

# Enforcement Mechanisms in International Law and International Environmental Law

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## I. Introduction

In contemplating how to approach the topic of enforcement mechanisms, I went to my bookshelf and consulted the indexes of a random selection of major textbooks on public international law and international environmental law. I looked for entries on “enforcement” and “compliance,” respectively. It may not be all that surprising that many international environmental law textbooks listed entries for “compliance,” but not for enforcement.<sup>1</sup> By contrast, it may be more surprising that, with some exceptions, the public international law textbooks not only did not index “compliance,” but also had no entries for “enforcement.”<sup>2</sup>

As I sat back to contemplate why “enforcement” was missing from so many of the textbook indexes, I wondered whether what Prosper Weil once referred to as the *couple diabolique obligation-sanction* had cast its long shadow yet again.<sup>3</sup> In other words, one of the possible explanations for the lack of focus on enforcement is that there remains a nagging sense that there is little of it in international law, let alone in international environmental law. In turn, the absence of enforcement, might feed a lingering sense that international law lacks effectiveness,<sup>4</sup> something best left unsaid.

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<sup>1</sup> List “compliance”: U. Beyerlin, *Umweltvölkerrecht*, 2000 (“Erfüllungskontrolle”); P. Birnie & A. Boyle, *International Law and the Environment*, 2<sup>nd</sup> ed, 2002 (referring, however, to both compliance and enforcement in the title of Chapter IV of the book); D. Hunter, J. Salzman & D. Zaelke, *International Environmental Law and Policy*, 1998. List “enforcement”: A. Epiney & M. Scheyli, *Umweltvölkerrecht: Völkerrechtliche Bezugspunkte des schweizerischen Umweltrechts*, 2000 (lists “Rechtsdurchsetzung” in table of contents); P. Sands, *Principles of International Environmental Law*, 2<sup>nd</sup> ed, 2003 (textual treatment includes compliance). List “compliance” and “enforcement”: A. Kiss & D. Shelton, *International Environmental Law*, 3<sup>rd</sup> ed, 2004.

<sup>2</sup> List neither “enforcement” nor “compliance”: I. Brownlie, *Principles of Public International Law*, 6<sup>th</sup> ed., 2003; J. Currie, *Public International Law*, 2001; M.W. Janis, *An Introduction to International Law*, 2<sup>nd</sup> ed, 1993; M.N. Shaw, *International Law*, 5<sup>th</sup> ed, 2003. List “enforcement”: A. Cassese, *International Law*, 2001; P. Malanczuk, *Akehurst’s Modern Introduction to International Law*, 7<sup>th</sup> ed, 1997. List “compliance”: J.L. Dunoff, S.R. Ratner & D. Wippman, *International Law: Norms, Actors and Processes – A Problem-Oriented Approach*, 2002.

<sup>3</sup> P. Weil, “Le droit international en quête de son identité,” *Récueil des Cours de l’Académie de Droit International* 237 (1992), 13 et seq. (53).

<sup>4</sup> See M.E. O’Connell, “Enforcement and the Success of International Environmental Law,” *Ind. J. Global Leg. Stud* 3 (1995), 47 et seq. (49).

International lawyers may be tired of seeing this old idea dragged to the surface again. But, whatever the reasons for the lack of textbook focus on enforcement, it is striking how common it remains among observers of international law to draw inferences regarding its binding quality or effectiveness from the perceived absence of sanctions. Political scientists often refer to the lack of enforcement of international law to confirm their view that international law is “epiphenomenal,” which, according to David Bederman, “is a nice way of saying it is stupid.”<sup>5</sup> In Canada, we have seen national political leaders make a virtue out of the epiphenomenon, reassuring constituents that seemingly intrusive international norms are not genuinely enforceable. For example, in the context of the debate about Canada’s ratification of the Kyoto Protocol, then Deputy Prime Minister, John Manley, was quoted in the press as saying that although “Canada should take its Kyoto obligations seriously if the pact is ratified... the accord is not a legally enforceable contract.”<sup>6</sup> But we need not look to political scientists or politicians for doubt. At least in Canada, judges too seem to question international law’s effect. For example, Justice Louis LeBel of the Canadian Supreme Court recently observed that “[a]s international law is generally non-binding or without effective control mechanisms, it does not suffice to simply state that international law requires a certain outcome.”<sup>7</sup>

It may seem as if, in offering these vignettes, I am intent on starting the conference proceedings off on a pessimistic note. Indeed, I do think that the *couple diabolique* has cast a particularly dark shadow over international environmental law, where norms are often seen to be yet softer and enforcement options yet more elusive. But my goal for this essay is actually the very opposite. I want to launch the proceedings on a high note, and suggest that many common impressions of international law are wrong in general, and particularly wrong in the context of international environmental law. Even more particularly, multilateral environmental agreements (MEAs) illustrate the maturation and sophistication of international environmental law. If anything, the diversity and flexibility of compliance approaches under MEAs highlight the limited purchase of simple dichotomies such as “binding vs. non-binding” or “enforcement vs. ineffectiveness.”

I begin by exploring the concept of “enforcement” in international law in general. I suggest that a concept of enforcement as imposition of legal sanctions, or penalties, is unduly narrow. I then canvass some of the main theoretical assumptions about international law and compliance. An exploration of this theoretical context illuminates the reasons underlying common misconceptions about international law and its enforcement, and helps put in perspective the evolution of approaches to compliance in international environmental law. Finally, against the backdrop of these general

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<sup>5</sup> D.J. Bederman, “Constructivism, Positivism and Empiricism in International Law,” *Georgetown L. J.* 89 (2001), 469 et seq. (473).

<sup>6</sup> Cited in P. Brethour, S. Chase & J. Mahoney, “Kyoto not binding, Manley says,” *The [Toronto] Globe and Mail*, 14 November 2002, A7.

<sup>7</sup> See (Justice) L. LeBel and G. Chao, “The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law,” (2002) 16 *Supreme Ct. L. Rev.* (2d) 16 (2002), 23 et seq. (62). See also R. Higgins, *Problems and Process: International Law and How We Use It*, 1994, 207, musing about a: “[p]sychology that disposes counsel and judge to treat international law as some exotic branch of the law, to be avoided if at all possible, and to be looked upon as if unreal, of no practical application to the real world.”

considerations, I examine key features of the approaches to compliance and enforcement in international environmental law and MEAs. My aim in this paper is to provide a ‘bigger picture,’ a context for the detailed discussions of compliance mechanisms that make up the bulk of the conference proceedings.

