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Compliance with international law: the Kyoto Protocol's compliance mechanisms as an effective tool to promote compliance?

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Abstract

This thesis presents an assessment of the effectiveness of the compliance mechanisms of the Kyoto Protocol in promoting compliance with the obligations under the Protocol. First, theoretical approaches to compliance are explored in order to understand the reasons for which states comply, using both international legal and international relations theory. This not only contributes to a greater understanding of compliance, but also helps to establish a framework of criteria for the assessment. Second, practical experience with the compliance mechanisms of the Montreal Protocol is used to develop further assessment criteria. Following a detailed description and analysis of the compliance mechanisms, the insights from theory and practice are applied. The results show that the Kyoto Protocol's compliance mechanisms present an innovative balance of managerial and incentive strategies and integrate important elements emphasised by constructivist approaches to international law. They are thus designed effectively to promote compliance with the Kyoto Protocol.

Résumé

Cette thèse présente une évaluation de l'efficacité des mécanismes relatifs au respect des dispositions du Protocol de Kyoto. Premièrement, les approches théoriques relatives au respect des dispositions sont explorées en utilisant les théories du droit et des relations internationales pour comprendre les raisons poussant les états à se conformer et contribuer à une meilleure compréhension des mécanismes. Ceci permettra d'établir un modèle de critères pour l'évaluation de leur efficacité. Deuxièmement, l'application pratique des mécanismes du Protocol de Montréal est utilisée pour développer des critères plus approfondis. Finalement, suivant une description détaillée et une analyse des mécanismes, les apports théoriques et pratiques sont appliqués. Les résultats démontrent que les mécanismes présentent un équilibre innovateur de « managerial model » et de mesures incitatives et qu'ils intègrent des éléments soulignés par les approches constructivistes au droit international. Ainsi, ils sont conçus efficacement pour promouvoir le respect des dispositions du Protocol de Kyoto.

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Table of Abbreviations

CDM	Clean Development Mechanism
CFC	Chlorofluorocarbon
COP	Conference of the Parties
FCCC	United Nations Framework Convention on Climate Change
GATT	General Agreement of Tariffs and Trade
GEF	Global Environment Facility
GHG	Greenhouse Gas
HFC	Hydrofluorocarbon
IC	Implementation Committee (of the Montreal Protocol)
ICJ	International Court of Justice
IL	International Law
IPCC	Intergovernmental Panel on Climate Change
IR	International Relations
MEA	Multilateral Environmental Agreement
MLF	Multilateral Fund
MOP	Meeting of the Parties
NGO	Non-Governmental Organisation
ODS	Ozone depleting substance
TEAP	Technology and Economic Assessment

	Panel
TOC	Technical Options Committee
UNEP	United Nations Environment Programme
WTO	World Trade Organisation

Chapter I

Introduction

The issue of climate change represents one of the central challenges that humanity faces in the 21st century.[1] The earth's climate, to a great extent responsible for life as we know it, is greatly influenced by the presence of greenhouse gases (GHGs) in the atmosphere.[2] Scientists around the globe have been observing an increase in the concentration of GHGs, accompanied by an accelerated rate of global warming and related occurrences.[3] In addition, highly sophisticated models calculate that the global average temperature will have risen by 1.4 to 5.8 degrees Celsius by the year 2100.[4] Further, scientists largely agree that human activity such as the combustion of fossil fuels, deforestation and agriculture are largely responsible for this development. In other words, the alterations are anthropogenic, i.e. human-induced.[5]

What effects an increasing concentration of GHGs and global warming will have on the climate is difficult to foresee. There is preliminary evidence suggesting that global warming is connected to the recent increased frequency of floods and droughts in many areas of the world.[6] Computer simulations indicate that an unprecedented global warming will cause major flooding as well as

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[1] See e.g. International Institute of Sustainable Development, Online information, "Climate change knowledge base", online: International Institute of Sustainable Development <http://www.iisd.org/climate> (last accessed 15 October 2003) (referring to climate change as the central challenge of sustainable development).

[2] These greenhouse gases do not reflect the shortwave solar radiation but trap the long wave radiation originating from the reflection of the solar radiation on the earth's surface. This results in a warming effect. See Philippe Sands, *Principles of international environmental law: volume I: Frameworks, standards and implementation* (Manchester; New York: Manchester University Press 1995) at 271.

[3] Observations indicate that the 1990's have been the warmest decade in the millennium as mean temperatures have risen by 0.4 to 0.8 degrees Celsius since the 1900s. The global average sea level has risen by 0.1 to 0.2 metres. Snow cover and ice extent have decreased. Altitudinal shifts of plant and animal ranges as well as declines of some plant and animal populations due to climate change can be observed. See for these and other information the *Report of the Working Group I of the third assessment report of the International Panel on Climate Change*, "Climate Change 2001: The Scientific Basis" (2001), online: <http://www.grida.no/climate/ipcc_tar/wg1/index.htm> (last accessed 15 October 2003).

[4] *Ibid.*

[5] *Ibid*; see also online: Center of International Environmental Law <http://www.ciel.org/Climate/programclimate.html> (last accessed 18 October 2003).

droughts, sea-level rise, spread of deadly diseases such as malaria and dengue fever, and violent storms. Without immediate action, the situation could reach a point at which the living conditions are unbearable for large parts of the global population, especially in poor developing regions.[7]

The urgency and the high stakes of the problem are accompanied by the difficult circumstances that any solution must face. Climate change presents unique difficulties to policy makers. It is a global problem requiring a global solution and therefore the participation of the large majority of countries in the world in order to be effective.[8] Further, GHGs stay in the atmosphere for a long-time, possibly centuries.[9] This creates the further political difficulty that action is needed before the scientific case is fully established and before major impacts on living conditions are being felt by the populations.[10] Finally, effectively addressing climate change will require fundamental changes in a variety of economic sectors and affect commercial and private activities.[11]

Over ten years ago, humanity started to respond to these challenges with the United Nations Framework Convention for Climate Change (FCCC),[12] followed by the Kyoto Protocol in 1997.[13] Despite this promising start, emission

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[6] *Ibid.*

[7] Models of the IPCC indicate for example a future reduction in potential crop yields in most tropical and sub-tropical regions, an increase in the risk of flooding and decreased water availability for populations in many water-scarce regions, see *the Report of the Working Group II of the third assessment report of the International Panel on Climate Change*, "Climate Change 2001: Impacts, Adaptation and Vulnerability" (2001), online: International Panel on Climate Change <http://www.grida.no/climate/ipcc_tar/wg2/index.htm> (last accessed 15 October 2003); see also online: The Center for International Environmental Law, *supra* note 5.

[8] See the *Report of the Working Group III of the third assessment report of the International Panel on Climate Change*, "Climate Change 2001: Mitigation: Summary for policy makers", online: International Panel on Climate Change <http://www.grida.no/climate/ipcc_tar/wg3/index.htm> (last accessed 18 October 2003).

[9] *Ibid.*

[10] In other words, the solution must be to a certain extent precautionary as well as preventive.

[11] Jutta Brunnée, "The Kyoto Protocol: Testing Ground for Compliance Theories?" (2003) 63 Heidelberg J. Int'l L. 255 at 270 [Brunnée, "Testing Ground"].

[12] *United Nations Framework Convention on Climate Change*, 9 May 1992, 31 I.L.M. 849 (1992), online: United Nations Framework Convention on Climate Change <http://unfccc.int/resource/convkp.html> (last accessed 15 October 2003) [*FCCC*].

[13] *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 10 December 1997, UN Doc. FCCC/CP/1997/L.7/Add.1, 37 I.L.M. 22 (1998), online: United Nations Framework Convention on Climate Change <http://unfccc.int/resource/docs/convkp/kpeng.pdf> (not yet entered into force) [*Kyoto Protocol*].

levels of GHGs in almost all industrialised nations are on the rise.[14] Consequently, as even the modest obligations of the Kyoto Protocol will be difficult to achieve for a variety of countries, the focus will have to shift to implementation and compliance once the Kyoto Protocol enters into force.[15] This shift in focus will determine whether the Kyoto Protocol can be more than merely another demonstration of good intentions.[16]

The attempt to preserve a global commons resource such as the atmosphere not only presents special economic and political challenges, but also legal ones. In areas such as ozone depletion or climate change, promoting implementation and compliance is particularly difficult as notions of reciprocity are less capable than in other areas to ensure the compliance of states.[17] Enforcement tools such as retaliation in kind, treaty suspension or countervailing

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[14] EU emissions despite hopeful signs in Great Britain and Germany are on the rise by 1.6 % as compared to 1990, see e.g. European Environment Agency, News Release, "EU greenhouse gas emissions rise for second year running" (6 May 2003) online: European Environment Agency <http://org.eea.eu.int/documents/newsreleases/ghg-2003-en (last accessed 15 October 2003). In Canada, emissions rose in just ten years between 1990 and 2000 by 20 %, see *Compilation and synthesis report on third national communications*, Subsidiary Body for Implementation Executive Summary, UN FCCC, 18th Sess., UN Doc. FCCC/SBI/2003/7 (2003) at Part III. Figure 2, online: FCCC <http://unfccc.int/resource/docs/2003/sbi/07.pdf> (last accessed 16 October 2003).

[15] It has not entered into force because the percentage of emissions by the Annex I countries (refers to Annex I of the FCCC, which contains a list of industrialised states and states undergoing the process of transition to market economies) that have signed only amounts so far to a total of 44.2 % of the total carbon dioxide emissions for 1990, thus not yet attaining the required total of 55 % needed for the Kyoto Protocol to enter into force. As the United States are currently not planning to ratify, the Kyoto Protocol could only enter into force with the accession of the Russian Federation. However, Russian President Vladimir Putin has announced recently that his country will only ratify after having studied the consequences thoroughly, indicating that ratification is not assured. For the reasons behind the Russian stance and the risks for the process, see e.g. Hervé Kempf, "Feu le protocole de Kyoto" *Le Monde* (8 October 2003). Further information on the status of ratification is available online: <http://unfccc.int/resource/kpstats.pdf> (last accessed 17 October 2003).

[16] In many areas of international environmental law, the amount of adopted instruments does not correspond to the actual efforts for implementation, see David G. Victor, Kal Raustiala & Eugene B. Skolnikoff, "Introduction and Overview", in David G. Victor, Kal Raustiala, Eugene B. Skolnikoff, eds., *The implementation and effectiveness of international environmental commitments: Theory and Practice* (Laxenburg, Austria: International Institute for Applied Systems Analysis, 1998) 1 at 1 [Victor, Raustiala & Skolnikoff, eds., *Implementation and Effectiveness*]; already a decade ago, Martti Koskenniemi expressed this by pointing out that what is needed is less the adoption of new agreements but a focus on a more effective implementation of the existing instruments, see Martti Koskenniemi, "Breach of treaty or non-compliance? Reflections on the enforcement of the Montreal Protocol" (1992) 3 Y.B. Int'l Env. L. 123 at 123.

[17] Markus Ehrmann, "Procedures of Compliance Control in International Environmental Treaties" (2002) 13 Colo. J. Int'l Envtl. L. & Pol'y 377 at 383; Patricia W. Birnie & Alan E. Boyle, *International Law and the Environment,* 2d ed. (Oxford: Oxford University Press, 2002) at 196.

measures, as provided for in international trade agreements or by the Vienna Convention of the Law of Treaties,[18] are less suitable in this problem area because their application would not target the violator, but rather would affect all Parties equally.[19]

Other means such as state responsibility and liability concepts suffer from serious deficiencies in practice. International jurisdiction is rarely compulsory, liability standards are uncertain and state responsibility is inadequate for the preventive approach that is necessary to effectively preserve global common resources.[20] The character of global commons also leads to difficulties with regard to standing before a court, because it is not any individual state, but the community of states as a whole which is injured.[21] Although this could be overcome by recognising an 'erga omnes' obligation[22] for global environmental responsibility, to expect such a decision from the International Court of Justice (ICJ) seems too optimistic when considering the reluctance of that body towards the employment of such a concept outside of human rights norms.[23]

These difficulties and the global character of the problem require the development of innovative concepts and mechanisms to resolve problems of compliance while maintaining the cooperation of states on a global scale.

The latest attempt to develop such mechanisms was the creation of the compliance mechanisms[24] of the Kyoto Protocol, which have been hailed as the

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[18] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969), Art.60.

[19] David Hunter, James Salzman & Durwood Zaelke, *International Environmental Law and Policy*, 2d ed. (New York: Foundation Press, 2002) at 457.

[20] Ulrich Beyerlin, "State Community Interests and Institution-Building in International Environmental Law" (1996) 56 Heidelberg J. Int'l L. 602 at 618; see also Koskenniemi, *supra* note 16 at 125-128 (for six criticisms of state responsibility concepts including causality and problems, the difficulties to establish wrongfulness and the inadequacy of state responsibility for prevention).

[21] See e.g. Koskenniemi, *ibid.* at 128.

[22] As recognised in principle, but not for environmental obligations, by the International Court of Justice in the *Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* [1970] I.C.J. Rep. 3.

[23] This reluctance could be seen in the *Nuclear Tests Cases (Australia v. France; New Zealand v. France)* [1974] ICJ Rep. at 253 and 457, online: International Court of Justice <http://www.icj-cij.org/icjwww/idecisions.htm> (last accessed 15 October 2003).

[24] In the following, I will use the term "compliance mechanisms" for the entire spectrum of regulations that relate to compliance, including reporting and monitoring. The term "non-compliance procedures" will be used to explicitly refer to procedures that are put in place to respond to actual non-compliance.

most elaborate and robust ever developed.[25] The objective of this thesis is to assess the ability and effectiveness of these compliance mechanisms in achieving their goal, namely "to facilitate, promote and enforce the compliance with the commitments under the Protocol."[26] The thesis is that the compliance mechanisms present an innovative system well equipped to lend considerable support to the equally innovative overall system of the Kyoto Protocol and thereby contribute to mitigating climate change.[27]

An assessment of the Kyoto Protocol's compliance mechanisms can build upon previous experiences. An important one was the development and practical application of the compliance mechanisms of the Montreal Protocol.[28] These mechanisms are seen as an important precedent in international environmental law.[29] It is likely that their design has contributed to the success that the Montreal Protocol has had.[30] Consequently, the experiences with these compliance

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[25] Matthew Vespa, "Annual Review of Environmental and Natural Resources Law" (2002) 29 Ecology L.Q. 395 at 413; Glenn Wiser, "Kyoto Protocol Packs a Powerful Compliance Punch" (2002) 25 Intl. Envtl. Rep. 86, online: Center for International Environmental Law <http://www.ciel.org/Publications/INER_Compliance.pdf> (last accessed 17 October 2003) [Wiser, "Powerful Punch"].

[26] See the *Procedures and mechanisms relating to compliance under the Kyoto Protocol* [*Kyoto Protocol non-compliance procedures*], entailed in an Annex to Decision 24/CP.7 of the "Marrakech Accords", at I. See for the Marrakech Accords the *Report of the Conference of the Parties to the United Nations Framework Convention on Climate Change on its Seventh Session,* UN FCCC, UN Doc. FCCC/CP/2001/13/Add.1-3 (2001), online: United Nations Framework Convention on Climate Change <http://unfccc.int/resource/docs/cop7/13a01.pdf> (Volume I), <http://unfccc.int/resource/docs/cop7/13a02.pdf> (Volume II), <http://unfccc.int/resource/docs/cop7/13a03.pdf> (Volume III) (last accessed 15 October 2003) [*Marrakech Accords*].

[27] The above mentioned objective should at the same time not distract from the fact that the path towards the assessment alone merits the efforts in research. It leads to an understanding of compliance and helps to identify elements that are generally essential to improve compliance with international law.

[28] *Montreal Protocol on Substances that Deplete the Ozone Layer*, 16 September 1987, 1522 U.N.T.S. 3, 26 I.L.M. 1541 (entered into force 1 January 1989) [*Montreal Protocol*].

[29] Hunter, Salzman & Zaelke, *supra* note 19 at 526; Edward A. Parson, "Protecting the Ozone Layer", in Peter M. Haas, Robert O. Keohane & Marc A. Levy, eds., *Institutions for the Earth: Sources of Effective International Environmental Protection* (Cambridge, Mass.: MIT Press, 1993) 27 at 27.

[30] Just recently, scientists have been able to show that the ozone destruction in upper atmospheric levels is starting to decrease for the first time in 30 years. They give the credit for this development to the global effort made under the Montreal Protocol, calling it "...the most significant environmental success story of the 20th century", see Peter N. Spotts, "After 30 years, ozone is recovering", in *The Christian Science Monitor* (August 1st 2003) (quoting Dr. Michael Newchurch, an atmospheric chemist at the University of Alabama at Huntsville whose research group has assessed the new data).

mechanisms and their design will be considered in this paper in order to provide insights for an assessment of the compliance mechanisms of the Kyoto Protocol.

Drawing upon practical experiences as the basis for an assessment is, however, not sufficient. An assessment of mechanisms designed to enhance compliance can not ignore the reasons for which states comply with international law. Therefore, looking at compliance and compliance-enhancing mechanisms will always be inextricably linked to different theories about what compliance means and how it is brought about.[31] Any choices made in the design of an international regime have to be justified in light of compliance theories before they are prescribed.[32] Consequently, different theories of compliance will be used to justify the turn to international law as a means to enhance compliance and to understand the underlying reasons for compliance of states. This understanding will provide the necessary theoretical background which, together with the criteria drawn from practical experience, will serve as the basis to assess the design of the compliance mechanisms of the Kyoto Protocol.

The roadmap to attain the objective of the paper as stated above will be the following: In chapter II, different theoretical approaches to the questions why and when states comply will be consulted. This will provide the theoretical framework for a more specific look at compliance mechanisms later and therefore stands at the beginning of the road. From the theory, I will try to develop a set of criteria that seem to be essential to enhance compliance and that can be helpful in assessing the design of compliance mechanisms. With the intent of drawing lessons not only from theory, but also from practical experience, chapter III will look at the compliance mechanisms of the Montreal Protocol and ultimately establish another set of criteria that will serve as a basis of the assessment in chapter V. In chapter IV, I will turn to the Kyoto Protocol's compliance mechanisms as the latest and most complex attempt to develop innovative

[31] As Benedict Kingsbury notes: "'Compliance' is thus not a free-standing concept, but derives meaning and utility from theories, so that different theories lead to significantly different notions of what is meant by 'compliance'", see Benedict Kingsbury, "The Concept of Compliance as a Function of Competing Conceptions of International Law" (1998) 19 Mich. J. Int'l L. 345 at 346.

compliance mechanisms, describing and analysing their regulations in comparison to the mechanisms of the Montreal Protocol in order to show the innovations. In a final step, chapter V will attempt an assessment of the compliance mechanisms, building upon the criteria identified in chapters II and III. The basis for the assessment is thus a framework combining lessons from theory and practice. Finally, the conclusion and summary in chapter VI will state the result and conclude whether the thesis stated above can be upheld.

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[32] George W. Downs, Kyle W. Danish & Peter N. Barsoom, "The Transformational Model of International Regime Design: Triumph of Hope or Experience?" (2000) 38 Colum. J. Transnat'l L. 465 at 467.

Chapter II

The role of international law in achieving compliance: theories of compliance as the theoretical framework and theoretical basis for effective legal design

A. Introduction

For the reasons outlined in the introduction, this paper makes an attempt to understand and assess compliance mechanisms, in particular the compliance mechanisms of the Kyoto Protocol. These mechanisms were created to enhance and promote compliance with multilateral treaties.[33] In order to be able to understand whether and how they are able to achieve that goal, one has to understand how the parties to such treaties can be influenced. In other words, it is necessary to understand why states do or do not comply with international law. This question of compliance has been debated by international legal theorists and international relations theorists for decades. In the quest for an answer to this question which can justify not only the turn to law as a tool to influence state behaviour, but which could possibly provide lessons for the design of effective compliance mechanisms,[34] I turn to this scholarship.[35] Looking at international legal and international relations theory, I will seek to understand the specific role of law in influencing state compliance and I will try to distil criteria for an assessment and improvement of the design of compliance mechanisms. These criteria, each embodying a certain theoretical aspect, will then be used in combination with the criteria established in chapter III to assess the compliance mechanisms of the Kyoto Protocol in chapter V.

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[33] See e.g. the *Kyoto Protocol non-compliance procedures, supra* note 26.

