, they are not granted the same standing as states parties. This is reflected, for example, in the fact that the regional economic integration organisation may only carry out certain activities, such as voting, if the state party that is a member to the regional economic integration organisation has authorised the latter to carry out their voting rights on their behalf.¹⁰⁴ It cannot be denied that the impacts of climate change are, and will be, felt by non-state actors. Nonetheless, only states can become states parties to the regime and the constitutional provisions create obligations for states parties only.¹⁰⁵

Lastly, in the first statement cited above, Kotzé observes that environmental constitutionalism brings environmental protection into the umbrella of constitutional protection. This can take the form of embedding environmental rights into the constitutions

¹⁰³ May and Daly 2014 (n 78).

¹⁰⁴ See, for example, article 18(2) UNFCCC.

¹⁰⁵ Chapter 3 constitutionalism explains that constitutional provisions refers to UNFCCC, Kyoto Protocol and Paris Agreement. Chapter 5 formal features further elaborates on the difference between constitutional and ordinary provisions within the climate change regime.

of nation states.¹⁰⁶ This is quite contrary to the approach of the CCL which does not contain the specific feature of fundamental rights for reasons explained in chapter 4. The usefulness of global environmental constitutionalism to the construction of the CCL is therefore limited to borrowing observations regarding the usefulness of constitutionalism in relation to those specific environmental aspects which are relevant in the climate change context. These shall be threaded throughout the discussion of necessary features of constitutionalism in chapter 4.

6 Three traits that characterise the compensatory constitutionalism lens for the climate change regime

In order to best understand the three key traits that characterise CCL it is useful to begin by recalling that the purpose of the constitutional assessment in this thesis is to identify and articulate legitimacy strengths and deficits in the relationship between the AIA of the CCR and sovereign states parties thereto. This is important because the purpose shapes the construction of the CCL and is reflected in its three key characteristics. Furthermore, this reminder highlights that for the present assessment, constitutionalisation of the CCR is not an end in itself, but rather a means to an end. The end to which it is a means being the identification of legitimacy strengths and deficits in the CCR.

This reminder further underlines that the CCL is constructed specifically for the assessment of the standard of legitimacy within the CCR. A consequence of this approach is that the application of the CCL does not serve to argue that the CCR is constitutional either in the sense of the nation state or in way of a global constitution. The assessment of the standard of legitimacy only concerns the relationship between the AIA and states parties within the boundaries of the CCR. This sets the use of constitutionalism in this thesis apart from other applications in the literature on constitutionalism beyond the state. Lastly, linking the construction of the CCL to the specific purpose with which it is applied reinforces the centrality of accommodating the principle of sovereign equality within the CCR. This highlights that the CCL does not seek to replace constitutionalism at the state level. Rather, the purpose of the CCL is to strike an appropriate balance between the need for sovereignty and the need for global coordination. Focusing on the purpose of the application of the CCL to the CCR is instructive because it both highlights the novelty of the assessment by contrasting it against existing uses of constitutionalism and also because it draws the outline within which the features of constitutionalism are selected and defined.

The first trait of the CCL is its instrumental use of constitutionalism. For the purpose of this thesis constitutionalism is constructed into a lens through which to view the CCR. This approach allows the focus to remain on the legitimacy relationship between the AIA of the CCR and states parties thereto. The use of constitutionalism supports the identification legitimacy strengths and deficits within the CCR. For this reason the features of constitutionalism of which the lens is constructed are selected and defined on the basis of their ability to provide a bridge between the legal architecture of the CCR and the legitimacy expectations of states parties. How the connection between certain features of constitutionalism can be used to derive insights regarding legitimacy perceptions is further

¹⁰⁶ May and Daly 2014 (n 78)

explained in chapter 4. The first characteristic of the CCL therefore can be summarised as focusing on constitutionalism as an aid to better understanding legitimacy perceptions regarding the CCR.

The second trait which characterises the CCL is that it is applied to the CCR only. This distinguishes the CCL from other approaches which look at the constitutionality of international law as a whole or which seek to identify a global constitution. This trait is not entirely unique though, as it does fall within the scope of what Kotzé describes as the 'International Regulatory Regime Approach.'¹⁰⁷ This category refers to the act of tracing constitutionalism in "increasingly autonomous clustered regimes of international law," such as in the World Trade Organization.¹⁰⁸ Yet it is unique within that approach because it is the first time the CCR is discussed from this perspective in isolation. The CCL is distinguishable from other uses of the International Regulatory Regime Approach because of the instrumentalisation of constitutionalism as a means of identifying legitimacy strengths and deficits.

The third trait that characterises the CCL is that it integrates constitutionalism beyond the state with the existing modes of constitutionalism in the nation state context. This is an essential part of the CCL because it makes it possible to apply a constitutional perspective with a focus on state sovereignty and the legitimacy of global governance activities without threatening the position of state sovereignty in either the domestic or the international order. The CCL does not seek to replace constitutionalism at the state level with constitutionalism at the global level of the CCR. It merely provides a perspective that allows states parties to view global cooperation through the CCR as a solution to the threats their sovereignty faces in light of the issue of climate change rather than viewing it as an added threat to their status as sovereign actors.

In this the CCL follows Peters' approach of compensatory constitutionalism.¹⁰⁹ Peters' approach highlights the importance of supplementing gaps appearing in modern constitutionalism in light of globalisation processes. The purpose of constitutionalism beyond the state in this approach is to re-establish the legitimacy of constitutional authority through ensuring that its features maintain adequately safeguarded where authority has escaped the comprehensive grasp of the constitution of the nation state and drifted into the traditionally unconstitutional sphere of international law. Considering the lens focusses on the authority relationship between the AIA of the CCR and states parties thereto, it is essential to its construction that the constitutional features included therein do not replace the constitutional orders of states parties. Instead the constitutional features of the CCL should reflect the intention of supplementing and enhancing the constitutional conditions within which the state emerges as the sovereign actor.

¹⁰⁷ Kotzé 2016 (n 78) 106.

¹⁰⁸ Idem. For an example see: Jeffrey Dunoff, 'The Politics of International Constitutions: The Curious Case of the World Trade Organization' in Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009) 178.

¹⁰⁹ Peters 2006 (n 67).

7 Using a compensatory constitutionalism lens to identify and articulate legitimacy deficits and strengths in the climate change regime

The role of this chapter in the overall architecture of this thesis' assessment of the standard of legitimacy in the CCR is to provide the conceptual groundwork for the construction of the CCL. Section 1 has highlighted the added value of applying a constitutionalism lens in the context of the CCR. In essence, constitutionalism provides a familiar means of addressing collective action issues such as climate change. States parties' need for supervised constraints stands in tension with their inherent autonomous nature as sovereign entities. Constitutionalism provides a useful means of addressing this tension because it represents, at least on an abstract level, shared values amongst states parties regarding the legitimation of exerting influence over the conduct of otherwise autonomous, equal, and free actors.

The explanation of the constitutional analogy demonstrates how legitimacy and constitutionalism exist at a crossroads. In particular, it brings the three-way distinction between the legitimacy object, legitimacy subjects, and grounds of legitimacy to the foreground. The object of the constitution is the AIA. The object of legitimacy is the relationship between the AIA of the CCR and states parties thereto. By enabling the AIA to influence the conduct of states parties and to supervise the implementation of the CCR an authority relationship arises which fulfils the role of the object of legitimacy. The terms object of the constitution and object of legitimacy therefore exist in close proximity but do not yet overlap. The constitutional analogy further introduces the term subjects of the constitution. It is here that constitutionalism and legitimacy meet at a crossroads. This is because the identification of subjects of the constitution coincides with the identification of subjects of a legitimacy claim. Both the term subjects of the constitution and subjects of legitimacy refer to states parties of the CCR.

The constitutional analogy further identifies provisions of the CCR as fulfilling the role of the constitution. Here the paths between legitimacy and constitutionalism diverge again slightly. The identification of constitutional provisions as opposed to ordinary rules does not provide any connection to legitimacy in itself. However, the need for the constitutional provisions to reflect the features of constitutionalism does connect back to legitimacy. This is because, as stated above, constitutionalism represents a shared framework of social norms amongst states parties. This observation follows from the fact that all states parties are constitutional states. Whilst the manifestation of constitutionalism differs amongst the actual constitutions of individual states parties, the fact that all states parties are constitutional orders reflects that on an abstract level all states parties share certain constitutional values.

The use of constitutionalism therefore casts the distinction between the object of legitimacy, the subjects of legitimacy, and the grounds of legitimacy into a familiar framework of social norms represented through constitutionalism. However, this chapter also noted that constitutionalism presents a certain degree of ambiguity. In light of the different takes on constitutionalism that are possible this chapter provides the groundwork for the construction of the CCL by aligning itself with certain aspects of modern constitutionalism, compensatory constitutionalism, and constitutionalism as legitimacy. It

also contrasts the use of the CCL against other forms of constitutionalism beyond the state in order to delineate the intellectual parentage of the CCL.

Chapter 4 Constructing the compensatory constitutionalism lens on the basis of necessary and relevant features of constitutionalism

1 Introduction

Chapters 2 and 3 provided the groundwork for the construction of the CCL by clarifying the meaning of legitimacy and the use of constitutionalism. Chapter 2 revealed that legitimacy's elusiveness can be explained away by identifying multiple layers of meaning which makes it possible for the concept to accommodate an infinite variety of authority relationships. It also explained that the object of the legitimacy assessment in this thesis is the relationship between the autonomous institutional arrangement (AIA) of the climate change regime (CCR) and states parties thereto.

Chapter 3 followed up on this by explaining why constitutionalism provides a useful perspective in assessing the relationship between the AIA and states parties. It did this by highlighting the use of constitutionalism in addressing collective action problems such as climate change and explaining what a constitutional analogy would amount to in the context of the CCR. The latter step was necessary because constitutionalism is predominantly established as a feature of the state and also because the instrumental use of constitutionalism as a means of assessing the standard of legitimacy in the CCR is novel.

Importantly, chapters 2 and 3 also highlighted that constitutionalism provides a useful focus for identifying a shared framework of social norms amongst states parties to the CCR. Chapter 2 on legitimacy identified that the persuasive power of legitimacy as a resource for compliance is grounded in the way it reflects the dominant framework of social norms in a society. By engaging with the framework of social norms in a society legitimacy is able to capture the reasons which provide persuasive traction in a community. Chapter 3 then identified that all states parties to the CCR share a foundation in constitutionalism. The significance of this is that constitutionalism can be identified as a set of shared values. For legitimacy to gain traction in the relationship between the AIA and states parties it must therefore reflect necessary features of constitutionalism. The reason why the CCL is needed in order to identify and articulate legitimacy strengths and deficits in the CCR is to draw out the 'expectation' part of legitimacy perceptions and articulate them into the language of law.

The focus of this chapter is to explain the reasoning behind the selection of features of constitutionalism for the construction of the CCL. Whilst constitutionalism can be identified as a framework of social norms which reflects shared values amongst states parties, it is an ambiguous concept. The ambiguity of constitutionalism is an asset because it makes it possible for constitutionalism to be context responsive. This means that constitutionalism, like legitimacy, can accommodate a variety of meanings in order to reflect the variety of circumstances within which it may be called upon. For example, the constitution of France may take on a different form than the constitution of Afghanistan. Both states' constitutions will be grounded in constitutionalism. Yet the context within which each constitution was written will mean that different aspects of constitutionalism will have been emphasised. Similarly, the way in which constitutionalism appears in the context of the CCR will be

different from the manifestation of constitutionalism in the context of the state. For this reason, this chapter explains what features of constitutionalism are included in the construction of the CCL and how these features specifically are relevant in the context of the CCR and provide meaningful insights regarding the legitimacy of the relationship between the AIA and states parties.

In selecting the features of constitutionalism from which to construct the CCL it is further necessary to highlight two points with regard to legitimacy that will influence this selection. Firstly, as explained throughout the thesis, the outcome of the assessment of the standard of legitimacy in this thesis is phrased as a matter of degree, rather than in a binary manner. This influences the second point, namely that the construction of the CCL focusses on minimal legitimacy expectations. As a result it features only necessary features of constitutionalism but does not engage with the question whether these would amount to sufficient features of constitutionalism. For the purpose of this thesis the consideration of sufficient features of constitutionalism is not necessary. That is because the argument does not claim that the CCR is a constitutional order. It merely exploits the features of constitutionalism as reflecting a shared set of values amongst states parties to the CCR. Considering that legitimacy is a matter of degree it can always continue to be enhanced. Therefore when using the CCL as a means of assessing the standard of legitimacy in the CCR it is not necessary to consider the question of 'sufficient' features of constitutionalism.

The focus on necessary features of constitutionalism in the construction of the CCL is further explained by the following. Where the legitimacy assessment conducted in this thesis identifies legitimacy deficits within the basic foundation of there would be little point in considering whether it might meet more ambitious legitimacy standards. The fact that more elaborate versions of constitutionalism can exist is not an obstacle to using the CCL to assess the standard of legitimacy on the basis of basic, foundational features of constitutionalism.

Lastly, it ought to be emphasised that the CCL instrumentalises constitutionalism. The CCL provides a means to an end. The end is the assessment of the standard of legitimacy of the CCR. Therefore, in carrying out this mapping exercise the focus is on how the features of constitutionalism link up with legitimacy components rather than the other way around. Demonstrating how various features of constitutionalism contribute to legitimacy components emphasises that the focus lies on identifying legitimacy strengths and deficits.

2 Identifying necessary features of constitutionalism

The three key traits that characterise the CCL, discussed in the previous chapter, set out the parameters within which the selection of necessary and relevant features of constitutionalism can take place. To this end, this section begins by discussing the difficulties of selecting features of constitutionalism which can satisfy the legitimacy expectations of a group of states parties in the absence of a clearly identifiable shared framework of social norms in the context of the CCR. Section 3 builds on this by explaining the distinction made in the construction of the CCL between formal, material, and substantive features of constitutionalism. It also explains why substantive features of constitutionalism are not included in the CCL. Section 4 then demonstrates how features of the CCL are selected on the basis of their relevance and contribution to legitimacy in the context of the CCR. Section

5 maps the features of constitutionalism built into the CCL against legitimacy components to highlight the connections that make it possible to use constitutionalism as a means of identifying legitimacy strengths and deficits in the CCR. The chapter ends by concluding that whilst all six features of constitutionalism can be presumed to be present to at least a minimal degree in the CCR, the extent to which these features are developed can influence states parties' perception of the legitimacy of the CCR.

Throughout the chapter reference is made to the six features of constitutionalism of which the CCL is comprised. These are enablement and constraint, entrenchment, supremacy, rule of law, separation of powers, and rules of procedure. The first three features are identified as formal features of constitutionalism whereas the latter three features are identified as material features of constitutionalism. This chapter provides a brief account of each of the selected features insofar as necessary to explain the way in which they contribute to the goal of the CCL. However, this chapter does not provide detailed definitions of each feature. This is because more detailed definitions of the individual features of constitutionalism are provided in chapters 5 and 6. Chapter 5 defines the formal features of constitutionalism and discusses to what extent these are present in the CCR. Chapter 6 then does the same for the material features of constitutionalism.

Considering the instrumentality of applying the CCL to the CCR as a means of assessing the standard of legitimacy it is of key importance that the features of constitutionalism in the CCL correspond with legitimacy expectations of states parties. As explained in chapter 2, legitimacy expectations are a reflection of the dominant framework of social norms within which an authority relationship operates. In the context of the CCR, the dominant framework of social norms refers to the shared values amongst states parties. Chapter 3 already identified that states parties share constitutional values on the basis that they are all constitutional states. This section builds on that argument in two ways. First it explains why constitutionalism offers a better framework of social norms for the basis of assessing the legitimacy of the CCR than other potential frameworks of social norms. Secondly, it explains which features of constitutionalism are both necessary and relevant in the context of the CCR.

2.1 Searching for a framework of social norms in the context of the CCR

The first place to look for shared values amongst states that could amount to a framework of social norms would be the topic of peremptory norms.¹ After all, these represent core values of the international community of sovereign states. However, since peremptory norms operate in the background of all of international law it would be unhelpful to articulate them as part of the CCL. The more limited context within which the CCL is applied means that to include these much broader oriented peremptory norms in its construction could skew the outcome of the assessment of the standard of legitimacy in the CCR. Therefore, unlike accounts of constitutionalism beyond the state which focus on

¹ For the importance of identifying a framework of social norms in order to assess the standard of legitimacy in an authority relationship see chapter 2.

constitutionalising the international legal order in its entirety², peremptory norms are unsuitable for the specific, instrumental, limited purpose of the CCL.³

The second potential approach to identifying features of constitutionalism that represent shared values amongst the states parties of the CCR would be to conduct a review of all the constitutions of each of the states parties and identify which features are present in each of the constitutions. However, such an approach would fail to take into consideration the fact that the CCR exists in a different context than those domestic constitutions do and serves a different, specific, purpose.⁴ Therefore, even if a specific feature were present in each and every constitution of states parties to the CCR it may not be suitable for application in the context of the CCR. For example, all domestic constitutions may display the feature that they are comprehensive. In the context of the nation state comprehensiveness may even be considered to be a necessary feature of constitutionalism.⁵ Yet the context of the CCR invites a compensatory approach that would not be reconcilable with the feature of comprehensiveness. This example highlights that whilst constitutionalism represents a framework of social norms which is shared by all states parties this does not mean that constitutionalism as it operates in the context of the state can be transplanted to the context of the CCR. The fact that all states parties consider constitutionalism to be a good thing provides a starting point for the identification of shared values amongst states parties to the CCR. However, the constitutions of states parties do not provide a blueprint for the identification of a shared framework of social norms that can legitimise the authority relationship between the AIA of the CCR and states parties thereto. To identify a relevant shared framework of social norms amongst states parties that can be used to identify legitimacy strengths and deficits in the CCR constitutionalism provides an abstract point of reference. However, the next step is to identify which features of constitutionalism are necessary and relevant in the context of the CCR. This is necessary because only those features which are necessary and relevant in the context of the CCR will gain sufficient traction that they can be used as a reflection of the shared framework of social norms which have a persuasive influence on the conduct of states parties.⁶

Instead this thesis takes the approach of identifying features of constitutionalism which in the Western constitutional tradition are generally acknowledged and which are furthermore

² Bardo Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 36(3) *The Columbia Journal of Transnational Law* 529, Andreas Paulus, 'The International Legal System as a Constitution' in Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World? Constitutionalism, international law and Global Governance* (CUP 2009) 69, Alexander Orakhelashvili, 'Peremptory Norms as International Public Order' in Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2009) 7.

³ This is not to say that the CCL could in any way go against peremptory norms of international law. Rather, it just means that the role of peremptory norms specifically is not included in the assessment of the standard of legitimacy of the CCR.

⁴ Achieving stabilisation of greenhouse gas concentrations in the atmosphere (article 2 United Nations Framework Convention on Climate Change) as opposed to protecting and promoting the autonomy, freedom, and equality of citizens within a geographically limited territory. For further explanation on this point refer back to chapter 3.

⁵ On the importance of the constitution's claim to comprehensiveness see, for example, Dieter Grimm 'The Constitution in the Process of Denationalization' (2005) 12(4) *Constellations* 447 Another example is can be found in Anne Peters, 'Conclusions' in Jan Klabbers, Anne Peters, and Geir Ulfstein, *The Constitutionalization of International Law* (OUP 2009) 342, 345 and 347.

⁶ For an explanation on the use of legitimacy as a resource for compliance see chapter 2.

relevant and applicable in the context of the CCR.⁷ The reason for using the Western constitutional tradition is because this tradition formed the basis for the spread of constitutionalism across the globe. Other constitutional traditions may have diverged from the Western constitutional tradition in order to respond to cultural and historical contexts within which constitutionalism was called to operate. However, even the diverging approaches to constitutionalism find their root in the Western constitutional tradition. In order to focus on aspects of constitutionalism which are shared amongst the wide variety of constitutional traditions which may be represented by states parties to the CCR, the Western constitutional tradition is used as the starting point for the construction of the CCL. This is not to exclude the potential resourcefulness of adding constitutional features outside the Western tradition in future assessments of the standard of legitimacy of the CCR. As explained in section 2.3 below, the focus of the CCL at this point is only on necessary features of constitutionalism. The consideration of necessary and sufficient features of constitutionalism falls outside the scope of this thesis. Whilst it would be useful to further develop the CCL to include a wider array of features of constitutionalism in order to assess the standard of legitimacy in the CCR in greater detail, this thesis focusses on the very basic aspects of legitimacy. This is necessarily the first step in assessing the standard of legitimacy in the CCR. Before discussing what may further enhance the legitimacy of the CCR it is first necessary to identify whether the CCR demonstrates a basic foundation of legitimate authority. Insofar as this thesis reveals legitimacy deficits at the basic level then it would not be fruitful to discuss potentially additional legitimacy enhancing features.

2.2 Using abstract definitions of the features of constitutionalism as a means of identifying a shared framework of social norms amongst states parties

The identification of necessary and relevant features of legitimacy is based on the definition of features of constitutionalism in the abstract. The definitions of each of the six features of constitutionalism discussed in this chapter is relatively brief. This is because chapters 5 and 6 each provide more detailed definitions of each feature of constitutionalism. Chapters 5 and 6 also explain how each of the features of constitutionalism manifests in the context of the CCR. The reason for focusing on abstract and concise definitions of each of the features of constitutionalism discussed in this chapter is because the focus of this chapter is the identification of these features as part of a shared framework of social norms amongst states parties. In order to reflect common ground this means that these features necessarily operate on a relatively abstract level. For example, all states parties might agree that the separation of powers is a constitutional feature which represents a value they all share.⁸ However, the way in which each state party enacts the separation of powers within their domestic sphere will depend on the relevant context. Similarly, the meaning of separation of powers should be defined in relation to the relevant context of the CCR. The point is, all

⁷ The focus on the Western constitutional tradition is based on the origins of constitutionalism in this tradition but does not aim to exclude other potential accounts of constitutionalism as these are developed and brought forward. See Martin Loughlin, 'Political Jurisprudence' in Martin Loughlin, *Foundations of Public Law* (OUP 2010) 157, 158, Cormac Mac Amhlaigh, 'Harmonising Global Constitutionalism' [(2016) 5(2) Global Constitutionalism 173, 190.

⁸ See, for example, Anthony Lang and Antje Wiener, 'A constitutionalising global order: an introduction' in Anthony Lang and Antje Wiener (eds), *Handbook on Global Constitutionalism* (Edward Elgar 2017) 1, 2, Paulus (n 2) 69, 71.

states parties agree in the abstract that the separation of powers is a necessary feature of constitutionalism. For this feature to do the work it needs to do, it needs to be tailored to the context within which it is applied. For the purpose of identifying a shared framework of social norms therefore an abstract definition is suitable. However, for the application of this feature as part of the assessment of the standard of legitimacy in the CCR as is done in chapters 5 and 6, a more detailed definition that reflects the context of the CCR is necessary. For this reason more detailed definitions are provided in chapters 5 and 6 instead of here.

2.3 The focus on necessary rather than sufficient features explained

The introduction of this chapter highlighted that the six selected features of constitutionalism represent a minimal, picture of constitutionalism. Additional features of constitutionalism, for example, codification, can exist and often supplement these features of constitutionalism. Importantly, the CCL's threshold approach to constitutionalism, does not imply that the thesis only considers the CCR in light of a thin approach to constitutionalism.⁹ The focus on the way in which the six selected features of constitutionalism provide insight into the normative expectations all states parties hold and share with regard to the exercise of authority, suggests that the CCL in fact relies on a thicker approach to constitutionalism. Furthermore, whilst the focus on treaty provisions may initially create the impression that a thin approach to constitutionalism is used, the thesis' emphasis on constitutionalism as a shared normative value amongst states parties to the CCR brings the thick approach to constitutionalism back to the foreground.

The CCL outlines the first step towards more legitimate global climate governance by assessing whether the CCR meets these minimal expectations of legitimacy as a starting point. Where the legitimacy assessment conducted in this thesis identifies legitimacy deficits within the basic foundation of there would be little point in considering whether it might meet more ambitious legitimacy standards. The fact that more elaborate versions of constitutionalism can exist is not an obstacle to using the CCL to assess the standard of legitimacy on the basis of basic, foundational features of constitutionalism. As legitimacy is a matter of degree rather than a binary question, it is always possible to expand beyond the foundational features of constitutionalism in accordance with the demands that arise from a particular context.

As stated in chapter 1, the thesis operates on the presumption that each of the six features of the CCL can be identified in the provisions of the CCR to at least a very minimal degree. However, applying the CCL to the CCR may also reveal that the legitimacy perception of the CCR could be improved by strengthening certain of the six features of constitutionalism which may be found to be lacking. If this is the case, then it is more sensible to begin by stabilising the legitimacy perception of the CCR on the basis of these minimal features of constitutionalism before attempting to embed more ambitious features of constitutionalism. The latter might not be able to flourish if the provisions of the CCR are

⁹ For a brief explanation of the distinction between thin and thick constitutionalism see Samantha Besson, 'Whose Constitution(s)? International Law, Constitutionalism, and Democracy' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World?: Constitutionalism, International Law, and Global Governance* (CUP 2009) 385.

not first firmly grounded in the necessary features of constitutionalism. For example, the inclusion of substantive features of constitutionalism relies on the presence of a robust and firmly grounded procedural framework which makes it possible for the balancing of values inherent in substantive features of constitutionalism (such as fundamental rights) to take place.

3 Six necessary features of constitutionalism that represent a shared framework of social norms amongst states parties

The six features of constitutionalism of the CCL are enablement and constraint, entrenchment, supremacy, separation of powers, rule of law, and rules of procedure. These are individually addressed below. The purpose is to explain why these features are considered to be necessary features in the absence of which the use of the word 'constitutionalism' in the CCL would be misdirected. This does not mean that these six features of constitutionalism are sufficient in order to conclude that the CCR is, in fact, a constitutional order. They are simply indicators of whether the very basic requirements of constitutionalism are present. This is important because in the absence of even the most basic features of constitutionalism it would not be possible to assess the standard of legitimacy of the CCR through a CCL.

3.1 Enablement and constraint

Enablement and constraint is a crucial feature of constitutionalism.¹⁰ It is through enablement and constraint that the constitutional order manages the relationships between the object of the constitution and the subjects of the constitution. Enablement identifies which actors may exercise what authority. Constraint identifies the circumstances of limits and limits within which each actor is able to exercise authority. Enablement and constraint are not separate features of constitutionalism because it is exactly in the combination of enablement and constraint that the balancing function of constitutionalism manifests. Enablement without constraint would simply be a licence for despotism. Similarly, constraint in the absence of enablement would amount to oppression. Therefore, constraint is a necessary counterweight to enablement and vice versa.¹¹

Enablement and constraint is furthermore a necessary feature of constitutionalism because, by outlining the scope and boundaries of what is permissible, this feature identifies the parameters of the constitutional order. By allocating and distributing authority amongst the object and subjects of the constitution, provisions which provide for enablement and constraint identify what actions each actor can take within the constitutionalised order. The enablement of the AIA identifies the limits of the CCR in that it allocates authority only for specific, limited purposes outlined in articles 7-11 United Nations Framework Convention on Climate Change (UNFCCC).¹² Enablement of states parties through the creation of a platform

¹⁰ Nicholas Barber, 'Introduction: Constitutionalism' in Nicholas Barber, *The Principles of Constitutionalism* (OUP 2016) 1. The point that constitutions enable as well as constrain is also made in: Martin Loughlin, 'The silences of constitutions' (2018) 16(3) *International Journal of Constitutional Law* 922.

¹¹ See chapter 3 for a more in-depth explanation of this point.

¹² United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC).

through which to achieve the overall objective articulated in article 2 UNFCCC also contributes to the identification of the scope and parameters of the CCR because it identifies the goal to which end the authority relationships within it are established.

3.2 Entrenchment

The second feature of constitutionalism is entrenchment. Entrenchment means that certain organisational aspects of a legal order are protected from amendment.¹³ This ensures that the legal order is able to achieve a degree of stability which is needed for it to maintain a certain degree of continuity.¹⁴ Entrenchment is a necessary feature of constitutionalism because it manages the expectations of authority claimants and authority subjects with regard to the space for each in the legal order to act autonomously or to influence each other's conduct. For example, the legislature knows that it can influence the conduct of individuals by making laws. Equally, individuals know that they must comply with the laws of the legislature. Similarly, individuals within a state may know that they can influence the making of laws by the legislature through participation in democratic processes. Equally, the legislature knows that it must follow the requirements set out by democratic processes in order to make law which can influence the conduct of individuals within the state. This interaction between legislature and individuals in a state is only possible if the basic framework of interaction demonstrates a certain degree of stability so that both actors know what to expect from each other. Such stability is ensured through the feature of entrenchment.

In essence, constitutionalism's concern with balancing relationships also makes entrenchment necessary in order to safeguard the constitutionally achieved balance from temporary power shifts. Also, entrenchment provides an additional safeguard against arbitrary exercises of authority. Since entrenchment makes it more difficult to amend constitutional provisions powerful actors within the constitutional order cannot simply change the rules to prioritise individual preferences over the common long-term objective. Additionally, entrenchment further represents a necessary feature of constitutionalism because the type of issue which invites a constitutional approach would normally require a certain degree of stability to be achieved.¹⁵

3.3 Supremacy

The third feature is supremacy which is defined here as the ability of a constitutional order to distinguish between constitutional provisions and ordinary law. What this distinction exactly entails is described in further detail in chapter 5. There it supremacy is broken down into external supremacy, internal supremacy, and norm supremacy. In order to explain why it is a necessary feature a brief summary of the role of supremacy is provided here. This

¹³ Jon Elster, 'Forces and mechanisms in the constitution-making process' (1995) 45(2) *Duke Law Journal* 364, 366.

¹⁴ Joseph H H Weiler, 'A Constitution for Europe? Some Hard Choices' (2002) 40(4) *Journal of Common Market Studies* 563, 565-566.

¹⁵ See chapter 3 on the types of issues which might attract a constitutional approach and why climate change is such an issue.

summary focusses on the role of internal supremacy, leaving the meaning and significance of external and norm supremacy to be elaborated on in chapter 5.

Internal supremacy is necessary because of its role in distinguishing between constitutional provisions and ordinary law.¹⁶ Where constitutional provisions set out a structure for the exercise of authority generally, ordinary law is a form of exercise of authority by the object of the constitution within that order. The combination of the fact that constitutional provisions set out the general framework for the exercise of authority and that this framework is protected from amendment through entrenchment means that subjects of the constitution lend the object of the constitution a form of general consent to exercise authority.¹⁷ This is distinguishable from the more specific form of consent that is required for the making of ordinary law. The function of supremacy is therefore to ground the general consent reflected in constitutional provisions as a broad acceptance of the enablement of the object of the constitution to exercise authority.

Being able to distinguish between constitutional and ordinary provisions is an important part of a regime's ability to provide both the necessary stability whilst also being able to develop and adapt to current circumstances within which the exercise of authority occurs. Whilst constitutional provisions are entrenched for the reasons stated above, a constitutional order, to survive, must also be able to respond to needs of the subjects of the constitution as they arise. It must also be able to adjust to developments in scientific knowledge and understanding. Using ordinary law to respond to the needs of the society the constitutional order regulates allows for the constitution order to be both continuous, stable, and flexible. Supremacy is necessary because it makes it possible to distinguish between these different levels which makes it possible to clarify what type of constraint, ordinary or constitutional, a legal provision establishes.

Churchill and Ulfstein comment that it is exactly the need for regimes that deal with environmental matters to provide both stability and flexibility that has given rise to the phenomenon of multilateral environmental agreements.¹⁸ They observe that these types of treaty regimes operate on the basis of a model that allows for more flexibility to adapt to changing circumstances, and is perceived to be more efficient, whilst still reflecting an appreciation of strong institutional arrangements.¹⁹ Having the permanent structure of the initial framework which sets out the objective, the key principles, and establishes the AIA provides an element of stability. The opportunity for continued development of the regime's content through regular meetings of the Conferences of the Parties (COP) and activities of the AIA provides for the necessary flexibility in the context of environmental concerns, such as climate change.²⁰ The distinction between provisions that provide stability

¹⁶ See Jeffrey Dunoff and Joel Trachtman, 'A Functional Approach to International Constitutionalization' in Jeffrey Dunoff and Joel Trachtman, *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 3, 20.

¹⁷ Weiler 2002 (n 14).

¹⁸ Robin Churchill and Geir Ulfstein, 'Autonomous institutional arrangements in multilateral environmental agreements: a little-noticed phenomenon in international law' (2000) 94(4) *American Journal of International Law* 623.

¹⁹ Churchill and Ulfstein 2000 (n 18) 628-629.

²⁰ It is acknowledged that it is possible to identify climate change law in a number of ways. For example, Bodansky, Brunnée and Rajamani observe that it could be seen as an environmental, an economic, or an

and provisions that enable flexibility is therefore helpful for the ongoing operation of multilateral environmental agreements such as the CCR. The feature of supremacy provides insight into this distinction by identifying the entrenched and the flexible aspects of the CCR.

3.4 Separation of powers

The fourth necessary feature of constitutionalism is the separation of powers. Two accounts of the separation of powers doctrine are prevalent. The first argues that the separation of powers serves to protect individual liberty by dividing authority into three distinct branches. These branches then act as a system of checks and balances on each other.²¹ The second account focusses on separation of powers as a means of enhancing the constitutional order's efficiency.²² For the purpose of the CCL the second account is most relevant. The increasing urgency of addressing climate change requires that the CCR can operate as efficiently as possible. The separation of powers contributes to the efficiency of a constitutionalised order by allocating tasks to those who are best suited to carry them out. How exactly this works is further explained in chapter 6 where a comprehensive definition of each of the material features of constitutionalism is provided.

To clarify, the choice to follow the efficiency account of the separation of powers does not imply that states parties sovereignty is unimportant.²³ Instead, it is argued that protection of states parties sovereignty is seen as being the task of the CCL in its entirety and is provided for through the sum of all the necessary features of constitutionalism outlined in this chapter.²⁴ Therefore, rather than claiming that the separation of powers specifically contributes to the CCL by providing for the protection of liberty, the efficiency-account is both more appropriate and more enriching. It is more appropriate because it does not diminish the role of the other features' contribution to the safeguarding of states parties' sovereignty by claiming that this feature alone provides the core contribution to that goal. It is enriching because it allows for the CCL to address both the safeguarding of states parties' sovereignty as well as the need for efficiency, especially in light of the urgent nature of the issue of climate change. The efficiency aspect of the chosen account of the separation of powers further highlights why it is a necessary feature of constitutionalism that needs to be

ethical problem. They also state that the most obvious perspective is to see it as an environmental problem. See Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani, *International Climate Change Law* (OUP 2014) 5. This is supported in their individual work too, where they discuss climate change within the context of international environmental law. See, for example Bodansky in Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93(3) *American Journal of International Law* 596; and Jutta Brunnée, 'COPing with Consent: Law-Making Under Multilateral Environmental Agreements' (2002) 15(1) *Leiden Journal of International Law* 1. Others who include the climate change regime within the category of international environmental law are Churchill and Ulfstein 2000 (n 18).

²¹ Also described as the 'pure view' on the separation of powers. For examples that contrast these two views see Aileen Kavanagh, 'The Constitutional Separation of Powers' in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (OUP 2016) 222, and Nicholas Barber, 'The Separation of Powers' in Nicholas Barber, *The Principles of Constitutionalism* (OUP 2018) 51.

²² *Idem*.

²³ Kavanagh and Barber speak of individual liberty rather than states parties' sovereignty. However, based on the constitutional analogy explained in chapter 3 states parties' sovereignty would be the relevant surrogate for individual liberty here. See Kavanagh 2016 (n 21) and Barber 2018 (n 21).

²⁴ See section 2 of this chapter.

included in the CCL. Considering the urgency of addressing climate change efficiency is necessary.

3.5 Rules of procedure

The fifth necessary feature of constitutionalism relates to rules of procedure. This feature can be broken down into three key aspects. These are transparency, accountability, and participation. These three aspects of the rules of procedure are joined under a single heading because they are interconnected.²⁵ Transparency is a requirement for accountability and participation.²⁶ If actors are not transparent about their conduct then it would be impossible to hold them accountable. Actions conducted in secrecy cannot be scrutinised. In terms of participation transparency is also necessary so that actors have meaningful opportunities for participation. Meanwhile, transparency would not be of much use without accountability and participation opportunities. This is because access to information without the ability to act on said information is not productive. Rules of procedure in the form of transparency, accountability, and participation are therefore a necessary feature of constitutionalism because it provides further guidance for the interaction between the object and the subjects of the constitution.

The specific context of the CCR further highlights the necessity for rules of procedure in the form of transparency, accountability, and participation. The way that climate change affects all states means that the information regarding greenhouse gas emitting activities of all states are of relevance to all other states. Therefore transparency is an important aspect for the global coordination of climate change policies. Accountability provides a tool through which to encourage mutual trust amongst states parties, especially in the absence of a strong community identity amongst states.²⁷ It does this by providing a safeguard that all actors, the AIA as well as all states parties, will be held accountable to their actions. Knowing that the same scrutiny will apply to all actors establishes a sense of fairness which can nurture mutual trust and understanding in the absence of the community identity. Accountability furthermore can provide an incentive for the implementation of commitments by the AIA and states parties thereby ensuring that all actors continue to encourage conduct that leads states parties closer to the achievement of the overall objective of the CCR.

Lastly, it is useful to highlight the necessity of participation as part of the feature of rules of procedure. Some accounts of constitutionalism describe democracy as a necessary

²⁵ For the connection between the three aspects see, for example, Alan Boyle and Kasey McCall-Smith, 'Transparency in International Law-Making' in Andrea Bianchi and Anne Peters (eds), *Transparency in International law* (CUP 2013) 419-420. See also Christine Kaufmann and Rolf Weber, 'The role of transparency in financial regulation' (2010) 13(3) *Journal of International Economic Law* 779.

²⁶ The meaning of transparency, accountability and participation are discussed in more detail in chapter 6. The description here is supposed to merely provide a brief indication as to why rules of procedure are necessary for the construction of the CCL.

²⁷ Unlike the demos of a specific state, which identify as a nation, sovereign states tend to focus on their individuality rather than as a community. See Fritz Scharpf, 'Political Democracy in a Capitalist Economy' in Fritz Scharpf, *Governing Europe: Effective and Democratic?* (OUP 1999) 6, 8-10.

feature.²⁸ Democracy is a specific form of participation, namely on the basis of democratic principles. What exactly these principles entail varies amongst accounts. Considering the global nature of the CCR it is more straightforward to speak of participation as a necessary feature of constitutionalism rather than democracy.²⁹ This makes it possible to consider means of participation that are relevant in the context of global cooperation amongst sovereign states on the issue of climate change. Shoehorning that experience into a disputed democratic format would not necessarily be as helpful to the assessment of the standard of legitimacy of the CCR as a more abstract consideration of ‘participation’ can be. Furthermore, in the balancing of the interactions between the object and the subjects of the constitution participation is a necessary feature because it creates a space within which subjects of constitution can exercise their autonomy. It also creates the possibility for subjects to exercise their autonomy in conjunction with others. The exercise of sovereignty as autonomy is then no longer done in a way that threatens the autonomy of others. Rather rules on participation delineate the impact each individual actor’s autonomy can legitimately have on the overall community.