## II. The Concept of Enforcement in International Law

In its most basic sense, enforcement may be defined as “the act of compelling compliance with a law.”<sup>8</sup> Historically, enforcement of international law was bilateral in that only the aggrieved state was entitled to respond to a perceived breach of its rights. Enforcement was state-focused in two important respects. On the one hand, international law was a self-judging system. Each state decided for itself whether its rights had been violated and what response action to take. On the other hand, it was a self-help system without any central authorities or institutions through which rights could be vindicated or enforced. Finally, until the beginning of the 20<sup>th</sup> century, military force was an acceptable means for states to settle differences, pursue their interests or enforce their rights.<sup>9</sup>

While contemporary international law is still state-centered in fundamental respects, the traditional conception of enforcement has come to be both tempered and widened in important ways. Arguably, states’ self-help options – countermeasures to a violation of their rights - no longer include forcible measures, except in the narrow circumstances of self-defence.<sup>10</sup> But as the range of permissible counter-measures has narrowed, the range of potential enforcers of international law has grown. Self-help is no longer purely bilateral. Today, international law encompasses some obligations that are owed *erga omnes*,<sup>11</sup> which entitle all states to take certain measures in response to a violation.<sup>12</sup> In addition, states are no longer entirely dependent upon self-help. International institutions provide for at least a limited range of collective enforcement mechanisms, the most prominent – and also unusual - among them being the UN Security Council.<sup>13</sup>

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<sup>8</sup> *Black’s Law Dictionary*, 8<sup>th</sup> ed., 2004, 569.

<sup>9</sup> Cassese, see note 2, 229.

<sup>10</sup> Articles 2(4), 51 UN Charter; Article 50, Draft Articles on Responsibility of States for International Wrongful Acts, in *Report of the International Law Commission on the Work of Its Fifty-Third Session*, UN GAOR, 56<sup>th</sup> Sess., Suppl. No. 10, 43, UN Doc. A/56/10 (2001) [hereinafter Draft Articles]. See generally O.Y. Elagab, “The Place of Non-Forcible Counter-Measures in Contemporary International Law,” in G.S. Goodwin-Gill & S. Talmon, eds, *The Reality of International Law – Essays in Honour of Ian Brownlie*, 1999, 125. But see also the Separate Opinion of Judge Simma in *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, International Court of Justice, November 6, 2003 (paras 12-13).

<sup>11</sup> *Barcelona Traction Case (Second Phase)*, I.C.J. Reports 1970, 3 et seq. (paras 33-34). See generally, M. Ragazzi, *The Concept of International Obligations Erga Omnes*, 1997.

<sup>12</sup> See Articles 42, 48, 49 & 54 of the Draft Articles, see note 10. Note that countermeasures may be taken only by “injured” states (Article 49), whereas other states are entitled only to “take lawful measures ... to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached” (Article 54).

<sup>13</sup> See e.g. T. Stein, “Decentralized International Law Enforcement: The Changing Role of the State as Law Enforcement Agent,” in J. Delbrück, ed, *Allocation of Law Enforcement Authority in the International System – Proceedings of an International Symposium of the Kiel Institute of International Law*, 1995, 135; T.D. Gill, “Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter,” *Netherlands Ybook Int’l L.* XXVI (1995) 33 et seq.

While self-help may have found only tentative complements in collective enforcement mechanisms, self-judgment of violations and assessment of appropriate responses has come to be significantly curtailed by collective processes and by the involvement of a widening range of non-state actors.

To be sure, auto-interpretation processes remain an important feature of the dynamic horizontal structure of contemporary international law.<sup>14</sup> However, states do have access to a growing range of judicial dispute resolution options. The spectrum runs from formal judicial forums, such as the International Court of Justice, the International Criminal Court or the International Tribunal for the Law of the Sea, to quasi-judicial processes, such as the World Trade Organization's dispute settlement procedure.<sup>15</sup> The range of options has grown to the point that concerns have been voiced over the proliferation of international tribunals with overlapping spheres of jurisdiction.<sup>16</sup>

Quite apart from judicial assessments, the conformity of state conduct with international norms is also scrutinized through an array of reporting, review and justificatory processes within international organizations or treaty-based institutions.<sup>17</sup> In addition, individuals and non-governmental organizations can trigger a variety of formal and informal assessment processes, both internationally and through resort to domestic institutions, including courts.<sup>18</sup> Finally, it should not be forgotten that the international law's interpretative community is now truly a global one. Through the media and rapid electronic communication, states' conduct is exposed to the judgment of non-governmental organizations (NGOs) and citizens around the world. As we have seen in the course of public reaction to recent events, such as the military intervention in Iraq or abuse at the Abu Ghraib prison, international law no longer is the exclusive domain of states and their governments.<sup>19</sup>

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<sup>14</sup> See D. Bodansky, "Customary (and Not So Customary) International Environmental Law," *Ind. J. Global Leg. Stud.* 3 (1995) 105 et seq (116-119).

<sup>15</sup> See R.O. Keohane et al, "Legalized Dispute Resolution: Interstate and Transnational," in J.L. Goldstein, et al, (eds), *Legalization and World Politics*, 2001, 73.

<sup>16</sup> See e.g., B.Kingsbury, "Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?" *N.Y.U. J. Int'l L. & Pol.* 31 (1999), 679 et seq.; P.M. Dupuy, "The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice," *N.Y.U. J. Int'l L. & Pol.* 31 (1999), 791 et seq.

<sup>17</sup> See e.g., the experience of the International Labor Organization. F. Maupain, "International Labor Organization Recommendations and Similar Instruments," in D. Shelton, (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, 2000, 372.

<sup>18</sup> See A. Alkoby, "Non-State Actors and the Legitimacy of International Environmental Law," *Non-State Actors & Int'l L.* 3 (2003), 23 et seq.; M. Anderson & P. Galizzi, (eds), *International Environmental Law in National Courts*, 2003; J. Ebbesson, "The Notion of Public Participation in International Environmental Law," *Ybook Int'l Env. L.* 8 (1997), 51 et seq.

<sup>19</sup> See e.g., D. MacIntyre, "The Iraq Crisis: Mr. Cook Has Resigned – But it is Mr. Blair Who is Out of Step with Public Opinion," *The Independent* (London, 18 March 2003), 18; "Who Speaks for Europe?" *The Economist* (London, 8 February 2003), 48; T.H. Winkler, "Outside View: Abu Ghraib and International Law," *The Washington Times* (26 August 2004), at <http://washingtontimes.com/upi-breaking/20040826-085726-3174r.htm>.

This brief sketch suggests not only that a system premised upon states' *self-help* and *self-judgment* has been transformed into an increasingly *collective* system. There has also been a distinct shift in emphasis from efforts to develop enforcement processes, be they self-help or collective enforcement, to efforts to establish processes of deliberation, justification and judgment. Nonetheless, international law is relatively rarely enforced through collective penalties or other coercive measures. Similarly, the growing range of options notwithstanding, binding judicial dispute settlement is most prevalent in certain areas of international law, such as trade law, and otherwise remains relatively rare. However, there is another dimension to the ways in which compliance with law can be "compelled," one that is not captured by focusing only upon enforcement or formal judgment. This additional dimension is highlighted by the classification of enforcement measures that Paul De Visscher offered in his 1972 *Cours général de droit international public*. Apart from what he referred to as *techniques institutionnelles* (involving international institutions), and *techniques d'autoprotection* (including self-defense, reprisals, retorsion, or embargos), De Visscher drew attention to the significance of *techniques spontanées* (voluntary compliance with international norms).<sup>20</sup> Indeed, as De Visscher suggested:

Dans la très large mesure où le droit international reflète fidèlement un état de conscience sociale, à ce point fermement établi que les gouvernements eux-mêmes ne sauraient plus l'ignorer ou le défier, le droit international ne requiert, pour sa réalisation, ni juge ni gendarme.<sup>21</sup>

This passage spotlights a crucial question: if collective enforcement through penalties and binding judicial processes still play only a limited role, what is it that brings about states' compliance with international law? De Visscher points to "social conscience." But how is it that international law comes to reflect social conscience? Thomas Franck, in explaining why states obey "powerless rules," stresses the importance of legal legitimacy.<sup>22</sup> Louis Henkin, who famously observed that "almost all states comply with almost all of international law almost all of the time," finds the explanation in states' interest in orderly relations.<sup>23</sup>

Ultimately, then, solving the puzzle of "voluntary" compliance presupposes a theory of compliance. Similarly, whether one sees the above-noted shift from enforcement to justification and judgment as recognition of the strength of international law or as admission of its weakness, depends in part upon the theoretical vantage point from which one contemplates the question.<sup>24</sup> For this reason, I now turn to a brief review of key themes in the theoretical debates on international law and compliance.

### III. Theoretical Frameworks on International Law and Compliance

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<sup>20</sup> P. De Visscher, "Cours général de droit international public," *Récueil des Cours de l'Académie de Droit International*, (1972), 1 et seq. (138-153).

<sup>21</sup> *Ibid.*, 139.

<sup>22</sup> T.M. Franck, *The Power of Legitimacy Among Nations*, 1990, 3.

<sup>23</sup> L. Henkin, *How Nations Behave: Law and Foreign Policy*, 2<sup>nd</sup> ed., 47.

<sup>24</sup> See B. Kingsbury, "The Concept of Compliance as a Function of Competing Conceptions of International Law," *Mich Int'l L. J.* 19 (1998), 345 et seq.

In the dominant positivist conception of international law, its binding effect derives from state consent to lawmaking through formal sources of international law, notably treaty or custom.<sup>25</sup> Once a norm is formally in existence, it is enforceable and its violation gives rise to consequences under the law of state responsibility. This positivist conception does not inquire into why states comply with international law or not. Indeed, this type of inquiry is seen to be beyond the purview of the lawyer's expertise.<sup>26</sup> However, even strongly positivist international lawyers have suggested that enforcement is not the critical factor and, at any rate, does not account for law's binding effect. In the words of Sir Gerald Fitzmaurice, "the law is not binding because it is enforced: it is enforced because it is already binding."<sup>27</sup> Sir Ian Brownlie stressed that because of the complex ways in which law is made meaningful in the life of its subjects, "the law is ... not external, coercive and alien but internal, logically necessary and familiar."<sup>28</sup>

Others have suggested that international lawyers should look beyond criteria such as sources, formal consent, and notional enforceability to understand the binding effect of law.<sup>29</sup> To the extent that international lawyers, rather than international relations theorists, inquire into law's ability to command adherence, the focus is primarily on the legitimacy of rules and law-making processes.<sup>30</sup> Thomas Franck, as already noted, argues that international law's "compliance pull" is generated by legal legitimacy.<sup>31</sup> According to Franck, legitimacy is a key factor because "it accommodates a deeply held popular belief that for a system of rules to be fair, it must be firmly rooted in a framework of formal requirements about how rules are made, interpreted and applied."<sup>32</sup> I have argued elsewhere that certain internal characteristics, notably that rules must be compatible one with another, that they must ask reasonable things, that they are transparent and relatively predictable, and that known rules actually guide official discretion, distinguish legal norms from broader social norms. These traits infuse legal norms with a distinctively legal legitimacy and enhance their ability to shape arguments, to persuade and to promote adherence.<sup>33</sup> The implications of theories focused on the legitimacy of international law for compliance and enforcement are significant. They suggest that promotion of compliance does not begin with "mechanisms" for the interpretation and application of pre-established rules. It is already in the processes through which norms are created that one must build the foundations for ultimate compliance.

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<sup>25</sup> See R. Ago, "Positivism," in R. Bernhardt, (ed), *Encyclopedia of Public International Law*, 1984, vol.7, 385 et seq.

<sup>26</sup> See generally, B. Simma & A.L. Paulus, "The Responsibility of Individuals for Human Rights Abuses in Internal Conflict: A Positivist View," *AJIL* 93 (1999), 302 et seq. (303-308).

<sup>27</sup> Sir G. Fitzmaurice, "The Foundations of the Authority of International Law and the Problem of Enforcement," *M.L.R.* 19 (1956), 1 et seq.

<sup>28</sup> I. Brownlie, "The Reality and Efficacy of International Law," *British Ybook. Int'l L.* 55 (1981), 1 et seq.

<sup>29</sup> For an overview, see J. Brunnée & S.J. Toope, "Persuasion and Enforcement: Explaining Compliance with International Law," *Finnish Ybook. Int'l L.* XIII (2002), 273 et seq.

<sup>30</sup> For an overview of different approaches to legitimacy, see *ibid.*

<sup>31</sup> Franck, see note 22, 3, 26 & 493.

<sup>32</sup> T.M. Franck, *Fairness in International Law and Institutions*, 1995, 7-8.

<sup>33</sup> J. Brunnée & S.J. Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law," *Columbia J. Transnat'l L.* 39 (2000), 19 et seq.; J. Brunnée & S.J. Toope, "Interactional International Law," *Int'l Law FORUM de droit int'l* 3 (2001), 186 et seq.; and J. Brunnée & S.J. Toope, see note 29.

Over the last fifteen years international lawyers have focused more explicitly on matters of compliance, beginning a lively exchange with international relations (IR) theorists.<sup>34</sup> Two broad sets of approaches can be discerned in the interdisciplinary engagement on compliance issues.

Rationalist theories, notably institutionalism and political economy, have long dominated compliance debates. They conceive of states as strategic actors that proceed on the basis of rationally assessed and pursued self-interest.<sup>35</sup> Participation in a regime or compliance with a norm occurs if the net benefits outweigh those of unilateral action. Consciously or unconsciously, this basic outlook informs the thinking of many international lawyers about the impact of law on state conduct. The rationalist outlook, then, helps explain the common preoccupation with enforcement, and the emphasis on incentives or disincentives to promote compliance. But it also illuminates Henkin's assertion that states tend to comply with international law because it tends to be in their interest.

However, it is not the dominant rationalist framework but a more recent, alternative framework that is most helpful in exploring how international law comes to reflect 'social conscience' and how it generates voluntary compliance. Constructivist IR theorists have sought to explain how norms, rather than simply mirror underlying power and interest balances, can actually shape state conduct. Thus, constructivist scholars have stressed the role of norms in framing social interaction, fostering "shared understandings," and influencing actors and their interests.<sup>36</sup> As such, constructivist theories tend to support the claims of legal scholars who posit that international law can exert independent compliance pull when it meets particular legitimacy requirements. In addition, constructivism helps explain the role of deliberation and justification – interaction framed by legal norms - in promoting compliance. In short, constructivist theories highlight avenues for promoting compliance that seem particularly well suited to the horizontal structure of international law.