[34] For scholars that share this understanding of the usefulness of compliance theory and who provide an excellent overview of the scholarship, see Kal Raustiala & Anne-Marie Slaughter, "International Law, International Relations and Compliance", in Walter Carlsnaes, Thomas Risse & Beth A. Simmons, eds., *Handbook of International Relations* (London, SAGE Publications, 2002) 538 at 538; for an overview see also Benedict Kingsbury, *supra* note 31.

[35] This choice of theories is of course highly subjective. Leaving some theories aside should not be considered as an implicit criticism of those that are left out, but rather as the consequence of the limited scope of this paper.

While pursuing these objectives, it became apparent very early that international relations scholarship can contribute substantively towards a better understanding of the questions involved.[36] The reason for this is that the question of the role of law in influencing state behaviour is closely related to some fundamental considerations about the behaviour of states in international politics. This is exactly the focus of international relation theory. Compliance must be seen in a broader perspective, and international relations theory enriches such a perspective by helping to better understand the fundamental conditions in which law operates or evolves. In concrete terms, it will be necessary and enriching for an understanding of the role of law to consider why states at times cooperate and how interests of states which influence decisions about compliance might be constructed. International relations theory will thus be used to explain what legal scholarship can not explain, and to better understand the underlying mechanisms that the legal scholarship is building upon.[37]

B. The role of international law in enhancing compliance of states: when and why do states comply with international law?

1. Legal positivism

Legal scholarship used to be preoccupied with whether international law can be called law at all. Positivists such as John Austin denied international law the status of law "properly so called" since it does not derive from a sovereign who can enforce it but is merely based on general opinion.[38] This perception displays that international law was largely assessed in analogy to municipal law and that law's influence was seen as dependent on centralised enforcement.

Such a simplistic view did not survive the more refined positivist legal theory of H.L.A. Hart. He points out that the international legal system, although

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[36] See Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, Mass.: Harvard University Press, *1995*) at X (Preface) (for the acknowledgement that "there is much to be learned from cognate disciplines-international relations, game theory, security studies, and the like.").

[37] For example, managerialism builds upon rationalist institutionalism and interactional theory builds upon constructivism. This will become clear in the course of this chapter.

[38] John Austin, *The Province of Jurisprudence Determined* (Aldershot, Brookfield, USA: Ashgate/Dartmouth, 1998, 1st ed. 1832) at 106 and 152.

neither equipped with secondary rules nor centralised enforcement, has the capability to provide a great deal of social ordering. Thus, international law despite its simplicity has the potential to be binding. As an explanation for this potential, Hart mentions the acceptance of many international legal rules and their actual functioning.[39] This shows that Hart, although having realised international law's factual influence, could not persuasively answer the puzzle formulated later in famous words by Louis Henkin, namely that "almost all nations observe almost all principles of international law and almost all of their obligations almost all the time."[40] Simply referring to the acceptance of states of these rules, which amounts to simple consent theory, is a step forward but still insufficient as it does not tell us why states accept and what makes them follow up on their obligations.[41] Positivism thus either denies international law the status of law because it is not enforceable and thus not binding or it can not explain its bindingness if it accepts international law as law.

The apparent focus of positivist legal doctrine on legal bindingness is criticised by critical legal theorists. They point out that positivists not only base their analysis on a false analogy to municipal law,[42] but that they also tend to wrongly search for the bindingness of an international legal order by separating international law from international politics.[43] In their eyes, including politics into the picture must lead to the conclusion that international law could never seriously constrain powerful states.[44]

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[39] H.L.A. Hart, *The Concept of Law* (London: Oxford University Press, 1961) at 209, 214, 215,229 and 230.
[40] Louis Henkin, *How nations behave: law and foreign policy* (New York: Columbia University Press, 2d ed. 1979) at 47.
[41] As Hart does not talk about what he means with acceptance, his account is insufficient for present purposes.
[42] This is according to Anthony Carty the result of the influence of international lawyers whose categories of thinking are rooted in municipal legal training applied to the field of international law. See Anthony Carty, *The decay of international law? A reappraisal of the limits of legal imagination in international affairs* 129 and 130 (Manchester: Manchester University Press, 1986).
[43] *Ibid.* at 74.
[44] *Ibid.* at 67.

2. Political realism

In their sceptical approach of international law, critical legal theorists do not stand alone. Political realists, perceiving the international system as an "anarchic"[45] structure in which states strive for power and security to ensure their survival,[46] largely deny international law any independent, i.e. behaviour-influencing role. Political realism asserts that the powerful can not be constrained by rules.[47] If international law contradicts this main goal or the interests of the powerful, it is manipulated or even abandoned.[48]

However, in a similar way to the development within positivism, this denial of the independent influence of international law could not be upheld in its entirety. Hans J. Morgenthau acknowledged early that denying "...that international law exists at all as a system of binding legal rules flies in the face of all the evidence."[49] Similarly, Robert Gilpin realises the need for a "minimum set of rules" to govern human interaction in the domestic as well as in the international sphere.[50] Nevertheless, the influence of law generally ends according to this scholarship where it contradicts the logic of power, because there does not exist any law enforcement against the powerful.[51]

It can be seen that within realism, the influence of international law is again thought of as dependent on enforcement possibilities, for example against the powerful. While it might be true that there does not exist a possibility to enforce military sanctions against the most powerful, realism neglects that other factors might be influential for the decision-making of states and therefore for

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[45] Meaning essentially the absence of agents with system-wide authority, see Kenneth N. Waltz, *Theory of International Politics* (Reading, Mass: Addison-Wesley, 1979) at 88.
[46] See instead of many others Waltz, *ibid.* at chapter 6.
[47] See e.g. the assessment of realism by David J. Bederman, "Constructivism, Positivism and Empiricism in International Law" (2001) 89 Geo. L. J. 469 at 473.
[48] Anthony Clark Arend, "Do Legal Rules Matter? International Law and International Politics" (1998) 38 Va. J. Int'l L. 107 at 114-115 [Arend, "Do Legal Rules Matter?] (presenting the realist view without embracing it).
[49] Hans J. Morgenthau devotes a whole chapter to international law, see Hans J. Morgenthau, *Politics Among Nations: The struggle for power and peace* (New York: Alfred A. Knopf, 5th revised ed. 1978, 1st ed. 1948) at 281.
[50] Robert Gilpin, *War and Change in World Politics* (Cambridge: Cambridge University Press, 1981) at 34-35 (seeing such a need in international law areas such as diplomatic protection and rules of war).
[51] Morgenthau, *supra* note 49 at 298.

their decisions to comply or not. Furthermore, realism insufficiently explains the explosion of international cooperation and legalisation of such cooperation, in matters of economics, for example, as well as in other areas such as the environment. It is simply inaccurate to assume that anarchy inevitably causes insecurity and conflict.[52] Even in a state of anarchy, recent developments show that close cooperation is possible in a variety of fields.[53] For example, states cooperate to the extent that they give up part of their sovereignty as they work together in supra-national entities (European Union). Similarly, bodies of international organisations such as the Dispute Settlement Body and the Appellate Body of the World Trade Organisation (WTO) issue decisions which are followed even by the most powerful states.[54] As realism concentrates on the limitations of cooperation and, related to that, on the limitations of international law's influence, it is insufficiently equipped to positively explain why compliance is happening.

In sum, realism has deficiencies similar to those of positivism since it can not provide sufficient explanations for the influence of law. It seems short-sighted to point at power constellations and the lack of centralised enforcement and thereby to dismiss international law's independent influence, because this overlooks the fact that cooperation and compliance with international law does exist despite inconveniences for the powerful. While it is important to understand the limitations of international law, what is needed in order to understand

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[52] Alexander Wendt, "Anarchy is what States Make of it: The Social Construction of Power Politics" (1992) 46 Int'l Org. 391at 403-407 [Wendt, "Anarchy"]; Arend, "Do Legal Rules Matter?", *supra* note 48 at 117.

[53] John Gerard Ruggie points out that despite expectations and theorising from realists, multilateral regimes and institutions are created and make a difference (they "matter") even in security and economic relations (North Atlantic Treaty Organization, UN, European Community, WTO), see John Gerard Ruggie, "Multilateralism: The Anatomy of an Institution", in John Gerard Ruggie, ed., *Multilateralism matters: The theory and praxis of an institutional form* (New York, Oxford: Columbia University Press, 1993) 3 at 3-5.

[54] See e.g. the GATT Dispute Panel Reports in *United States.-Standards for Reformulated and Conventional Gasoline (complaint by Venezuela)* (1996), WTO Doc. WT/DS2/R; *United States-Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (complaint by Japan)* (2001) WTO Doc. WT/DS184/R. Both decisions were rulings against the United States, which complied with the decisions through changes in their domestic law, see *United States - Standards for Reformulated and Conventional Gasoline - Status Report by the United States* (1997) WTO Doc. WT/DS2/10/Add.7; *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan - Status Report by the United States – Addendum* (2003) WTO Doc. WT/DS184/15/Add.12. All decisions and reports are available online: WTO

compliance are positive explanations of the existing international cooperation and the distinctive influence of international law in enabling, enhancing or fostering such cooperation.

Having realised these insufficiencies of political realism, in the following section I will examine why states cooperate and if there is a role that law can play in achieving and improving such cooperation.

3. Explaining cooperation and the role of law with rational choice, institutionalism and political economy approaches

a) Why do states cooperate?

Institutionalism and regime theory seek to explain why and when states cooperate. They argue that states establish regimes and institutions[55] because and when such cooperation is beneficial to their long-term interest.[56] With little mention made of legal rules directly, the role of law in this model of cooperation must be deduced from the notion of the regime. Cooperation in regimes indirectly indicates compliance with international legal rules to the extent that international regimes and institutions are built around such rules.[57] For example, it is acknowledged that compliance mechanisms are a major component of international regimes.[58] In fact, an international treaty can be commonly found at

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<http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm> (last accessed 15 October 2003).

[55] Regimes can be defined as "sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations", see e.g. Stephen D. Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables" (1982) 36 Int'l Org. 185 at 185. Institutions, on the other hand, are for example defined as a "general pattern or categorization of activity" or a "particular human-constructed arrangement, formally or informally organized", see e.g. Robert O. Keohane, "International Institutions: Two Approaches" (1988) 32 Int'l Studies Quarterly 379 at 383 [Keohane, "Two Approaches"]. The differences seem to mainly lie in the specificity of the activity, but will not concern me here as they do not advance the argument any further.

[56] Kenneth A. Oye, "Explaining Cooperation under Anarchy", in Kenneth A. Oye, ed., *Cooperation Under Anarchy* (Princeton, N.J.: Princeton University Press, 1986) 1 at 2-4; see also Raustiala & Slaughter, *supra* note 34 at 540.

[57] Anthony Clark Arend implies in his analysis that to a certain extent, one can equate the influence of regimes with the influence of legal rules, although institutionalists have only rarely mentioned legal rules when talking about regimes, see Anthony Clark Arend, *Legal Rules and International Society* (New York, Oxford: Oxford University Press 1999) at 123.

[58] Oran R. Young counts three major components of international regimes: a substantive component (rights and rules), a procedural component (aggregating preferences into group choices) and compliance mechanisms, which are defined as "institution or set of institutions

the centre of any complex regulatory regime.[59] As this is the case, institutionalism implicitly argues that states comply with international law when and as long as it is in their long-term interest to cooperate.

But what are these interests? Largely relying on rational economic models, the states' interest in cooperation depends to a great extent on positive "payoff-structures", i.e. on positive cost-benefit calculations.[60] Hence, states comply in order to receive the benefits produced by the institutional arrangement. States that do not comply must expect to be excluded from any possible benefit.[61] Possible benefits from cooperation in multilateral regimes include for example lower transaction costs,[62] a better predictability of reactions from other states, or the acquisition and maintenance of a good reputation and respect through participation and compliance with the regime.[63] In addition to the benefits from cooperation which induce states to comply, liberal institutionalists also stress the role and influence of nongovernmental interest groups such as non-governmental organisations (NGOs).[64]

In sum, states comply when the cooperation is beneficial to their long-term interests. It becomes clear that liberal institutionalism has a much broader notion of interest than does realism. Regarding the role of international law, however, it seems as if its role is negligible since benefits are independent from its influence. Does international law play a role in achieving international cooperation? One rationalist approach addressing this question is the theory of political economy.

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publicly authorized to promote compliance with the substantive provisions of a regime or with the outcomes generated by its social-choice mechanisms", see Oran R. Young, *International Cooperation, Building Regimes for Natural Resources and the Environment* (Ithaca, London: Cornell University Press, 1989) at 15-21.

[59] Chayes & Chayes, *supra* note 36 at 2.

[60] Oye, *supra* note 56 at 4 and 5.

[61] Oran R. Young, *supra* note 58 at 72.

[62] Those are the costs of communicating, monitoring performance and decision making, see Keohane, "Two Approaches", *supra* note 55 at 386 and 387.

[63] States are more and more involved within a variety of beneficial institutions and interested in maintaining such cooperation. An important prerequisite and guarantee for participation in the regime as well as compliant behaviour by other participants is a good reputation, see Robert Axelrod & Robert O. Keohane, "Achieving cooperation under anarchy: Strategies and Institutions", in Kenneth A. Oye, ed., *Cooperation Under Anarchy*, *supra* note 56, 226 at 250.

[64] Those actors can by themselves or in "transnational alliances" with other groups exert pressure on agencies and governments to comply, thus influencing the collective choice for compliance at the domestic and international level, see Oran Young, *supra* note 58 at 78.

b) Theory of political economy - law as a tool to create incentive structures

George W. Downs and his colleagues stress the importance of incentives and disincentives in regimes to achieve compliance.[65] This does not refer to enforcement in the form of sanctions, but rather to multilateral strategies which can deter non-compliance by offsetting the net benefits which a violator of the rules could gain from non-compliance.[66] The theoretical basis of this approach, notably institutionalism and rational choice, is not only visible in the emphasis on cost-benefit structures to achieve compliance, but also in the reliance on game theory as an analytical tool. Accordingly, the need for incentives or disincentives depends on the underlying game. The greater the benefits a state can gain from defection, the greater the necessity for deterrence in form of a threat of punishment.[67] The costs for compliance rise with the depth of cooperation, i.e. "the extent to which it [a treaty] requires states to depart from what they would have done in its absence."[68] This means that the deeper the cooperation envisioned by the agreement, the greater must be the costs or incentives envisioned by an enforcement strategy.

Since the incentives and disincentives are set by legal rules, international law's role in achieving cooperation is one of improving the incentive structures and thus the conditions for cooperation. Thus, law's influence is at best indirect.[69] States follow the law because and as long as it makes economic sense, and international law can indirectly influence that decision by providing the necessary incentives structures.

The approach of Downs *et al.* is helpful insofar as it points out that the design of compliance mechanisms should take into account whether the regime requires states to depart considerably from former practice and whether this has economic

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[65] George W. Downs, "Enforcement and the Evolution of Cooperation" (1998) 19 Mich. J. Int'l L. 319 [Downs, "Enforcement"]; see also George W. Downs, David M. Rocke & Peter N. Barsoom, "Is the good news about compliance good news about cooperation?" (1996) 50 Int'l. Org. 379 [Downs et al., "Good news?"].
[66] Downs, "Enforcement", *ibid.* at 321.
[67] *Ibid.* at 324.
[68] Downs, "Good news?", *supra* note 65 at 383 and 386.
[69] Brunnée, "Testing Ground", *supra* note 11 at 260.

costs. Downs' *et al.* contribution is to recognise that compliance mechanisms must correspond to the specifics of the regime and the demands that it has on states. In cases of deep cooperation, incentives and disincentives issued by strong institutions through legal rules can be important because economic interests of states are, at least initially, an important factor for compliance.

However, despite revealing some insights in how law can help to indirectly promote compliance, the view of law in this theoretical approach is very limited. Surely, incentives and disincentives can play important roles in the calculations of decision-makers. But is that all that matters? Can law not have a direct influence? Must incentive structures not be accepted by the states in order to work as incentives or disincentives? Must they not build on some kind of acceptance of these rules as authoritative? There might be something about legal rules or about legal processes which is not sufficiently explained by the political economy approach put forward by Downs *et al.* To what extent are legal rules and legal processes to be distinguished with respect to their function, and if so, when are they most efficient?

In order to understand more about the distinctive quality of legal rules which could provide the grounds for their specific influence and acceptance, further insights into the question of compliance are needed. Legal scholars, concentrating traditionally more on the rules themselves, might be able to provide such insights. Having acquired such knowledge, I will come back to Downs *et al.* at a later stage, then possibly better equipped to further assess their approach.[70]

4. Quality of the rules - the power of legitimacy

Contrary to Downs *et al.*, Thomas M. Franck does not see incentive structures as central to the compliance question. He turns to the quality of the rules and rule-making processes and emphasises the importance of fairness of processes and legitimacy of legal rules.[71] The latter exert a "compliance pull"

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[70] See for a further discussion of Downs *et al.* later in this chapter at B.4., below.

[71] Thomas M. Franck, *The Power of Legitimacy among Nations* (New York, Oxford: Oxford University Press, 1990) at 29 and 34 [Franck, *Legitimacy*]; Thomas M. Franck, "Legitimacy in the International System" (1988) 82 A.J.I.L. 705 at 705.

when they are legitimate and based on right process.[72] Such conditions are in turn increased according to Franck when four characteristics of the rules are present: *determinacy* (the ability of the text of the rule to transmit a clear message),[73] *symbolic validation* (the communication of authority through certain cues that signal the significance and validity of the norm)[74], c*oherence* (the rules must emanate from principles of general application)[75] and the *adherence* of the rule to secondary rules of "right process." Regarding the latter, the secondary rules are ultimately legitimised through a rule of recognition by the international community.[76]

While his turn to the quality of legal rules as the key to compliance illuminates what international law can specifically and directly contribute to compliance, the criteria for legitimacy seem less helpful. For example, legal rules that are most influential and fundamental are often the ones that are the least determinate and the most open to interpretation. In fact, this allows legal interpretation and thus flexible application.[77] Similarly, how coherent a norm is with regard to its application and how it conveys symbolic authority is very often a matter of perception.

Particularly the criterion of adherence can be subjected to criticism. A rule displaying the characteristic of adherence to secondary rules is ultimately dependent on recognition by the community of states through means of an ultimate rule of recognition. This recognition can only be demonstrated "by the conduct of nations manifesting their belief in the ultimate rules' validity *as the irreducible prerequisite for an international concept of right process.*"[78] The

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[72] Franck defines legitimacy as "a property of a rule or rulemaking institution which exerts a pull towards compliance ... because those addressed believe that the rule ... has come into being and operates in accordance with generally accepted principles of right process", see Franck, *Legitimacy*, *ibid.* at 24.

[73] Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995) at 31 [Franck, *Fairness].*

[74] Franck, *ibid.* at 34 (as an example, Franck points to the symbols used by the UN to signal the authority of the rules put forward through UN actors); Franck, *Legitimacy*, *supra* note 71 at 91.

[75] Franck, *Fairness*, *supra* note 73 at 38; Franck, *Legitimacy*, *ibid.* at 152.

[76] Franck, *Legitimacy*, *ibid.* at 194; Franck, *Fairness*, *ibid.* at 45.

[77] Jutta Brunnée & Stephen J. Toope, "Persuasion and Enforcement: Explaining Compliance with International Law" (2002) 13 Finnish Ybook Int'l L. (forthcoming) [Brunnée & Toope, "Persuasion and Enforcement].

[78] Franck, *Legitimacy*, *supra* note 71 at 194 (emphasis in original).

characteristic of adherence and therefore the variable of legitimacy are thus ultimately dependent on the conduct of the addressees of the rule, i.e. the states. This gives rise to the danger of a circular argument, because it can be seen as the attempt to explain compliant behaviour by looking at the actual compliance of actors.[79] The theoretically independent variable 'legitimacy' is really a dependent one.[80] Thus, the basis of ultimate rules and thus of legitimacy of the primary rules is merely that states habitually act accordingly.[81] Compliance is explained by habitual compliance, which is essentially circular.

Notwithstanding this critique, Franck's theory is important in that it draws attention to the specific influence of legal rules for achieving compliance. Such influence lies in a certain authority of legitimate rules and focuses on the process of how rules evolve and operate.[82] This strongly indicates that enforcement might not be the key to compliance. However, it remains unclear how exactly processes are influential, what legitimate rules look like and how compliance could be promoted by processes and rules without focusing on enforcement. Some answers to these questions can be found in the managerial approach.

5. Treaty management instead of enforcement to achieve compliance?

a) Managerial approach

In agreement with Franck, Abram Chayes & Antonia Handler Chayes in their "managerial model" largely dismiss sanctions and penalties as relevant elements in achieving compliant behaviour in the context of regulatory agreements.[83] Observing that states have a "propensity to comply"[84] with international law even in the absence of enforcement, they put forward other explanations why states comply, thereby emphasising processes and quality of the rules, but also institutionalist insights.

