SPECIAL ISSUE:
PUBLIC AUTHORITY & INTERNATIONAL INSTITUTIONS

Cross-cutting Analyses

The Enforcement Authority of International Institutions

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A. Introduction

I. Implementation and enforcement

One of the most striking features of international institutional law that emerges from the several cases studies collected in this issue is that enforcement authority is now vested in international institutions alongside the more familiar types of public authority almost as a matter of course. Enforcement of international law by international institutions needs to be distinguished from other closely related concepts of public authority that are in turn the subject of closer studies collected in this issues. As discussed by von Bogdandy, Dann and Goldmann,[1] international institutions often dispose of an implementation authority which in turn is subject to a branch of international institutional law. The responsibilities and indeed the authority of international institutions do not stop at the mere implementation of their legal base. However, enforcement involves a categorically different exercise of public authority. It concerns the interaction with another subject of law. Insofar as enforcement essentially empowers an international institution to confront States it deeply interferes with the sovereign's conduct, and its very existence may seem counterintuitive.

II. The concept of enforcement by international institutions

Enforcement aims to ensure effectiveness of the law, primarily involving the exercise of public power. A law-internal perspective of enforcement is possible nevertheless. For enforcement will be subject to legal regulation. Such regulation will constitute the power that may be exercised to react to the possible reaction to the norm violation, and shape the procedure for determining whether there has

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[1] *See* von Bogdandy, Dann & Goldmann, in this issue.

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been a norm violation in the first place, the principles guiding the use of the available enforcement powers. As such, thinking about enforcement is emphatically within the remit of (international) law scholarship.

Enforcement may be defined as public action with the objective of preventing or responding to the violation of a norm. While this definition is inspired by (national) administrative law, it is just as much applicable to public international law. For the definition relates to the concept of the rule of law and the normativity of any legal order, including public international law, not to the background of a domestic constitutional system.

However, a number of caveats are in order for the purposes of this paper. Only international institutions are of relevance, not the state, and its inherent enforcement authority over individuals. Quite differently, the prime interest here lies in enforcement action by international institutions against States.

Furthermore, public action needs to be understood not just as legally binding action but in the broad sense of public authority amicable to this project. All action that merely conditions the addressee to comply with the norm in question instead of violating it is also covered.

The objective of enforcement finally needs to be understood specifically. Enforcement closely relates to compliance, which remains the objective of all enforcement in the international realm where punishment has no role. Contra-factual compliance, i.e. compliance that would otherwise not occur, will be the result of both the prevention and the repression of norm violation by an act of public authority.

Enforcement as such may be distinguished from compliance control and related terms. The focus of this paper remains on international public authority so that its working definition of enforcement cannot focus on all coordinated, negotiated, assisting or otherwise managerial action, aiming at furthering or controlling compliance with the norms of a given treaty or institutional regime. Such managerial concerns for ensuring compliance are well catered for in the vast and impressive literature on the managerial analysis of international institutions.[2] But, for the reasons set forth in the introductory paper, this project's law-internal concern is primarily with analysing such international public authority the exercise of which triggers specific public law concerns.

[2] *See* ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 311 (1995).

III. Objective and plan of paper

The case studies of this research project show however, that the domain of enforcement authority of international institutional law has by now matured to the point that a doctrinal reconstruction along the lines set forth in the introductory paper[3] appears worthwhile. Our objective is thus modest. First of all it is to provide a stocktaking and systematisation of the bewildering variety of enforcement authority that international institutions wield. It will be argued that a proper systematisation of the enforcement authority of international institutions should encompass at least five elements. The plan of the paper in support of this objective is the following: I will propose to identify several mechanisms of enforcement that each embodies a specific strategy across the several sectors of substantive law and which are put at the disposition of international institutions (B.). I will then examine the addressees of these enforcement mechanisms (C.), the procedures that regulate the application of these mechanisms (D.) as well as institutional issues (E.), and, finally, any principles guiding the allocation and exercise of enforcement authority that can be identified (F.).

Parts B. to F. of the paper are essentially concerned with a doctrinal reconstruction of the legal data at hand. This will not exhaust the subject though. For enforcement authority is a public resource to be spent wisely. Part G. will therefore adopt a governance perspective and undertake to identify criteria that may guide the international legislator in deciding on how to shape the authority to enforce of a given international institution.

In its concluding Part H. the paper will then inquire about the wider ramifications for public international law brought about by the emergence of an institutionalised – a vertical - enforcement dimension that complements traditional horizontal enforcement.

B. Mechanisms of Enforcement

There are several ways doctrinally to reconstruct the data assembled in the various case studies. This paper suggests that the reconstruction be oriented by a typology of enforcement mechanisms. For the purposes of this typology, an enforcement mechanism is characterised by the strategy brought to bear to react to the norm violation and the type of public authority that goes with it. Essentially four mechanisms of enforcement can be distinguished: persuasion (I), incentives and

[3] *See* von Bogdandy, Dann & Goldmann, in this issue.

disincentives (II), force (III), sanctions (IV), and quasi-judicial dispute settlement (V).[4] The specifically legal quality of the public authority employed to administer these mechanisms matures correspondingly: The persuasion mechanism exclusively relies on the international institution conditioning the addressee, incentives and disincentives additionally change the addressee's legal situation, and both force and sanctions provide for the imposition of new legal obligations on the addressee.