In the context of MEAs, compliance scholarship has been dominated by a debate between proponents of managerial and sanction-oriented models. To a large degree, these models map onto the broad streams of IR theory sketched out above. The sanction-oriented model is firmly tied to rationalist IR theory. By contrast, the managerial model resonates with many constructivist insights, notwithstanding the fact that it is rooted in an ultimately interest-based explanation of compliance. However, each of the two models also offers additional insights into the compliance puzzle.

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<sup>34</sup> For an overview on the recent theoretical debates see K. Raustiala & A.M. Slaughter, "International Law, International Relations and Compliance" in W. Carlsnaes *et al.*, (eds), *Handbook of International Relations*, 2002, 541 et seq.

<sup>35</sup> See P.J. Katzenstein *et al.*, "International Organization and the Study of World Politics," *Int'l Org.* 52 (1998), 645 et seq. (658).

<sup>36</sup> See M. Finnemore & K. Sikkink, "International Norm Dynamics and Political Change," *Int'l Org.* 52 (1998), 887 et seq.; J.G. Ruggie, "What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge," *Int'l Org.* 52 (1998), 855 et seq.; A. Wendt, "Collective Identity Formation and the International State" (1994) 88 *Am. Pol. Sci. Rev.* 88 (1994), 384 et seq.

The managerial approach, pioneered by Abram Chayes and Antonia Handler Chayes, argues for a "cooperative, problem-solving approach" to promoting compliance with international regulatory agreements such as MEAs.<sup>37</sup> The Chayes assert that non-compliance rarely flows from deliberate disregard.<sup>38</sup> Therefore, apart from the fact that "sanctioning authority is rarely granted by treaty, rarely used when granted," the Chayes assert that sanctions are "likely to be ineffective when used."<sup>39</sup> Compliance strategies should focus instead on the actual causes of non-compliance and "manage" these through positive means, consisting in a blend of transparency (regarding both the regime's norms and procedures and the parties' performance), dispute settlement, and capacity-building.<sup>40</sup> Thus, managerialism augments both rationalism and constructivism by offering the pragmatic insight that neither penalties nor normative persuasion alone will be successful when non-compliance results from causes such as norm ambiguity or capacity limitations. The main engines of managerialism, continuous processes of argument and persuasion, and "justificatory discourse," have strongly constructivist traits.<sup>41</sup> The compliance strategy builds upon treaty parties' "general sense of obligation to comply with a legally binding prescription."<sup>42</sup> At the same time, although the Chayes downplay the significance of the costs or benefits in the context of an individual regime,<sup>43</sup> their ultimate explanation for the success of managerialism is rationalist. Due to growing interdependence, they argue, most states can only realize their sovereignty through participation in various international regimes. Therefore, states' propensity to comply with international law is explained by the need to remain a "member in good standing of the international system."<sup>44</sup>

The most prominent competing theory on treaty compliance is advanced by George Downs and colleagues.<sup>45</sup> While oriented towards sanctions, Downs *et al.*'s concept of "sanction" encompasses a broad range of measures that create costs or remove benefits.<sup>46</sup> Moreover, Downs *et al.* do not claim that sanctions are always required to ensure cooperation, but only that they are needed where strong incentives exist for non-compliance. This is the case where treaties require states to depart significantly from what they would have done in the absence of the treaty ("deep cooperation").<sup>47</sup> For Downs *et al.*, the most significant weakness of the managerial approach is that it offers policy advice without sufficient attention to context, and without sufficient evidence.<sup>48</sup> Downs *et al.* claim that managerial "policy inferences are dangerously contaminated by selection problems,"<sup>49</sup> building upon

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<sup>37</sup> A. Chayes & A. Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*, 1995, 3.

<sup>38</sup> *Ibid.*, 10-5.

<sup>39</sup> *Ibid.*, 32-3.

<sup>40</sup> *Ibid.*, 22-5.

<sup>41</sup> *Ibid.*, 25-6.

<sup>42</sup> *Ibid.*, 110.

<sup>43</sup> *Ibid.*, 27.

<sup>44</sup> *Ibid.*, 28.

<sup>45</sup> G.W. Downs, D.M. Rocke, & P.N. Barsoom, "Is the Good News about Compliance Good News about Cooperation?" *Int'l Org.* 50 (1996), 379 et seq. (382-7).

<sup>46</sup> See G.W. Downs, "Enforcement and the Evolution of Cooperation," *Mich. J. Int'l L.* 19 (1998), 319 et seq., 320-321.

<sup>47</sup> Downs *et al.*, see note 45, 382-3.

<sup>48</sup> *Ibid.*, 397

<sup>49</sup> *Ibid.*, 380.



many treaty examples that involve merely “shallow” cooperation. Therefore, the patterns of compliance and absence of sanctions reported by the Chayes' do not justify the conclusion that sanctions are never required or appropriate to ensure cooperation.<sup>50</sup> It is equally possible and, according to Downs *et al.*, even likely that “there is little need for enforcement because there is little deep cooperation.”<sup>51</sup> Thus, a key contribution of Downs *et al.*'s sanction-oriented model is that it focuses our attention on the importance of contextual factors and warns against across-the-board prescriptions for compliance strategies. However, the model fails to address the important question of how one brings a regime to a point at which sanctions, assuming they are indeed needed, will be broadly acceptable as well as effective.

Several conclusions of direct practical relevance can be drawn from this brief survey of theoretical approaches. First, no theory can assert universal explanatory power. For example, there are bound to be circumstances in which the inherent compliance pull of legitimate norms is insufficient to overcome strong countervailing factors, be they interests or capacity limitations. Yet, at the same time, we may need the insights of a legitimacy-centered account of compliance to help establish a setting in which sanction-oriented approaches become possible. Finally, and perhaps most importantly, constructivism, legitimacy-centered accounts and managerialism each suggest concrete options for promoting compliance when, for whatever reason, a sanction-oriented approach is not available.

#### **IV. Enforcement Mechanisms: Mapping International Environmental Law and MEAs**

De Visscher's matrix of enforcement measures provides a helpful starting point for mapping international environmental law onto the backdrop of conceptions of enforcement in international law. A brief sketch of the context in which international environmental law operates helps appreciate which of the types of enforcement techniques distinguished by De Visscher are most likely to be relevant in this setting.

Much of international environmental law today is preoccupied with regional or global concerns of various kinds, rather than with bilateral concerns over transboundary pollution. Solutions to regional and global environmental problems require broad-based cooperation, often in situations of uncertainty as to causes and ultimate effects of a given type of pollution or degradation. Moreover, pollution and environmental decline typically do not result from state conduct *per se*, but from activities within states. This means that solutions for many environmental problems require fundamental adjustments to social and economic patterns. It also means that, much as the Chayes suggest, the root causes both of environmental problems and of failures to combat them, are often not lack of respect for international standards, but gaps in economic, regulatory and technical capacity.

This sketch suggests that “autoprotection,” or self-help techniques can play only a relatively limited role in addressing regional or global environmental concerns. There are

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<sup>50</sup> *Ibid.*, 391.

