Environment Law, Regulation, Governance: Shifting Architectures

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Explaining Shifting Architectures

➢ How has the architecture of environmental law, regulation and governance changed?

➢ Why have these changes taken place and what are their consequences

➢ from law, to state-centered regulation to polycentric governance?

➢ what sorts of architectures work and why?

➢ Implications for theory and policy

A structure

➢Roles of the state

➢Roles of business

➢Roles of civil society /NGOs

➢An Integrated approach

The State: First Generation Environmental Law and Regulation

➤ The Beginning: 1970 and beyond

➤ Characterised by direct 'command and control' regulation

➤ Focus on large point source polluters and 'brown' issues

➤ Focus on 'end of pipe'

➤ Common approach in N America, Western Europe and Australasia but differential enforcement

➤ Did it work?

Second Generation Environmental Regulation: A Return to Markets?

➢ The Shift to Neo-Liberalism
➢ Increase focus on economic instruments
➢ Voluntary instruments, negotiated Agreements and partnerships
➢ Industry self-regulation and co-regulation
➢ So less law, and more light handed regulation
➢ Did it work?

Reinventing Environmental Regulation: A Transitional Strategy

- Light handed regulation
- Aim to nurture a cooperative relationship with business built on trust and reciprocity (Yorktown)
- Tacit assumption of 'win-win' and the desirability of going 'beyond compliance'
- Emphasis on environmental management systems
- Incorporates pollution prevention, internal compliance auditing, and compliance assurance
- Engagement with third parties (communities etc)
- Collaboration rather than conflict

Challenges to State Regulation:

1990s and beyond

- ➤ Increasingly complexity of the environmental challenge
- ➤ Responses: meta regulation, collaborative governance, engaging with SMEs
- ➤ Shift from dyadic approach to solutions involving business and civil society

A Context: Shifting Regulatory Architecture

➢ The contracting state

➢ Increasing engagement of communities/civil society

➢ Increasing involvement of business/commercial third parties

Civil Society

➢ organisations of civil society set standards for business behaviour

➢ Mechanisms include consumer boycotts, certification programs, partnerships and direct action

➢ State role to empower civil society eg the Toxic Release Inventory

Business

➢ Part of the problem or part of the solution?

➢ Business Case for Environment Responsibility

 - Environment protection as Risk Management

 - Environment Protection as Business Opportunity

- CSR and going "Beyond compliance"

➢ Collective Initiatives: Responsible Care and INPO

➢ Protecting Social and Reputation Capital- TRI , NIMBY pulp

Bringing It All Together: 1. Smart Regulation

➢ Market failure/government failure

➢ A diversity of "next generation" instruments, but how do we select between them?

➢ One size does not fit all: eg size and sector matter

Smart Regulation

➤ Solutions require:

- broader range of strategies,

- tailored to broader range of motivations,

- harnessing broader range of social actors

➤ Recognises roles of ISO, supply-chain pressure, commercial institutions,financial markets, peer and NGO pressure