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[79] See e.g. Robert O. Keohane, "International Relations and International Law: Two Optics" (1997) 38 Harv. Int'l L.J. 487 at 493 [Keohane, "Two Optics"] (for the circularity criticism in less explicit form).
[80] Raustiala & Slaughter, *supra* note 34 at 441.
[81] Franck, *Legitimacy, supra* note 71 at 43.
[82] Franck's view insofar resembles constructivist thinking, see Raustiala & Slaughter, *ibid.* at 541.
[83] Chayes & Chayes, *supra* note 36 at 3.
[84] *Ibid.* at 3.

First, norms are largely accepted and obeyed by the subjects of the legal system because their authoritative character creates *a feeling of obligation.* The authoritative character of the norms is based on a mixture of tradition, the belief that some kind of order is necessary for social life[85] and, very importantly, on its *legitimacy.* The latter depends "on the extent to which the norm (1) emanates from a fair and accepted procedure, (2) is applied equally and without invidious discrimination, (3) and does not offend minimum substantive standards of fairness and equity."[86] Thanks to the authority of legal norms, they play a central role in the conduct of international relations as actions can be most convincingly justified or attacked in terms of legal norms. The influence of law is thus largely generated through *justificatory discourse.*[87] This understanding of the role of legal norms underlines not only the importance of legitimacy and fair procedures. It also emphasises that there is an independent influence of norms. In this regard, Chayes & Chayes share much common ground with Franck. At the same time, they propose a way of looking at the processes through which legitimate international rules can be influential, namely through discourse to justify behaviour.

Second, compliance saves *transaction costs* because states do not have to continuously reconsider their policy decisions which would waste scarce governmental resources.[88] This argument clearly reflects the institutionalist thinking and rationalist paradigm, where cooperation takes place because and as long as it is beneficial to participants.[89]

Third, treaty-making processes which imply national and international negotiations, reconsideration and reviews ensure, at least in democratic countries, that *the rules established roughly represent the national interest* of the country even though it might be a compromise.[90] The idea is that states would not have

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[85] *Ibid.* at 116-118.
[86] *Ibid.* at 127-134.
[87] *Ibid.* at 118-123.
[88] *Ibid.* at 4.
[89] See for discussion of institutionalism in this chapter, above, at B.2.
[90] Chayes & Chayes, *supra* note 36 at 7.

signed the treaty if they had not somehow managed to incorporate their interests or if the process had not reshaped their interests.[91]

This latter assumption reflects again that this view is deeply rooted in rationalist thinking as it explains commitments largely in terms of underlying interests. The analysis has difficulties explaining why states comply even though their interests changed *after* the process of ratification. Furthermore, there might be other reasons for states to sign treaties. Especially in environmental affairs, states accept treaties because of internal pressure from environmental groups or industries or because of external pressure from other countries.[92] By signing a treaty, states could also wish to gain a better international reputation by acting as the others do.[93]

As states tend to comply with international law due to the above mentioned factors, eventual non-compliance is according to Chayes & Chayes mainly caused by ambiguity of the treaty language, limitations of the parties' capacity to comply as well as unforeseen social, political and economic changes.[94] Since problems with compliance are hardly ever the result of wilful disobedience, what is needed is a management strategy that helps parties to overcome these obstacles.

The proposed management strategy comprises several aspects. Problems with ambiguity of treaty language can be addressed by informal instead of costly and contentious formal dispute settlement.[95] Lack of capacity should be countered by enabling capacity building through the provision of technical and financial assistance.[96]

Central to the management of the treaty regime is also the inclusion of mechanisms to promote transparency. Transparency usually refers to the "accuracy, availability, and accessibility of knowledge and information about the

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[91] *Ibid.*
[92] Harold K. Jacobson & Edith Brown Weiss, "A Framework for Analysis", in Edith Brown Weiss & Harold K. Jacobson, eds., *Engaging Countries: Strengthening Compliance with International Environmental Accords* (Cambridge, Mass.: MIT Press, 1998) 1at 2 [Brown Weiss & Jacobson, *Engaging Countries*].
[93] *Ibid.*
[94] *Ibid.* at 10.
[95] *Ibid.* at 207.
[96] *Ibid.* at 25.

policies and activities of parties to the treaty...."[97] Transparency is important because it will facilitate cooperation, provide reassurance to the other participants and deter others from non-compliance.[98] For example, information sharing through means of reporting and a secretariat which disseminates the information can help to foster cooperation because coordination problems, e.g. rules for civil aviation, can be solved easier. Further, it is important for the parties to know that others are complying so that abiding by the rule continues to make sense and so that states will feel that each party is contributing.[99] In order to provide such reassurance to the parties that want to comply, reporting and monitoring are essential because parties are informed about others. At the same time, such mechanisms increase the probability that violations are discovered and can therefore deter parties that were contemplating non-compliance.[100] In sum, information sharing procedures and monitoring are central to successful treaty management because they are important tools to achieve transparency.

These managerial measures, i.e. capacity building, informal dispute settlement, monitoring and information sharing mechanisms, merge according to Chayes & Chayes "into a broader process of 'jawboning'",[101] meaning essentially that states are *persuaded* through these measures combined with discourse to change their ways.[102] But despite this interest in discourse, which stresses the power of legal norms in shaping persuasive arguments, the fundamental reason why the management strategy is expected to work is another: A state needs to be in good standing in the international community in order to be able to participate in the international system, thus securing economic growth and political influence. In fact, this is the only way for a state in the interdependent world to maintain and express its sovereignty: by being a respected and reliable member of the community of states.[103] In order to keep that status, states might have to transcend

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[97] Abram Chayes, Antonia Handler Chayes & Ronald B. Mitchell, "Managing Compliance: A Comparative Perspective", in Brown Weiss & Jacobson, *Engaging Countries, supra* note 92 at 43.
[98] Chayes & Chayes, *supra* note 36 at 135-153.
[99] *Ibid.* at 142.
[100] *Ibid.* at 151.
[101] *Ibid.* at 25.
[102] *Ibid.* at 25 and 26.
[103] *Ibid.* at 27.

their interests in a particular regime for the sake of continued respected membership in the community.[104] States are ultimately compliant due to the economic and political benefits which come with being a respected member in the international community. This shows to what great extent the "managerial approach" is rooted in institutionalist and rationalist theory as outlined above.

b) Critique of the managerial approach

Within rationalist institutionalism, reputation and membership are considered valuable assets in systems where states merely benefit from cooperation.[105] With their emphasis on membership and reputation, Chayes & Chayes occupy a place in the spectrum of this scholarship opposite the political economists. This end of the rationalist institutionalist scholarship sees enforcement of rules as only "a marginal factor in compliance calculations."[106] Consequently, the managerial view has been attacked from the other end of the spectrum, notably Downs *et al.*[107]

Downs *et al.* criticise Chayes & Chayes on the ground that the good compliance record in the absence of enforcement is due to the rarity of "deep cooperation."[108] The empirical findings of Chayes & Chayes are seen as being "contaminated by selection",[109] because most of the analysed agreements are just not deep enough to require enforcement. Chayes & Chayes are thus not wrong in their analysis of regimes, but their findings can not serve as a strategy for regimes of deep cooperation, which will be needed ever more frequently in the future according to Downs *et al.*[110]

Examples show that indeed, states often choose to include tougher enforcement rules as the level of cooperation increase.[111] A prominent case is the development of Article 16 of the Dispute Settlement Understanding of the

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[104] *Ibid.*
[105] See e.g. Oran Young, *supra* note 58 at 75.
[106] *Ibid.*
[107] This section builds in part on the earlier discussion of Downs et al., see in this chapter, above, at B.2b), above.
[108] Downs et al., "Good news?", *supra* note 65 at 388-392.
[109] *Ibid.*
[110] *Ibid.* at 380.

GATT,[112] where the adoption of panel reports was changed from a de facto veto right for any Party to the automatic adoption of such reports unless a consensus of all Parties rejects it.[113] Equally, Downs' *et al.* empirical findings suggest that in most multilateral environmental agreements of deeper cooperation, states have been eager to include stronger enforcement measures.[114] While it is difficult to address this question empirically, the Kyoto Protocol supports this view as it entails an "Enforcement Branch" of the Compliance Committee.[115]

However, the examples mentioned by Downs *et al.* regarding the WTO or the European Community are incidents where states created stronger institutions, more formal rules or of a strengthening of the position of courts.[116] They show the need for stronger international institutions and regimes in areas of deep cooperation, but not necessarily the need for enforcement structures as a prerequisite for compliance. In those cases, states comply with supranational panel or court decisions without any direct enforcement. One can even argue that in both cases, states are not even complying due to incentive structures, but adhere to the decisions for different reasons.[117]

Therefore, the critique of Downs *et al.* has some weight, but it does not negate the finding that enforcement is not the key to compliance. Nor can it deny the importance of a management strategy based on legitimate rules. However, Downs *et al.* rightly point out the importance of strong institutions and incentive structures as tools to support management strategies in cases which require deep cooperation. As the theory is based on cost-benefit calculations, its application

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[111] Downs, "Enforcement", *supra* note 65 at 335.

[112] See *Understanding on Rules and Procedures Governing the Settlement of Disputes,* in *Annex 2 of the Agreement Establishing the World Trade Organization,* 15 April 1994, 33 I.L.M. 1226, Art.16.4, online: WTO <http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf> (last accessed 17 October 2003) [*WTO Dispute Settlement Understanding*].

[113] A similar development is visible in European Community Law, where increased cooperation was matched with a more powerful role for the European Court of Justice, see Ann Marie Burley & Walter Mattli, "Europe before the Court: A Political Theory of Legal Integration" (1993) 47 Int'l Org. 41 at 74, cited in Downs, "Enforcement", *supra* note 65 at 335.

[114] Downs, "Enforcement", *supra* note 65 at 333.

[115] See the description and discussion of the compliance mechanisms of the Kyoto Protocol in chapter IV, below.

[116] As for example in the case of the European Court of Justice.

could prove especially helpful in cases of treaty regimes which directly affect the economic interests of states.

In situations, however, where states have serious difficulties with achieving compliance, Chayes & Chayes are able to show that management of non-compliance can be effective to address those difficulties. They share common ground with Franck with respect to the importance of the quality of the rules as an element to enhance the influence of international law. By putting much emphasis on process, legitimate rules and discursive persuasion, Chayes & Chayes distance themselves considerably from the approach of political economists. If actors are completely rational, self-interested utility maximisers, they would rely on the information they have and take their decisions according to cost-benefit calculations, but not necessarily take into account reputational factors.[118] The central difference to a purely rationalist perspective applying cost-benefit considerations is Chayes & Chayes' focus on norms and the discursive processes which are at the base of international law's power and influence.[119] Thus, it is its normative force rather than the force of economic incentives that makes states comply.

Despite these important insights, however, Chayes & Chayes' approach remains based in rationalist thinking, because rationality does not exclude the consideration of such factors as reputation and social standing. These factors can be part of a rational strategy to receive the maximum benefit from cooperation in an interdependent society of states. The difference in the approach taken by Downs *et al.* is therefore not fundamental, but lies in different emphases and prescriptions. The prescription put forward by Chayes & Chayes is helpful in overcoming difficulties with compliance of countries that are nevertheless willing to comply, whereas Downs *et al.* emphasise the importance of changing the

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[117] For example, scholars having studied the role of the European Court of Justice emphasise domestic linkages as the key causal mechanism for compliance, see for a discussion and further details Raustiala & Slaughter, *supra* note 34 at 542

[118] See for this point Friedrich v. Kratochwil, "How do norms matter?", in Michael Byers, ed., *The role of law in international politics: essays in international relations and international law* (Oxford, New York: Oxford University Press, 2000) 35 at 54-55 [Byers, *Role of law in international politics*].

[119] Chayes & Chayes, *supra* note 36 at 134.

incentive structures in some cases where states might be inclined to defect. Thus, both approaches are compatible as long as the enforcement-oriented measures do not destroy managerial efforts. What is needed is a balanced mixture of managerial and incentive strategy.[120] In such a combined strategy, international law plays not only a indirect role by setting the incentive structures, but also a direct one in helping to persuade and justify in processes of discourse.

However, such an approach still assumes that egoistic actors must be "jawboned" into compliance, because their underlying egoistic interests are unalterable. Despite their emphasis on justificatory discourse and persuasive processes, Chayes & Chayes can not explain how legitimate rules in discursive processes lead to greater compliance. Why exactly should an actor change his mind in such processes when his underlying interests remain the same? Chayes & Chayes do not succeed in explaining how the processes that they mention, e.g. justificatory discourse, culminate in changing the decision-making rationale of a state.[121] They do not explore the full consequences of their focus on norms and discourse and can not explain why legitimacy enhances compliance.[122] Why is it not possible to say that the discourse, framed and supported by authoritative arguments based on legitimate law, can alter these interests to achieve voluntary compliance?

Consequently, the main criticism voiced vis-à-vis the rationalist paradigm to which Downs *et al.* as well as Chayes & Chayes adhere is that it takes interests and identities as exogenously given, thereby ignoring how states acquire certain

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[120] David G. Victor, "International Environmental Agreements: compliance and enforcement: enforcing International Law: implications for an effective global warming regime" (1999) 10 Duke Env. L. & Pol'y F 147 at 168; see also Jutta Brunnée, "A Fine Balance: Facilitation and Enforcement in the Design of a Compliance Regime for the Kyoto Protocol (2000) 13 Tul. Envtl. L. J. 223 at 269 [Jutta Brunnée, "A Fine Balance"] (arguing that experience with compliance mechanisms suggest that the managerial and political economy approach should be understood as two components of a "persuasive continuum"); Harold Hongju Koh, "Review essay: Why Do Nations Obey International Law?", Book Review *of The New Sovereignty: Compliance with International Regulatory Agreements* of Abram Chayes & Antonia Handler Chayes, and of *Fairness in International Law and Institutions* by Thomas M. Franck (1997) 106 Yale L. J. 2599 at 2639 [Koh, "Why do nations obey?"] (arguing that managerial and enforcement models should be seen as complementary instead of oppositional).

[121] See Koh, "Why do nations obey?", *ibid.* at 2640 (arguing that Chayes & Chayes lack an exact account of the processes that lead to voluntary compliance through internalisation of the rules).

[122] Brunnée, "Testing Ground", *supra* note 11 at 261.

identities which in turn shape the corresponding interests.[123] It thereby neglects the possibility that social structures - and for that matter, law - might also shape the identity and interests of states.[124] Such an influence can possibly lead to compliance independently of the benefits that a state can expect from such membership or the participation in the regime. A similar deficiency concerns the possibilities that lie in a reconstitution of interests during the processes of regime-participation. In this regard, the theory advanced by institutionalism and by Chayes & Chayes in particular remains inconclusive, although it provides important tools to promote compliance of rational actors.

An inquiry into the processes by which legal rules can influence actors through discourse and thus affect their underlying motivations is therefore needed. Could it be that cooperation and thus compliance can go beyond rationalist strategies? Could their interests be reshaped? And again, what is the specific role of legal rules in such processes? In an attempt to find answers to those still remaining questions, I turn to constructivist scholarship, which has explored the construction of actors' interests and could therefore provide insights into the issue of compliance.

6. Constructivism and interactional theory of law

a) Constructivism and the role of law

Partly as an answer to many of the criticisms directed at rationalist thinking, a new approach to international relations theory emerged in the late 1980's. It is now widely referred to as constructivism. Although far from being a homogenous school of international relations theory, adherents to the constructivist approach share the belief that the objects and practices that make up social life are intersubjectively constructed.[125] Instead of taking social reality for granted, one can understand it as a complex structure of "institutional facts" that came into

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[123] See instead of many others the classic piece by Wendt, "Anarchy", *supra* note 52 at 391-392 [Wendt, Anarchy]; John Gerard Ruggie, "What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge" (1998) 52 Int'l Org. 855 at 863.

[124] Anthony Clark Arend, *Legal Rules and International Politics*, *supra* note 57 at 125.

existence only because actors were agreeing that they should exist and what they should mean. In other words, actors construct the very bases of social reality by collectively imposing functions on brute physical or social facts.[126] For example, money plays an important part in social reality, but it exists as money purely due to a collective intention to accept it as money.[127]

It thus becomes clear that the foundations of social reality are "shared understandings, expectations, or knowledge"[128] of the actors, resulting from their interaction. Furthermore, it springs from this importance of the collective agreement that law as a social institution is dependent on the "continued collective acceptance or recognition of the validity of the assigned function[s]",[129] because without the continuous acceptance of the rules, they cease to exist as such and the institution dies with the lack of collective agreement. Finally, it can also be deduced from this approach that material facts are not denied any influence. In fact, as can be seen from the findings of John R. Searle, they are prior to institutional facts.[130] This explains why material capabilities and economic interests of states continue to play important roles.

The further argument is that similar to individuals, states as well as other actors through their interactions socially construct the international structure. The international structure is thus not only material, but also social.[131] Since international law is part of the international structure, it can therefore be seen as a socially constructed institution.[132] As a matter of fact, international law can serve

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[125] See e.g. James Fearon & Alexander Wendt, "Rationalism versus Contructivism: A Skeptical View", in Walter Carlsnaes, Thomas Risse & Beth A. Simmons, eds., *Handbook of International Relations* (London: SAGE, 2002) 52 at 57.
[126] See John R. Searle, *The Construction of Social Reality* (New York: The Free Press, 1995) at chapters 4 and 5.
[127] *Ibid.* at 37-43.
[128] See e.g. Alexander Wendt, "Collective Identity Formation and the International State" (1994) 88 Am. Pol. Sci. Rev. 384 at 385; Alexander Wendt, "Constructing International Politics" (1995) 20 Int'l Security 71 at 73.
[129] Searle, *supra* note 126 at 45.
[130] See Fearon & Wendt, *supra* note 125 at 58.
[131] See Anthony Clark Arend, "Legal Rules and International Politics", *supra* note 57 at 127.
[132] For the authors in Katzenstein's collection of essays, law is part of the cultural environment which sets the standards for the international social system, see Peter J. Katzenstein, "Introduction: Alternative Perspectives on National Security", in Peter J. Katzenstein, ed., *Culture of National Security: Norms and Identity in World Politics* (New York: Columbia University Press, 1996) 1 at

as a perfect example for the existence of institutions based on shared meanings. No one seriously questions the existence of a body of rules called international law. State interactions over the years have produced many rules that are widely accepted and complied with in a seemingly natural way. For example, the existence of entities called states or the fact that states have jurisdiction within their territories are never put into question.[133]

At this point, it is important to see that the interactions resulting in shared understandings not only constitute the international system, but also shape and construct the identities of the international actors.[134] And since "identities are the basis of interests"[135], interests are constructed as well, contrary to the previously mentioned assumptions of realism and institutionalism.[136]

Examples can support the importance of identity and self-perception in the formation of interests and thus for the behaviour of states. One such example is the Cuban Missile Crisis. President Kennedy decided not to order an (internationally illegal) air strike after his brother Robert Kennedy argued that such a strike would be against the traditions, heritage and ideals of the United States. Robert Kennedy made the point that such an attack could not be contemplated because it would be equivalent to the Japanese attack on Pearl Harbour.[137] The decision makes clear that identity and self-perception matter in shaping the interests of states and in determining whether states will comply with international law or not. Despite the imminent atomic threat, President Kennedy was guided in his decision not to attack by the view and conviction that the United States acts law-abiding and is a "good country" as opposed to belligerent lawbreakers such as Japan in World War II. The interest underlying the decision

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6 [Katzenstein, *Culture of National Security*]; Anthony Clark Arend, *Legal Rules and International Society*, *supra* note 57 at 129.

[133] Anthony Clark Arend, *ibid.* at 135.

[134] Friedrich v. Kratochwil, "How do Norms Matter", *supra* note 118 at 56; Keohane, "Two Approaches", *supra* note 55 at 382.

[135] Alexander Wendt, "Anarchy", *supra* note 52 at 398.

[136] Alexander Wendt, "Anarchy", *ibid.* at 403-407; Martha Finnemore, *National Interest in International Society* (Ithaca, NY: Cornell University Press, 1996) at 24; Ronald L. Jepperson, Alexander Wendt & Peter J. Katzenstein, "Norms, Identity, and Culture in National Security", in Katzenstein, *The Culture of National Security, supra* note 132 at 33-36.

