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Raging Bulls and Flyswatters: The Networked Pyramid Model

> A fly should not be hit with a sledgehammer, nor a raging bull with a flyswatter.
>
> I Ayres and J Braithwaite, regulatory theorists[1]

Chapter Overview

This chapter sets out the theoretical framework that is employed in later chapters to analyse the effectiveness of the conflict diamonds governance system, thereby responding to the second of two main research questions being considered in this book. The chapter begins by discussing the value of using a regulatory approach in this type of context as opposed to, for example, a strictly legal analysis. Finally, a number of sophisticated regulatory models are explored in more detail, namely the network model, the pyramid model, and an approach that combines the two, the networked pyramid hybrid model.

1 Ayres, I and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) 49.

Why Use a Regulatory Approach?

There are a number of different ways in which a governance system, such as the conflict diamonds governance system, can be analysed. Naturally, the starting point for those with legal training is to identify sources of law, such as treaties, legislation and jurisprudence, from which rights and obligations might be identified. By contrast, a regulatory approach provides a significantly different perspective. Julia Black's definition of regulation is illuminating in this regard:

> Regulation is the sustained and focussed attempt to alter the behaviour of others according to defined standards or purposes, with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behaviour modification.[2]

Consideration of this definition is of assistance in articulating the value of using a regulatory lens to analyse a legal system, whether it be national or international in nature. Of central interest is that regulation has defined standards or purposes that it seeks to achieve. Whereas a lawyer may be content with considering the question, 'what is the law?', a regulatory approach will critically analyse the current law in terms of whether or not it is achieving a particular purpose and, if it is not achieving that purpose, suggest ways in which it might be improved. Regulation extends beyond law itself, to encompass a variety of means by which its purpose might be achieved. For example, a lawyer might question whether an industry code of conduct is legally binding. However, if it has the effect of achieving a particular purpose in that industry, then it may still qualify as effective regulation.[3]

A related consideration is that legal scholars are concerned, to a significant degree, in maintaining the internal consistency and integrity of the rules system. This objective seems to be of comparatively less importance from the regulatory perspective, which is less concerned with whether law is correct in seeing itself

2 Black, J, 'Critical Reflections on Regulation', *Australian Journal of Legal Philosophy,* vol. 27, 2002, 20.

3 Parker, C et al. (eds), *Regulating Law* (Oxford University Press, 2004) 1–3.

as characterised by unity, coherence, or particular modes of reasoning. Rather, it is the outcomes of the legal system or regulatory system that are paramount, such as social justice, or economic efficiency.[4]

Regulatory theory not only seeks to analyse a system in terms of its ability to achieve a particular purpose, but also involves a generally agreed set of functional criteria as to whether that system will be successful. In developing these criteria, regulatory theory has borrowed from the study of artificial intelligence, or cybernetics. These criteria can be listed as mechanisms of standard-setting, information gathering (or monitoring) and behaviour modification. These criteria, it is argued, provide for the means of control whereby a system, whether artificial or natural, is kept within a preferred subset of all possible states. In the absence of any one of these elements, there is not control in a cybernetic sense.[5]

Further to the discussion in earlier chapters of this book, the conflict diamonds governance system is defined to include those persons, corporations, and organisations involved in addressing the conflict diamonds issue through their regulatory behaviour. The main players in the system are national governments, the Kimberley Process Certification Scheme (KP) (including the non-governmental organisations (NGOs), corporations and national governments therein represented), the United Nations Security Council (UNSC), and the International Criminal Court (ICC). In considering the utility of applying a regulatory approach to a system such as the conflict diamonds governance system, the regulatory approach will not simply provide insight into the rights and obligations that comprise that system, but will also assess the system in terms of whether it is achieving a particular purpose or set of purposes. In relation to the conflict diamonds governance system, the central issue is whether the system is actually preventing the illegal diamonds trade from providing financial support to human rights abusers.

4 Black, J, 'Critical Reflections on Regulation', *Australian Journal of Legal Philosophy,* vol. 27, 2002, 22–26; Parker, C et al. (eds), *Regulating Law* (Oxford University Press, 2004) 3–4.

5 Black, J, 'Critical Reflections on Regulation', *Australian Journal of Legal Philosophy,* vol. 27, 2002, 20.

A regulatory approach also contemplates approaches that are not strictly legal in character, as long as they contribute to the achievement of the overall objective in question.[6] This approach is well suited to an analysis of the conflict diamonds governance system, which features strong elements of industry self-regulation, and reflects the important role of NGOs and the media in managing the conflict diamonds problem. This reflects the trend towards 'new governance' and 'fragmentation', through which governments are recognised as only one of a number of regulatory agents.[7] The organisation most central to the world's response to conflict diamonds, namely the Kimberley Process Certification Scheme, does not possess formal legal status or impose obligations under the international laws relating to treaties.

Finally, regulatory theory provides insight into criteria that are essential in establishing an effective system in promoting the desired outcomes: the elements of standard-setting, monitoring, and behaviour modification. Through the articulation of particular regulatory approaches and models, regulatory theory provides a further level of sophistication to assist in designing a system that will achieve the desired outcomes.[8]

In terms of regulatory approaches, the two approaches at the opposite ends of the behaviour modification spectrum are command-and-control, and goal-orientated regulation. Command-and-control regulation focuses on punitive action by a central regulator, such as a government agency, which rigorously polices a given industry, and applies punitive measures against those who are non-compliant. By contrast, goal-orientated regulation moves the locus of regulation from the regulator to industry participants, relying on internalised motivations to promote whole-hearted and creative engagement rather than begrudging compliance.[9]

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6 Parker, C et al. (eds), *Regulating Law* (Oxford University Press, 2004) 1–3.

7 Scott, C, 'Regulating in Global Regimes', Working Paper No 25/2010, University College Dublin (2010) 1–4.

8 Black, J, 'Critical Reflections on Regulation', *Australian Journal of Legal Philosophy,* vol. 27, 2002, 20.

9 Salamon, L M, 'The New Governance and the Tools of Public Action: An Introduction' in L M Salamon (ed.), *The Tools of Government: A Guide to the New Governance* (Oxford University Press, 2002) 15.

More complex regulatory models combine command-and-control and goal-orientated approaches. They articulate particular systems of standard-setting, monitoring and behaviour modification that are designed to maximise the ability of a given regulator to achieve the desired regulatory outcomes. The models presented in this chapter are network models, pyramid models, and hybrid models combining features of both networks and pyramids. These models stand out as being useful in their application to the conflict diamonds governance system, for reasons discussed in greater detail below. Of greatest interest is the hybrid networked pyramid model, as it combines the insights and approaches of both network and pyramid models.

The Network Model

There is an increasing and diverse literature based around the ways in which networks of people, businesses, organisations, and governments act together in a regulatory capacity.[10] Networks contribute expertise and information that assists in carrying out regulatory functions. They may also contribute a range of regulatory interventions to a given system. They typically deploy techniques that are based on dialogue rather than coercion, and are horizontal in the sense that they operate in a non-hierarchical manner.[11] Beyond general principles, more sophisticated models for the regulatory

10 For example, see Braithwaite, J and P Drahos, *Global Business Regulation* (Cambridge University Press, 2000) 550–562; Slaughter, A-M, *A New World Order* (Princeton University Press, 2004); Burris, S, P Drahos and C Shearing, 'Nodal Governance' (2005) 30 *Australian Journal of Legal Philosophy* 30; Drahos, P, 'Intellectual Property and Pharmaceutical Markets: A Nodal Governance Approach' (2004) 77 Summer *Temple Law Review* 401; Scott, C, 'Regulation in the Age of Governance: The Rise of the Post-regulatory State' in J Jordana and D Levi-Fuar (eds), *The Politics of Regulation: Institutions and Regulatory Reform for the Age of Governance* (Edward Elgar, 2004); Koechlin, L and R Calland, 'Standard-setting at the Cutting Edge: An Evidence-based Typology for Multi-stakeholder Initiatives' in A Peters et al. (eds), *Non-State Actors as Standard Setters* (Cambridge University Press, 2009); Coen, D and M Thatcher, 'Network Governance and Multi-level Delegation: European Networks of Regulatory Agencies' (2008) 28(1) *Journal of Public Policy* 49; Freiberg, A, *The Tools of Regulation* (The Federation Press, 2010); Mikler, J, 'Sharing Sovereignty for Global Regulation: The Cases of Fuel Economy and Online Gambling' (2008) 2(4) *Regulation and Governance* 383; Williams, C A, 'Civil Society Initiatives and 'Soft Law' in the Oil and Gas Industry' (2004) 36 Winter–Spring *New York University Journal of International Law and Politics* 457.

11 Braithwaite, J and P Drahos, *Global Business Regulation* (Cambridge University Press, 2000) 553–554; Slaughter, A-M, *A New World Order* (Princeton University Press, 2004) 19–20. Issues of power may continue to play a role, albeit less pronounced, in such networks. For example, economic and military strength may be considerations in horizontal diplomacy.

functioning of networks have been developed. Two of these models, discussed below, are the web of dialogue and horizontal government network models.

Close attention to network models and the way they contribute to hybrid networked pyramid models is merited in relation to the conflict diamonds issue, as the Kimberley Process (KP) self-consciously incorporates important features of network governance. Its tripartite structure of government, industry, and NGOs brings together three different networks, each with a particular interest in the resolution of the conflict diamonds problem. Its informal manner of functioning, including the monitoring technique it has labelled as peer review reflect the benefits of networks in creating a regulatory process of socialisation and peer pressure. The manner in which network regulatory models generate insights into the descriptive and normative operation of the conflict diamonds governance system is discussed in depth in Chapter 7 of this book.