I. Persuasion

International institutions may rely on persuasion to enforce legal obligations. The core strategy here is to persuade the norm addressee to comply with its international legal obligations even though it may not be inclined to do so. Persuasion in this sense will seek to achieve transparency about both treaty demands and the ways to achieve compliance, and it will incidentally determine the question of whether the norm addressee – mostly States - is currently in compliance or not. The assumption is that such transparency is not self-evident, but needs to be constituted by way of a dialogue between the international institution and the norm addressee. The norm addressee will then be asked to submit reports on its national implementing measures to the international institutions in regular intervals, which will be discussed with a view to securing that treaty obligations are complied with. If applicable, the international institution may issue recommendations for any steps needed to be taken to bring the State into compliance, and it may follow up on these recommendations through various means. The public authority that the competent international institution may use in a persuasion context is "soft;" it resides in the loss of prestige for the States that the international institution can bring about by making its findings public.

Persuasion in this sense is probably one of the oldest and, quantitatively speaking, still the most prevalent if not pervasive means of enforcement by international institutions. It can be found across the spectrum of international institutional, as a brief survey touching on the areas of human rights, international peace and security, international environmental law and international economic law will show:

1. Human Rights

Institutionalised human rights treaties extensively provide for enforcement by persuasion. The 1998 ILO Declaration on Fundamental Principles and Rights at

[4] Obviously, the terminological designation given to the several mechanisms is not of primary importance and may be subject to debate.

Work[5], the OSCE's High Commissioner on National Minorities[6], and possibly the OECD's PISA Policy[7] understood as the international assessment of national policy in a human rights sensitive area give a good illustration of this.

2. International Peace and Security

While developed and honed to maturity in the human rights context, persuasion has now become a standard means of enforcement in all areas where States are under an international obligation to take complex implementing action in their national legal system. A powerful example is provided by the numerous resolutions on anti-terrorism of the UN Security Council adopted under Chapter VII UN Charter. These resolutions set forth complex schemes for economic legislation that Member States need to enact in order to cut the funding stream for terrorist activities. To ensure the effectiveness of these substantive resolutions the Security Council has accompanied them with an extensive reporting scheme. States are to report on the implementation of the resolutions' requirements to committees of the Security Council specifically created for that purpose, which will discuss them with State representatives. The committees will be assisted in their task by groups of experts, monitoring developments in the Member States.[8] All of this serves to persuade Member States, in the sense identified above, effectively to comply with the resolutions.

3. International Environmental Law

Other examples for the use of the reporting technique and thus persuasion as an enforcement means are provided by the extensive fabric of international environmental law. The FAO Code of Responsible Fisheries is a case in point.[9]

4. International Economic Law

Also, as The WTO Committee on Trade in Financial Services illustrates, international economic law employs the mechanisms of persuasion. This Committee provides a forum for Parties to discuss relevant issues of the Agreement

[5] de Wet, in this issue.

[6] Farahat, in this issue.

[7] von Bogdandy & Goldmann, in this issue.

[8] *See* most recently, S/RES/1822 (2008).

[9] *See* Friedrich, in this issue.

on Trade in Services.[10] Such discussion will provide the transparency inducing a State to comply with its obligations under the WTO Agreement. Arguably, the OECD's disciplines for national export credits institutions also belong to the category of persuasion. This flexible non-binding regulatory framework contains procedures of notification and consultation with the OECD in case a State does not want to comply with the regime's substantive provisions.[11] The transparency brought about by these procedures will work not just directly on the State concerned, but it will also work indirectly. For the non-complying State now has to countenance reciprocal non-compliance of other States, triggering a subsidies race which is in no one's interest.

II. Incentives and Disincentives

As several case studies of this project show, international institutional law has moved beyond traditional persuasion-based enforcement. Enforcement may also consist of conditioning the decision-making process of the norm addressee through incentives for norm-compliance and/or disincentives against norm-violation. Such incentives and disincentives will be administered by international institutions unilaterally.

International institutional law has given shape to at least two groups of incentive-based enforcement mechanisms. A first group is composed of treaty based compliance control regimes, which primarily employ positive incentives (1). A second group is composed of liability regimes (2).

1. Compliance Control Regimes

Major multilateral treaties increasingly provide not just for substantive regulation of the matter at hand but also for the enforcement of these provisions through elaborate compliance regimes. These compliance regimes essentially set forth incentives for compliance, removing the causes for non-compliance with the treaty's provisions. These incentives may comprise technical, economic and other assistance, which is administered by an international institution.[12]

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[10] *See* Windsor, in this issue.

[11] Andrew Moravcsik, *Disciplining Trade Finance: The OECD EXport Credit Arrangement*, 43 INTERNATIONAL ORGANIZATION 173 (1989).