[137] See Graham Allison, *Essence of Decision* (Boston: Little Brown, 1971) at 197 and 203, cited in Friedrich v. Kratochwil, "How do Norms Matter", *supra* note 118 at 58.

was thus very much defined in terms of having a certain identity, and not only in terms of economic or power considerations.

While this shows that identity matters, the construction of identities is much harder to grasp. To some extent, the shaping of identities seems to be already implicit in the fact that shared understandings are possible. That actors can constitute social institutions through shared understandings implies that they are abiding with certain rules upon which the institutions are founded. On the other hand, it has not yet become clear why shared understandings should constitute the actors and not merely result in rules that everybody agrees upon at a certain moment in time. Again, Searle is helpful in explaining the nature of shared understandings and their implications for the identity of actors.

For Searle, actors follow the rules agreed upon because they have developed "background capabilities."[138] This means that "a person behaves the way he does, because he has a structure that disposes him to behave that way....and he has become to be disposed to behave that way, because that's the way that conforms to the rules of the institution."[139] Thus, actors develop a set of dispositions that are "sensitive to the rule structure,"[140] which means that behaviour is rule-governed although the actors do not consciously follow the rules in each decision they make. The point is that actors have developed the abilities to live in the society which has those rules at its basis. The actors are thus constituted by the rules that evolve from interaction based on shared understandings.

Since one of the institutions that evolve during the shared understandings of the principal actors is international law, the contructivist approach translates into the view that international law can constitute the identity and interests of the actors.[141] Legal norms therefore not only have a regulative, but also a constitutive role to play. They constitute not only the international legal system, but also the

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[138] Searle defines his concept of the "background" as the set of intentional or preintentional capacities that enable intentional states to function, see Searle, *supra* note 126 at 129.
[139] *Ibid.* at 144.
[140] *Ibid.* at 145.
[141] See Jepperson, Wendt & Katzenstein, *supra* note 136 at 54.

actors.[142] For example, international legal rules determine that states are the primary actors. Furthermore, it depends on international legal rules when something is called a treaty, thereby triggering the basic rule of *pacta sunt servanda*.[143]

The implications for compliance with international law are obvious. Actors are likely to comply if the rules are reflecting a broad base of acceptance or of shared understandings of the actors. Once this is the case, international law can play its constitutive role. This is an important insight which demands that compliance mechanisms are based on broad acceptance and shared understandings to have a maximum influence.

In sum, constructivism presents an approach that is able to account for the influence of law in the horizontal structure of the international society of states. By emphasising identity and interest formation through socialisation of the actors, constructivism not only fills the gaps of rational approaches such as institutionalism, but is also able to fully account for the influence of social factors on actors. It thus complements institutionalism without neglecting the importance of interests.

However, it has not become entirely clear how international law can influence the identities of states. What is law's role in socialising the actors? Can international law also play an active role in achieving and shaping those shared understandings that shape actors' identities? What is also missing from the constructivist account is an answer to the question if law has certain qualities that make its influence unique and specific? And if so, can its influence be enhanced in some way? Building upon constructivist theory, the specificity of law in the interactional processes is one of the main interests of the research by the legal scholars Jutta Brunnée & Stephen J. Toope.

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[142] Without specifying this for legal rules, Katzenstein understands norms to have a regulative effect by specifying standards of proper behaviour and a constitutive effect by defining the identity of an actor. According to this perception, the institutionalist view thus captures only what is "normal" about norms, but not their role as "premises of action", see Katzenstein, "Introduction: Alternative Perspectives on National Security", *supra* note 132 at 6 and 20; see also Andrew Hurrell, "Conclusion: International Law and the Changing Constitution of International Society", in Byers, *Role of law in international politics, supra* note 118 at 327 and 346; Anthony Clark Arend, *Legal Rules and International Society*, *supra* note 57 at 130.

b) Interactional theory of law[144]

By building upon constructivist thought and the legal theory of Lon Fuller,[145] Jutta Brunnée and Stephen J. Toope point out that law is continuously evolving through the interaction of the actors who are engaged in "mutual generative activity."[146] In other words, law evolves as patterns of expectations are constructed between the actors when they interact in formal and informal institutions. At the same time, these processes shape the identities of the actors through a variety of elements such as membership in organisations, reputation, self-esteem or the need for aid. In line with most of constructivist thought, the relevant actors are mainly, but not only, state actors. NGO's, cooperations, expert networks or epistemic communities play an important role in the processes.[147]

In consequent application of these theoretical underpinnings, Brunnée & Toope propose that neither authority based on the hierarchy of norms nor the ability to enforce the law can provide for any specific binding character of international law as opposed to other norms of social practice.[148] Rather, it is the "internal morality of law"[149] which provides for law's legitimacy and thus ultimately for its persuasiveness when shaping the actors. One can see from the emphasis on persuasion that law exerts its constituting influence especially through argument and thus through discourse.[150] Its constitutive role therefore manifests itself in the ability to shape the discourse and the decision-making. It

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[143] *Vienna Convention on the Law of Treaties*, *supra* note 18, Art.26.
[144] Jutta Brunnée & Stephen J. Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39 Colum. J. Transnat'l L. 19 [Brunnée & Toope, "Interactional theory].
[145] Lon L. Fuller, *The Morality of Law* (New Haven and London: Yale University Press, 1969).
[146] Jutta Brunnée & Stephen J. Toope, "The Changing Nile Basin Regime: Does Law Matter?" (2002) 43 Harv. Int'l L. J. 105 at 114 [Brunnée & Toope, "Nile Basin Regime"]; Fuller similarly stressed the nature of law as an "activity" and the legal system as the result of a "sustained purposive effort", see Lon L. Fuller, *The Morality of Law*, *ibid.* at 106.
[147] Brunnée & Toope, "Interactional Theory", *supra* note 144 at 69.
[148] *Ibid.* at 51.
[149] *Ibid.* at 56 (By internal morality, Brunnée & Toope mean, building again on Fuller, that the rules should be compatible with one with another, should ask reasonable things of the addressees, should be transparent and relatively predictable, and officials should treat known rules as shaping their exercise of discretion).
[150] See Brunnée & Toope, "Persuasion and Enforcement", *supra* note 77.

thereby exerts an influence which is in turn displayed in the shared meanings and legal rules that evolve in the process.[151]

This clarifies what constructivism means for international law and how law can shape the identities. The constitutive role of norms is not restricted to shaping the behaviour of actors once the shared meanings are established. It seems to already play a central role in shaping these interactional processes by providing the framework for the discourse between the actors. This shows that interactional theory emphasises processes of communication and the influence of law upon them. This power to shape the discourse seems to be an asset specific to law. The question is what is special about law to have such a power?

The unique influence that law is able to exert can be best understood by considering the case of the Nile Basin regime. For generations, the Nile Basin states were entrenched in competitive and confrontational behaviour, especially concerning the usage of the watercourse of the Nile. During the last decade, however, the ten riparian states of the Nile have moved towards more cooperative behaviour.[152] This development culminated in the creation of the Nile Basin Initiative in 1999, in which all key state actors of the Nile Basin are actively participating to cooperate on the technical, but also on the political level.[153] While there seems to have been considerable influence of non-legal factors in this development such as overlapping interests of the riparian states as well as promises of multilateral and bilateral donors[154], the story points to a distinct and remarkable influence of law in a threefold way:

First, law shaped the individual and collective identities of the actors by influencing the actors' perceptions of each other and by categorising actors into (opposing or uniting) groups.[155] Accordingly, the historic treaties and traditional

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[151] Stephen J. Toope, "Emerging Patterns of Governance and International Law", in Michael Byers (ed.), *Role of law in international politics, supra* note 118 at 95; Peter J. Katzenstein, *supra* note 132 at 6.

[152] This was displayed by the creation of an intergovernmental technical cooperation committee for the promotion of development and environmental protection on the Nile in 1992, followed by the Nile River Basin Action Plan in 1995 and, finally, the Nile Basin Initiative, see Brunnée & Toope, "Nile Basin Regime", *supra* note 146 at 131-140.

[153] *Ibid.*

[154] *Ibid.* at 140-144.

[155] *Ibid.* at 144-153.

international water law have shaped collective state identities that were only self-interested, whereas the new informal and formal processes, designed to point out the common problems and thus to unite rather than divide, provided the ground for effective "normative evolution" towards cooperation.[156].

Second, law helps to differentiate between persuasive argument and pure rhetoric and thus establishes the framework for discourse.[157] The United Nations Watercourse Convention of 1997 thus undermined the legitimacy of the opposing arguments which stressed priorities of different watercourse law principles[158] basically by failing to provide a legal justification for either position.

Third, the specific legitimacy of law provides the ground for persuasion. Again, the processes in the Nile Basin have led from unpersuasive law (historic treaties) to legitimate law which is based on the inclusion of all riparian states and on transparency.[159]

The case shows clearly how international law helps to constitute the actors' identities and thus their behaviour. It does so by shaping the processes of interaction as well as the perceptions that actors have of themselves and of others. Important and unique tools available to law in these processes are persuasive arguments and language. If one looks at the practice of international relations, this unique role is displayed by the fact that all international acts are almost always justified in legal terms.[160] Finally, the persuasion necessary for the socialisation of the actors will be most effective if law is perceived as legitimate and will be accepted as authoritative.

But when can one speak of legitimate law? In order to achieve a maximum of legitimacy and thus authority, the law must be transparent, fair and accountable.[161] Although interactional theory emphasises processes, it is important to note that the substantive content of a rule is also contributing to its legitimacy. The reason for

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[156] *Ibid.* at 154.
[157] *Ibid.* at 144.
[158] Principles of "equitable utilization" and "no significant harm", see Brunnée & Toope, "Nile Basin Regime", *ibid.* at 148.
[159] *Ibid.* at 156.
[160] The discussion about the legality of the war on Iraq in 2003 in the UN and especially the attempted defence and legitimisation by the US government is the most recent example.

this is that the main influence of law in this view lies in the shaping of the interactions by providing for persuasive legal arguments and categorisations. Arguments are more persuasive if they build not only on procedural, but also on substantive values of fairness and justice.[162]

This briefly outlined interactional theory of law is able to provide an explanation for the constitutive function of international law, i.e. how law shapes actor's identities by shaping the discourse between them. It makes clear what it is about law that has the power to do so and when such power is the greatest. By explaining the uniqueness of law's influence, interactional theory enriches the discussion tremendously. While Chayes & Chayes had also emphasised the role of norms in discourse, they did not consider that law can thereby help to shape the actors as such, possibly leading to changes in interests over time. Brunnée & Toope draw the full consequences from the central role of discourse and can thereby explain the uniqueness of legal rules. By doing so, interactional theory can explain the distinctive contributions that international law can make to achieve compliant behaviour if it is legitimate and thus persuasive as well as based on shared understandings.[163]

Therefore, compliance mechanisms should be assessed on the basis of the fairness, transparency and accountability of the procedural rules and the justice and fairness of their substantive value. Only then will they be regarded as legitimate and persuasive. And only then can they develop their full potential in shaping the actors to comply with the rules.

This shows again that enforcement is not the key to compliance.[164] Instead of focusing on enforcement and its limits, lawyers should focus on how voluntary adherence can be promoted for example, but not only, through "the design of

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[161] Stephen J. Toope, "Emerging Patterns of Governance and International Law, *supra* note 118 at 98.
[162] *Ibid.* at 103.
[163] What Kratochwil calls the "legitimisation of means", see Friedrich v. Kratochwil, *Rules, Norms, and Decisions: On the conditions of practical and legal reasoning in international relations and domestic affairs* (Cambridge, New York: Cambridge University Press, 1989) 142.
[164] This has been suggested relatively early by constructivists especially interested in norms, see for example Friedrich v. Kratochwil, *ibid.* at 256 and 259; see also Brunnée & Toope, "Persuasion and Enforcement", *supra* note 77.

processes of interaction and consultation" for regimes.[165] This underscores the importance of providing room for interaction and discourse in the design of compliance mechanisms. If enforcement measures such as sanctions and other disincentives are employed for reasons mentioned previously, they must be building upon a broad basis of general acceptance or shared understandings derived from interaction. If these premises are absent, even collective enforcement measures will be widely regarded as illegitimate and will be ineffective.[166]

One lesson is thus that that discourse has to be given its space to develop the shared understandings necessary for effective international law. As law shapes discourse, compliance can be enhanced if law can provide for unifying arguments, i.e. arguments which stress the common interests of the participants rather than the differences. Similarly, as law provides the framework for arguments, compliance will be strengthened by legal rules that diminish the possibilities to justify non-compliant behaviour.

These very important insights can be further complemented by looking at how the influence of norms on discourse can lead to compliant behaviour. Are there other ways to support the power of law in shaping the discourse? One approach that could complement interactional theory in that sense is the theory of transnational legal process.

7. Transnational legal process and compliance

In order to understand and possibly enhance the processes by which states can develop voluntary obedience instead of "grudging compliance"[167] under the influence of constitutive legal norms, we need to know how these processes exactly function. Harold Hongju Koh claims that internalisation of international norms in what he calls "transnational legal process" can provide the necessary link between externally existing rules and internal voluntary obedience.[168] This process is described as follows.

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[165] Stephen J. Toope, "Emerging Patterns of Governance and International Law", *supra* note 118 at 99 and 106.
[166] Brunnée & Toope, "Persuasion and Enforcement", *supra* note 77.
[167] Koh, "Why do nations obey?", *supra* note 120 at 2646.
[168] *Ibid.* at 2648.

First, transnational actors provoke *interactions* with one another in law-declaring fora, e.g. in treaty regimes; domestic and international courts, NGOs or conferences.[169] Koh mentions transnational norm entrepreneurs, governmental norm sponsors, transnational issue networks and interpretive communities as the key agents.[170] By transnational issue networks, Koh means foremost so-called epistemic communities,[171] i.e. "networks of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area."[172]

The interactions of the actors lead to a common *interpretation* of the norms in their application to certain situations.[173] As a result of this ongoing process, the international norm is then *internalised* into the domestic legal system of the participants by means of social, political or legal internalisation.[174] As a state has internalised the norm, it perceives it as binding and will act accordingly. In sum, the process generates rules that will guide future interactions between the parties and ultimately shape the interests and identities of the participants.[175]

According to this understanding of compliance, compliance mechanisms and procedures should strive to enlarge participation of intergovernmental organisations, NGOs, private business entities, and transnational norm entrepreneurs as process-activators. In addition, new international fora for the enunciation and elaboration of norms should be established.[176]

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[169] Harold Hongju Koh, "The 1998 Frankel Lecture: Bringing International Law Home" (1998) 35 Hous. L. Rev. 623 at 643, 646-654 [Koh, "Bringing Law Home"].
[170] *Ibid.* at 645.
[171] *Ibid.* at 648.
[172] Peter M. Haas, "Introduction: Epistemic Communities and International Policy Coordination" (1992) 46 Int'l Org. 1 at 3.
[173] Koh, "Why do nations obey?", *supra* note 120 at 2645.
[174] According to Koh, social internalisation means that a norm is followed because it has achieved a high amount of public legitimacy. Political internalisation means the acceptance of an international norm by the political elites. Legal internalisation occurs through the incorporation of an international norm into domestic law through executive action, legislative action and judicial interpretation. See Koh, "Bringing Law Home", *supra* note 169 at 641-644; Harold Hongju Koh, "Transnational Legal Process", 75 Neb. L. Rev. 181 at 204 [Koh, "Transnational Legal Process"].
[175] Koh, "Why do nations obey?", *supra* note 120 at 2646; Koh, "Transnational Legal Process", *ibid.* at 204.
[176] Koh, "Bringing Law Home", *supra* note 169 at 676-678; Koh, "Why do nations obey?", *ibid.* at 2656-2658.

Koh's theory emphasises interactional processes that are norm-creating, and focuses on the vertical processes by which these norms become part of a state's domestic structure and thus of its identity. Hence, his theory shares important features with constructivism and interactional theory. By clarifying that international horizontal interaction is not sufficient to explain identity formation, it complements and advances these approaches.[177] However, it merely describes the pathway to obedience through internalisation without really explaining why and when this is happening.[178] Why is it that some norms are internalised and not others? What is it about legal norms that can contribute to better internalisation?

Despite these difficulties, the theory rightly points out the importance of the participation of civil society in order to establish long-term acceptance of the rules and thus to ensure reliable long-term obedience. It should be ensured that these processes of internalisation are given their place in compliance mechanisms in order to achieve a qualitatively better standard of compliance. Koh's account can therefore be used as an element in a successful compliance strategy.

C. Conclusion: drawing lessons for design features to enhance compliance

The complexity of the issues involved suggests that the compliance question can not be answered with reference to one simple variable. Behaviour is complex, and so is the behaviour of states. It can not be predicted as states have diverse interests, but especially since law might be able to reshape identities and thus interests. An attempt to find an absolute point of view would mean that one would have to cease being interested "in all those things that are constitutive of law and politics."[179]

Still, an examination of various theoretical approaches to compliance has pointed to answers to the questions asked in the beginning of this chapter. The turn to law is justified as realism and positivism neglect the possibilities of cooperation and as international law has specific possibilities to independently influence states in their behaviour. When considering a compliance strategy, it is

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[177] For a similar assessment see Brunnée & Toope, "Persuasion and Enforcement", *supra* note 77.
[178] Raustiala & Slaughter, *supra* note 34 at 544.
[179] Friedrich v. Kratochwil, "How do norms matter?", *supra* note 118 at 68.

important to understand that enforcement is not the key to compliance. However, in certain cases of deeply cooperative regimes, a management strategy might have to be complemented with some incentive and disincentives in order to outweigh the economic constraints or the economic incentives for non-compliance. This part of the strategy recognises the fact that interests of states matter for compliance, and that interests are not infinitely malleable. Despite the possibility that notions of identity influence interests, states will never start to act completely altruistically. Self-interest and economics will continue to matter. Incentive structures complement management elements to address these aspects of self-interest.

However, the influence of law starts already in the processes that culminate in the interests and behaviour of states. Management and incentive strategies must be based on shared understandings to achieve their goals. In the process of interest formation, law might be at its most influential when it shapes the conditions in which states act, negotiate and justify their actions. Its distinctive power in doing so depends however on the quality of the rules such as legitimacy and authority.

These theoretical insights can improve the understanding what effective compliance mechanisms should look like. When designing such mechanisms in the attempt to promote compliance, lawyers should therefore take into account the following aspects.

1. Fora for interactions to create shared understandings and acceptance

As pointed out by constructivism, interactional theory and the theory of transnational legal process, the regime should be equipped with a variety of possibilities to exchange viewpoints, find common ground and create shared understandings. They can provide the basis for the acceptance of the rules and thus for the constitutive function of law.

2. Legitimate rules and fair procedures

It is important for the distinctive influence that international law exerts on actors in discourse that the rules are legitimate. This is essential for an

interactional understanding of law because legitimate rules can persuade in discourse, give law authority and are able to constitute actors and international structures.[180] Similarly, authors such as Chayes & Chayes, drawing on the writings of Franck, emphasise the role of legitimate rules in providing powerful arguments in "justificatory discourse." Hence, effective compliance mechanisms must contain legitimate rules as this will promote acceptance of the rules and provide the basis for the other elements.

Further research is required on the question 'what does a legitimate rule look like?' For the time being, legitimacy will be understood as the necessity for fair, transparent and accountable procedural rules as well as rules that observe substantive values of equity and fairness.[181]

3. Compliance management

Compliance management of a regime pays tribute to the underlying interests of states in cooperation. With respect to overcoming compliance problems, the management of compliance occupies a central place in the writings of Chayes & Chayes. A management approach that makes use of conciliatory language can at the same time avoid confrontation and positively influence the development of shared understandings which are essential from a constructivist perspective.

A management strategy encompasses capacity building, establishing transparency through information sharing and monitoring as well as persuasive discursive strategies to overcome ambiguity and other sources of non-compliance.

4. Reputation and respected membership

In order to participate in beneficial regimes, a state's reputation as a reliable partner is essential. Similarly to this institutionalist insight, Chayes & Chayes point out that being a respected member in the community of states is a prerequisite for modern sovereignty. For constructivist and interactional thinking, elements of a compliance strategy that build on these notions can be effective because they appeal to the identities which states have acquired through the

[180] See the interactional theory in this chapter, above, at B.5.b).

discourse. Reputation and membership tools that build upon shared understandings of what is acceptable behaviour for a state and what is not can therefore provide one connection between law's ability to construct the identity of actors and their behaviour. Reputation and the desire to be a respected member of the international community can be made instrumental in compliance mechanisms for example through the tool of shaming.