3.6 Rule of law

The sixth necessary feature of constitutionalism is the rule of law. For reasons further elaborated in section 3 of this chapter the CCL adheres to a formal conceptualisation of the rule of law.³⁰ The CCL further adopts Raz’s take on the rule of law.³¹ This means that law and law-making should be prospective, clear, and open. The judiciary must be independent and accessible. Lastly, discretionary powers of enforcement cannot be allowed to undermine the purpose of the law.³² The rule of law is a necessary feature of constitutionalism because it provides the conditions which make it possible for the law to guide the actions of those it addresses.³³ Constitutionalism’s role in balancing relationships depends on the ability of the provisions of the constitutionalised order to guide the behaviour of the object and the subjects of the constitution. If its provisions are not able to guide their behaviour then it could not achieve the balancing of their relationship. In the context of the CCR this account of the rule of law is helpful because it stresses formal over a value-driven approach to commitments and obligations. In the absence of strong shared values, as further discussed in section 3, focusing on formal aspects of authority can be helpful to establish common ground. This is especially the case since the formal aspects of the rule of law as outlined by Raz focus on the ability to guide conduct in the absence of the influence of any value

²⁸ For example, Antje Wiener and others, ‘Global Constitutionalism: Human rights, democracy and the rule of law’ (2012) 1(1) *Global Constitutionalism* 1.

²⁹ On the topic of whether democracy is the most appropriate solution beyond the state context see, for example, Joseph H H Weiler, ‘In the Face of Crisis: Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration’ (2012) 34(7) *Journal of European Integration* 825; Andreas Follesdal, ‘Constitutionalization, not Democratization’ in Nienke Grossman and others (eds) *Legitimacy and International Courts* (OUP 2018) 307.

³⁰ On the distinction between formal and substantive approaches to the rule of law see Paul Craig, ‘Formal and substantive conceptions of the rule of law: an analytical framework’ [1997] *Public Law* 467.

³¹ Joseph Raz, ‘The Rule of Law and its Virtue’ in Joseph Raz, *The authority of law: Essays on law and morality* (OUP 2009) 210. See also Joseph Raz, ‘On the Authority and Interpretation of Constitutions: Some Preliminaries’ in Larry Alexander, *Constitutionalism Philosophical Foundations* (CUP 2001) 152.

³² Raz 2009 (n 31) 214-219.

³³ *Idem*.

standard. Therefore, this account of the rule of law is suitable for a global context such as presented by the CCR because it does not hide value bias behind seemingly objective standards.

4 Distinguishing between formal, material, and substantive features of constitutionalism

Within the CCL a distinction is made between formal and material features of constitutionalism. This distinction serves to clarify the different ways in which formal and material features contribute to the legitimacy perception of the CCR. This section explains the difference between formal, material, and substantive features of constitutionalism, their role in the construction of the CCL, and their relevance to the CCR. To do so, this section explains what is meant when distinguishing between formal, material, and substantive features of constitutionalism and then explains why each of the six features of the CCL fall within a specific category. Whilst the CCL does not contain any substantive features of constitutionalism a definition thereof is nonetheless provided in order to be able to explain their exclusion.

4.1 The material/formal distinction

The material/formal used in the construction of the CCL is based on Besson's use of that distinction.³⁴ With regard to the material dimension of the distinction, Besson writes:

“The thick constitution's material content consists of fundamental elements for political life and order, such as the separation of powers, checks and balances, the rule of law, democracy, and fundamental rights. Those elements may vary, and all constitutions do not entail the same ones.”³⁵

This can be contrasted against the description of the formal dimension of the distinction which Besson describes as follows:

“The formal or procedural constitution ensures the stability and resilience of the material political and legal order constituted by vesting its constraints with formal (source-based) and not only material (content-based) superiority by reference to the process by which it was constituted and to the process by which it can be amended.”³⁶

From the above it can be derived that formal elements of the constitution are concerned with two issues in particular. These are the delineation and maintenance of the constitutionalised order. This follows from the focus on the process by which the

³⁴ Besson uses the descriptors procedural and formal interchangeably at first, but then shifts to a consistent use of the descriptor 'formal'. The CCL uses the descriptor formal rather than procedural in order to avoid confusion between formal features of constitutionalism and rules of procedure, which it identifies as a material feature of constitutionalism. See Samantha Besson, 'Whose Constitution(s)? International Law, Constitutionalism, and Democracy' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World?: Constitutionalism, International Law, and Global Governance* (CUP 2009) 381.

³⁵ Besson 2009 (n 34), 386.

³⁶ Idem.

constitution was constituted and the process by which it can be amended. These two concerns are presented as value neutral elements of the constitution. It does not prescribe what the constitutive process should be nor does it detail requirements for the process of amendment. This is highlighted by the fact that not all constitutions come about in the exact same way, nor are their amendment procedures identical. No value-system in particular dictates what form the processes to which formal features of constitutionalism refer must take. Instead, these processes are influenced by the context within which the constitutional order came about.³⁷

In the context of the modern constitution the appropriate constitutive process is linked to the constituent power of the subjects of the constitution, namely individuals.³⁸ The analogy on which the thesis' analysis of the standard of legitimacy of the CCR is based, identifies states parties, rather than individuals, as the subjects of the constitution.³⁹ This makes states parties the relevant 'constituent power' in the context of the CCR.⁴⁰ In international law, treaty-making is an established way for sovereign states to express their will to formalise their rights and obligations towards each other. Based on this one can infer that the equivalent of an constitutive process in the context of international law is the establishment of legal framework regimes by treaty.⁴¹ This does not in and of itself imply that every treaty is automatically a constitution of sorts. Treaty-making as a constitutive process merely opens the door to the possibility that states could create a constitutionalised order by treaty. Other features of constitutionalism would need to be included in the regime the treaty establishes in order to speak of a constitutionalised order.

The second role of the formal element of the constitution as described by Besson is that it is resilient and provides stability. This too can be described as a value-neutral requirement, because it would apply to any political theory other than anarchy. Within the CCL the features of constitutionalism which engage with the two concerns addressed by the formal distinction are enablement and constraint (relating to constitutive process), entrenchment

³⁷ See Besson 2009 (n 34), 386. See also Mac Amhlaigh (n 7) p 187. There he comments that constitutionalism developed "out of a set of diverse and at times contradictory series of practices, historical accidents and diverse political movements", highlighting that there exists no uniform template for constitutionalism.

³⁸ A vast literature, too extensive to cite here in full, exists on the topic of constituent power. A few examples include: Nico Krisch, 'Pouvoir constituant and pouvoir irritant in the postnational order' (2016) 14(3) *International Journal of Constitutional Law* 657;

Mark Tushnet, 'Constitution-Making: An Introduction' (2013) 91(7) *Texas Law Review* 1983, Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2008); Joseph H H Weiler, 'Does Europe Need a Constitution? Demos, telos and the German Maastricht Decision' (1995) 1(1) *European Law Journal* 219.

³⁹ See chapter 3 for a more in-depth explanation of the analogy and meaning of the term 'subjects of the constitution.'

⁴⁰ This is reinforced by the fact that the CCR does not confer any rights or responsibilities onto individuals directly.

⁴¹ Since treaty-making is how states formalise their legal rights and responsibilities towards each other. It is therefore not surprising that the CCR too is established and delineated through treaties, namely the UNFCCC, the Kyoto Protocol, and the Paris Agreement.

(relating to process of amendment), and supremacy (related to both the constitutive process and the process of amendment).⁴²

4.2 The material/substantive distinction

The distinction between material and substantive features of constitutionalism is best understood in relation to organisation of the constitutionalised order overall. Subsection 4.1 outlines that formal features of constitutionalism refer to aspects of the constitution that are 'external' to the constitutionalised order in that they create and maintain the constitutionalised order. Material features of constitutionalism are 'internal' in that they organise the exercise of authority within the constitutionalised order as outlined by the formal features of constitutionalism. Besson makes this distinction by linking the formal to sources and the material to content. However, the reference to content in relation to material features of constitutionalism risks confusing material features with substantive features.

Material features of constitutionalism provide guidance for the methods of exercise of authority within the constitutional order, delineated and maintained through formal features of constitutionalism. Material features explain how the exercise of authority within the constitutionalised order should be organised.⁴³ This is why the CCL categorises the rule of law, separation of powers, and rules of procedure as material features of constitutionalism. These features provide instructions regarding the way in which authority in the CCR must be exercised. For example, the states parties must be able to expect that any exercise of authority takes place in accordance with the expectations set out by the rule of law, rather than arbitrarily. Furthermore, states parties can expect that the exercise of authority is transparent, accountable, and provides them with opportunities for participation.

What the material features of constitutionalism do not do is provide guidance relating to the content produced by the exercise of authority. The latter is the function of substantive features of constitutionalism, which lay out the values a constitutionalised order strives to achieve.⁴⁴ Substantive features therefore give the value-system a more comprehensive role in the constitutionalised order than formal or material features do. In relation to material features of constitutionalism, the value-based aspect is limited to the organisation of political life within the order. In the modern constitution these are republicanism and liberalism.⁴⁵ Yet the value-aspect of the material features of constitutionalism is limited to

⁴² Chapter 5 discusses in more detail how the CCR, through the provisions of the United Nations Framework Convention on Climate Change, the Kyoto Protocol, and the Paris Agreement provide for enablement and constraint, and superiority.

⁴³ With regards to the separation of powers and rules of procedures it is quite clear how these relate to organisational rather than substantive aspects of the exercise of authority within the CCR. The rule of law could be seen as either a material or a substantive feature depending on one's interpretation. This thesis adheres to a Razian take on the rule of law, which focusses on the formal aspects of the concepts only. Craig 1997 (n 30). For detail on the Razian approach see Raz 2009 (n 31) and chapter 6.

⁴⁴ The distinction made here between formal/material/substantive features of constitutionalism can be mapped against Mac Amhlaigh's distinction between the origins, the methods, and the aims of authority which constitutionalism is concerned with. See Mac Amhlaigh (n 7), 194-197.

⁴⁵ Mac Amhlaigh (n 7).

the choices regarding how authority should be exercised within the constitutionalised order and does not set a standard against which the outcomes of the exercise of authority must be measured.

In contrast, substantive features of constitutionalism do not prescribe how the exercise of authority is to be organised within the constitutionalised order. Instead, substantive features add another layer to the constitutionalised order by prescribing that all activities within the constitutionalised order must meet the standard set by the substantive values embedded in the constitutional order as guiding principles or instructive values. Like the core of a Babushka doll, substantive features of constitutionalism therefore exist nested within the constitutionalised order established through formal features and organised by material features. Their function is to provide a normative instruction with regard to the aims of the constitutionalised order and the content produced by the exercise of authority within that order. One can take the example of the legislature within a constitutionalised order to demonstrate the distinction between material and substantive features of constitutionalism. The material features of constitutionalism merely require that the authority wielded by the legislature be separate from the authority exercised by the executive and the judiciary. It says nothing about the content of the laws which the legislature makes. Substantive features of constitutionalism, on the other hand, have the ability to “dictate the content of law.”⁴⁶

For example, substantive approaches could involve reference to fundamental human rights.⁴⁷ In the example used previously, this would mean that the legislature cannot enact any laws that would breach human rights of the individuals within its territory. For example, according to accounts of constitutionalism which include substantive features, such as fundamental human rights, if the legislature were to enact a law that discriminates between citizens on the basis of religion, this law would be unconstitutional and therefore lack legal validity.

Whilst the CCL does not include any substantive features of constitutionalism, Kotzé’s proposition for the inclusion of substantive features is cited here to illustrate the impact of their inclusion, and how it is distinctive from the normativity implied by material features of constitutionalism. As a proponent of including environmental care as a substantive feature of constitutionalism is Kotzé writes:⁴⁸

“environmental constitutionalism sets environmental care as a condition for all other functions of the state, the law and of society, and renders environmental care a primary obligation and function of the state, thereby broadening the scope of traditional state governance functions to deliberately include environmental concerns.”

⁴⁶ Louis Kotzé, ‘The Fundamentals of Environmental Constitutionalism’ in Louis Kotzé, *Global environmental constitutionalism in the Anthropocene* (Hart Publishing 2016) 153

⁴⁷ For example, Besson 2009 (n 34), Klaus Bosselman, ‘Global environmental constitutionalism: mapping the terrain’ (2015) 21(17) *Widener Law Review* 172, Craig 1997 (n 30), Wiener and others 2017 (n 28).

⁴⁸ Others with similar views which essentially establish environmental protection as a substantive feature of constitutionalism include Bosselman 2015 (n 47) 178.

Having clarified the distinction between material and substantive features of constitutionalism it is necessary to explain why the CCL is constructed of only formal and material features. There are three reasons why including substantive features of constitutionalism is not appropriate in the context of the CCL for the CCR.

Firstly, the compensatory nature of the constitutionalism approach used in this thesis means that the CCL must leave sufficient scope for the constitutions of the domestic legal orders of states parties. Because it is compensatory, the constitutionalism aspect of the CCR only kicks in where the global aspect of climate change threatens the comprehensive nature of the constitutional orders of states parties. With regards to the fundamental values within societies, these remain best represented by their domestic constitutional orders.⁴⁹

Secondly, the global nature of the CCR means that the CCL must be able to accommodate the wide variety of values which states parties to the climate change regime may identify with. The inclusion of substantive features of constitutionalism into the CCL would risk embedding unjustified value bias into the CCR.⁵⁰ This would be more harmful than helpful to the legitimacy perception of the regime. Lastly, the issue of climate change presents significant scope for reasonable disagreement.⁵¹ It is therefore more likely that states parties can agree on matters relating to the organisation of the CCR (formal and material features of constitutionalism) than the content of the CCR (informed and guided by substantive features of constitutionalism).⁵²

5 Selecting features of constitutionalism which respond to the global context of the climate change regime

This section explains why the six selected features of constitutionalism are not just necessary but furthermore relevant to the specific context of assessing the standard of legitimacy in the CCR. This is done by highlighting the connections that exist between these selected features and the context of the CCR. Establishing a clear link with the climate change context is further important exactly because constitutionalised orders are shaped in response to context rather than following a uniform blueprint.⁵³ For the CCL to make the intended contribution to the assessment of the CCR's standard of legitimacy it is necessary that the selected features of constitutionalism are responsive to the context to which they are being applied. In order to maximise the utility of constitutionalism's conceptual ambiguities it is necessary to reflect on what specific issues the context of climate change

⁴⁹ See also the discussion in May and Daly on the benefits of local vs international aspects of environmental constitutionalism. James May and Erin Daly, 'The nature of environmental constitutionalism' in James May and Erin Daly, *Global Environmental Constitutionalism* (CUP 2014) 17.

⁵⁰ Regarding the bias argument see Anne Peters, 'The Merits of Global Constitutionalism' (2009) 16(2) *Indiana Journal of Global Legal Studies* 397, 403-404 and Carol Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17(1) *European Journal of International Law* 187.

⁵¹ See Luke Tomlinson, 'Reasonable Disagreement and Procedural Deadlock' in Luke Tomlinson, *Procedural justice in the United Nations Framework Convention on Climate Change: negotiating fairness* (Springer 2015) 29.

⁵² See also May and Daly on the benefits of procedural constitutional rights in comparison to substantive procedural rights in James May and Erin Daly, 'Procedural environmental constitutionalism' in James May and Erin Daly, *Global Environmental Constitutionalism* (CUP 2014) 236.

⁵³ Besson (n 34) Mac Amlaigh (n 7).

and the CCR give rise to and which features of constitutionalism best respond to these. The selection of the six features of constitutionalism over other potential features of constitutionalism can then be justified on the basis of their relevance to the context of the CCR to which the CCL applies.

In identifying relevant context the main feature of climate change is its cumulative, indivisible, and potentially catastrophic impact on the living environment.⁵⁴ These characteristics give rise to the need for global governance of states parties' greenhouse gas emitting activities. This creates a situation in which the sovereign autonomy of states must be squared with the constraints arising from global cooperation. Therefore, the CCL must consist of features of constitutionalism which are able to address the tension that arises from the fact that the issue of climate change emphasises the necessity of global cooperation whereas the principle of sovereign equality emphasises the autonomy of states.⁵⁵ The previous chapter highlighted the reasons why constitutionalism provides a suitable way of resolving these seemingly contradictory needs of autonomy versus cooperation.

Squaring the need for cooperation with the need for sovereignty as autonomy within the specific context of climate change can be unpacked into two distinct issues which the CCL can help the CCR to address. The first issue relates to the classic constitutional dilemma of justifying the exercise of authority over autonomous, free, and equal actors. The second issue is how to safeguard sovereignty in the light of threats that arise in the context of climate change. The first issue is the most general and provides a clear link to the classic constitutional dilemma, namely striking a balance between authority and autonomy. How does one preserve autonomy in light of authority imposed for the achievement of a long-term common objective? The indivisible and non-territorially limited consequences of climate change give rise to this same question. How can states parties maintain sovereignty in light of the pressures and constraints of global coordination on the issue of climate change? Having established a potential constitutional analogy as well as a similar problematic it makes sense to rely on established features of constitutionalism to resolve this issue.⁵⁶ The starting point of selecting relevant features of constitutionalism for the CCL is therefore to identify which features of constitutionalism provide the basic foundations for a constitutional order. The selection of necessary features of constitutionalism has already been discussed in section 2 of this chapter and does not require repetition here.

Within the second issue, which threats arise from the context of climate change to the sovereignty of states, two separate types of threats can be identified. The first relates to threats states parties perceive to exist with regard to their sovereignty in the more general context of climate change. This is further discussed in subsection 5.1. The second type of threat relates to ways in which the CCR itself may be perceived by states parties' to threaten their sovereignty. These are discussed in section 5.2. Section 5.3 demonstrates how the

⁵⁴ Living environment here is supposed to denote the reality which people live in and within which states operate. Care was taken to avoid the term 'natural environment' because this might imply that there exists a difference between a natural and a human environment.

⁵⁵ See chapter 3 for an explanation of these two seemingly opposing factors.

⁵⁶ See chapter 3 for an explanation of the constitutional analogy and further discussion of suitability of constitutionalism for the climate change context.

selected features of constitutionalism are useful to the context of the CCR by linking it to the concerns identified.

5.1 Identifying two threats to sovereignty that arise from the general context of climate change

The first of the two potential threats to the sovereignty of states arising in the context of climate change relates to practical consequences. Climate change, if left unchecked, is expected to change the reality within which states are called upon to operate. If the circumstances within which the state operates change dramatically this could impact on the state's ability to meet expectations and fulfil its responsibilities towards its citizens.⁵⁷ If the state is unable to provide the conditions for which it was created then it may not survive a post-climate change reality.⁵⁸ To illustrate this point, many states parties have made commitments to human rights in their constitutional orders.⁵⁹ Yet climate change, even with the current mitigation and adaptation policies in place, can threaten a wide array of human rights.⁶⁰ For example, extreme weather conditions that are more likely to manifest as a result of climate change will pose threats to the right to life, the right to health, and the right to water.⁶¹ Furthermore, it has been highlighted that climate change poses significant threat to states parties' domestic commitments to democracy and the rule of law.⁶² Climate change therefore threatens states' ability to meet their domestic constitutional commitments. The inability to meet such domestic constitutional commitments threatens to undermine the states' claim to sovereignty.⁶³

In light of the above, the CCR aims to enable states parties to address climate change on the basis of global coordination. This provides for the protection of states parties' sovereignty in two forms. The first form of protection is as follows. If the CCR's succeeds in its objective then climate change will not go unchecked and therefore its impacts can be mitigated or states are provided with opportunities to adapt to those consequences which can no longer be avoided. The CCL contributes towards achieving this goal by bringing to light legitimacy strengths and deficits. Highlighting legitimacy strengths creates better conditions for states parties to commit to the CCR. Identifying legitimacy deficits makes it possible to improve on the legitimacy of the CCR thereby addressing potential reasons states parties may be reluctant to make the necessary commitments to binding obligations under the regime. The CCL therefore engages with the threat to states parties' sovereignty arising from the impact

⁵⁷ On the role of the state to protect and promote the wellbeing of its citizens see Thomas Hobbes, *The Clarendon Edition of the Works of Thomas Hobbes, Vol. 2: De Cive: The English Version* (Howard Warrender ed. OUP 1983) 157.

⁵⁸ The Intergovernmental Panel on Climate Change has reported on the expected impacts in a number of reports. These are available at <<https://www.ipcc.ch/reports/>> last visited 1 March 2020.

⁵⁹ See James May and Erin Daly, 'Textualizing environmental constitutionalism' in James May and Erin Daly, *Global Environmental Constitutionalism* (CUP 2014) 55.

⁶⁰ Phillip Alston, *Climate change and poverty report of the special rapporteur on extreme poverty and human rights A/HRC/41/39*, 17 July 2019 available at: <<https://digitallibrary.un.org/record/3810720?ln=en#record-files-collapse-header>> accessed 17 July 2020.

⁶¹ See Amnesty International, 'Climate Change' available at <<https://www.amnesty.org/en/what-we-do/climate-change/>> accessed 17 July 2020.

⁶² Philip Alston 2019 (n 60).

⁶³ For an explanation of the purpose of the state and the role of sovereignty refer back to chapter 3.

of climate change indirectly by helping the CCR enable states parties to avoid such consequences. The second form of protection entails enshrining features of constitutionalism into the CCR which helps states parties to fulfil domestic constitutional commitments that are challenges as a result of globalisation. For this reason the constitutionalism lens focusses on compensatory constitutionalism. This approach makes it possible to view the presence of constitutional features beyond the state context not as a threat to the sovereignty of states but as a means of enabling states to meet their constitutional commitments where these are under threat due to pressures of globalisation.⁶⁴ By viewing the CCR through a constitutionalism lens it becomes possible to see that the CCR provides for constitutional safeguards in those areas where the constitutions of states come to be strained as a result of global problems, such as climate change.⁶⁵

The second potential threat to a state's sovereignty that arises from the general context of climate change can be seen to come from the actions of other sovereign states. Such threats can arise either within or outside the context of the CCR. The sovereign right of one state to exercise authority within their territory can impact on other states' ability to do this. This is because the consequences of climate change cannot be limited to remain within territorial borders. To give an example, where one state engages in activities that result in greenhouse gas emissions, this inevitably restricts the ability of other states in their decision-making. This is because their decision-making will be influenced by the reality of living in a world with higher concentrations of greenhouse gas emissions in the atmosphere. This is a limitation because states will need to choose to emit fewer greenhouse gasses themselves in order to compensate and/or invest more in adaptation. In the absence of a global cooperation framework, such as provided by the CCR, states would constantly need to adapt their actions in accordance with the actions of other states. This would be a practical obstacle to sovereignty as autonomy for states because their decisions and actions are influenced by external factors, namely the decisions and actions of other states.

The nature of sovereign states to look after the interests of their own citizens before considering the interests of others is one of the obstacles which needs to be overcome⁶⁶ in order for global cooperation on the issue of climate change to be realised in a legitimate manner.⁶⁷ The collective action required from states parties in order to address the issue of climate change necessitates that states parties shift away from business as usual which relies in many ways on greenhouse gas emitting activities. The cumulative and indivisible nature of the causes and consequences of greenhouse gas concentrations in the atmosphere further makes it necessary for states to acknowledge that global cooperation is a mutual benefit and not a limitation of their sovereignty.⁶⁸ To this end the CCL can demonstrate that global cooperation on the issue of climate change enhances rather than

⁶⁴ See chapter 3 for the impact of globalisation on the ability of states to uphold their domestic constitutional commitments and the use of compensatory constitutionalism as a means of enabling states to fill these gaps.

⁶⁵ Peters 2009 (n 43).

⁶⁶ See chapter 3 for an explanation of the meaning of sovereignty, the nature of states to prioritise territorial interest and the reason why constitutionalism provides a plausible solution.

⁶⁷ In a legitimate manner here denotes the contrast with the possibility of climate change being dealt with through coercion or force.

⁶⁸ Chapter 3 provides a definition of sovereignty as autonomy.

threatens states parties' status as sovereign actors. As with the first threat to sovereignty, the CCR is supposed to enable states parties to cooperate on the basis of sovereign equality in order to avoid being at the mercy of each other's actions, levelling the playing field to ensure decisions are reached on the basis of consensus amongst states parties.

5.2 Identifying two threats to states parties' sovereignty that arise in the context of the CCR

As the previous subsection has stated, the CCR can form a safeguard against threats arising out of the general context of climate change. However, the CCR itself may be perceived by states parties as a threat to their sovereignty. This can happen in two ways. Firstly, the global aspect of the CCR may give rise to concerns that decision-making shifts beyond the sovereign grasp of the state.⁶⁹ Moving decision-making to the global level, as is necessary to cooperate on climate change, makes it more difficult for states to legitimise their authority within the state. The authority of the state in part is legitimated on the basis of democratic decision-making. When the state therefore allows decision-making to be further removed from the influence of the citizen this can give rise to concerns regarding the democratic deficit of international decision-making.⁷⁰ Scharpf comments in this regard that "the plausibility of the participatory rhetoric suffers, however, as the distance between the persons affected and their representatives increases".⁷¹ For the state to subject itself to the authority of the AIA means that citizens within the state will be impacted by the exercise of authority in the AIA indirectly. For the legitimacy of the state itself, it remains crucial to legitimate the obligations it accepts under the CCR towards its citizens. The issue of democratic deficit is not further discussed here because it would expand the scope of the legitimacy assessment beyond the narrowly identified limits of the authority relationship between the AIA of the CCR and states parties thereto. The point is nonetheless raised here because whilst this thesis does not suggest solutions for the democratic deficit issue it is aware that within the context of the CCR such an issue could arise. Therefore, it represents a concern for states parties as subjects of the CCR in their relationship to the AIA and the extent to which they can accept the exercise of authority by the AIA.

The concern regarding legitimating the exercise of authority over states parties in light of their commitments to democracy domestically links in with another concern states parties may have in the context of the authority of the AIA. Each of the states parties will need to represent their citizens' interest when participating in the decision-making procedures of the CCR. Whilst the principle of sovereign equality means that each state has equal weight in the decision-making procedures of the CCR, there remain de facto power inequalities.⁷² These power inequalities can undermine the trust of citizens within a state that their

⁶⁹ Andrew Moravcsik, 'Is there a 'Democratic Deficit' in World Politics?' A Framework for Analysis' (2004) 39(2) *Government and Opposition* 336, 340; Fritz Scharpf, *Governing Europe: Effective and Democratic?* (OUP 1999) 6, 7.

⁷⁰ Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' in J Dunoff and J Trachtman (eds), *Ruling the World?: Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009) 296.

⁷¹ Scharpf 1999 (n 27), 7.

⁷² This taps into realist view on international law to whom "the most important empirical reality is that national powers, including but not limited to the ability to wage war, matters more than anything else." See Stephen Krasner, 'Realist Views of International Law' (2002) 96 *American Society of International Law Proceedings* 265.

representative has sufficient pull to represent their interests effectively.⁷³ Therefore, from the point of view of states parties, subjecting themselves to the authority of the AIA can undermine their legitimacy within their domestic constitutional orders.

Whilst power dynamics cannot be erased, the use of constitutionalism can help to establish a framework which balances them in a way that moves global climate governance away from naked power politics. Through implementation of the six features of constitutionalism of the CCL the exercise of authority through the CCR can instead channel interactions among states parties into procedures which reflect states parties' legitimacy expectations. For example, entrenchment protects provisions of the CCR from being adjusted according to the most powerful states' preferences. Furthermore, features such as participation can ensure that states parties are enabled to take part in the decision-making procedures which contribute to the continued development of the content of the CCR.⁷⁴ Accountability and transparency too can be implemented in a way that provides protections against decision-making taking place on the basis of arbitrary preferences of more powerful states parties rather than on the basis of collective deliberative processes. The way in which accountability and transparency help to achieve this is further explained in chapter 6.

Lastly, by enabling the AIA of the CCR to interfere in the interactions between states parties as well as enforce expectations set out by the CCR of states parties, states parties may fear that their sovereignty is under threat from interference by the CCR's AIA. The CCR establishes a number of key bodies which manage states parties interactions and exist in order to aid them in the achievement of the CCR's objective. The existence of the AIA poses a potential threat to the sovereignty of states parties exactly because of its autonomous nature. The autonomous nature of the institutional arrangement of the CCR, as one of multiple multilateral environmental arrangements discussed by Churchill and Ulfstein, follows from its characteristic that it is:

“freestanding and distinct both from the states parties to a particular agreement and from existing IGOs [...]. They are also autonomous in the sense that they have their own law-making powers and compliance mechanisms.”⁷⁵

The AIA of the CCR includes the Conference of the Parties (COP), the Secretariat, the Subsidiary Body for Scientific and Technological Advice (SBSTA), the Subsidiary Body for Implementation (SBI), and the Financial Mechanism (FM). The specific role of each of these bodies and their ability to exercise authority over states parties in the context of the CCR are further discussed in chapter 5. There it will also be discussed to what extent the AIA can be said to actually have “their own law-making powers” and the extent to which its enablement authorises it to influence states parties conduct autonomously.

Within the context of this chapter it is enough to point out the possibility that states parties may perceive the enablement of the CCR's AIA as threat to their sovereignty. The perceived

⁷³ This links back to Scharpf's comment cited above regarding the impact of the proximity of decision-making to those thereby affected. See Scharpf 1999 (n 27) 7.

⁷⁴ Examples are provided in chapter 5. Furthermore, whether or not the AIA of the CCR has autonomous law-making powers specifically is also discussed in chapter 5.

⁷⁵ Churchill and Ulfstein 2000 (n 18).

threat to sovereignty could arise from the fact that the AIA, in acting out its mandate, is able to influence states parties conduct. This could happen either through the setting of standards or the surveillance of implementation and compliance. Whilst such activities may be desirable in light of achieving the common objective of the CCR, it stands in tension with sovereign states parties right to autonomous exercise of authority within their territories. It also requires a high standard of legitimacy in order for states parties to be able to justify the acceptance of the authority of the AIA within their domestic constitutions, where citizens may feel unduly impacted by an authority to which they have no direct input. Therefore, states parties, whilst being aware of their need for the AIA may also be inherently suspicious of the AIA. The acknowledged need for interference by the AIA coupled with the resistance to external influence makes it necessary to identify actual legitimacy deficits and strengths in order to bring to light whether such intuitive concerns are justified or not. If they are, bringing legitimacy deficits to light can help to correct them. If they are not justified, then demonstrating that there is no actual cause for concern is helpful because it underlines the high standard of legitimacy of the CCR.⁷⁶

The true extent of the AIA's ability to exercise authority over states parties is discussed in further detail in chapter 5. At this stage it is enough to identify that the enablement of the AIA can potentially be perceived as a threat to states parties ability to exercise autonomy as sovereign entities.

5.3 Linking the features of constitutionalism to the concerns of states parties regarding their sovereignty in the context of the CCR

The overall purpose of the CCL is to assess the standard of legitimacy in the CCR. To this end, the next section of this chapter maps the features of constitutionalism to individual legitimacy components. Yet what this section of the chapter does is equally important. Questions of legitimacy can arise where autonomous, free, and equal actors are forced to accept the influence of other actors on their conduct. This prompts investigations as to whether such influence is legitimate. What this subsection specifically looks at is the extent to which the features of constitutionalism provide legitimating circumstances by balancing the interference by other actors with the safeguarding of individual autonomy. More specifically, this section looks at the way in which the selected features of constitutionalism are able to provide safeguards to the protection of the sovereignty of states parties.

The first feature of enablement and constraint contributes to the safeguarding of states parties' sovereignty by articulating the scope of authority which all actors, object and subjects, are entitled to exercise in the context of conduct within the context of the CCR.

⁷⁶ It goes without saying that the CCR is not the only treaty regime that struggles with legitimation on the basis of the concerns outlined above. Similar concerns are apt to arise with regard to any form of international institutional arrangement which aims to address at issues which cannot be resolved purely domestically. As Peters has pointed out the processes of globalisation have increased interdependencies making the use of such international institutions as a means of addressing certain issues such as trade and human rights more commonplace. The construction of the CCL in this chapter focusses only on the way it can be designed to meet the specific needs of the CCR. However, a comparison of how other regimes have addressed these issues, how these solutions may inform further enhancement of the CCR's legitimacy and the way in which the CCL may be of use in the context of other international regimes would make for stimulating future research opportunities.

By casting the provisions of the CCR in terms of enablement and constraint it becomes easier to assess whether the scope of enablement is sufficiently balanced by constraints. This makes it possible to assess whether the balance achieved so far by the CCR is adequate or whether future development requires the establishment of further enablement and/or constraints.⁷⁷

The stability provided by the second feature of constitutionalism, entrenchment, contributes to the safeguarding of states parties' sovereignty in two ways. Firstly, it prevents the CCR from being at the mercy of temporary power shifts. States parties can feel assured that the development of globally coordinated climate policies will follow the patterns set out by the framework of the CCR. Knowing in advance the ways in which the AIA and other states parties might influence the setting of globally coordinated climate change policies makes it possible for states parties to maximise their own opportunities for input and participation. The stability provided by entrenchment furthermore makes it easier for states parties to set their expectations regarding the way in which the CCR balances the relationships between the AIA and themselves, as well as amongst states parties.

The third feature of supremacy contributes to the safeguarding of states parties' sovereignty by establishing the distinction between constitutional and ordinary provisions. This is helpful because it clarifies which aspects of the CCR are entrenched and settled, and which aspects of the CCR can be influenced by states parties. In other words, the flexibility of ordinary provisions within the CCR to correspond to the fluctuating needs of states parties and the real time developments in scientific understanding of climate change, and the real time developments in terms of practical impacts climate change is already having, allows for continued input and participation by states parties. Since states parties can be involved in the shaping of ordinary provisions, through participation in the COP, the distinction between constitutional and ordinary provisions, which the feature of supremacy establishes, helps to safeguard state sovereignty by clarifying the areas in which they are able to exercise their influence.

The fourth feature of the rule of law helps to safeguard states parties' sovereignty because it provides a safeguard against arbitrary exercise of authority. All exercise of authority within the context of the CCR must follow the requirements of the rule of law as set out above in section 2. These characteristics contribute to the prevention of power abuses, thereby providing a safeguard for states parties' sovereignty.

Separation of powers is the fifth feature of the CCL which provides a safeguard against the erosion of states parties' sovereignty. As explained above, the account of the separation of powers chosen for the construction of the CCL focusses on efficiency of the constitutional order. However, this is not incompatible with the possibility that the separation of powers also contributes to the safeguarding of states parties' sovereignty by instituting a system of checks and balances between the three powers. The focus on efficiency in the chosen account of the separation of powers means that the separation of powers should not be implemented in a way that would make the regime inefficient. However, insofar as the separation of powers as a system of checks and balances does not interfere with the

⁷⁷ This assessment is carried out in chapter 5.

efficiency of the regime, the safeguarding of states parties' sovereignty is an additional, beneficial, contribution of the separation of powers.

The sixth and final feature of the CCL is that of rules of procedure. The three aspects of the feature of constitutionalism regarding rules of procedure also contribute to the safeguarding of the sovereignty of states parties. Transparency contributes to this goal by making information accessible to states parties on the basis of which they can assess whether other actors (the AIA or other states parties) have acted within the boundaries of what is permissible within the CCR. Accountability contributes to safeguarding states parties' sovereignty by making it possible to hold actors who transgress accountable, thereby encouraging both conduct that stays within the scope of allocated authority and also making it possible to correct mistakes where transgressions occurred. Lastly, participation contributes to the protection of states parties' sovereignty because it establishes spaces within which states parties can exert influence within the CCR. As was stated in section 2.2, participation creates a space within which states parties can exercise their autonomy. It also creates the possibility for states parties to exercise their autonomy in conjunction with others. The exercise of sovereignty as autonomy is then no longer done in a way that threatens the autonomy of others. Rather rules on participation delineate the impact each individual actor's autonomy can legitimately have on the overall community.

6 Mapping features of constitutionalism against legitimacy components

The instrumental use of the CCL to assess the standard of legitimacy in the CCR relies on the connection between constitutionalism and legitimacy. This connection is central to the thesis' argument and therefore requires closer consideration. This section contributes to the overall argument by unpacking the connection between constitutionalism and legitimacy. It does this by mapping the selected features of constitutionalism against the legitimacy components identified and discussed in chapter 2.

Linking features of constitutionalism to specific legitimacy components clarifies the way in which measuring the provisions of the UNFCCC, the Kyoto Protocol,⁷⁸ and the Paris Agreement⁷⁹ against the six features of constitutionalism provides an insight into the standard of legitimacy in the CCR. Before mapping the six features of constitutionalism to the relevant legitimacy components it is beneficial to highlight the reason why the intermediary of the CCL is used, instead of simply measuring the provisions of the CCR against the legitimacy components directly. The reason why the CCL is needed in order to identify and articulate legitimacy strengths and deficits in the CCR is to draw out the 'expectation' part of legitimacy perceptions and cast them into a legal vocabulary. By mapping the features of constitutionalism to the legitimacy components the seemingly elusive nature of legitimacy perceptions can be framed in a way that can be used by lawyers to improve the existing framework.

The extent to which the CCR demonstrates congruence with various legitimacy components influences the overall legitimacy perception of states parties regarding the CCR's legitimacy.

⁷⁸ Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162.

⁷⁹ Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016).

Therefore, to assess the standard of legitimacy in the CCR it is necessary to assess the extent it reflects the identified legitimacy components. The recasting of legitimacy components into legal terms is important especially since the CCR consists of treaties, which are legal instruments. In order to best embed legitimacy standards into this legal framework it is helpful to identify ways in which legitimacy components can be cast in familiar legal structures.

6.1 Using the notion of constitutionalism as legitimacy as a building block for the exercise of mapping features of constitutionalism against legitimacy components

Mac Amhlaigh's work on constitutionalism as legitimacy represents an important step in this direction. By identifying republicanism and liberalism as two co-original ideologies embedded into the concept of constitutionalism he brings the connection between the value-based aspect of constitutionalism and the way this gets cast into law through the constitution to the foreground. He furthermore mapped specific aspects of constitutional orders against expectations that arise from republican and liberal accounts of how authority should be exercised.⁸⁰ What this thesis does is very similar in that it maps features of constitutionalism against legitimacy components. Yet it can be distinguished from Mac Amhlaigh's work in two ways. Firstly, the CCL is constructed with the specific context of the CCR in mind, rather than representing a general conception of constitutionalism abstracted from any particular context. Secondly the choice to link features of constitutionalism directly to legitimacy components rather than linking it to specified ideologies makes for a more suitable argument in the context of a global regime such as the CCR. This is because the concept of legitimacy does not represent a specific ideology but rather identifies a number of more abstract components which can be associated with a range of cultural and historical experiences.

Having identified in previous sections of this chapter the reasons why the selected features of constitutionalism are relevant to the context of the CCR and capable of addressing the balancing act between the need for cooperation with the need to safeguard sovereignty, this section takes the next step by linking the expectations of authority articulated through the features of constitutionalism. Knowing which specific legitimacy component is served by which features of constitutionalism contributes to the identification of legitimacy strengths and deficits because it makes it possible to move away from legitimacy as an internal and subjective experience and recast it into external standards of measurement.

