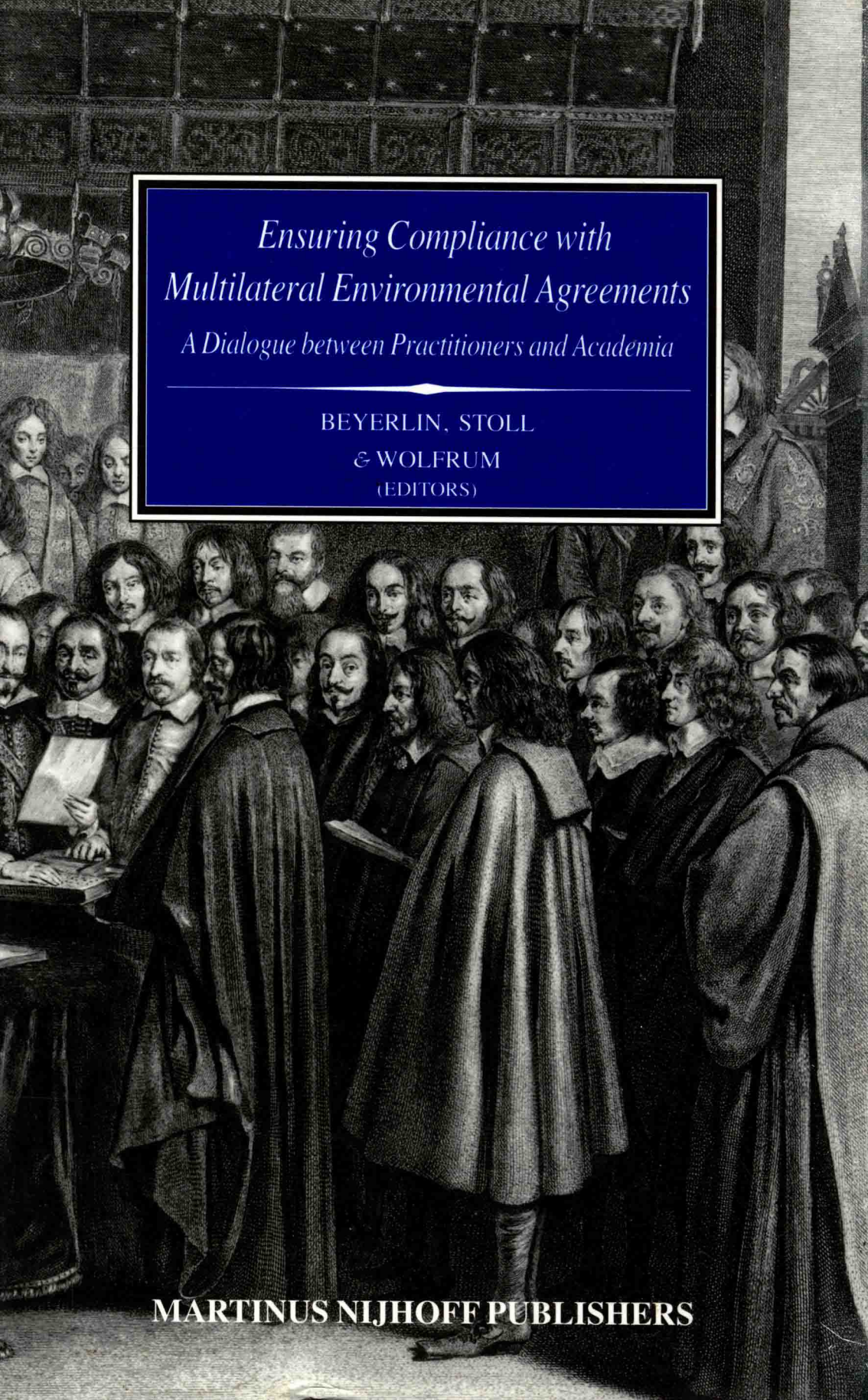

# *Ensuring Compliance with Multilateral Environmental Agreements*

## *A Dialogue between Practitioners and Academia*

BEYERLIN, STOLL
& WOLFRUM
(EDITORS)

MARTINUS NIJHOFF PUBLISHERS

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Edited by

ULRICH BEYERLIN, PETER-TOBIAS STOLL
& RÜDIGER WOLFRUM

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The 'swearing of the oath of ratification' of the peace of Münster,
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# ENSURING COMPLIANCE WITH MULTILATERAL ENVIRONMENTAL AGREEMENTS

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# Preface

There is a simple wisdom law-makers quite often seem to neglect: "Law is only as good as it is obeyed." Consequently, any law-making that runs the risk of remaining dead letters should be avoided. Law cannot fulfil its guiding function unless it is rational; that means that its addressees fully understand and accept the reasons why it has been made and must be complied with.