5. Incentive and disincentive strategies

Enforcement may not be the key to compliance, but incentives and disincentives can play an important role in enhancing compliance, because economic interests will still matter to states, even if they are generally willing to comply. The increasing importance of incentives in regimes of deep cooperation is shown by Downs *et al.* In such regimes, state-actors have to justify and often pay for major changes in their behaviour. Law can in those cases provide for economic incentives to support the shared understandings reached. Similarly, an incentive strategy should be seen as complementary, and not as an alternative, to management strategies.[182]

6. Participation of civil society

Increased participation of NGOs, epistemic communities or other representatives of civil society contributes to compliance for different theoretical reasons. They can issue pressure on governments, ensure internalisation of the international norms or be an important part of the discourse which shapes actors. In particular the participation of expert communities, but also of civil society in general, can enhance the legitimacy and acceptance of the rules through participation and thus the creation of lasting shared understandings.[183]

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[181] These criteria are based on Brunnée & Toope, Chayes & Chayes as well as Franck.
[182] See in this chapter, above, at B.4.
[183] This point thereby integrates findings of interactional theory, managerialism and of course, of Koh's theory of transnational legal theory.

Chapter III

Learning from practical experience for effective legal design: the compliance mechanisms of the Montreal Protocol

A. Introduction

After having looked at compliance theory as a theoretical basis for assessment, a next step will take account of the practical experience. Looking at the Montreal Protocol's compliance mechanisms not only provides the ground for an interesting comparison between the design of the two compliance mechanisms. The practical experience with the compliance mechanisms of the Montreal Protocol will also provide a further set of criteria suitable to assess the compliance mechanisms of the Kyoto Protocol. As such, this chapter is to be understood as an inquiry into the issue of why states comply from a practical point of view and is therefore independent from the theories outlined in chapter II. Nevertheless, some references to compliance theory will be made in order to better understand the connections between theory and practice. The criteria established in this chapter will then be used, in combination with the ones from chapter II, for the assessment of the compliance mechanisms of the Kyoto Protocol in chapter V.

B. The Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol)[184] as a point of reference and basis for assessment

The Montreal Protocol is for several reasons especially well suited as a point of reference to assess the features of the Kyoto Protocol's compliance mechanisms.

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[184] *Montreal Protocol*, *supra* note 28, as amended and adjusted by the second, fourth, seventh, ninth and eleventh Meeting of the Parties. See *Report of the Second Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, UNEP, UN Doc. UNEP/OzL.Pro.2/3 (1990); *Report of the Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, UNEP, UN Doc. UNEP/OzL.Pro.4/15 (1992); *Report of the Seventh Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, UNEP, UN Doc. UNEP/OzL.Pro.7/12 (1995); *Report of the Ninth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, UNEP, UN Doc. UNEP/OzL.Pro.9/12 (1997); *Report of the Eleventh Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, UNEP, UN Doc. UNEP/OzL.Pro.11/10

First, the Montreal Protocol is widely regarded as a success story with respect to its effectiveness.[185] Although one must be careful with such an assessment because of the particularities of the ozone issue, the ozone regime has clearly influenced the implementation of the required changes.[186] It has led to a phase-out or significant reduction of all known ozone depleting substances (ODSs).[187] Many factors surely played a role in this process but it is unlikely that this process would have happened in the absence of the ozone regime founded on the Vienna Convention for the Protection of the Ozone Layer[188] and the Montreal Protocol.

Second, the Montreal Protocol, like the Kyoto Protocol, is the implementing Protocol for a regime that seeks to protect a global commons resource, i.e. the atmosphere, on a global scale requiring truly global cooperation and involving high costs of transition despite scientific uncertainty over the scale of harm.[189] Therefore, the Montreal Protocol also shares with the Kyoto Protocol the difficulties of dealing with the protection of the global commons where reciprocity as a compliance inducing tool is hardly applicable. The protection of global commons resources such as the atmosphere differs from other legal issues such as trade because the community of states as a whole, rather than simply individual states, is affected by the non-compliance of other states.[190]

Third, the Montreal Protocol and the decisions taken by the Conference of the Parties/Meeting of the Parties (COP/MOP) led to the most complex and extensive compliance procedures in international environmental law under a Multilateral Environmental Agreement (MEA) before the birth of the Kyoto Protocol. As a matter of fact, the Montreal Protocol possesses one of the most sophisticated

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(1999. All reports online: UNEP Ozone Secretariat <http://www.unep.org/ozone/mop/mop-reports.shtml> (last accessed 17 October 2003).

[185] Jørgen Wettestad, *Designing Effective Environmental Regimes: The Key Conditions* (Northampton, MA: Edward Elgar, 1999) at 158; Elizabeth R. DeSombre, "The Experience with the Montreal Protocol: Particularly Remarkable, and Remarkably Particular" (2000/2001) 19 UCLA J. Envtl. L. & Pol'y 49 at 49 [De Sombre, "Particularly Remarkable"].

[186] Wettestad, *ibid.*

[187] DeSombre, "Particularly Remarkable", *supra* note 185 at 49.

[188] *Vienna Convention for the Protection of the Ozone Layer*, 22 March 1985, 1513 U.N.T.S. 293, 26 I.L.M. 1529 (1987) (entered into force 22 September, 1988) [*Vienna Convention*].

[189] See Hunter, Salzman & Zaelke, *supra* note 19 at 527; DeSombre, "Particularly Remarkable", *supra* note 185 at 49.

[190] DeSombre, *ibid.*; Birnie & Boyle, *supra* note 17 at 196.

systems of reporting and non-compliance procedures.[191] As such, it can be seen as a useful model and the "most important precedent in international law" for other multilateral agreements, as for example in the context of climate change.[192]

For these reasons, the Montreal Protocol will serve as a point of reference and as a basis for the assessment of the compliance mechanisms of the Kyoto Protocol. Hopefully it will be possible to draw lessons from the design and especially from the practical application of the non-compliance procedures, although one needs to keep in mind that a transfer of such lessons is limited due to the differences between the regimes.

In addition, a look at the formal features of the Montreal Protocol will help to understand some of the regulations of the Kyoto Protocol while at the same time showing the ongoing developments in international environmental law.

C. Overview: history and main contents of the ozone regime

After having been used for an ever increasing number of industrial processes for about 40 years, chlorofluorocarbons (CFCs) were first linked to damage to the ozone layer in the early 1970s.[193] This sparked a debate in the United States which culminated eventually in a unilateral ban of CFC aerosols in 1977. Nevertheless, world production of CFCs soared anew in the mid 1980's as world economic growth and new industrial applications led to previously unattained levels of CFC production and consumption.

Efforts by UNEP to achieve some kind of international cooperation on the issue resulted in the Vienna Convention. Despite many good intentions, this convention failed to establish controls or a ban on production and consumption of CFCs, largely because of the influence of multinationals on the French and British

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[191] See Philippe Sands, *supra* note 2 at 270; David G. Victor, "The Operation and Effectiveness of the Montreal Protocol's Non-Compliance Procedure", in Victor, Raustiala & Skolnikoff, eds., *Implementation and Effectiveness, supra* note 16, 137 at 137 [Victor, "Montreal Protocol's Non-Compliance Procedure"].

[192] Hunter, Salzman & Zaelke, *supra* note 19 at 526; Parson, *supra* note 29 at 27.

[193] For a detailed description of the history of the scientific and political processes see Parson, *ibid.* at 28-64.

positions.[194] It was not until the discovery of the "ozone hole" by the British Antarctic Survey in May 1985 and studies on health risks that the public started to be alarmed.[195] Despite ongoing scientific uncertainty about the links between ozone depletion, the ozone hole and effects on health, countries moved to negotiate the Montreal Protocol, which provided for specific reduction commitments and was signed in late 1987.[196]

The success of the negotiations can be partly attributed to a strong international US leadership supported domestically by the US-based CFC industry. The US industry preferred an international agreement to unilateral domestic measures of the US after having lost a considerable market share to European producers of aerosols due to the unilateral US aerosol ban in 1978. In addition, the industry wanted to secure a future market for CFC substitutes before it would invest further in research & development.[197]

Originally requiring that the production and consumption of CFCs be halved, the Montreal Protocol was adjusted several times over the years in order to accelerate the phase-out schedules and to cover additional substances. It has thus undergone a considerable extension of its obligations,[198] leading to a decrease of

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[194] The Vienna Convention only calls for "appropriate measures" to protect the ozone layer and for cooperation in research and exchange of information, see *Vienna Convention, supra* note 188, at arts.2, 3 and 4; for the diplomatic background of these provisions see e.g. Hunter, Salzman & Zaelke, *supra* note 19 at 536; for a very detailed account of the negotiations and developments of positions see Richard Elliot Benedick, *Ozone Diplomacy: New Directions in Safeguarding the Planet* (Cambridge, Mass. and London, England: Harvard University Press, 1991).

[195] The British Arctic Survey announced a springtime reduction in the ozone layer of 50 % compared to levels of the 1960's. An international study launched in 1984 and published in 1986 had found that atmospheric concentrations of CFCs had doubled between 1975 and 1985 and that these levels would possibly lead to 150 million new cases of skin cancer by 1975 as well as cause 18 million eye cataracts in the US alone. See Hunter, Salzman & Zaelke, *supra* note 19 at 541-542.

[196] None of the available studies could make the scientific case for either the responsibility of CFCs for the ozone hole or for the causality between a decrease in ozone and an increase in ultraviolet radiation and related illnesses, see Hunter, Salzman & Zaelke, *ibid.* at 542.

[197] *Ibid.* at 536 and 543.

[198] In addition to tighter phase-out schedules, the 1990 London Amendment included additional CFCs and two solvents (carbon tetrachloride and methyl chloroform), the 1992 Copenhagen Amendment included methyl bromide, Hydrobromofluorocarbons and Hydrochlorofluorocarbons, the Montreal Amendment of 1997 finalised the schedules for phasing out methyl bromide and the Beijing Amendment of 1999 included Bromochloromethane for immediate phase out. The latter amendment also introduced production controls on Hydrochlorofluorocarbons as well as controls on trade with non-parties. See Edith Brown Weiss, "The Five International Treaties: A Living History", in Jacobson & Brown Weiss, *Engaging Countries*, *supra* note 92, 89 at 138-144

circa 90 % of the production and consumption of CFCs as well as a considerable decrease of the consumption of other ODSs such as halons and methyl chloroform.[199] However, these outstanding accomplishments should not distract from the fact that the ozone regime still faces major challenges, including the phase out of ODSs in developing countries, illegal trade in ODSs and the reduction of the major replacement for CFCs, hydrofluorocarbons (HFCs), which have been included in the GHGs covered by the Kyoto Protocol.[200]

In addition to the obligation to reduce the emission of specified ozone depleting substances[201], the Montreal Protocol obligates the Parties to restrict trade with non-Parties of controlled substances and of products containing those substances.[202] This leaves the Parties free to trade the controlled substances among themselves as long as they remain within mandated production and consumption limits. This regulation amounts to the establishment of a secluded trade of the substances, which may have encouraged developing countries to adopt the Montreal Protocol.

Another incentive for developing countries to adopt the protocol is the fact that the Montreal Protocol considers the special needs and capacity limitations of developing countries by granting those among them with low consumption and production rates a grace period of ten years.[203] The amended Article 10 of the

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(especially table 5.6. for a detailed table of all the amended requirements); see for the legal texts of the amendments *supra* note 184.

[199] The world-wide consumption and production of CFCs has dropped from 1,1 million tons in 1986 to 110 000 tons in 2001, including a decrease in developing countries of 15 %; see Ozone Secretariat, Online publication, "Backgrounder: Basic Facts and Data on the Science and Politics of Ozone Protection", online: UNEP Ozone Secretariat <http://www.unep.org/ozone/PressBack/Press-Backgrounder.shtml> (last accessed 15 October 2003).

[200] Developing Countries have just started to enter the compliance phase. In the long-term, the Montreal Protocol can only be a success if developing countries will be able to phase out ODSs despite their growing economies. Illegal trade is of growing concern as traders illegally sell new CFCs in the industrialised countries in the guise of recycled substances or as exports to developing countries. A major problem is the increase in the production and consumption of HFCs, which are used as a replacement for CFCs but are included in the basket of six GHGs under the Kyoto Protocol. See for those and other challenges ahead the "UNEP backgrounder", *ibid.*

[201] *Montreal Protocol*, *supra* note 28, arts. 2, 2A-2F.

[202] *Ibid.*, Art.4.

[203] These criteria are established by the *Montreal Protocol*, *ibid.*, Art.5 (countries fulfilling these criteria are often referred to as Art.5 countries).

Montreal Protocol[204] establishes, for the first time in the history of international environmental law, a "financial mechanism" with the aim to help Article 5 countries to comply with their obligations. This mechanism is supported and institutionalised by a newly created Multilateral Fund (MLF). The MLF is designed to provide financial and technical assistance to developing countries and is financed through equitable contributions from all other Parties to the Montreal Protocol.[205]

D. Compliance mechanisms of the Montreal Protocol

1. Compliance information system

The compliance of the Parties with their control obligations is monitored by a reporting procedure which requires them to issue an initial base-line report and further annual reports to the Secretariat entailing a detailed account of the production, imports and exports of the controlled substances.[206] The Secretariat will then prepare and distribute reports to the Parties on the basis of the data provided in the annual reports.[207] The review of the data by the Secretariat focuses on completeness rather than on quality and accuracy of the data.[208]

The discussion of the reports by the MOP concentrates on general trends and guidelines. The review of the performance of individual countries has been delegated to the Implementation Committee (IC), which was established in 1992 as the organisational entity to deal with non-compliance.[209]

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[204] *Ibid.*, Art.10 as amended in 1990.
[205] *Ibid.*, Art.10 (6) as amended in 1990.
[206] *Ibid.*, Art.7.
[207] *Ibid.*, Art.11 (c).
[208] Although the Secretariat focuses on completeness, it may and has informally compared the data with data from other agencies such as UN statistical agencies. However, there is no formal procedure to do so and the Secretariat must ultimately rely on the data provided by the country. See e.g. the discussion concerning population figures from Lebanon which contradicted World Bank estimates at the twelfth meeting of the Implementation Committee, in *Report of the Implementation Committee under the Non-Compliance Procedure for the Montreal Protocol on the work of its Twelfth meeting*, UNEP, UN Doc. UNEP/OzL.Pro/ImpCom/12/3 (1995), online: UNEP Ozone Secretariat <http://www.unep.org/ozone/impcom/12impcom-3.e.pdf> (last accessed 15 October 2003); see also Victor, "Montreal Protocol's Non-Compliance Procedure", *supra* note 191 at 144.
[209] See *Report of the fourth meeting of the Parties to the Montreal Protocol on substances that deplete the ozone layer*, Annex IV to Decision IV/5, UNEP, UN Doc. UNEP/OzL.Pro.4/15 (1992)

Beyond those formally established review mechanisms, other actors and institutions which were not officially assigned such tasks have become involved in the collection and review of information on implementation and compliance as well as in the process of making recommendations to the Parties.[210] An example for this development is the involvement of expert panels, notably the Technology and Economic Assessment Panel (TEAP). This is one of the three assessment panels designed to prepare reports to the review sessions of the MOP with respect to scientific, technological and environmental developments.[211] In practice, the role of the TEAP expanded through the 1990s to include *de facto* informal implementation review. By establishing Technical Options Committees (TOCs) to examine technical questions regarding particular ODS uses and the feasibility of phase-outs, the TEAP developed a mechanism by which highly influential experts, usually prominent members of the community of producers and regulators in their respective countries, are engaged in monitoring the developments and make recommendations to the TEAP. Ultimately, they would thus shape the agenda of MOP meetings.[212] In addition to this indirect influence, the TOC's recommendations often led directly to changes in regulations and practices even without formal endorsement by the MOP.[213]

These expert panels provided a link between the scientific and expert community on the one side and the participants of the formal procedures of the compliance mechanisms on the other, contributing not only to the credibility of recommendations to the MOP, but also directly leading to the implementation of reduction or substitution measures and thus to higher compliance.

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at para.5, online: <http://www.unep.org/ozone/mop/mop-reports.shtml> [*Montreal Protocol non-compliance procedure*].

[210] Owen Greene, "The System for Implementation Review in the Ozone Regime", in Victor, Raustiala & Skolnikoff, eds., *Implementation and Effectiveness, supra* note 16, 89 at 95.

[211] *Montreal Protocol, supra* note 28, Art.6. In praxis, the MOP has established a so-called Open-Ended Working Group as an intergovernmental body which reviews the panel assessments and makes recommendations to the MOP, thus providing for a buffer between the personal expert assessment and governmental endorsement of those assessments, see Wettestad, *supra* note 185 at 153.

[212] Greene, *supra* note 210 at 95-101.

[213] For example, Technical Options Committee members from the oil and gas industry changed the fire fighting practices first in their own companies and then in other companies of the industry using links within the industry, thus contributing directly to the reduction of the use of halons which is a dangerous ODS. See Greene, *ibid.* at 97-98.

2. Non-compliance procedures

The principles for the non-compliance procedures, i.e. that the procedure should avoid complexity and should be non-confrontational, transparent, flexible as well as simple, had already been agreed upon by legal experts in 1989.[214] These principles are reflected in the procedures and practical application of the non-compliance procedures in a variety of ways.

a) Initiation of the procedures

If the Secretariat becomes aware of a possible case of non-compliance during the preparation of its report to the Parties, it will request further information from the Party and inform the IC.[215] In this case, the Secretariat initiates the procedure and thus has a relatively independent and self-responsible role which goes beyond a merely administrative one.[216]

Further, any Party can raise "reservations regarding another Party's implementation of its obligations"[217] by writing to the Secretariat. In addition to that Party-to-Party trigger, any Party can by itself start the non-compliance procedures by submitting to the Secretariat that it is unable to comply.[218]

b) Non-compliance response procedures

In response to those submissions, after having reviewed the submissions and, possibly after having gathered some further information from the Party concerned, the IC will consider the information "with a view to securing an amicable solution of the matter."[219] It will report the issues to the MOP while at the same time recommending the response measures that should be taken. The MOP will then decide upon the steps that should be taken to "assist the Parties' compliance with

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[214] See *Report of the First Meeting of the Ad Hoc Working Group of Legal Experts on non-compliance with the Montreal Protocol*, UNEP, UN Doc. UNEP/OzL.Pro.LG.1/3 (1989), online: UNEP Ozone Secretariat <http://www.unep.org/ozone/adhoc/adhoc-nc-docs.shtml> (last accessed 15 October 2003) [*Report of Working Group on non-compliance*].
[215] *Montreal Protocol non-compliance procedure*, *supra* note 209 at para.3.
[216] Ehrmann, *supra* note 17 at 397.
[217] *Montreal Protocol non-compliance procedure*, *supra* note 209, at para.1.
[218] *Ibid.* at para.4.
[219] *Ibid.*, at para.8.

the Protocol" and to "further the Protocol's objectives."[220] In order to know what can be expected as the outcome of the procedure, the Parties agreed upon an "indicative list of measures that might be taken by a meeting of the Parties in respect of non-compliance with the Protocol."[221] These measures are:

- Appropriate assistance, including assistance for the collection and reporting of data, technical assistance, technology transfer and financial assistance, information transfer and training.
- Issuing cautions.
- Suspension, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, of specific rights and privileges under the Protocol, whether or not subject to time limits, including those concerned with industrial rationalisation, production, consumption, trade, transfer of technology, financial mechanism and institutional arrangements.

It can be seen from the language of the Protocol as well as from the nature of the first two measures on the indicative list that the compliance mechanisms of the Montreal Protocol are designed to be non-confrontational and to concentrate on facilitation and support for non-compliant Parties rather than on enforcement. This is in line with the principles mentioned previously. The handling of cases of non-compliance described in the following demonstrates further that this approach has largely been successful.

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[220] *Ibid.*, at para.9.
[221] See *Report of the Fourth Meeting of the Parties to the Montreal Protocol, supra* note 209 at Annex V.