Chapter 2 highlighted that legitimacy is a matter of degree and that not all legitimacy components must be fulfilled to the fullest extent at all times. Rather, the legitimacy components together represent the framework of social norms within which the authority relationships must be legitimised. Which legitimacy components are emphasised at any given time depends on the dominant framework of social norms at the time of assessment. In the context of a global regime, such as the CCR, it is beneficially to include a minimal degree of each of the components. The reason behind this is that including a wide variety of legitimacy components allows for a reflection of a broad spectrum of legitimacy views and expectations. Furthermore, if the dominant framework of social norms were to shift then

⁸⁰ See Mac Amhlaigh 2016 (n 7), 196 Table 1.

the existing regime can shift along with it only if the legitimacy components of the new dominant framework of social norms is already embedded into the regime. By including a wide variety of legitimacy components in the regime it is therefore better able to withstand times of change and avoid the possibility of falling victim to a legitimacy crises. The inclusion of a wide array of legitimacy components, however, also emphasises that not all components can be fully met at all times.

This in itself makes constitutionalism a useful legal framework through which to assess legitimacy. This is because constitutionalism too, with its sometimes overlapping, sometimes contradicting, co-original ideologies of republicanism and liberalism, is designed to accommodate shifts in the dominant perception of the standards against which authority ought to be measured. The inherent competing interests built into constitutionalism also mean that constitutionalism inherently acknowledges that the values of constitutionalism cannot be achieved fully. Rather, at all times a legal order will approximate the values of constitutionalism the best it can. This means that constitutionalism, much like legitimacy, is best understood as a matter of degree.

6.2 Mapping features of constitutionalism against legitimacy components

The first step in the mapping exercise is to put the legitimacy components and the features of constitutionalism side by side. Chapter 2 identified that the perception of legitimacy in an authority relationship can be broken down into the following components: input legitimacy, output legitimacy, procedural legitimacy, expert legitimacy, and legal legitimacy. Definitions of each component are provided in chapter two and shall not be repeated here. This chapter has identified enablement and constraint, entrenchment, supremacy, the rule of law, separation of powers, and rules of procedure as necessary features of constitutionalism.

This thesis uses the CCL as a means to an end. The end is the assessment of the standard of legitimacy in the CCR. Therefore, in carrying out this mapping exercise the focus is on how the features of constitutionalism link up with legitimacy components rather than the other way around. Demonstrating how various features of constitutionalism contribute to legitimacy components emphasises that the focus lies on identifying legitimacy strengths and deficits.

6.2.1 Input legitimacy

The first legitimacy component is input legitimacy. As discussed in chapter 2, input legitimacy refers to the justification of the exercise of authority by a political system on the basis of its organisational structure.⁸¹ This legitimacy component is therefore best linked up with the constitutional feature of enablement and constraint. That is because enablement and constraint refers to those provisions which outline the parameters of the order at hand and also identify which actors are authorised to do what. The provisions of the CCR discussed under enablement and constraint provide for the organisational structure of the

⁸¹ Fritz Scharpf, *Demokratietheorie zwischen Utopie und Anpassung* (Konstanzer Universitätsreden 1970) 25. This translates into 'Democratic Theory between Utopia and Adaptation'.

regime by establishing the AIA, providing it with a mandate, constraining its authority, and managing the overall relationship between states parties as the subjects of the constitution and the AIA as the object of the constitution.

The second feature of constitutionalism which contributes to input legitimacy is the feature of rules of procedure. In particular the participation element of the rules of procedure contributes can be linked to input legitimacy. As this component is also at times describes as government by the people, the participation element of the constitutional feature of rules of procedure highlights the role of states parties participation in the operation of the CCR. A third feature of constitutionalism which contributes to input legitimacy is the feature of entrenchment. This is because entrenchment contributes to the stability and maintenance of the organisational structure referred to in the definition of input legitimacy.

6.2.2 Output legitimacy

The component of output legitimacy refers to whether the exercise of authority achieves the results for which it was established. In other words, it looks at the output the regime produces. As was noted in chapter 2 it can be difficult to identify a way of measuring whether a regime successfully produces the desired content. This is because there are various ways of measuring success. For example, the CCR may be viewed as successful because it has, for the past three decades, facilitated global cooperation on the issue of climate change. It has continued to enable states parties to develop the content of the regime, reach new agreements and set further targets. If measured in terms of continued interaction amongst states parties as well as between states parties and the AIA, one may argue that the regime is, from an institutional point of view, providing what it promises, a platform for ongoing cooperation on the issue of climate change. Yet if one looks at the regime's objective set out in article 2 UNFCCC as well as the further specification thereof in article 2 Paris Agreement another picture emerges.

The focus of output legitimacy on the content produced by the exercise of authority suggests that it would be best matched against substantive features of constitutionalism. This is because substantive features of constitutionalism are the only features which examine the content produced by the exercise of authority. Substantive features of constitutionalism would most likely fall within category of output legitimacy as the focus would be on outcome (does the outcome of the exercise of authority meet this substantive standard). However, as explained in section 4.2 of this chapter, the CCL constructed in this thesis does not include substantive features of constitutionalism. For this reason, output legitimacy does not feature in the overall legitimacy assessment of the CCR in this thesis.

6.2.3 Expert legitimacy

The component of expert legitimacy can be summarised as the expectation that the exercise of authority should take into consideration the relevant expertise. The feature of constitutionalism that best matches up with the component of expert legitimacy is therefore the separation of powers. As stated in section 2 the separation of powers allocates specific tasks to those with the relevant skillset to carry out the task at hand. In this way, the separation of powers contributes to expert legitimacy. Expert legitimacy

further might require that those who exercise authority are advised by experts in the relevant topic area.

6.2.4 Procedural legitimacy

The component of procedural legitimacy most evidently matches up with the feature of constitutionalism that relates to rules of procedure. The key difference between the legitimacy component and the feature of constitutionalism is that the former focusses on the consequences of the procedures, namely that the outcome of procedures is acceptable on the basis of them being perceived as fair and appropriate. The feature of constitutionalism however provides a more substantive account of how this perception of fairness can be established. As chapter 6 explains in greater detail, the three aspects of the rules of procedure establish and maintain a space within which states parties can exercise their autonomy. This in turn demonstrates that the rules of procedure can be used as a means of safeguarding and enhancing the sovereignty of states parties.

6.2.5 Legal legitimacy

In defining the component of legal legitimacy, chapter 2 cited Thomas' description thereof as "a property of an action, rule, actor, or system which signifies a legal obligation to submit to or support that action, rule, actor or system."⁸² This description of the component of legal legitimacy is well matched with Raz's formal approach to the rule of law because both legal legitimacy and the rule of law focus on the ability to influence behaviour. In addition to the rule of law, the feature of supremacy also contributes to legal legitimacy. This is because supremacy makes it possible to establish a distinction between constitutional and ordinary law. This distinction contributes to legal legitimacy because it makes it possible to distinguish between constitutional provisions, which lay down the requirements for legal validity of ordinary laws, and ordinary laws, which provide additional details necessary for the regime to guide the actions of states parties in more detail.⁸³

7 Concluding remarks

This chapter has explained the process of constructing the CCL on the basis of six necessary and relevant features of constitutionalism. It explained the different functions of each of the six features of constitutionalism and highlighted the way in which formal and material features each make a different type of contribution to understanding the way in which the a constitutionalised order manages the authority relationships it establishes. Furthermore, in explaining why certain features of constitutionalism are necessary for the assessment of the standard of legitimacy this chapter has brought to the foreground not only the general relationship of these features of constitutionalism to legitimacy but also explained how these features contribute to a better understanding of the standard of legitimacy in the specific context of the CCR.

⁸² Chris Thomas, 'The Uses and Abuses of Legitimacy in International Law' *Oxford Journal of Legal Studies* [2014] 34(4), 729-758.

⁸³ Stephen Gardbaum, 'The place of constitutional law in a legal system' in Michel Rosenfeld and Andrés Sajó (eds) *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 170.

Each of the sections in this chapter dealt with different aspects of the reasoning behind the inclusion of each of the selected features of constitutionalism into the CCL. This highlights that the three issues with which this thesis engages (climate change, constitutionalism, and legitimacy) exist at an intellectual crossroads. The consequence of bringing these three issues together at an intellectual crossroads is that, to understand the way in which each of the different issues come together, it is necessary to look at the overlapping area between these from each of the three perspectives. In this chapter it is brought to the foreground that when using the CCL to assess the standard of legitimacy of the CCR it is important to consider what each of the three issues individually brings to the table and what new insights emerge in the space where the three individual issues merge.

The conclusion of this chapter is that, after reflection on the meaning of each of the individual issues, the overlapping area results in a CCL which is constructed of three formal and three material features of constitutionalism. These are enablement and constraint, entrenchment, supremacy, rule of law, separation of powers, and rules of procedure. At this point the inclusion of substantive features of constitutionalism is premature. However, it remains possible for the CCR to develop towards the inclusion of substantive features of constitutionalism in the future.

The six features of constitutionalism together demonstrate clear links to the various legitimacy components. Some of the features, such as rules of procedure, are even relevant in the context of more than one legitimacy component. This makes these six features of constitutionalism in particular useful as an instrument for assessing the standard of legitimacy in the CCR. Furthermore, the selected features of constitutionalism each demonstrate the ability to be applied within the context of the challenges states parties face in their journey towards achieving stabilisation of greenhouse gas emissions in the atmosphere at levels that would prevent dangerous anthropogenic interference. Lastly, constitutionalism's preoccupation with managing authority relationships provides a useful umbrella for the assessment of the standard of legitimacy in the CCR. This is because the management of authority relationships is at the heart of any legitimacy assessment.

The next two chapters shall measure the provisions of the CCR against the six features of constitutionalism in order to reach a conclusion regarding the overall standard of legitimacy of the CCR. The expectation is that the result of this analysis will be that each of the six features of constitutionalism are represented through the provisions of the CCR at least to a minimal extent. Chapters 5 and 6 aim to identify which features of constitutionalism are strongly embedded in the CCR and which features of constitutionalism may require further development. This will provide the foundation for the thesis' conclusion regarding the outcome of the assessment of the standard of legitimacy in the CCR on the basis of the application of the CCL.

CHAPTER 5 FORMAL FEATURES OF CONSTITUTIONALISM IN THE CLIMATE CHANGE REGIME

Introduction

The previous four chapters set the scene for the assessment of the standard of legitimacy in the climate change regime (CCR). They also explained the meaning attributed to the ambiguous concepts of legitimacy and constitutionalism. Furthermore, the previous chapters identified the various intersections between these three key themes and the way in which these can be productively exploited for the purpose of identifying legitimacy strengths and deficits in the CCR. Having situated the argument on the intellectual crossroads between legitimacy, constitutionalism, and climate change this chapter and the next use the CCL as a compass to navigate the assessment of the standard of legitimacy in the CCR.

This chapter takes the first steps by applying the formal features of the CCL to the provisions of the CCR. It makes most sense to start with the formal features of the CCL because these provide the basic architecture of a constitutionally legitimate legal order. Considering that the CCR is a treaty based regime and therefore meets the standards of international law, the expectation is that it will meet the legitimacy expectations related to the formal features of the CCL. Nonetheless, in order to provide an in-depth assessment of the extent to which the provisions of the CCR live up to the expectations set out by the formal features of the CCL, this chapter is structured as follows. Sections 2, 3, and 4 discuss one of the three formal features of constitutionalism each. Each section begins by explaining what the feature under discussion entails and then continues to examine the extent to which the CCR meets the requirements of the feature. This is necessary since the previous chapter only provides a limited explanation of the meaning of each feature and focussed solely on aspects of the meaning of each feature which were relevant to demonstrating how it could be linked to specific legitimacy components. This chapter takes the explanation of the meaning of individual formal features of the CCL further by providing a more in-depth account of what enablement and constraint, entrenchment, and supremacy each entail.

As stated in chapter 3, the purpose of applying the CCL to the CCR is not to argue that it is a constitutional order for the sake of it. Rather, the extent to which formal features of constitutionalism can be identified in the CCR provides an indication of the standard of legitimacy the CCR currently demonstrates. If shortcomings are identified, the development of the CCR to better meet the legitimacy expectations as articulated through the formal features of constitutionalism can be suggested to improve the regime's legitimacy. To the extent that the application of the formal features of constitutionalism to the CCR reveals that the CCR already demonstrates a high degree of adherence to the requirements of the formal features of constitutionalism, this is also helpful. It is helpful because it allows for recognition of the legitimacy strengths the regime already possesses and send a clear signal

to states parties that some of their concerns regarding the authority relationship arising through the enablement of the AIA within the CCR may not pose any substantial obstacle to their legitimate participation in the global coordination of climate change policies.

1 Selecting constitutional features for the assessment of legitimacy in the climate change regime

Chapter 3 highlighted the ambiguities regarding the appropriate meaning of constitutionalism. The ambiguity exists both in relation to the different uses of constitutional language throughout the history of law as well as with regard to the conceptualisation of the modern constitution.¹ It then used the ambiguity surrounding the various uses of constitutional language throughout legal history as a stepping stone to the discussion of the added value of applying a constitutionalism lens to the CCR. Chapter 3 further exploited the ambiguity regarding the necessary features of constitutionalism to select features for the construction of the CCL. It claimed that the ambiguity surrounding the selection of necessary features of constitutionalism was a by-product of constitutionalism's context responsive nature. The discussion of necessary features of constitutionalism in relation to the modern constitution, for example, could be traced back to the specific circumstances within which each individual state came to develop into a constitutional legal order. As a result, literature on the topic of the modern constitution supplies a wide range of potential constitutional features. Common examples of constitutional features include: supremacy, rule of law, democracy, codification, fundamental rights, based on constituent power, comprehensiveness, and enabling and constraining the exercise of public authority.²

In the context of constitutionalism beyond the state, authors have also created lists of specific features that they consider to be essential to constitutionality. For example, Wiener and Lang identify four fundamental norms of a constitutional order.³ These four fundamental norms are: the rule of law, separation of powers, constituent power, and

¹ Giovanni Sartori, 'Constitutionalism: A Preliminary Discussion' (1962) 56(4) *American Political Science Review* 853; Graham Maddox, 'A Note on the Meaning of 'Constitution'' (1982) 76(4) *The American Political Science Review* 805; Howard McIlwain, *Constitutionalism Ancient and Modern* (Cornell University Press 1947); Jill Harries, 'Global constitutionalism: the ancient worlds' in Anthony Lang and Antje Wiener (eds), *Handbook on Global Constitutionalism* (Edward Elgar 2017) 23-34; Dieter Grimm, 'The Constitution in Historical Perspective', *Constitutionalism Past, Present, and Future* (Oxford University Press 2016); Stephen Holmes, 'Constitutions and Constitutionalism' in M Rosenfeld and A. Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012).

² See for example, Andreas Paulus, 'The International Legal System as a Constitution' in Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World?: Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009) 69; Anne Peters, 'The Merits of Global Constitutionalism' (2009) 16(2) 397; Wouter Werner, 'The never-ending closure: constitutionalism and international law' in Nicholas Tsagourias (ed) *Transnational Constitutionalism: International and European Models* (Cambridge University Press 2007). See also Nicholas Barber, *The principles of constitutionalism* (OUP 2018) 329.

³ Anthony Lang and Antje Wiener, 'A constitutionalising global order: an introduction' in Anthony Lang and Antje Wiener (eds), *Handbook on Global Constitutionalism* (Edward Elgar 2017) 1, 2.

rights.⁴ These are the norms that guide the constitution, which they further describe as enabling and restraining decision-making.⁵ Dunoff in turn identifies hierarchical superiority, entrenchment, fundamental rights, separation of powers, and the establishment of institutions that are empowered to create legally binding obligations upon states parties as relevant constitutional features beyond the state, specifically in reference to the WTO.⁶ In the work of Fassbender, key features of constitutionality include: the intention of the authors of the constitution to create an instrument that: arises from a constitutional moment, establishes a system of governance, defines membership, sets out the rights and obligations of actors within the constitutional order, is meant to last, that is difficult to amend, exists in a hierarchy of norms, and belongs to an elevated class of document.⁷ Lastly, Fassbender points towards the constitutional history that he claims the United Nations Charter has. He does not explain why this would be a requirement or constitutionality, but does point out that the United Nations has acted, and was perceived to legitimately act, in a way that would justify taking it as a point of departure in a search for constitutionalism beyond the state.

The above demonstrates that neither in the context of the nation state, nor in the context of constitutionalism beyond the state, is there a lack of potential constitutional features to be examined. The difficulty lies not so much in the identification of constitutional features as in the choice which features are necessary and sufficient. This chapter narrows that discussion down by constructing the CCL for the limited purpose of assessing legitimacy in the CCR. This provides to practical limits. The first is that it focusses the discussion on the instrumentality of features of constitutionalism with regards to revealing legitimacy expectations. Features of constitutionalism which may be necessary for a legal order to provide a comprehensive constitutional order but which do not necessarily relate to any specific component of legitimacy can therefore be left out of the construction of the CCL. The second restriction this creates is that only those features of constitutionalism which provide a relevant link to the specific legitimacy questions which are grappled with in the CCR are considered in terms of being necessary. This limits the potential scope of features of

⁴ Ibid.

⁵ Ibid.

⁶ Jeffrey Dunoff, 'The Politics of International Constitutions: The Curious Case of the World Trade Organization' in Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009) 178, 180-181.

⁷ Bardo Fassbender, 'The United Nations Charter As Constitution of the International Community.' (1998) 36(3) *Columbia Journal of Transnational Law* 569. The importance of the intention of creating a constitution is also reflected in his discussion of the importance of the title 'Charter' for the United Nations Charter. He argues that the choice for the specific word 'charter' as opposed to, for example, 'covenant' reflects the intention to create a legal instrument that includes the list of constitutional features he creates. In his description of the feature of membership Fassbender also engages in a discussion of the relationship between universality and sovereignty as regards member-states and non-member states. This indicates again the importance of the question of sovereignty in the matter of constitutionality and especially in the context of constitutionality beyond the state.

constitutionalism. For example, it excludes the inclusion of the otherwise often considered to be necessary feature of providing and protecting fundamental rights of individuals.

2 Enablement and constraint

A key feature of constitutionalism is that the constitution is an instrument that enables and constrains.⁸ Whilst some accounts of constitutionalism highlight the constraining aspect of constitutionalism, it is important to also acknowledge the significance of the constitution's enabling role. This is especially the case when looking at enablement and constraint in the context of the CCR. This is because states have long taken centre stage in the sphere of international law. By establishing the AIA the CCR effectively adds a new player to the field. Not only this, it also enables that player to take in a position of exercising authority over sovereign states parties. Therefore, the enablement aspect of constitutionalism is just as essential to the assessment of the standard of legitimacy as the constraint aspect is.

Through enablement and constraint, the constitutional provisions manage the interactions between its subjects and its object.⁹ In this case these are the AIA of the CCR and states parties thereto. In this way the constitution structures the exercise of authority in a way that protects and enhances the autonomy of the subjects of the constitution.¹⁰ The way in which the constitutional arrangement enables the subjects of the constitution is different from the way in which it enables the object of the constitution. The way in which the subjects and object are constrained is also different.

As discussed in chapter 3, the constitution is in essence a construct that enables individual actors who are autonomous, free, and equal, to achieve a common objective in regards to which they face two obstacles. The first obstacle is that the objective is one which actors are unable to achieve through their individual efforts alone. Cooperation is a necessity for the realisation of the common objective. For example, in the context of the state, individuals rely on the state claiming monopoly on the use of force in order to achieve collective security from each other and from outside threats.¹¹ For the desired security to be achieved it is necessary that there is a collective buy-in. Collective action issues cannot be resolved on an individual basis. This makes the CCR suited to examination through a constitutionalism lens. The cumulative causation and indivisible impacts of climate change means that buy-in

⁸ See Nicholas Barber, 'Introduction: Constitutionalism' in Nicholas Barber, *The Principles of Constitutionalism* (OUP 2018). The point that constitutions enable as well as constrain is also made in: Martin Loughlin, 'The silences of constitutions' (2018) 16(3) *International Journal of Constitutional Law* 922.

⁹ The Oxford Dictionary of Law describes the constitution as consisting of "the rules and practices that determine the composition and functions of the organs of central and local government in a state and regulate the relationship between the individual and the state." See J Law and E Martin, 'Constitution' in *A Dictionary of Law* (OUP 2014).

¹⁰ On the role of the constitution in enhancing autonomy see chapter 6.

¹¹ This builds on Hobbes account of the state of nature, see Thomas Hobbes, *The Clarendon Edition of the Works of Thomas Hobbes, Vol. 2: De Cive: The English Version* (Howard Warrender ed. OUP 1983) 42-61.

is required from all states for global climate governance to be realised. The second obstacle is that individual actors will be tempted to prioritise individual interests even where this is detrimental to the common objective.¹² The prioritisation of individual interests can be linked back to the fact that the individual actors are inherently suspicious of each other, because each actor is expected to protect and promote their own interests over those of others.¹³

Where the need for cooperation is met with the acknowledged temptation to prioritise individual interest over the common interest and the inherent suspicion of other actors' commitment to the common objective, a constitutional arrangement can provide a solution. This was already signposted in chapter 3. This recap serves the purpose of bringing to the foreground the significance of these challenges for providing the backdrop for the first necessary feature of constitutionalism, enablement and constraint.

The temptation to prioritise individual interests and the suspicion that others will be similarly inclined to further their own interests creates the need for constraint. In the case of the issue of climate change, this means that states must accept constraints on their conduct insofar as it relates to greenhouse gas emitting activities. In light of the inherent distrust amongst sovereign states, it becomes necessary for the implementation of these constraints to be supervised. For this, an objective, third party actor must be established and enabled to supervise the constraints on states parties. Since states are inherently suspicious of each other, the establishment of a new actor provides the greatest reassurance of objectivity and fairness. In the case of the CCR this new actor is the AIA.

Adequate constraints on the conduct of the subjects of the constitution remove the risk that individual actors sabotage the realisation of the common objective by prioritising individual interests. Constraints furthermore address the fear that others may not act in good faith towards the achievement of the common objective. Individual actors know that all who subject themselves to the constitution face constraint. No longer does each individual actor need to fear that another will exploit an opportunity to their own advantage and at the cost of the collective.¹⁴ The burden of accepting constraints on one's range of options is alleviated by the knowledge that others too are predictably constrained and that these constraints are supervised by another entity with the relevant authority.¹⁵

¹² This is derived from Jon Elster's discussion of the need for constraints in Jon Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* (CUP 1979).

¹³ In the case of individuals and modern constitutionalism see on this topic, for example: Hobbes 1983 (n 11). For an explanation on how a similar problem arises in the context of sovereign states see chapter 3.

¹⁴ The articulation of constraints in and of itself does not guarantee that all actors will abide at all times. Chapter 6 therefore takes a closer look at the role of rules of procedure, including transparency and accountability, in managing the realisation of constraints.

¹⁵ See Tom Bingham, *The rule of law* (Penguin Books 2010), 210-217.

To supervise the implementation of the constraints on states parties requires an actor which has the authority to act to this end. By enabling the AIA to supervise the conduct of states parties, the CCR in essence establishes an authority relationship between the AIA and states parties. The enablement of the AIA, therefore also poses a threat to the autonomy of states parties. To protect the autonomy of states parties the powers of the AIA must therefore be subjected to constraints as well. If the enablement of the object of the constitution were absolute then the subjects of the constitution would be subject to arbitrary interference, which would impede their ability to exercise their autonomy, freedom, and equality. Therefore, for the authority relationship between states parties and the AIA of the CCR to have legitimacy, both experience elements of enablement and constraint.

Being aware of their limited ability to prioritise the common objective over their individual interests, individual actors can acknowledge and accept the need for another entity to exercise authority for the purpose of preventing conduct which would obstruct the realisation of the common objective.¹⁶ What the above demonstrates is that the flipside of the constraint of the subjects of the constitution is therefore the enablement of the object of the constitution. This is why enablement and constraint are mentioned as a single feature. The constraint of the subjects of the constitution is paired with the enablement of the object of the constitution and vice versa. They cannot realistically be separated. In order for subjects of the constitution to be constrained, they must enable another entity to exercise authority over them.¹⁷

In the context of the CCR this means that states parties accept constraints on their conduct and enable the AIA to oversee the implementation of these constraints. Highlighting the enablement and constraint feature in the context of the CCR is especially important because the obligations it creates for states parties are not static and fixed in time. Rather, the architecture of the CCR is designed to be responsive to changes that are a result of the ongoing impacts of climate change as well as to the continuous developments in scientific knowledge in the context of climate change. Whilst this responsiveness is necessary in order to address an issue such as climate change it also presents to states parties a situation in which their rights and obligations may shift over time in response to real time developments.

To summarise, the constitutional provisions enable subjects of the constitution by facilitating the necessary cooperation for the achievement of a common objective. The constitutional provisions constrain the subjects by limiting their options to prioritise individual interests. The constitution enables its object by establishing an AIA and providing it with a mandate to carry out specific activities, including the supervision of the

¹⁶ Building on Jon Elster's work on rationality in Elster 1979 (n 12).

¹⁷ For the meaning of subjects of the constitution and allocation of constitutional roles see chapter 3.

implementation. The constitutional provisions also constrain the object of the constitution by limiting the AIA's ability to exercise authority only within the boundaries of its mandate and by requiring the exercise of authority to take place with consideration for procedural safeguards.

These observations provide an abstract explanation of the meaning of the necessary formal feature of enablement and constraint in the context of the CCL. The following subsections use this abstract point of reference as the foundation upon which a more specific meaning in the context of the CCR can be developed, and apply it to the relevant provisions of the CCR as well.

2.1 Enablement of states parties

Enablement of states parties takes the form of the CCR providing the circumstances through which they are able to achieve a common objective that would be unattainable individually. In the case at hand, the CCR provides states parties with the tools that are needed for them to achieve the ultimate objective set out in article 2 United Nations Framework Convention on Climate Change (UNFCCC):¹⁸

“to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”¹⁹

This is a long term objective that states parties share, but are unable to achieve in the absence of a constitutional arrangement. As stated above, the need for supervision by an objective actor, the AIA, arises from the nature of states to prioritise their individual short term interests over the common long term interest.²⁰ Through the interference by the AIA states can be reassured that all subjects of the constitution will be held accountable.

2.2 Constraint of states parties

In a constitutional setting constraint is often first and foremost thought to mean constraint of the institutional arrangement tasked with governance in the legal order.²¹ However, constraint of the subjects of the constitution, states parties, is equally important. Only if the states parties to the CCR accept constraints on their conduct can it be ensured that they are prevented from prioritising their individual interests over the common interest. Constraint

¹⁸ United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

¹⁹ Article 2 UNFCCC.

²⁰ This is further discussed in chapter 3. The tendency of states to prioritise their own interests over the long-term interest can be seen as a product of the purpose of the state, which is to protect and promote the interests of their citizens, especially where these interest may be in competition with other interests. Considering the wide variety of interests at stake in the context of climate change this characteristic of the state comes starkly into relief.

²¹ See Barber 2018 (n 8).

of all states parties further contributes to mitigation of the natural distrust states parties may harbour against each other's motivations and intentions. If states parties expect others to accept constraints that bind them to act in a way that is compatible with stabilising greenhouse gas concentrations in the atmosphere at levels that would prevent dangerous anthropogenic interference with the climate system²², then they must be willing to accept such constraints as well.

2.2.1 Distinguishing ordinary from constitutional constraint²³

In a broad sense, any legal obligation could be seen as a form of constraint on states parties, because it limits them from exercising their sovereign authority in a way that is incompatible with their legal obligation. Thus states parties are constrained to the extent that their conduct must not be contrary to any of their legal obligations. In the context of the CCR, this means that, in order to achieve the ultimate objective, set out in article 2 UNFCCC, states parties must accept that activities that result in an increase in the concentration of greenhouse gas emissions in the atmosphere are restricted in some way. For example, article 4(2)(a) of the UNFCCC sets out a commitment for states parties included in Annex I of the Convention to:

“adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs. These policies and measures will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions consistent with the objective of the Convention, recognising that the return by the end of the present decade to earlier levels of anthropogenic emissions of carbon dioxide and other greenhouse gases not controlled by the Montreal Protocol would contribute to such modification, and taking into account the differences in these Parties' starting points and approaches, economic structures and resource bases, the need to maintain strong and sustainable economic growth, available technologies and other individual instances, as well as the need for equitable and appropriate contributions by each of these Parties to the global effort regarding that objective. These Parties may implement such policies and measures jointly with other Parties and may assist other Parties in contributing to the achievement of the objective of the Convention and, in particular, that of this subparagraph”

²² This is taken from article 2 UNFCCC, which sets out the ultimate objective of the climate change regime and is cited in full on pages 5 and 6 of this chapter.

²³ This distinction is in part inspired by the distinction made by Hart between primary and secondary rules See H L A Hart, *The concept of law* (with a postscript edited by Penelope A. Bulloch and Joseph Raz; and with an introduction and notes by Leslie Green, 3rd ed, OUP 2015), 81.

Article 4(2)(a) UNFCCC provides an example of constraint, broadly interpreted, because it requires that those states parties that are included in Annex I of the Convention “shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs.” This is a constraint because mitigation of climate change requires a reduction of activities that contribute to the increase in greenhouse gas concentrations in the atmosphere. States parties are therefore effectively constrained in their freedom to autonomously decide what greenhouse gas emitting activities to conduct.

The constraint of adopting policies that lead to mitigation of climate change as imposed on states parties by article 4(2)(a) UNFCCC is tempered by five factors. These are:

“differences in [...] starting points and approaches, economic structures and resource bases, the need to maintain strong and sustainable economic growth, available technologies and other individual instances, as well as the need for equitable and appropriate contributions”.

As a result, the precise extent of the obligation to limit greenhouse gas emissions arising from article 4(2)(a) UNFCCC is unclear. Nonetheless, it provides an example of constraint broadly interpreted, because states parties to whom the obligation applies, should act in a way that is compatible with their obligation to mitigate climate change and limit greenhouse gas emissions.

The Kyoto Protocol²⁴ also presents an example of constraint on states parties concerning activities that result in greenhouse gas emissions. Article 3(1) Kyoto Protocol creates a binding obligation for states parties included in Annex I who

“shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of the Article, with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012.”

This article is an example of constraint on states parties because it demonstrates a restriction on the activities that they can carry out. Activities that would result in greenhouse gas emissions beyond the assigned amounts are not permitted.

²⁴ Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162.

Both the UNFCCC and the Kyoto Protocol created constraints regarding activities that result in greenhouse gas emissions which did not apply to all states parties to the regime. The Paris Agreement²⁵ for the first time introduced the obligation for all states parties to submit nationally determined contributions. This obligation is stated in article 4(2) which reads: “Each Party shall prepare, communicate, and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.” In contrast to the Kyoto Protocol, the Paris Agreement does not designate targets to specific states parties. Whilst it isn’t stated expressly, it may be assumed that the nationally determined contributions are to entail policies that limit the amount of greenhouse gas emissions states parties are to produce. This assumption is derived from the reference to “domestic mitigation measures”.

However, these are not the types of constraints which the CCL is looking for. If any type of legal obligation were to be interpreted as a relevant constraint, then any treaty which establishes legally binding obligations demonstrates the feature of constraint. To take such a broad interpretation of the feature of constraint could detract from the significance of applying specifically constitutional terminology.²⁶ The concerns which were outlined in chapter 3 regarding the hollowing out of constitutional language would then be justified. In order to prevent the use of too broad a definition of constraint resulting in the emptiness of constitutional terminology, it is preferable to make a distinction between ordinary constraint and constitutional constraint. To illustrate the difference, it is useful to explain the distinction in the context of modern constitution first.

In the context of the modern constitution, ordinary law creates ordinary constraint. The content of ordinary law constrains individuals by prescribing their conduct. What sets ordinary constraint apart from constitutional constraint, is that individuals can influence the content of ordinary law through participating in democratic processes. In this sense, there is no constraint placed on them from above. Rather, the constraints are self-imposed. Constitutional constraint on the other hand, exists as a flipside of the enablement of the state as the object of the constitution. As articulated above, the constitution enables the object of the constitution through establishing an institutional arrangement and giving each body thereof specific mandates to act. In the context of the modern constitution, the feature of constitutional constraint manifests in the individual’s act of subjecting themselves to the authority of state.

In contrast to ordinary constraint, which provides specific prohibitions or prescriptions of conduct, constitutional constraint is open ended. Constitutional constraint places certain questions regarding governance beyond the scope of debate.²⁷ Individuals agree and accept

²⁵ Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016).

²⁶ Walker discusses the criticism against constitutionalism against the state which focusses on the concern of hollowing out the meaning of constitutional terminology in Neil Walker, ‘Taking Constitutionalism Beyond the State’ *Political Studies* (2008) 56(3), 519.

²⁷ Grimm 2016 (n 1), 18.

that the exercise of authority by the state takes place through the legislature, the executive, and the judiciary. This as opposed to, for example, law-making by a single official for the duration of their lifetime and law-enforcement through mob justice. The individual accepts that the state may interfere, through the legislature, the executive, and the judiciary, with its conduct, within the limits of fundamental rights and procedural safeguards.²⁸ The individual accepts this without knowing the specific content of future legislation, policies, or law-application by the judiciary. The individual's acceptance therefore exists in relation to the exercise of authority through the institutional arrangement of the state, rather than in relation to specific outcomes of the exercise of authority by the state.

This acceptance flows from the reassurance provided within the constitution of the protection of the individual's fundamental rights and the provision of procedural safeguards against arbitrary or absolute abuses of authority.²⁹ Under these conditions, it becomes possible for autonomous, free, and equal, individuals to defer authority to the institutional arrangement of the state without requiring each individual's review on the content of each act of rule-making, rule-enforcement, and rule-application.³⁰ Constitutional constraint over the subject of the constitution therefore manifests in the exercise of authority by the constitutionally established institutional arrangement. Such exercise of authority can take place through law-making, law enforcement, and law application. It is in the operation of the legislature and the judiciary in particular that the constitutional constraint of individuals in the state context becomes visible. Constitutional constraint on the subjects of the constitution does not diminish individuals' status as autonomous, free, and equal actors. In fact, the constitution specifically protects their status through the provision of fundamental rights and procedural safeguards.³¹

This distinction between ordinary constraint and constitutional constraint is useful for the purpose of establishing a constitutional framework for global climate governance without risking a detrimental hollowing out of constitutional language. As stated above, if any legal obligation arising from international law is seen as constraint, then there would be little interest in defining an international legal regime as constitutional or not. All treaties containing binding obligations could be described as constraining. Instead, the label of ordinary constraint can be used to describe those obligations that states have negotiated and individually consented to. In the context of ordinary treaty negotiation, the analogy between ordinary laws in the context of the state, where individuals can influence the content by participating in democratic processes, becomes visible. Similarly, states can influence the content of their obligations arising out of treaty law where they participate in the relevant processes of negotiation and ratification. Constitutional constraint, however, would exist there where states, in their identity of states parties to a treaty regime, have

²⁸ In the context of the modern constitution these include democracy. In the context of the CCL the material features rules of procedure are more likely to be centred on safeguarding sovereignty, than providing democracy. For a more detailed discussion of the material features of constitutionalism see chapter 6.

²⁹ Dieter Grimm, 'The Function of Constitutions and Guidelines for Constitutional Reform' in Dieter Grimm, *Constitutionalism: Past, Present, and Future* (OUP 2016) 127.

³⁰ In other words, the material features of constitutionalism provide the circumstances within which the exercise of authority through the constitutional institutional arrangement is legitimised. See also chapter 4 for more detailed discussion of the connection between legitimacy and constitutionalism.

³¹ See chapter 6 for a discussion on the rule of law.

authorised an AIA within the treaty regime to interfere in their conduct insofar as necessary for the purpose of achieving the treaty regime's objective.

To clarify, whilst states did negotiate and consent to the individual provisions of the UNFCCC, what they consented to in that specific treaty was the creation of a framework convention. The characterisation of the UNFCCC as a framework convention means that its main purpose is the installation of an institutional arrangement that facilitates the ongoing cooperation required to achieve the treaty's objective.³² What states parties consented to in the UNFCCC was the establishment of an AIA that would support them in their ambition to achieve the common long-term objective of stabilising greenhouse gas emissions. Constitutional constraint in the context of constitutionalism beyond the state is therefore best identified in states parties' acceptance of the exercise of authority through the AIA of the treaty regime. In the context of the CCR, this would require that states parties agree to be bound by law-making, law-enforcing, and law-application activities of the AIA, prior to knowing the potential outcomes of these activities. Whilst the CCR is not unique in adopting a treaty regime with this structure, it does set it apart from traditional treaties which outline a more or less static set of rights and obligations for states parties.³³

This form of constraint poses a challenge to traditional understanding of the principle of sovereignty within international law, which focusses on the autonomy of the state and requires specific consent for the acceptance of new international obligations.³⁴ Yet sovereignty as autonomy is not inherently incompatible with this form of constraint.³⁵ It is possible for the state to accept the unknown outcome of a decision-making activity if this outcome is the product of a decision-making procedure which the state consented to. This does require that both the decision-making procedure as well as the entity entrusted to operate it can demonstrate a high standard of legitimacy. Only where the decision-making procedure and the entity operating it can demonstrate that they meet the normative expectations of those who will be subjected to the outcome of the decision can inherently sovereign and autonomous actors be persuaded to agree to obey the outcome of the decision solely on the basis of the decision-making procedure and the entity operating it.

Sovereignty as autonomy of the state implies that the state is at liberty accept constraints if doing so enhances its ability to protect and promote the wellbeing of its citizens.³⁶ In the same way that consenting to the exercise of authority through the state does not diminish

³² Although the UNFCCC is mostly a framework convention, as demonstrated also by the title of the treaty, it does contain some substantive obligations. Bodansky therefore claims it is best described as a hybrid. See Daniel Bodansky, 'The United Nations Framework Convention on Climate Change: a commentary' (1993) 18(2) *The Yale Journal of International Law* 451, 493-496.

³³ A list of examples of other treaty regimes with a similar set up can be found in Robin Churchill and Geir Ulfstein, 'Autonomous institutional arrangements in multilateral environmental agreements: a little-noticed phenomenon in international law' (2000) 94(4) *American Journal of International Law* 623.

³⁴ Daniel Bodansky, 'The legitimacy of international governance: a coming challenge for international environmental law?' (1999) 93(3) *The American Journal of International Law* 596. See also Churchill and Ulfstein 2000 (n 33).

³⁵ This is traced and discussed in great detail by Franz Xaver Perrez in: Franz Xaver Perrez, *Cooperative Sovereignty From Independence to Interdependence in the Structure of International Environmental Law* (Kluwer Law International 2000).

³⁶ For an explanation of sovereignty as autonomy see chapter 3.

the status of individuals as being autonomous, free, and equal actors the acceptance by states parties of the exercise of authority through the AIA of the CCR is not incompatible with their sovereignty.³⁷ This is the case insofar as the exercise of authority takes place on the basis of legitimate procedures, based on the rule of law, and taking place within the limits procedural safeguards, is not incompatible with sovereignty. These three boundaries to the exercise of authority by the AIA represent the necessary material features of the CCL and are defined and discussed in greater detail in chapter 6.

2.2.2 Constitutional constraint of states parties in the climate change regime

The CCR demonstrates constitutional constraint to varying degrees. For example, according to article 7 the Conference of the Parties (COP) may adopt and shall make, within its mandate, the decisions necessary to promote effective implementation of the CCR. Article 7(2) in particular states that:

“The Conference of the Parties, as the supreme body of this Convention, shall keep under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention.”

It then continues to list in article 7(2)(a-m) a number of activities the COP is authorised to carry out. In light of constitutional constraint of states parties it is perhaps of particular interest to point out the content of the following paragraphs of article 7: 7(2)(e), 7(2)(i), 7(2)(k) and 7(2)(m).