Webs of Dialogue

The web of dialogue model was proposed by Braithwaite and Drahos in the context of systems of business regulation at the international level. Given the focus of the Kimberley Process on the regulation of the international trade in rough diamonds, the model has a clear applicability at face value. Apparent in the label, web of dialogue is the idea of a network of different persons and organisations that act on each other using techniques of dialogue to achieve a regulatory purpose. These webs, which often link industry, government, and civil society participants, are identified as the principal means by which regulatory systems are developed and exported across the globe. A web of dialogue may refer to the operations of an intergovernmental organisation, a multinational corporation, or an industry or professional association. The term dialogue refers to a range of non-coercive interactions between actors in a regulatory setting, ranging from

discussions in intergovernmental organisations, to mutual auditing between subsidiaries of a multinational corporation, and even naming and shaming of irresponsible corporate practices by NGOs.[12]

In their study, Braithwaite and Drahos concluded that the regulatory technique of dialogue was more prevalent and significant than techniques of coercion and reward.[13] An earlier study of over 100 multilateral treaties to which the US was a party, encompassing both national security and business regulatory matters, found very little resort to sanctions. Indeed, few treaty texts even included a formal enforcement mechanism.[14] Beyond their empirical observation that webs of dialogue are successful in achieving regulatory outcomes, Braithwaite and Drahos attempt to explain why this is the case. They suggest the answer lies in a number of factors, which they describe as complex interdependency, normative commitment, modelling, and habits of compliance.[15]

The initial process of problem definition can be crucial to the success of a web of dialogue. During this process, actors are persuaded to take ownership of a global problem by identifying their own interests in its resolution. An interesting example of this is the manner in which different groups, particularly in the United States, rallied together to address the problem of the depletion of ozone gas in the earth's atmosphere. Naturally enough, environmental groups were involved in raising awareness of the issue, noting the increase in harmful radiation as a result of the loss of significant ozone levels. The conservative US Government was not initially in favour of the international process that led to the Montreal Protocol, but was persuaded to come on side

12 Braithwaite, J and P Drahos, *Global Business Regulation* (Cambridge University Press, 2000) 553. There is some debate in the literature about whether naming and shaming is a non-coercive technique deserving the title of 'dialogue' or if it is more coercive than this. Elsewhere, it is suggested that naming and shaming of corporate practices may be more a technique of coercion than dialogue: Ayres, I and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) 22–24. The context of the naming and shaming may be important to take into account. For example, shame or praise in a largely private context of an organisational meeting may be considered less coercive than an aggressive media campaign targeting a particular corporation.

13 Braithwaite, J and P Drahos, *Global Business Regulation* (Cambridge University Press, 2000) 557.

14 Chayes, A and A H Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, 1995) cited in Braithwaite, J and P Drahos, *Global Business Regulation* (Cambridge University Press, 2000) 556.

15 Braithwaite, J and P Drahos, *Global Business Regulation* (Cambridge University Press, 2000) 553–554.

as a result of the intervention of a major US manufacturer, Du Pont. Du Pont led research and development towards replacement products for the harmful chlorofluorocarbons (CFCs) responsible for the damage to the ozone layer. As a result, it had a keen economic interest in the international prohibition on CFCs, as it was then in a position to become a global market leader. In this manner, the US Government intervened decisively in favour of the Montreal Protocol, which was finalised in 1989. The level of cohesion created in the ozone-implementation network was described clearly in the words of scientist-diplomat Mostafa Tolba: 'What they would implement, and how, has been based on a circle of friends, an ever-growing circle of friends, that has worked tirelessly under conditions of personal trust.' The subsequent success in replacing CFCs with innocuous hydrofluorocarbons has resulted in the global success story of the ozone problem. Today, levels of atmospheric ozone have returned to acceptable levels.[16]

In the example discussed above, civil society, industry, and government found common cause to establish and implement an international regulatory regime. Braithwaite and Drahos provide an explanation for the cooperative behaviour of disparate groups even in the absence of easily identified self-interest. The explanation, labelled complex interdependency, is that actors seeking to find a solution to a regulatory issue are often engaged with each other in other forums in relation to different issues. As a result, there is an over-arching reason to cooperate, even in the absence of clearly identified self-interest that relates to that specific issue or problem. For example, a national government may be persuaded to cooperate in a global environmental regime through the realisation that it wishes to make headway in upcoming trade negotiations with those same countries involved in the environmental negotiation. This approach can develop into a habit of compliance, whereby parties to a regulatory negotiation will favour compliance as their default position.[17]

16 Ibid 264–267. Quote is cited in Canan, P and N Reichman, *Ozone Connections: Expert Networks in Global Environment Governance* (Greenleaf Publishing Limited, 2002) 60–61, which deploys a network model to explain the success of that system (see generally 61–100).

17 Braithwaite, J and P Drahos, *Global Business Regulation* (Cambridge University Press, 2000) 550–562.

Braithwaite and Drahos highlight a number of other factors as supporting the efficacy of dialogue as a regulatory technique. For example, parties may be persuaded as to the normative value of a course of action, and can be convinced by the modelling and compliance of actors they consider as their equals. When a number of national governments agree to a new regulatory standard, a type of peer pressure comes into play, influencing representatives of other national governments to give serious consideration to joining the regulatory regime. This type of peer pressure can be reinforced through reporting obligations, which institutionalise praise and shame for parties to a regime. An example of this is where labour ministries appear before the Freedom of Association Committee or the Committee of Experts of the International Labour Organization (ILO) to account for their efforts implementing ILO agreements. According to Braithwaite and Drahos, a sense of professional pride and honour is created, which motivates representatives to complete with each other in relation to their level of regulatory compliance.[18]

Another important feature of webs of dialogue is the ability to share information. By meeting the informational needs of potential participants in such a network, the costs and benefits of compliance are more easily understood, thereby facilitating decision making. Networks are able to provide technical expertise on aspects of the regulatory system to those parties who may have such a need.[19]

Webs of dialogue and their processes of socialisation and peer pressure share a similar conceptual framework with the idea of isomorphism — a Latin word meaning 'same form' — in the regulatory literature. Under this concept, organisations undergo particular pressures to conform to a common standard (for example, international accounting firms may undergo pressure to conform to unified financial reporting standards). The literature discusses three forms of isomorphism: coercive isomorphism, mimetic isomorphism, and normative isomorphism. Under coercive isomorphism, organisations conform to unified standards as a competitive necessity — for example, to compete for international finance. Mimetic isomorphism operates when an organisation adopts a standard to avoid pitfalls (such as fraud scandals) that appear to have been avoided by standard adopters. Peer

18 Ibid 555–556.

19 Ibid 555, 562–563.

pressure by professionals operate under normative isomorphism, in particular with a need to ensure that organisations are able to meet common market needs and expectations in relation to their services.[20]

Horizontal Government Networks

In her work *A New World Order*, Slaughter suggests a network model for international regulation. Her model is proposed both on a descriptive level, as being something that is already occurring in the international environment, and on the normative level, as a constructive approach that entails significant benefits for effective international regulation. Her model is informed by a redefinition of the meaning of sovereignty for a modern nation state. In conceptualising and identifying global networks that influence the decisions of national governments, she posits that the modern concept of national sovereignty is more concerned with a state's ability to influence these global networks, rather than that state's ability to exclude the network from having an influence in its national jurisdiction. Government networks are loosely defined by Slaughter to be a pattern of regular and purposive relations among like government units from different nations working together. Slaughter recognises that civil society and industry groups participate in discussions hosted by government networks, but suggests that privileging of government representatives is appropriate for reasons of democratic legitimacy.[21]

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20 Werner, J R and J Zimmermann, 'The Evolving Post-National Regulation of Financial Reporting' in H Rothgang and S Schneider (eds), *State Transformations in OECD Countries: Dimensions, Driving Forces, and Trajectories* (Palgrave Macmillan, 2015) 73–74.

21 Slaughter, A-M, *A New World Order* (Princeton University Press, 2004) 11, 14, 56, 261–262; Chayes and Chayes cited in Slaughter, A-M, *A New World Order* (Princeton University Press, 2004) 267. There is a small volume of literature discussing Slaughter's model, although much of it is a discussion of issues of the political legitimacy of the actors involved in government networks, such as Howse, R, 'Book Review: A New World Order, By Anne-Marie Slaughter, Princeton, NJ: Princeton University Press, 2004' (2007) 101 *American Journal of International Law* 231. See also Chung, C, 'International Law and the Extraordinary Interaction Between the People's Republic of China and the Republic of China on Taiwan' (2009) 19 *Indiana International and Comparative Law Review* 233; Anderson, K, 'Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks' (2005) 118 *Harvard Law Review* 1255; Antal, E, 'Lessons from NAFTA: The Role of the North American Commission for Environmental Cooperation in Conciliating Trade and Environment' (2006) 14 *Michigan State Journal of International Law* 167; Lang, A and J Scott, 'The Hidden World of WTO Governance' (2009) 20 *European Journal of International* Law 575.