E. Experiences with non-compliance and response

1. Non-compliance with reporting commitments

The first difficulties with non-compliance occurred with respect to reporting deficiencies.[222] Despite having been provided with capacity building assistance by the MLF to address the problem, reporting, especially by developing countries, remained poor until the IC asked the offenders to explain themselves at its meeting in October 1994. The IC also invited to that meeting (and in fact to all the following meetings) representatives of other institutions such as the MLF, the World Bank, the United Nations Development Programme, UNEP and the United Nations Industrial Development Organisation. This decision placed pressure on the non-compliant Parties to issue the reports and made clear that cooperation with the IC was essential to benefit from the potential assistance of the other agencies and institutions.[223] Shortly thereafter, the missing reports were supplied or promised for the near future.[224]

Over the years, the IC has continued to work closely with the MLF and its implementing agencies. They attend the IC meetings and are involved in solving difficulties. As non-compliance with reporting has become an exclusive problem of Article 5 countries, i.e. developing countries for which the grace period has ended,[225] the approach taken by the IC is one of offering as much assistance as possible while urging the countries to provide the data.[226] The assistance is provided through the Secretariat or mostly from the MLF and implementing

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[222] For instance, only 42 % of the Parties had reported for 1994 by October 1995 and only 54 % of the Parties had reported complete data for 1993 by October 1995, see Wettestad, *supra* note 185 at 155.

[223] Greene, *supra* note 210 at 112.

[224] See *Report of the Implementation Committee under the non-compliance procedure for the Montreal Protocol on the work of its ninth meeting*, UNEP, UN Doc. UNEP/OzL.Pro/ImpCom/9/2 (1994), online: UNEP Ozone Secretariat <http://www.unep.org/ozone/impcom/impcom-reports.shtml> (last accessed 15 October 2003).

[225] At the thirtieth meeting of the IC, non-compliance with data reporting under Art.7 of the Montreal Protocol was noted with respect to 13 countries classified as Art.5 countries. See *Report of the Implementation Committee under the non-compliance procedure for the Montreal Protocol on the work of its thirtieth meeting*, UNEP/OzL.Pro/ImpCom/30/4 (7 July 2003) at para.66, online: UNEP Ozone Secretariat <http://www.unep.org/ozone/impcom/impcom-reports.shtml> (last accessed 15 October 2003) [*IC Report on thirtieth meeting*].

[226] As a reaction to non-compliance with reporting, the IC urges countries to collect the data by working closely with the MLF and its Compliance Assistance Programme as well as with the other agencies, see *IC Report on thirtieth meeting*, *ibid.* at paras. 66-68 and Annex I.

agencies. So far, assistance in the collection of the data and the establishment of reporting structures seems to have been effective in ensuring eventual compliance of most countries. However, problems with data reporting by some developing countries still persist.[227]

The handling of the problem demonstrates several things. First, the non-confrontational approach has proven to be effective with respect to reporting if assistance is exchanged for cooperation by the countries. At the same time, it can be seen that developing countries have difficulties providing the reports without the assistance.

Second, the emphasis the IC is putting on complete reporting manifests that punctual and complete reporting is central to the effective functioning of the regime, especially in a very technical and complex area such as the reduction of emission of certain substances. In order to attain full compliance with this central obligation, the IC has established a linkage between financial assistance and compliance with reporting. This is a major innovation in international environmental law. Although sanctions have never been applied, this linkage at least establishes an incentive structure to comply with the reporting requirements. The logic being applied is an implicit threat to end the assistance in the case of non-cooperation with the IC. The IC has thus created a pressure tool to achieve compliance with reporting while keeping up a non-confrontational approach.

Third, the handling of this problem with non-compliance shows the involvement of multiple actors that are not originally designated to address issues of non-compliance. The IC successfully integrated the MLF and implementing agencies into the process of dealing with non-compliance. This demonstrates the flexibility of the IC and for that matter the importance of flexible structures which give enough authority to the institutions.

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[227] *Ibid.*

2. Non-compliance with reduction commitments (case of the Russian Federation)

The second incident of non-compliance was more serious. Roughly three years after the establishment of the non-compliance procedure and the IC, the mechanisms and the ozone regime as such were tested by 5 cases of non-compliance, namely by Belarus, Bulgaria, Poland, the Russian Federation and the Ukraine. The most important and most difficult case among those was by far the one of the Russian Federation, because the former USSR was a major producer, consumer and exporter of ozone-depleting substances when the Protocol was signed. Its economic profile and the fact that it was not considered a developing country despite undergoing an enormous economic transition meant that the Russian Federation would have to make the same or tougher adjustments than many developed free-market countries.[228] As commitments of the Protocol were tightening, the Russian Federation was struggling with dismemberment and economic collapse[229] and was therefore unable to comply with its reduction commitments after 1995.[230] Facing unavoidable non-compliance, the Russian Federation first called attention to its difficulties at the MOP 6 in 1994 and voiced in a statement to the Open-ended Working Group of the Parties to the Montreal Protocol its hope for a loosening of its obligations at the MOP 7.[231] This statement was interpreted by the IC as a self-reporting submission under paragraph 4 of the non-compliance procedure.[232] Although the Russian Federation came to the process unwillingly, this interpretation made it possible for the non-compliance response procedures to begin earlier. It became possible for the IC to deal with the

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[228] Jacob Werksman, "Compliance and Transition: Russia's Non-Compliance tests the Ozone Regime" (1996) 56 Heidelberg J. Int'l L. 750 at 753.

[229] The other countries, having been satellite states or part of the USSR, were in a similar situation. I will concentrate on the Russian Federation as the largest ODS-producer among them, but a similar assessment applies to the difficulties and the procedural treatment of the other countries with economies in transition.

[230] Before 1995, the Russian Federation was able to stay in compliance thanks to a slump in production following economic collapse, see Werksman, *supra* note 228 at 760.

[231] See *Report of the Sixth Meeting of the Parties to the Montreal Protocol*, UNEP, UN Doc. UNEP/OzL.Pro.6/7 (1994), online: UNEP Ozone Secretariat <http://www.unep.org/ozone/mop/mop-reports.shtml>.

[232] See Werksman, *supra* note 228 at 764.

case instead of leaving it to the more political MOP as the Russian Federation had originally intended.[233]

After having consulted not only with the Russian Federation, but also with the Global Environmental Facility (GEF) and its implementing agencies (e.g. World Bank), the IC made recommendations to the MOP 7 which provided the basis for that meeting's decision regarding the case of the Russian Federation. The decision of the MOP contains three core elements:

First, it is noted that the Russian Federation is in compliance as of 1995, but will be expected to be non-compliant in the year 1996.[234] The meeting thus stresses that the Russian Federation is not non-compliant, but that there is a danger. This is in line with the second point on the "indicative list", namely to issue cautions.

Second, the MOP acknowledged the "major efforts" made by the Russian Federation to provide the necessary data to the IC.[235] Again, it becomes obvious that both the IC and the MOP are acting in accordance with the principle that the procedure should be non-confrontational.[236]

Third, and most importantly, the MOP decided on two consequential measures, thereby striking a balance between facilitation and enforcement. It is very likely that these measures had an impact on the Russian Federation's subsequent policy to increase its efforts to achieve compliance. One of the measures was the promise of international financial assistance in the Russian Federation's efforts to achieve compliance. Such assistance was made contingent on the Russian Federation's cooperation with the measures undertaken by the IC.[237] In other words, the Russian Federation would be given assistance if it was complying with the reporting requirements of the Protocol as well as the trade restrictions established by the MOP decision. Similarly to the approach taken with

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[233] Victor, "Montreal Protocol's Non-Compliance Procedure", *supra* note 191 at 156.
[234] See *Report of the Seventh Meeting of the Parties to the Montreal Protocol*, UNEP, Dec.VII/18, UN Doc. UNEP/OzL.Pro.7/12 (1995), at para.3, online: UNEP Ozone Secretariat <http://www.unep.org/ozone/mop/mop-reports.shtml> (last accessed 15 October 2003) [*MOP 7 on Russia's non-compliance*].
[235] *Ibid.* at para.4.
[236] See *Report of Working Group on non-compliance*, *supra* note 214, at III.A. para.9 (b).
[237] *MOP 7 on Russia's non-compliance*, *supra* note 234, at para.9 (e).

respect to earlier cases of non-compliance with reporting commitments, an incentive was linked to the fulfilment of the obligations. It is also noteworthy that the assistance would not be provided through the MLF, which was established only to assist developing countries, but through the GEF. The inclusion of the GEF in the process is part of the facilitative efforts undertaken by the IC and not formally foreseen by the Montreal Protocol and subsequent amendments. As an informal tool, it allowed for the flexibility to individually respond to cases of non-compliance by establishing a linkage between GEF-assistance and compliance.

The other measure issued was that the Russian Federation should still be allowed to trade in controlled substances with members of the Commonwealth of Independent States.[238] This implies that it could not trade with other Parties to the Protocol.[239] It is interesting to note that the decision is formulated permissively rather than restrictively, such that it remains somewhat ambiguous.

The reaction of the Russian Federation to the decision shows that the implicit restrictions were clearly understood.[240] It protested forcefully against the trade measures and against the contingency between assistance and compliance. The protest was essentially based on two arguments. The first calls the decision discriminatory insofar as it did not take into consideration the difficulties of economies in transition as had been done in other environmental agreements.[241] The reaction displays a sense of inequality and frustration on the part of the Russian Federation with the differential treatment given to economies in transition and developing countries as well as with the unreasonable differentiation between other environmental agreements and the ozone treaty.[242] The second argument put forward by the Russian Federation referred to the fact that the measures issued by the decision against the Russian Federation did not reflect the hierarchy of the "indicative list",[243] in which punitive trade measure were only the last point on the

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[238] *Ibid.*
[239] *Ibid.* at para.8; Werksman, *supra* note 228 at 768.
[240] The delegation of the Russian Federation at one point left the conference, see Benedick, *supra* note 194 at 282.
[241] Russian statements at the MOP 7, *see Report of the Seventh Meeting of the Parties to the Montreal Protocol*, *supra* note 234 at paras. 76, 128-129.
[242] Werksman, *supra* note 228 at 765.
[243] See for the indicative list earlier in this chapter, at C.2.b), above.

list, whereas the other two possibilities of response measures (of assistance and issuing cautions, points A and B on the list) had not yet been fully exploited.

Even though the Russian Federation continued to be non-compliant until the year 2000, the MOP agreed in subsequent meetings that "the Russian Federation should continue to be treated in the same manner as a Party in good standing" to the extent that it is working towards fulfilment of its commitments. This includes compliance with the specific country programme established by the IC, which would help the Russian Federation in "demonstrating a decrease in imports and consumption" of ODSs.[244] Consequently, despite the fact that the Russian Federation was not in compliance for a long period, the MOP, following the advice of the IC, managed to bind the Russian Federation to the process not by shaming it into compliance, but by showing that it still belonged to the community of nations. The tool of shaming was held off on the condition of cooperative behaviour and the Russian Federation could remain in "good standing."

The fact that the Parties included these words in the reports shows the importance of reputation and membership for achieving compliance. The careful approach chosen by the Parties contributed to a sense of cooperation instead of confrontation and exclusion and thus eased the way for Russian compliance. At the same time, it is implicit in the decisions that the "good standing" would cease once the Russian Federation showed to be non-cooperative.

In sum, it is certain that a variety of factors played a role in overcoming the Russian Federation's non-compliance. Certainly, the Russian Federation committed itself to the tough constraints on its economic interests such as the loss of markets of ozone depleting substances especially in the developing world, which could buy the substances or products containing such substances under the "basic needs" exemption of the Montreal Protocol.[245] The interest in this trade was effectively used as a pressure tool by the IC and the MOP, thereby relying on a

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[244] See e.g. *Report of the Tenth Meeting of the Parties to the Montreal Protocol*, UNEP, Dec. X/26, UN Doc. UNEP/OzL.Pro.10/9 (1998) at para.3, online: UNEP Ozone Secretariat <http://www.unep.org/ozone/mop/mop-reports.shtml> (last accessed 17 October 2003).

[245] *Montreal Protocol*, *supra* note 28, Art.5.1, see also Werksman, *supra* note 228 at 759 (for the argument that the Russian Federation remained dedicated to the process for economic reasons).

non-compliance procedure that incorporates this tool as part of its response measures.

In addition, the Russian Federation's weak economic state made it dependent on the good faith of many developed nations which supported the Montreal Protocol.[246] Again, this was effectively used in the non-compliance response by extending the label of "good standing" to a non-compliant Russian Federation, implicitly threatening a loss of that reputation in case of non-cooperation. The cooperation of the Russian Federation could thus be partly explained by the wish to have a good reputation and stay a respected member. Moreover, the Russian Federation remained dedicated to the process because this was the only way to receive international assistance for a technology change that it had to undergo eventually in any case. The non-compliance procedures had an impact by establishing a possibility for international assistance "outside" the Protocol and link it to cooperation.

The IC and the non-compliance response procedure played an important role in the successful response to Russian non-compliance. However, other actors were also involved in the process, as could be seen by the involvement of the GEF and the fact that the TEAP helped to identify difficulties with compliance early in the process.[247] In sum, it becomes obvious that multiple actors and institutions were involved in the response mechanism. Their involvement was enabled through the IC and considerably strengthened the effectiveness of the work of the IC and the Secretariat.

F. Conclusion: what can be learned from the experience with the Montreal Protocol for effective legal design of compliance mechanisms?

1. Limitations of comparability

Before attempting to draw lessons from the experience with the Montreal Protocol, it is important to note that the success of the Montreal Protocol might to some extent result from particular favourable circumstances which eased the way

[246] Werksman, *ibid.*

to a successful substitution of ozone depleting substances. Among those special circumstances, the relatively limited and circumscribed number of substances that have to be replaced by alternatives helped to focus attention and develop these alternatives.[248] In the context of climate change, this is not the case: GHG-emissions result from human and natural processes. The human-induced "production" of GHGs forms to a large extent the base of industrial activity in the world. It is directly linked to the question of energy production and consumption and thereby touches on almost every activity in industry and private households. This means that the task of mitigating climate change is much harder to achieve than that of the ozone regime, because it is not only a question of substituting certain substances, but of changing the way people live and how companies produce.

Another factor that was undoubtedly beneficial for the success of the Montreal Protocol was the competitive interest of the American chemical industry in a global regulation which would level the playing field between international competitors.[249] They took on the challenge to develop substitutes as soon as the regulatory frame was clear. In the climate change context, this support might not be so readily available as substitutes for the current energy bases are more difficult to find and as the US is not ratifying the Kyoto Protocol.[250]

In sum, under the more difficult circumstances of the climate change issue, it will in all likeliness not be enough to replicate the Montreal Protocol's compliance procedures. Nevertheless, the Montreal Protocol can provide lessons for how to deal with the protection of global commons on a global scale. Although there is a high probability that Montreal Protocol represents the easier case, the design of its compliance mechanisms can be regarded as a minimum requirement for effective Kyoto Protocol compliance mechanisms.

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[247] Greene, *supra* note 210 at 116.
[248] DeSombre, "Particularly Remarkable", *supra* note 185 at 52 and 77.
[249] *Ibid.* at 57-58.
[250] This does not mean, however, that US or European industries could not play an important role by investing in research & development in order to secure future markets and by lobbying for a global legal framework that gives stability to planning.

2. Influence of the ozone regime?

While it is important to understand the special favourable circumstances outside the framework of the regime that contributed to the success of the Montreal Protocol, the real question for present purposes is whether the Montreal Protocol and its treaty control measures, i.e. the compliance mechanisms, contributed to the success story.

Notwithstanding the importance of the fact that most states and most industrial producers had an interest in developing and maintaining a strong ozone regime,[251] the treaty regime as such has clearly had an important impact. Not only did the continuing multilateral negotiations help to keep the issue on the table, but the agreement on a global treaty was also the precondition for industries to invest heavily in research and development of substitutes as it secured the future markets. This is reflected in the fact that market leader in CFC production, DuPont, intensified efforts to find a substitute in 1986 after the Vienna Convention and especially after the Montreal Protocol was signed.[252]

More specifically, the compliance control measures such as reporting induced national controls in countries where they would otherwise not have taken place.[253] Formal controls also helped to convince states to join because they would not have to fear competitive disadvantages.[254] The institutional framework, which included a strong secretariat, expert groups and financial mechanisms (GEF, MLF), was important for the amendments of the Montreal Protocol, because the Secretariat could convene expert panels and present the results to the Parties, thus setting a powerful agenda that reluctant Parties could hardly ignore.[255]

A powerful example of the way that the compliance control system was influencing the outcome is the case of the Russian Federation, which was persuaded into compliance through the combined effort of the institutions set up by the non-compliance procedure. The case of the Russian Federation also

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[251] Greene, *supra* note 210 at 123.
[252] DuPont invested $5 million in 1986, $10 million in 1987 and $30 million in 1988 into research for substitutes, after having stopped the research in the early 1980's. See Parson, *supra* note 29 at 41.
[253] *Ibid.* at 68.
[254] *Ibid.*

demonstrates that the compliance mechanisms should not be regarded on their own, but as the formally dedicated part of a much broader system of compliance control and non-compliance response in which links are established that do not exist formally in the procedures. As could be seen, the GEF and its implementing agencies were important for an effective response to non-compliance.

Of course, other purely rational factors are equally or even more important, but the design of the Montreal Protocol compliance mechanisms provided a fertile regulatory ground for other factors previously mentioned to develop their potential and for countering developments that could have put the entire process at risk.

3. Lessons from the Montreal Protocol for an effective legal design of the compliance mechanisms of the Kyoto Protocol

The experiences with the practical functioning of the compliance mechanisms of the Montreal Protocol can provide another set of criteria or design features encorporating the lessons from this experience. As these criteria are solely extracted from this chapter, they do not correspond to the earlier set of criteria. However, many parallels to the earlier theoretical considerations are apparent and are superficially mentioned in the following. The similarities between the sets of criteria are evidence of the fact that the findings from each chapter are mutually supportive. In combination, they should be a powerful tool to assess the Kyoto Protocol's compliance mechanisms.

a) Legitimate rules

Legitimacy of rules can be understood at least to some extent in terms of non-discrimination and fairness.[256] The Russian Federation's response to the MOP decision where it argues that the decision is discriminatory underscores the importance of fairness of the procedures as a contribution to legitimacy that helps

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[255] *Ibid.* at 67.

[256] See for the criteria of a legitimate rule according to various authors already in chapter II, above, at Part C para.1.

to achieve acceptance and thus compliance.[257] The argument that the problems of economies in transition are treated more adequately in other environmental treaties shows that addressees of the rules demand equity in the application of the rules. Finally, the perception of rules as legitimate seems to require that the rules or rulings are predictable. This can be seen in the discussion about the application of the "indicative list", where the Russian Federation put forward a different interpretation of the list than had the IC.

Obviously, this example can hardly provide any proof for the importance of legitimacy, considering that the Russian Federation has, despite these arguments, largely complied with the decision of the MOP. Also, it is equally plausible that the arguments were put forward purely as self-serving defensive measures, lacking inner conviction. In the end, the Russian Federation could not convince the other states, i.e. the arguments were not persuasive. However, the fact that these arguments were used in legal discourse and taken seriously suggests that states attribute importance to such issues, at least in legal discourse. Had the Russian Federation perceived the rules as less discriminatory and fair, the decision would have been more authoritative and would not have put the process at risk.

The Russian Federation's reaction, including the implicit threat to leave the process, demonstrates that, especially in international law, compliance and the possibility of enforcement is dependent on, or at least enhanced, by the rules being perceived as legitimate. Legitimacy, in turn, can be understood, in light of the experience with the Montreal Protocol, as consisting of fairness, non-discrimination and predictability of procedural outcomes.

This analysis largely supports what could have been expected from a theoretical standpoint, where many theorists have stressed the importance of legitimacy of the rules and suggested similar elements to constitute a legitimate rule.[258] It demonstrates that legal arguments govern the discourse between Parties and that those arguments will have more authority if they defend a rule that is perceived as being legitimate. To a certain extent, the experience with the

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[257] See in chapter II, above, at Part C para.2.
[258] *Ibid.*

Montreal Protocol underscores the findings of the interactional approach and its focus on normative discourse.

b) Non-confrontational approach

As has been demonstrated in this chapter, the procedures of the Montreal Protocol were designed and carried out in a non-confrontational manner. Although it is difficult to assess the extent to which the non-confrontational approach contributed to the success of the process, the IC and the MOP have successfully dealt with the cases using this approach. This became apparent in the extensive consultations with the non-compliant Parties and in the language that was employed in the text as well as in the decisions. Examples for this are the language of the decision concerning Russian non-compliance and the fact that the Russian Federation was still considered a "Party in good standing" despite its non-compliance.