➤ 'steering not rowing'': harnessing capacities of markets,civil society and other institutions
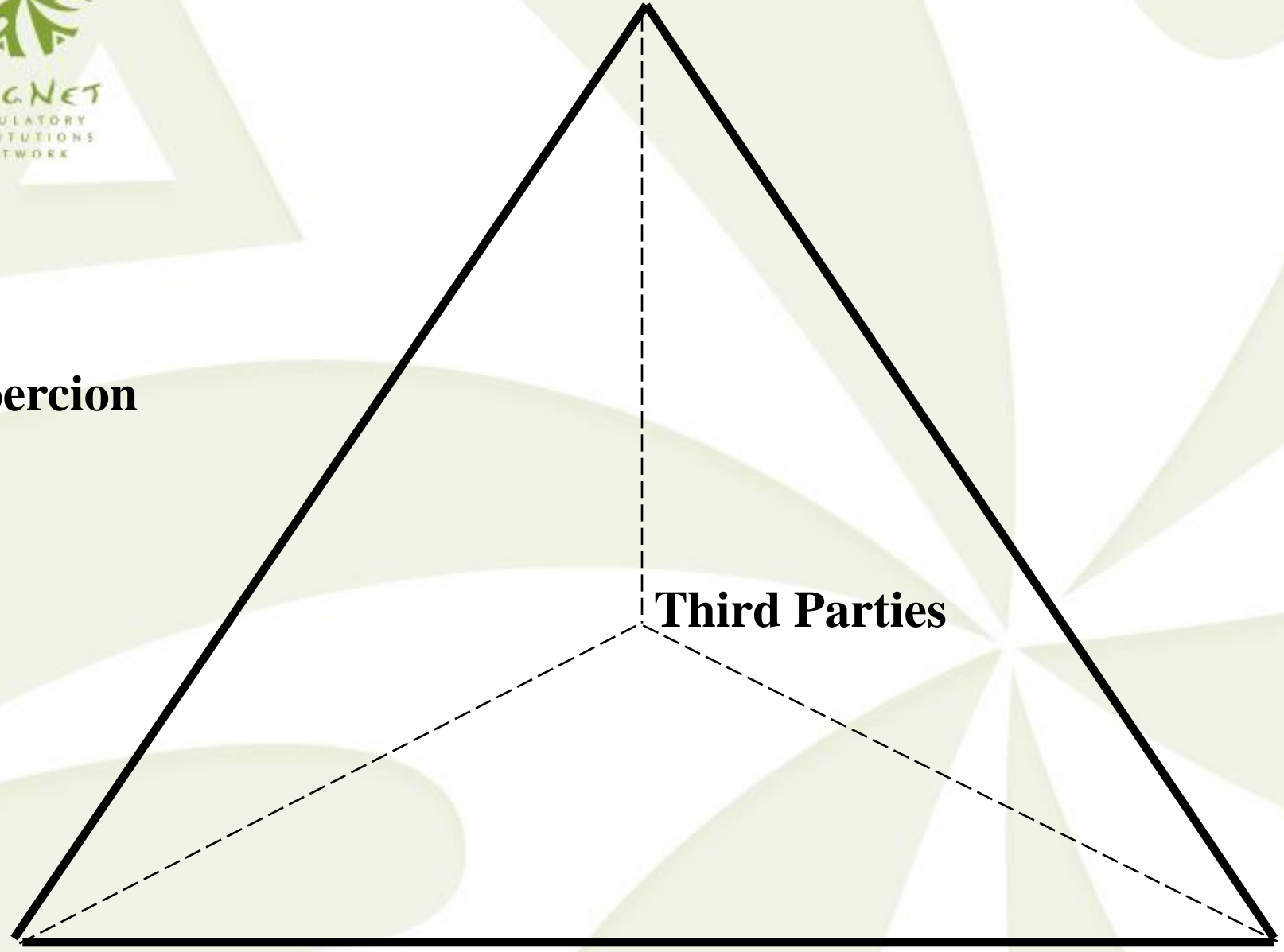
Optimal Mixes Involve

➢ build on strengths and compensate for weaknesses of individual instruments

➢ build on advantages of engaging broader range of parties

➢ matching tools with particular problem

➢ with the parties best capable of implementing them

➢ with each other

H

Coercion

Third Parties

L Government

Business

Environment Improvement Plans:

- ➢ Public commitment by a company to enhance its environmental performance
- ➢ negotiated with the local community, local government, EPA and others
- ➢ clear time-lines for completion of improvements
- ➢ details of ongoing monitoring
- ➢ Tripartism, disclosure, consultation.

SMEs: Thinking Laterally

➤ Buyer Supplier Relationships

  - Powerful source of leverage over SMEs

➤ The Role of Surrogate Regulators:
   - MTA as de facto regulator

➤ Self-audit and self-management

Bringing It All Together: (2) Explaining Corporate Environmental Behaviour

➢ Views businesses as constrained by a multi-faceted 'license to operate'

➢ Corporate behaviour explained by interactions between regulatory, social and economic licenses

 - terms of legal and social licence commonly mutually reinforcing

 - terms of economic and regulatory licenses commonly in conflict but regulatory trumps the economic licence