Slaughter suggests the notion of horizontal government networks to explain the cooperation between national agencies from different countries aimed at resolving international concerns. She identifies three broad types of networks within the range of horizontal networks: information networks, enforcement networks, and harmonisation networks. Information networks bring together regulators, judges, or legislators to exchange information and collect best practice. An example is the environmental exchange between the Environmental Protection Agency of the USA and Mexico's equivalent, La Procuraduría Federal de Protección al Ambiente, on monetary penalties in enforcement cases, administrative enforcement procedure and the development of programs for criminal environmental enforcement. [22]

Enforcement networks are motivated by the need of government officials to cooperate with other countries to enforce their own laws. Cooperation involves information exchange and assistance programmes. Perhaps the best known enforcement network is Interpol, which is composed of 179 police services internationally, but has no constituent treaty to constitute itself on a formal basis. Criminal intelligence, including arrest warrants, is shared between member nation police forces through Interpol. Other examples include the European Union's criminal enforcement network, known as Trevi. Enforcement networks may also include the provision of capacity building, or technical assistance. For example, technical assistance from the US Securities and Equities Commission, US Environment Protection Agency, and Justice Department and Treasury Department is a significant contribution to capacity building in the areas of competition, environmental and other forms of regulation globally.[23]

Harmonisation networks generally rely on a treaty or executive agreement, and bring regulators together to ensure that rules in a particular area conform to a common regulatory standard. Harmonisation networks have come under particular criticism as undemocratic, because the technical process of harmonising laws generally bypasses the public, and ignores domestic winners and losers

22 Slaughter, A-M, *A New World Order* (Princeton University Press, 2004) 14, 56, 264.
23 Ibid 56.

from the process. Harmonisation is often linked to trade agreements such as the World Trade Organization (WTO) agreements or the North American Free Trade Area agreement, but can also be bilateral.[24]

Slaughter suggests a number of features possessed by horizontal government networks: they are a flexible and fast way to conduct the business of global governance; they are able to coordinate and harmonise national government action; they can initiate and monitor different solutions to global problems; they are decentralised and dispersed, and so cannot exercise centralised coercive authority; and they are government actors, and so are responsible to constituencies that will hold them accountable in the same manner as purely domestic activity, even though they may interact with NGOs of civic and corporate nature.[25]

At the normative level, Slaughter identifies a number of advantages to such arrangements, which benefit in particular weak, poor, and transitional countries, including the exchange of information; the development of collective standards; the provision of training and technical assistance; ongoing monitoring and support; and active engagement in enforcement cooperation. Counterparts in more powerful countries are able to reach beyond their borders to try to address problems impacting within those borders.[26]

According to Slaughter, networks create a system of socialisation that develops and enforces standards of honesty, integrity, competence, and independence in performing regulatory functions. The prestige of membership in a network is often enough to give government officials who want to adhere to high professional standards ammunition against countervailing domestic forces.[27]

24 Ibid 19.
25 Ibid 11.
26 Ibid 265–266.
27 Ibid 24.

The Pyramid Model

The regulatory pyramid approach, first articulated by Ayres and Braithwaite in 1992, seeks to combine a number of regulatory approaches into a dynamic synthesis. Its initial formulation concerned regulation at the national level. The pyramid model combines elements of both the deterrence or command-and-control approaches, which argue that law must be tailored towards ill-intentioned people who seek to unscrupulously pursue their interests, as well as elements of the compliance and goal-oriented models, which argue that gentle persuasion is the best approach to securing business compliance. Put another way, it combines rational choice thinking, which argues that business always looks to economic self-interest, along with sociological approaches that give credit to the law-abiding and socially responsible instincts of business. Ayres and Braithwaite argue that it is a false dichotomy to have to choose between punishing and persuading, and that regulators need both approaches in their regulatory armoury. It is a vertical approach in that the model also provides for coercive interventions that may be imposed by a regulator acting from a hierarchically privileged position. The privilege may relate to superior legal authority or simply greater power or influence.[28]

Braithwaite argues that an optimally functioning enforcement pyramid strategy will involve the following elements: a tit-for-tat strategy; access to a hierarchical range of sanctions and interventions, which can be set out in the form of a pyramid diagram; and the availability of a highly coercive sanction at the apex of the pyramid diagram.[29] The model lends itself intuitively to the study of the conflict diamonds governance system as it allows for the type of dialogic interaction and socialisation that occurs within the Kimberley Process, but also goes further to provide for more coercive approaches in appropriate cases. Exclusion from the Kimberley Process, or referral to either the UNSC or the ICC, represent escalations that are available within the system.

28 Ayres, I and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) 20–21.
29 Ibid 40–44.

The Tit-for-Tat Strategy

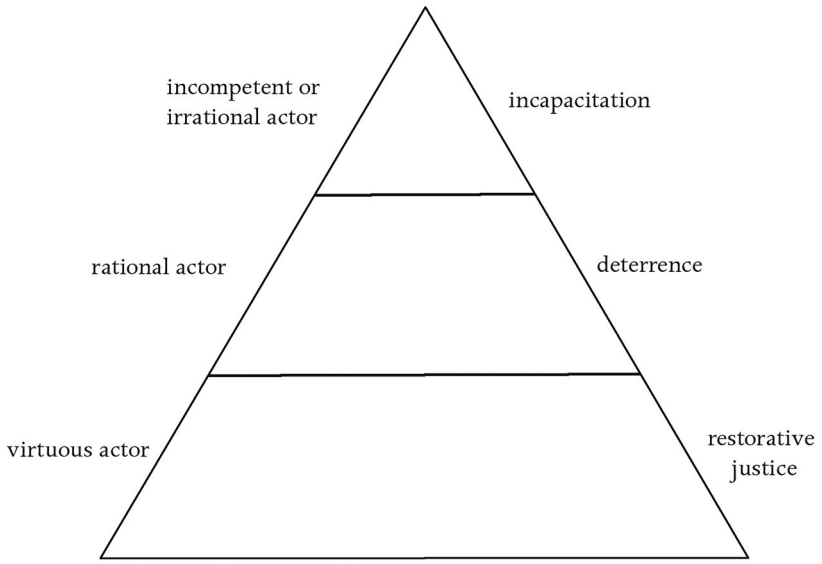

Figure 6.1: Regulatory Pyramid: Escalating Approaches According to Actor

Source: Author's research. Based on Ayres, Ian and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

One of the key processes for the functioning of the regulatory pyramid is labelled tit-for-tat enforcement, which can be described as being contingently provocable and forgiving. The fundamental principle of the tit-for-tat approach, which is synonymous with ratchetting up and down the enforcement pyramid, is that it rewards like with like. It starts off with a posture that the regulated entity will be compliant with the regulations. This gives it the advantage of preserving the trust, goodwill, and cooperation of businesses that are seeking to comply with the regulations. A regulator may also employ the technique of positive attribution that encourages long-term compliance — for example, labelling a regulated business as helpful may encourage the directorship of that business to act in a helpful manner. However, in the event that it finds that the business is non-compliant and unresponsive to an approach based on dialogue and persuasion, the regulator gives like in return for like, and escalates one stage up the enforcement pyramid, thereby demonstrating that

negative consequences arise from unprincipled business behaviour.[30] The decision by the regulator to start from a position of trust, however, means that the threat of sanctions has low salience for actors who are intrinsically motivated, but can be made salient for those with no intrinsic motivation.[31]

It is important, however, that the minimal sufficiency principle be applied in the deployment of an appropriate sanction to the non-compliant business. A fly should not be hit with a sledgehammer, nor a raging bull with a flyswatter, to use Braithwaite's colourful imagery. By using the minimum sanction necessary to trigger compliance, long-term damage to the relationship between regulator and the regulated business is avoided. When the business returns to a compliant posture of conscientious cooperation, a promptly forgiving posture by the regulator rewards this move and quickly consolidates the desire to return to resource-conserving dialogue and persuasion. It should be noted in this regard that persuasion is cheap, while punishment is expensive, whether in terms of financial or political capital. A strategy based on punishment alone also fosters organised subcultures of resistance, involving regulatory cat-and-mouse, loophole games, and rule proliferation. Punishment damages the capacity of the business to adopt a goal-oriented approach of internalised cooperation.[32]

The core idea of a contingently punitive or forgiving approach is a core idea that is incorporated into the dual networked pyramid model (DNPM) presented in Chapter 7. Under the DNPM, the conflict diamonds governance system is set up in a pyramid fashion to present the idea of a hierarchy of regulatory actors as is required in the regulatory pyramid model of responsive regulation. Under the DNPM, the key regulatory players in the international conflict diamonds governance system are set up in pyramidal fashion, with national governments at the bottom, the Kimberley Process in the middle, the UNSC above that, and the ICC at the apex. The idea of ordering these regulatory actors in this way is to reflect the tit-for-tat, contingently punitive or forgiving concept underlying the regulatory pyramid. For example, the Kimberley Process is able to be contingently punitive or forgiving in relation to a national government that has been found to

30 Ibid 21–27.
31 Ibid 49–51.
32 Ibid.

be in contravention of its obligations under the Kimberley Process. While willingness to engage might be rewarded with full membership, and even prestige through positive publicity and recognition, minor or serious non-compliance may attract adverse attention through a critical peer review or even expulsion from the Kimberley Process itself. The ability of the KP to act in this way in relation to a national government, but not the reverse, indicates a hierarchical relationship, which is an understood feature of the regulatory pyramid.

A Hierarchical Range of Sanctions

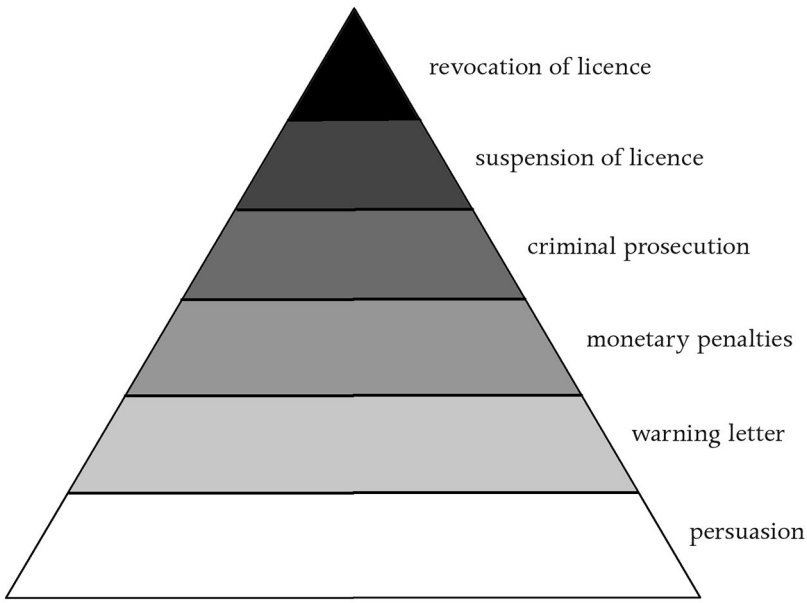

Figure 6.2: Regulatory Pyramid: Escalating Sanctions

Source: Author's research. Based on Ayres, Ian and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

Braithwaite argues that businesses will more readily defect from cooperation where a regulator has only one deterrence option, even if that option is cataclysmic. Such a super-punishment is unlikely to be used for political, moral, or legal reasons if it is disproportionate to the seriousness of the crime.[33] For example, prosecutions for criminal

33 Ibid.

offences involving long periods of imprisonment are unlikely to be initiated for relatively minor business transgressions, such as creating a low level of pollution.