While this demonstrates, to a certain extent, the success of managerial tools, it is equally important to note that non-confrontational institutions can foster shared understandings between the actors, because the focus is not on confrontation, but on what unites the actors. Non-confrontational approaches of the legal institutions of the regime can in this way enhance non-confrontational discourse and, as a result, enhance in consequence the willingness of actors to comply.

c) Management and (economic) incentive strategies

The experience with the Montreal Protocol and especially the non-compliance cases show that a close interplay between management and economic incentive structures is likely to be successful.[259]

First, the compliance mechanisms of the Montreal Protocol create transparency by relying on an extensive reporting and monitoring system. In an innovative manner, the IC and MOP put special emphasis on this managerial tool by establishing a linkage between reporting and financial assistance. However, no quality control of the reporting is institutionalised and the participation of civil

[259] Werksman, *supra* note 228 at 772.

society (NGOs) is not formally constituted. Rectifying these two issues would increase transparency and hence the trust of the Parties in each other's compliance.

Furthermore, persuasion and transparency combined with a non-confrontational attitude seem to have provided for the right framework within which pressure tools could be fruitfully employed without risking that the non-compliant Party exits the process. In addition, financial and technical assistance has played an important role by bringing countries in line with their reporting commitments, for example.

However, it has also become clear that the difficult cases where countries were not complying with reporting or substantive commitments could only be resolved by linking the management to some economic incentive strategies, including the threat of trade suspensions and other economic incentives in addition to the non-confrontational tools of persuasion and assistance.[260] Accordingly, non-compliance with reporting commitments was resolved only when the invitation of GEF and MLF representatives to the respective IC meeting implied that financial assistance was dependent on compliance. Equally, the tool of trade restrictions successfully enhanced compliance. The dedicated (MLF) and non-dedicated (e.g. GEF) mechanisms for financial assistance were not only essential in securing participation of the developing countries, but they were also essential as a tool to bring about compliance of laggard states. As such, they play an important two-sided role: one of assistance and thus management and one of material incentive and pressure.

In sum, one can learn from the Montreal Protocol experience that managerial strategies do work. However, at a certain point, cases of non-compliance connected to economic interests are very likely to be resolved by some kind of further pressure and coercion, notably economic incentives and disincentives. This analysis supports the theoretical findings that managerial tools and discourse about rules can be relied upon for enhancing compliance especially to persuade and help with difficulties, but that this must be complemented with incentive

[260] Victor, "Montreal Protocol's Non-Compliance Procedure", *supra* note 191 at 164.

structures when economic interests are at stake in order to deter defection.[261] Although the Montreal Protocol is considered a relatively easy case,[262] economic incentives and disincentives such as those indicated by Downs *et al.* played an important role.

d) Reputation and membership

As was demonstrated in the treatment of non-compliance cases under the Montreal Protocol, it is important for countries to be a respected member of the community of states, to be a member of "good standing." The discussions and consultations were kept as non-confrontational as possible in order to maintain an atmosphere in which views are exchanged and actors feel that they belong to the group. The non-confrontational approach of the IC and MOP made extensive use of reputation and membership. Of course, this makes sense from an institutionalist perspective where those variables can be used as instruments to satisfy one's interests. Furthermore, the importance that states attribute to reputation and notions of membership suggests that self-perception and identity have a value on their own. States want to be parties of good standing and respected members of the community. This indicates that constructivist theory, which emphasises identity as the root of interests, is a helpful tool to understand compliance and can be applied to practice.

e) Multiple actors and flexible structures

As could be seen from the actual functioning of the compliance mechanisms under the Montreal Protocol, several institutions, i.e. the GEF, expert panels, the MLF, the IC and the Secretariat participated formally and informally in the review and response mechanisms. This interaction between formal and informal institutions must be considered an institutional strength with regard to improving reporting and dealing with compliance issues due to several reasons:

Generally speaking, the participation of several actors in a regime increases the amount of information available, and can point to solutions when blockages

[261] See for the argument already chapter II, above, at Part B para.2.b).

occur in one institution.[263] Perhaps more importantly, the interplay of several actors makes it possible to establish linkages between the different institutions, e.g. between financial assistance and compliance, thereby reinforcing the impacts of the individual institution in bringing about compliance of countries in a synergetic way. The experiences with cases of non-compliance under the Montreal Protocol with regard to reporting and reduction commitments are excellent examples of the synergistic participation of those different institutions.

Another aspect that was demonstrated by the response to non-compliance was that a multiplicity of agencies can contribute to a more flexible regime because such multiplicity increases the capacity of the regime to develop original and creative solutions.

f) Expert groups

The experience with the Montreal Protocol has shown that the involvement of expert groups is important. The example of the TEAP demonstrated that expert groups can play an informal role by carrying out a factual review of information. However, expert groups have not been involved in quality control of the data provided by the Parties.

Furthermore, expert groups provide a link between scientific development and the institutions of the regime, establishing a dialogue between science and politics.[264] This linkage is essential because, as the example of the Montreal Protocol shows, it increases the flexibility of the regime and therefore its capacity to adapt to new developments and difficulties. Furthermore, it lends the process the necessary scientific credibility. The personal authority of their members added to the legitimacy of the proposals that were based on the work of those groups.

g) Independent compliance body with formalised decision rules

Clearly, the experience with the Montreal Protocol shows that despite positive effects from informal measures and the informal integration of actors from outside

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[262] See Downs *et al.*, "Good news?", *supra* note 65 at 391.
[263] Greene, *supra* note 210 at 119.
[264] Wettestad, *supra* note 185 at 153.

the regime, it is important to have a powerful standing body that is formally recognised and thus legitimate enough to flexibly employ other agencies when addressing cases of non-compliance. Bodies such as the IC of the Montreal Protocol are well equipped to provide coordination among the actors. However, the IC remains dependent on decision-making by the MOP. It has the power to set the agenda and shape the process, while the ultimate decision-making power under the Montreal Protocol remains with the MOP. This constraint might have contributed to unnecessary difficulties. For example, the decision on the non-compliance of the Russian Federation[265] was preceded by heated discussion due to amendment proposals in which developing countries such as India demanded stricter trade measures, thereby presumably trying to rid themselves of a competitor in ODS trade. This was part of the reason why the Russian Federation left the meeting in protest.[266] It would have been preferable to remove the decision regarding the response from the political realm, where unrelated or immediate interests of states can influence the discussions and where there exists the danger of hurting national pride. Therefore, compliance mechanisms should be designed to provide mandates to institutions that allow for a certain independence and thus for the flexible application of the rules in accordance with the needs of the situation.[267]

In addition, the experience with the Montreal Protocol has shown that a standing body such as the IC is probably more capable than ad hoc bodies to deal effectively with cases of non-compliance, because the body can gain experience, develop a modus operandi and gain the confidence of the Parties.[268]

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[265] See *MOP 7 on Russia's non-compliance*, *supra* note 234.
[266] See Benedick, *supra* note 194 at 282.
[267] Similar argument made by Greene, *supra* note 210 at 122 and 123.
[268] Ehrmann, *supra* note 17 at 412.

Chapter IV

The compliance mechanisms of the Kyoto Protocol

After having looked at various theoretical approaches to compliance and after having studied the procedures of and practical experiences with the Montreal Protocol as an important precedent to the Kyoto Protocol, I will now turn to the compliance mechanisms of the Kyoto Protocol. The presentation of the relevant rules and decisions will be accompanied by comparisons with the Montreal Protocol so as to better understand the rules and to better appreciate their novelty. Furthermore, cross-references to compliance theory will be included in order to locate the theories' relevance in the procedures. It should be noted, however, that the detailed assessment in light of the criteria developed from theory (chapter II) and practice (chapter III) will follow in the next chapter.

A. Overview of the Kyoto Protocol

1. General overview

One of the major results of the 1992 United Nations Conference on Environment and Development was the commitment of 155 countries and the EC under the FCCC to stabilise greenhouse gas (GHG) concentrations in the atmosphere "at a level that would prevent dangerous anthropogenic interference with the climate system",[269] i.e. to mitigate and eventually stop the dangerous human impact on the global climate.

Specific reduction targets and timetables were subsequently adopted in 1997 at the COP 3 to the FCCC in Kyoto, Japan. The Kyoto Protocol, despite the ratification or accession of 119 countries, has not yet entered into force, however.[270]

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[269] FCCC, *supra* note 12, Art.2.

[270] 119 countries have ratified or acceded as of 29 September 2003, excluding e.g. the United States of America, Australia, the Russian Federation, Ukraine, see for the statistics on ratification and accession of states online: FCCC <http://unfccc.int/resource/kpstats.pdf >; for the reasons why it has not entered into force and the current difficulties see *supra* note 15.

Under the Kyoto Protocol, Annex I states, i.e. the developed countries, seek a reduction of their combined output of GHGs to 5% below the level of 1990 in the period between 2008 and 2012.[271] In order to achieve that goal, each state is assigned a certain number of amount units representing the level of greenhouse gas emissions that should not be surpassed.[272] With respect to those goals, the Kyoto Protocol resembles the Montreal Protocol except for the much lower level of reduction commitments. However, in order to achieve its goal and secure participation, the Kyoto Protocol introduces a number of novelties which add enormously to its complexity and possibly to its acceptance and effectiveness.

2. The flexible mechanisms

Very importantly, participant countries acknowledge that a reduction can be achieved at different costs in different countries and regions. It therefore makes economic sense to introduce mechanisms which allow Parties to gain credit for action undertaken in other countries. The Protocol implements three such mechanisms which are designed to reduce the cost and increase the effectiveness of implementing the Kyoto Protocol. In that respect, the following flexible mechanisms contribute to the goal of promoting compliance:[273]

- **"International Emission Trading"** (Article 17): Annex I countries can trade different sorts of reduction units among each other. A country may sell or acquire units from others if having been successful or unsuccessful in complying with the limitations of the Kyoto Protocol. In

[271] *Kyoto Protocol*, *supra* note 13, Art.3(1).
[272] *Ibid.*, Art.3 and Annex B.
[273] The flexible mechanisms are certainly a major instrument to enhance compliance, not only because they reduce costs and thus provide an incentive but also because such possibilities might increase the perception of the Kyoto Protocol as coherent rules that make sense and are fair. However, since my analysis focuses on the specific issue of the non-compliance procedures influence on enhancing compliance, the extent to which emission trading rules can be used to enhance compliance will not be included in the analysis. See for such a similar argument and an analysis for example Robert R. Nordhaus, Kyle W. Danish, Richard H. Rosenzweig & Britt Speyer Fleming, "International Emission Trading Rules as a Compliance Tool: What is Necessary, Effective, and Workable?" (2000) 30 ELR 10837 at 10837.

order to ensure that each Annex I[274] country undertakes serious domestic efforts, the Parties agreed that each country must hold units that account for at least 90% of its calculated assigned amount.[275]

- "**Joint Implementation**" (Article 6): An Annex I country is allowed to transfer emission reduction units to other such Parties or acquire units from others "for the purpose of meeting its commitments under Article 3",[276] i.e. in order to meet its targets of emission reductions. Those units are generated by projects that reduce emissions or remove greenhouse gas from the air through sinks. This "trade" only involves the industrialised Annex I countries.

- "**Clean Development Mechanism** (CDM)" (Article 12): Annex I countries may implement projects in developing countries that reduce emissions and receive in turn certified emission reductions. This mechanism is not only designed to make compliance with the Protocol more cost-effective for Annex I countries, but also to help developing countries to pursue a path towards more sustainable development with respect to climate change.

The successful implementation of these potentially effective mechanisms depends on the ability of countries to create and maintain stable and reliable markets in emission rights trading. Such reliability is endangered if countries were able to "oversell", i.e. sell more allowances than they have or more than they will need to account for their emissions at the end of the commitment period.[277] Preventing such a danger and providing for the stability of the trading markets presents a new challenge for the Kyoto Protocol and its compliance mechanisms.

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[274] *Annex I* refers to the Annex I of the United Nations Framework *Convention on Climate Change* containing a list of developed countries and countries undergoing the process of transition to a market economy, *see* Annex I to the *FCCC, supra* note 12.
[275] See for the requirement of a 90% so-called "commitment period reserve" the *Marrakech Accords, supra* note 26, Annex to Dec. 18/CP.7.
[276] *Kyoto Protocol, supra* note 13, Art.6.

In order to meet that challenge, the compliance mechanisms of the Kyoto Protocol need to be more robust than those of previous MEAs.[278]

3. Financial mechanisms and capacity building for developing countries and countries with economies in transition

The role of the financial institution for the FCCC and the Kyoto Protocol has been assigned to the GEF.[279] Similarly to the role of the MLF under the Montreal Protocol, the GEF is thus the main funding entity for the financial mechanisms for developing countries as outlined in Article 11 of the FCCC.[280] The funding is generated through four funds managed by the GEF as the operating entity.

In addition to the main GEF Trust Fund which finances climate change projects and thus helps developing country Parties to meet their obligations of mitigating climate change under the FCCC, the Parties at COP 7 established the "Special Climate Change Fund" and the "Least Developed Countries Fund" which both operate under the FCCC. The former is designed to complement the Trust Fund by financing projects relating to capacity building, adaptation, technology transfer, climate change mitigation and economic diversification for countries highly dependent on income from fossil fuels.[281] The latter fund focuses on a special work programme for the needs of the least developed countries.[282]

Overall, funding under the FCCC is designed to help developing countries reduce their emission and thus fulfil their general obligations under the FCCC. In addition, the funding should help developing countries with tasks such as information gathering and establishing inventories in order to fulfil their reporting

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[277] Nordhaus *et al.*, *supra* note 273 at 10837.
[278] David A. Wirth, "Current developments: Sixth Session (Part II) and Seventh Session of the Conference of the Parties to the FCCC" (2002) 96 A.J.I.L. 648 at 654; David G. Victor, *The Collapse of the Kyoto Protocol and the struggle to slow global warming* (Princeton, Oxford: Princeton University Press, 2001) at 13 [Victor, Collapse of Kyoto].
[279] See for the designation of the GEF as the main funding entity which reports to the COP the *Memorandum of Understanding between the Conference of the Parties and the Council of the GEF*, in *Report of the Conference of the Parties on its second session*, UN FCCC, Dec. 12/CP.2, UN Doc. FCCC/COP/1996/15/Add.1 (1996), online: FCCC <http://unfccc.int/resource/docs/cop2/15a01.pdf> (last accessed 17 October 2003).
[280] See *FCCC*, *supra* note 12, Art.11.
[281] *Marrakech Accords*, *supra* note 26, Dec. 7/CP.7 at para.2a-d).
[282] *Marrakech Accords, ibid.*, Decision 7/CP.7 at para.6.

obligations.[283] An additional "Adaptation Fund" has also been established at the COP 7 to help implement Article 12.8 Kyoto Protocol. It is intended to support developing countries in adapting to the consequences of climate change.[284] In addition to voluntary contributions, the Adaptation Fund will be financed by a share of proceeds from the clean development projects and administered by a separate entity, distinct from the GEF.[285] It sponsors activities such as the promotion of adaptation technology, capacity building for taking preventive measures and establishing early warning systems for extreme weather conditions.[286] The GEF is also designated as the financial institution (possibly in cooperation with World Bank and UNDP) for capacity building projects in countries with economies in transition.[287]

B. The Compliance Mechanisms of the Kyoto Protocol

The scope of the changes required by the international community to slow climate change affects nearly all human industrial activities. Therefore, compliance with the Kyoto Protocol will require far-reaching changes in the behaviour of both states and private actors. Because of this unprecedented scope, the Protocol's success may depend on an entirely new and complex compliance system among other factors.[288] Indeed, the compliance mechanisms of the Kyoto Protocol are the most complex ever developed in international environmental law, going beyond the Montreal Protocol in several respects.

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[283] *Marrakech Accords*, *ibid.*, Decision 5/CP.5 at para.7 of the *Marrakech Accords*, *ibid.*
[284] *Marrakech Accords, ibid.*, Decision 10/CP.7 at para.1.
[285] *Ibid.* at para.2. It is noteworthy that Canada, the EU, Iceland, New Zealand, Norway and Switzerland have pledged to provide $ 410 million annually by 2005, thus providing a secure base for the commencement of the Funds activities.
[286] See *Marrakech Accords*, *supra* note 26, Decision 10/CP.7. (for the funded activities).
[287] *Marrakech Accords*, *ibid.*, Decision 3/CP.7.
[288] See Glenn M. Wiser, "Compliance Systems Under Multilateral Agreements: A Survey for the Benefit of Kyoto Protocol Policy Makers" at 1, online: Center of International Environmental Law <http://www.ciel.org/publications/pubccp.html> (last accessed 17 October 2003).

1. Compliance information system

A reliable and strong monitoring and reporting system is essential for an effective compliance system.[289] Its main objective is to maximise transparency of the regime. It is therefore central to any management approach and provides the basis of enforcement.[290]

From a rational perspective, transparency decreases the risk of defection in situations of strategic rational choices, especially in cases of "contingent compliance", e.g. when actors are likely to comply on the condition that others comply. It generally allows actors to better coordinate their behaviour and provides reassurance that other Parties are complying, thus mitigating the fear of "free riding" by the other Parties.[291]

Transparency is also important from the perspective of constructivism.[292] It can generate shared understandings, because actors can better understand the position of their counterparts. As transparency creates trust, it helps to foster shared understandings among the parties to a MEA. These shared understandings are important for compliance according to constructivist approaches because the law has to be accepted in order to have an influence. Furthermore, transparency can help to constitute identities of states by helping to maintain an atmosphere of openness and common values among states. Finally, transparent rules and procedures are perceived as fair and therefore more legitimate, which enhances the influence of legal norms on discourse and hence contributes to promoting compliance. In sum, transparency is an important element in a successful compliance strategy from both constructivist and managerial perspectives.

Reporting, sharing information and implementation review may also strengthen the position of domestic actors in favour of implementation and compliance by providing them with arguments which they can use to exert

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[289] See e.g. Jutta Brunnée, "A Fine Balance", *supra* note 120 at 237.

[290] See for a definition and the place of transparency in the managerial approach chapter II, above, at B.2.

[291] Kal Raustiala, "Compliance and Effectiveness in International Regulatory Cooperation" (2000) 32 Case W. Res. J. Int'l L. 387 at 416 [Raustiala, "Compliance and Effectiveness"]; see for the rationalist view also chapter II, above, at B.3. and B.4.

[292] See for constructivist view on the role of legal norms to enhance compliance chapter II, above, at B.5., above.

pressure on their governments.[293] These instruments can thereby enhance the internalisation of international norms through domestic actors as described by Koh. Sharing the information with other states also provides governments with an opportunity to more effectively learn from each other's experience in dealing with specific implementation problems more effectively.[294] Finally, a reporting system can serve as an "early warning" system for compliance problems, because it helps to identify deficits in domestic capability as well as problems of ambiguity of the rules.[295] As such, reporting prepares the ground for facilitative measures of the Facilitative Branch which will be discussed under section B in this chapter.

a) Reporting requirements

The Kyoto Protocol requires Annex I Parties to "have in place ... a national system for the estimation of anthropogenic emissions by sources and removals by sinks of all greenhouse gases...."[296] This national monitoring system will enable Parties to produce an annual inventory of their emissions which they have to include in their reporting commitment.[297] In addition to the annual inventories, Annex I Parties' national communications to the Secretariat must also describe the steps taken to implement the FCCC.[298]

It is noteworthy that Articles 7.1 and 7.2 of the Kyoto Protocol require both the inventories and the national communications to include "...supplementary information necessary to demonstrate compliance with its commitments under this Protocol...."[299] This amounts to a linkage between the "usual" reporting obligations and an assessment and demonstration of a country's own compliance. This regulation, which is absent under the Montreal Protocol, stresses the function

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[293] David G. Victor, Kal Raustiala & Eugene B. Skolnikoff, "Introduction to Part I", in Victor, Raustiala & Skolnikoff, eds., *Implementation and Effectiveness*, *supra* note 16 at 51; Raustiala, "Compliance and Effectiveness", *supra* note 291 at 416.
[294] *Ibid.*
[295] Jutta Brunnée, "A Fine Balance", *supra* note 120 at 237; Chayes & Chayes, *The New Sovereignty*, *supra* note 36 at 155.
[296] *Kyoto Protocol*, *supra* note 13, Art.5(1).
[297] *FCCC*, *supra* note 12, Art.12(1)(a).
[298] *Ibid.*, Art.12(1)(b).
[299] *Kyoto Protocol*, *supra* note 13, Arts. 7(1) and 7(2).

of reporting as a "crucial interface" between implementation and compliance assessment and provides for an effective "early warning" system.[300]

The self-assessment of one's compliance not only connects compliance assessment to reporting and thus facilitates review and considerations by the Compliance Committee. It also has the potential to heighten a Party's own awareness about its performance and can possibly lead to very early measures by the Party itself to comply, thus avoiding the potentially harmful official considerations and determinations of the Compliance Committee.[301] Assuming a will on the part of the countries to comply and an interest to avoid public attention, an early realisation of difficulties with compliance by the Party or the Compliance Committee can trigger a self-initiation of the compliance response mechanism and a facilitative resolution of the problems. The experience with the Montreal Protocol shows that this can be a successful and non-confrontational way of counteracting compliance problems, especially if they are rooted in capacity limitations.