[12] *See* J Brunnée, *Enforcement Mechanisms in International Law and International Environmental Law*, 3 ENVIRONMENTAL LAW NETWORK INTERNATIONAL REVIEW 3, 11 (2005) ("non-complying parties are most likely to be states with genuine capacity limitations.").

Such non-compliance procedures have become a standard of international environmental law in particular,[13] but other treaties designed to protect an international public good – such as non-proliferation etc - will now also comprise such a compliance regime. A hugely influential model for such a compliance control regime remains the Non-Compliance Procedure under the Montreal Protocol to the Vienna Convention on the Protection of the Ozone Layer.[14] This procedure allows Parties to apply to the Implementation Committee for technical and economic support in the fulfilment of their treaty obligations to phase out ozone depleting substances.[15] It is characteristic that a potentially non-complying Party itself but also the Protocol's Secretariat may seize the Implementation Committee. The Kyoto-Protocol on Climate Change essentially copies this procedure. The Facilitative Branch of the KP's Compliance Committee is competent for handling cases where a Party requires and requests international compliance assistance of a technical or financial nature.[16]

2. Liability Regimes

Any liability regime allows to react to a norm violation and to make good any consequences of such a violation through compensation of the victim. Beyond this remedial action effect the availability of a liability regime will also have the effect of preventing norm violations in the first place. The certain expectation that damages will have to be paid will act as a disincentive to violating the norm in the first place.

General international law provides for damages through, i.e., the law of state responsibility. The law of state responsibility applies to all types of obligations under international law. It provides that the violation of any primary obligation incumbent on a State will trigger a set of secondary obligations including damages for that State. The right to claim damages lies with the State to which the primary obligation was owed. The law of state responsibility is of a general nature. The fact that it applies across all international law entails a lack of specificity leaving room for more specialized regimes adapted to the circumstances of a given area of law.

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[13] *See* Jan Klabbers, *Compliance Procedures*, *in* INTERNATIONAL ENVIRONMENTAL LAW 995, 990 (2007) (giving examples). *See also* Friedrich, in this issue (considering Implementation Assistance provided by FAO to States under the Code of Conduct for Responsible Fisheries).

[14] *See* Jan Klabbers, *Compliance Procedures*, *in* INTERNATIONAL ENVIRONMENTAL LAW 995 (Daniel Bodansky, Jutta Brunnée & Ellen Hey eds., 2007).

[15] However, the threat of sanctions such as export restrictions is not excluded should the Party fail to meet the commitments indicated by the MOP, *see* Klabbers (note 14), at 997.

[16] *See* Láncos, in this isssue.

Any specialized regime will require an international institution administering it.[17] The UN Claims Commission was essentially set up to deal with Iraq's liability arising from its internationally unlawful invasion of Iraq.[18] The International Commission on Holocaust Era Insurance Claims (ICHEIC) may also be seen as a case in point as this institution took it upon itself to seek to enforce secondary (monetary) claims of individuals for primary human rights atrocities committed during the Holocaust.[19] Other international institutions such as the World Bank are empowered to insert provisions for damages into their contracts with States.

III. Legal Sanctions

The incentive-based mechanisms discussed are qualitatively improved upon in terms of effective legal enforcement whenever genuine sanctions lie against a State in violation of its treaty obligations. There may be different definitions and understandings of sanctions. But, in the context of this paper, sanction should be understood to involve the detrimental change in the addressee's legal situation brought about in response to the latter's prior action. The case studies bear out that international institutions apply two forms of sanctions. One is that the Party concerned is put under additional substantive obligations. The other type of sanction involves removal of certain of the concerned Party's rights and privileges. International institutions may find the legal base for their sanctioning decisions either in the constitutive treaty (1) or in a contractual arrangement (2).

1. Constitutive treaties: The Case of the Kyoto Protocol with Marrakech Accords

This novel concept of enforcement through legal sanctions is now being realised as part of the international climate change regime, which is based on the UN Framework Convention and the Kyoto Protocol (KP). In 2007 the KP's Meeting of Parties (MOP) adopted a set of rules implementing the KP's provisions. These so-called Marrakech Accords[20] not only flesh out the emission trading provisions of

[17] In the recent past, several more such regimes have come into existence. A recent example from 2005 is the so-called Liability Annex (VI) to the 1991 Protocol on Environmental Protection in Antarctica, which, e.g., puts the Antarctic Treaty Secretariat in charge of the contingency funds. *See* D. J. Bederman & S. P. Keskar, *Antarctic Environmental Liability: The Stockholm Annex and Beyond,* 19 EMORY INTERNATIONAL LAW REVIEW 1383 (2005).

[18] *See* Less, in this issue.

[19] This is, of course, a somewhat idiosyncratic way of looking at the mandate of the ICHEI. For a detailed analysis, *see* Less, in this issue.