<sup>51</sup> *Ibid.*, 388.

a number of reasons for this. First, several of the legal parameters for triggering a state's right to self-help are problematic in the environmental context. Suffice it here to point to the following dimensions of the law of state responsibility: causation issues complicate the identification of states that could legitimately be the target of counter-measures; difficulties resulting from the due diligence standard for obligations under customary environmental law; and uncertainties regarding states' ability to take counter-measures against violations of *erga omnes* obligations.<sup>52</sup> A second shortcoming of self-help measures in the present context is that they tend to be reactive and confrontational. Granted, in certain circumstances, unilateral measures may help induce international cooperation.<sup>53</sup> One might think here of the Canadian enforcement action against the Spanish *Estai* in 1995, which helped prompt the negotiation of further Northwest Atlantic Fisheries Organization (NAFO) standards and new enforcement powers under the UN Straddling Stocks Agreement.<sup>54</sup> However, unilateral measures can typically play only a temporary role as they cannot marshal the necessary longer-term coordination. These concerns apply even more strongly when capacity issues are in play. Finally, whether undertaken unilaterally or through self-selected 'coalitions of the willing,' in the context of collective problems, self-help risks being perceived as lacking legitimacy. In the environmental context, this issue was brought to the fore, for example, by the American efforts to protect dolphins and sea turtles through import restrictions on countries that did not meet US protective requirements.<sup>55</sup> Although, arguably, these restrictions were genuinely intended to protect global commons,<sup>56</sup> they were exposed to charges of trade protectionism. In the *Shrimp-Turtle* case, the WTO Appellate Body stressed that measures to address international environmental problems were more appropriately agreed multilaterally than imposed unilaterally.<sup>57</sup>

All these factors, then, highlight the importance of De Visscher's second category of institutionalized techniques. For present purposes I leave aside international judicial processes.<sup>58</sup> Clearly, international courts and tribunals play an important role in certain circumstances. They can also lend international legitimacy to a particular outcome. However, in the context of regional or global environmental concerns, their potential contribution is encumbered by some of the same factors that I highlighted above. One, admittedly particularly stark, example may suffice to illustrate the point: Even if a state,

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<sup>52</sup> See generally, J. Brunnée, "Of Sense and Sensibility: International Liability Regimes as a Tool for Environmental Protection," *ICLQ* 53 (2004), 351 et seq. (353-354).

<sup>53</sup> See also L. Boisson de Chazournes, "Unilateralism and Environmental Protection: Issues of Perception and Reality of Issues," *Eur. J. Int'l L.* 11 (2000), 315 et seq. (319-321) (showing that unilateral measures to protect the environment are neither rare nor a new phenomenon).

<sup>54</sup> See G. Vigneron, "Compliance and International Environmental Agreements: A Case Study of the 1995 United Nations Straddling Fish Stocks Agreement," *Georgetown Int'l. Env. L.R.* 11 (1998), 581 et seq. (585-588); Boisson de Chazournes, *ibid.*, 329-330.

<sup>55</sup> See R.W. Parker, "The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict," *Georgetown Int'l Env'tl. L. Rev.* XII (1999), 1 et seq.; L. Guruswamy, "The Annihilation of Sea Turtles: World Trade Organization Intransigence and U.S. Equivocation," *Env'tl. L. Rep.* 30 (2000), 10261 et seq.

<sup>56</sup> See Parker, *ibid.*; Guruswamy, *ibid.*, 10262-10266.

<sup>57</sup> See *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, October 1998; reprinted in (1999) 38 I.L.M. 121 (paras 166-171 of the decision).

<sup>58</sup> For a helpful overview, see Sands, see note 1, 182-191.

such as a small island nation, suffered specific climate change related damage, it would face an uphill battle in overcoming the hurdles of causation requirements and due diligence standards.<sup>59</sup> A state looking to undertake an *actio popularis* to protect the global climate would face even greater difficulties.<sup>60</sup> Further, even assuming that the parties concerned could agree to submit the dispute to binding settlement, it is not clear that a judicial decision would contribute to building the complex regime that will be required to tackle the problem.<sup>61</sup>

All these considerations, of course, help explain the emergence and continuing growth of MEAs. The very purpose of MEAs is to recognize and facilitate a response to common concerns, to build mechanisms for norm creation and adaptation, and to promote compliance in the context of polycentric problems where states are likely to be both perpetrator and victim.<sup>62</sup> Indeed, MEAs facilitate a range of the enforcement mechanisms canvassed earlier.

First, MEAs enhance opportunities for voluntary compliance, whatever the underlying dynamics may be. For example, the extensive information gathering and reporting mechanisms established under most MEAs help shape states' understanding of the environmental problem at hand, and of the need for and feasibility of coordinated action.<sup>63</sup> In other words, in line with rationalist accounts, MEAs can help states discover that coordinated action and (voluntary) compliance with regime demands is actually in their interests. At the same time, MEAs also provide a setting in which the voluntary compliance dynamics highlighted by constructivists can unfold. A characteristic feature of modern MEAs is that they are not merely treaties, but establish treaty bodies that facilitate ongoing lawmaking processes. The regular meetings of plenary bodies such as Conferences of the Parties (COPs), of various subsidiary bodies and of an array of expert groups provide opportunities for interlinking policy, legal and technical discourses. In short, MEAs provide forums for ongoing interactions and thus enhance opportunities for the emergence of shared understandings of the concern at hand, as well as of basic normative parameters. Finally, MEAs also allow participants to pay attention to the demands of legitimate lawmaking.<sup>64</sup> Typically, one of the first steps in the regime-building process is the establishment of institutions, such as COPs, of procedures for regime-development, and rules for decision-making. The point here is not that all MEA-based lawmaking necessarily scores equally high on a legitimacy scale. It is only that the

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<sup>59</sup> See BBC World News, "Tiny Pacific Nation takes on Australia," Monday 4 March 2002, <http://news.bbc.co.uk/1/hi/world/asia-pacific/1854118.stm>.

<sup>60</sup> See generally, Sands, see note 1, 187-191.

<sup>61</sup> It might, of course, assist the victim's efforts to see impacts mitigated or damage compensated.

<sup>62</sup> Note that, although formal dispute settlement processes are provided for in most MEAs, they have remained unused. The only exception would appear to be the triggering by Ireland of OSPAR Convention's dispute settlement procedure in the context of its differences with the United Kingdom in relation to British nuclear installations on the Irish Sea. However, that situation very much involved a bilateral dispute, rather than the sorts of concerns over degradation of a commons that tend to give rise to MEAs. See Permanent Court of Arbitration, *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention (Ireland vs. United Kingdom of Britain and Northern Ireland)*, 2 July 2003; at [www.pca-cpa.org](http://www.pca-cpa.org).

<sup>63</sup> See e.g. Article 5, Kyoto Protocol to the UNFCCC, reprinted in (1998) 37 I.L.M. 22.