➢ The importance of Social License: underpinned by   Informational regulation, and empowering NGOs and communities
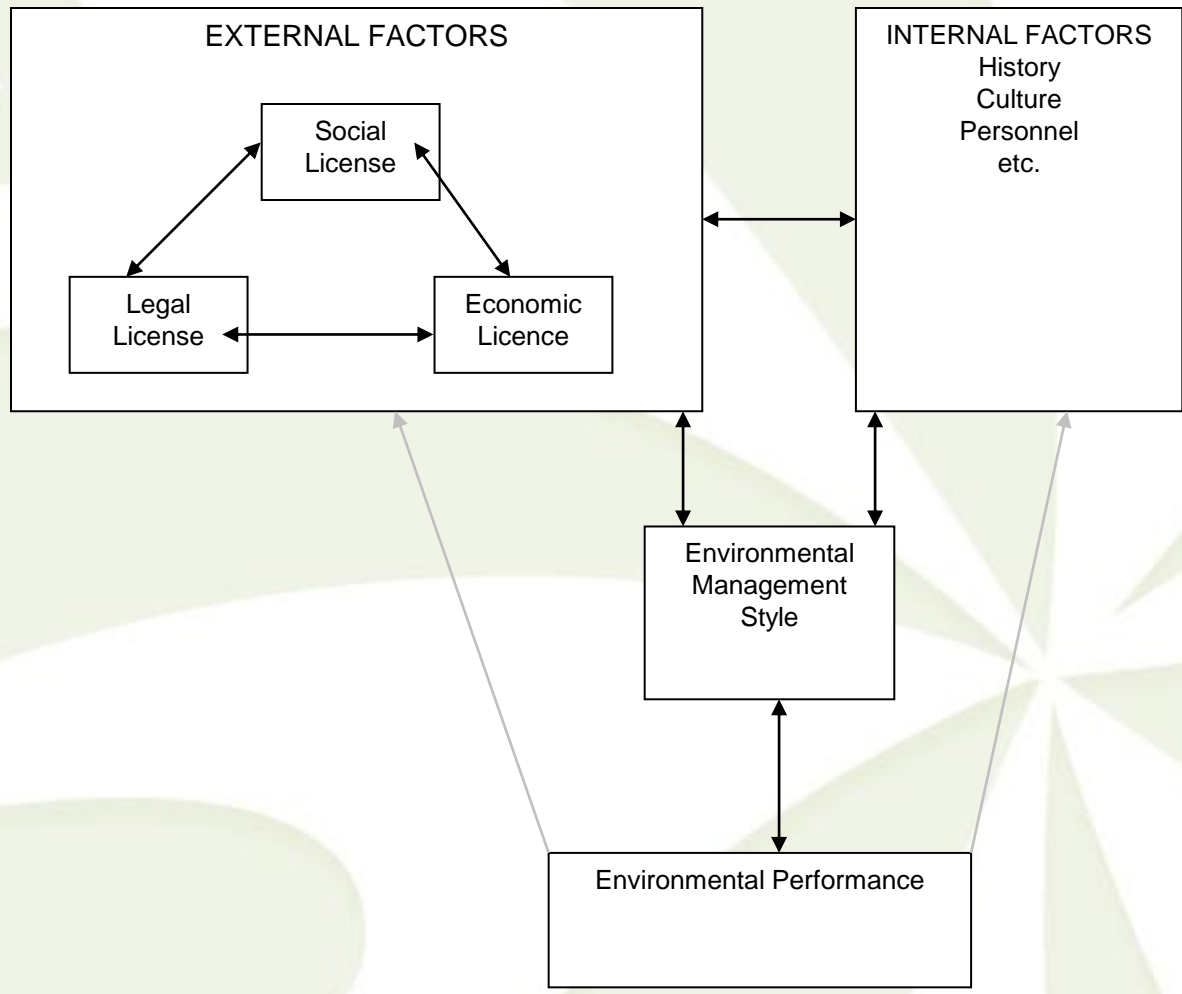
Bringing it all together (3) Meta Regulation

➤ Recognises the limitations of the state to deal with complex environmental issues

➤ Focus on procedures rather than prescribing behaviour

➤ State shifts to meta-regulation and meta-risk management

- Government monitoring of self-monitoring, or the regulation of self-regulation

- To monitor and seek to re-make the risk management systems of regulatees

- Three Mile Island: from rule-following automatons to strategic thinkers

- Piper Alpha and the 'safety case' for North Sea Oil

Taking Stock

➢ Traditional regulation has largely been rejected in favour of 'light handed' regulation

➢ Neo-liberal mechanisms (voluntarism, self regulation, partnerships etc has not worked well)

➢ Contemporary environmental challenges are increasingly complex and do not lend themselves to direct regulation

➢ Are there alternative strategies better able to address such problems?