An example of a regulatory pyramid of sanctions is persuasion — warning letter — monetary penalties — criminal prosecution — temporary suspension of licence — permanent revocation of licence.[34] A discussion of the powers of the Australian Securities and Investments Commission (ASIC) by Assaf provides a real-life example.[35] ASIC has powerful strategies at its disposal, ranging from administrative and civil to criminal options, relating to corporate regulation. Powers possessed by the regulator include freezing assets, and criminal prosecutions can be commenced by ASIC for illegal corporate activity. The ultimate sanction is, arguably, the de-registration of the corporation.

The concept of the regulatory pyramid of sanctions, which sets out key regulators hierarchically, is a core idea in the newly presented DNPM of this book. Each actor in the system has access to an escalating range of sanctions, and there is an ability to ratchet up to a further actor higher up the system who can bring a further range of sanctions to bear. For example, the Kimberley Process is located higher up the DNMP than national governments. The KP has at its disposal an escalating range of sanctions that it can deploy in cases of minor or serious non-compliance. At the lower level, the KP is able to generate critical publicity through a negative peer review. This might be amplified by networked actors such as NGOs who might undertake a negative publicity campaign on the basis of a peer-review report. Further up the scale is the prospect of a national government being expelled from the KP and a blanket export ban on diamonds originating from that country being imposed for serious non-compliance. Further escalations of sanctions may be deployed by other actors in the same system, positioned towards the apex of the DNPM. For example, the UNSC might impose an independent ban on diamond exports acting under its Chapter VII peace and security powers, if particularly concerned by the situation in a country. Beyond this, cases might be referred to the ICC in relation to international crimes committed in conjunction with a conflict diamonds issue, as a further escalation.

34 Ibid.

35 Assaf, F, 'What will Trigger ASICs Strategies?' (2002) May *Law Society Journal*, 60, 60–63.

A more general approach to the regulatory pyramid is to describe general tools pitched at the entire industry. An example of a pyramid of broad strategies might be self-regulation — enforced self-regulation — command regulation with discretionary punishment — command regulation with nondiscretionary punishment.[36] A central advantage of this broad strategies approach is that it provides for industry self-regulation as part of the regulatory pyramid, with industry peak bodies effectively acting as an intermediate regulator. In some respects, industry associations can be more important regulatory players than single firms. For example, individual firms will often follow the advice of the industry association to cooperate or face a more interventionist regulatory regime. Peer regulation may also have greater salience to an individual business, as its reputation in the eyes of fellow businesses may be considered more important than its reputation in the eyes of an external regulator.

The escalating systems approach is also reflected in the DNPM, which can be described as a pyramid within a pyramid. The national regulation of conflict diamonds can be considered a distinct pyramid, even while it operates conceptually as a subset of the international conflict diamonds regulatory pyramid. Thus, the idea of escalating regulatory systems is also reflected in the DNPM, albeit that both the national and the international system are stand-alone systems with a full range of sanctions available to them, from the persuasive and self-regulatory to the punitive. It is simply that the peak regulator at the national level, the national government, becomes the regulated entity in the international pyramid, with institutions such as the Kimberley Process and the UNSC taking on regulatory functions.

One of the interesting observations from empirical work in this area is that businesses are intrinsically concerned with adverse publicity, above and beyond simple loss of profits. It has been observed that the personal reputation and corporate reputation of businesses are considered as priceless assets. It follows that a powerful punishment for a business, which can be used in the sanctions armoury of the regulatory pyramid, is adverse publicity.[37]

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36 Ayres, I and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) 39.

37 Ibid 22–24.

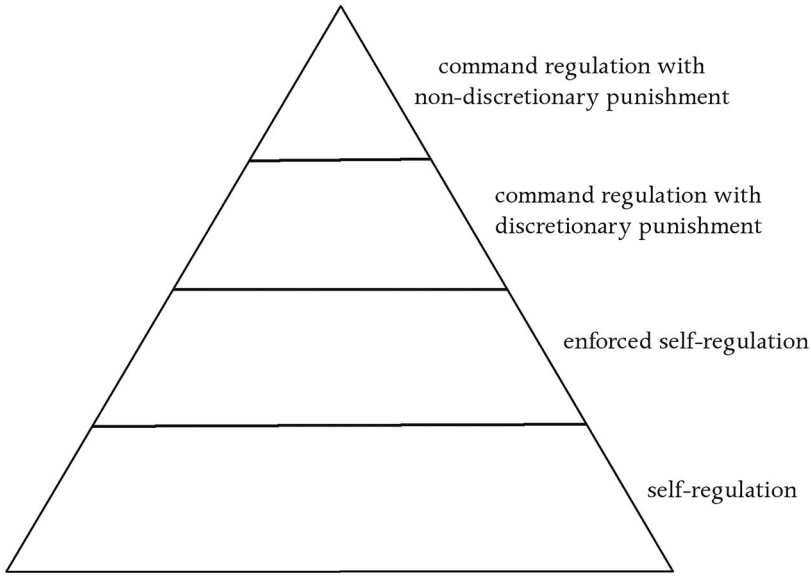

Figure 6.3: Regulatory Pyramid: Escalating Systems

Source: Author's research. Based on Ayres, Ian and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

In a more recent discussion of the tit-for-tat strategy, Braithwaite has warned against a rigid, doctrinal use of the pyramid approach. He reinforced the concept that there is a presumption for use of the least coercive technique, but that this is a presumption only. He styles the regulatory interventions as tools in a tool-box, and states that it is important to differentiate these tools from the work of the regulator. That is, the work, or goals, must be in the forefront of the thinking of the regulator. As such, there may be situations where, despite the presumption of starting at the foot of the regulatory pyramid, it is necessary to commence a regulatory intervention part-way up the pyramid, or even at its apex. Braithwaite discusses the possibility that occasionally it is necessary to have a radical escalation or even a radical de-escalation. As an example of a radical de-escalation, he discusses the situation where police confront an armed individual in a siege situation. In such a stand-off, he suggests that a radical de-escalation may involve bringing in the spouse, mother, or other loved one of the armed person, who may be able to persuade that person to surrender.

When discussing interventions by police and other forces in East Timor, he noted that a Catholic nun had intervened to diffuse stand-offs between violent youth gangs.[38]

Availability of Highly Punitive Punishments

Ayres and Braithwaite describe the most effective regulatory players as benign big guns. Such a player, they argue, speaks softly while carrying a very big stick. An example they give is the operation of the Reserve Bank of Australia, which has extensive powers to take over banks, seize gold, and increase reserve deposit rations. However, the Reserve Bank hardly ever uses its powers, but instead relies on persuasion,[39] which becomes a highly effective tool to the extent that it could be dubbed regulation by raised eyebrows. Ayres and Braithwaite argue that the greater the heights of punitiveness to which an agency can escalate, the greater its capacity to push regulation down to the cooperative base of the pyramid. The availability of highly punitive responses helps regulators to cultivate an image of invincibility, so that it is believed that the regulator is good to the loyal, but invincible when it decides to impose sanctions on the disloyal.[40] If the regulator is viewed as being invincible, there is little point in the regulated entity moving for a direct challenge, and cooperation is seen as the only viable approach.

It might also be said that strategic punishment can underwrite regulatory persuasion. In the event of the failure of persuasion, a punitive stance with a recalcitrant company can underwrite the authority of the regulator, who is seen as being fair in the eyes of responsible companies that do not cheat. If the regulatory agency is patient and fair in the escalation, giving warning of the inevitability of the escalation, it enhances even further its reputation for justice as well as strength against recalcitrance.[41] As argued by the Australian Law Reform Commission, effective regulation requires that rules must be implemented in a predictable and consistent manner.[42]

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38 Braithwaite, J, *Regulatory Capitalism* (Edward Elgar, 2008) 97–104.

39 Ayres, I and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) 40.

40 Ibid 44–47.

41 Ibid 42–43.

42 Australian Law Reform Commission, 'Penalties: Policy, Principles and Practice in Government Regulation' (Conference Discussion Paper, June 2001).