<sup>64</sup> For an overview, see J. Brunnée, "COPing with Consent: Lawmaking under Multilateral Environmental Agreements," *Leiden J. Int'l L.* 15 (2002), 1 et seq.

modern MEA - an institutional and procedural framework through which substantive requirements are gradually developed and then continuously reassessed for appropriateness - provides an array of opportunities for enhancing the regime's inherent "compliance pull." To put it in more pointed terms, fostering the legitimacy of lawmaking processes and outcomes deserves close attention in building the foundations of a "culture of compliance."<sup>65</sup>

However, second, and contrary to what a casual observer might assume, MEAs have also spawned an array of context-sensitive measures to address non-compliance, reaching far beyond the standard repertory of general international law. The possible responses to non-compliance span the spectrum of managerial and sanction-oriented prescriptions.

In keeping with the insights of the managerial approach, MEA-based responses to non-compliance typically take account of the causes of non-compliance and of the differing circumstances of non-complying states.<sup>66</sup> The NCP under Montreal Protocol on Substances that Deplete the Ozone Layer pioneered this approach in making it one of the tasks of the compliance committee to "identify the facts and possible causes relating to individual cases of non-compliance."<sup>67</sup>

The managerial prescriptions of transparency, justificatory discourse and capacity building also play prominent roles in existing NCPs. The Kyoto Protocol provides a good illustration of the emphasis that MEAs place on transparency of parties' performance. An important role is assigned to monitoring and emissions inventory reporting requirements, and to expert reviews of parties' reports.<sup>68</sup> These reports are discussed at the meetings of the COP.<sup>69</sup> Transparency regarding the parties' performance, notably with respect to their greenhouse gas emissions and reduction efforts, is seen to play an important role in building mutual trust among parties and promoting compliance with commitments.<sup>70</sup> Along with the deliberations of the COP and its subsidiary bodies, all reports are publicly available, including through the internet.<sup>71</sup> The UNFCCC regime also attempts to not

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<sup>65</sup> L. Henkin, "International Law, Politics, Values and Function," *Récueil des Cours de l'Académie de Droit International*, volume 261 (1989/IV) 251 et seq. (72-74).

<sup>66</sup> See e.g. Article 18, Kyoto Protocol, see note 63; Basel Convention, *Establishment of a Mechanism for Promoting Implementation and Compliance*, Decision VI/12, in *Annex to the Report of the Conference of the Parties to the Basel Convention of the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, Doc. UNEP/CHW.6/40, 10 February 2003, ¶¶ 2, 20 [hereinafter Basel Convention NCP]; Convention on Biological Diversity, *Establishment of procedures and mechanisms on compliance under the Cartagena Protocol on Biosafety*, Decision BS-1/7, in *Annex to Report of the First Meeting of the Conference of the Parties Serving as the Meeting of the Parties to the Protocol on Biosafety*, 14 April 2004, sections I, III 1(a), VI [hereinafter Biosafety Protocol NCP].

<sup>67</sup> See UNEP, *Report of the Tenth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, Annex II: *Non-Compliance Procedure*, UNEP Doc. OzL.Pro.10/9, 3 December 1998, ¶ 7(d). [hereinafter Montreal Protocol NCP].

<sup>68</sup> For a detailed review of the various elements see J. Corfee Morlot, *Ensuring Compliance with the Global Climate Change Agreement*, OECD Information Paper ENV/EPOC(98)5, 22-55 (1998).

<sup>69</sup> See e.g. *Summary Compilation of Annual Greenhouse Gas Emissions Inventory Data from Annex I Parties*, UN Doc. FCCC/CP/1998/INF.9.

<sup>70</sup> See Corfee Morlot, see note 68; 17 & 22.

<sup>71</sup> All official documents of the UNFCCC system are accessible at the convention's website (<http://unfccc.int/>) on or shortly after the date of release. During meetings of the COP or its subsidiary

merely provide information, but to make it more easily accessible to the interested public. The UNFCCC website offers various kinds of basic background information on the issue of climate change,<sup>72</sup> and on the operation of the UNFCCC regime.<sup>73</sup>

MEAs enmesh states in a variety of increasingly dense collective processes of deliberation, justification and judgment. MEAs facilitate the input of a wide range of actors into continuous processes of norm-setting and norm-adaptation. While states remain the primary decision-makers, a number of channels exist for NGOs, business groups and expert networks to feed into these rolling regulatory processes.<sup>74</sup> In this manner, MEAs also facilitate the growth of dynamic interpretative communities. In addition, in promoting continuous information gathering, MEAs facilitate the adaptation of standards and commitments. As noted above, through their reporting and monitoring requirements, they also promote transparency regarding states' performance and build a foundation for rigorous and legitimate justificatory processes.<sup>75</sup> Finally, through the regime-specific peer review processes or "non-compliance procedures" (NCPs) that have emerged over the last 15 years or so, justification and 'judgment' can be contextualized and tied into ongoing regime development or adjustment. All of the NCPs that have been negotiated since 1990 place heavy emphasis on "justificatory discourse."<sup>76</sup> Once a compliance procedure has been triggered, the party in question must provide information on, and explain, its performance through written and oral exchanges with the compliance body.<sup>77</sup> In some cases, the justificatory dynamic produced by an NCP is further enhanced by calling on

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bodies, it is possible to follow the evolution of discussions through in-session documents and live video or audio web casts.

<sup>72</sup> See the *Climate Change Information Kit*, which is available at the UNFCCC website at <http://www.unfccc.int/resource/iuckit/index.html> (accessed 30 September 2004).

<sup>73</sup> For example, information on the UNFCCC and its Kyoto Protocol is provided at <http://unfccc.int/resource/convkp.html> (accessed 30 September 2004).

<sup>74</sup> Within the UN system, the practice has been to admit non-governmental organizations that are qualified in relation to the matters governed by a given agreement. For detailed discussions see, e.g., Alkoby, see note 18; S. Charnovitz, "Two Centuries of Participation: NGOs and International Governance," *Mich. J. Int'l L.* 18 (1997), 183 et seq. (250-256). Note that the practice under some MEAs has been considerably narrower. For example, under Article 7.6 of the United Nations Framework Convention on Climate Change (UNFCCC), reprinted in (1992) 31 I.L.M. 849, a non-governmental body that is "qualified in matters covered by the Convention" can be admitted as an observer. However, there has been an "established practice whereby non-governmental organizations are required to furnish proof of their non-profit (tax exempt) status in a Member State of the United Nations or a specialized agency." See *Admission of observers: intergovernmental and non-governmental organizations – Note by the secretariat*, ¶ 4, UN. Doc. FCCC/CP/2001/7 (2001).

<sup>75</sup> On transparency, see further, see notes 68-73, and accompanying text.

<sup>76</sup> NCPs have been negotiated under the Montreal Protocol on Substances that Deplete the Ozone Layer (1990), the ECE Convention on Long-Range Transboundary Air Pollution (1997), the Espoo Convention on Transboundary Environmental Impact Assessment (2001), the Kyoto Protocol on Climate Change (2002), the Basel Convention on Transboundary Movements of Hazardous Wastes (2002), the Aarhus Convention on Access to Information and Public Participation (2002), and the Cartagena Protocol on Biosafety (2004). NCPs are under negotiation for the Rotterdam Convention on Hazardous Chemicals; the Stockholm Convention on Persistent Organic Pollutants, and the International Treaty on Plant Genetic Resources.