Transposed on international treaty law, this means that compliance with treaty obligations considerably depends on the soundness of the whole treaty regime. Thus, ensuring treaty compliance begins with sound treaty-making. In this respect, four essential requirements have to be met: (1) Any treaty obligation must be designed in such a way that the contracting parties are fully aware of what they are expected to undertake for achieving the treaty's objective. (2) The content of any treaty obligation must be so clear-cut and definite that its fulfilment can be effectively controlled. (3) Mechanisms of compliance control must be transparent to such a degree that each contracting party clearly foresees the consequences of non-compliance. (4) The benefits that each party draws from compliance must outweigh the costs of non-compliance.

In the field of multilateral environmental agreements (MEAs), mechanisms of compliance control have been developed which are based on the idea of cooperation and partnership rather than on confrontation. These innovative mechanisms considerably differ from the traditional means of enforcing MEAs, such as sanctions, reprisals or authoritative judicial dispute settlement procedures, which so far have proved to be rather ineffective in international treaty practice. This is not to say that the latter means are totally obsolete today. But the method of non-confrontational compliance control promises to show more efficacy in practice than that of taking merely repressive measures. However, the method of non-confrontational compliance control is not yet available under all MEAs. Furthermore, thus far it shows certain short-comings and uncertainties. In particular, the appropriate combination of carrots and sticks merits further attention. Also, such mechanisms are yet not consolidated and settled enough to be employed in all cases where MEAs are not complied with by one or the other party. Much remains to be done in order to make this method a reliable and useful tool for ensuring treaty compliance for a range of MEAs as broad as possible. A better understanding of these mechanisms is the key to exploring options for their further improvement and for considering their wider application in the realm of international environmental regimes. Such understanding has to be based on a sound theoretical framework and the practical experience available.

For these good reasons, the Federal Ministry for the Environment and the Federal Environmental Agency initiated and generously supported a workshop, which was organized by Tobias Stoll, Rüdiger Wolfrum and myself. It took place in Heidelberg at the Max Planck Institute for Comparative Public Law and International Law in autumn 2004. In a joint effort of the authors, organizers and sponsors, the wealth of information and thoughtful consideration as presented by scholars and practitioners from various regions of the world has been gathered together in this volume.

After an introductory contribution providing the theoretical basis for the discussion on enforcement mechanisms in international (environmental) law (*Brunnée*), expert reports on compliance control under the Montreal Protocol (*Sarma)*, the Geneva Convention on Long-range Transboundary Air Pollution and accompanying protocols (*Kuokkanen*) illustrate the idea of modern compliance control from a practical point of view. Similar and alternative mechanisms of ensuring treaty compliance employed or currently emerging under the MEAs in various other fields, such as climate change (*Wolfrum / Friedrichs)*, control of transboundary movements of hazardous wastes (*Shibata*), protection of endangered species of wild flora and fauna (*Biniaz*), and last, but not least, protection of the marine environment and marine living resources (*Simcock*, *Fitzmaurice-Lachs, Mensah, Edeson* and *Birnie*) further illuminate the scene. IAs a whole, these reports offer rich insights into the concept, institutional setting and procedure of compliance mechanisms and clarify their relationship with the classical enforcement mechanisms.

On that basis, a number of cross-cutting issues are addressed, including reporting (*Kiss*), inspection and external monitoring (*Bothe*), the question of sanctions and state responsibility (*Sand*), technical and financial assistence (*Boisson de Chazournes*), financial and other incentives (*Matz*), the interplay with dispute settlement (*Sands*) and last – but not least – the role of NGOs in this context (*Epiney*).