[20] Available at: http://www.unfccc.de/cop7/documents/accords_draft.pdf. The legal status of the Marrakech Accords is a decision of the COP/MOP, not a separate international treaty. This does not, however, affect its bite since the Accords will be treated as having the same legal quality as the KP itself.

the Protocol but more importantly, they also stipulate an innovative enforcement mechanism including sanctions of both types identified above. The Accords provide for an autonomous administrative-law style procedure conducted by a newly created Enforcement Branch leading to binding decisions:[21]

Under the Marrakech Accords, questions of non-compliance can be raised by a Party with respect to itself, or by any Party with respect to another, provided the question is supported by corroborating information. The newly created Enforcement Branch of the KP's Compliance Committee will conduct a preliminary investigation within three weeks of the submission to determine whether the question is supported by sufficient information, is not *de minimis* or ill-founded, and is based on the requirements of the Protocol. Institutionally, the Enforcement Branch is a sub-organ of the Compliance Committee, which is itself an organ of the Meeting of Parties, but with limited membership. If it decides to proceed, the Branch may consider information from expert review teams staffed by experts serving in a personal capacity (ERTs), the Party that submitted the reference, reports from treaty bodies including the Facilitative Branch of the Compliance Committee, as well as from the Party concerned. After finding a case of non-compliance, the Enforcement Branch may decide on the consequences of that breach of treaty law, and also follow through on that decision (*vollziehen*). The powers of the Enforcement Branch comprise both forms of legal sanctions identified above. In case that a Party does not meet its substantive GHG emissions reduction obligations, the Committee may decide to increase the concerned Party's GHG emission reduction obligations by up to a third for the subsequent reduction period. The Committee's decision changes the concerned Party's substantive obligations under the treaty. It does not constitute physical force nor any other extra-legal means of pressure. But it is automatic, not subject to agreement by the concerned Party. This is a case of sanctioning by imposition of additional obligations. In case a Party does not fulfil its procedural obligations under the emissions trading scheme of the KP, the Committee may decide to exclude that Party from further participating in the scheme. This is sanctioning by removal of a privilege or right. The Party concerned has the right to be heard by the Enforcement Branch, and it may challenge any decision by the Enforcement Branch before the KP-MOP. However, the review is for procedural errors of the Branch only.

The KP Compliance Committee's enforcement mechanism is the most advanced and complex realisation of the "sanctions" type enforcement mechanism to-date. Similar albeit less advanced systems have been inserted in other environmental

[21] For discussion, *see* Láncos, in this issue.

treaties.[22] A somewhat less complex mechanism was realised under the CITES regime. The power of the CITES' Standing Committee to curtail a Party's right to trade in certain species is nevertheless an instance of a legal sanction for non-compliance.[23] And UNESCO, an institution charged with the protection of the global cultural heritage, may remove a site from the coveted World Heritage List that it maintains if the requirements for such designation are no longer met.[24]

2. Contractual: The World Bank

Sanctions in the above sense may also be employed by international institutions on the basis of a contract. The World Bank may enforce the contractual duties of the recipient State through sanctions in the shape of the suspension or even termination of the financing of projects. Unilateral and bilateral rules regulate in detail, under which circumstances the Bank can suspend or cancel its financial support for a project.[25] But the Bank can also declare the acceleration of its payment of dues or even demand a refund of already paid sums. These sanctions will be used to enforce the standards on corrupt, fraudulent or collusive behavior on the side of the recipient or the performance requirements that the recipient is under. While based on a contract, such sanctions can be considered to form part of public authority for the World Bank may impose them unilaterally.

IV. Force

Ultimately, international institutions may be empowered to use force to enforce certain international law. Force here is physical power. In a world of sovereign States such a stark mechanism must be the exception, but the UN Charter does provide for it. Chapter VII UN Charter authorizes the Security Council to take action including force to ensure that a Member State respects its obligation under the Charter, and in particular Art. 2(4) UN Charter. Doctrinally, the public authority of the Council legally to decide on the use of force is to be distinguished from the actual exercise of this force, which may be carried out be the Council itself (Art. 43 UN Charter) or by States acting pursuant to its authorization.

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[22] The procedure established under the Cartagena Protocol on Biosafety includes rules on the admissibility of submissions, admissible information, and on the measures that can be taken against the Party concerned. *See* Dec. UNEP/CBD/BS/COP-MOP/1/15 (14 April 2004), Annex.

[23] *See* Fuchs, in this issue.

[24] *See* Zacharias, in this issue.

[25] General Conditions IBRD, Art. VII; also OP 13.50.

The Security Council may make use of its powers only pursuant to a well-defined procedure with important voting rules, namely the veto of one of the permanent five members. While often considered an obstructive element to the effective functioning of the Charter system it can also be seen as an important constraint on the very broad power of an international institution. Additionally, certain principles underlie and harness the use of the force-enforcement mechanism by the Security Council. The use of force by the Council is to be proceeded by non-forcible economic and other sanctions and the use of positive incentives for the State to comply with its obligations under the Charter.[26] The Security Council also emphasizes the need for a negotiated solution to any crisis, involving the groupings of the most interested States and any regional organisations in the efforts to resolve the crisis peacefully. However, the background of such negotiations is formed by the fact that the Security Council can resort to the use of force if it considers doing so necessary.