<sup>77</sup> See, e.g., Basel Convention NCP, see note 66, ¶¶ 12-16; Biosafety Protocol NCP, see note 66, IV-V; Montreal Protocol NCP, see note 67, ¶¶ 3-4, 7(c), 8, 11.

parties with compliance difficulties to develop compliance action plans and by providing for the review of their implementation.<sup>78</sup>

Finally, cooperative facilitation of compliance is the primary objective of the majority of existing NCPs. The NCP under the Montreal Protocol neatly encapsulates this approach in stating that it is aimed at “securing an amicable solution ... on the basis of respect for the provisions of the Protocol.”<sup>79</sup> Similarly, the NCP under the LRTAP Convention notes that its compliance body is to consider submissions “with a view to securing a constructive solution.”<sup>80</sup> Other NCPs describe their approaches as “facilitative,”<sup>81</sup> or designed to “promote compliance” and “address cases of non-compliance.”<sup>82</sup> To date, the Kyoto Protocol’s NCP is the only one that explicitly declares its goals to be “facilitate, promote and *enforce* compliance” with the protocol.<sup>83</sup>

Given their focus on facilitation of compliance, it is not surprising that the NCPs adopted under the Montreal Protocol, the LRTAP Convention, the Basel Convention, and the Biosafety Protocol all place strong emphasis on financial and technical assistance and other capacity-building measures.<sup>84</sup> This pragmatic approach to promoting compliance recognizes the fact that non-complying parties are most likely to be states with genuine capacity limitations.<sup>85</sup> Furthermore, it reflects the fact that parties’ collective interest in achieving regime goals tends to be better served by promoting full compliance than by punishing non-compliance.

However, the emphasis on facilitation of compliance does not mean that even those compliance regimes that are cast as primarily cooperative are devoid of sanction-oriented features, at least in the wider sense of creation of costs or removal of benefits.<sup>86</sup> NCPs usually allow for the publication of parties’ compliance records,<sup>87</sup> or the issuance of “cautions” to non-complying parties.<sup>88</sup> Some NCPs also envisage the suspension of certain

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<sup>78</sup> See e.g. the Basel Convention NCP, see note 66, ¶ 19(c); the Biosafety Protocol NCP, see note 66, VI, 1(c); UNFCCC, *Implementation of the Buenos Aires Plan of Action: Adoption of the Decisions Giving Effect to the Bonn Agreements Procedures and Mechanisms on Compliance under the Kyoto Protocol*, FCCC/CP/2001/L.21, Draft Decision -/CP.7, Annex, XV, 5(b) [hereinafter Kyoto Protocol NCP].

<sup>79</sup> See Montreal Protocol NCP, see note 67, ¶ 8.

<sup>80</sup> See Convention on Long-range Transboundary Air Pollution, *Report of the Fifteenth Session of the Executive Body*, ECE/EB.AIR/53, January 1998, Annex III ¶ 3(b).

<sup>81</sup> Basel Convention NCP, see note 66, ¶ 19.

<sup>82</sup> Biosafety Protocol NCP, see note 66, I,1.

<sup>83</sup> Kyoto Protocol NCP, see note 78, I (emphasis added).

<sup>84</sup> See e.g., UNEP, *Indicative List of Measures that Might be Taken by a Meeting of the Parties in Respect of Non-Compliance with the Protocol*, in *Annex V to Report of the Tenth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the ozone Layer*, UNEP Doc. Ozl. Pro.4/15, 25 November 1992; Basel Convention NCP, see note 66, ¶ 20(a); Biosafety Protocol NCP, see note 66, VI, 2(a).

<sup>85</sup> But note that, in the case of the LRTAP Convention, the countries found to be in non-compliance include Finland, Greece, Ireland, Norway, and Spain. See contribution by Tuomas Kuokkanen, in this volume.

<sup>86</sup> See note 46, and accompanying text.

<sup>87</sup> See e.g., Biosafety Protocol NCP, see note 66, VI, 2(c); Kyoto Protocol NCP, see note 78, XV, 1(a).

<sup>88</sup> See e.g., Montreal Protocol NCP (Indicative List of Measures), see note 84; Biosafety Protocol NCP, *ibid.*, VI, 2(b); Basel Convention NCP, see note 66, ¶ 20(b).

“privileges” under the MEA when a party fails to meet its commitments.<sup>89</sup> In providing for the suspension of privileges, these MEAs come close to deploying what has remained rare in general international law – actual penalties for non-compliance.<sup>90</sup> That said, the punitive character of such measures defused when they are built into the prerequisites for access to the privilege. For example, under the Kyoto Protocol rules on international emissions trading, eligibility for participation depends on a party’s compliance with its reporting commitments.<sup>91</sup> This approach has two important effects. First, the conditionality of participation in emissions trading serves to create an incentive for compliance with key commitments. Second, since the compliance body merely determines whether or not a party has met the eligibility requirements, its task is likely to be far less sensitive than it would be if it actually decided upon a penalty.

As already hinted, the Kyoto Protocol NCP does have an explicitly sanction-oriented dimension, taking it considerably beyond the range of approaches of other non-compliance regimes. Indeed, in addition to suspending a party’s eligibility for participation in the protocol’s trading mechanisms, the compliance body is charged with applying a specific consequence to a party’s non-compliance with its emission reduction commitment. If a party fails to meet its emissions target, its excess emissions will be deducted (at a penalty rate of 1.3) from future emission allowances.<sup>92</sup> The Kyoto compliance regime also sets itself apart through institutional and procedural arrangements that reflect the broader range of its goals. Its compliance body will have a “facilitative branch” and an “enforcement branch.”<sup>93</sup> The enforcement branch is tasked with the resolution of all compliance questions relating to parties’ emission target related commitments: the actual emission reduction commitment, relevant inventory and reporting commitments under Arts. 5 and 7, and the above-mentioned eligibility requirements for the Kyoto mechanisms.<sup>94</sup> Notwithstanding its sanction-oriented approach, the NCP attempts to blunt the punitive edge of the measures it provides for. Quite apart from the fact that they are referred to as “consequences” of non-compliance rather than sanctions or penalties, they are cast as

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<sup>89</sup> See e.g. Montreal Protocol NCP (Indicative List of Measures), *ibid*; Kyoto Protocol NCP, see note 78, XV, 4 & 5.

<sup>90</sup> For example, in the case of the Montreal Protocol, Decision VI/5 of the sixth MOP imposed a cost on non-reporting Article 5 Parties, which would lose their Article 5 status if they did “not report base-year data...within one year of the approval of [their] country program and [their] institutional strengthening by the Executive Committee.” Similarly, in dealing with persistent Russian non-compliance, Decision VII/18 provided for international assistance to help Russia comply with its treaty obligations made this assistance contingent on adequate reporting of data and planned actions to prevent re-export of controlled substances. See O. Yoshida, ““Soft Enforcement” of Treaty: The Montreal Non-Compliance Procedure and the Functions of Internal International Institutions,” *Col. J. Int’l Envtl. L. & Pol.* 10 (1999), 95 et seq. (135-136).