Yes: Smart Regulation, License Pressures, Meta Regulation etc

But such innovative strategies still assume

➢ that the key actors in regulatory governance are state actors

➢ That the key instruments are underpinned by state law and hierarchy

A post-regulatory state?

➢ Is it arguable that:

(i) The capacity of law to exert control is limited

(ii) Control based on law is marginal to contemporary processes of ordering

(iii) State law is only likely to be effective when linked to other ordering processes

(iv) From regulation to governance?

The New Environmental Governance

Involves collaboration between a diversity of private, public and non-government stakeholders who, acting together towards commonly agreed (or mutually negotiated) goals, hope to achieve far more collectively than individually

Regional Natural Resource Management (NRM) in Australia

- ➢ Recognition that NRM best addressed at ecosystem level
- ➢ Devolution of NRM decision-making to regional level (56 regional NRM bodies)- a 'fourth sphere of governance'
- ➢ Regional bodies: partnership involving both government and non-government actors (community, rural and other stakeholders)
- must develop a regional plan and investment strategy
- Implement these under a collaborative partnership-based decision-making process
- Subject to performance indicators and other controls imposed by Federal Government
- Federal Government tight control over purse strings and strict accountability mechanisms

The New Regional NRM

➢ Assumes that the state has only very limited ability to achieve its NRM objectives directly

➢ enlists non-state actors with local capacities and local knowledge

➢ involves a combination of government and non-state actors

➢ Multi-party, multi-level and multi-faceted

➢ Formal democratic accountability at top level and deliberative democracy at the regional level

The New Collaborative Environmental Governance

- Participatory dialogue
- Devolved decision-making
- Flexibility
- Inclusiveness
- Transparency
- Institutionalised consensus-building

- Cf EU Open Method of Co-Ordination/Water Framework Directive

Different architectures invoke different policy prescriptions

➤ Strengthen internal reflection and self-control (Meta Regulation)

➤ Use mix of instruments and harness third parties/points of leverage (Smart Regulation)

➤ Empower the institutions of civil society to make corporations more accountable (Civil Regulation)

➤ Empower local communities to engage in 'on ground' decision-making subject to central government oversight (collaborative governance)

Different architectures are appropriate to different contexts

➤ Large reputation sensitive companies vs SMEs

➤ Integrated catchment management

➤ Major Hazard Facilities

➤ Diffuse source pollution

Markets, Hierarchies, Networks/collaboration

➤ Hierarchy: is the state being decentred or simply shifting its roles?

➤ Markets? Have these moved from periphery to centre stage?

➤ Networks/collaboration?

➤ The Roles of Hybrids

The State: From Law to Regulation to Governance?

-The state played different roles in different initiatives and with different degrees of success but remains central not peripheral

➢ Key roles of the state: (i) definitional guidance (ii) incentives to participate (iii) enforcement capability

Enforcement under Neo-liberalism

- Effectiveness, efficiency, equity <u>and political acceptability</u>
- the Hampton Review: "Reducing Regulatory Burdens"
  - Hampton also urges a greater focus on advice and education and less emphasis on inspections and enforcement
  - Thus no inspection should take place unless there is a clearly demonstrated need
- Better Regulation Task Force report: "Regulation-Less is More: Reducing Burdens, Improving Outcomes".

If a year and a half ago the FSA had wanted higher capital adequacy, more information on liquidity – had said that it was worried about the business models of Northern Rock – and had wanted to ask questions about remuneration, it would have been strongly criticised for harming the competitiveness of the City of London, for red tape, and for over-regulation …over-regulation and red tape has been used as a polemical bludgeon. We have probably been over-deferential to that rhetoric"

Lord Adair Turner, FSA, 17 Oct 2008.

A cautionary note

➢ Where should scarce regulatory resources be deployed- to leaders or laggards?

➢ How far will business go 'beyond compliance'

➢ Locking in continuous improvement

➢ The importance of corporate commitment