V. (Quasi-)Judicial Dispute Settlement

Judicial dispute settlement is an enforcement mechanism in its own right. The central enforcement effect lies in the finding of a breach of international law by a court, resulting in a considerable loss of prestige as well as the obligation to correct the illegal behaviour. Factors determining the effectiveness of this mechanism are a court with mandatory jurisdiction and the power of an international institution unilaterally to seize the court. Examples are far and few between. The example of European integration demonstrates this amply with the European Court of Justice's enjoying mandatory jurisdiction over cases involving EU law and the European Commission being empowered to seize the Court in any instance of a Member State violating its obligations under the EC treaty. The International Tribunal for the Law of the Sea has mandatory jurisdiction over disputes involving the Deep Seabed Authority under UNCLOS Part XI on Deep Seabed Mining.[27] Otherwise, the WTO through its Dispute Settlement Body and also ITLOS rely on decentralized enforcement, however, in that a Party to the treaty needs to seize the court.

It is probably not too much of an exaggeration to say that the effectiveness of international judicial enforcement takes a quantum leap whenever private actors have access to an international court or tribunal. Such access may be of a direct or indirect variety as is the case with the referral procedure (Art. 234 EC). Private

[26] *See* Volker Röben, *Managing Risks to Global Stability*, *in* INTERNATIONAL LAW TODAY: NEW CHALLENGES AND THE NEED FOR REFORM? 51 (Doris König, Peter-Tobias Stoll, Volker Röben & Nele Matz-Lück eds., 2008).

[27] *See* Wolfrum, in this issue.

parties' access rights are very rare, again with the exception of the EC and the deep seabed mining regime of UNCLOS.

C. Addressees of Enforcement Action by International Institutions

The several case studies collected in this volume demonstrate that the panoply of addressees of enforcement action by international institutions reaches from States (I) to individuals (II).

I. States

The multi-level governance model is based on the interaction between international institutions and sovereign States. International institutions rapidly emerge as policy-makers, rule-makers, and rule-implementers. Their prime interlocutors remain the sovereign states, which are to domestically further implement and enforce the measures adopted by international institutions. Consistently with this model, international institutions need to address their enforcement action to States.

But, international institutions may also reach through the sovereign shell in certain instances and address a range of sub-state actors and institutions as well. For instance, under the OCED's export credits discipline, those sub-state institutions that manage "official support" for export credits and credit guarantees as well as so-called tied aid are addressees.

II. Individuals and Other Entities

Several case studies of this project demonstrate that the decisions of international institutions increasingly reach through to individuals. International institutions may attribute to them a certain status or right, such as the recognition of a refugee status by UNHCR[28] or the allocation of a trade mark by WIPO[29]. Socalled listing-procedures trigger legal consequences for the listed entities and individuals. The UN Security Council's Al-Qaida and Taliban Sanctions Committee is the striking case in point.[30] Multinational enterprises are the object of certain OECD-

[28] *See* Smrkolj, in this issue.

[29] *See* Kaiser, in this issue.

[30] *See* Feinäugle, in this issue.

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Guidelines[31] and non-governmental organisations engaged in fishing of the FAO Code of Conduct for Responsible Fisheries[32].

These are, however, decisions of a primary nature, i.e. they determine rights and obligations of individuals and other entities. Enforcement of this primary law is left to the States, which are placed under an international law obligation to take any requisite enforcement action towards their nationals.[33] The framework for international enforcement is complemented by state-internal enforcement, the machinery of which may have to be set up in the first place by each Party. Obviously, Parties will at some point direct their attention to the internal rule of law institutions in place in each State Party. The role of the international institution is restricted to providing technical assistance and coordination concerning the domestic enforcement. Such is the role of the WIPO Enforcement Committee.[34] Under traditional international institutional law this was considered a bright line rule stipulating a limit to the potential reach of international institutions.

However, on closer inspection this may well be an overly formalistic view of things. Clearly, individuals will at least be indirectly affected whenever the relevant international institution in turn enforces the domestic enforcement obligations incumbent on the State. As a result, questions regarding fair hearing and legal protection for individuals become pertinent from the enforcement angle as well. The received (continental) doctrine of administrative law holds lessons as to how to tackle these questions short of, in particular judicial remedy, which may not always be an option.[35]

D. Procedure

All of the above enforcement mechanisms require that the international institution completes a certain procedure before being allowed to apply. The institution will follow a procedure that has at covers at least the following five elements: clarification of the applicable law, implicit or explicit determination of non-

[31] *See* Schuler, in this issue.

[32] *See* Friedrich, in this issue.

[33] For instance, international registration by WIPO bestows upon the applicant the exclusive right to prevent unauthorized third parties from using the trademark in the territories of the designated contracting parties; the enforcement of which right, however, would have to take place in the national courts.

[34] *See* Kaiser, in this issue.

[35] *See* Feinäugle, in this issue.

compliance,[36] the decision on the consequences of that finding, (4) the application of this decision, and follow-up.