As organizers of the workshop and editors of this volume, Tobias Stoll, Rüdiger Wolfrum are deeply indebted to the German Federal Environment Ministry and the Federal Environmental Agency for their generous support and to the authors for their willingness to revise and hand in their papers. *Petra Minnerop* and *Lucy Keller* from the Max-Planck-Institute were in charge of the conference organization. *Roslyn Fuller* from the Göttingen Institute was in charge of the editing, while *Doris Ruhr* and *Till Holterhus* did the final formatting. They all deserve special thanks for their patience and skill.

*Ulrich Beyerlin*
*November 2005*

# Introduction

*Karsten Sach**

The German Ministry for the Environment, Nature Conservation and Nuclear Safety is grateful that Professors Wolfrum, Stoll and Beyerlin have jointly organized and are hosting this workshop. I enjoyed their outstanding legal scholarship during the preparation of the workshop as well as on other occasions and I am looking forward to experiencing more of it now at this centre of scholarship in modern international law in the romantic old university town of Heidelberg.

In addition, I would like to warmly thank the speakers and participants for coming and entering into this dialogue between practitioners and academia. Ensuring compliance with multilateral environmental agreements is a complex task. I am convinced that the variety of experiences and complementary ways of thinking you represent will help bring us a step closer to accomplishing this complex task. This is even more true as we can hold discussions here without the pressure of negotiations under political instructions from capitals and as the Chatham House Rules apply opinions may be quoted, but not attributed to anyone.

Before we begin I would like to take this opportunity to explain why the German Environment Ministry initiated this workshop and what expectations and hopes I have.

The starting point was that there are very good reasons for non-compliance with MEAs, such as political advantages of becoming a Party, regardless of the ability or intention to comply, or more pressing issues requiring scarce resources. However, there are good reasons for compliance, too, namely the protection of the environment and the international order of law. Effective environmental protection requires the negotiation of legally binding MEAs but equally - or at this stage in the development of international environmental law even more importantly - requires compliance with them. Therefore a number of instruments to further compliance have been established and new compliance mechanisms in particular have been developed. The compliance mechanisms under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Montreal Protocol on Substances that Deplete the Ozone Layer and the Convention on Long-Range Transboundary Air Pollution (LRTAP) have been in operation for several years now. The Compliance Committees of the ECE Conventions on Environmental Impact Assessment in a Transboundary Con-

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* Deputy Director General "International Cooperation", Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, Germany

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text (Espoo) and on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus) have just received their first cases. Other mechanisms such as under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, the Cartagena Protocol on Biosafety, the Kyoto Protocol to the UNFCCC, the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (PIC), and the Stockholm Convention on Persistent Organic Pollutants (POPs) are about to become operational or at least finalized in the not-so-distant future. Another group of regimes, namely most of the maritime regimes, follow different, more traditional approaches.

After some practical experience with these different instruments, it is now time to take stock. In order to evaluate the situation we are in, three sets of questions are of particular interest:

Firstly: Do the compliance instruments really improve compliance? This is a difficult question to answer, but the answer is obviously crucial for all of the following considerations.

Secondly: What are the preconditions for success or failure? There are two key elements in a compliance instrument:

- the trigger, i.e. who is entitled to start the proceedings, and
- the measures that may be taken in cases of non-compliance.

Very different measures are available under existing regimes, ranging from financial assistance or the issuance of a caution to a decision on trade sanctions or compensation. Do these choices influence compliance? Or to put it another way: Is compliance better promoted by offering financial resources to the Party breaching its treaty obligation or by threatening to take financial resources from it? The European Commission would probably be able to tell some success stories in favour of the second approach as the EC Treaty provides for penalty payments to be paid by Member States not fulfilling their obligations under EC law. The provision has proved to be a strong incentive to implement EC legislation swiftly. It would be interesting to compare these experiences with experiences at the international level.

A further point for discussion could be whether the preconditions are to be set in the MEA or in a later decision establishing the compliance instrument. This is by no means a mere formality, as it is much easier to revise decisions than it is to revise treaties - sometimes merely by a simple majority vote - whereas a treaty amendment might involve a hundred or more ratification processes. On the other hand, some measures might require a stronger legal basis than a decision of the Conference of the Parties. Perhaps the answer to all these questions is that sometimes compliance mechanisms work and sometimes they do not, as different types of obligations may require dif-

ferent types or a different mix of compliance instruments. In that case it would be very useful to get some guidance on what types of treaty obligations require what set of compliance provisions.