Article 7(2)(e) states that the COP shall:

“Assess, on the basis of all information made available to it in accordance with the provisions of the Convention, the implementation of the Convention by the parties, the overall effects of the measures taken pursuant to the Convention, in particular environmental, economic, and social effects as well as their cumulative impacts and the extent to which progress towards the objective of the Convention is being achieved.”

This is interesting in light of constitutional constraints of states parties to the CCR because it indicates the role of the COP in supervising the extent to which states parties are contributing to the achievement of the ultimate objective of the regime. This is a form of constraint because it provides a form of supervision over the conduct of states parties. Article 7(e) UNFCCC does not attach any enforcement powers to this form of supervision. However, this is a common approach in international law, which generally relies more on methods such as reporting and monitoring rather than relying on more aggressive measures of enforcement.

³⁷ On the rule of law as a means of creating and maintaining a space within which the individual actor may exist in liberty see Trevor Allan, ‘The Rule of Law’ in David Dyzenhaus and Malcolm Thornburn (eds), *Philosophical foundations of constitutional law* (OUP 2016) 201.

Article 7(2)(i) states that the COP shall: “Establish such subsidiary bodies as are deemed necessary for the implementation of the Convention.” This too indicates a form of constitutional constraint for states parties because they are accepting the authority of the COP to further develop the institutional framework, without negotiating specifically what future subsidiary bodies the COP may decide to establish. The consent is therefore focussed on the COP’s ability to act rather than on specific outcomes.

Article 7(2)(k) is perhaps even more important in terms of constitutional constraint on states parties. It states that the COP shall: “Agree upon and adopt, by consensus, rules of procedure and financial rules for itself and for any subsidiary bodies.” Here it can be seen that states parties have agreed that the COP may itself, decide what its rules of procedure are going to be, as well as rules of procedure for any subsidiary bodies. This is significant because once again states parties are handing control over to the COP with regard to an important aspect of the operation of the CCR. That the scope of decision-making implied by the authority to develop rules of procedure for itself and any subsidiary bodies is extensive is demonstrated by a number of COP decisions which elaborate such rules. For example, the Marrakesh Accords³⁸ adopted by the COP in 2001, formalised the agreement on operational rules for the Kyoto Protocol. As such the rulebook for the Kyoto Protocol was adopted through the COP, demonstrating the scope of constraint the COP can impose on states parties to the CCR.

On the face of it this looks as if states parties have accepted that the COP can exercise authority in a decision-making capacity. This would indicate that states parties have accepted a constitutional constraint, because they have agreed to a method of decision-making that is not based on direct participation. However, the role of the COP is more complex. On the one hand, decisions of the COP do not have direct effect. For a legal obligation to arise the requirement of consent through ratification remains necessary. This shifts the object of consent away from the decision-making procedures of the COP, which would indicate constitutional constraint, back onto the substantive content of individual decisions, indicating ordinary constraint. Whilst states parties on the face of it have consented to defer to the decision-making procedures of the COP, in reality they maintain tight control over the extent of their obligations by insisting on continued reliance on consent. For example, the COP may adopt the text of a new protocol containing additional obligations for states parties. However, new obligations only arise for those states parties who ratify the text of the protocol.³⁹

On the other hand, the role of the COP goes beyond the question whether it can create legal obligations with direct effect. The very existence of the COP and the activities it carries out can contribute to positive feedback loops which influence states parties’ conduct.⁴⁰

³⁸ Conference of the Parties, ‘Report of the Conference of the Parties on its seventh Session, Held at Marrakesh From 29 October to 10 November 2001’ UN Doc FCCC/CP/2001/13/add.1 (FCCC/CP/2001/13/add.1) available at <<https://unfccc.int/resource/docs/cop7/13a01.pdf>> accessed 14 July 2020.

³⁹ To illustrate, to date only 185 out of 197 states parties to the UNFCCC have ratified the Paris Agreement. See ‘Paris Agreement Status of Ratification’ available at <<https://unfccc.int/process/the-paris-agreement/status-of-ratification>> accessed 17 July 2020.

⁴⁰ Bodansky 1993 (n 32), 495.

Furthermore, the power of the COP to The potential existence of positive feedback loops, however, would be an insufficient degree of constraint to speak of constitutional constraint. The degree to which the CCR presents constitutional constraints upon states parties is therefore questionable at best. The lack of clear constraint on the conduct of states parties highlights that the CCR does not live up to the normative expectations of constitutional standards. This could indicate a legitimacy issue in the CCR as viewed through the lens of constitutionalism.

2.3 Enablement of the institutional arrangement of the climate change regime

The CCR enables the AIA in two ways. The first mode of enablement is through the establishment of the bodies that constitute the AIA. When looking at the bodies of the CCR as object of the constitution, it is necessary to make a distinction between the bodies created directly through the treaty texts and the bodies that were created through this institutional arrangement. The former are a part of the object of the constitution. The latter are not a part of the object of the constitution. This is because they were not created by the constitutional provisions directly but through decisions of the COP. As mentioned in chapter 3, the UNFCCC, the Kyoto Protocol, and the Paris Agreement establish a number of key bodies that comprise the core of the regime's AIA. At the core of the CCR are four bodies, which contribute to the development of the regime's normative content. These four bodies are also tasked with promoting and supervising the implementation of the CCR and compliance with it. Article 7-10 of the UNFCCC establish the COP,⁴¹ the Secretariat,⁴² the Subsidiary Body for Scientific and Technological Advice (SBSTA)⁴³ and the Subsidiary Body for Implementation (SBI).⁴⁴ The COP also acts as the Meeting of the Parties (MOP) for the Kyoto Protocol and for the Paris Agreement.⁴⁵ Articles 7-10 UNFCCC therefore demonstrate the first mode of enablement of the AIA by establishing these four key bodies.

The second mode of enablement exists in the provisions which provide each of the abovementioned four key bodies with a mandate. The individual bodies of the AIA are all tasked with different aspects of developing the regime's normative content and supervising

⁴¹ Article 7(1) UNFCCC "A Conference of the Parties is hereby established."

⁴² Article 8(1) UNFCCC "A secretariat is hereby established."

⁴³ Article 9(1) UNFCCC "A subsidiary body for scientific and technological advice is hereby established to provide the Conference of the Parties and, as appropriate, its other subsidiary bodies with timely information and advice on scientific and technological matters relating to the Convention. This body shall be open to participation by all Parties and shall be multidisciplinary. It shall comprise of government representatives in the relevant field of expertise. It shall report regularly to the Conference of the Parties on all aspects of its work."

⁴⁴ Article 10(1) UNFCCC "A subsidiary body for implementation is hereby established to assist the Conference of the Parties in the assessment and review of the effective implementation of the Convention. This body shall be open to participation by all Parties and comprise government representatives who are experts on matters related to climate change. It shall report regularly to the Conference of the Parties on all aspects of its work."

⁴⁵ Article 13(1) Kyoto Protocol "The Conference of the Parties, the supreme body of the Convention, shall serve as the meeting of the Parties to this Protocol". Article 16(1) Paris Agreement "The Conference of the Parties, the supreme body of the Convention, shall serve as the meeting of the Parties to this Agreement."

and facilitating the regime's implementation and states parties' compliance with it. To understand better the extent to which the CCR enables the AIA it created, it is necessary to take a closer look at the provisions that outline the mandate of each of its individual bodies.

2.3.1 Conference of the Parties

The COP is the most important of the four key bodies established in the CCR. The importance of the COP is demonstrated by the fact that article 7 UNFCCC highlights it as the convention's supreme body.⁴⁶ Its importance is furthermore clear from its extensive mandate as evidenced by the list of activities it is authorised to carry out.⁴⁷ Significantly, the COP has the power to adopt further legal instruments, review implementation of the Convention and further legal instruments it adopts, and take decisions necessary to promote the effective implementation of the Convention. Reviewing the implementation of the Convention and further legal instruments that it adopts reflects the supervisory role allocated to the COP.⁴⁸

The UNFCCC does not authorise the COP to attach consequences to perceived shortcomings in state parties' implementation.⁴⁹ The Kyoto Protocol, on the other hand, did enable the COP to

“approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree, and frequency of non-compliance. Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol.”⁵⁰

To date no amendment to create binding consequences in the event of non-compliance has been made. Article 18 did, however, lead to the COP adopting decision FCCC/CP/2001/13/Add.3, containing rules relating to states parties' compliance with the Kyoto Protocol.⁵¹

⁴⁶ Article 7(2) UNFCCC states: “The Conference of the Parties, as the supreme body of this Convention, shall keep under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention [...]”.

⁴⁷ Listed in article 7(2)(a-m) UNFCCC.

⁴⁸ Article 7 UNFCCC.

⁴⁹ The COP, however, did have authority to create the Kyoto Protocol compliance mechanism. Arguably this means the COP indirectly has the authority to attach sanctions to perceived failures by state parties to comply with their legal obligations under the CCR.

⁵⁰ Article 18 Kyoto Protocol.

⁵¹ Conference of the Parties, *Report of the Conference of the Parties on its seventh Session, Held at Marrakesh From 29 October to 10 November 2001* UN Doc FCCC/CP/2001/13/Add.3 available at: <<https://undocs.org/en/FCCC/CP/2001/13/Add.3>> accessed 14 July 2020. See for example, pages 65-77.

The importance of the COP's authority to adopt decisions has even led to it being compared to a legislator. Brunnée elaborates on the COP as a form of global legislator by explaining that:

“The texts of various MEAs indicate that the COPs' involvement ranges from the adoption of texts that are subsequently ratified by MEA parties to what appear to be more autonomous forms of law-making. For example, the Kyoto Protocol charges the UNFCCC COP and its counterpart, the 'Conference of the Parties serving as the Meeting of the Parties' to the Protocol ('COP/MOP'), with elaborating and adopting the guidelines, rules or procedures that are needed to flesh out several of the Protocol's key provisions. It would seem, then, that the COP is the focal point of climate change law-making activities [...] Its role in the law-making process, therefore, is of particular interest and it is timely to ask whether the UNFCCC COP [...] are evolving [...] into issue-specific 'equivalents of global legislatures.'”⁵²

Brunnée's argument that the COP is the “focal point of climate change law-making activities” highlights the COP's role in developing the normative content of the framework convention. Despite this, it remains difficult to fully attribute the status of legislator to the COP, especially in comparison to the role of a legislator in the domestic context. A key difference is that the COP can only suggest the content for obligations. For these to become binding on states parties, ratification of the texts adopted by the COP remains necessary. In contrast, a state legislator is able to bind all citizens of its state, regardless of whether they individually consent to the proposed law or not. The consent to be bound by the state legislator is embedded in the organisational structure of the state.

This difference does not, however, mean that the COP's contribution to the development of the normative content of the CCR should be seen as negligible. Firstly, the COP's impact on the establishment of new obligations for states parties can be described as creating a system of feedback loops.⁵³ Another way of viewing the law-making role of the COP is to consider it as a form of direct democracy in which all potential addressees of a future obligation participate actively in the negotiation of its content and consensus amongst all potential addressees of the obligation is required before the obligation is enacted. Through the COP, state parties have negotiated and ratified the content of the Kyoto Protocol and the Paris Agreement, including any new obligations these presented.

⁵² Jutta Brunnée, 'COPing with Consent: Law-Making Under Multilateral Environmental Agreements' (2002) 15(1) *Leiden Journal of International Law* 1, 4. In support of her argument Brunnée references Kyoto Protocol articles 3(4), 5(1), 6(2), 7(4), 8(4), 12(7), 16, 17 and 18 in the original text.

⁵³ Bodansky 1993 (n 32), 495.

In discussing whether the COP's powers can be described as legislative, it is sometimes compared to the institutional arrangement of the European Union (EU). Bodansky comments that, compared to the EU, which has the doctrines of direct effect and supremacy, a European Council of Ministers with broad legislative powers, and the European Court of Justice with compulsory jurisdiction, the CCR's AIA appears much weaker in terms of being able to exercise public authority.⁵⁴ While Bodansky's comparison with the EU raises some valid observations, it does not lead to the conclusion that the AIA in its current capacity cannot be considered to meet the standard of constitutional enablement. This is because the point of examining the CCR through the perspective of the CCL is not to argue that the CCR is a comprehensive, fully constitutionalised legal order. Rather, the intention is to identify the regime's strengths and weaknesses. This implies that it is presumed that there are areas in which the CCR may need to be developed further in order to improve its standard of legitimacy. That the AIA of the CCR is not yet as fully developed as that of the EU does not mean that it therefore automatically falls short of the first necessary formal feature of the CCL. What is necessary is that it demonstrates at least a minimal degree of the feature so that this may be used as a foundation for future further development.

An additional reason not to dismiss the possibility that the CCR might already incorporate a minimal degree of constitutional enablement despite its shortcomings in comparison with the EU is that, just as constitutions between nation states differ, it is possible for variations of constitutionalism to exist at the international level. Especially considering that each international regime addresses a different subject area, which is reflected in the articulation of each regime's objective, it should not be assumed that all objectives are best achieved in the same manner.

The EU's main objective is to promote peace, follow the EU's values, and improve the wellbeing of nations.⁵⁵ The World Trade Organization describes its objective as opening up trade for the benefit of all.⁵⁶ Article 1 of the constitution of the World Health Organization declares its objective to be the attainment by all peoples of the highest possible level of health.⁵⁷ Such varying objectives may warrant varying forms of institutional arrangements.

⁵⁴ See Bodansky 1999 (n 34), 598-599.

⁵⁵ <<https://europarlamenti.info/en/values-and-objectives/objectives/>> accessed 15 July 2020.

⁵⁶ World Trade Organization, 'Overview' <https://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm> accessed 15 July 2020.

⁵⁷ International Health Conference, 'Constitution of the World Health Organization 1946' (2003) 80(12) Bulletin of the World Health Organization 983 (WHO constitution). Available at <<http://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf?ua=1>> accessed 15 July 2020. See article 1 WHO constitution.

As long as the objective represents the two key characteristics that invite a constitutional approach, and the key constitutional features are reflected, it is not required that each international regime operates in exactly the same way. In addition, the constitutionality of the EU itself is disputed. So even if the CCR's AIA would be identical to that of the EU, this would not automatically mean it would have the legitimating impact sought.

Further evidence of the way in which the CCR has enabled the AIA can be seen in the authority it has given the COP to expand the original institutional framework. Using this authority, the COP has expanded the institutional framework of the CCR by developing a score of further bodies to promote effective implementation of the treaty. Adding to the bodies created by states parties through the UNFCCC directly⁵⁸, the COP created the Adaptation Committee (AC)⁵⁹, the Standing Committee on Finance (SCF)⁶⁰, the Paris Capacity Building Committee⁶¹, the Technology Mechanism (consisting of a Technology Executive Committee and a Climate Technology Centre and Network⁶²), the Consultative Group of Experts on National Communications from non-Annex I Parties (CGE)⁶³, and the Least Developed Countries Expert Group (LEG)⁶⁴. The COP also established four additional bodies in its role as COP/MOP to the Kyoto Protocol. These bodies exist specifically in relation to the Kyoto Protocol. They are: The Compliance Committee⁶⁵, the Joint

⁵⁸ The Conference of the Parties (article 7 UNFCCC), the secretariat (article 8 UNFCCC), the Subsidiary Body for Scientific and Technological Advice (article 9 UNFCCC) and the Subsidiary Body for Implementation (article 10 UNFCCC).

⁵⁹ Conference of the Parties, 'Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010' UN Doc FCCC/CP/2010/7/Add.1 (FCCC/CP/2010/7/Add.1) available at <<https://unfccc.int/sites/default/files/resource/docs/2010/cop16/eng/07a01.pdf>> accessed 14 July 2020. See page 5 paragraph 20.

⁶⁰ Idem, see page 18, paragraph 112.

⁶¹ Conference of the Parties, 'Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December' UN Doc FCCC/CP/2015/10/Add.1 (FCCC/CP/2015/10/Add.1) available at <<https://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf#page=10>> accessed 1 May 2020, see page 10 paragraph 71.

⁶² FCCC/CP/2015/10/Add.1, see page 19 paragraph 117.

⁶³ Originally established by the COP see: Conference of the Parties, 'Report of the Conference of the Parties on its fifth session, at Bonn from 25 October to 5 November' UN Doc FCCC/CP/1999/6/Add.1 available at: <<https://unfccc.int/sites/default/files/resource/docs/cop5/06a01.pdf>> accessed 15 July 2020, see page 19 paragraph 3. In order to improve national communications (NCs) and the Biennial Update Reports (BURs) from developing country Parties through technical advice and support, in 1999 the COP further established the Consultative Group of Experts on National Communications from non-Annex I Parties (CGE). See Decision 19/CP.19 FCCC/CP/2013/10/Add.2/Rev.1 available at <http://www.ciesin.columbia.edu/repository/entri/docs/cop/FCCC_COP19_dec19.pdf> accessed 1 May 2020.

⁶⁴ Conference of the Parties, 'Report of the Conference of the Parties on its seventh session, held at Marrakesh from 29 October to 10 November 2001 Decision 29/CP.7', UN Doc FCCC/CP/2001/13/Add.4 (2002) available at <<https://unfccc.int/resource/docs/cop7/13a04.pdf#page=14>> accessed 14 July 2020. See page 14.

⁶⁵ Conference of the Parties, 'Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its first session, held at Montreal from 28 November to 10 December 2005' UN Doc FCCC/KP/CMP/2005/8/Add (FCCC/KP/CMP/2005/8/Add.3) available at <<https://unfccc.int/sites/default/files/resource/docs/2005/cmp1/eng/08a03.pdf>> accessed 15 July 2020, see page 93 Roman Numeral II. The procedures and mechanisms relating to compliance under the Kyoto Protocol

Implementation Supervisory Committee (JISC)⁶⁶, the Executive Board of Clean Development Mechanism (EB CDM)⁶⁷, and the Adaptation Fund Board⁶⁸.

So while the scope of the COP's authority does not match the format of a state legislator, nor is it as fully developed as the EU's institutional arrangement, the COP undeniably impacts on the conduct of states parties in a number of ways. It can impact on states parties conduct through the adoption of decisions which lead to the ratification of further protocols and agreements which influence the scope of states parties' obligations. The COP also has the authority to supervise the implementation of the CCR and do anything necessary to promote its implementation. It also has the ability to further develop the institutional framework of the CCR by adding bodies and providing them with mandates of their own. These too impact on the conduct of states parties and aim to further aid them in their objective of cooperating on the issue of climate change.

In summary, The COP is the supreme body of the AIA⁶⁹ and as such has a wide range of responsibilities. For example, the COP supervises the activities of many of the other bodies of the AIA. It also has the capacity to instruct other bodies on how to act. This is seen in multiple provisions, discussed below, in which the mandates of other bodies include text along the lines of 'other functions as determined by the COP'.⁷⁰ In other words, the establishment of the COP and the authority granted to it in its mandate demonstrate that the CCR displays the necessary feature of enablement of the object of the constitution. However, as the COP is only one out of four key bodies of the AIA it remains necessary to outline the mandates of the remaining four bodies in order to provide a comprehensive overview of the extent of enablement of the AIA in the CCR. This is relevant because the extent of enablement will then need to be mirrored in the extent of constraints in order to achieve an appropriate balance that can contribute to a high standard of legitimacy in the CCR.

were adopted through decision 27/CMP.1, see FCCC/KP/CMP/2005/8/Add.3, 'Decision 27/CMP.1 Procedures and mechanisms relating to compliance under the Kyoto Protocol'.

⁶⁶ Conference of the Parties, *Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its first session, held at Montreal from 28 November to 10 December* UN Doc FCCC/KP/CMP/2005/8/Add.2, Decision 10/CMP.1 available at <<https://unfccc.int/resource/docs/2005/cmp1/eng/08a02.pdf>> accessed 1 May 2020, see page 14.

⁶⁷ Article 12 Kyoto Protocol and Conference of the Parties, *Report of the Conference of the Parties on its seventh session, held at Marrakesh from 29 October to 10 November 2001*, UN Doc FCCC/CP/2001/13/Add.2, 'Decision 15/CP.7 Principles, nature and scope of the mechanisms pursuant to Articles 6, 12 and 17 of the Kyoto Protocol' available at <<https://unfccc.int/sites/default/files/resource/docs/cop7/13a02.pdf>> accessed 17 July 2020.

⁶⁸ Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, *Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its third session, held in Bali from 3 to 15 December 2007*, UN Doc FCCC/KP/CMP/2007/9/Add.1, Decision 1/CMP/3 Adaptation Fund' available at <<https://unfccc.int/resource/docs/2007/cmp3/eng/09a01.pdf#page=3>> accessed 17 July 2020.

⁶⁹ Article 7 UNFCCC.

⁷⁰ See for example article 8(2)(g) UNFCCC.

2.3.2 Secretariat

The second body created by the UNFCCC is the Secretariat.⁷¹ In contrast to the COP, the Secretariat does not have the authority to engage in any decision-making procedures that affect state parties' obligations. Rather, its responsibilities are of a more facilitative nature. Its functions include making arrangements for sessions of the COP, compiling and transmitting reports, facilitating assistance to state parties in the compilation and communication of information required in accordance with the provisions of the UNFCCC, reporting on its own activities to the COP,⁷² ensuring necessary coordination with secretariats of other bodies, to enter, under guidance of the COP, into administrative and contractual arrangements, and performing other secretarial functions specified by the COP.⁷³ The first four responsibilities of the Secretariat demonstrate how it facilitates the communication of necessary information between state parties and the AIA. This does not amount to the exercise of authority over states parties, but is nonetheless fundamental to the functioning of the CCR. It is also relevant to transparency, which is further discussed in chapter 6. The type of objective that the CCR articulates cannot be achieved unless state parties agree to on-going cooperation. Cooperation between as many parties as participate in the CCR requires a significant amount of logistical coordination, which the Secretariat provides. Therefore, while the UNFCCC does not enable the Secretariat to exercise authority to the same extent as the COP, it nonetheless enables the Secretariat to carry out activities that are necessary for the proper functioning of the CCR.

In addition to its facilitative role, the Secretariat also plays an important part in the CCR's external relations. Article 8(e-f) UNFCCC enables the Secretariat to ensure the necessary communication with other relevant international bodies and to enter into administrative and contractual arrangements (with the limitation that these are required for the discharge of its functions and take place under the guidance of the COP). These powers of the Secretariat mean that the CCR is able to act externally by engaging with bodies and entities outside its own institutional structure. In other words, the AIA, through the Secretariat, can engage with actors and entities beyond state parties. This ability to engage with other external bodies puts the CCR on the map as an autonomous actor. The word autonomous here indicates that other actors or entities are engaging with the CCR directly, rather than through states parties. This aspect of the enablement of the Secretariat therefore contributes to the autonomous nature of the CCR's institutional arrangement.

Article 8(g) further provides a type of catch all clause, similar to that seen in article 7(2) for the COP. It is not quite as far reaching as article 7(2), which allows the COP to make *any* decisions that are necessary to promote the effective implementation of the Convention (emphasis added). However, it is similar in nature, because article 8(g) enables the

⁷¹ Article 8 UNFCCC.

⁷² Article 8(2)(a-d) UNFCCC.

⁷³ Article 8(2)(e-g) UNFCCC.

Secretariat to perform other functions specified in the Convention and in any of its protocols, and “such other functions as may be determined by the COP.”⁷⁴ While it would go too far to claim that this gives the Secretariat unlimited possibilities for expanding on its mandate, it does open up the scope of possible actions the Secretariat may be tasked to carry out in the future as instructed by the COP.

2.3.3 Subsidiary Body for Scientific and Technological Advice

The third key body that forms a part of the AIA enabled by the CCR is the SBSTA.⁷⁵ This body works for, and under guidance of, the COP. As the name suggests, it is tasked with providing information and advice in relation to scientific and technological matters mostly to the COP, but if appropriate also to other bodies.⁷⁶ Furthermore, the COP and its subsidiary bodies may put forward questions to which the SBSTA must respond.⁷⁷ The CCR’s objective of stabilising greenhouse gasses at levels that would prevent dangerous anthropogenic interference with the climate system is one that is not only highly political in nature, but also requires thorough scientific and technological knowledge. Therefore it is important that the AIA of the CCR includes a body that is dedicated to: providing assessments of the state of scientific knowledge relating to climate change, preparing scientific assessments on the effects of measures taken in the implementation of the UNFCCC, identifying technologies and methods of transferring them, as well as giving advice on scientific programs, international cooperation in research, and supporting endogenous capacity building.⁷⁸

A comparison to the institutional arrangement of the state would lead to the observation the latter does not include a specific body that mirrors the format of the SBSTA in its core arrangement. This could lead to the conclusion that therefore such a body as the SBSTA should not be considered as part of the object of the constitution. According to such reasoning, if it has no counterpart in the constitution of the nation state then it cannot have a constitutional function. However, such a line of reasoning fails to acknowledge the evolutionary nature of constitutionalism and its ability to adapt in order to accommodate the context in which it is to operate.⁷⁹ The objective of the CCR requires that states parties are provided with relevant and accurate scientific information in order to enable them to best coordinate appropriate policies that will lead to the stabilisation of greenhouse gas concentrations in the atmosphere. Therefore, the inclusion of the SBSTA in the AIA is reasonable and justified.

⁷⁴ Article 8(2)(g) UNFCCC.

⁷⁵ Article 9 UNFCCC.

⁷⁶ Article 9(1) UNFCCC.

⁷⁷ Article 9(2)(e) UNFCCC.

⁷⁸ Article 9(2) UNFCCC.

⁷⁹ See chapter 3.

This is not to claim that the realisation of the UNFCCC's objective is solely scientific inherently apolitical. Quite to the contrary, the diversity and intensity of the interests at stake for each of the states parties renders the global coordination of climate policies highly political. However, the issue of climate change necessitates decision-making on the basis of accurate scientific information that can help to guide states parties in the making of the inevitable value judgements. For example, to consider what amounts to 'dangerous' interference with the climate system requires knowledge of the impact of climate change on the natural environment. Achieving the objective of the UNFCCC therefore requires scientific knowledge. No amount of politics can achieve the objective set out in article 2 UNFCCC in the absence of supporting scientific knowledge. The question how to interpret 'dangerous' is a judgement value which will be based on political negotiation. What levels of greenhouse gases will result in what type of consequences can be predicted with varying degrees of confidence by scientists.⁸⁰

Considering the need for scientific and technical information, the existence of the SBSTA is of crucial importance in the constitutional structure of the CCR. The presence of the SBSTA helps to enable the subjects of the constitution to achieve the objective of the CCR because it provides states parties with information they require in order to develop adequate responses to climate change. In the absence of the scientific and technological advice provided by the SBSTA it would be that much harder for the CCR to function properly, and for states parties to have the knowledge required to engage with the regime in a meaningful way.

The SBSTA therefore demonstrates the two steps of enablement. Firstly, article 9 UNFCCC establishes the body. Secondly, enablement follows from the provision of a mandate which authorises it to: provide assessments of the state of scientific knowledge relating to climate change and its effects, prepare scientific assessments on the effects of measures taken in the implementation of the UNFCCC, identify innovative and efficient technologies and know-how, identify ways of promoting development and transferal of said technologies, provide advice on scientific programs, provide advice on international cooperation in research and development, provide advice on ways of supporting endogenous capacity building in developing countries, and respond to scientific, technological, and methodological questions of the COP and its subsidiary bodies.⁸¹ In addition, the tasks of the SBSTA may be further elaborated by the COP.⁸²

⁸⁰ M Allen and others 'Framing and Context' in V Masson-Delmotte and others (eds), *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* IPCC In Press 2018.

⁸¹ Article 9(2) UNFCCC.

⁸² Demonstrating, again, the role of the COP as ordinary lawmaker within the CCR.

2.3.4 Subsidiary Body for Implementation

The fourth key body that forms a part of the AIA is the SBI.⁸³ This body essentially reviews the effective implementation of the CCR by considering the information in member parties' communications, which they have an obligation to submit according article 12 UNFCCC. These communications are listed here in paraphrased format for ease of reading. The specific reference to the original text is added in the footnotes. Article 12(1) requires member parties to communicate a national inventory of anthropogenic emissions,⁸⁴ a general description of steps taken or envisaged to implement the UNFCCC,⁸⁵ and other information that the member party considers relevant and suitable for inclusion.⁸⁶ Article 12(2) requires specifically developed states parties and other parties included in Annex I to include in their communications a detailed description of the policies and measures they have adopted to implement their commitments,⁸⁷ and a specific estimate of the effects that these policies and measures will have on anthropogenic emissions.⁸⁸

It should be noted that the mandate of the SBI as articulated in article 10 UNFCCC specifically uses the word 'consider' in relation to the SBI's responsibility to review materials submitted by states parties in accordance with article 12 UNFCCC. The use of the word 'consider' as opposed to, for example, review, indicates that the UNFCCC has only enabled the SBI to a limited extent. To consider the national inventories rather than review them suggests that the SBI has no authority to act in response to the national inventories.

Furthermore, article 10(1) states that the SBI assists the COP in assessing and reviewing the effective implementation of the UNFCCC. The impact of the SBI's consideration of national inventories is therefore most likely to be seen in the advice it gives the COP after considering state parties' national inventories. It appears the UNFCCC has only enabled the SBI to the extent that it can play a facilitative role through its assistance to the COP. Its mandate does not provide authority to act as a judicial branch of the CCR. It can neither pass judgment nor advise state parties directly. Had the SBI been enabled as an implementation body with its own powers to review, one may have been able to argue that this body had a certain judiciary function. However, as its title indicates, it is merely a subsidiary body and exists to support the COP in its powers to review the effectiveness of the UNFCCC's implementation. The SBI therefore does not exercise any authority over states parties directly. Its influence on states parties conduct is channelled through the activities of the COP.

⁸³ Article 10 UNFCCC.

⁸⁴ Article 12(1)(a) UNFCCC.

⁸⁵ Article 12(1)(b) UNFCCC.

⁸⁶ Article 12(1)(c) UNFCCC.

⁸⁷ Article 12(2)(a) UNFCCC.

⁸⁸ Article 12(2)(b) UNFCCC.

2.3.5 Drawing together the overall enablement of the AIA

The above subsections have each explained in detail the enablement of the AIA. The four key bodies of the AIA have a wide array of powers designed to channel states parties' efforts into achieving the ultimate objective set out in article 2 UNFCCC. Unsurprisingly, enablement of the AIA features most strongly in the provisions of the UNFCCC. This is unsurprising because, being a framework convention, the main purpose of the UNFCCC is to establish the necessary bodies for the ongoing development of the substantive content of the regime.⁸⁹

2.4 Constraint of the autonomous institutional arrangement

This subsection explains the two ways in which the CCR imposes constitutional constraints on the AIA. The first is through the limits of its mandate. The specific mandates of each of the bodies of the AIA have already been discussed in section 3.3 above. They are a constraint in the sense that anything the AIA is not specifically mandated to do, falls beyond the scope of its authority. This form constraint is tempered in two ways. Firstly, article 7(2)(m) states that the COP shall "exercise such other functions as are required for the achievement of the objective of the Convention as well as all other functions assigned to it under the Convention." This provision opens up the mandate of the COP to include any type of activity that can be argued to be "required for the objective of the Convention." This could potentially authorise a wide variety of activities the COP could be considered to be authorised to carry out. Article 8(2)(g) similarly states that the functions of the Secretariat shall include the ability "to perform the other secretariat functions specified in the Convention and in any of its protocols and such other functions as may be determined by the Conference of the Parties." The opening up of the mandate of the COP in article 7(2)(m) combined with article 8(2)(g) means that the COP can potentially instruct the Secretariat to carry out a wide variety of functions. Article 9(3) contains a similar clause for the Subsidiary Body for Scientific and Technological Advice which states that "The functions and terms of reference of this body may be further elaborated by the Conference of the Parties." This gives the impression that the mandates of the AIA are relatively flexible rather than imposing strict limitations on the exercise of authority.

Secondly, the imposition of constraints through the mandates of the AIA is weakened through the doctrine of implied powers⁹⁰. Recognised by the ICJ in the 1949 *Reparations for injuries* opinion the doctrine makes it possible for international organisations to act beyond their express mandates when deemed "essential for the performance of its duties."⁹¹

⁸⁹ Churchill and Ulfstein 2000 (n 33), 623. Bodansky 1993 (n 32), 451.

⁹⁰ Jan Klabbbers, 'Constitutionalism Lite.' (2004) 1(1) *International Organizations Law Review* 31, 38-39.

⁹¹ *Reparation for Injuries Suffered in the Service of the United Nations*, advisor opinion, [1949] *ICJ Reports* 174, 12.

Whilst the AIA is not formally an international organisation, Churchill and Ulfstein have highlighted the similarities between AIAs and international organisations.⁹² Therefore, the doctrine of implied powers might plausibly be extended to apply to the AIA of the CCR.

The second form of constitutional constraints on the AIA exists through the CCR's rules of procedure. These act as a form of constitutional constraint by setting limits to the exercise of authority and channelling said exercise of authority into normatively accepted forms. As a result, the arbitrary exercise of authority is prevented. Rules of procedure can cover a range of topics, such as, participation, transparency, and accountability. Importantly, they also set out the rules for binding decision-making.

The use of rules of procedure as a constraint on the exercise of authority by the AIA is a problem area in the CCR.⁹³ In practice, the CCR has two sets of procedural rules, namely those set out in the constitutional provisions and the procedural rules adopted by a decision of the COP.⁹⁴ This section is concerned only with those rules of procedure that apply to the AIA. The procedural rules of the COP are most interesting because the procedural rules for all other bodies are established by the COP.⁹⁵ Therefore, the procedural rules of the COP determine the way in which all the other procedural rules within the CCR can be made and adopted. Technically, only the rules set out in the constitutional provisions should count as procedural rules that form constitutional constraint on the institutional arrangement. Procedural rules of the first category are found in article 7(2)(k) UNFCCC, articles 15, 17 and 18 UNFCCC, article 13(5) and articles 20-22 Kyoto Protocol, and articles 16 and 25 Paris Agreement. Most of these procedural rules relate to the adoption of amendments to the texts of the UNFCCC, the Kyoto Protocol, or the Paris Agreement.⁹⁶ Article 7(2)(k) UNFCCC tasks the COP with the adoption of procedural rules of the second category.

Rules of procedure of the second category, those adopted through the COP rather than found in the constitutional provisions of the CCR are furthermore too broad a category to be of sufficient relevance here. For example, the Marrakesh Accords set out the rules of procedure for the Article 6 Kyoto Protocol Executive Committee and for the Compliance Committee of the Kyoto Protocol.⁹⁷ These procedural rules are not considered here because they do not relate to the procedural rules of the four key bodies of the AIA. Therefore, they are not relevant to the discussion of the constitutional constraints on the AIA. Those procedural rules do not affect the decision-making procedures of the COP of the UNFCCC, the COP/MOP of the Kyoto Protocol, or the COP/MOP of the Paris Agreement.

⁹² Churchill and Ulfstein 2000 (n 34), 632-633.

⁹³ Antto Vihma, 'Climate of Consensus: Managing Decision Making in the UN Climate Change Negotiations' (2015) 24(1) *Review of European, Comparative & International Environmental Law* 58.

⁹⁴ The Marrakesh Accords and the Katowice Package are examples of the latter type of rules of procedure.

⁹⁵ Article 7(3) UNFCCC.

⁹⁶ See Articles 15 and 18 UNFCCC, articles 20-21 Kyoto Protocol, and article 25 Paris Agreement.

⁹⁷ FCCC/CP/2001/13/add.1.

Despite the obligation arising from article 7(k) UNFCCC to adopt rules of procedure for its operation at the first session of the COP, the COP continues to fail to adopt a comprehensive set of procedural rules for its operation. While the COP did write up draft rules of procedures, these were adopted with the exclusion of rule 42.⁹⁸ The exclusion of rule 42 of the draft rules of procedures is significant, because this rule related to the voting rules for the adoption of decisions by the COP. In the absence of a procedural rule for the adoption of decisions by the COP, decision-making within the COP takes place on the basis of consensus.

However, the scope and boundaries of consensus are somewhat ambiguous. This leaves the rules of procedure currently in place for the COP vulnerable to criticism. For example, Vihma argues that consensus is not synonymous to unanimity.⁹⁹ Instead, the amount of agreement required to reach consensus can be considered to be context dependent. As a result, Vihma observes that decision-making within the COP takes place within a “legal vacuum.”¹⁰⁰ To term consensus-based decision-making a legal vacuum, might be too strongly put. However, whilst consensus-based decision-making might be appropriate in a context with limited actors and a strong sense of mutual community, the variety and intensity of interests at stake from not just a few but as many as 196 states parties could suggest that a voting rule with clearer boundaries would lead to less political apprehension among states. Vihma states a concern that what amounts to sufficient consensus in one context may or may not suffice as sufficient consensus in another context.¹⁰¹ In this situation, when there is an absence of strong mutual trust among the actors involved in the decision-making process, then it is not farfetched to consider that states parties might easily perceive the process to be biased or unfair. This damages the legitimacy perception states parties hold with regard to the AIA of the CCR and weakens the effectiveness of its conduct. Under these circumstances, decision-making procedures based on clear voting rules could alleviate the suspicions. However, the fact that the COP negotiated draft rules of procedure which included exactly such a voting rule, namely rule 42 of the draft procedures, also indicates that states parties considered an alternative to consensus but chose to forego that option.

Overall, the extent to which the CCR’s AIA faces constitutional constraints is limited. Rights of states are not explicitly protected in the provisions of the CCR. Procedural rules are present but incomplete. Consensus remains the central decision-making rule. The need for consensus-based decision-making by the COP (and other bodies) is a form of procedural

⁹⁸ Conference of the Parties, ‘*Organizational Matters Adoption of the Rules of Procedure Note by the Secretariat*’ UN Doc FCCCP/CP/1996/2 available at <https://unfccc.int/sites/default/files/resource/02_0.pdf> accessed 14 July 2020.

⁹⁹ Vihma 2015 (n 93). See also Brunnée 2002 (n 52), 10.

¹⁰⁰ Vihma 2015 (n 93).

¹⁰¹ *Idem*.

constraint because it means that the COP cannot arbitrarily adopt decisions but must be able to gather broad support amongst states parties.

The only obvious constitutional constraint on the AIA exists in the limits of the mandate of each of the respective bodies. Consequently, the initial impression is that the AIA is insufficiently constrained by the provisions of the CCR. The lack of balance between enablement and constraint could indicate an issue with the legitimacy of the CCR. However, before concluding that the lack of constraint of the AIA causes a significant legitimacy issue a further observation must be made. This further observation is that, while the mandates of the four bodies of the AIA initially appear to be relatively broad, decisions by the COP do not have direct effect. To create binding obligations, ratification of decisions adopted by the COP remains a requirement. As a result, the degree to which the AIA is able to exercise authority over states parties is limited from the outset.

3 Stability through entrenchment

Entrenchment refers to the characteristic that constitutional provisions are protected from amendment. Amendment of the constitutional provisions requires specified procedures which put in place more stringent requirements than are in place for the amendment of ordinary law.¹⁰² The contribution of entrenchment is that it provides stability and predictability by removing certain issues from the realm of debate.¹⁰³ Essentially, the constitutional provisions entrench both the structure and the guiding principles for the exercise of authority. By removing the structure for the exercise of authority and the normative foundations that support this structure from the realm of debate the constitutional provisions put these on a pedestal. It is the pedestal of generally accepted norms of good governance in the society outlined by the constitutionalised order. It is in this way that entrenchment provides the necessary stability and predictability for the functioning of a community.