Additionally, a review procedure may be provided for. Conceptually speaking, the international institution's decision on the enforcement action may be subject to an administrative or even judicial review, which may be internal or external to the institution. The several case studies of this project demonstrate that enforcement mechanisms are indeed increasingly subject to review of one type or another. The World Bank inspection panel, Interpol's control commission,[37] and the OECD-guidelines on corporate social responsibility[38] for instance foresee the submission of individual complaints by external actors. In most instances the institution's general review mechanisms will also cover the institution's enforcement action to the extent that internal rules and guidelines provide so. Any such review serves to limit the enforcement power of international institutional and therefore is functionally quite distinct from the use of (quasi-)judicial review as an enforcement mechanism.

But the KP system envisages a specialised procedure for the review of any enforcement measures taken. Under this system, Parties who feel they have been denied due process will have the right to appeal a non-compliance determination to the MOP.[39] The enforcement branch's decision will stand pending an appeal, and it may be overturned only by a three-fourths majority vote of the MOP. If a Party's eligibility to participate in the Protocol's three flexibility mechanisms has been suspended, there are expedited procedures for reinstatement.

While varying in degree across the several areas of law referenced in this project, it can safely be stated that States increasingly bind enforcement by international institutions to judicial or administrative control and review. This is not the classic inter-State dispute settlement machinery epitomized by the International Court of Justice. Rather it is a matter of devising specialized procedures and organisational structures. The procedures will be the more formal the more effective the enforcement authority to be controlled is to the point of including (quasi)judicial elements. The increase in effective and justiciable enforcement authority vested in international institutions, by the same token, changes the overall Gestalt of the international institutions concerned.

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[36] It is obvious that the mere fact that an international institution finds a State to be in violation of its international obligations will in itself often enforce that obligation.

[37] *See* Schöndorf-Haubold, in this issue.

[38] *See* Schuler, in this issue.

[39] Decision 24/CP.7 Annex, Art. XV.

E. Organisation

Effective enforcement of international law and the rise of international institutionalism are two concepts that are inexorably intertwined. Effective enforcement requires independent actors - an international institution - which can handle the complex legal and factual issues arising in an independent and neutral manner. The increasingly complex enforcement mechanisms presuppose the existence of institutions with a concomitant level of organisational complexity. Thus, legal sanctions cannot be operated by States acting either individually or in ad-hoc cooperation with other States. Rather they can only be applied by an organisationally differentiated body such as the Enforcement Branch of the Kyoto Protocol.

Effective enforcement mechanisms presuppose an organisationally differentiated international institution for their functioning, but they do not necessarily require an international organisation. While it is true that force can be exercised only by the UN – the archetype of an international organisation – it is equally true that the Meeting of Parties of the KP can take legal sanctions against Parties. Importantly, this latter institution had both the ability and flexibility to *develop* an organisational set-up commensurate to sanctions as a new enforcement mechanism not provided for under the treaty.[40]

In this respect, a number of models emerge from the State practice as evidenced by the case studies of this project. At the one end, a fully centralised set up marked by institutional autonomy can be conceived. It would comprise a specialised limited membership body which can examine cases of non-compliance of its own motion and take relevant action, as required. The body would have the right of initiating the enforcement procedures, or such right of initiative would be vested in another body or organ of the international institution. Finally, review of the enforcement action taken, if any, would again be conducted within the institution. The Kyoto/Marrakech system comes closest to this model. The other end of conceivable organisational set ups is marked by decentralisation where most of these functions are entrusted to States, acting individually or jointly.

Several intermediate stages between these two extremes are conceivable and realised in practice. In particular, there can be lateral linkage between centralised

[40] Decision 25/CP.7 plus annex, adopted at the eighth plenary meeting of the Conference of the Parties to the UNFCCC (Doc. FCCC/CP/2001/13/Add.3 [21 January 2002], at 64-77). Similarly, the Montreal Protocol's non-compliance procedure was adopted by that Protocol's MOP (Doc. UNEP/OzL.Pro.10/9 [3 December 1998], Annex II).

and decentralised organisational elements. One example of such a solution is FAO and its voluntary Code of Responsible Fisheries (CCFR). The norms of the CCRF partake in the decentralised enforcement mechanism foreseen, e.g., in the UN Fish Stocks Agreement (FSA).[41] Since FSA contains an obligation to apply "generally recommended international minimum standards for the responsible conduct of fishing operations" through cooperation in regional fisheries management organizations, this can be understood as a reference or linkage to norms outlined in the CCRF. Another instance of such lateral enforcement by another institution is the European Union's basing its admission of new Member States on the recommendations of the OSCE High Commissioner on Minorities.[42] Fitting enforcement powers and organisational structure of the international administration is a matter of institutional choice.

F. Principles

Enforcement by international institutions against States is in need of legitimacy. Issues of legitimacy become more pressing in proportion to the "degree of formality and the autonomy of international officials."[43] Effective enforcement arguably involves the highest degree of formality and autonomy of international officials on all categories of international institutional decision-making. Consistently, regardless of the classic State-consent reasoning, the legitimacy of effective enforcement authority including sanctions wielded by international institutions vis-à-vis States is now perceived to require the respect of certain principles. Among these principles are adequate procedural safeguards and defense rights for States in the original proceeding as well as an quasi-judicial review of the institution's decisions.