Tit-for-tat maximises the difference between the punishment payoff and the cooperation payoff. Cooperation is the economically rational response, and where punishment is perceived as a fair response, the intrinsic motivation of the actor continues to be supported.[43] Effective escalation is characterised by a short stick period of discomfort, followed by a longer carrot period of reintegration where the punished party is induced to cooperate with its punishers during the stick period. By inducing cooperation in the stick period, agencies reduce the costs of punishment, and self-punishment moves more quickly onto the carrot phase. In plea bargaining, for example, the threat of stick and stick makes stick and carrot seem the preferable option.[44]

The regulatory pyramid must also have the ability to manage a further category of regulated entities, namely those who act in an irrational rather than self-interested manner. For example, non-compliance may be the result of negligent management of a business rather than wilful pursuit of greater profits. Although mid-level sanctions may assist negligent management to raise its standards (for example, by compulsorily seeking a business consultancy report), the ability to incapacitate a business (for example, by the revocation of its licence to do business) should also be available.[45]

Pyramids with Multiple Regulators in Parallel

Since the original formulation of the regulatory pyramid model in 1992, there has been a significant literature dedicated to testing the theory in numerous empirical settings. This literature has resulted in a number of critiques and re-modelling of the regulatory pyramid approach.[46] One of the significant critiques of the theory is that it underestimates

43 Ayres, I and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) 49–51.

44 Ibid 43.

45 Ibid 30.

46 For example, Grabosky, P N, 'Discussion Paper: Inside the Pyramid: Conceptual Framework for the Analysis of Regulatory Systems' (1997) 25 *International Journal of the Sociology of Laws* 195; Drahos, P, 'Intellectual Property and Pharmaceutical Markets: A Nodal Governance Approach' (2004) 77 Summer *Temple Law Review* 401; Braithwaite, J, *Regulatory Capitalism* (Edward Elgar, 2008); Braithwaite, J, 'Methods of Power for Development: Weapons of the Weak, Weapons of the Strong' (2005) 26 *Michigan Journal of International Law* 297; Rawlings, G, 'Taxes and Transitional Treaties: Responsive Regulation and the Reassertion of Offshore Sovereignty' (2007) 27(1) *Law and Policy* 51; Parker, C, 'The "Compliance" Trap: The Moral Message in Responsive Regulatory Enforcement' (2006) 40 *Law and Society Review* 591.

the ability of industry self-regulation and third-party regulation to impose coercive measures on recalcitrant businesses. For example, in the diagram showing the pyramid of strategies (Figure 6.3), self-regulation is considered to be at the base of the pyramid, on the basis that it is the most persuasive and least coercive general strategy for business regulation. This was criticised as not being reflective of the potential coercive measures available through self-regulation.[47] For example, the ability of medical practitioner boards to revoke a medical practitioner's ability to practice is the equivalent of the business incapacitation of that individual and is a severe penalty for medical malpractice.[48] Similarly, the NSW legal practitioners' board was recently empowered to suspend the practicing certificates of barristers who went bankrupt as a method for avoiding tax responsibilities.[49]

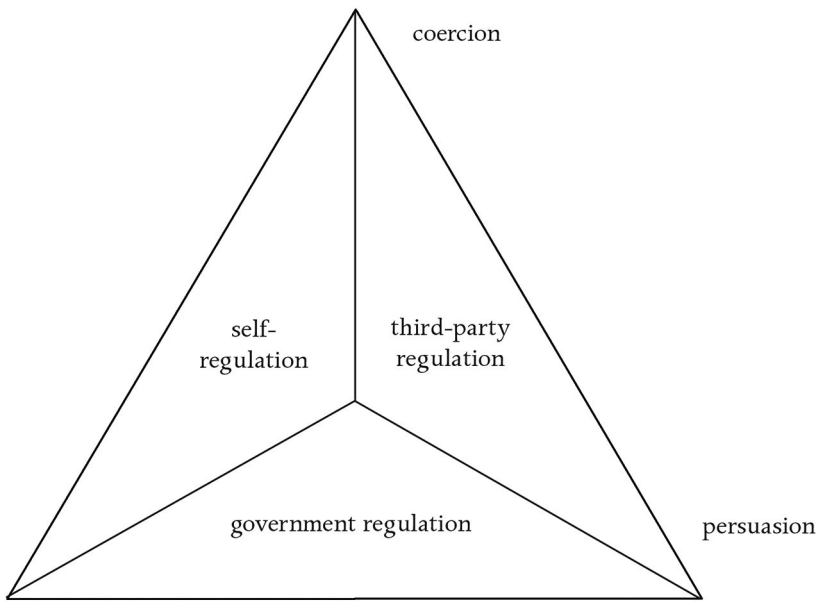

Figure 6.4: Regulatory Pyramid: Multiple Regulators in Parallel

Source: Author's research. Based on Grabosky, P N, 'Discussion Paper: Inside the Pyramid: Conceptual Framework for the Analysis of Regulatory Systems' (1997) 25 *International Journal of the Sociology of Laws* 195.

47 Grabosky, P N, 'Discussion Paper: Inside the Pyramid: Conceptual Framework for the Analysis of Regulatory Systems' (1997) 25 *International Journal of the Sociology of Laws* 195, 197–199.

48 Ibid 199.

49 Book, L, 'Refund Anticipation Loans and the Tax Gap' (2009) 20 *Stanford Law and Policy Review* 13–15.

A further critique of the regulatory pyramid was that it did not account for the action of third-party regulators, who are neither governments nor industry self-regulatory mechanisms. Although the original model contemplated action by way of adverse publicity, it did not specifically identify non-governmental or third-party operators as the regulators using this regulatory tool. By contrast, subsequent literature highlighted the ability of such operators to wield powerful coercive tools appropriately located in the upper part of a regulatory pyramid.[50] Examples include the ability of a bank to bankrupt a business in the event of consistent default,[51] and the ability of NGOs to use the media for the purpose of naming and shaming.[52]

In an effort to re-imagine the regulatory pyramid so as to address these limitations, Grabosky proposed a three-dimensional pyramid model (see Figure 6.4) that has three distinct faces. As with the original model, the vertical dimension represents the range of interventions available to a particular regulator, with the most coercive at the apex of the pyramid. Each of the faces of the pyramid represents the efforts of a different regulatory actor: government, industry self-regulation, or third-party regulation. The advantage of having the pyramid appear in three dimensions is that it gives a visual representation of the action of three different regulators, potentially acting simultaneously, in a single model. Each type of regulator is represented as having a full range of possible interventions available in their tool-kit, including highly coercive ones.[53]

Figure 6.4 discusses the concept of multiple regulators in parallel. It demonstrates how different regulators may operate simultaneously on a particular regulated industry, with each deploying a range of measures that range from persuasive to coercive. Operation of multiple regulators in parallel has particular relevance to the DNPM, in particular the tripartite nature of regulation under the Kimberley

50 Grabosky, P N, 'Discussion Paper: Inside the Pyramid: Conceptual Framework for the Analysis of Regulatory Systems' (1997) 25 *International Journal of the Sociology of Laws* 195, 199; Scott, above n 497. In Braithwaite, J, *Regulatory Capitalism* (Edward Elgar, 2008) 87–88, he notes that his earlier work discussed 'tripartism', but the role of third-party regulators was not worked seamlessly at that time into the regulatory pyramid model.

51 Grabosky, P N, 'Discussion Paper: Inside the Pyramid: Conceptual Framework for the Analysis of Regulatory Systems' (1997) 25 *International Journal of the Sociology of Laws* 195, 200.

52 Ibid 198–200.

53 Grabosky, P N, 'Discussion Paper: Inside the Pyramid: Conceptual Framework for the Analysis of Regulatory Systems' (1997) 25 *International Journal of the Sociology of Laws* 195, 198–201.

Process, which is depicted as part of the DNPM. Within and beyond the Kimberley Process, industry self-regulation, government regulation, and NGO regulation act simultaneously, with each regulator having at its disposal a range of sanctions starting with those of a more persuasive nature and moving up to progressively more coercive options. For example, within the private confines of the Kimberley Process, NGOs may raise compliance concerns of particular national governments with other parties. They may, however, ratchet up action against a non-compliant government through the means of organising a consumer boycott of diamonds produced by the national government, or indeed organising a boycott of the Kimberley Process. In parallel with regulation by such NGOs, industry and national governments have a range of available persuasive and coercive options at their disposal. Through the instrumentality of the Kimberley Process, industry and national governments cooperate to share information and regulatory approaches and, in cases of serious non-compliance, may recommend, endorse, and enforce a coercive diamond export ban on a particular country.

Pyramids with Multiple Regulators in Sequence

While different regulators may act simultaneously, or in parallel, on a particular regulated group, other systems involve a sequence of independently acting regulators. One such sequence was represented in a regulatory pyramid depicting police action to manage gang-led unrest in East Timor in 2006. At the base of the pyramid were community policing and problem-solving efforts by the Australian Federal Police operating in Dili and other parts of East Timor under international arrangements. Where such efforts were unsuccessful, and police were confronted with organised hostility by gangs, the AFP would pass the baton to the Portuguese elite force called the Guarda Nacional Republicana, who were armed with heavy firearms and had a range of more coercive strategies available to them, including the use of rubber bullets and pushing gangs apart with shields. The apex of the pyramid involved a third group, the joint Australian and New Zealand armed forces, who were able to initiate full-scale military operations as a last resort.[54]

54 Braithwaite, J, *Regulatory Capitalism* (Edward Elgar, 2008) 100–104.

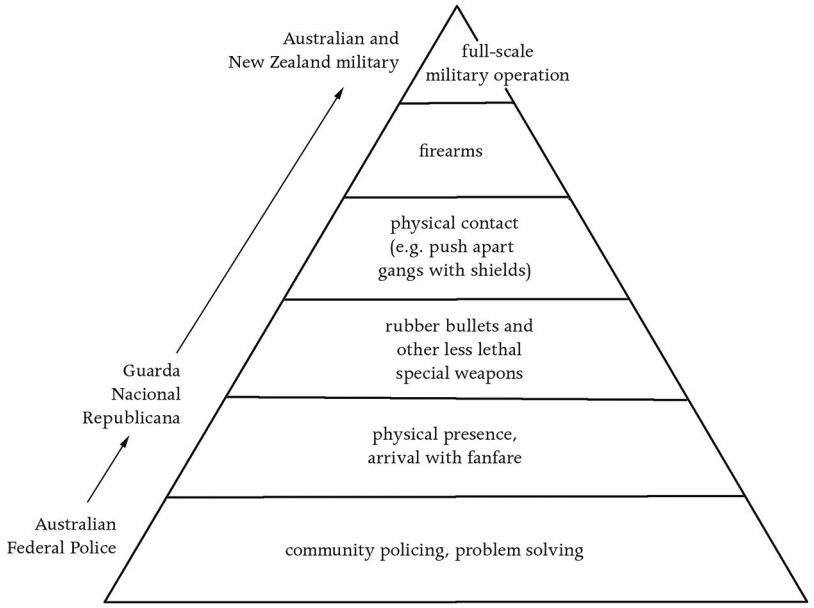

Figure 6.5: Regulatory Pyramid: Multiple Regulators in Sequence

Source: Author's research. Based on Braithwaite, John, *Regulatory Capitalism* (Edward Elgar, 2008).