<sup>91</sup> See *Report of the Conference of the Parties to the United Nations Framework Convention on Climate Change on its Seventh Session*, U.N. FCCC, U.N. Doc. FCCC/CP/2001/13/Add.1-3 (21 January 2002) [hereinafter Marrakech Accords], Decision 15/CP.7, Draft Decision (Mechanisms), ¶ 5; Decision 16/CP.7, Draft Decision (Article 17), ¶¶ 2-4.

<sup>92</sup> Kyoto NCP, see note 78, at XV, 5(a).

<sup>93</sup> *Ibid.*, II.2.

<sup>94</sup> *Ibid.*, V.4. With respect to the eligibility requirements, the *Procedures and Mechanisms* are complemented by the rules governing the Kyoto mechanisms. These rules provide that the enforcement branch is tasked with eligibility assessments. See Marrakech Accords, see note 91, Decision 15/CP.7, Draft Decision (Mechanisms), ¶ 5.

providing for “the restoration of compliance to ensure environmental integrity,” and “for an incentive to comply.”<sup>95</sup>

There has been some evolution towards more sanction-oriented approaches in promoting compliance with MEAs. For example, notwithstanding the Montreal Protocol non-compliance procedure’s declared goal of securing “an amicable solution” to compliance problems,<sup>96</sup> observers have noted a gradual “hardening” of its practice, including increasing resort to “sticks,” such as the abovementioned withdrawal of privileges, to address persistent patterns of non-compliance.<sup>97</sup> Thus, it is fair to say that the experience gained in the negotiation and operation of NCPs has increased states’ readiness to contemplate various options for giving MEAs some bite.<sup>98</sup> Indeed, the features of the Kyoto Protocol NCP seem to suggest a wider trend away from facilitation or compliance management and towards sanction-oriented approaches. However, this would be the wrong conclusion to draw. That there is no such trend is illustrated by the fact that two of the NCPs adopted after the negotiation of the Kyoto compliance regime are primarily facilitative in approach. The Basel Convention NCP is described as a “facilitation procedure” and, as noted earlier, it prioritizes technical assistance, capacity building and access to financial resources to promote compliance. Similarly, the “measures to promote compliance and address cases of non-compliance” under the Biosafety Protocol NCP are primarily designed to assist parties in coming into compliance. Of course, this is not to say that, as occurred under the Montreal Protocol, more assertive measures could not evolve within individual regimes once its procedures begin to operate and gain credibility among parties. In fact, the Biosafety Protocol’s procedure does envisage that the COP may decide upon additional measures in “cases of repeated non-compliance.”<sup>99</sup>

Therefore, the real insight reflected in the evolution of MEA non-compliance procedures over the last decade or so is that compliance strategies must be context-sensitive, and tailored to the features of each regime. For example, much like the Montreal Protocol NCP, the Basel Convention and Biosafety Protocol NCPs are most likely to encounter non-compliance by developing countries or, in the latter case, countries with economies in transition. Consequently, capacity issues are likely to play a significant role in the promotion of compliance. By contrast, in the case of the Kyoto Protocol, only developed countries and countries with economies in transition will have emission reduction commitments at this stage. Therefore, capacity-building and financial assistance are much less likely to be appropriate in promoting compliance. Moreover, the Kyoto Protocol regime has certain unique features that necessitated a tailor-made approach to compliance. In addition to imposing emission reduction commitments, the protocol provides for

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<sup>95</sup> *Ibid.*, V.6.

<sup>96</sup> See Montreal Protocol NCP, see note 67, Annex IV, ¶ 8.

<sup>97</sup> See D.G. Victor, “Enforcing International Law: Implications for an Effective Global Warming Regime,” *Duke Env’tl. L. & Pol’y F.* 10 (1999), 147 et seq. (166-170).

<sup>98</sup> Note that there is one early agreement that may be said to have pioneered, without reliance on an NCP or specific non-compliance body, several of the approaches now increasingly employed by MEA NCPs - the Convention on International Trade in Endangered Species of Wild Flora and Fauna, reprinted in (1973) 12 I.L.M. 1085. See contributions by Susan Biniarz and by Peter Sand to this volume.

<sup>99</sup> Biosafety Protocol NCP, see note 66, VI.2(d).



mechanisms through which parties can trade emissions units or reduction credits.<sup>100</sup> These mechanisms as such are designed to promote compliance in two important ways. They provide parties with some flexibility in meeting their emissions targets, allowing them to acquire emission credits to make up for excess emissions or additional emission units to effectively extend their targets. At the same time, the hope is that market-dynamics will create incentives for compliance by enabling parties to meet commitments in more cost-effective ways, or to derive a benefit from trading emissions shares, as the case may be. However, to ensure the integrity and thus effective operation of the emissions trading mechanisms, the Kyoto Protocol needed a compliance regime that could backstop their abuse. In short, the Kyoto Protocol's emphasis on rigorous reporting, its creation of eligibility requirements for participation in the Kyoto mechanisms, and the NCP's inclusion of consequences such as suspension of eligibility or deduction of excess emissions are all shaped at least in part by the protocol's reliance on the trading mechanisms.

## V. Conclusion

My assignment for this contribution was to provide reflections on “enforcement mechanisms in international law in general and international environmental law in particular.” I hope to have demonstrated that “enforcement” is a far more multi-faceted concept than often assumed – it encompasses a wide spectrum of means for “compelling compliance” with law. Various theoretical perspectives illuminate this spectrum of means, highlighting the different dynamics that can be harnessed by efforts to promote compliance. When a wider concept of enforcement and a set of theoretical lenses are superimposed on the existing experience with MEA compliance regimes, several conclusions emerge.

It is time to leave the shadow cast by the *couple diabolique obligation-sanction* behind. There is no necessary connection between the enforcement of law and its binding effect or its effectiveness. But, perhaps most importantly, the common assumptions that international law is not enforceable or that international environmental lacks enforcement mechanisms are actually wrong. They are based on an unduly narrow conception of enforcement as imposition of penalties. As a result, they overlook the array of enforcement mechanisms that are available within MEAs, including, not least, the wide spectrum of collective processes of deliberation, justification and judgment. Moreover, although enforcement in the narrow sense plays only a relatively limited role in promoting compliance with MEAs, some agreements actually do provide for what comes close to penalties. However, not in all settings are penalties, or even sanctions in the wider sense of ‘disincentives,’ feasible or appropriate. At one level, penalties and sanctions are unlikely to be feasible unless they back up norms that are seen to be procedurally and substantively legitimate. At another level, they are unlikely to be effective when non-compliance is not a matter of choice but results, for example, from technical or financial capacity limitations. Therefore, the limited reliance of many MEAs on penalties or sanctions and their focus on

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<sup>100</sup> Arts 6, 12 & 17, Kyoto Protocol, see note 63.

justificatory processes and concrete means to promote compliance is not a sign of the weakness of international environmental law, but of its flexibility and, ultimately, strength.