The case studies collected here bear out this point. This is clearly demonstrated by the deep seabed mining provisions of UNCLOS,[44] and also by the KP system for enforcing States Parties' GHG emission reduction obligations.[45] And the enforcement of international law against States as per KP is circumscribed by strict procedures both of an administrative and a quasi-judicial type that will tie the discretion of the international officials put in charge of the enforcement

[41] *See* Friedrich, in this issue.

[42] *See* Farahat, in this issue.

[43] Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE LAW JOURNAL 1490, 1510 (2006).

[44] *See* Wolfrum, in this issue.

[45] *See* Láncos, in this issue.

machinery.[46] This applies both to the enforcement action directed against States and against individuals. The enforcement of international law against individuals per UN Security Council resolutions calls for ever improving protection for the targeted individual and other entities against abuse.

G. Criteria for the Design of Enforcement Mechanisms

While persuasion used to be the only enforcement mechanism for a long time, modern treaties increasingly provide for incentives, disincentives, force, and legally binding sanctions. Such a development might seem counterintuitive to the received notions of legal sovereignty, for, clearly, providing an international institution with the power to enforce international law through sanctions reaches deep into national sovereignty of States subject to it. The provision of effective enforcement is a matter inherently in need of a justifying rationale; put differently, enforcement raises governance issues. First of these issues, enforcement makes sense only if compliance by States with their international obligations is not assumed, which was a central tenet of international law scholarship for a long time.[47] The more realistic worldview reflected in the burgeoning literature on compliance control/enforcement implicitly acknowledges the increasing depth of international law and the fact that international norms will not always stipulate the course of conduct that States would wish to adopt anyway. A further consideration is that all the models that can be chosen from are clearly identified. It is a noble task of legal scholarship to order the mass of legal provisions at hand at any time.[48] At best, this effort of reconstruction will yield a consistent structure storing innovative as well as time-tested concepts and model solutions that are potentially "horizontally" relevant for many if not all areas of law. Parts B. to F. of the paper were devoted to constructing such a contemporary model of the enforcement authority vested in international institutions. Finally, one will need to look for criteria for evaluating

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[46] Olav Schram Stokke, Jon Hovi & Geir Ulfstein, *Introduction and Main Findings*, *in* IMPLEMENTING THE CLIMATE CHANGE REGIME 1, 11 (Olav Schram Stokke & Geir Ulfstein eds., 2005); Láncos, in this issue.

[47] This may still explain much of the workings of some of the most effective international institutions such as Interpol (*see* Bettina Schöndorf-Haubold, in this issue). Given the strong preference of competent national authorities for cooperating with each other through Interpol, the chance of being factually barred from further cooperation arguably makes any formal enforcement of the cooperative requirements superfluous.

[48] EBERHARD SCHMIDT-AßMANN, DAS ALLGEMEINE VERWALTUNGSRECHT ALS ORDNUNGSIDEE (2nd ed., 2004); *see also* Eberhard Schmidt-Aßmann, *Die Herausforderung der Verwaltungsrechtswissenschaft durch die Internationalisierung der Verwaltungsbeziehungen*, 45 DER STAAT 315 (2006). The present paper owes much to this publication, which is itself firmly rooted in the German administrative law tradition. This assumes a primarily inductive, reality-driven reasoning, while complementarily inductive, constitutional-law driven reasoning is not excluded *per se*.

the several models and the respective advantages and disadvantages that they present in deciding on the best fit between abstract model solution and the matter at hand.[49]

Parts B. to F. having laid the ground, Part G. will now undertake to identify criteria for the design of the enforcement mechanism proper for the substantive law regime at hand. Essentially two such criteria may be conceived of. One criterion is the legal qualification of the standards (I). A second, explanatorily more powerful criterion is the complexity of the cooperation intended (II).

I. Legal Qualification of Substantive Standards?

Intuitively, one would assume that the legal qualification of the substantive standards controls the choice of the enforcement mechanism. However, no strong correlation between the two can be observed in practice, as the examples of the non-binding Codex Alimentarius being enforced by binding decisions of the WTO DSB[50] and of non-binding FAO Code of Fisheries being enforced laterally[51] amply illustrate.

II. The Complexity of the Cooperation Intended

Mere legal analysis will not do the job. Rather, one needs to venture into adjacent disciplines such as economic theory. The economic literature on enforcement of international law redirects attention to the fact that the design of international institutions ultimately is best explained as a result of the cooperation of States. Or, in other words, institutions serve the cooperative needs of the principals, i.e. States.[52] Economic theory informs us that if States truly want to make their cooperation work, they need effective enforcement, containing at least these three elements: verifiable information, credibility and potency.[53] An effective enforcement regime also has to meet certain requirements of legitimacy and

[49] On the methodology applied here, *see* ADRIAN VERMEULE, MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL (2007).