The concept of multiple regulators in sequence is foundational to the DNPM developed in this book. Such an idea relates to the key idea that regulation is passed from national to international regulators, while, at the same time, the entirety can be understood as a single system for the regulation of conflict diamonds internationally. For example, the central regulator at the national level is the national government, however, national governments are themselves the subject of regulation by international operatives such as the Kimberley Process, the UNSC, and the ICC, particularly in the case that national governments are in serious breach of their responsibilities under the Kimberley Process.

The Strengths-Based Pyramid

A complementary partner to the regulatory pyramid, the strengths-based pyramid, has been proposed in recent regulatory literature. This model, which might also be usefully termed the pyramid of rewards, focuses on rewarding admirable behaviour rather than imposing sanctions on unsatisfactory behaviour. It is the carrot to the regulatory pyramid's stick. Table 6.1 contrasts the two approaches.

While the regulatory pyramid deters through fear and involves risk assessments of regulated parties, the pyramid of rewards creates incentives through hope, and encourages regulators to make opportunities assessments in relation to regulated parties.[55]

Table 6.1: Comparison of Regulatory Pyramid and Strengths-Based Pyramid

Regulatory Pyramid	Strengths-Based Pyramid
Risk assessment	Opportunities assessment
Fear	Hope
Prompt response before problem escalates	Wait patiently to support strengths that bubble up from below
Pushing standards above a floor	Pulling standards through a ceiling

Source: Author's research. Based on Braithwaite, John, *Regulatory Capitalism* (Edward Elgar, 2008).

Further elaboration of the pyramid of rewards is made easier with reference to Figure 6.6. Each sanctions escalation up the regulatory pyramid is mirrored by an escalation of rewards on the strengths-based pyramid. For example, at the base of both pyramids is education and persuasion, although the focus of such discussion in the regulatory pyramid concerns a problem to be avoided (at pains of possible sanctions), whereas the education in its complementary pyramid is in relation to a strength that is being encouraged. The well-known practice of naming and shaming in the regulatory pyramid is paralleled by naming and faming, through which positive behaviour is praised to encourage the regulated party, as well as bringing the behaviour to the attention of others as a model worthy of emulation.[56]

Ratchetting up the regulatory pyramid are sanctions imposed for failure to meet a standard, so as to deter both the regulated party and others from violating that standard. At the equivalent place in the pyramid of rewards is a prize or grant through which financial reward is added to prestige and praise for achievement and commitment to exceeding minimum standards. Escalated sanctions in the regulatory pyramid lead ultimately to what Braithwaite terms capital punishment, which may also be read, in the business world,

55 Ibid 115–126.
56 Ibid.

as revoking a corporation's right to operate. While it is unlikely that Braithwaite is championing the death penalty for natural persons, his general point is that there should be a serious consequence to either natural persons or business entities that can be deployed in the most extreme cases of non-compliance with regulatory standards. In the parallel world of the pyramid of rewards, the apex might be a highly prestigious and/or financially rewarding prize, such as the academy awards given annually in the motion picture industry. While the apex for either punishment or reward is infrequently bestowed, the possibility of its imposition serves to either deter or inspire, as the case may be, greater action.[57]

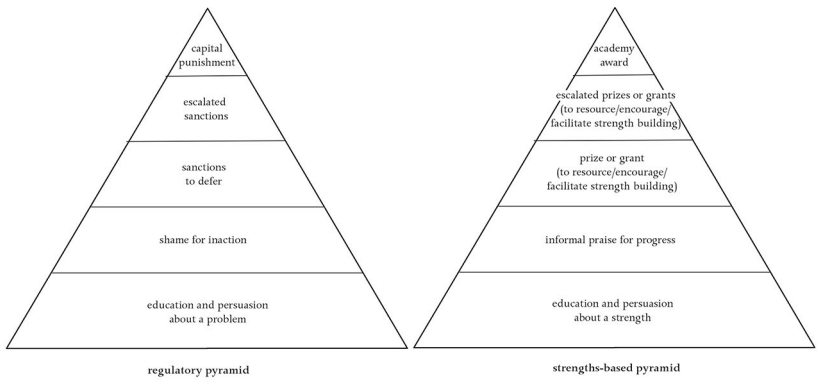

Figure 6.6: Diagram of Regulatory Pyramid and Strengths-Based Pyramid

Source: Author's research. Based on Braithwaite, John, *Regulatory Capitalism* (Edward Elgar, 2008).

The Networked Pyramid Hybrid Model

Over the last few years there have been attempts to combine the essential features of network models and pyramid models so as to benefit from the insights from both theoretical frameworks. In so doing, these new approaches seek to benefit from both the horizontal thinking of the network approaches, as well as the ability to escalate vertically to more coercive forms of intervention. In thinking about

57 Ibid.

the simultaneous applicability of two theoretical approaches to a real world issue, it might be recalled that in the field of physics, light, paradoxically, was observed to behave as both a particle and a wave at the same time.

Vertical Networks

Some of the first thinking about mixed models occurred with the development of network models involving elements of coercion. Braithwaite and Drahos proposed a web of reward and coercion. They suggested that reward involves increasing the value of compliance, while coercion is concerned with reducing the value of non-compliance. Techniques of reward include the provision of foreign aid, while coercion can involve economic sanctions or the threat or use of military force. According to Braithwaite and Drahos, only a few actors on the international stage had the resources to deploy reward and coercion techniques, notably the US, EU, China, and the World Bank.[58]

Braithwaite and Drahos argued that webs of reward and coercion were in general less efficient than webs of dialogue and that this was the case because extrinsic pressures overwhelm intrinsic motivation and normative commitment to comply. By contrast, dialogic webs heighten the probability that norms established will be internalised by actors who are part of the web.[59]

Slaughter's vertical government network involved a more sophisticated attempt to bring together network approaches and coercive regulatory interventions, recognising that nation states will, for specific problems, form genuinely powerful supranational institutions that are able to overcome the collective action problems inherent in formulating and implementing global solutions. Hard power is exercised by the institution, which is not simply the combined membership of the network, such as the ability to make a binding decision in relation

58 Braithwaite, J and P Drahos, *Global Business Regulation* (Cambridge University Press, 2000) 557–559.
59 Ibid.

to a country, including co-opting domestic government enforcement powers, or excluding a country from membership. This power can be contrasted with the soft power of information, socialisation, persuasion, and discussion. However, as they involve national governments as well as supranational entities, they are still considered to be networks.[60]

The Dispute Resolution Panel of the WTO is the supranational organisation exercising hard power over national governments in the WTO vertical government network. The panel consists of three experts, who make binding decisions based on their understanding of WTO treaty instruments. These decisions affect individual members and the generality of the membership of the government network of WTO members. Other vertical networks are spearheaded by the European Court and the European Commission.[61]

A significant point to be considered in relation to vertical networks is that supranational organisations are more effective in performing functions that states charge them to perform if they can link directly with national government institutions. Such linkages resolve the traditional problem of the inability to enforce decisions of a world body, such as the International Court of Justice, in the absence of a permanent international police force or other enforcement agency. A practical solution to this dilemma is where the existing national enforcement networks are drawn upon by the supranational body. For example, the European Court of Justice interacts directly with national courts to ensure that its decisions are reflected in the decision making of their counterparts at the national level. This is a disaggregated state approach, in which courts interact directly with each other without, for example, being mediated by the respective minister for foreign affairs.[62]

Another example of a vertical network is the complementarity system established by the *Rome Statute for the International Criminal Court 1998*. Under this system, primary jurisdiction is exercised by national courts over war crimes, crimes against humanity, and genocide. It is only where a national court is unable or unwilling to prosecute

60 Slaughter, A-M, *A New World Order* (Princeton University Press, 2004) 269.
61 Ibid 13, 269.
62 Ibid 20.

that the ICC may claim jurisdiction and take over a prosecution. The possibility of such a jurisdictional takeover occurring is, in principle, a motivating factor for national prosecutors to take their responsibilities in this matter seriously. It should be noted, however, that the international system benefits from this primacy. The international court is unlikely to have the resources to manage all prosecutions that must be followed throughout the world. Therefore, relying on appropriately well-established national systems significantly relieves this case load, and enables the international court to co-opt the domestic courts to promote its international objectives. National courts, in addition, would increasingly be reliant on precedent-setting cases handed down by the international court, thereby promoting a uniform jurisprudence on international criminal law.[63]

It might be noted that Slaughter does not include secretariats, commissions, and other information agencies under the rubric of vertical government networks, as they are perceived as operating solely though the soft power of information sharing, dialogue, and persuasion only. In this category are placed the technical committee of the International Organisation of Securities Commissioners, the Secretariat of the Convention on the International Trade in Endangered Species, and the Secretariat of the Commonwealth. As they do not possess the binding, coercive powers of bodies such as the European Court of Justice, they are seen rather as handmaidens to national government officials, providing such officials with information needed to coordinate and enforce national law. Nevertheless, this role represents a real level of power, particularly when it is recognised that the professional reputation of member agencies can be buttressed or damaged as a result of compliance information obtained and transferred by a secretariat body. Such modes of operation are increasingly seen as more flexible, responsible and effective than command-and-control approaches.[64]

63 Ibid 21, 147.
64 Ibid 156.

Pyramids Linked with Networks and Nodes

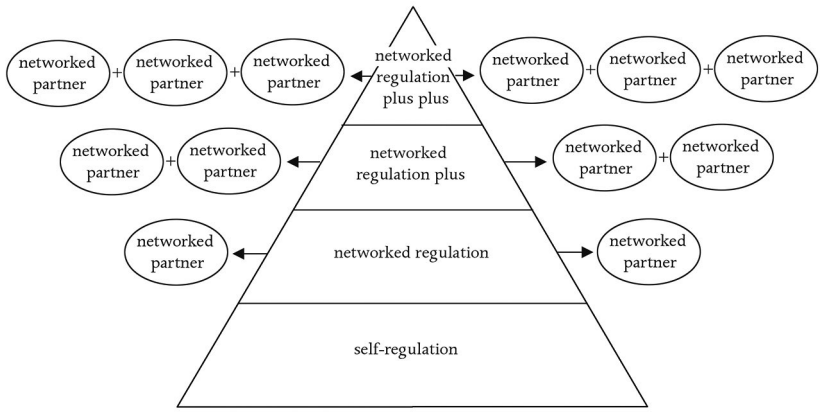

Figure 6.7: Regulatory Pyramid: Escalating Using Networked Partners

Source: Author's research. Based on Braithwaite, John, *Regulatory Capitalism* (Edward Elgar, 2008).