The third set of questions addresses the possible links between the different compliance instruments. Are there synergies of, or conflicts between, the new, non-confrontational mechanisms on the one hand and the traditional, confrontational instruments on the other? It is standard practice to include a provision in new compliance procedures stating that the compliance procedures are without prejudice to the dispute settlement proceedings under the treaty. But question marks remain. For example: Do the new compliance mechanisms rule out traditional dispute settlement, at least as long as a case is dealt with under the procedure of the compliance mechanism? Is a declaration of non-compliance from a Conference of the Parties binding for an international court? Does a decision of a compliance committee or a Conference of the Parties on a compliance plan foreseeing further years of non-compliance exclude State responsibility of the non-complying Party? When we use the new compliance mechanisms we wish to be very clear on whether and how we influence our other options.

It is my hope that after having learnt more about these cross-cutting issues we can negotiate better MEAs and decisions establishing the compliance instruments and use these and other instruments more efficiently.

# Table of Contents

# Enforcement Mechanisms in International Law and International Environmental Law

*Jutta Brunnée**

## 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".[1] 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."[2]

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* Professor of Law and Metcalf Chair of Environmental Law at the University of Toronto. I thank Kate Brookson-Morris and David Wei for their excellent research assistance.

1 Listing "compliance": U. Beyerlin, *Umweltvölkerrecht,* (2000), ("Erfüllungskontrolle"); P. Birnie/A. Boyle, *International Law and the Environment*, 2nd 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).

Listing "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*, 2nd ed, (2003), (textual treatment includes compliance). Listing "compliance" and "enforcement": A. Kiss/D. Shelton, *International Environmental Law*, 3rd ed., (2004).

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

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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.[3] 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,[4] something best left unsaid.

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."[5] 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."[6] 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."[7]

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3 P. Weil, "Le droit international en quête de son identité", *Récueil des Cours de l'Academie de Droit International* 237 (1992), pp. 13 *et seq.* (53).

4 See M.E. O'Connell, "Enforcement and the Success of International Environmental Law," *Ind. J. Global Leg. Stud* 3 (1995), pp. 47 *et seq.* (49).

5 D.J. Bederman, "Constructivism, Positivism and Empiricism in International Law," *Georgetown L. J.* 89 (2001), pp. 469 *et seq.* (473).

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

7 See, L. LeBel/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), pp. 23 *et seq.* (62). See also R. Higgins, *Problems and Process: International Law and How We Use It,* (1994), p. 207, musing about a: "[p]sychology that

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 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."[8] 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. For one thing, international law was a self-judging system. Each state decided for itself whether its rights had been violated and what response action to take. Additionally, it was a self-help system without any

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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."

8 *Black's Law Dictionary*, 8th ed., (2004), p. 569.

central authorities or institutions through which rights could be vindicated or enforced. Finally, until the beginning of the 20th century, military force was an acceptable means for states to settle differences, pursue their interests or enforce their rights.[9]

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-defense.[10] 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*,[11] which entitle all states to take certain measures in response to a violation.[12] 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.[13]

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9 Cassese, *supra* note 2, p. 229.

10 Arts. 2 (4) and 51 UN Charter; Art. 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, 56th 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, 6 November 2003 (paras 12-13).

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

12 See Arts. 42, 48, 49 and 54 of the Draft Articles, *supra* note 10. Note that countermeasures may be taken only by "injured" states (Art. 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" (Art. 54).

13 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), p. 135; T.D. Gill, "Legal and Some Political Limitations on the Power of the UN

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.[14] 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.[15] 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.[16]

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.[17] 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.[18] Finally, it should not be forgotten that the international law's inter-

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Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter," *Netherlands Ybook Int'l L.* XXVI (1995), pp. 33 *et seq.*

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

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

16 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), pp. 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), pp. 791 et seq.*

17 See, e.g., for 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, p. 372.

18 See A. Alkoby, "Non-State Actors and the Legitimacy of International Environmental Law", *Non-State Actors & Int'l L.* 3 (2003), pp. 23 *et seq.*; M. Anderson/P. Galizzi, (eds.), *International Environmental Law in National Courts,*