Entrenchment in the context of the CCR is vital because it guides states parties' conduct in the direction that is required for the achievement of the long-term common objective of stabilising greenhouse gas emissions.¹⁰⁴ Considering the cumulative nature of greenhouse gas concentrations in the atmosphere the feature of entrenchment is especially important. The lack of progress or even regression at any given time exponentially escalates the problem. Removing certain issues from the realm of debate would therefore be beneficial in the context of the global coordination of climate policies. It would also help towards streamlining the negotiation of globally coordinated climate policies by focussing on the content of such policies rather than the procedures related thereto by removing the latter from the realm of debate.

¹⁰² Jon Elster, 'Forces and mechanisms in the constitution-making process' (1995) 45(2) *Duke Law Journal* 364, 366. Also Joseph H H Weiler, 'A Constitution for Europe? Some Hard Choices' (2002) 40(4) *Journal of Common Market Studies* 563, 565-566.

¹⁰³ Dieter Grimm, 'The Origins and Transformation of the Concept of the Constitution' in Dieter Grimm, *Constitutionalism: Past, Present, and Future* (OUP 2016) 3.

¹⁰⁴ Paraphrased from article 2 UNFCCC which is cited in full in chapter 1 pages 5-6.

Entrenchment manifests in two ways. The first is that the organisation of the constitutional order, including its balancing of the relationship between the object (the AIA) and the subjects (states parties) are entrenched. This embeds the structure for the exercise of authority in the regime. Who is authorised to do what becomes clear, predictable, and stabilised as the constitutional provisions entrench the organisational structure of the AIA and the authority it has over states parties. Secondly, through entrenchment, the normative foundations that underpin the material features of constitutionalism become embedded in the governance mechanisms. In this way entrenchment settles normative disputes regarding the how and why of governance in advance. All that remains to be done is give effect to the common long-term objective through the exercise of authority by the AIA and under guidance of the normative principles of constitutionalism. What this also demonstrates is that constitutionalisation does not de-politicise governance.¹⁰⁵ Rather, entrenchment of the normative underpinnings of the constitutional arrangement makes it clear on the basis of what normative assumptions governance activities are being carried out.

3.1 Entrenchment through amendment procedures

The feature of entrenchment is generally achieved through amendment procedures.¹⁰⁶ The procedures for the amendment of constitutional provisions are more stringent as compared to amendment procedures for ordinary law. In order to assess whether the CCR demonstrates the feature of entrenchment it is necessary to compare the amendment procedures of the constitutional provisions to the amendment procedures of ordinary law. Whilst it has already been explained that the UNFCCC, the Kyoto Protocol, and the Paris Agreement represent the constitutional provisions of the CCR, it remains necessary to clarify what can be identified as ordinary law. Considering the COP's role in the continued development of the content of the CCR it is logical to label the decisions of the COP as ordinary law within the context of the CCR.¹⁰⁷ What remains to be resolved is whether the procedure for the amendment of the provisions of the UNFCCC, the Kyoto Protocol, and the Paris Agreement is more stringent than the procedure for amendment of ordinary COP decisions.

According to article 15 UNFCCC amendments to the UNFCCC are adopted at an ordinary session of the COP.¹⁰⁸ Article 15 further states that a decision to amend the text of the

¹⁰⁵ Klabbers 2004 (n 90).

¹⁰⁶ See Jeffrey Dunoff and Joel Trachtman, 'A Functional Approach to International Constitutionalization' in Jeffrey Dunoff and Joel Trachtman, *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 3, 20. On the importance of entrenchment for the function of the constitution as a normative framework of reference for the exercise of authority see Grimm 2016 (n 103), 18.

¹⁰⁷ Bodansky and Brunnée even consider the possibility of identifying the COP as a global legislator. However, they each, separately, reach the conclusion that whilst that may one day be the case, the COP is currently still shy of being a fully-fledged global legislator. Brunnée 2002 (n 52). Bodansky 1999 (n 34). Churchill and Ulfstein further comment on the hierarchy of norms between the treaties that establish the AIA, the decisions of the COP and of subsidiary bodies. See Churchill and Ulfstein 2000 (n 33) 633.

¹⁰⁸ Article 15(2) UNFCCC states: "Amendments to the Convention shall be adopted at an ordinary session of the Conference of the Parties."

UNFCCC is adopted preferably by consensus.¹⁰⁹ However, if no consensus can be reached in the COP then a three fourth majority suffices to adopt the suggested amendment.¹¹⁰ Furthermore, an amendment adopted either by consensus or a three fourth majority must still be accepted by states parties. Article 15(4) states that:

“Instruments of acceptance in respect of an amendment shall be deposited with the Depository. An amendment adopted in accordance with paragraph 3 above¹¹¹ shall enter into force for those Parties having accepted in on the ninetieth day after the date of receipt by the Depository of an instrument of acceptance by at least three fourths of the Parties to the Convention.”

In order to establish whether this is a more stringent amendment procedure than ordinary decisions of the COP face, it is first necessary to identify the rules of procedures for ordinary COP decisions. Article 7(3) UNFCCC states that:

“The Conference of the Parties shall, at its first session, adopt its own rules of procedure, as well as those of the subsidiary bodies established by the Convention, which shall include decision-making procedures for matters not already covered by decision-making procedures stipulated in the Convention. Such procedures may include specified majorities required for the adoption of particular decisions.”

In light of this, the COP created a set of draft rules of procedure. These were never adopted because agreement could not be reached on rule 42, which covers the voting rules for the adoption of decisions by the COP.¹¹² Instead, the COP decided to apply the draft rules of procedures with the exception of rule 42, until consensus on the adoption of rules of procedure could be reached.¹¹³ Since then, no rules of procedures have been formally adopted by the COP. Until the COP adopts any further decisions on the topic its rules of procedure, decision-making on the basis of consensus continues to be the default rule for the adoption of decisions by the COP. This demonstrates that in comparison to the rules for amendment of the UNFCCC, the ordinary rules of procedure regarding COP decisions are less stringent. Both ordinary decisions and the decision to amend the text of the UNFCCC

¹⁰⁹ Article 15(3) UNFCCC states: “The Parties shall make every effort to reach agreement on any proposed amendment to the Convention by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a three-fourths majority vote of the Parties present and voting at the meeting. The adopted amendment shall be communicated by the secretariat to the Depository, who shall circulate it to all Parties for their acceptance.”

¹¹⁰ See article 15(3) UNFCCC (cited in footnote 109 above).

¹¹¹ This refers to Article 15(3) (cited in footnote 109 above).

¹¹² See Conference of the Parties, *Organizational Matters Adoption of the Rules of Procedure Note by the Secretariat* FCCCP/CP/1996/2, UN Doc FCCC/CP/1996/2 (1996) (FCCC/CP/1996/2)

<https://unfccc.int/sites/default/files/resource/02_0.pdf>
accessed 14 July 2020.

¹¹³ See FCCC/CP/1996/2 page 1: “As decided by the Conference of the Parties (COP) at the start of its first session, the draft rules of procedure are at present being applied by the COP and its subsidiary bodies, with the exception of draft rule 42: “Voting” (see FCCC/CP/1995/7, para. 10), which appears in bold font in the present document. The President of the Conference conducted consultations on the rules during the first session and, towards the end of the session, undertook to continue such consultations with a view to enhancing consensus before the second session of the Conference (FCCC/CP/1995/7, para 14). The President will report to the second session on the results of her consultations.”

are, in principle, negotiated by consensus. As opposed to an ordinary COP decision, however, an amendment decision must additionally be accepted by states parties.¹¹⁴ The amendment only enters into force with regard to those states parties who have deposited instruments of acceptance to the depositary and only in the case that at least three fourth of states parties have submitted instruments of acceptance.¹¹⁵

The above demonstrates that the CCR displays a certain degree of entrenchment in its amendment procedures. The provisions of the UNFCCC are more protected against amendment than ordinary decisions of the COP are. This means that it takes more than an ordinary decision of the COP to change the provisions of the UNFCCC. This entrenchment of the provisions of the UNFCCC has the effect of placing a number of important matters beyond the scope of debate.¹¹⁶ These matters include the establishment and the enablement of the AIA. This is significant because, whilst the COP cannot create binding obligations in the absence of ratification by states parties, its wide ranging decision-making capacity is nonetheless of importance. Whilst the provisions of the UNFCCC, the Kyoto Protocol, and the Paris Agreement, all three of which required ratification by states parties to enter into force, provide the legally binding framework for the CCR, it are the decisions of the COP which provided the impetus for the negotiation and adoption of the Kyoto Protocol and the Paris Agreement,¹¹⁷ and it is through the decisions of the COP that the operational rules for the implementation of these ratified agreements are established.¹¹⁸ By entrenching

¹¹⁴ See article 15(4) UNFCCC cited above.

¹¹⁵ See article 15(4) UNFCCC cited on the page above.

¹¹⁶ Entrenchment as a means of placing the decision-making framework itself beyond the scope of debate is also discussed by Grimm 2016 (n 103), 18.

¹¹⁷ The Berlin Mandate adopted by the COP at its first session stated that the COP “Agrees to begin a process to enable it to take appropriate action for the period beyond 2000, including the strengthening of the commitments of the Parties included in Annex I to the Convention (Annex I Parties) in Article 4, paragraph 2(a) and (b), through the adoption of a protocol or another legal instrument.” See Conference of the Parties, *Report of the Conference of the Parties on its first session, held at Berlin from 28 March to 7 April 1995*, UN Doc FCCC/CP/1995/7/Add.1 (1995) available at: <<https://unfccc.int/resource/docs/cop1/07a01.pdf>> accessed 14 July 2020. The Durban Platform for Enhanced Action stated the COP’s decision “to launch a process to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable for all Parties, through a subsidiary body under the Convention hereby established and to be known as the Ad Hoc Working Group on the Durban Platform for Enhanced Action.” The COP further declared that “the Ad Hoc Working Group on the Durban Platform for Enhanced Action shall complete its work as early as possible but not later than 2015 in order to adopt this protocol, another legal instrument or an agreed outcome with legal force at the twenty-first session of the Conference of the Parties and for it to come into effect and be implemented from 2020.” Conference of the Parties, *Report of the Conference of the Parties on its seventeenth session, held in Durban from 28 November to 11 December 2011*, UN Doc FCCC/CP/2011/9/Add.1 (2012), Decision 1/CP.17 ‘Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action’ in FCCC/CP/2011/9/Add.1 available at <<https://undocs.org/FCCC/CP/2011/9/Add.1>> accessed 15 July 2020.

¹¹⁸ For example, the Marrakesh Accords, adopted at the seventh COP, are considered the operational rulebook for the Kyoto Protocol. Similarly, the Katowice Package, adopted at the twenty-fourth COP, provides the operational rulebook for the Paris Agreement. See Conference of the Parties, *Report of the Conference of the Parties on its seventh session, held at Marrakesh 29 October to 10 November 2001* UN Doc FCCC/CP/2001/13/Add.1 (2002) available at <<https://unfccc.int/sites/default/files/resource/docs/cop7/13a01.pdf>> accessed 1 August 2020. See also <<https://unfccc.int/process-and-meetings/the-paris-agreement/paris-agreement-work-programme/katowice-climate-package>> accessed 1 August 2020.

the authority of the COP, its establishment and mandate are provided by the constitutional provision of article 7 UNFCCC, the CCR also entrenches its current scope of authority.

In summary, the CCR demonstrates that the constitutional provisions are entrenched in the classic manner. This means that it is more difficult to amend the provisions of the CCR than it is to amend decisions of the COP. The difference in amendment procedure however is minimal. Both amendment procedures for the decisions of the COP and for the constitutional provisions of the CCR both are founded on decision-making by consensus. The additional barrier to amendment that exists in the case of the constitutional provisions of the CCR is that states parties must individually deposit an instrument of acceptance. Whilst this may appear on the face of it to be a potentially significant additional hurdle, the fact that states parties will have already achieved consensus in the first stage of the amendment procedure would suggest that states parties would not object to submitting instruments of acceptance. Where states parties do refuse to deposit an instrument of acceptance after reaching consensus, this would raise questions regarding the quality of consensus that was achieved. In essence therefore it appears that the amendment procedures of the constitutional provisions of the CCR are not significantly more stringent than those that apply in the context of amending ordinary decisions of the COP. Whether this means that the amendment procedures for the constitutional provisions of the CCR are not strict enough or whether the procedures for amendment of ordinary decisions of the COP are too strict is ambiguous. Potentially, if states parties adopt a set of rules of procedure that include rule 42 or a revised version thereof the distinction between amendment procedures of constitutional and ordinary law in the CCR will become more distinct.

3.2 Non-regression obligations as a means of entrenchment

Amendment procedures are not the only available means of achieving entrenchment in the CCR. So far this chapter has only investigated the presence of entrenchment in the form this feature takes in the context of the modern constitution, namely entrenchment through amendment procedures. In the context of the CCR it is possible to identify an additional form of entrenchment, which manifests in the non-regression obligations states parties have in the context of the Paris Agreement.

The feature of entrenchment does not require that provisions within the constitution are permanent and irreversible. The function of entrenchment is to provide a certain degree of stability to the regime.¹¹⁹ Stringent amendment procedures with regard to the provisions of the constitution provide such stability by placing certain issues beyond the area of discussion. The provisions of the constitution become a matter of fact rather than something that is subject to constant change. This enables subjects of the constitution, in

¹¹⁹ See Dunoff and Trachtman 2009 (n 106), 20.

this case states parties, to adjust their conduct on the basis of the provisions set out in the CCR.¹²⁰ Non-regression obligations on the other hand provide stability by forcing conduct irreversibly into a specified direction. Non-regression means that once states parties have improved their conduct with regard to mitigation and adaptation, these efforts cannot be undone.

For example, article 3 of the Paris Agreement states that:

“As nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of this Agreement as set out in article 2. *The efforts of all Parties will represent a progression over time*, while recognizing the need to support developing country Parties for the effective implementation of this Agreement.”¹²¹

By obliging states parties to demonstrate progress over time through their nationally determined contributions the CCR creates an obligation not to regress and not to maintain the status quo. In effect this means that what states parties have already committed to in their nationally determined contributions cannot be undone. This provides for stability in the sense of creating a bottom line which cannot be reversed. This form of stability through non-regression also features in a number of other provisions in the Paris Agreement as well. These are highlighted below.

Article 4(3) Paris Agreement also contains a non-regression obligation. It states:

“Each Party’s successive nationally determined contribution will represent a progression beyond the Party’s then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.”

Article 4(11) Paris Agreement states that:

“A Party may at any time adjust its existing nationally determined contribution with a view to enhancing its level of ambition, in accordance with the guidance adopted by the Conference of the Parties serving as the meeting of the Parties to this Agreement.”

¹²⁰ The relevance of this aspect of entrenchment is discussed in further detail in chapter 6.

¹²¹ Emphasis added.

The reference to “enhancing its level of ambition” suggests that states parties may adjust their nationally determined contributions to reflect higher ambitions but cannot adjust them to reflect lower ambitions. This too then is a form of a non-regression requirement, which contributes to the entrenchment of commitments made by states parties regarding their mitigation and adaptation efforts. This is because states parties cannot undermine the overall effort towards achieving the objective set out in article 2 UNFCCC by downgrading their own commitments thereto once these have been set at a certain standard.

In order to track progress made in implementing and achieving nationally determined contributions, article 13(7)(b) Paris Agreement obliges states parties to regularly provide

“Information necessary to track progress made in implementing and achieving nationally determined contribution under article 4.” The obligation to provide this information signals that the AIA follows up on the non-regression obligations of states parties, making it more difficult for states parties to hide any regressions. Article 13(11) Paris Agreement also adds that “Information submitted by each Party under paragraphs 7 and 9¹²² of this Article shall undergo a technical expert review, in accordance with decision 1/CP.21.”

Article 13(12) Paris Agreement then continues that:

“The technical expert review under this paragraph shall consist of a consideration of the Party’s support provided, as relevant, and its implementation and achievement of its nationally determined contribution. The review shall also identify areas of improvement for the Party, and include a review of the consistency of the information with the modalities, procedures and guidelines referred to in paragraph 13 of this Article, taking into account the flexibility accorded to the Party under paragraph 2 of this Article. The review shall pay particular attention to the respective national capabilities and circumstances of developing country Parties.”

Notably, article 13(12) Paris Agreement does not say that the technical expert review includes an assessment whether states parties meet their non-regression obligations. So while states parties are under pressure through article 13(7)(b) to demonstrate progress, the obligation of non-regression is not subject to review.

The provisions of the Paris Agreement cited above contribute to entrenchment through non-regression obligations by outlining how states parties will be held accountable for their implementation of their non-regression obligations. Adding accountability for states parties to live up to the non-regression obligations they have provides for additional stability as it

¹²² Articles 7 and 9 Paris Agreement are each partially cited below.

makes it more difficult for states parties to get away with not living up to their non-regression responsibilities.

The non-regression obligations outlined in this subsection are a form of entrenchment. By requiring that states parties demonstrate progress, states parties are committed to the targets set out in their nationally determined contributions as well as committed to not regress on those targets. A potential downside of the non-regression obligations is that it could encourage a 'race to the bottom' effect where states parties deliberately keep their commitments low in order to prevent being bound to arduous commitments in the long term. In terms of providing a degree of stability, however, they are effective.

4 Supremacy

Constitutional supremacy is the final necessary formal feature of constitutionalism discussed in this chapter. The feature of supremacy can be broken down into three elements. These are external supremacy,¹²³ internal supremacy,¹²⁴ and norm supremacy.¹²⁵

External supremacy refers to the fact that the institutional arrangement of the constitutional order is able to represent subjects of the constitution in its communications with actors outside the constitutional order. For example, the state may represent its citizens in the international community. In case of the CCR external supremacy is implied by article 8 UNFCCC. According to article 8(f) UNFCCC, the Secretariat is able to enter into such administrative and contractual arrangements as may be required.¹²⁶ Furthermore, article 8(e) UNFCCC is an example of the external supremacy of the CCR. Article 8(e) states that one of the functions of the Secretariat shall be "to ensure the necessary coordination with the secretariats of other relevant international bodies." In this capacity, the Secretariat therefore demonstrates external supremacy of the CCR, because it represents states parties in its interactions with other, relevant, international bodies.¹²⁷

Internal supremacy refers to the fact that constitutional provisions are higher order law than ordinary law provisions of the constitutional regime in question are.¹²⁸ In the context of the CCR this means that the provisions of the UNFCCC, the Kyoto Protocol, and the Paris

¹²³ External supremacy is based on the notion of external sovereignty. Since the CCR is not sovereign, it is more relevant to capture the essence of external sovereignty through external supremacy. In this the compensatory nature of the CCL shines through. Rather than claiming that the CCR replaces states parties' external sovereignty it takes what is captured by external sovereignty and moulds into a format suitable to the nature of the CCR as existing alongside sovereign states.

¹²⁴ Dunoff and Trachtman 2009 (n 116).

¹²⁵ Joseph Raz, 'The institutional nature of law' in Joseph Raz, *The authority of law: Essays on law and morality*. (OUP 2009), 118-119.

¹²⁶ Article 8(f) UNFCCC states that one of the functions of the Secretariat shall be "To enter, under the overall guidance of the Conference of the Parties, into such administrative and contractual arrangements as may be required for the effective discharge of its duties;"

¹²⁷ For an in-depth discussion of the external capacity of the AIA of the CCR see Churchill and Ulfstein 2000 (n 30) 647-649.

¹²⁸ Dunoff and Trachtman 2009 (n 106).

Agreement are higher order law than decisions of the COP.¹²⁹ In addition to the discussion of the distinction between constitutional provisions of the CCR and ordinary 'law' decisions of the COP, the following three points highlight the presence of internal supremacy within the CCR.

Firstly, the UNFCCC, Kyoto Protocol, and Paris Agreement create the AIA and enable it to carry out its mandate. Consequently, the AIA's authority is derived from, and is subordinate to, the constitutional provisions. As a result, the AIA can only exercise authority insofar as doing so supports the realisation of the constitution's objective. The constitutional provision's ability to constrain the object of the constitution¹³⁰ demonstrates the supremacy of the constitutional provisions over COP decisions. The AIA would neither exist nor be able to act in the absence of the constitutional provisions.

Secondly, internal constitutional supremacy is further visible in the distinction that can be made between the ordinary decisions of the COP and the constitutional provisions of the UNFCCC, the Kyoto Protocol, and the Paris Agreement. To take the example of internal supremacy within the modern constitution, one feature thereof is that constitutional law is hierarchically superior to law created by the state legislator. In the context of the CCR, this translates into supremacy of the provisions of the UNFCCC, the Kyoto Protocol, and the Paris Agreement over ordinary decisions of the COP. Section 3 on entrenchment already established that provisions of the UNFCCC are entrenched compared to regular decisions of the COP.

Thirdly, Churchill and Ulfstein observe in their description of the authority of and within the AIA that

“The law of AIAs takes a hierarchical form: the MEA serves as *lex superior* and decisions by the COP, subsidiary bodies, and the secretariat constitute step-wise levels of authority. Such a hierarchy between the constitution of an IGO and decisions of its organs is unknown in the law of treaties, but forms a distinct feature of international institutional law.”¹³¹

This too highlights the presence of internal supremacy within the CCR.

This leaves only norm supremacy to be discussed. In essence, norm supremacy indicates that while a legal order may tolerate the existence and operation of other norm-based systems (for example, religious rules or family rules), it claims that, in the case of any dispute, the constitutional norms have finality.¹³² Other norm-based rules cannot be incompatible with the content of the constitution nor can they override it. International law

¹²⁹ See also section 3 of this chapter.

¹³⁰ As discussed in section 3 of this chapter.

¹³¹ See also Churchill Ulfstein 2000 (n 33), 633.

¹³² Raz 2009 (n 125). The same reference to Raz on norm supremacy can also be found in Barber 2018 (n 2) 94.

in general requires that states parties cannot use domestic law as an excuse to forego their obligations of international law. The same applies for the CCR, which, being treaty-based, would require states parties to comply with its provisions regardless of domestic laws. This demonstrates that the CCR has norm supremacy.

With regard to the relationship between supremacy within the CCR and states parties' sovereignty two further observations remain significant. Firstly, the sovereign nature of states parties is not inherently incompatible with a supremacy claim of the CCR. As the above discussion demonstrates, supremacy is not claimed over states parties as such. Supremacy is claimed in the regime's ability to interact independently with other actors and in relation to a hierarchy of norms within the CCR.

Secondly, a supremacy claim made by the CCR does not threaten the sovereign nature of states parties, because supremacy does not detract from sovereignty. Individuals who live within a state are no less autonomous, free, and equal to each other for being citizens in a nation state than they would have been outside the state.¹³³ Similarly, sovereignty as autonomy does not imply that states may never be subject to international legal obligation or constraints arising from multilateral agreements.¹³⁴ Rather, sovereignty as autonomy implies that states have the ability to consent to obligations and constraints.

States do not lose their sovereignty by subjecting themselves to the CCR. Rather they are protecting their ability to act out their role as sovereign by choosing to exist within a regime that protects their existence through the achievement of the objective of stabilising greenhouse gas concentrations in the atmosphere at levels that would prevent dangerous anthropogenic interference with the climate system. Just as individuals are no less inherently autonomous, free, and equal by accepting the constraints imposed on them by the state constitution, states parties to the CCR are no less inherently sovereign by consenting to the constraints arising thereof and acknowledging the supremacy of the CCR's constitutional provisions.

5 Concluding Remarks

This chapter has explained the content of the formal features of constitutionalism and assessed the extent to which these are present in the CCR. The overall picture this produced is that each of the formal features of constitutionalism can be found in the provisions of the CCR. However, some features are more developed than others. The balance between enablement and constraint does not appear to have found its equilibrium yet both in relation to the object of the constitution and the subjects of the constitution. The extent to which CCR has the capacity to enable states parties to achieve the objective of article 2

¹³³ For further discussion on this point see chapter five.

¹³⁴ Sovereignty as autonomy is explained in chapter three.

UNFCCC remains difficult to assess. Recent reports indicate that more is required of states parties in order to achieve the goal of limiting global warming to 2 degrees Celsius, which article 4 Paris Agreement identified as relevant to the stabilisation of greenhouse gas concentrations in the atmosphere at levels that would prevent dangerous anthropogenic interference. However, it remains possible for states parties to achieve the goal.¹³⁵

Constraint on states parties also presents an ambiguous picture. The fact that it remains necessary for states parties to ratify any decision of the COP before it can create any binding obligations indicates that the only substantive constraints of states parties remain the obligations that are phrased in the provisions of the constitutional provisions. Effective constitutional constraint, however, would require that the AIA has the possibility of developing further obligations for states parties as and when the need arises.

The need for ratification does present a constraint on the AIA. Additional constraints on the AIA exist in its limited authority to act only insofar as outlined in the mandates of the four key bodies and in rules of procedure to which it must adhere. In particular the need to achieve consensus before being able to adopt any decisions poses a realistic constraint on the authority of the AIA because it ties the adoption of decisions to individual agreement from each of the states parties.

These constraints are balanced out with a degree of enablement which is hard to evaluate. The nature of the CCR as a facilitative platform for the coordination of states parties provides some explanation as to why the powers of the AIA focus so much on creating communication opportunities amongst states parties. However, for the AIA to be able to provide the impetus for states parties to set aside individual interests for the achievement of the common objective of article 2 UNFCCC it may be necessary to consider further enablement of the AIA in future. At the moment its ability to influence the conduct of states parties exist in the creation of opportunities for states parties to get together and negotiate, supervision and communication of states parties' conduct through reporting obligations, and the ability to further develop the institutional arrangement within the CCR. The latter is potentially significant and can contribute to the establishment of positive feedback loops. However, the COP remains the supreme body of the AIA and is not able to create any bodies whose powers would be more expansive than its own.

Entrenchment is present both in the form of slightly more stringent amendment procedures for constitutional provisions than for ordinary decisions of the COP. Perhaps more

¹³⁵ The IPCC Special Report outlines a number of possibilities, which it calls pathways, through which this goal may yet still be achieved. See P Forster and others, 'Mitigation pathways compatible with 1.5°C in the context of sustainable development' in V Masson-Delmotte and others (eds), *Global warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5 °C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (IPCC In Press 2018).

significant in terms of providing stability through entrenchment are the non-regression obligations in the Paris Agreement. This indicates that the CCR is able to provide a certain degree of stability, which should help states parties be able to move forward in their ambition to achieve the ultimate objective of article 2 UNFCCC.

Lastly, the three forms of supremacy can also be identified in the architecture of the CCR. The Secretariat's ability to represent the CCR indicates that the CCR has external supremacy. This is further emphasised by the autonomous aspect of the CCR's institutional arrangement. Internal supremacy features strongly in the CCR and manifests as a hierarchy of norms with the constitutional provisions of the CCR at the top, followed by decisions of the COP, followed by decisions of subsidiary bodies.

Overall, it can be claimed that the architecture of the CCR incorporates all of the formal features of constitutionalism at least in a minimal sense. In relation to supremacy the provisions of the CCR are satisfactory. The provisions relating to entrenchment are sufficiently satisfactory at this point but could be improved through further development of the rules of procedure of the COP. The feature of enablement and constraint, arguably the most significant of the formal features of constitutionalism, could definitely be improved through further fine-tuning in order to achieve a more productive balance in the relationship between states parties and the AIA.

Chapter 6 Material Features of Constitutionalism in the Climate Change Regime

1 Introduction

The purpose of this chapter is to apply the material features of the compensatory constitutionalism lens (CCL) to the climate change regime (CCR). The material features of constitutionalism provide the guidance for the exercise of authority within the order outlined by the formal features. In providing the prescriptive aspect for the exercise of authority within the order the link between material features of constitutionalism and legitimacy comes to the foreground. In order to provide a persuasive account of why authority ought to be exercised in a specified manner, the material features of constitutionalism need to coincide with the dominant framework of social norms. Where the material features of constitutionalism reflect the framework of social norms it can provide for discursive reasons that result in a positive legitimacy perception. As such, the material features of constitutionalism are informative as to the normative values that underpin the constitutional structure.

Using the intersection between legitimacy and constitutionalism as a means of identifying the presence of material features of constitutionalism in the CCR is therefore an important aspect of this thesis' research question. Actively seeking out the material features of constitutionalism and linking these to legitimacy expectations is helpful in developing a better understanding of obstacles states parties face their interaction with the CCR. Furthermore, the connection between material features of constitutionalism as indicators of normative expectations held by states makes it possible to counter the criticism that applying constitutional language outside the context of the nation state unjustly invokes a sense of legitimacy.¹ This is because the connection between legitimacy and constitutionalism is not merely assumed but demonstrated.

Demonstrating a high degree of adherence to the material features of constitutionalism is furthermore important because addressing climate change requires states to achieve significant changes in their social and economic infrastructures. While all regulation involves impact on human activity to some extent, the deep embedment of activities which contribute to the concentration of greenhouse gas emissions means that a significant shift in consumption patterns must be achieved to realise the common objective of the CCR as set out in article 2 United Nations Framework Convention on Climate Change (UNFCCC).²

For the CCR this means that, in addition to the technical difficulties law already faces, law-making needs to take into consideration the way in which climate change governance is perceived by the societies affected.³ Much of the world's economic and social

¹ Dieter Grimm 'The Constitution in the Process of Denationalization' (2005) 12(4) *Constellations* 447; Jan Klabbers, 'Constitutionalism Lite.' (2004) 1(1) *International Organizations Law Review* 31, 37–58. Joseph H H Weiler, 'In Defence of the Status Quo: Europe's Constitutional Sonderweg' in Joseph H H Weiler and M Wind (eds), *European Constitutionalism beyond the State* (CUP 2003) 9.

² United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

³ Climate change has presented itself as a complex problem without precedent. Compounding on the regular difficulties of responding to a novel phenomenon are the challenges of scientific uncertainty, cumulative

infrastructures rely on activities that contribute to the concentration of greenhouse gasses in the atmosphere.⁴ This deep embedment of greenhouse gas emitting activities means that legal strategies to address climate change must be accompanied and supported by societal change. By engaging with the normative expectations held by the subjects of the authority, legitimacy is able to provide a set of discursive reasons for the acceptability of authority. The constitutionalism lens embeds these reasons into the legal framework which also outlines the boundaries of the exercise of authority.

If states perceive the regime to reflect a high standard of legitimacy this should result in more effective policy-making.⁵ This in turn should result in better management of climate change at the global level and the prevention of further increases in global warming. In order for the CCR to fulfil its transformative and guiding role it must have the capacity to disrupt business as usual. In order to change practices and laws that came about through legitimate means, the CCR must be able to demonstrate that its activities have a basis in legitimacy too. For these reasons, this chapter defines and applies the material features of the separation of powers, the rules of procedure, and the rule of law to the provisions of the CCR.

2 Separation of powers

Chapter 4 highlighted that there are two prevalent accounts of the separation of powers as a constitutional feature. The first argues that the separation of powers serves to protect individual liberty by dividing authority into three distinct branches which act as a system of checks and balances on each other.⁶ The second account focusses on separation of powers as a means of enhancing the constitutional order's efficiency.⁷ As explained in chapter 4, the feature of separation of powers as part of the CCL follows the efficiency account. In explaining the efficiency account of the separation of powers this thesis relies on Kavanagh's and Barber's explanation thereof. Both are writing in the context of the modern constitution and therefore speak of individual liberty or individuals rather than of states parties' sovereignty. However, based on the constitutional analogy explained in chapter 3 states parties' sovereignty would be the relevant surrogate for individual liberty.

causation, indivisible impact, and allocation of responsibility over a timespan that includes the past, present, and future. These complications represent various types of problems which the law traditionally struggles to deal with and respond to. See Richard Lazarus, 'Super wicked problems and climate change: restraining the present to liberate the future' (2009) 94(5) *Cornell Law Review* 1153.

⁴ Hilal Elver, 'New constitutionalism and the environment' In Steven Gill and A. Claire Cutler (eds), *New Constitutionalism and World Order* (CUP 2014) 261.

⁵ Nicholas Barber, 'The Rule of Law' in Nicholas Barber, *The Principles of Constitutionalism*. (OUP 2018) 85. Christian Reus-Smit, 'International Crises of Legitimacy' (2007) 44 *International Politics* 157.

⁶ Also described as the 'pure view' on the separation of powers. For examples that contrast these two views see Aileen Kavanagh, 'The Constitutional Separation of Powers' in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (OUP 2016) 222-240; and Nicholas Barber, 'The Separation of Powers' in Nicholas Barber, *The Principles of Constitutionalism* (OUP 2018) 51.

⁷ *Idem*.

Choosing the efficiency account does not imply that states parties' sovereignty is unimportant.⁸ Instead, it is argued that protection of state parties sovereignty is seen as being the task of the CCL in its entirety and is provided for through the sum of all the necessary features of constitutionalism outlined in this chapter.⁹ Therefore, rather than claiming that the separation of powers specifically contributes to the CCL by providing for the protection of liberty, the efficiency-account is both more appropriate and more enriching. It is more appropriate because it does not diminish the role of the other features' contribution to the safeguarding of states parties' sovereignty by claiming that this feature alone provides the core contribution to that goal. It is enriching because it allows for the CCL to address both the safeguarding of states parties' sovereignty as well as the need for efficiency, especially in light of the urgent nature of the issue of climate change. The efficiency aspect of the chosen account of the separation of powers further highlights why it is a necessary feature of constitutionalism that needs to be included in the CCL. Considering the urgency of addressing climate change efficiency is necessary.

Before explaining in further detail how the separation of powers manifests in the efficiency account it is necessary to bring to the foreground two difficulties of measuring the extent to which the CCR adheres to the separation of powers. The first problem is that the scope of enablement of the autonomous institutional arrangement (AIA) is not comparable to the scope of authority exercised by the state. The extent to which the state has powers that can be separated is therefore more developed than it will be in the AIA. This ties in with the second difficulty which relates to the compensatory nature of the CCL. Since the CCR does not provide a comprehensive legal order in the same way that the state does the exercise of 'powers' by the AIA is focussed on integration with the powers of the state. The AIA's exercise of authority is supplementary to the exercise of authority by the state. This brings to the foreground again that the scope of powers exercised by the AIA are far more limited than those of the state. A result of the more limited scope of powers exercised by the AIA the evaluation of the separation of powers can come across somewhat lopsided.

2.1 Efficiency through the separation of powers

The starting point of Barber's efficiency account of the separation of powers is that the capacity of individual actors is inherently limited.¹⁰ He suggests that individual actors can overcome these shortcomings by channelling their actions through institutional frameworks in which the exercise of powers is separated according to the unique skillset of each institution. Whilst not referenced by Barber specifically, this echoes the work of Elster, who suggests that constitutional structures are a way of overcoming the type of inherent shortcomings described by Barber.¹¹ Whilst both Elster and Barber were discussing the use of institutional arrangements to overcome the shortcomings of individuals the same reasoning can be applied to states parties of the CCR. As discussed chapter 3, states are inherently limited in their ability to adequately address climate change in the absence of a

⁸ Kavanagh and Barber speak of individual liberty rather than states parties' sovereignty. However, based on the constitutional analogy explained in chapter 3 states parties' sovereignty would be the relevant surrogate for individual liberty here.

⁹ See section 4 of this chapter.

¹⁰ Barber 2018 (n 5).

¹¹ Idem.

framework which binds them into mutual cooperation and constrains their abilities to make choices that prioritise individual (short-term) interests over the common long-term objective.

Barber furthermore connects the separation of powers to three specific functions of the state. The purpose of the state is to advance the well-being of its citizens.¹² In order to do this, Barber argues that the state must be able to have an institutional arrangement which can make law, apply law, and enforce law. These three functions are mirrored in the separation of powers doctrine, according to which powers are divided between a legislature, a judiciary, and an executive. The legislature makes the law, the judiciary applies the law, and the executive carries out the law.

Prior to assessing the extent to which the CCR adheres to the separation of powers, it is necessary to highlight the compensatory role assigned to constitutionalism in the context of the CCR. The aim is not to identify a legislature, judiciary, and executive which replace these institutions within the state. Rather, the purpose is to identify whether the AIA of the CCR is able to support these functions as required for the safeguarding of these features in the exercise of authority beyond the state. In order to respect the compensatory nature of the CCL, each of the functions of the state therefore is relied on within the constitutional structure of the state. It is only supplemented insofar necessitated by the exercise of authority over states parties by the AIA.

2.2 Legislature

The role of the legislature is characterised by Barber as follows:

“The legislature is a good forum for enabling representatives of the population to test expert opinion. It is a bad forum for the initial formulation or refinement of expert opinion. [...] One of the most important functions of a legislature is the discussion, and challenge, of proposed legislation, and the scrutiny of the executive.”¹³

He furthermore identifies three characteristics of the legislature. These are that the legislature is relatively large, it generally lacks expert knowledge, and serves as a democratic check on unrestrained technocratic rulemaking. In the context of the CCR the COP is the body that is most like a legislature.¹⁴ All states parties have the right to participate in the COP and its mandate includes the power to adopt decisions that are necessary to promote the regime’s implementation.¹⁵

The COP can also be said to meet all three of the characteristics described by Barber and listed above. According to the COP’s procedural rules each party to the CCR is represented in the COP by a delegation. A delegation consists of a head of delegation and any additional

¹² On the role of the state to protect and promote the wellbeing of its citizens see Thomas Hobbes, *The Clarendon Edition of the Works of Thomas Hobbes, Vol. 2: De Cive: The English Version* (Howard Warrender ed. OUP 1983) 157.

¹³ Barber 2018 (n 5) 58.

¹⁴ See also chapter 4.

¹⁵ Article 7 UNFCCC.

representatives and advisors that may be required.¹⁶ With nearly 200 parties to the CCR and each party represented by a full-fledged delegation, it is fair to say that the COP meets the characteristic of being large. The COP also meets the second and third characteristics. The delegations, sent by each of the individual states parties to participate in sessions of the COP, are representatives of their states. Their participation in the sessions of the COP is based on representing their state rather than negotiate on the basis of expert knowledge in the absence of consideration of the interests of the state that sent them. In this sense the delegations fulfil the representative quality of legislators and also demonstrate that their representative function is valued above their potential expert knowledge. Representatives might have some expert knowledge and states parties may choose to send representatives with relevant knowledge. But they are not characterised by their expert knowledge.

In addition, the COP also serves first and foremost as a forum “for enabling representatives [...] to test expert opinion.”¹⁷ Within the COP states parties can discuss the state of scientific expertise as presented to them by the Intergovernmental Panel on Climate Change (IPCC). Due to the lack of significant expertise among representatives ‘It is a bad forum for the initial formulation or refinement of expert opinion.’ Initial formulation and refinement of expert opinion instead is done by the IPCC.

Moreover, an important function of the COP is the “discussion, and challenge, of proposed legislation, and the scrutiny of the executive.”¹⁸ The COP lives up to these tasks it is responsible for the substantive development of the CCR on the basis of expert opinion provided by the IPCC. The COP does not, however, formulate its own expert opinion. Rather, it integrates the provided expert knowledge into the articulation and adoption of its decisions. It is in the sessions of the COP that states parties can discuss and challenge the expert advice provided by the IPCC and also highlight their individual concerns that arise in the light of the expert opinions provided.