A number of recent developments in regulatory theory have sought to bring together both regulatory pyramid and network models. Some of the concrete examples explored have considered these models in an international context rather than a purely national one. One of the general framework diagrams set out above by Braithwaite shows the ability of a regulator to elicit the support of a new regulator, which is perhaps a network of people, businesses, or organisations. The new regulator adds new resources, information, expertise and regulatory intervention tools that may be deployed. As the resources of further regulators/networks are enlisted, an even greater range of resources, information, expertise and tools are made available to the primary regulator.[65]

65 Braithwaite, J, *Regulatory Capitalism* (Edward Elgar, 2008) 94–97.

One of the important developments in networks theory over the last few years is the concept of the node. A node is like the command centre for a network, where resources and expertise are pooled, and key decisions are made. A grass-roots example of a node in relation to a network comes from the movement for peace and security in South African townships. A diverse range of people wanting to promote peace and security through dialogue and discussion at the local level constitutes the network, while the node, where resources are pooled and key decisions made, is the peace committees.[66] The literature also states that there are meta-nodes, where a number of different networks are represented in a single decision-making forum. An example of such a meta-node is discussed below in the section about the international intellectual property regime.

A further model, developed by Drahos, seeks to explain some of the interaction between network and pyramid concepts in a hybrid model. Drahos' model suggests that the reach of a regulatory pyramid is extended by its connection with a greater number of nodes. This model, like that developed by Braithwaite, notes that networks and their nodal command centres add resources, information, expertise, and tools to a primary regulator. The concept of regulatory reach in the context of Drahos' model includes the ability of a regulatory regime, such as intellectual property protection, to operate in an increasing number of national jurisdictions throughout the globe.[67]

66 Burris, S, P Drahos and C Shearing, 'Nodal Governance' (2005) 30 *Australian Journal of Legal Philosophy* 30, 30–43; Drahos, P, 'Intellectual Property and Pharmaceutical Markets: A Nodal Governance Approach' (2004) 77 Summer *Temple Law Review* 401, 404–405.

67 Drahos, P, 'Intellectual Property and Pharmaceutical Markets: A Nodal Governance Approach' (2004) 77 Summer *Temple Law Review* 401, 418–419.

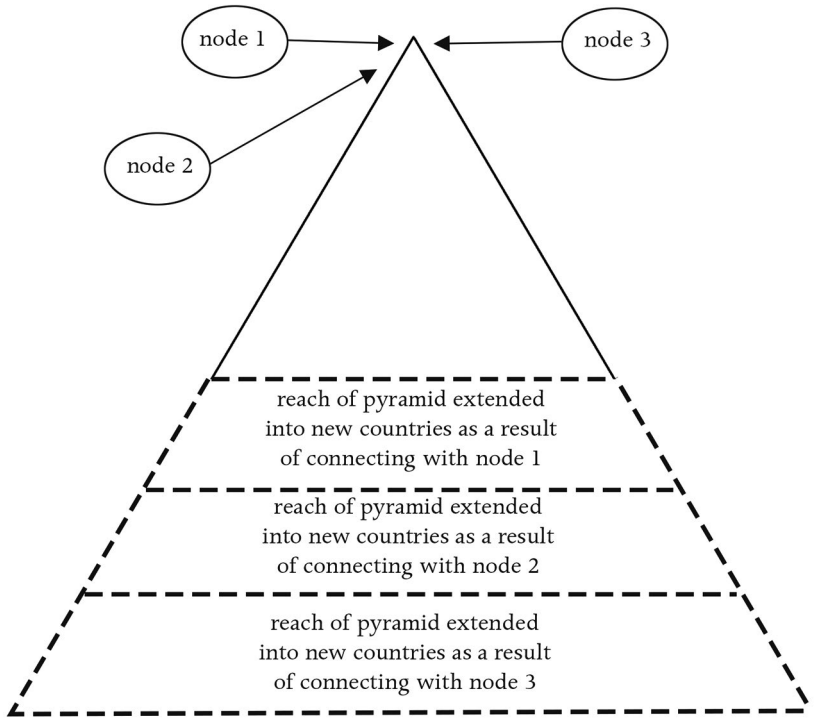

Figure 6.8: Nodes and the Reach of an Enforcement Pyramid

Source: Author's research. Based on Drahos, P, 'Intellectual Property and Pharmaceutical Markets: A Nodal Governance Approach' (2004) 77 Summer *Temple Law Review* 401.

Hybrid Models Applied to Different Systems

The Intellectual Property Regulatory Pyramid

Drahos diagrammatically sets out a significant example of the way in which an international pyramid is constructed, and its utilisation of nodes and networks. The example considers the development and export of legal standards for intellectual property protection from the United States to other countries in the international community. Drahos discusses how the process was initiated and has subsequently been sustained by a large number of multinational corporations based in the United States, which come from industries such as pharmaceuticals, software and entertainment, seeking patent and copyright protection for their products. In particular, the corporations

seek intellectual property protection in emerging markets so that they can financially benefit from exporting products or operating there in line with the situation they enjoy in the US domestic market.[68]

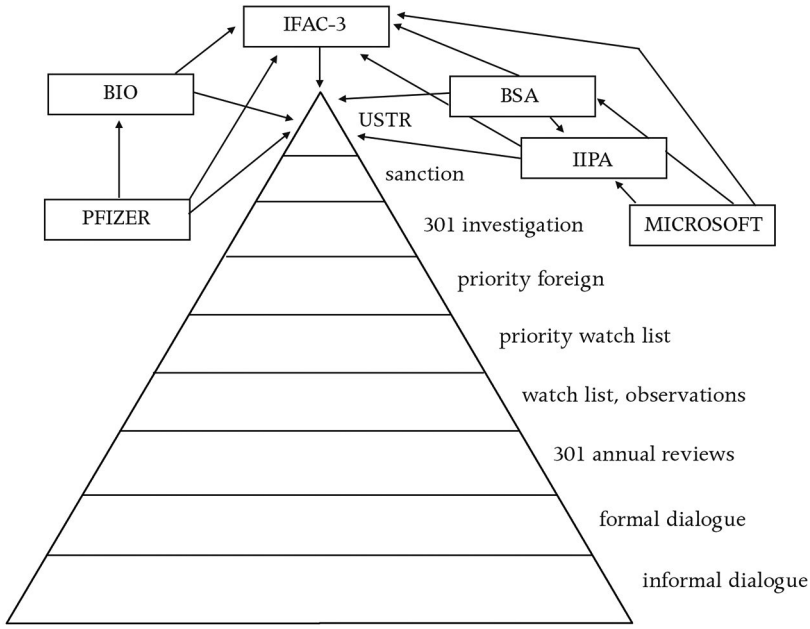

Figure 6.9: Nodally Coordinated International Enforcement Pyramid for Intellectual Property Rights

Source: Author's research. Based on Drahos, P, 'Intellectual Property and Pharmaceutical Markets: A Nodal Governance Approach' (2004) 77 Summer *Temple Law Review* 401.

Drahos charts how the corporations enlisted the support of the US Government in the 1980s, which actively pursued the intellectual property agenda through multilateral treaties such as the Agreement on Trade-Related Aspects of Intellectual Property Rights, and bilateral negotiations. His regulatory model involves both a pyramid, the apex of which is the key regulator, the US Trade Representative, as well as showing connections to the nodes that play a central role in the regulatory system. The interventions available to the US Trade Representative begin with informal dialogue, continue on to listing on various types of watch lists, with the ultimate intervention being the

68 Ibid 413–419; see also Burris, S, P Drahos and C Shearing, 'Nodal Governance' (2005) 30 *Australian Journal of Legal Philosophy* 30.

imposition of formal trade sanctions on a country, thereby depriving that country of access to the very large US market for its export goods. The US Trade Representative is empowered by interaction with some important nodes, the most significant of which is the Industry Functional Advisory Committee on Intellectual Property Rights for Trade Policy Matters (IFAC-3). This body is a committee that advises the US Congress and President on all matters that relate to intellectual property in prospective trade agreements. It is composed of a number of representatives of peak industry groups with an interest in international recognition of intellectual property standards, such as the pharmaceutical, software, and entertainment industries. IFAC-3 contributes its expertise, information resources, and political influence towards promoting the goals of US-based multinationals. Besides offering formal advice as to whether an agreement is in the economic interests of the US, the committee occasionally also takes an active role in the finalisation of actual text of intellectual property provisions in agreements. For example, it was a major drafter of the US–Singapore free-trade agreement.[69]

Other nodes identified by Drahos as interacting with the US-based intellectual property regulatory pyramid are peak industry bodies: the Biotechnology Industry Organization, with a membership of more than 1,000 member organisations, the Business Standards Association, which is concerned with copyright issues, and the International Intellectual Property Alliance, with a membership of over 1,100 companies. These are industry peak bodies that are constituted with the goal of advancing the common goals of its membership with respect to intellectual property. Each is directly represented on IFAC-3, although, as Figure 6.9 shows, each may also interact directly with the US Trade Representative. Because IFAC-3 harnesses the resources of a number of nodes, it is described by Drahos as a meta-node.[70]

The concept of the nodally coordinated enforcement pyramid is an important regulatory idea that is developed by the author in the DNPM. In a nodally coordinated pyramid, the regulation is undertaken by a node of actors, in the case of intellectual property regulation,

69 Drahos, P, 'Intellectual Property and Pharmaceutical Markets: A Nodal Governance Approach' (2004) 77 Summer *Temple Law Review* 401, 401–419.
70 Ibid.

business and government. Such nodal action is also reflected in the Kimberley Process, which operates as a node that brings together NGO, corporate, and governmental players. Such players share key information as well as carrying out enforcement action in the case of Kimberley Process non-compliance.