[50] *See* Pereira, in this issue.

[51] *See* Friedrich, in this issue.

[52] *See, e.g.*, Duncan Snidal, Barbara Koremenos & Charles Lipson, *The Rational Design of International Institutions*, 55 *INTERNATIONAL ORGANIZATION* 761 (2001). I shall follow these assumptions for the purpose of this paper making abstraction from the rich literature on the identity and aspirations of institutions.

[53] *See, e.g.*, Scott Barrett, *An Economic Theory of International Environmental Law*, *in* INTERNATIONAL ENVIRONMENTAL LAW 231, 249-52 (Daniel Bodansky, Jutta Brunnée & Ellen Hey eds., 2007).

acceptability. They relate particularly to institutionalised processes of decision-making including the dispute settlement subject to procedural guarantees and certain organisational standards.

Economic theory of law would furthermore point out that effective enforcement will deter States from norm violation in the first place.[54] Or, put differently, effective enforcement being in place will make it more likely that norms are complied with in the first place, making use of the enforcement mechanism superfluous. States would want to ensure compliance in this way with norms that legally protect areas of cooperation to which they attach particular importance and which require significant change in behaviour. In other words, the greater the value of a specific cooperation the greater the likelihood that States will install effective enforcement mechanisms 'to make the deal stick.'[55] Occasional enforcement would then have a normative effect of its own, stabilizing the primary norm by ensuring that it is internalised by the addressee(s).

It is thus the type, intensity, and complexity of the cooperation reflected in the primary standards that matters most. Climate change serves as an illustration. Any effort to protect the climate requires that each State needs to make considerable investments. Such cooperation will need to be protected by enforceable law.

Of course, there are also limits to the usefulness of this push for effective enforcement. These limits result from the need to strive for universality of international law-backed cooperation. Achieving such universality or at least the participation of the greatest number of states possibly requires more than simply effective enforcement through sanctions. It requires most often enforcement through positive incentives. For the reasons set out above, such incentives are the instrument of choice whenever lack of capabilities is the primary reason why States or a group of States cannot meet their international obligations.[56] Consistently, the most recent enforcement systems to be operated by international institutions contain both sanctions and incentives.

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[54] *See* Scott Barrett, *An Economic Theory of International Environmental Law*, in INTERNATIONAL ENVIRONMENTAL LAW 231, 252 (Daniel Bodansky, Jutta Brunnée & Ellen Hey eds., 2007).

[55] *See* Joseph Weiler, *The European Court of Justice in the Arena of Political Integration*, 31 *JOURNAL OF COMMON MARKET STUDIES* 417 (1993).

[56] This implies a matter of public choice. The involvement of many particularly many developing countries in the treaty regime may have to be traded off with the set up of an effective system of sanctions approved by a smaller group of states. Of course, the trade off may change over time as the system matures.

H. What Enforcement Tells Us About International Law

On the basis of the legal data assembled in this issue, the domain of enforcement can be considered a viable part of international institutional law across its several substantive areas. This legal data on enforcement can be fitted into a general doctrinal reconstruction resting on three elements: the several mechanisms of enforcement, each mechanism embodying a specific strategy of reacting to a norm violation and bringing about compliance (persuasion, incentives and disincentives, force, and sanctions), the procedures and the organisation of the international institution applying the enforcement mechanism(s), and the potential addressees of this public authority.

This identification of the legal structure of enforcement vested in international institutions serves the rationale of any "*Allgemeines Verwaltungsrecht*" and more specifically the idea of a consistent system, *Ordnungsidee*, which is to systematize the several specific solutions, serve as 'storage' for solutions implemented, and allow for the comparison between them so as to guide the search for the best solution in future instances. Given the twin concerns of effectiveness and respect for sovereign sensibilities, the design of the enforcement powers of a given international institution will have be tailor-made. The search for such a design may be aided and inspired by the models that have been implemented in practice. Of particular relevance in this respect may in the future be the models of the KP and the WTO DSB that serve institutionalised treaty regimes through which the international community administers global public goods.

But the chapter 'enforcement' of international institutional law also goes a long way towards strengthening the publicness of public international law of which it is part and parcel. For, the publicness of public international law and the very quality of public international law as a legal order can be considered to hinge on its at least occasional enforceability. While it is true that law (including public international law) is motivational in its own right, lack of at least occasional contra-factual enforcement of the law will undermine the belief in the law as binding prescript and thus the very underpinning of any legal order,[57] weakening the contribution that international law can make to global governance.

As an essentially horizontal legal order, international law traditionally provides for enforcement mechanisms adapted to its horizontal structure. The law of state responsibility serves as an example. International institutional law now adds

[57] NIKLAS LUHMANN, DAS RECHT DER GESELLSCHAFT (2004).

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vertical enforcement to the traditional horizontally operating mechanisms. In small albeit growing segments, international law can now be vertically enforced by international institutions vis-à-vis States. International environmental law and international economic law may be considered the most innovative references ("*Referenzsysteme*") in this respect.

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