The above illustrates that the COP displays the three structural characteristics of a legislature. However, the most important function of the legislature is that it makes law. The question arises to what extent the COP actually makes law. So far it has been illustrated that the COP can adopt decisions. However, the decisions of the COP lack direct effect. For these decisions to amount to international law, they must be ratified by states parties. Bodansky and Brunnée therefore argue that the COP falls short of being a legislator.¹⁹ Its inability to create binding obligations on states in the absence of individual consent is an insurmountable obstacle from their point of view.

Despite the fact that the COP falls short of being a fully-fledged legislator in the way the function manifests in the state, it still plays a significant role in influencing the conduct of

¹⁶ Conference of the Parties, *Organizational Matters Adoption of the Rules of Procedure Note by the Secretariat* FCCCP/CP/1996/2, UN Doc FCCC/CP/1996/2 (1996) available at <https://unfccc.int/sites/default/files/resource/02_0.pdf> accessed 14 July 2020 see Rule 2 and Rule 17.

¹⁷ Barber 2018 (n 5).

¹⁸ *Idem*.

¹⁹ Jutta Brunnée, ‘COPing with Consent: Law-Making Under Multilateral Environmental Agreements’ (2002) 15(1) *Leiden Journal of International Law* 1; Daniel Bodansky, ‘The legitimacy of international governance: a coming challenge for international environmental law?’ (1999) 93(3) *The American Journal of International Law* 596, 598-599.

states parties. This takes place in different forms. For example, the AIA is tasked with the further development of the content of the CCR. This also includes the negotiation of future obligations for states parties. In addition, the AIA provides a channel for states parties to channel the expert information provided by the IPCC into globally coordinated climate change policies. It therefore plays a role in shaping conduct of states parties by enabling them to globally coordinate climate change policies in their efforts to achieve the ultimate objective set out in article 2 UNFCCC. It is also worth noting that the nature of compensatory constitutionalism means that the role of legislator within the CCR should always facilitate the operation of the legislature of the state, rather than replace it. In this context the need for ratification of decisions of the COP before new obligations arise for states parties under the CCR makes sense.

In light of the above, to focus on the ability of a legislator to bind subjects against their will is not necessarily the most appropriate focus in the context of the CCR. Whilst this might be an important aspect of law-making in the context of the legislator within a state, the compensatory nature of the constitutionalism lens in the context of the CCR means that ratification meaningfully reserves a space for the protection of sovereignty of the state. Therefore, despite Bodansky and Brunnée's observations that the COP is not a legislator, it can be concluded that it is sufficiently like a legislator to fulfil that function within the discussion of the separation of powers in the CCR. Considering the more limited scope of 'powers' exercised by the AIA is also not necessary for the legislator to be measured against the extent of powers it exercises within the context of the state.

2.3 Executive

The role of the executive is often associated first and foremost with the ability to enforce the law with the threat of force. Whilst Barber does not deny this aspect of the executive he places a stronger emphasis on the characteristic of the executive as the force that carries out the law. As such, he notes, the executive has a technocratic function. In order to carry out the law, the executive requires specific skills and knowledge that cover the range of topics regulated by law. The executive interacts with the legislature by using its expert knowledge to suggest what laws should be enacted.²⁰

This two-pronged approach regarding the executive is especially useful in the context of viewing the CCR through the lens of compensatory constitutionalism. The role of the executive as regards the carrying out of law and enforcing law can be fulfilled by the executive forces of states parties. There is no good reason to replace executive functions within the legal order of states parties by an international executive. Local implementation and enforcement of the CCR's targets and objectives are best carried out by those with the relevant knowledge of and legitimate powers in the local context.

Regarding the technocratic function of the executive, the AIA includes the subsidiary body for scientific and technological advice (SBSTA).²¹ As discussed in chapter 5, the SBSTA provides information and advice on scientific and technological matters related to climate

²⁰ Barber 2018 (n 5).

²¹ Article 9 UNFCCC.

change. It also is responsible for providing answers to any specific questions the other bodies of the AIA may present with regard to scientific and technological matters. One distinction perhaps between the executive's technocratic function of the SBSTA as compared to the executive in the context of the state is that the former is specifically a *subsidiary* body to the COP. In context of the separation of powers within the state, however, no such hierarchy exists. By providing assessments of the state of scientific knowledge relating to climate change, preparing scientific assessments on the effects of measures taken in the implementation of the UNFCCC, identifying technologies and methods of transferring them, as well as giving advice on scientific programs, international cooperation in research, and supporting endogenous capacity building the SBSTA can be said to fulfil the role of the executive insofar as relevant to the technocratic function thereof.²²

Within the context of the CCR the technocratic function of the executive is fulfilled by the SBSTA. Where the enforcement aspect of the executive is concerned the CCR relies on executive forces within the state. Regarding the centrality of the monopoly of force by the state it is more natural for the CCR to take a compensatory approach to the enforcement aspect of the executive. However, the SBSTA and the SBI are specifically subsidiary to the COP. This would indicate that, even if they are identified as fulfilling an executive type role within the CCR, there is no separation of powers between the legislature and the executive. Rather, the COP is hierarchically superior over the SBSTA and the SBI.

2.4 Judiciary

At the heart of the judiciary is its responsibility to provide "disputing parties with a forum in which their disagreement can be authoritatively resolved."²³ The AIA does not include a tribunal or court. However, article 14 UNFCCC, article 19 Kyoto Protocol,²⁴ and article 24 Paris Agreement²⁵ provide states parties with options for the settlement of disputes arising from the interpretation or application of the CCR. In particular, article 14(2)(a) UNFCCC opens up to opportunity to have the International Court of Justice preside over disputes between states parties. The CCR therefore provides an option for access to a court for states parties. However, so far only four out of all of the states parties have submitted declarations in accordance with article 14 UNFCCC. These states parties are Cuba, the Netherlands, the Solomon Islands, and Tuvalu.²⁶ Access to a court for individuals is not relevant in the context of this thesis which focusses only on the role and perspective of states parties.

Considering the international context in which the CCR operates it is not surprising that it does not create a judicial body to be a part of the AIA. Traditionally the emphasis on state

²² Article 9(2) UNFCCC.

²³ Barber 2018 (n 5).

²⁴ Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162 (Kyoto Protocol).

²⁵ Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) (Paris Agreement).

²⁶ 'Declarations by Parties' available at <<https://unfccc.int/process/the-convention/status-of-ratification/declarations-by-parties>> accessed 15 July 2020.

sovereignty in international law has prevented more widespread use of judiciary bodies in international regimes. While the judiciary forms an important part of the institutional arrangement of the state, it appears to not always have the same legitimising impact beyond the context of the nation state. While courts exist on the international plane, they can be a source of legitimacy debates.²⁷ Alternative forms of supervision, such as compliance procedures, reporting obligations, or conciliation procedures appear to be favoured instead at the international level. In the context of supervisory powers, the COP's mandate includes responsibility for the supervision of the CCR by states powers. In addition, the COP has established a number of additional bodies which are tasked with various aspects of supervising implementation of obligations by states parties. For example, in the context of the Kyoto Protocol it established a Compliance Committee²⁸ and the Joint Implementation Supervisory Committee (JISC).²⁹

2.5 Assessing the extent to which the CCR provides for the separation of powers in the AIA

Based on Barber's account of the separation of powers, the COP can be identified as a legislative type body and the SBSTA and the SBI can arguably provide for an executive in the AIA. The AIA does not, however, provide for a judiciary. This means that, judged against the efficiency account of the separation of powers based on the model of the constitutional state the CCR does not fulfil the basic requirements of the separation of powers, as there is no provision for a judicial body. In addition, even though the COP, the SBSTA, and SBI can be described in legislative and executive terms, there exists, importantly, no separation between the exercises of their powers. The COP is the supreme body of the AIA³⁰ and the

²⁷ See for an example on the literature on the legitimacy of international courts: Nienke Grossman, 'The normative legitimacy of international courts' (2018) 86(1) Temple Law Review 61; Allen Buchanan and Robert Keohane, 'The legitimacy of global governance institutions' (2006) 20 Ethics and International Affairs, 405; Andrew Moravcsik, 'Is there a "democratic deficit" in world politics? A framework for analysis' (2004) 39 Government and Opposition 336. Andreas Follesdal, 'Constitutionalization, not democratization: How to assess the legitimacy of international courts' in Nienke Grossman and others (eds) *Legitimacy and International Courts* (CUP 2018) 307.

²⁸ Conference of the Parties, 'Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its first session, held at Montreal from 28 November to 10 December 2005' UN Doc FCCC/KP/CMP/2005/8/Add (FCCC/KP/CMP/2005/8/Add.3) available at <<https://unfccc.int/sites/default/files/resource/docs/2005/cmp1/eng/08a03.pdf>> accessed 15 July 2020, see page 93 Roman Numeral II. The procedures and mechanisms relating to compliance under the Kyoto Protocol were adopted through decision 27/CMP.1, see FCCC/KP/CMP/2005/8/Add.3, 'Decision 27/CMP.1 Procedures and mechanisms relating to compliance under the Kyoto Protocol'; see also FCCC/KP/CMP/2005/8/Add.3, Decision 27/CMP.1 'Procedures and mechanisms relating to compliance under the Kyoto Protocol' available at <https://unfccc.int/files/kyoto_protocol/compliance/application/pdf/dec.27_cmp.1.pdf> accessed 1 May 2020.

²⁹ Conference of the Parties, 'Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its first session, held at Montreal from 28 November to 10 December 2005' FCCC/KP/CMP/2005/8/Add.2, Decision 10/CMP.1 available at <<https://unfccc.int/resource/docs/2005/cmp1/eng/08a02.pdf>> accessed 15 July 2020, see page 14.

³⁰ Article 7 UNFCCC.

SBSTA and SBI are subsidiary to it. This means that a hierarchical relationship exists between them.

On the one hand, it would be possible to argue that the sensitive diplomatic nature of states parties' relationships to each other suggests that the context of the CCR means that it would not be appropriate for the AIA to include a judiciary body. It is entirely possible to argue that the separation of powers manifests differently according to context and that the context of the CCR suggests that the AIA should not include a judiciary body of its own. One could argue that the opportunity for states parties to submit their disputes to the ICJ provides sufficient opportunity for judiciary involvement. There would still exist a separation of powers between the COP, the SBSTA and the SBI, and the ICJ. On the other hand, the hierarchical relationship means that, despite the possibility of identifying legislative and executive bodies within the CCR it is not possible to describe the AIA as meeting the requirements of the feature of separation of powers. This could indicate a potential legitimacy deficit in the CCR.

3 Rules of procedure: Safeguarding sovereignty beyond consent

The topic of rules of procedure featured briefly in chapter 4 as an aspect on constraint on the AIA. Rules of procedure also provide an important contribution to the material features of constitutionalism. The material aspect of the rules of procedure come to the foreground when explaining their function. The rules of procedure are a means of balancing the authority relationship between the AIA and states parties. In particular, rules of procedure are able to create a space within which the autonomy of states parties is safeguarded. This explains why rules of procedure, whilst they have a formal aspect³¹, are primarily cast as a material feature of constitutionalism in this thesis.

The function of rules of procedure as a safeguard for the autonomy of states demonstrates that this feature is grounded in the normative assumption that state sovereignty ought to be protected. This represents the connection between this feature and legitimacy as a reflection of the dominant framework of social norms. This in turn highlights the usefulness of the CCL as a means of identifying legitimacy strengths and deficits in the CCR. If the CCR can demonstrate that it embeds rules of procedure as a mechanism to safeguard the sovereignty of states parties in light of the exercise of authority by the AIA, this will have a positive influence of the regime's overall legitimacy perception.

The need for procedural rules as a means of safeguarding the autonomy, and thereby sovereignty, arises from the nature of the CCR as a multilateral environmental agreement that establishes an AIA.³² This means that there arises a need for safeguarding sovereignty

³¹ The formal aspect lies therein that they place a practical constraint on the institutional arrangement of the climate change regime. See chapter 5.

³² Robin Churchill and Geir Ulfstein, 'Autonomous institutional arrangements in multilateral environmental agreements: a little-noticed phenomenon in international law' (2000) 94(4) *American Journal of International Law* 623. For discussion of this see chapter 3.

beyond consent.³³ Traditionally the requirement of consent is used to safeguard sovereignty. Legal obligations can only be established following the acquisition of state consent. No higher entity can otherwise impose their will on sovereign states. Within the CCR consent continues to play an important role. This is seen, for example, in the fact that only those COP decisions which are ratified by states parties following their adoption create legally binding obligations. Beyond the requirement for consent, the CCR further seeks to respect the principle of sovereignty by phrasing its obligations as targets rather than instructions for specific conduct. In the Paris Agreement the CCR has even gone so far as to allow states parties to set their own targets through nationally determined contributions.³⁴ The choice for targets over substantive obligations is sometimes perceived as a weakness of the CCR. However, if this does in fact represent the regime's greatest weakness, it will only be possible to overcome after the CCR manages to demonstrate a high standard of legitimacy. Only in light of a high standard of legitimacy which has the capacity to both safeguard and enhance the autonomy of states parties would it become more feasible to increase the number of substantive obligations for states parties within the framework of the CCR.

Despite the fact that consent continues to feature in the creation of obligations in the CCR, the enablement of the COP, as discussed in chapter 4, means that the AIA is able to influence state conduct in ways that do not require express and individual consent. Whilst chapter 4 reached the conclusion that the COP does not amount to a global legislator, it also found that COP decisions are able to influence state conduct either through the creation of positive feedback loops, or by adopting decisions which are then put forward for ratification. Chapter 4 further highlighted that the adoption of decisions by the COP is done on the basis of consensus. This demonstrates that the decisions of the COP, which influence the conduct of states parties, do not in every instance meet the requirement of consent.

To further elaborate on this point, it is useful to bring forward the distinction made in chapter three between constitutional provisions within the CCR and 'ordinary law' within the CCR. This distinction reveals that whilst the establishment of the CCR through the creation of the UNFCCC, the Kyoto Protocol, and the Paris Agreement follows the traditional means of safeguarding sovereignty by requiring state consent for the imposition of international obligation. However, since the CCR goes beyond 'traditional' treaties in that it creates an ongoing platform for decision-making by an entity that can act with a certain degree of autonomy from states parties, there arises a need for an additional layer of protection for states parties.³⁵ Since states parties have consented, through the creation of

³³ Bodansky 1999 (n 17).

³⁴ Article 4 Paris Agreement.

³⁵ It should be noted that this description of the CCR may bring to mind treaties which establish international organisations, such as the World Health Organization, for example. However, the CCR specifically does not create an international organisation and therefore the legitimisation strategies used in those treaties should not be assumed to apply to it. This thesis is not original in its concern regarding the legitimisation of multilateral environmental agreements such as the CCR. See for example Bodansky 1999 (n 17) and Churchill and Ulfstein 2000 (n 30). This thesis' discussion of the legitimacy of the CCR is, however, distinct from those publications because it specifically uses constitutionalism as a means of addressing the legitimacy of the CCR. While others, such as Kotzé have also used constitutionalism in relation to global environmental law their focus has not been specifically on the CCR or on the architecture of the CCR as a multilateral environmental agreement. See Louis

the CCR, to be involved in an ongoing decision-making platform that does not require explicit state consent for the adoption of decisions, the need for procedural rules as a safeguard of sovereignty arises.

The need to safeguard sovereignty beyond consent is of particular importance in the context of climate change. The necessity of global cooperation in the context of climate change stands in tension with the autonomy of sovereignty. States parties do not have the option of not cooperating globally if they are to successfully achieve the CCR's ultimate objective as set out in article 2 UNFCCC. Since the need for cooperation cannot be circumvented, it is necessary instead to seek appropriate means of fitting safeguards for sovereignty into to decision-making processes of the CCR.

The following three subsections consider participation, transparency, and accountability as rules of procedure through which sovereignty can be safeguarded beyond consent. The embedding of these rules of procedure can help to ensure that states parties maintain their status as autonomous, free, and equal actors to the greatest possible extent within the cooperative framework of decision-making procedures of the CCR. To a certain degree, the inclusion of rules of procedure therefore fulfil a similar function to that of rights of states. Both the feature of rights of states and the feature of rules of procedure seek to create and protect a space which the AIA needs to respect. The creation of this space within which the sovereignty of states is protected helps to even out the authority relationship between states parties and the AIA. It does this by tying the exercise of authority by the AIA to conditions (respecting rights of states, observing procedural rules) which reflect the normative values states parties seek to maintain within the authority relationship. The exercise of authority by the AIA is not random or arbitrary. Instead, it takes places within the confines of the normative expectations held by the subjects of the authority, which in the context of the CCR are states parties.

3.1 Participation by States Parties

Participation of states in the creation of international obligations does not normally raise any issues. After all, article 6 of the Vienna Convention on the Law of Treaties³⁶ establishes that "Every state possesses the capacity to conclude treaties."³⁷ However, the CCR is a multilateral environmental agreement which establishes an autonomous institutional arrangement.³⁸ The role of the institutional arrangement, in particular the COP, is to further develop the content of the CCR, including the development of new obligations for states parties. Whilst chapter 3 highlighted that the COP does not amount to a global legislator, it also concluded that it exercises authority over states parties in a way that it is able to influence their conduct. The right of states parties to participate in the creation of the CCR is taken for granted. Therefore, the discussion of this section is limited to participation by states parties to the CCR in the further development of the regime's content.

Kotzé, *Global environmental constitutionalism* (Hart Publishing 2016); James May and Erin Daly, *Global Environmental Constitutionalism* (CUP 2014).

³⁶ United Nations Vienna Convention on the Law of Treaties (adopted 23 May 1969) 1155 UNTS 331 (VCLT).

³⁷ Article 6 VCLT.

³⁸ See chapter 2.

This section further identifies and discusses three categories of participation. The first category of participation consists of provisions in the CCR that refer to formal participation rights. These are rights that the constitutional provisions of the CCR provide for states parties which ensure their ability to be involved in the operation of the AIA. Opportunities for participation are especially important in this context because of the AIA's ability to influence the conduct of states parties. An example of the first category of participation rights is the right to vote or the right to be represented in the bodies of the institutional arrangement of the CCR.³⁹

The second category of participation creates obligations for states parties. This is referred to as substantive participation. This form of participation considers the extent to which states parties participate in the CCR in terms of contributing through their conduct to the achievement of the CCR's ultimate objective as set out in article 2 UNFCCC and further elaborated in article 2 Paris Agreement. The third category of participation is closely related as it consists of provisions which provide support in order to enable participation by states parties which might otherwise not have the capacity to fulfil their obligations or engage fully with the operation of the CCR. Examples of this type of participation are provisions related to transfer of technologies, financial support, and support for capacity building.⁴⁰

3.1.1 Formal participation rights

This category of participation refers to provisions which explicitly provide rights for states parties to be involved in the operation and continued development of the content of the CCR, including the creation of new obligations. The latter takes place through participation in the decision-making processes of the COP. Participation rights can also exist in relation to the operation of the other bodies of the CCR's institutional arrangement.⁴¹ This section identifies the provisions of the CCR which establish such formal participation opportunities.

The COP is the supreme body of the CCR and as such it is tasked with regular review of implementation and the adoption of decisions necessary to promote implementation.⁴² Article 7 UNFCCC does not specify membership of the COP or who has the right to participate. However, from its title one might infer that all states parties to the UNFCCC together form its Conference of the Parties. This inference is further supported by Rule 2(2) of the draft rules of procedure for the Conference of the Parties defines 'Parties' as "Parties to the Convention". Rule 17 further states that each "Party participating in a session shall be represented by a delegation", which further implies that each Party to the Convention has the opportunity to participate in the Conference of the Parties. Whilst the draft rules of procedure are not part of the constitutional provisions of the CCR, their content is brought into the remit of the constitutional provisions in this instance, because article 7(3) UNFCCC specifically mentions that the COP is to adopt its own rules of procedure. What this means is

³⁹ See, for example, article 18 UNFCCC, article 20 Kyoto Protocol, and article 25 Paris Agreement.

⁴⁰ See, for example, article 4 UNFCCC, article 10 Kyoto Protocol, and article 11 Paris Agreement.

⁴¹ These are listed in chapter 4.

⁴² Article 7(2) UNFCCC "The Conference of the Parties, as the supreme body of this Convention, shall keep under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention."

that although the content of the draft rules of procedure themselves do not have constitutional status, the constitutional provisions of the CCR, in this case article (7) UNFCCC does put in place the requirement that there are procedural rules for the operation of the COP. The existence of rules of procedure for the COP is therefore included in the constitutional provisions of the CCR, however, their content is not. Whilst the content of the draft rules of procedure are therefore not included in the assessment of the legitimacy of the CCR as viewed through a constitutionalism lens, they are referenced occasionally. This is because in certain contexts, like the one discussed here, not mentioning the draft rules of procedure would stand in the way of understanding the operation of the institutional arrangement of the CCR.

Furthermore, article 18 UNFCCC establishes that “Each Party to the Convention shall have one vote, except as provided for in paragraph 2 below.”⁴³ Since article 18 UNFCCC grants each party one vote, it can be assumed that each party can use that vote to participate in the session of the COP. Another implication that states parties can participate in the COP on the basis of their status as states parties can be derived from articles 13 Kyoto Protocol and 16 Paris Agreement. The inference that being a state party creates the right to participate in the COP can be taken from the wording of article 13(2) Kyoto Protocol and article 16(2) Paris Agreement.⁴⁴ They state that parties to the UNFCCC that are not parties to the Kyoto Protocol or the Paris Agreement may act as observers only in the sessions where the COP serves as the meeting of the Parties to the Kyoto Protocol or the Paris Agreement. It then goes on to specify explicitly that when the Conference of the Parties serves as the meeting of the Parties to this Protocol/Agreement, decisions under this Protocol/Agreement shall be taken only by those that are Parties to this Protocol/Agreement.⁴⁵ The exclusion of participation of states parties to the UNFCCC, who are not states parties to the Kyoto Protocol or the Paris Agreement demonstrates that participation in the COP, or the COP serving as the meeting of the Kyoto Protocol or Paris Agreement, is dependent on whether or not a state is a party to the treaty in question.

Participation in the COP is especially important because it is the supreme body of the CCR’s institutional arrangement. Furthermore, the COP’s involvement with the continued development and implementation of the CCR make participation especially relevant to states parties. The above illustrates that participation in the COP is granted on the basis of being a state party to the UNFCCC. Participating in the COP serving as the meeting of the Parties to the Kyoto Protocol or the Paris Agreement is also dependent on being a state party to each of those texts. Limiting participation in the COP serving as the meeting of the Parties to the Kyoto Protocol or the Paris Agreement safeguards the sovereignty of states parties to those treaties by restricting participation in the supreme body of the institutional arrangement, which carries the primary responsibility for implementation to those states who will be affected by the decisions of the COP. This safeguards the sovereignty of states parties by ensuring that the decisions of the COP cannot be directly influenced by states who, unlike states parties, are not affected directly by those decisions. Lastly, article 18

⁴³ Article 13(1) Kyoto Protocol and 16(1) Paris Agreement establish that the Conference of the Parties to the UNFCCC shall also act as the meeting of the Parties to the Kyoto Protocol and the Paris Agreement.

⁴⁴ These are phrased nearly identically, with the exception that where article 13 speaks of ‘Protocol’, article 16 Paris Agreement speaks of ‘Agreement’.

⁴⁵ See article 16(2) Kyoto Protocol and article 16(2) Paris Agreement.

UNFCCC provides for participation opportunities by establishing that “Each Party to the Convention shall have one vote, except as provided for in paragraph 2.” Whilst this article does not speak explicitly of participation, the ability to vote is in essence an opportunity for participation for states parties to the UNFCCC.

In addition to participating in the sessions of the COP, participation in the other bodies of the institutional arrangement is also relevant, because this enables participation in the wider operation of the CCR. The exception is the Secretariat, for which there are no explicit or implied participation rights to be found in the provisions of the CCR. Reference to who operates the Secretariat is found in the COP’s decisions that the Secretariat be institutionally linked to, yet independent from, the United Nations, and that the rules for hiring staff for the Secretariat be consistent with the Financial and Staff Regulations and Rules of the United Nations.⁴⁶

Unlike the COP and the Secretariat, the Subsidiary Body for Scientific and Technological Advice (SBSTA) and the Subsidiary Body for Implementation establish the right to participation. For the SBSTA this is made explicit in the second sentence of article 9(1) UNFCCC which states: “This body shall be open to participation by all Parties and shall be multidisciplinary.” It further elaborates that participation shall take place by “government representatives competent in the relevant field of expertise.” The same applies to the SBI, which states in the second sentence of article 10(1) UNFCCC that “This body shall be open to participation by all Parties and comprise government representatives who are experts on matters related to climate change.” Articles 9(2) UNFCCC and 10(2) UNFCCC furthermore set out the mandate of the SBSTA and the SBI, which clarifies the types of activities states parties can participate in when making use of their right of participation in these two bodies. Additionally, article 15 Kyoto Protocol establishes that the SBSTA and the SBI established in the UNFCCC shall also serve the Kyoto Protocol. Article 15(2) clarifies that Parties to the UNFCCC that are not Parties to the Kyoto Protocol “may participate as observers in the proceedings of any session of the subsidiary bodies. When the subsidiary bodies serve as subsidiary bodies of this Protocol, decisions under this Protocol shall be taken only by those that are Parties to the Protocol.” This highlights again that participation is granted to states parties only. This enhances the sovereignty of states by limiting participation in processes that could potentially influence the conduct of states parties. This protects sovereignty by restricting the scope of actors who can potentially limit the autonomy of states parties by placing constraints on states parties conduct without accepting the same constraints upon themselves. The content of article 15 Kyoto Protocol is replicated in article 18 Paris Agreement. The only difference is that where article 15 Kyoto Protocol speaks of ‘Protocol’, article 18 Paris Agreement speaks of ‘Agreement’.

⁴⁶ See Conference of the Parties, *Report of the Conference of the Parties on its first session, held at Berlin from 28 March to 7 April 1993*, UN Doc FCCC/CP/1995/7/Add.1, Decision 14/CP.1 available at <https://unfccc.int/sites/default/files/resource/docs/cop1/07a01.pdf> accessed 15 July 2020. See also Conference of the Parties, *Designation of a Permanent Secretariat and Arrangements for its functioning Note by the Executive Secretary*, UN Doc A/AC.237/79/Add.1 (1994) available at <https://unfccc.int/resource/docs/a/79add1.pdf> accessed 17 July 2020.

The provisions of the CCR also provide opportunities for participation beyond participation in the operation of the institutional arrangement. For example, article 17 Kyoto Protocol states that states parties “included in Annex B may participate in emissions trading for the purposes of fulfilling their commitments under Article 3.” In the Paris Agreement an obligation for participation by states parties is established in the context of the ETF. Article 13(11) Paris Agreement specifies that “Information submitted by each Party under paragraphs 7 and 9 of this Article shall undergo a technical expert review, [...] In addition, each Party shall participate in a facilitative, multilateral consideration of progress with respect to efforts under Article 9, and its respective implementation and achievement of its nationally determined contribution.”

3.1.2 Substantive participation

As set out in section 3.1, substantive participation refers to the extent to which the CCR creates obligations for states parties. This is considered substantive participation because the obligations influence the conduct of states parties in a way that intends to put them on a path to achieving the ultimate objective of the CCR. Varying types of substantive obligations can be found throughout the UNFCCC, the Kyoto Protocol, and the Paris Agreement. The purpose of this section is not to list or describe all obligations that arise for various states parties through the provisions of the CCR. Rather, this section focusses on two aspects of substantive participation that are notable in the CCR. The first is concerned with the conditions for entry into force of the UNFCCC, the Kyoto Protocol, and the Paris Agreement. The second aspect refers to the principle of common but differentiated responsibility.

As discussed in chapter 3, the ability of the CCR to achieve its ultimate objective set out in article 2 UNFCCC requires broad participation. The global nature of climate change means that ideally all states would become states parties to the CCR. In addition to broad membership, the CCR requires substantive participation by a significant amount of states. This is reflected in article 23 UNFCCC, article 25 Kyoto Protocol, and article 21 Paris Agreement, which set the conditions for each text to enter into force. The most notable difference between these provisions is that article 25 Kyoto Protocol and article 21 Paris Agreement use an emissions formula that ties the entry into force to ratification by states representing a certain percentage of global greenhouse gas emissions. In the case of the Kyoto Protocol, entry into force is dependent on the condition that

“This Protocol shall enter into force on the ninetieth day after the date on which not less than 55 Parties to the Convention, incorporating Parties included in Annex I which accounted in total for at least 55 per cent of the total carbon dioxide emissions for 1990 of the Parties included in Annex I, have deposited their instruments of ratification, acceptance, approval or accession”

Article 21 Paris Agreement also ties its entry into force to the condition of states accounting for at least 55 per cent of the global greenhouse gas emissions. However, unlike the Kyoto Protocol, the Paris Agreement does not specify any requirements relating to the country of origin of these emissions. It merely states that:

“This Agreement shall enter into force on the thirtieth day after the date on which at least 55 Parties to the Convention accounting in total for at least an estimated 55 per cent of the total global greenhouse gas emissions have deposited their instruments of ratification, acceptance, approval or accession.”

Bodansky comments that the use of an emissions formula contributes to credibility, because it demonstrates involvement by the states which contribute the most to the problem.⁴⁷ He also observes that it minimises the risk that states place themselves at a competitive disadvantage if they ratify the treaty early on, because the burden of the obligations only enters into force if and when a significant number of states have committed themselves through the same obligations through ratification.⁴⁸ He further comments that this second line of reasoning explains why the use of an emissions formula was not considered necessary as a condition for the entry into force of the UNFCCC, since it only creates “general obligations which will not impose high costs on parties initially”.⁴⁹

The use of an emissions formula as a condition for the entry into force of the Kyoto Protocol and the Paris Agreement reflects the regime’s concern with substantive participation. In drafting article 25 Kyoto Protocol and article 21 Paris Agreement, an awareness is demonstrated that in order to achieve the ultimate objective of article 2 UNFCCC, the CCR must engage substantive participation from states who significantly contribute to the issue. Furthermore, as the concern for being placed at a competitive disadvantage highlights, the CCR is better able to attract global participation if it can demonstrate a significant degree of substantive participation by as many states as possible.

Whilst participation on the basis of an emissions formula was less of a concern to states in the drafting of the UNFCCC, Bodansky makes an interesting comment relating to participation that is reflected in the phrasing of article 23 UNFCCC. He specifically ties the interest of states in the drafting of the conditions for entry into force of the UNFCCC to their desire to be able to participate in the COP’s first meeting.⁵⁰ Noting that the first COP would be tasked with adopting its own rules of procedure, it was considered important to make entry into force requirements neither too easy nor too strict. If they were too easy, states whose ratification procedures would take too long could end up being excluded from the first session of the COP.⁵¹ Ultimately, it was decided that the receipt of fifty instruments of ratification, acceptance, approval or accession reflected the number which struck the most appropriate compromise between allowing states enough time to ratify without risking significant delays to the UNFCCC’s entry into force.

Overall, the three articles relating to each treaty’s entry into force demonstrate the CCR’s awareness of the need for substantive participation by states parties. The different conditions for entry into force reflect the different purposes of each treaty. In the context of

⁴⁷ This comment is made in a general sense, as the Kyoto Protocol and the Paris Agreement had not yet been written at the time of publication of the article referred to here.

⁴⁸ Daniel Bodansky, ‘The United Nations Framework Convention on Climate Change: a commentary’ (1993) 18(2) *The Yale Journal of International Law* 451, 551-552.

⁴⁹ Bodansky 1999 (n 17) 551.

⁵⁰ *Idem*.

⁵¹ *Idem*.

the UNFCCC, the entry into force requirements reflected a concern for participation by states in the first COP. The Kyoto Protocol, which imposes differentiated obligations on states parties was concerned with substantive participation by those parties who would be burdened by obligations. The Paris Agreement's conditions for entry into force on the other hand reflect that the approach to establishing obligations had changed since the Kyoto Protocol. The reference to "total global greenhouse gas emissions" as opposed to "the total carbon dioxide emissions for 1990 of the Parties included in Annex I" reflects that under the Paris Agreement all states parties accept obligations to reduce emissions.

This leads to the second topic of discussion relating to substantive participation in the CCR, namely the principle of common but differentiated responsibility. The principle of common but differentiated responsibility is not straightforward and can be read in a variety of ways. This section discusses its relevance in the limited context of participation. Therefore, whilst the principles reference to 'differentiated responsibility' can refer both to the differences in states parties' contribution to the issue as well as their different capacities to address climate change⁵², this subsection focusses merely on the latter dimension.

The principle of common but differentiated responsibility is incorporated in all three treaty texts.⁵³ It is of particular relevance to the topic of participation because it reflects both that all states parties have a role to play in the CCR (common responsibility) as well as acknowledging the reality of difference between states parties' ability to participate. Rajamani comments that the principle contributes to participation by "carving out a role for developing countries within the climate regime."⁵⁴ This is relevant to the material feature of rules of procedure. The purpose of this feature is to provide safeguards for sovereignty. In the absence of the principle of common but differentiated responsibility obligations would either have to be set to the standard of states parties with the lowest capacity to address climate change, or certain states parties may be practically excluded from the regime because of their de facto inability to fulfil obligations. The former would not be beneficial to the CCR as it may well prevent the regime from achieving its ultimate objective as set out in article 2 UNFCCC. In this context it is of particular relevance that article 2 UNFCCC includes that its ambitions must be fulfilled "within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner."⁵⁵ The second option described above, would essentially exclude certain states parties from engaging with the CCR. This is because certain states simply lack the capacity to accept significant emissions reduction burdens. That this is the case is demonstrated by the repeated inclusion of provisions of all three treaties to enhance the endogenous capacities and capabilities of certain groups of states to participate in the CCR.⁵⁶

⁵² See, for example, Lavanya Rajamani, 'The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Change Regime' 2000 9(2) RECIEL 120, 121.

⁵³ See the preamble to the UNFCCC, articles 3(1) and 4(1) UNFCCC; article 10 Kyoto Protocol the preamble to the Paris Agreement and articles 2(2), 4(3) and 4(19) Paris Agreement.

⁵⁴ Rajamani 2000 (n 50).

⁵⁵ See the last sentence of article 2 UNFCCC.

⁵⁶ See, for example, articles 4(5); 5(c); 9(2)(d) UNFCCC, article 10(d) Kyoto Protocol, and articles 9(4) and article 11 Paris Agreement.

This section highlights that substantive participation by all states parties to the CCR is a topic on which the regime's provisions demonstrate a degree of fluctuation. On the one hand, the provisions relating to entry into force demonstrate that an attempt has been made repeatedly to ensure meaningful substantive participation in the CCR by states parties. The phrasing of the entry into force requirements of the COP demonstrate this by attempting to strike a balance between allowing enough time to enable states parties to be able to participate in the first session of the COP and yet not allowing so much time that entry into force and therefore substantive participation by states parties within the framework would be unnecessarily delayed. The entry into force requirements of the Kyoto Protocol and the Paris Agreement further demonstrate that substantive participation by states parties whose conduct amounts to a significant percentage of global greenhouse gas emissions was an important consideration in the phrasing of their entry into force provisions. Whilst these treaties would enter into force even in the absence of global ratification, it ensured that they would only enter into force once a meaningful amount of states parties committed to substantive participation.

Judging the extent to which the principle of common but differentiated responsibility contributes to substantive participation is a lot more difficult. On the one hand, the principle stresses the common aspect of responsibility. In differentiating between states parties' substantive commitments, the principle may have contributed to substantive participation by creating circumstances within which all states parties felt that their contributions would be appropriately allocated. On the other hand, the allocation of obligations amongst states parties on the basis of the principle of common but differentiated responsibility may have also slowed down substantive participation by allowing certain groups of states parties to limit their commitments within the framework of the regime. Ultimately, the extent to which common but differentiated responsibility impacts positively on the enablement of substantive participation, thereby contributing to the safeguarding of the sovereignty of states parties may remain somewhat speculative.

Overall, it can be noted however, that the CCR demonstrates awareness and sensitivity to the need for opportunities for substantive participation. In this regard the CCR therefore meets the expectations of substantive participation as an aspect of the material feature of rules of procedure as a safeguard of sovereignty.

3.1.3 Enabling participation through support

The CCR's commitment to participation also shines through in its many provisions regarding assistance and support. The UNFCCC, having fewer substantive obligations for states parties than the Kyoto Protocol and the Paris Agreement, only has one such provision. Article 8(2)(c) assigns the Secretariat the task

“to facilitate assistance to the Parties, particularly developing country Parties, on the compilation and communication of information required in accordance with the provisions of the Convention.”

This is relevant to participation as an aspect of the rules of procedure that safeguard sovereignty because it acknowledges that, de facto, not all states parties may have the same

opportunities for participation, be it formal or substantive. Article 8(2)(c) UNFCCC demonstrates the willingness of the institutional arrangement to not just acknowledge such de facto inequalities but also act to counter them where necessary. This demonstrates a real commitment on behalf of the institutional arrangement to ensure that states parties have real opportunities for participation. This in turn contributes to the safeguarding of sovereignty because it ensures that certain states parties with less capacity to participate are not automatically disadvantaged.⁵⁷ This demonstrates how the feature of rules of procedure, in particular the aspect of support for participation, contributes to the legitimacy of the CCR. By ensuring that all states parties have real opportunities for participation, the CCR demonstrates a respect for states parties' sovereignty, which would lead to a positive legitimacy perception.

The Kyoto Protocol provides three additional examples of provisions that provide support to states parties who may otherwise not be able to fully take advantage of opportunities for participation in the CCR. These can be found in articles 3(6) and 12(2) Kyoto Protocol. Article 3(6) articulates support by stating that "a certain degree of flexibility shall be allowed" in the implementation of commitments by states parties included in Annex I to the Kyoto Protocol which are undergoing the process of transition to a market economy. Whilst not explicitly providing support in an active way, this provision nonetheless supports certain states parties by granting them flexibility in the implementation of their commitments due to their circumstances in the transition to a market economy. Were such flexibility not granted, then these states may not have had an opportunity to accept the substantive commitments imposed by the Kyoto Protocol. As a result, they may not have ratified the Protocol and have been excluded from substantive participation in it. This type of phrasing can also be found in article 13(2) Paris Agreement, which establishes that"

"The transparency framework shall provide flexibility in the implementation of the provisions of this Article of those developing country Parties that need it in the light of their capacities. The modalities, procedures and guidelines referred to in paragraph 13 of this Article shall reflect such flexibility."

The support provided by article 12(2) is phrased in terms of assistance. It establishes that the purpose of the CDM is to

"assist Parties not included in Annex I in achieving sustainable development and in contributing to the ultimate objective of the Convention, and to assist Parties included in Annex I in achieving compliance with the certified emission limitation and reduction commitments under Article 3."

The content of article 12(2) Kyoto Protocol speaks clearly as to its intentions to provide support for identifiable groups of states parties to substantively participate in the global effort to achieve the CCR's ultimate objective.

⁵⁷ See also article Article 14(2) Kyoto Protocol and article 17(2) Paris Agreement, which, to paraphrase, states that article 8(2) UNFCCC on the functions of the secretariat shall apply *mutatis mutandis* to the functioning of the secretariat in relation to the Kyoto Protocol and the Paris Agreement.