The Traditional Knowledge Pyramid

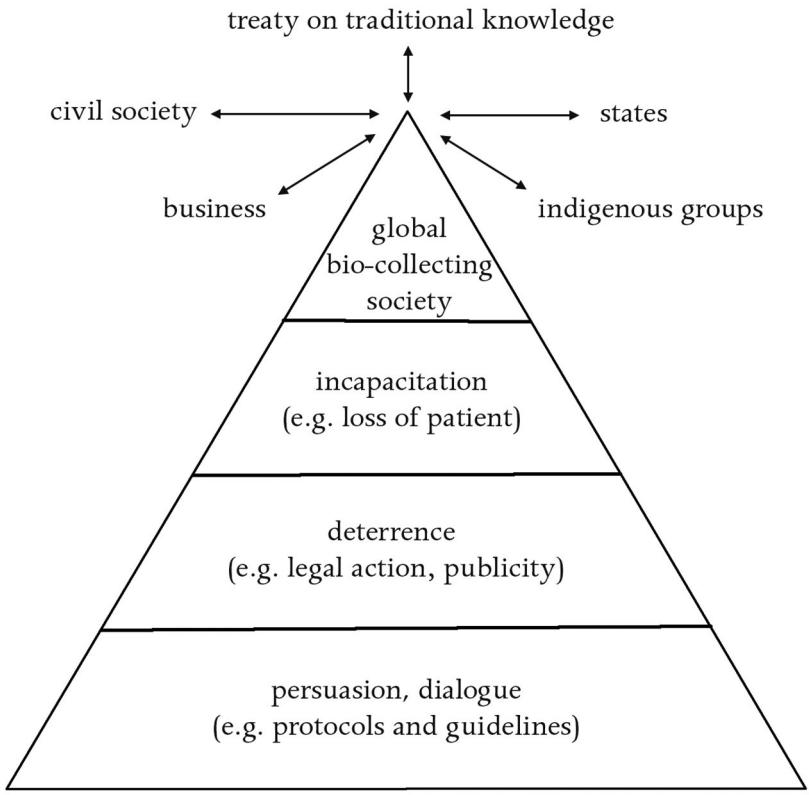

Figure 6.10: International Enforcement Pyramid for Traditional Knowledge

Source: Author's research. Based on Drahos, P, 'Intellectual Property and Pharmaceutical Markets: A Nodal Governance Approach' (2004) 77 *Summer Temple Law Review* 401.

Drahos gives another example of an international enforcement model, involving pyramids and networks, to represent a potential regulatory model for the regulation of traditional knowledge. Traditional knowledge is the broad range of customary knowledge known by indigenous peoples around the world, including the use of genetic

resources from local flora and fauna. Drahos proposes a model where the primary regulator is a potential global bio-collecting society. The global bio-collecting society, for example, is well-placed to provide resources to indigenous groups seeking to protect a particular patent. Identifying possible patent infringements by carefully examining patent applications and existing patents can be an exhaustive process, which indigenous groups may not always have the resources to undertake. Therefore, the resources of the global bio-collecting society, and any other groups they may be able to network with such as business, states or civil society, are vital from the regulatory perspective.[71]

The Threat of Collective Debt Default

A further example of an international regulatory pyramid, connected to appropriate networks, has been suggested as a means by which developing countries could leverage their resources internationally around issues of significance to them. The regulatory tool is an example of turning a perceived weakness — the massive scale of the debt of developing countries to countries and financial institutions in the developed world — into a strength. It is based on the somewhat ironic notion that a person with an enormous financial debt to a bank has a lot of effective control over that institution. The concept that developing countries might network for the purpose of making a coordinated default on their bank loans has real weight to it, considering that the collective debt has been estimated to be US$2.5 trillion. Braithwaite suggests that such an intervention might represent the apex of a regulatory pyramid, and that the threat of this intervention could be used by developing countries with a view to making gains in other areas of collective interest. These areas might include the lowering of agricultural tariffs that currently exist in some developed countries against exports from developing nations.[72]

71 Ibid 419–424.

72 Braithwaite, J, 'Methods of Power for Development: Weapons of the Weak, Weapons of the Strong' (2005) 26 *Michigan Journal of International Law* 297, 311–330.

Regulation of International Tax Havens

The regulation of international tax havens, also known as offshore financial centres, has also been considered in terms of the regulatory pyramid model. An understanding of the way in which the regulatory pyramid model has been applied to specific international regulatory systems demonstrates the utility of the model in understanding such systems. Such an in-depth understanding is important because the regulatory pyramid model is one of the foundational theoretical models that underpins the author's DNPM.

The central concern of the regulation of international tax havens is the behaviour of a number of nation states, such as Liechtenstein, Monaco, and the Bahamas, which do not impose tax on international persons or businesses, thereby operating as a way for foreign nationals to avoid their tax obligations. The article considered the regulatory efforts of international organisations, including the Organisation of Economic Co-operation and Development (OECD), the International Monetary Fund (IMF) and the European Union. Empowered with significant coercive tools at their disposal, these organisations have attempted to achieve tax law reform in these nations. A further development, however, were attempts of a number of countries to foster bilateral tax arrangements known as double tax treaties. Under the provisions of these treaties, the relevant tax haven undertakes obligations to the effect that, where a person or business had affiliations with another country, it must pay tax either to that country or to the government of the tax haven country. However, according to Rawlings, the effect of negotiating these agreements was to grant recognition and political capital to the tax haven in question. Bolstered by the new political support, it became more difficult for the international organisation to enforce a greater level of cooperation in relation to that country.[73]

The study of international tax havens has utility for the development of a model to help understand the descriptive and normative operation of the international conflict diamonds governance system. The tax havens case study shows that the regulatory pyramid model can be used to hierarchically sequence a number of international regulators as well as the persuasive and coercive interventions they offer. The model

73 Rawlings, G, 'Taxes and Transitional Treaties: Responsive Regulation and the Reassertion of Offshore Sovereignty' (2007) 27(1) *Law and Policy* 51, 51–66.

of double tax treaties is a less coercive intervention, as it provides tax relief in the event that tax has already been paid in the country of residence. Potentially more interventionist strategies are applicable through the auspices of the OECD, the IMF, and the European Union. Similarly, the DNPM deploys, in part, the regulatory pyramid approach in an attempt to describe the operation of international and national regulators in the conflict diamonds governance system. Like the international tax havens example, it benefits from the application of the regulatory pyramid, as the pyramid demonstrates how the deployment of an escalating range of sanctions is efficacious in dealing with non-compliance with the conflict diamonds regime. The regulatory pyramid model in the international setting is able to effectively describe the way in which an issue might be transferred to a different international regulator for more efficacious intervention, thereby making use of a sequence of international regulators.

Concluding Remarks

This book considers two main research questions:

1. To what extent has the conflict diamonds governance system achieved its objectives?
2. Does an application of the networked pyramid regulatory model to the system provide descriptive or normative insights into its effectiveness?

The role of this chapter was to provide the necessary theoretical underpinning for a sophisticated response to the second question, which comes from a regulatory point of departure, rather than a strictly legal one. Rather than a purely legal analysis that identifies sources of law, from which particular rights and obligations are derived and articulated, a regulatory perspective considers whether a legal system has been successful in achieving its core objectives. Regulation does not confine itself to strictly legal systems, but includes non-governmental and civil society organisations as protagonists in systems involving standard-setting, monitoring, and behaviour modification.

A number of specific models have been developed to explain why some regulatory systems have proven to be effective, and how their efficacy might be further improved. The network model recognises that

regulation occurs horizontally between governments, corporations, and NGOs in webs that promote normative commitment to common goals. The main regulatory techniques involved in such networks are dialogue, persuasion, and socialisation. Although the pyramid model allows for techniques of dialogue, persuasion, and socialisation, it also suggests that there is an important role to be played by more coercive interventions in appropriate cases. If these vertical interventions are employed infrequently and judiciously, then there is an overall reinforcement of the dialogue and socialisation occurring at the base of the pyramid. The networked pyramid hybrid model seeks to combine the key features of both models into a single approach. It recognises, for example, that there may be a network of regulators who operate simultaneously, or who operate in sequence, by passing the regulatory baton to others in the network. Node concept provides a logical connection between network and pyramid models. This concept recognises that networked regulation has a command centre or node that, as well as benefiting from the information-gathering nature of the network, is able to deploy an escalating array of interventions, as envisaged by regulators in the pyramid model.

Recalling that the second research question requires the application of the networked pyramid model to the conflict diamonds governance system, a sub-issue relates to the immediate readiness of the existing theoretical model to accommodate such an application. As discussed in chapters 3 to 5, the conflict diamonds governance system is a complex system involving simultaneous regulatory action at both national and international levels, and in which national governments regulate and are regulated. A system of this complexity has not previously been adequately modelled using the networked pyramid approach. To accommodate these requirements, the model itself needs to be elaborated. It will be argued that an optimal model should include both incentives and sanctions in a single diagrammatic approach. The construction of a model fulfilling these two objectives is addressed in the next chapter.

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