On the topic of provisions that support states parties' in engaging in opportunities to participate, substantively or formally, in the CCR the Paris Agreement is the most articulate. It provides for such support in as many as 7 of its articles.⁵⁸ Some of these, such as article 3 Paris Agreement, merely acknowledge the need for support.⁵⁹ Others, such as articles 4(5),⁶⁰ 7(13),⁶¹ 9(9),⁶² 10(6),⁶³ 13(14)⁶⁴, and 13(15)⁶⁵ use phrasing, with slight varieties, that support shall be provided to "developing country Parties." Article 7(7)(d) Paris Agreement speaks of assistance to states parties that can be identified as "developing country Parties" to the Paris Agreement. Article 9 Paris Agreement discusses the provision of financial resources to assist states parties identified as developing country parties.⁶⁶ Article 13(2) establishes that the enhanced framework for transparency "shall provide flexibility". That this provides for a form of support for participation has already been discussed above.

The above provisions of the Paris Agreement all provided support in relation to states parties that can be identified as developing country parties. In addition, the Paris Agreement includes two provisions which provide support without specifying that it exists in relation to developing country parties only. Firstly, article 10(4) establishes that the technology framework it establishes is intended to, amongst other things, "support the implementation of this Agreement." The support provided by the technology framework of the Paris Agreement is therefore designed to enable all states parties to better be able to achieve implementation. Secondly, article 15(2) Paris Agreement provides support in that it specifies that the committee responsible for operating the mechanism to facilitate implementation and promote compliance⁶⁷ "shall pay particular attention to the respective national capabilities and circumstances of Parties."

⁵⁸ These include articles 3, 4, 7, 9, 10, 13 and 15 of the Paris Agreement.

⁵⁹ Article 3 Paris Agreement states: "As nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of this Agreement as set out in Article 2. The efforts of all Parties will represent a progression over time, while *recognizing the need to support developing country Parties for the effective implementation of this Agreement.*" Emphasis added.

⁶⁰ Article 4(5) Paris Agreement "*Support shall be provided to developing country Parties for the implementation of this Article, in accordance with Articles 9, 10 and 11, recognizing that enhanced support for developing country Parties will allow for higher ambition in their actions.*" Emphasis added.

⁶¹ Article 7(13) Paris Agreement *Continuous and enhanced international support shall be provided to developing country Parties for the implementation of paragraphs 7, 9, 10 and 11 of this Article, in accordance with the provisions of Articles 9, 10 and 11.*" Emphasis added.

⁶² Article 9(9) Paris Agreement "The institutions serving this Agreement, including the operating entities of the Financial Mechanism of the Convention, *shall aim to ensure efficient access to financial resources through simplified approval procedures and enhanced readiness support for developing country Parties, in particular for the least developed countries and small island developing States, in the context of their national climate strategies and plans.*" Emphasis added.

⁶³ Article 10(6) Paris Agreement in the first sentence states that: "*Support, including financial support, shall be provided to developing country Parties for the implementation of this Article*". Emphasis added.

⁶⁴ Article 13(14) Paris Agreement "*Support shall be provided to developing countries for the implementation of this Article.*" Emphasis added.

⁶⁵ Article 13(15) Paris Agreement "*Support shall also be provided for the building of transparency-related capacity of developing country Parties on a continuous basis.*" Emphasis added.

⁶⁶ See in particular article 9(1-3) Paris Agreement.

⁶⁷ See article 15(1) and 15(2) Paris Agreement.

Support for participation may not at first sight be the most obvious aspect of the material feature of the constitutionalism lens relating to rules of procedure. However, especially in light of the need for global participation in the CCR as an essential aspect of climate governance, support for participation cannot be overlooked. To establish a regime in which global membership is of critical importance means that de facto participation opportunities will vary greatly amongst states parties. This would mean that states parties with lesser capacity to participate are more likely to be subjected to the influence of states parties with a higher capacity to participate. For the legitimacy of the CCR, especially in its role in safeguarding the sovereignty of all states parties, it is important that the existing power relations do not become entrenched. Instead, safeguarding the sovereignty of states parties includes providing additional safeguards to those states parties most likely to be threatened in their sovereignty not just by the institutional arrangement's operation but also through the influence of other states parties trying to assert their own interests over those of states parties with a lesser capacity to participate.

3.1.4 Assessing the extent to which the climate change regime enables participation

The provisions of the CCR demonstrate that the issue of participation by states parties is embedded into the regime's architecture. This section has broken participation down into three categories, all of which can be identified in the UNFCCC, the Kyoto Protocol, and the Paris Agreement. In particular the commitment to providing support for identifiable groups of states parties to enable participation demonstrates the CCR's commitment to participation. By providing for participation opportunities throughout, the CCR provides numerous safeguards for the sovereignty of states parties. Participation is an important aspect of safeguarding sovereignty through rules of procedure because it creates an opportunity for states parties to exercise their autonomy in the operation of the CCR. This allows states parties to actively represent and promote their interests. Furthermore, participation also creates opportunities for states parties to exercise autonomy within the boundaries of the AIA's procedures. The clear commitment to participation contributes to the legitimacy of the CCR because it provides safeguards for states parties' sovereignty. This further demonstrates the way in which the CCR is able to not just safeguard but even enhance the sovereignty of states. In the absence of the CCR each state would be at the mercy of the choices other states make which influence the concentration of greenhouse gas emissions in the atmosphere. The opportunities for participation provided by the CCR enable states parties to be active participants in the global coordination of a response to climate change.

3.2 Transparency

Transparency has a long tradition in legitimising the exercise of authority.⁶⁸ Peters demonstrates this when she cites a range of examples from Bentham, to Kant, to Mill, who highlight the legitimating impact of transparency.⁶⁹ In the context of the CCR, transparency

⁶⁸ Anne Peters, 'Towards Transparency in International Law' in Andrea Bianchi and Anne Peters (eds) *Transparency in International Law* (CUP 2013) 534, 556-557.

⁶⁹ Anne Peters 2013 (n 66) 557. In relation to the potentially legitimating impact of transparency in the CCR specifically see David Cipler and Robert Timmons, 'Climate change and the transition to neoliberal environmental governance' (2017) 46 *Global Environmental Change* 148, 154.

contributes to the safeguarding of sovereignty of states parties by enabling and enhancing the possibility to hold the AIA accountable and to meaningfully participate in the framework of the CCR. The inclusion of transparency requirements in the CCR is therefore another example of the way in which rules of procedure maintain a space within which states parties are able to exercise their autonomy.⁷⁰ The use of rules of procedure as a feature of the CCL therefore demonstrates that it supports the normative viewpoint that states parties ought to maintain as much as possible opportunities to exercise their autonomy within the context of the CCR. Procedural safeguards relating to transparency contribute to constitutionalism's key function of balancing the relationship between the object and the subjects of the constitution by ironing out power imbalances that arise from uneven distribution of or access to information.⁷¹ Where one party holds more information than another, the power balance shifts in favour of the knowledgeable party.⁷² Transparency eases this inequality by making information accessible to all actors.

Broadly speaking there are two categories of transparency in the context of governance. These are transparency for governance and transparency of governance.⁷³ If states parties are not transparent about the actions they are taking to implement their obligations arising from the climate change regime, then the AIA becomes unable to carry out its mandate of promoting and reviewing implementation. Without access to relevant information from states parties the AIA would not be able to know what actions remain to be taken to achieve the objective of article 2 UNFCCC. This demonstrates the necessity of transparency for governance. However, the discussion of transparency as an aspect of the material feature of constitutionalism serves the specific purpose of identifying safeguards for the maintenance of sovereignty of states parties. Therefore, the topic of transparency for governance is not further considered in this chapter. Instead, the focus is solely on transparency of governance, which refers to the responsibility of the AIA to ensure it is sufficiently transparent in its undertakings so that states parties are able to monitor its activities.⁷⁴

Transparency of governance can be broken down further into documentary transparency, decision-making transparency and operational transparency.⁷⁵ Documentary transparency relates to the availability of documents that are made available. Decision-making transparency relates to information regarding who can make what decisions on what basis. Operational transparency refers to the availability of information regarding the implementation of decisions in practice. Each of the subcategories of transparency further require that information is accessible, intelligible, and accurate.⁷⁶ Ebbeson comments on the importance of all four types of transparency (without naming them as such) in stating that in the context of international environmental governance he understands "transparency as

⁷⁰ Jonathan Klaaren, 'The Human Right to Information and Transparency', in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (CUP 2013) 223, 228.

⁷¹ Anne Peters 2013 (n 66) 554.

⁷² *Idem*.

⁷³ Ronald Mitchell, 'Transparency for governance: the mechanisms and effectiveness of disclosure-based and education-based transparency policies' (2011) 70 *Ecological Economics* 1882.

⁷⁴ See Mitchell 2011 (n 71). See also Peters 2013 (n 66) 552.

⁷⁵ Luis Martínez, 'Transparency in International Financial Institutions' in Andrea Bianchi and Anne Peters (eds) *Transparency in International Law* (CUP 2013) 77, 80.

⁷⁶ Peters 2013 (n 66) 548. See also Mark Bovens, 'Information Rights: Citizenship in the Information Society' (2002) 10 *Journal of Political Philosophy* 317, 330.

referring both to public access to information and data as such, and to public access to decision-makers, decision-making procedures and institutions.”⁷⁷

The need for transparency of governance is of particular importance in the context of climate change.⁷⁸ Because climate change is a global issue, it is necessary to develop policies on the basis of information collected globally. It is unlikely that individual states parties would, in the absence of an overarching body, have access to all the information necessary in order to achieve the level of understanding of climate change necessary to be able to develop adequate climate change policies.⁷⁹ The AIA on the other hand is able to act as a central collection point of information. This information is then used by the AIA to further develop the content of the CCR and supervise the conduct of states parties.⁸⁰ In light of the powers of the AIA it is important that states parties have access to the information which the AIA collects in order to guide its actions. Only if states parties have access to the information on the basis of which the AIA makes decisions are they able to meaningfully participate in the operation of the AIA and hold the bodies of the AIA accountable where necessary.⁸¹

Much of the literature on transparency in the CCR focusses on the obligations of states parties to provide transparency regarding their implementation of obligations under the CCR. The focus in this chapter on transparency of governance, however, means that the following subsection look specifically at the requirements set out in the constitutional provisions for transparency by the AIA. For this reason, the following subsections cite heavily from the text of the three treaties of the CCR specifically.

3.2.1 Transparency in the operation of the COP⁸²

Article 7 UNFCCC provides an appropriate starting point for the consideration of transparency in the operation of the AIA, because it establishes the supreme body of the institutional arrangement. Article 7 UNFCCC does not explicitly refer to transparency. However, it requires transparency from the COP nonetheless. For example, the mandate of the COP as set out in article 7(2) UNFCCC states that:

⁷⁷ Jonas Ebbeson, ‘Global or European Only? International Law on Transparency in Environmental Matters for Members of the Public’ in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (CUP 2013) 52.

⁷⁸ See, for example, William Hare and others, ‘The architecture of the global climate regime: a top-down perspective’ (2010) 10(6) *Climate Policy* 600.

⁷⁹ On the role of transparency in multilateral rule-making in the context of international environmental law as a means of enhancing sovereign *equality* see Michael Mason and Aarti Gupta, ‘Transparency Revisited’ in Michael Mason and Aarti Gupta (eds), *Transparency in global environmental governance: critical perspectives* (MIT Press 2014) 334.

⁸⁰ See for example article 7 UNFCCC.

⁸¹ Dean and Hammam state in this context that “Because the climate change challenge requires both technological and policy innovations, the MRV requirements theoretically benefit nation states by enhancing the clarity of shared information”. See F Deane and E Hamman, ‘Transparency in Climate Finance After Paris: Towards a More Effective Climate Governance Framework’ in: M Rimmer (ed), *Intellectual Property and Clean Energy* (Springer 2018). See also Ebbeson 2013 (n 71) 52-53.

⁸² Including in its function as meeting of the Parties to the Kyoto Protocol (article 13(1)) and meeting of the Parties to the Paris Agreement (article 16(1)).

“The Conference of the Parties [...] shall:

(b) promote and facilitate the exchange of information on measures adopted by the Parties to address climate change and its effects [...]”⁸³

(d) promote and guide [...] the development and periodic refinement of comparable methodologies [...] for preparing inventories of greenhouse gas emissions by sources and removals by sinks, and for evaluating the effectiveness of measures to limit the emissions and enhance the removals of these gases.⁸⁴

(f) consider and adopt regular reports on the implementation of the Convention and ensure their publication.”⁸⁵

Article 7(2)(b) UNFCCC is an example of documentary transparency of governance because it obligates the COP to make information available to states parties.⁸⁶ Article 7(2)(d) UNFCCC contributes to transparency of governance because providing comparable methodologies it makes the information that it collects more intelligible, improving its accessibility. Article 7(2)(f) UNFCCC is further a classic example of transparency because it obliges the COP to make its reports public and therefore accessible to all states parties. In addition, article 7(3) UNFCCC obliges the COP to adopt rules of procedure. Whilst these rules of procedure are not part of the constitutional provisions of the CCR, they do provide additional insight into the transparency requirements for governance through the institutional arrangement. For example, rule 30(1) of the rules of procedure states that:

“Meetings of the Conference of the Parties shall be held in public, unless the Conference of the Parties decides otherwise.” The public nature of sessions of the COP also contributes to transparency of governance by the institutional arrangement of the CCR. Regarding the activities of the COP as meeting of the Parties to the Kyoto Protocol and the Paris Agreement, article 13(5) Kyoto Protocol and article 16(5) Paris Agreement state that “the rules of procedure of the Conference of the Parties and financial procedures applied under the Convention shall be applied *mutatis mutandis*” under this Protocol or Agreement, “unless otherwise decided by consensus by the Conference of the Parties serving as the meeting of the Parties to this” Protocol or Agreement.

⁸³ See also article 13(4)(c) Kyoto Protocol. While this is not repeated literally in the Paris Agreement, article 16(4)(b) does state that the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement shall “exercise such other functions as may be required for the implementation of this Agreement.” This is phrased broadly and could therefore easily be interpreted to include the same responsibility towards transparency as contained in article 7(2)(b) UNFCCC and article 13(4)(c) Kyoto Protocol.

⁸⁴ See also article 13(4)(e) Kyoto Protocol. While this is not repeated literally in the Paris Agreement, article 16(4)(b) does state that the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement shall “exercise such other functions as may be required for the implementation of this Agreement.” This is phrased broadly and could therefore easily be interpreted to include the same responsibility towards transparency as contained in article 7(2)(d) UNFCCC and article 13(4)(e) Kyoto Protocol.

⁸⁵ Whilst article 7(2)(f) arguably contains the most explicit transparency commitment for the UNFCCC, this exact wording does not reappear in article 13 Kyoto Protocol or article 16 Paris Agreement, which establish the responsibilities of the COP serving as the meeting of the Parties to the Kyoto Protocol and the Paris Agreement.

⁸⁶ This falls within the description of transparency as provided by Ebbeson cited above. Ebbeson 2013 (n 75).

It was briefly stated in section 5.1.1 above that, while the draft rules of procedure of the COP are not a part of the constitutional provisions of the COP, article 7(3) UNFCCC nonetheless guarantees that such rules of procedure shall be adopted by the COP. Similarly, article 18 Kyoto Protocol defers the adoption of “appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol” to a later decision to be adopted by the COP acting as the meeting of the Parties to the Kyoto Protocol. This means that, whilst the protection of transparency in the operation of procedures and mechanisms to determine and address non-compliance are not included in the constitutional provisions of the CCR, article 18 Kyoto Protocol nonetheless guarantees that such rules are incorporated in the operation of the CCR.⁸⁷ The COP serving as meeting of the Parties to the Kyoto Protocol fulfilled this responsibility through adoption of the Marrakesh Accords. Since these are not part of the constitutional provisions of the CCR, however, they are not discussed in further detail here.

The Kyoto Protocol further contains provisions that establish transparency responsibilities for the COP in articles 3(4), 12(7), and 17. Article 3(4) establishes that:

“[...] The Conference of the Parties serving as the meeting of the Parties to this Protocol shall [...] decide upon modalities, rules and guidelines as to how, and which, additional human-induced activities related to changes in greenhouse gas emissions by sources and removals by sinks in the agricultural soils and the land-use change and forestry categories shall be added to, or subtracted from, the assigned amounts for Parties included in Annex I, taking into account uncertainties, transparency in reporting, verifiability, the methodological work of the IPCC, the advice provided by the SBSTA in accordance with Article 5 and the decisions of the Conference of the Parties serving as the meeting of the Parties to this Protocol. [...]”

The reference to the provision of modalities, rules and guidelines in article 3(4) essentially creates a responsibility for the COP which contributes to the transparency of the CCR. By providing further information about rules, modalities and guidelines the COP serving as the meeting of the Parties to the Kyoto Protocol provides additional clarity for states parties regarding their assigned amounts of greenhouse gas emissions. This helps states parties to better understand the actions required of them in order to achieve the long-term objective of article 2 UNFCCC. A similar responsibility for enhancing the regime’s transparency through the establishment of principles, modalities, rules, guidelines, and procedures arises in article 12(7) Kyoto Protocol⁸⁸ and article 17 Kyoto Protocol. These responsibilities for the COP serving as the meeting of the Parties to the Kyoto Protocol have the same positive impact on transparency as article 3(4) discussed above. In the Paris Agreement similar provisions exist. See for example articles 6(7), 7(3), 9(7), 13(13), and 15(3) Paris Agreement.

⁸⁷ One should be able to assume that the reference in article 18 Kyoto Protocol to “appropriate” procedures would include rules of procedure related to transparency.

⁸⁸ Article 12 Kyoto Protocol establishes a clean development mechanism. Article 12(7) Kyoto Protocol establishes an obligation to rules and procedures that enhance the transparency, efficiency and accountability through independent auditing and verification of project activities. Such rules and procedures can be found in the Marrakesh Accords. Since the Marrakesh Accords are not part of the ‘constitutional’ provisions of the climate change regime they are not discussed in further detail here. Chapter 3 explains why only the provisions of the UNFCCC; the Kyoto Protocol and the Paris Agreement are considered to be constitutional.

In the case of the Paris Agreement, these modalities, guidelines, and procedures can be found in the Katowice Package.⁸⁹

3.2.2 The Secretariat's contribution to transparency

The Secretariat contributes to transparency of governance in a number of ways. For example, article 8(2) UNFCCC⁹⁰ on the functions of the Secretariat includes the responsibility to: “compile and transmit reports submitted to it”⁹¹ as well as to prepare reports on its activities and present them to the COP.⁹² Rule 29 of the draft rules of procedure further state that the Secretariat shall, amongst other things, distribute documents of the session of the COP, publish and distribute the official documents of the session of the COP and make and arrange for keeping of sound recordings of the session of the COP.⁹³ The Secretariat further plays an important role in the transparency of the CCR because of additional tasks relating to transparency it is given throughout the regime. For example, the last sentence of article 15(2) on the topic of amendments to the UNFCCC states that:

“The secretariat shall also communicate proposed amendments to the signatories to the Convention and for information to the Depository.”

By ensuring that all signatories are up to date about any proposed amendments to the UNFCCC, the Secretariat contributes to the decision-making and operational transparency of the regime because it provides states parties with information which they require in order to make an informed choice on how to act. In this case for example, states parties can make the necessary preparations to respond to the proposed amendment. To this end, article 20 Kyoto Protocol⁹⁴ and article 22 Paris Agreement⁹⁵ establish the same responsibility for the Secretariat, albeit in relation to amendments to the Kyoto Protocol or the Paris Agreement. Article 15(3) UNFCCC creates a similar transparency obligation by tasking the Secretariat with the responsibility of communicating adopted amendments to the Depository. The

⁸⁹ Since the Katowice Package is adopted by an ordinary decision of the COP, it is not part of the ‘constitutional’ provisions of the climate change regime. Therefore, the content of the Katowice Package is not discussed in further detail here. Chapter 3 explains why only the provisions of the UNFCCC; the Kyoto Protocol and the Paris Agreement are considered to be constitutional.

⁹⁰ See also article Article 14(2) Kyoto Protocol and article 17(2) Paris Agreement, which, to paraphrase, state that article 8(2) UNFCCC on the functions of the secretariat shall apply *mutatis mutandis* to the functioning of the secretariat in relation to the Kyoto Protocol and the Paris Agreement.

⁹¹ Article 8(2)(b) UNFCCC.

⁹² Article 8(2)(d) UNFCCC.

⁹³ See Conference of the Parties, ‘Organizational Matters Adoption of the Rules of Procedure Note by the Secretariat FCCCP/CP/1996/2, UN Doc FCCC/CP/1996/2 (1996) available at <https://unfccc.int/sites/default/files/resource/02_0.pdf> accessed 14 July 2020. These draft rules of procedure are not part of the constitutional provisions which are assessed through the constitutionalism lens. They are mentioned here as it significantly contributes to understanding the role of the secretariat in relation to transparency of governance.

⁹⁴ The last sentence of article 20(2) Kyoto Protocol states that: “the secretariat shall also communicate the text of any proposed amendments to the Parties and signatories of the Convention and, for information, to the Depository.” The last sentence of article 20(3) Kyoto Protocol further states: “The adopted amendment shall be communicated by the secretariat to the Depository, who shall circulate it to all Parties for their acceptance.”

⁹⁵ Article 22 Paris Agreement states: “The provisions of Article 15 of the Convention on the adoption of amendments to the Convention shall apply *mutatis mutandis* to this Agreement.”

Depositary in turns is tasked with the circulation of this information to all Parties.⁹⁶ As was the case with article 15(2) UNFCCC, article 15(3) UNFCCC is replicated for the Kyoto Protocol and the Paris Agreement in article 20 Kyoto Protocol and article 23 Paris Agreement.

Similar transparency responsibilities to those described above, arise for the Secretariat from articles 21(3) and 21(4) Kyoto Protocol. The last sentence of article 21(3) Kyoto Protocol states that “the secretariat shall also communicate the text of any proposed annex or amendment to an annex to the parties and signatories to the Convention and, for information, to the depositary.” The last sentence of article 21(4) Kyoto Protocol similarly states that: “the adopted annex or amendment to an annex shall be communicated by the secretariat to the Depositary, who shall circulate it to all Parties for their acceptance.” The amendment of annexes under the Paris Agreement follows the same procedure as the amendment of annexes under the UNFCCC.⁹⁷ The procedure for the amendment of annexes under the UNFCCC refers back to article 15(2) and 15(3) UNFCCC. Therefore, the Secretariat has the same transparency responsibilities regarding the adoption of amendments to annexes under the Paris Agreement and the UNFCCC as it does in relation to amendments to the UNFCCC arising from article 15(2) and 15(3) UNFCCC discussed above. In this context it is further relevant to note that article 17 of the UNFCCC tasks the Secretariat to communicate to states parties the text of any proposed protocol to the UNFCCC. This contributes to the transparency of governance in the same way as article 15(2) UNFCCC and 15(3) UNFCCC discussed above.

The Secretariat’s responsibility to enhance transparency also shows in article 12 UNFCCC. Article 12 UNFCCC establishes an obligation for states parties to communicate information to the COP on a number of topics. In this regard, article 12(10) UNFCCC states:

“Subject to paragraph 9 above⁹⁸, and without prejudice to the ability of any Party to make public its communication at any time, the secretariat shall make communications by Parties under this Article publicly available at the time they are submitted to the Conference of the Parties.

The publication of these communications by the Secretariat contributes to the documentary transparency of the CCR because it makes the information in question accessible.⁹⁹ It also contributes to the operational transparency of the CCR by making information accessible regarding implementation.

Moving on from the provisions of the UNFCCC, the Kyoto Protocol also contains several provisions which allocate certain transparency responsibilities to the Secretariat. Above, those provisions which mirror provisions in the UNFCCC have already been noted. In addition, the Kyoto Protocol also establishes new transparency responsibilities. For

⁹⁶ Article 15(3) UNFCCC last sentence states: “The adopted amendment shall be communicated by the secretariat to the Depositary, who shall circulate it to all Parties for their acceptance.”

⁹⁷ Article 23(1) Paris Agreement.

⁹⁸ Article 12(9) UNFCCC tasks the secretariat with maintaining the confidentiality of certain information submitted by states parties.

⁹⁹ A similar provision exists in article 7(12) Paris Agreement, which establishes that adaptation reports shall be held in a public registry maintained by the Secretariat.

example, the last sentence of article 4(2) Kyoto Protocol establishes that the Secretariat shall inform states parties and signatories to the UNFCCC of the terms of an agreement to fulfil commitments under article 3 Kyoto Protocol jointly, where such an agreement has been reached by states parties. This contributes to the transparency of governance because it establishes the responsibility for the Secretariat to ensure that states parties have access to information that is relevant to the operational transparency of the CCR. This is because it makes information available that is relevant to implementation.

An additional transparency responsibility for the Secretariat arises from article 8 Kyoto Protocol. This article provides for the review by expert review teams of information submitted by each party included in Annex I to the Protocol under article 7 Kyoto Protocol.¹⁰⁰ The transparency commitment for the Secretariat arises from article 8(3) Kyoto Protocol which states that the reports of the expert review teams in relation to the implementation of the commitments of the Parties shall be “circulated by the secretariat to all Parties to the Convention.” This contributes to transparency because it ensures that all states parties have access to information regarding the implementation by other states parties of their commitments.

The Paris Agreement also provides further transparency responsibilities for the Secretariat. For example, article 4(12) Paris Agreement states that the nationally determined contributions communicated by states parties shall be recorded in a public registry maintained by the Secretariat. The public availability of this information contributes to transparency of governance because it ensures that all states parties have access to this information which has been collected by the institutional arrangement of the CCR. The information that the institutional arrangement therefore uses for its assessment of the implementation of the CCR is therefore also freely available and accessible to states parties.

Furthermore, article 4(16) Paris Agreement establishes that Parties, including regional economic integration organisations, that have reached an agreement to act jointly under article 4(2) Paris Agreement, have the obligation of informing the Secretariat of the terms of their agreement. The Secretariat in turn has the responsibility to inform the parties and signatories to the Convention of the terms of such an agreement.¹⁰¹ As was the case with article 4(12) Paris Agreement, the Secretariat’s responsibility to inform all states parties of the terms of an agreement reached under article 4(2) Paris Agreement enhances transparency of governance by making information held by the AIA available to all states parties.

The Paris Agreement also contributes to the transparency of governance through the global stocktake set out in article 14. According to article 14(1) Paris Agreement the COP serving as the meeting of the Parties to the Paris Agreement

“shall periodically take stock of the implementation of the Paris Agreement Article 14(1) the COP shall periodically take stock of the implementation of this Agreement

¹⁰⁰ Paraphrased from article 8(1) Kyoto Protocol.

¹⁰¹ Paraphrased from article 4(16) Paris Agreement.

to assess the collective progress towards achieving the purpose of this Agreement (global stock take).”

That the results of the global stock take are shared with states parties follows from article 14(3) which states that

“The outcome of the global stock take shall inform Parties in updating and enhancing, in a nationally determined manner, their actions and support in accordance with the relevant provisions of this Agreement, as well as in enhancing international cooperation for climate action.”

Article 14 therefore demonstrates that the institutional arrangement, by carrying out a global stock take of progress made towards implementation of the Paris Agreement enhances the transparency of the operation of the CCR for states parties. As previously discussed, the information states parties require in order to develop adequate nationally determined contributions is dependent on the type of information the global stocktake of article 14 Paris Agreement provides. In the absence of transparency of this information, it would be easy for the institutional arrangement to impose obligations onto states parties without them being able to verify the adequacy thereof. This demonstrates that transparency of governance provides a safeguard for the sovereignty of states parties.

3.2.3 Transparency responsibilities of the SBSTA and the SBI

Article 9 and 10 UNFCCC do not create any explicit responsibilities for the SBSTA and the SBI to act in a transparent manner. In relation to the SBSTA and the SBI, article 15(1) Kyoto Protocol states that

“The provisions relating to the functioning of these two bodies under the Convention shall apply *mutatis mutandis* to this Protocol.”

This means that the Kyoto Protocol does not add any transparency responsibilities for the SBSTA and the SBI. Article 18(1) Paris Agreement contains phrasing identical to that cited above and therefore does not provide any additional transparency responsibilities for the SBSTA or the SBI either.

3.2.4 The enhanced transparency framework of article 13 Paris Agreement

Throughout the CCR’s constitutional provisions, it is possible to identify a variety of commitments to transparency of governance and transparency for governance. These are discussed in the two subsections below. Of particular note, however, is that article 13 Paris Agreement establishes an enhanced transparency framework for action and support (ETF). Whilst it may appear at first that the ETF represents the focal point of transparency in the CCR, this is not the case. Rather, the need for the ETF arose from the bottom-up approach taken in the Paris Agreement to the establishment of commitments for states parties through nationally determined contributions. Compared to the Kyoto Protocol, where adaptation and mitigation commitments were imposed on states parties from above, meaning they were determined by the institutional arrangement of the CCR, the Paris

Agreement puts states parties in charge of determining the scope of their own adaptation and mitigation commitments.¹⁰² This act of de-centralisation in essence necessitated the establishment of the ETF in the Paris Agreement. Therefore, while the ETF builds on collective experience as well as on transparency arrangements under the UNFCCC,¹⁰³ it does not replace or integrate transparency arrangements which the UNFCCC and Kyoto Protocol have already put in place. This means the ETF is not the focal point of all transparency related issues in the CCR. Because of this it remains important to discuss the provisions relating to transparency that can be found throughout the CCR individually. This is further illustrated by the fact that article 13(1) describes the ETF as existing for action and support. The focus on action and support highlights the role of the ETF in regard to transparency for governance. This is further highlighted in article 13(5) Paris Agreement and article 13(6) Paris Agreement. These state that:

Article 13(5) Paris Agreement:

“The purpose of the framework for transparency of action is to provide a clear understanding of climate change action in the light of the objective of the Convention as set out in its Article 2, including clarity and tracking of progress towards achieving Parties’ individual national determined contributions under Article 4, and Parties’ adaptation actions under article 7, including good practices, priorities, needs and gaps, to inform the global stocktake under Article 14.”

Article 13(6) Paris Agreement:

“The purpose of the framework for transparency of support is to provide clarity on support provided and received by relevant individual Parties in the context of climate change actions under Articles 4, 7, 9, 10 and 11, and, to the extent possible, to provide a full overview of aggregate financial support provided, to inform the global stocktake under Article 14.”

These two paragraphs of article 13 illustrate clearly that the purpose of the ETF is focussed on states parties conduct. Whilst the ETF also includes instructions for the institutional arrangement of the CCR regarding the topic of transparency, the two paragraphs of article 13 cited above bring home that the purpose of the ETF is mostly focussed on creating transparency in relation to climate change action taken by states parties. This places it firmly in the category of transparency for governance. Therefore, it shall only be discussed to a limited extent in this chapter.

3.2.5 Assessing transparency of governance in the climate change regime

Overall the CCR demonstrates a high level of commitment to transparency of governance in terms of documentary transparency and operational transparency. The main weakness is that a number of the key transparency responsibilities are written in the draft rules of

¹⁰² Nicholas Chan, ‘Contributions and the Paris agreement: Fairness and equity in a bottom-up architecture’ (2016) 30(3) *Ethics & International Affairs* 291.

¹⁰³ See paragraphs 1 and 3 of article 13 Paris Agreement.

procedure instead of in the constitutional provisions of the CCR. As these draft rules of procedure are not entrenched to the same extent as the constitutional provisions of the CCR are, they are vulnerable to change. Therefore, the levels of transparency expected from the AIA could be lowered, by the AIA, relatively easily. However, even ordinary decisions of the COP, such as would be required to change the content of the draft rules of procedure, would require consensus of all states parties. Since transparency of governance contributes to the safeguarding of the sovereignty of states parties it would be unlikely that states parties would reach consensus on lowering the standards of transparency for the conduct of the AIA. Therefore, it seems the threat of these standards being lowered is not significant.

An additional observation is that when it comes to transparency of governance it would be possible to further enhance the transparency of the SBSTA and the SBI. These currently do not have any transparency responsibilities. Transparency regarding their findings may contribute to the documentary transparency of the CCR. This could further enhance the legitimacy of the CCR because the availability of information enables states parties to make informed decisions regarding their conduct within the framework of the CCR.

3.3 Accountability of the autonomous institutional arrangement

There are two reasons why the discussion of accountability in the CCR is limited to accountability of the AIA. Firstly, the use of rules of procedure as a material feature of constitutionalism in this thesis serves the purpose of providing a safeguard of the sovereignty of states parties. The need to safeguard states parties' sovereignty arises from the enablement of the AIA to exert influence over states parties. In order to prevent the AIA's powers from amounting to a threat to states parties' sovereignty or being enacted arbitrarily rules of procedure, including accountability, are necessary. The operation of the AIA, on the other hand, experiences no similar threat from the sovereignty of states parties. Furthermore, the assessment of the standard of legitimacy of the CCR is carried out from the perspective of states parties. Therefore the focus of this section lies on accountability of the AIA rather than of states parties.

Accountability can be defined in different ways. Considering accountability as it is used in this chapter is couched in the context of material features of constitutionalism, the most appropriate definition for the purpose of the CCL arises from Rached's observations regarding the interrelationship between legitimacy, accountability, and constitutionalism.¹⁰⁴ She writes that one way of describing the normative aspect of accountability is through its constitutional ambitions. This links accountability to constitutionalism. It also links accountability to legitimacy. This is because it describes the normative aspect of accountability, which links it to one of the many social norms reflected in the framework of social norms which legitimacy expectations reflect. Therefore, assessing the accountability of the AIA on the basis of Rached's definition highlights how this aspect of the feature of rules of procedure can contribute to a better understanding of the standard of legitimacy in the CCR. This is because her definition provides an insight into both the constitutional aspect of accountability as well its connection to legitimacy expectations.

¹⁰⁴ Danielle Rached, 'The Concept(s) of Accountability: Form in Search of Substance' (2016) 29 *Leiden Journal of International Law* 317, 335.

It is exactly this type of connection which this thesis brings to the foreground. By identifying objective standards of measurement, such as accountability as a rule of procedure, or any of the other features of the CCL, it becomes possible to identify shared values amongst states parties to the CCR. These shared values form the basis of states parties' legitimacy expectations regarding the operation of the CCR. The use of the constitutionalism lens to draw out legitimacy expectations by linking them to features of constitutionalism means that this thesis makes it possible to constructively identify constructively whether the regime is performing well or falling short in the eyes of its states parties. This creates an opportunity to evaluate ways in which the regime needs to evolve in order to continue to support states parties to adequately address climate change.

On the constitutional aspect of accountability, Rached writes that its purpose is to keep power in check. It does this by moderating and counterbalancing the weight of power:

“through a set of procedural techniques and substantive standards. Under such perspective, legitimate power cannot be raw and naked power. It should be restricted, so that the arguably constant danger of abuse [...] gets domesticated. The political maxim is meant to serve a clear-cut goal: the protection of individual autonomy. [...] The point of constraining authority, thus, is to block arbitrariness, to retain power under check.”¹⁰⁵

This highlights accountability's instrumental role in protecting the sphere of autonomy from undue interference. The reference to procedural techniques in the citation above is not further elaborated by Rached in this particular context. However, leading up to the description cited above, she discusses the role of reason-giving as an obligation which has an accountability-promoting quality.¹⁰⁶ She describes that where the power-holder has an obligation to articulate a public justification for each decision taken, they are constrained by a duty to reason.¹⁰⁷ In addition, she describes the procedural prism of accountability, relevant in this context which discusses accountability in the CCR as an aspect of rules of procedure, as including “voting, reason-giving and other participatory tools.”¹⁰⁸ It must be noted here that Rached situates the procedural prism alongside 10 other potential prisms. The reason for focusing solely on the procedural prism of accountability in this chapter is because of the constraints of the context within which it discusses accountability in the CCR, as described above.

As the purpose of accountability as defined and delineated in this chapter is to safeguard the sovereignty of states parties in the face of the enablement of the institutional arrangement, one would expect that reason-giving by the latter would feature prominently in the constitutional provisions of the CCR. It is therefore remarkable that, while the constitutional provisions of the CCR enable the institutional arrangement to make a wide array of decisions, it does not impose anywhere reason-giving obligations on the institutional arrangement.

¹⁰⁵ Idem.

¹⁰⁶ Rached 2016 (n 102), 330.

¹⁰⁷ Idem.

¹⁰⁸ Rached 2016 (n 102), 333.

An example of this is visible in article 3(5) Kyoto Protocol, which states:

“The Parties included in Annex I undergoing the process of transition to a market economy whose base year or period was established pursuant to decision 9/CP.2 of the Conference of the Parties at its second session shall use that base year or period for the implementation of their commitments under this Article. Any other Party included in Annex I undergoing the process of transition to a market economy which has not yet submitted its first national communication under article 12 of the Convention may also notify the Conference of the Parties serving as the meeting of the Parties to this Protocol that it intends to use an historical base year or period other than 1990 for the implementation of its commitments under this Article. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall decide on the acceptance of such notification.”

As the last sentence of article 3(5) Kyoto Protocol illustrates, the decision of the COP serving as the meeting of the Parties to the Kyoto Protocol does not need to provide any reasons why it has, or has not, decided on acceptance of the notification.

Neither the UNFCCC, the Kyoto Protocol or the Paris Agreement create any obligations for the five bodies of the AIA to provide reasons that explain or justify their decisions. The draft rules of procedure for the COP and its subsidiary bodies also do not create any obligations to provide reasons. The Marrakesh Accords create an obligation to provide reasons in 11 instances.¹⁰⁹ None of these obligations, however, are imposed on the five key bodies of the AIA. The Katowice Package, which sets out the essential rules of procedure and mechanisms of the Paris Agreement, does not include any obligations for the AIA to provide reasons for their decisions either.¹¹⁰ Overall then it appears that AIA is under no obligation to provide reasons when making decisions. In the case of decisions adopted by the COP, the COP serving as the meeting of the Parties to the Kyoto Protocol or the COP serving as the meeting of the Parties to the Paris Agreement an explanation for the lack of reason-giving obligations may be that all decisions are negotiated by consensus. Since all states parties have a seat in the COP it could be that the expectation is that all states parties are aware of

¹⁰⁹ See Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, *Guidance on the implementation of Article 6 of the Kyoto protocol*, UN Doc FCCC/KP/CMP/2011/L.7 (2011) <<https://unfccc.int/sites/default/files/resource/docs/2011/cmp7/eng/l07.pdf>> accessed 14 July 2020. See paragraph 28 and 29; The Conference of the Parties, *Report of the Conference of the Parties on its seventh session, held at Marrakesh from 29 October to 10 November 2001*, UN Doc FCCC/CP/2001/13/Add.2 (2002), Decision 17/CP.7 available at <https://unfccc.int/files/meetings/workshops/other_meetings/application/pdf/17cp7.pdf> accessed 15 July May 2020, paragraph 40, 41, 65; Conference of the Parties, *Report of the Conference of the Parties to the Kyoto Protocol on its first session, held at Montreal from 28 November to 10 December 2005*, UN Doc FCCC/KP/CMP/2005/8/Add.3, Decision 27/CMP.1 available at <https://unfccc.int/files/kyoto_protocol/compliance/application/pdf/dec.27_cmp.1.pdf> accessed 1 May 2020, paragraph 1 and 7, IX Procedures for the enforcement branch paragraph 5 and 9, Part I: General Approach to Review paragraph 80.

¹¹⁰ ‘The Katowice climate package: making the Paris Agreement Work For All’ available at <<https://unfccc.int/process-and-meetings/the-paris-agreement/katowice-climate-package>> accessed 3 July 2020. An overview of the relevant decisions relating to the Katowice Package is available at <<https://unfccc.int/process-and-meetings/the-paris-agreement/paris-agreement-work-programme/katowice-climate-package>> accessed 3 July 2020.

the reasons for adopting decisions, because all states parties were potentially involved in the negotiations leading up to the adoption of the decisions.

3.4 Assessing the extent to which the climate change regime provides for rules of procedure that contribute to safeguarding the sovereignty of states parties

The material feature of rules of procedure as described in this chapter consists of three aspects. These are participation, transparency, and accountability. Each of these aspects provides a safeguard for the sovereignty of states parties in the relationship to the institutional arrangement of the CCR. Assessing the degree to which the CCR provides safeguards to states parties' sovereignty through provisions that create opportunities for participation, transparency, and accountability it becomes clear that there is a lack of accountability in the decision-making procedures of the CCR. There are not any provisions which impose obligations on the five key bodies of the institutional arrangement of the CCR to provide reasons or explanations. This lack of accountability obligations in the provisions of the CCR extends to the draft rules of procedure, which has no such obligations either. The lack of accountability obligations for the four key bodies of the CCR could potentially negatively impact the CCR's overall standard of legitimacy. In the absence of any accountability obligations there exists a threat that the enablement of the institutional arrangement of the CCR, as discussed in chapter 4, is not adequately delineated with an accompanying responsibility to provide reasons for actions taken. Without the obligation to provide reasons for actions taken, it becomes more difficult for states parties to assess whether the institutional arrangement's activities remain within their mandate, or have, in practice, overstepped its boundaries. In the absence of this safeguard the legitimacy perception held by states parties could be negatively impacted.

In contrast to accountability, the CCR does demonstrate significant commitment to transparency and to creating opportunities for participation. With regard to participation the CCR even surpasses expectations by paying attention to de facto inequalities between states parties and making efforts to remedy these by providing support to identifiable groups of states parties. By addressing de facto inequalities the CCR demonstrates commitment to participation because it highlights that it strives for global participation. This contributes to a positive legitimacy perception because it creates opportunities for states parties to exercise their sovereignty within the framework of the CCR. Through being able to make use of participation opportunities, states parties are able to exercise their autonomy and thereby promote their interests within the coordination and cooperation efforts of the CCR. This aspect of the rules of procedure really highlights the importance of the CCR's structure as enhancing the ability of states parties to achieve together that which individually they cannot.

On the subject of transparency, the CCR also does well. There are many provisions which indicate attempts at creating transparency, both for governance and of governance. The attention to transparency provides a degree of protection of the sovereignty of states parties, however, there remains room for improvement. The CCR could enhance the impact of its transparency provisions by stating more clearly what type of transparency each provision creates and in what way transparency is to be achieved. Whilst such explanations can be found in relation to transparency obligations for states parties, especially in the

Katowice Package, the role of transparency of governance in the CCR is still somewhat unclear. To maximise the impact of transparency provisions in the CCR on the legitimacy perception held by states parties it would be helpful if the content and purpose of transparency of governance were brought to the foreground in the phrasing of the constitutional provisions of the UNFCCC, the Kyoto Protocol, and the Paris Agreement.

Overall then, it can be observed that the material feature of rules of procedures in the CCR provides a degree of protection for the sovereignty of states parties. Whilst it demonstrates particular strengths in the aspect of participation, the legitimacy of the CCR could still be improved with regards to transparency and is in genuine need of improving the accountability responsibilities of the institutional arrangement.

4 The rule of law

A key function of constitutionalism is to establish a balance between the need to safeguard a space within which individual subjects of authority can exercise their autonomy and the need provide the object of the constitution with the capacity to exercise authority so as to prevent the exercise of autonomy by individual actors from jeopardising the achievement of collectively desired long-term objectives. The first part of this balance, safeguarding a space for individual autonomy, indicates that constitutionalism's allocation of authority to the object of the constitution intrinsically limits the use of that authority. The object of the constitution is only justified in exercising authority insofar as necessary for the achievement of the common objective. In all else the subjects of authority must be left to act autonomously. In addition, the exercise of authority is only justified on the basis of its ability to enable subjects of authority to achieve a specified common objective. This means that constitutionalism ties the exercise of authority to its ability to guide the conduct of the subjects of authority. This is where the connection to the rule of law becomes visible. This connection is especially strong in relation to the Raz's formal account of the rule of law.

The protection of individual liberty as well as the ability of authority to make the difference it purports to make in the conduct of its subjects, are at the core of Raz's formulation of the rule of law.¹¹¹ Raz's account of the rule of law is, of course, rooted in prior accounts.¹¹² However, the purpose of this section is not to dissect the conceptual roots of the rule of law. Instead, chapter 4 already explained that the Razian account of the rule of law is particularly suited to the context of the CCR because of its focus on organizational rather than substantive aspects of the exercise of authority. This section builds on that choice and elaborates what the Razian account entails and the extent to which the provisions of the CCR conform to it.

According to Raz the rule of law can be dissected into the following principles. Firstly, law and law-making should be prospective, clear, and open. Secondly, law should be relatively stable. Thirdly, the judiciary must be independent and accessible. In addition, courts should have review powers over the implementation of rule of law. Fourthly, discretionary powers

¹¹¹ Joseph Raz, 'The Rule of Law and its Virtue' in Joseph Raz, *The authority of law: Essays on law and morality* (OUP 2009).

¹¹² For a discussion of how to situate Raz's take on the rule of law amongst the wider rule of law literature, see Nicholas Barber, 'The Rule of Law' in Nicholas Barber, *The Principles of Constitutionalism* (OUP 2018) 85.

of enforcement cannot be allowed to undermine the purpose of the law.¹¹³ Lastly, the legal order must observe principles of natural justice.¹¹⁴ Subsection 4.1 discusses the first aspect of the rule of law in relation to the CCR. Subsection 4.2 then discusses the third and fourth aspects. The second aspect of the rule of law, stability, is not discussed here because stability is already discussed in detail in chapter 4 in the context of entrenchment as a formal feature of constitutionalism. The last aspect, that the legal order must observe principles of natural justice,¹¹⁵ is also not discussed in this chapter. This is because chapter 4 already explained why the CCL does not contain any substantive features or references to any form of universal value systems in the absence of strong evidence that such exists in the current community of states parties to the CCR.

4.1 Prospective, open, and clear rules

The first requirement of the rule of law is that laws and law-making are prospective, clear, and open. If the law is to guide people they must be able to find out what it is."¹¹⁶ All states parties to the CCR were involved in the negotiation of the texts of the UNFCCC, the Kyoto Protocol, and the Paris Agreement. Therefore, states parties will have been aware of the content of the provisions prior to ratification. In addition, each of these three treaties has specific provisions regarding their entry into force.¹¹⁷ This demonstrates that the obligations of the CCR were publicised prior to entering into force.

The last aspect of this requirement is that the provisions of the CCR must be clear. Linguistically speaking, there is no obstruction to the clarity of the meaning of the provisions of the CCR. However, beyond pure linguistic clarity, it is necessary that the provisions of the CCR are clear enough that states parties are able to adjust their conduct accordingly.¹¹⁸ In order to assess whether the CCR is clear in this aspect, it is necessary to take into consideration the framework aspect of the regime, as well as the specific characteristics of international law.

The UNFCCC especially demonstrates framework features. Whilst it is best classified as a hybrid treaty, it contains relatively few substantive obligations for states parties. Its main focus is to establish the framework for continuous global governance by states parties on the topic of climate change.¹¹⁹ To this end it establishes the institutional framework for the continued operation of the CCR. A benefit of the framework approach is that it allows for continued development of the substantive content in accordance with developments in scientific knowledge.¹²⁰ The discussion of the composition of the AIA and the mandates of its individual bodies in chapter 5 section 2.3 demonstrates that the CCR's provisions regarding its framework function meet the requirements for clarity.

¹¹³ Raz 2009 (n 109), 214-219.

¹¹⁴ Raz 2009 (n 109), 214-218.

¹¹⁵ *Idem*.

¹¹⁶ Raz 2009 (n 109), 214.

¹¹⁷ Article 23 UNFCCC, article 25 Kyoto Protocol, article 21 Paris Agreement.

¹¹⁸ Joseph Raz, 'The Politics of the Rule of Law' (1990) 3(3) *Ratio Juris* 331, 332.

¹¹⁹ 20 of the 26 articles of the UNFCCC either establish the institutional arrangement or relate to the operation of the Convention.

¹²⁰ Churchill and Ulfstein 2002 (n 30), 623.

Looking at the CCR in its entirety, it should be noted that, being treaty-based, the CCR reflects certain characteristics that are specific to international law. One of these characteristics is that the provisions of the CCR are structured around the sovereignty of states parties. This has an impact on the way in which obligations are formulated. For example, whilst the Kyoto Protocol obliges states parties not to exceed a specified amount of greenhouse gas emissions within a specified period of time, it does not instruct states parties how they are to achieve these targets.¹²¹ The intention is that by leaving the method of achieving the target open, the principle of sovereignty remains protected. States can work towards the achievement of their obligations in a way that is best suited to their domestic context. International law in this way is interfering only minimally with the internal affairs of the state. Similarly, the Paris Agreement obliges states parties to communicate nationally determined contributions (NDCs) which must be progressive, yet does not provide instructions on the goals articulated in these NDCs should be achieved.¹²² Such open phrasing in terms of targets rather than detailed instructions does not necessarily lead to the conclusion that the phrasing of the rules of the CCR lack clarity. As long as the rules are able to guide states parties' conduct, the requirement of clarity is met.

A number of other provisions within the CCR may initially raise concerns in regard to the requirement of clarity. What is expected of states parties when they are instructed to aim to hold the increase in global average temperature to "well below" two degrees Celsius and "pursue efforts" to limit the temperature increase to one and a half degrees Celsius?¹²³ At what point have states parties fulfilled this expectation? What is meant when states parties are instructed to aim to reach global peaking of greenhouse gas emissions "as soon as possible"?¹²⁴ Despite the initial questions such phrasing might raise, closer inspection of the the provisions of the CCR demonstrates that the language is carefully constructed exactly in order to provide as much clarity as possible without compromising on flexibility. For example, the phrasing of article 4(1) Paris Agreement specifically makes a point of the importance combining the need to achieve global peaking of greenhouse gas emissions with a strategy of rapid reductions following this peaking moment. Thorgerisson points out that stating this reality explicitly in the provisions of the Paris Agreement improves the clarity of states parties' broadly stated commitment to aim to strengthen the global response to the threat of climate change in article 2 Paris Agreement.¹²⁵

4.2 Judiciary and enforcement in the rule of law

The next aspect of Raz's account of the rule of law is that the judiciary must be independent and accessible. In addition, courts should have review powers over the implementation of rule of law. As was highlighted in the discussion of the separation of powers, the AIA itself does not provide a judiciary. Instead, article 14 UNFCCC states that any disputes regarding the regime's interpretation or application should be settled in first instance either through

¹²¹ See for example article 3 Kyoto Protocol.

¹²² Article 4 Paris Agreement.

¹²³ Article 2(a) Paris Agreement.

¹²⁴ Article 3 Paris Agreement.

¹²⁵ Halldór Thorgerisson, 'Objective (Article 2.1)' in: Klein and others, *The Paris Agreement on climate change analysis and commentary* (OUP 2017) 123, 127-128.

negotiation or any other peaceful means.¹²⁶ Article 14(2) UNFCCC further opens up the possibility for states parties to declare any dispute arising out of the interpretation or application of the UNFCCC to be submitted to the ICJ or to arbitration. Lastly, articles 14(5) and 14(6) UNFCCC provide an opportunity for conciliation of the dispute by a conciliation commission. Importantly, all of article 14 UNFCCC applies to disputes arising from the Kyoto Protocol and the Paris Agreement as well.¹²⁷ This indicates that the CCR provides a number of options for the intervention in disputes between states parties.

However, as highlighted above, very few states parties have made use of the option set out in article 14(2) UNFCCC to make the submission of disputes to the ICJ compulsory. Neither has the COP yet added an arbitration annex as it is tasked to do in article 14(2)(b) UNFCCC.¹²⁸ This indicates that there remains room for improvement within the provisions of the CCR to create opportunities for states parties to submit their disputes to an independent judiciary. Considering the context of the CCR, and the fact that sovereign states as a rule of thumb prefer to settle disputes through non-judiciary channels, it may not be of crucial significance that access to an independent judiciary within the constellation of the AIA is lacking. This may be especially the case considering that the CCR does supply other means of dispute settlement that states parties can access and which are generally preferred in the interaction between states.

Furthermore, in assessing whether the CCR measures up to states parties' expectations arising from the formal account of the rule of law, it should be taken into consideration that Raz emphasises that all aspects of the rule of law exist as a matter of degree and that the fulfilment of the rule of law is not a binary evaluation. The same holds true for the overall assessment of the standard of legitimacy in this thesis. Therefore, in evaluating whether the rule of law is sufficiently incorporated into the architecture of the CCR in order for states parties' legitimacy expectations to be met, it can be observed that the CCR does meet threshold requirements of the rule of law, but that there may be room for improvement in order to further strengthen the regime's standard of legitimacy.

This then leaves the final aspect of the rule of law to be discussed in this subsection, which entails that discretionary powers of enforcement cannot be allowed to undermine the purpose of the law.¹²⁹ Regarding the relatively limited scope of enforcement powers the AIA has access to and the fact that the mandate of the COP specifically allows for the exercise of these powers only insofar as necessary to promote the implementation of the CCR there exists little to no risk that the AIA would be able to use discretionary powers in a way that undermines the ultimate objective set out in article 2 UNFCCC.

4.3 Assessing the extent to which the CCR adheres to Raz's account of the rule of law

¹²⁶ Article 14(1) UNFCCC.

¹²⁷ See article 14(8) UNFCCC, article 19 Kyoto Protocol and article 24 Paris Agreement.

¹²⁸ On the potential significance of arbitration in the context of the CCR see Ristead de Paor, 'Climate Change and Arbitration: Annex Time before there won't be A Next Time' (2017) 8(1) *Journal of International Dispute Settlement* 179.

¹²⁹ Raz 2009 (n 109), 214-219.

The above illustrates a mixed account of the extent to which the CCR is able to meet the requirements of the rule of law. There is no issue with the requirements that the constitutional provisions are prospective, open, and clear. The requirements of the rule of law with regards to the judiciary present a similarly positive account. With regard to states parties access to the ICJ it is clear that this provides for access to an independent judiciary. The accessible part of the requirements for the judiciary are more difficult to assess. Whilst states parties formally have access to the ICJ the realities of international diplomacy means that states parties are generally reluctant to take disputes to the ICJ. This could be described as an obstacle to the de facto accessibility of the judiciary provisions within the CCR. It is, however, not an issue that arises intrinsically from the structure of the CCR or the phrasing of its provisions.

5 Concluding remarks

The roadmap of this thesis' argument started with the identification of the importance of achieving a high standard of legitimacy within the operation of the CCR. This is especially important in light of the global and urgent nature of CCR, and the fact that climate change requires that all states cooperate, as soon as possible, in the development of a strategy to prevent climate change from undermining the purpose of the sovereign state and materialising as an existentialist threat to human survival.¹³⁰ Global cooperation in a community of sovereign states raises questions as to who may enforce constraints or influence conduct in order to enable global cooperation in the light of the self-interested and autonomous character of these sovereign states. The first signpost in the roadmap led this thesis towards a constitutional analogy as an appropriate means of overcoming the obstacles of states' suspicion towards each other's commitment to addressing climate change, as well as suspicion towards the enablement of the institutional arrangement of the CCR as an authority to oversee their conduct in devising a coordinated, global response to climate change. Chapters 4 and 5 further gave direction to the assessment of the standard of legitimacy in the CCR by constructing and applying the formal and material features of the constitutionalism lens to the CCR. The intersection between constitutionalism and legitimacy allows the constitutionalism lens to be used as a means of articulating the legitimacy expectations states parties have in light of the CCR's ability to influence state parties' conduct. Chapter 4 mapped the formal features of the constitutionalism lens against the CCR. This chapter contributes by mapping the material features of constitutionalism against the CCR.

The results of mapping the material features of constitutionalism against the CCR demonstrated that traces of each of the three material features of constitutionalism that are included in the CCL can be identified in the CCR treaty provisions. The separation of powers reveals that the AIA does not include its own judiciary body. However, the CCR does provide states parties with the opportunity to submit their disputes to the ICJ. Whilst the AIA does include bodies that can be described in legislative and executive terms, it is notable that there exists no separation between these. Instead, the executive branch is specifically hierarchically inferior to the legislative branch.

¹³⁰ See chapter 2 section 6.1.

The material feature of rules of procedure, on the other hand, orients states parties' legitimacy perception of the CCR back onto a positive track. Whilst there is still scope for improvement, in particular with regards to accountability of the institutional arrangement, the overall impression arising from the provisions of the UNFCCC, the Kyoto Protocol, and the Paris Agreement is that safeguarding sovereignty through rules of procedure is a priority of the CCR. This contributes positively to states parties' legitimacy perception of the CCR because it highlights the commitment towards safeguarding sovereignty.

Lastly, the material feature of constitutionalism relating to the rule of law demonstrates that here too the CCR manages to meet the minimum requirements of balancing states parties' autonomy and the need for the AIA to constrain their freedom in order to enable global cooperation. This chapter demonstrated that the CCR manages to fulfil the various aspects of the rule of law, including access to independent dispute resolution and provisions which are able to provide certainty, stability, and clarity.

CHAPTER 7 CONCLUSION

1 The crossroads between legitimacy, constitutionalism, and climate change as point of departure

The complexity of climate change presents numerous challenges. One aspect of climate change governance that presents a particular challenge in the context of law is the need to manage the need for global cooperation in light of self-interested sovereign states. Leaving climate change to develop unchecked can undermine the constitutional architecture of the state. One example of this is where realities changed by the impacts of climate change would make it impossible to ensure constitutionally enshrined rights, such as a right to a healthy environment.¹ However, in order to adequately address climate change two things are necessary. These are global cooperation and the acceptance of constraints in the pursuit of short term individual objectives in order to enable achievement of the common long-term objective of addressing the issue of climate change. However, shifting decision-making capacities to the international plane in order to achieve global cooperation and the constraint of individual interests is inherently problematic for states, which are by nature autonomous, free, and equal actors.

The reality that a global approach is required in order to adequately address climate change is unavoidable. Therefore, in order to achieve global cooperation on climate change the United Nations climate change regime (CCR) was established in 1992 and later expanded by the Kyoto Protocol and the Paris Agreement. Following a pattern common in environmental treaty regimes, the CCR is a multilateral environmental agreement that is built on a framework approach. The initial framework of the UNFCCC provides the stability of the regime whereas the establishment of the autonomous institutional arrangement (AIA) ensures the flexibility of the regime in light of fast changing developments. This in itself, however, does not resolve the issue that global climate governance represents a potential threat to the sovereign autonomy of states parties, which is an essential aspect of their constitutional architecture. In order to reassure states parties that no such threat does in fact arise from the CCR it is crucial that the regime can demonstrate a high standard of legitimacy.

To this end, the thesis makes an original contribution by assessing the standard of legitimacy in the CCR through the application of a compensatory constitutionalism lens (CCL). Chapter 1 begins by explaining the intersections between legitimacy, constitutionalism, and climate change. Chapter 2 gives an account of the meaning and role of legitimacy in the context of the CCR that draws out that legitimacy is of particular relevance in the context of climate change because of its global, cumulative, and indivisible causes and consequences. Chapter 3 illustrates the connection between legitimacy and constitutionalism by identifying the latter as a framework of social norms that is shared by all states parties to the CCR. This finding is distinct from existing accounts which examine the degree or desirability of constitutionalisation of the CCR. Using constitutionalism as a means of identifying shared values among states parties instrumentalises constitutionalism

¹ For example, May and Daly comment on the fact that many constitutions provide a variation of a right to a healthy environment. James May and Erin Daly, *Global Environmental Constitutionalism* (CUP 2014).

and places the focus of the assessment on the discussion of the standard of legitimacy of the CCR, rather than constitutionalisation thereof as a goal in and of itself. It is also distinct from the notion of constitutionalism as legitimacy because it focusses specifically on the relevance of certain features of constitutionalism and their corresponding legitimacy components as relevant to the context of climate change.

Chapter 4 draws together the content of chapters 2 and 3, demonstrating how the intersection of the three themes can be exploited to construct a novel framework of analysis, the CCL. The lens consists of three formal and three material features of constitutionalism but excludes substantive features of constitutionalism. Chapter 5 and 6 subsequently apply the CCL to the treaty provisions of the CCR. This final chapter draws all the threads together and provides a conclusion on the standard of legitimacy in the CCR as viewed through the CCL. To this end section 2 of this chapter connects the findings of chapters 5 and 6 to the legitimacy components set out in chapter 2. Section 3 then answers the question of the standard of legitimacy in the CCR. This is followed by the thesis' final remarks in section 4.

2 From features of constitutionalism to legitimacy components

In order to discuss the thesis' findings regarding the standard of legitimacy in the CCR it is first necessary to explain the findings of chapters 5 and 6 in light of the definition of legitimacy set out in chapter 2. There, it was explained that this thesis follows a mixed account of legitimacy which measures the standard of legitimacy on the basis of objectively identifiable legitimacy components. Chapter 3 demonstrated that constitutionalism represents shared normative values amongst states parties and are therefore suitable as objective standards of measurement which can draw out the 'expectation' element of legitimacy in relation to non-sentient actors such as states. Chapter 4 linked the six features of constitutionalism of which the lens is constructed to specific legitimacy components and explained why the selected features of constitutionalism are relevant to the context of the CCR. Following the application of the CCL to the CCR in chapters 5 and 6 it remains necessary to link the findings back to the legitimacy components in order to conclude in section 4 on the overall standard of legitimacy in the CCR.

2.1 Input legitimacy

Input legitimacy in the context of the CCR refers to the justification of the exercise of authority on the basis of its organisational structure.² Based on this definition, it is possible to link the expectations related to input legitimacy to the constitutional features of enablement and constraint, rules of procedure (participation especially), and entrenchment.

² See chapter 1 and Fritz Scharpf, *Demokratietheorie zwischen Utopie und Anpassung* (Konstanzer Universitätsreden 1970) 25. This translates into 'Democratic Theory between Utopia and Adaptation 25.

2.1.1 Input legitimacy in relation to enablement and constraint

Input legitimacy focusses on a balance of authority between the authority claimant and the subjects of authority. In this context it should be noted that the application of the CCL reveals that the CCR has not yet found its equilibrium in balancing the relationship between the AIA and states parties. On the one hand, the AIA is constrained by the limits of its mandate and by the rules of procedure. Not only do ordinary decisions of the COP require states parties to reach consensus, for these decisions to establish new obligations for states parties they must still be ratified by them as well. On the other hand, the focus of the CCR is to provide a facilitative platform through which states parties can coordinate their policies and harmonise the variety of interests at stake. The facilitative and coordination focussed nature of the CCR indicates that consensus style decision-making that identifies strategies and common goals without creating obligations or enforcing them is appropriate. However, the role of the AIA is also to provide for an objective governance arrangement in which all states parties' interests are represented and protected. Yet the constraints on the AIA outweigh its ability to act. This is visible, for example, in the requirement of ratification for the creation of any new obligations for states parties. This suggests that the degree of constraint which the AIA faces within the CCR is insufficiently balanced out by correlating enablement.

The insistence of states parties to require consensus *and* ratification for the further development of commitments under the CCR therefore indicates that their expectations extend beyond what can be accommodated within input legitimacy. It also indicates that these expectations extend beyond what can reasonably be expected of governance institutions whose task it is to harmonise inherently diverging interests. A reverse-image imbalance is visible regarding the enablement and constraint of states parties. The lack of constraints on states parties risks inhibiting the potential for enablement through the CCR. The fact that it remains necessary for states parties to ratify any decision of the COP before it can create any obligations indicates that the only substantive constraints on states parties are those which are already written into the provisions of the UNFCCC, the Kyoto Protocol, and the Paris Agreement. Whilst this may be the traditional way of constructing obligations for states parties through treaties, the purpose of styling the CCR as a multilateral environmental agreement was to enhance the regime's ability to overcome the stasis of traditional treaties.³

For the CCR to provide the type of responsiveness and flexibility that is required to address the fast developing issue of climate change, the balance of powers between states parties and AIA needs to be reconsidered. The CCR cannot achieve the 'government' aspect of input legitimacy if states parties remain unwilling to enable the AIA to act as an objective governance arrangement that has the ability to influence their conduct. Constraining the

³ Robin Churchill and Geir Ulfstein, 'Autonomous institutional arrangements in multilateral environmental agreements: a little-noticed phenomenon in international law' (2000) 94(4) *American Journal of International Law* 623.

AIA without establishing correlating enablement means that the CCR remains limited in its ability to assist states parties in achieving the ultimate objective set out in article 2 UNFCCC.

2.1.2 Input legitimacy and rules of procedure (participation)

The application of the material features of the CCL to the CCR in chapter 5 reveals that the CCR provides states parties with a formal and substantive means of participation. Participation rights are furthermore enhanced by the provision of support for states parties who may struggle to otherwise be able to use their participation rights. Insofar as the participation aspect of input legitimacy is concerned the CCR therefore does extremely well. Considering the importance attached to sovereignty by all states parties it comes as no surprise that participation is a well-developed aspect of the CCR. However, it is important that states parties' desires to be able to give input within the CCR does not override their need for governance as a means of harmonising their varied interests and priorities.

2.1.3 Input legitimacy and entrenchment

The connection between input legitimacy and entrenchment lies in the fact that the latter contributes to the provision of a stable organisational structure. Since input legitimacy includes justification of the organisational structure of authority, the feature of entrenchment is relevant. This is because entrenchment provides for the type of stability that any organisational structure needs in order for it to achieve a certain degree of continuity.

Chapter 5 explained that entrenchment exists in two formats in the CCR. Firstly, entrenchment takes the form of making the amendment of constitutional provisions more difficult than the amendment of ordinary law within the CCR. As discussed in chapter, the provisions of the CCR are more protected from amendment than the decisions of the COP, but the difference is minimal. The second way in which entrenchment features in the CCR is through the inclusion of non-regression obligations in the Paris Agreement. Chapter 5 observed that these provide an effective means of achieving stability in the CCR. Overall then it can be concluded that the CCR provides for a very reasonable degree of entrenchment. This has a positive impact on the overall measurement of input legitimacy in the CCR.

2.2 Procedural Legitimacy

States parties' focus on sovereignty is evident in the way in which rules of procedure manifest in the CCR. As chapter 2 explained, procedural legitimacy focusses on channelling the exercise of authority through procedures which subjects of authority find acceptable. Chapter 4 linked procedural legitimacy to the constitutional feature of rules of procedure.

Chapter 6 further emphasised the ability of rules of procedure to establish and maintain a space within which the subjects of authority can act autonomously. It also discussed that the rules of procedure can be broken down into three aspects. These are participation, transparency, and accountability.

It is clear that the first aspect of the rules of procedure, participation, safeguards sovereignty by requiring the AIA to take into consideration the interests represented by states parties. It is also indisputable that participation establishes a space within which states parties can influence the exercise of authority by the AIA. Considering the obvious connection between participation and safeguarding the sovereignty of states parties it is not surprising that this aspect of the CCR is well developed.

In terms of transparency, the second aspect of the rules of procedure, chapter 6 identified that the CCR is committed to providing transparency in terms of ensuring information is available to the AIA. However, there remain two weaknesses in the transparency provisions of the CCR. The first is that certain transparency requirements are set out in decisions of the COP rather than incorporated in the constitutional provisions of the CCR. This means that these rules are easier to amend making it possible for the AIA to reduce its transparency commitments. However, as noted in the discussion of the feature of entrenchment, the rules for amendment of decisions of the COP require consensus, implying that any changes to the transparency requirements would be widely accepted by states parties. The second weakness in the transparency requirements of the AIA is that they do not set out any obligations for the Subsidiary Body for Scientific and Technological Advice (SBSTA) and the Subsidiary Body for Implementation (SBI). This negatively impacts the way in which the CCR measures up against the transparency aspect of the component of procedural legitimacy. By further developing transparency requirements in the constitutional provisions the CCR can improve the extent to which it demonstrates procedural legitimacy and thereby enhance its standard of legitimacy.

The third aspect of the rules of procedure, accountability, is an important tool in balancing the relationship between the authority claimant and the authority subjects. The possibility of holding the authority claimant accountable for their actions is a crucial part of ensuring that authority is exercised appropriately. Therefore it is notable that the CCR contains no accountability requirements for the AIA. Instead, all accountability provisions in the CCR are focussed on accountability of states parties only. In order to improve the balance of enablement and constraints for both the AIA and states parties it will be necessary for development of the AIA's enablement to be coupled with accountability measures. In terms of legitimating the exercise of authority the lack of accountability of the AIA signals a significant legitimacy deficit.

2.3 Legal legitimacy

Chapter 4 pointed out that the component of legal legitimacy links up with the constitutional features of the rule of law and supremacy. Chapter 6 explained that the most appropriate account of the rule of law in the context of the CCR is Raz's formal account thereof. This is because the absence of clearly identifiable shared substantive values amongst states parties would make it difficult to justify a substantive account of the rule of law. Chapter 6 identified that, overall, the provisions of the CCR are clear, open, and prospective. The rule of law further requires that subjects of authority have access to an independent and accessible judiciary. The AIA does not include a judiciary body of its own. States parties can submit their dispute to the ICJ or engage in non-judicial forms of dispute resolution within the context of the CCR. Insofar as the rule of law is concerned the CCR therefore measures up positively against the component of legal legitimacy.

The connection between supremacy and legal legitimacy arises from the fact that supremacy makes it possible to distinguish between constitutional and ordinary law. This in turn makes it possible to assess the extent to which authority is exercised within the rules of the legal order within it operates.⁴ As discussed in chapter 5, the organisation of the CCR demonstrates the feature of supremacy. Whilst the provisions of the CCR do not explicitly state this distinction, the application of the CCL in chapter 6 illustrated that the provisions of the UNFCCC, the Kyoto Protocol, and the Paris Agreement include aspects of external, internal, and norm supremacy. Overall then it can be concluded that there is sufficient evidence that the CCR measures up against the expectations captured by the component of legal legitimacy, both as concerns the rule of law and the feature of supremacy.

2.4 Expert legitimacy

Chapter 4 linked expert legitimacy to the constitutional features of the separation of powers. This on the basis that the separation of powers can enhance efficiency in the exercise of authority by ensuring that each action is undertaken by the body with the relevant information and skills.⁵ Chapter 6 identified that on the basis of this account of the separation of powers, the COP is most like the legislature, while the SBSTA and the SBI fulfil functions similar to that of the executive branch in the state. Chapter 6 made two further key observations in relation to the separation of powers in the CCR. The first observation was that, whilst the legislative and executive branches can be identified in the roles of the COP, the SBSTA, and the SBI, there is no separation between these bodies. Instead, there exists a hierarchical relationship between the COP and the SBSTA, and the COP and the SBI.

⁴ Chris Thomas, 'The Uses and Abuses of Legitimacy in International Law' *Oxford Journal of Legal Studies* [2014] 34(4), 729-758.

⁵ See Aileen Kavanagh, 'The Constitutional Separation of Powers' in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (OUP 2016) 222-240, and Nicholas Barber, 'The Separation of Powers' in Nicholas Barber, *The Principles of Constitutionalism* (OUP 2018).

The second observation is that the AIA lacks a judiciary body of its own. In the context of the state the lack of a judiciary body would signal a significant legitimacy deficit. However, this is in part because the state claims to present a comprehensive legal order. The CCL, on the other hand, focusses on constitutionalism in a compensatory manner. As a result, it is possible that in the context of the CCR it is not necessary for the AIA to provide a judiciary body. Considering the CCR provides the opportunity to states parties to submit their disputes to the ICJ, there is access to a judiciary. In addition, the judiciary, in the form of the ICJ, can be described as both independent and separate from the legislative and executive branches of the AIA.

3 Findings regarding the assessment of the standard of legitimacy in the climate change regime through application of a compensatory constitutionalism lens

Encouragingly, the application of the CCL to the CCR in chapters 5 and 6 reveals that each of the six features of constitutionalism in the CCL are represented in the provisions of the UNFCCC, the Kyoto Protocol, and the Paris Agreement. This indicates that the CCR contains elements of each of the four legitimacy components relevant to this thesis. The application of the CCL to the CCR also demonstrated that certain features are better developed in the CCR than others at this point. For example, the CCR demonstrates a high degree of commitment to participation and to the formal account of the rule of law. Where this is the case, one can speak of legitimacy strengths. Other features of constitutionalism can be found in the provisions of the CCR but demonstrate significant room for improvement. For example, chapter 5 identified that the feature of enablement and constraint lacks equilibrium in the current state of the CCR. This type of finding is described as a legitimacy weakness. It is called a weakness in order to distinguish it from a deficit whilst signalling that further development can improve the overall standard of legitimacy in the CCR.

The most notable legitimacy deficit that arises from this thesis' assessment is the lack of output legitimacy. However, the reason for this is because the construction of the CCL specifically excluded any substantive features of constitutionalism. Therefore, rather than concluding that there is a legitimacy deficit with relation to the component of output legitimacy it is more accurate to state that the aspects of the CCR which may reflect substantive features of constitutionalism were not included in the assessment of the standard of legitimacy. A consequence of excluding substantive features of constitutionalism from the construction of the CCL is that it is not possible to measure the extent to which the CCR meets expectations set out by the component of output legitimacy. The risk of embedding normative bias into the CCL outweighs the benefit of including substantive features at this point in time.

However, the CCR does present scope for the further development of substantive features. Whilst the earlier stages of the development of the CCR focussed heavily on the adaptation and mitigation aspects of climate change policies, increasingly attention is also paid to those provisions of the CCR which engage with compensation for loss and damage.⁶ This could

⁶ For example, see R Mechler and others, *Loss and Damage from Climate Change Concepts, Methods and Policy Options* (Springer International Publishing 2019); R Mechler and others, 'Loss and Damage and limits to

indicate a potential shift in which states parties become more receptive to further development of aspects of the CCR which could be cast in substantive terms. Once the CCR does further develop along such lines it would also become possible to integrate substantive features of constitutionalism into the construction of the CCL in order to draw out an assessment of the extent to which the CCR meets expectations captured by the component of output legitimacy.

The second most notable deficit in the standard of legitimacy of the CCR exists in regard to expert legitimacy. Whilst it is possible to identify a legislative and an executive branch within the architecture of the AIA, these branches have a hierarchical relationship rather than demonstrating a separation of powers between them. The thesis' overall objective is to assess the standard of legitimacy in the CCR through a compensatory constitutionalism lens. This chapter has drawn together the findings of the application of the CCL to the CCR and identified that the CCR demonstrates a very mixed picture in terms of its standards of legitimacy. Without commenting on the component of output legitimacy it is possible to state the following: the CCR's biggest strength lies in the component of legal legitimacy. On the basis of a formal account of the rule of law and in terms of internal, external, and norm supremacy, the CCR meets all expectations.

A more mixed picture arises, however, in relation the component of input legitimacy. Whilst the regime provides for ample participation opportunities, it only demonstrates a minimal degree of entrenchment and further lacks balance in its allocation of enablement and constraint between the AIA and states parties. Whilst it appears there is sufficient input legitimacy for there not to be a definite legitimacy deficit in this regard, the overall standard of legitimacy of the CCR can be enhanced by addressing the shortcomings identified. Regarding the component of procedural legitimacy the same holds true. Whilst the regime provides for participation, its transparency requirements are in need of further development and accountability measures for the AIA are lacking entirely. In order to improve the standard of legitimacy in the CCR it would be necessary to address these issues. The development of accountability requirements for the AIA could also contribute to achieving a better balance of enablement and constraint in the CCR.

Lastly, the CCR falls short with regard to the component of expert legitimacy. The lack of separation between the legislative and executive branches within the AIA is cause for concern from a constitutionalism point of view. In addition, it requires further reflection whether the CCR would benefit from including an independent judiciary body within the constellation of its AIA. Considering the nature of international law it may be that access to other means of dispute resolution, as currently provided by the CCR, is the represents the most suitable option.

The task of identifying legitimacy strengths and deficits in the CCR provides an important step towards improving states parties' ability to engage constructively with the AIA of the CCR and move closer towards achieving the common objective set out in article 2 UNFCCC. The use of the CCL as a means of assessing the standard of legitimacy in the CCR has the

adaption: recent IPCC insights and implications for climate science and policy' Sustainability Science 2020 (15) 1245.

added benefit of providing a suggestion as to how the legitimacy may be enhanced where it is found lacking. Further development of provisions which provide for enablement and constraint, entrenchment, transparency, accountability, and the separation of powers will be able to further enhance the standard of legitimacy in the CCR and improve the relationship between its AIA and states parties.

4 Final remarks

In order to provide both stability and flexibility, the United Nations climate change regime is based on a framework approach which includes the establishment of an autonomous institutional arrangement that is tasked to oversee implementation and further development. Chapter 3 highlighted that, whilst the establishment of the autonomous institutional arrangement is necessary for states parties to achieve the objective of the United Nations climate change regime, it also gives rise to legitimacy concerns. The sovereign nature of states parties means that any exercise of authority over them by a third party requires legitimation. In order for the United Nations climate change regime to best fulfill its purpose of assisting states parties to achieve the objective set out in article 2 UNFCCC, it is therefore necessary that it demonstrates a high standard of legitimacy.

In order to assess the standard of legitimacy in the United Nations climate change regime in its current form, this thesis constructed and applied a compensatory constitutionalism lens in chapters 4, 5, and 6. Chapter 2 defined legitimacy for the purpose of this thesis as set of discursive reasons which are used to persuade a group of autonomous, free, and equal actors to adjust their conduct in accordance with the instructions of an authority claimant. These discursive reasons find traction within the group of authority addressees because they reflect the dominant framework of social norms to which said authority addressees adhere.⁷ Chapter 3 and 4 identified six features of constitutionalism that reflect shared normative values amongst all states parties to the United Nations climate change regime. This finding, combined with its use for the construction of the compensatory constitutionalism lens provides an original contribution to the existing literature on climate change and constitutionalism beyond the state.

Furthermore, the thesis provides an original contribution in its finding that the United Nations climate change regime incorporates aspects of all four of the legitimacy components it investigated, whilst also identifying significant scope for improvement. The United Nations climate change regime meets all requirements of the component of legal legitimacy as phrased in terms of the constitutional features of the rule of law and supremacy. With regard to input legitimacy, procedural legitimacy, and expert legitimacy the United Nations climate change regime demonstrates a minimum degree of incorporation which makes it possible to state that it meets at least the threshold requirements of these four legitimacy components. Nonetheless, the application of the compensatory constitutionalism lens also identified that there remains significant scope to further enhance the standard of legitimacy in the United Nations climate change regime,

⁷ This definition is constructed on the basis of numerous accounts of legitimacy which are fully discussed and referenced in chapter 2.

especially in relation to the components of input legitimacy, procedural legitimacy, and expert legitimacy.

Articulating these legitimacy strengths and deficits is constructive because it brings to light ways in which the United Nations climate change regime can continue to develop its standard of legitimacy. Only by achieving a high standard of legitimacy can the United Nations climate change regime justify the exercise of authority which states parties require in order for the AIA to assist them in achieving the objective to stabilise greenhouse gas emissions at levels that would prevent dangerous anthropogenic interference with the climate system.

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