It is also worth noticing that the methodology employed for estimating the emissions in the reports will be a unified standard provided by the expertise of the Intergovernmental Panel on Climate Change (IPCC).[302] The methodology is subject to regular review by the Parties, who can revise it and make adjustments.[303] Given the complexity of overseeing the emissions and the reductions of a large variety of GHGs, such a unified standard is a prerequisite for a reporting system that intends to achieve transparency and trust among the Parties because it provides comparability of the information. In addition, the regulation strengthens the position of expert groups in the process. In other words,

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[300] Jutta Brunnée, "A Fine Balance", *supra* note 120 at 239.

[301] Harmful are these considerations and determinations at least in the sense that they hurt the reputation of the non-compliant country.

[302] The IPCC was established by the World Meteorological Organisation and UNEP in 1988. It combines the efforts of scientists around the world and regularly issues assessment reports based on the findings of these scientists. For example, over 1000 scientists and many more reviewers worked on the Third Assessment Report published in 2001. The next report is in preparation and its publication foreseen for 2007. For further information and the reports see online: <http://ipcc.ch> (last accessed 15 October 2003).

[303] *Kyoto Protocol*, *supra* note 13, Art 5(2).

it leads to the further empowerment of epistemic communities or transnational issue networks as emphasised by Koh.[304]

b) Information review

The information provided by the Parties under Article 12 FCCC and Article 7 of the Kyoto Protocol will be reviewed by "expert review teams" under the coordination of the Secretariat.[305] These teams will assess the information in the reports and review the national inventories. This includes a check of the modalities used and a search for possible discrepancies in national registries of emission units through in-country review.[306] The review will culminate in a report to the MOP "assessing the implementation of the commitments of the Party and identifying any potential problems in, and factors influencing, the fulfilment of commitments."[307]

The extensive review is thus designed to assess not only the completeness but also the quality of the data of the reports and the quality of the maintenance of the national registries. This amounts to an institutionalised formal quality control of reporting and monitoring. The review can be regarded as an improvement when compared to the Montreal Protocol, under which expert groups were only employed for scientific assessment and informal review. The review mechanism strengthens the reporting and monitoring mechanisms of the Kyoto Protocol considerably because Parties have greater trust in the data provided, which in turn enhances transparency. The importance of transparency and trust has been shown for example by Chayes & Chayes. Equally, as just mentioned, transparency helps to foster shared understandings and therefore acceptance of the law.

While expert teams control the data, it is worth noticing that, contrary to the linkages between implementation review and compliance assessment under the reporting requirements, the process of review by experts is concerned only with implementation and identification, not with assessing compliance issues.

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[304] See for the terms and theory already chapter II, above, at B.6.
[305] *Kyoto Protocol*, *supra* note 13, Art.8(1).
[306] For the very detailed provisions on the review mechanism under Art.8 of the *Kyoto Protocol* see *Marrakech Accords*, *supra* note 26, Decision 23/CP.7..
[307] *Kyoto Protocol*, *supra* note 13, Art.8(3).

This ensures the separation of factual analysis from the potentially politicised and sensitive questions of compliance, which are left to the Compliance Committee.[308]

The independent, fact-oriented character of the "review teams" is also expressed by the composition of the teams. They consist of independent experts selected from a geographically balanced roster, where Annex I and non-Annex I countries are equally represented and nationals of the Party under review are excluded.[309] Such efforts to provide for geographically balanced representation contributes to creating the appearance of independent review, thus enhancing the Parties' trust in the monitoring process. This furthers the goal of transparency and thereby increases the acceptance of the procedures by the actors. In addition, experts enjoy scientific authority and their independence guarantees that they will not base their assessment on political considerations. Both aspects help to create the perception that the institution is based upon transparent and legitimate processes. The importance of legitimacy has been described by Chayes & Chayes as well as Franck. In addition, the interactional theory has shown how legitimacy in procedural terms is important for the role that norms play in framing the discourse of the actors and thus in shaping their identities. During the discourse, only fair and legitimate procedures will be accepted by the actors as a valid legal frame. A reporting system which is based on independently scientifically reviewed evidence will be less open for political argumentation which seeks to establish excuses for non-compliance or which is trying to dilute the requirements. The expert review can thus greatly enhance compliance.

Furthermore, qualitatively sound reporting is the precondition for an early treatment of cases of non-compliance so that they can be managed in a non-confrontational way. Besides, it is preferable to have a check on Parties which is as de-politicised as possible. Similarly, institutionalised formal review seems preferable to informal ad hoc review as the institutionalisation guarantees equity and the predictability of the procedures, thus enhancing the legitimacy of the review.

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[308] Jutta Brunnée, "A Fine Balance", *supra* note 120 at 241.

2. Non-compliance procedures of the Kyoto Protocol

Article 18 of the Kyoto Protocol calls upon the COP to "...approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol."[310] The COP 7 in Marrakech responded to this directive. It adopted a compliance response system which revolves around a newly created Compliance Committee.[311] This committee is divided into two branches, the Facilitative and the Enforcement Branch. Each branch is composed of ten members of which five are nationals of countries from the five regional groups of the United Nations,[312] one from the so-called small island developing states,[313] two from Annex I and two from non-Annex I countries.[314]

As is the case with regard to the IC under the Montreal Protocol, the Parties wished to achieve equal geographic representation despite the fact that developing countries do not have any obligations under the Kyoto Protocol. The special treatment of small island developing countries recognises their special status as called for in the preamble of the FCCC.[315]

Generally, allowing developing countries to participate in the decision-making processes of the non-compliance procedures can foster shared understandings by creating a sense of community among the participants. Such a sense can develop when participants in the system are being delegated certain functions, e.g. in the compliance procedures. As the Parties work together on a common goal, shared

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[309] See *Marrakech Accords*, *supra* note 26, Annex to Decision 23/CP.7. at paras.25,32.
[310] *Kyoto Protocol*, *supra* note 13, Art.18.
[311] *Kyoto Protocol non-compliance procedures*, *supra* note 26 at II.
[312] The UN system in some instances divides the world into 5 regional groups of countries, i.e. Africa, Asia and the Pacific, Europe and North America, Latin America and the Caribbean, Western Asia. This is not foreseen by the UN Charter but reflected in the 5 regional commissions to the UN Secretariat reporting to the Economic and Social Council (ECOSOC), i.e. the Economic Commission for Africa (ECA), the Economic and Social Commission for Asia and the Pacific (ESCAP), the Economic Commission for Europe (ECE), the Economic Commission for Latin America and the Caribbean (ECLAC), the Economic and Social Commission for Western Asia (ESCWA). See online: United Nations Organization <http://www.un.org/aboutun/chArt.html.> (last accessed 17 October 2003).
[313] Those are low-lying small island countries that are particularly vulnerable to the expected effects of climate change such as global warming (rise of sea-level) and extreme weather conditions (storms). Their special position is recognised in the preamble of the FCCC and implemented at various places in the convention, see e.g. *FCCC*, *supra* note 12, Art.4(8)(a).
[314] See *Kyoto Protocol non-compliance procedures*, *supra* note 26, at IV.1. & V.1.

understandings about the importance of the project evolve. This means that actors' identities are being shaped as they shift from initial scepticism to proud participation. Similarly to the developments in the Nile Basin regime, law can thus have a unifying influence on actors by establishing unifying categories and groups rather than opposing ones. Furthermore, the equal representation in the Compliance Committee can foster these shared understandings by letting the rules appear as equitable and thus legitimate as possible.

With regard to legitimate rules, however, there is the danger that participation of countries that do not have concrete reduction obligations in the decision making could be perceived by Annex I countries as being unfair. However, this fear is addressed by the voting procedures for the Enforcement Branch. Every decision in this branch requires not only a three-fourths majority, but this majority must in addition include a majority of votes from Annex I countries.[316] This double-majority ensures that the countries with reduction commitments can not be overruled by a majority of countries without such commitments.

a) Initiation of the process

Parties to the Kyoto Protocol can submit compliance problems ("questions of implementation") with respect to their own non-compliance or the with respect to the non-compliance of other Parties to the Secretariat. The latter method amounts to a classic Party-to-Party trigger and might lead to an effective control tool by Parties with a strong interest in an effective Protocol, such as the small island developing states.[317] Questions of implementation are also indicated in the reports of the review teams. The questions of implementation are then submitted to the plenary of the Compliance Committee.[318]

Similarly to the Montreal Protocol, the Secretariat has a relatively strong position not only in administering the non-compliance procedures, but also in triggering them. However, under the Montreal Protocol, the secretariat has in fact

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[315] See already at note 313, *supra.*
[316] See for this point the discussion of the two branches in this chapter at B.2.b), below.
[317] Vespa, *supra* note 25 at 414; for more on the role of these states, see at note 313, *supra.*
[318] *Kyoto Protocol non-compliance procedures, supra* note 26 at VI.1.(a).

never made use of that power. Unlike the regulation under the Montreal Protocol, the initiation power of the Secretariat is more limited as it can only act on the basis of compliance problems indicated in the reports of the expert review teams. Thus, the circle of participating institutions is further enlarged and the process based to an even greater extent on scientific non-political expertise. This stronger role for the review expert groups has the potential to further enhance compliance as it might lead to higher acceptance and to better internalisation of the rules through the empowerment of epistemic communities.

b) Determination and response measures

Both branches can base their determination of compliance problems and their decisions on information provided by the reports of the expert review teams, the concerned Party, and the Party that has triggered the process with respect to another Party or on reports of the MOP.[319]

It is noteworthy that "competent intergovernmental and non-governmental organisations may submit factual and technical information."[320] In addition, the information that is considered by the Compliance Committee is made public unless the relevant branch decides otherwise.[321] Final decisions are also available to the public.[322] This is one of the few legal avenues by which civil society can participate in the process. Such participation corresponds to the theoretical considerations about the importance of civil society voiced by Koh, Young and the constructivists. In particular with regard to an interactional perspective, the submission of information by NGOs shapes the discourse of the Parties, because they will have to consider this information and discuss it. The information submitted can open up the discourse to include a much broader spectrum of sources. It will therefore lead to understandings that have a greater acceptance within societies. Equally important is the participation of the public in the processes. The shared understandings evolving in the discussions will be built on

[319] *Ibid.* at VIII.3.
[320] *Ibid.* at VIII.4.
[321] *Ibid.* at VIII.6.
[322] *Ibid.* at VIII.7.

a broader basis if the discussions reach outside the conference rooms. This broad basis is important for durable common understandings that can lead to changes in the collective identity of states. This approaches to what Koh seems to refer to with the idea of internalisation of the norms. International law is internalised through the participation and active involvement of non-state actors in order to bring the discourse and understandings of the international realm into the domestic one. Of course, this requires not only participation in the international realm, but also domestic processes of discussion and dissemination of information.

However, the access of the public to information during compliance proceedings is not fully established under the procedural rules. It can be restricted at the request of a Party concerned.[323] While this could have negative impacts on an effective public participation, it is worth noticing that the restriction lies at the discretion of the branch concerned. This diminishes considerably the chances of an actual restriction on the wish of a single Party and serves the goal of public participation.

(1) Facilitative Branch of the Compliance Committee

The Facilitative Branch is mandated with providing advice as well as financial and technical assistance to the Parties in order to promote compliance.[324] To fulfil this task, the Facilitative Branch's mandate comprises *questions of implementation* which concern the requirement that the implementation of commitments should strive to "minimize adverse social, environmental and economic impacts on developing country Parties."[325] Furthermore, it oversees the supplemental use of the flexible mechanism, i.e. that a country keeps a commitment period reserve.[326] Finally, it provides "early warnings" in cases of potential non-compliance, i.e. prior to the commitment period.[327]

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[323] See *Marrakech Accords*, *supra* note 26, Annex to Decision 24/CP.7 at VIII.6.
[324] *Kyoto Protocol non-compliance procedures, supra* note 26 at XIV.
[325] *Ibid.* at IV.5.a); see for the requirement also the *Kyoto Protocol*, *supra* note 13, Art.3(14).
[326] *Kyoto Protocol non-compliance procedures, supra* note 26 at IV.5.b). See for the commitment period reserve requirement already in this chapter at A.2., above.
[327] See *Kyoto Protocol non-compliance procedures*, *ibid.* at IV.5 & 6.

The first two tasks can be seen as the surveillance of the "soft" requirements of the Kyoto Protocol, i.e. commitments that do not lie at the heart of the Kyoto Protocol but should nevertheless be observed. Further, the importance of early warnings for a compliance control system was already pointed out. The earlier possible problems are detected, the greater are the chances of finding a "managerial solution" in an amicable manner, thus reducing the risk of Parties exiting the Kyoto Protocol.

These functions of the Facilitative Branch represent the implementation of a managerial strategy in a way analogous to that successfully employed in the compliance mechanisms of the Montreal Protocol and as has been emphasised by Chayes & Chayes. It is based on persuasion and facilitation. Capacity problems can be addressed by means of financial assistance. This assistance includes funding from sources of the Protocol (i.e. Adaptation Fund) or from other sources.[328] The Facilitative Branch could thus use similar measures as the IC by establishing linkages between financial support and cooperative behaviour early in the process. Contrarily to the Montreal Protocol, under which the MOP could also make use of the suspension of treaty rights,[329] the Kyoto Protocol strictly divides tasks within the compliance body, leaving only facilitative and "soft" requirements to the Facilitative Branch.

The main difference to the compliance mechanisms of the Montreal Protocol regarding the compliance body is the decision making power of the Facilitative and Enforcement Branch. Both can decide on responses to non-compliance *independently of the MOP*.[330] This means that the non-compliance response procedure is more self-contained and less dependent on the political body of the MOP. Thus, the standing compliance body has a much stronger position compared to that of the Montreal Protocol.

However, this power is curtailed in two respects. First, the appeal procedure allows for a review of the decisions by the MOP. Second, the responses of the

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[328] *Ibid.* at XIV.b).
[329] Which is the third point on the indicative list of measures, see for the list above, chapter III at C.2.b).
[330] *Ibid.* at XIV.

Compliance Committee are outlined in detail in the procedures, leading to less flexibility in their application.[331] The detailed list shows that the link to the Parties is still maintained by means of a more rigid regulatory framework. This choice of procedures can be understood as a response to the need for expedient processes. Increased expediency can result in greater effectiveness in dealing with compliance problems. In addition, the separation of the process from political influences can be beneficial because this helps prevent Parties from justifying their non-compliance politically. It excludes political arguments and thus reinforces the role of legal rules in the process. This can help to shape the discourse between the Parties in a way similar to the UN Watercourse Convention in the Nile Basin and thereby to enhance the positive influence of the compliance mechanisms on the Parties.

(2) Enforcement Branch of the Compliance Committee

The Enforcement Branch can take decisions with a three-quarter majority if consensus fails. In addition, decisions must be taken with a double majority from both Annex I and Annex II countries.[332] This regulation expresses the concern of developed states that they could be overruled in politically motivated decisions of the Enforcement Branch by a majority from developing countries that do not have any reduction commitments.[333] This regulation mitigates potential difficulties which could arise from a perception of the rules as unfair.

The Enforcement Branch determines whether an Annex I country is not in compliance with the emission reduction commitments under Article 3 and the reporting requirements of Articles 5 and 7 of the Kyoto Protocol. It also controls the eligibility requirements for the participation in the flexibility mechanisms.[334] Thus, it oversees the compliance with the core of the commitments under the Kyoto Protocol. In response to any findings of non-compliance, the Enforcement

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[331] See for both points later in this chapter, below.
[332] *Ibid.* at II.9.
[333] Glenn Wiser, "Report to CAN on the Compliance Section of Marrakech Accords to the Kyoto Protocol" (2001) at 3, online: Climate Action Network <http://www.climatenetwork.org/docs/gwcompliancefinal.pdf> (last accessed 17 October 2003) [Glenn Wiser, "Report to CAN"].

Branch can apply the following consequences, "taking into account the cause, type, degree and frequency of the non-compliance of that Party."[335]

(a) As a response to non-compliance with the requirement to set up national systems and annual inventories of emissions, the Enforcement Branch can

- issue a declaration of non-compliance, and
- demand the development of a plan analysing the non-compliance and containing detailed measures that the Party intends to implement in order to remedy its non-compliance, including a timetable for implementation.[336]

(b) Such a plan of remedy must be submitted to the Enforcement Branch at the latest three months after the declaration of non-compliance for review and assessment.[337]

(c) Reports on the implementation of this plan must be submitted on a regular basis.[338]

(d) The eligibility to participate in the flexibility mechanisms "shall be suspended" if the eligibility criteria are not met.[339]

(e) In case of non-compliance with the reduction commitments, the Enforcement Branch "shall declare" the non-compliance of the Party with Article 3 of the Kyoto Protocol and "shall apply" the further consequences of

- deducting 1.3 tonnes for each ton of excess emissions from the Party's assigned amount for the next reduction period, which is in effect a 30 % penalty for every ton, and
- requiring the development of a compliance action plan, and
- suspending the right of the Party to make transfers under Article 17 of the Kyoto Protocol.[340]

(f) The compliance action plan including analysis, a description of actions to be taken and a timetable will have to be submitted within 3 months.[341]

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[334] *Kyoto Protocol non-compliance procedures, supra* note 26 at V.4.
[335] *Ibid.* at XV.
[336] *Ibid.* at XV.1.
[337] *Ibid.* at XV.2.
[338] *Ibid.* at XV.3.
[339] *Ibid.* at XV.4.

(g) Annual progress reports on the implementation of this plan have to be submitted on an annual basis.[342]

As can be seen, the list of measures to be applied by the Enforcement Branch is much more elaborate than the indicative list of measures under the Montreal Protocol. It includes not only the suspension of the right to participate in the flexible mechanisms but also a (non-financial) penalty by subtracting an additional 30 % in the next commitment period. At the same time, the determination of non-compliance should not be underestimated. As is pointed out by Chayes & Chayes, respected membership in international relations is vital for a state as its political influence and economic well-being depend on good relations with other states.[343] To officially declare that a state is in non-compliance can hurt the state's reputation of being a good and reliable member of the international state system. Not only in the managerial perspective, but also in the constructivist and interactional view, such a declaration presents an effective tool. States acquire certain identities during interactions with other states. Depending on the kind of identity acquired by a state, the threat of such declaration can be an effective tool when a bad reputation runs counter the identity of the state. As states' identities are shaped during the discursive processes within regimes, it is likely that the declaration will be an effective instrument in most cases.

The measure to penalise non-compliance in the next commitment period as well as the possible suspension of treaty rights provide an economic incentive for states to comply with the commitments. The measures in that sense follow the theory of political economy defended by Downs *et al.*[344]

Seen in its entirety, the list of possible responses by the Enforcement Branch displays a development towards predetermination and formalisation even in comparison to the relatively complex non-compliance procedure under the

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[340] *Ibid.* at XV.5.
[341] *Ibid.* at XV.6.
[342] *Ibid.* at XV.7.
[343] See in chapter II, above, at B.3. & B.4.; Chayes & Chayes, *supra* note 36 at 110.

Montreal Protocol. The language ("shall") and the division into numbered paragraphs indicating the consequences display a shift towards a system where the consequences of non-compliance are certain beforehand. This means that consequences for non-compliance are more predictable. This might enhance compliance in accordance with institutionalist theory where the predictability of reactions from others is important for states to consider cooperation as beneficial.[345] Furthermore, the decision-making process on the application of consequences is de-politicised. This diminishes the possibility for a state to influence other states politically in order to evade the application of consequences.

(3) Appeal

A completely new development for MEAs is the possibility of an appeal. A Party may appeal to the MOP against a decision of the Enforcement Branch that relates to Article 3 of the Kyoto Protocol (emission reductions) if it feels it was denied due process in the decision making process. As a response, the MOP can with a three-quarter majority override the decision of the Enforcement Branch and send the appeal back.[346]

The possibility of an appeal is to a certain extent the consequence of granting the Compliance Committee independent decision-making power. Especially for the G-77 countries and China, it was important to link the process back to the MOP who in this way retains some control over the decisions of the Enforcement Branch.[347] As a result, the non-compliance procedures move further in the direction of formalised quasi-judicial decision-making as has successfully been employed in the Dispute Settlement Procedures of the GATT/WTO.

This tendency may, it is to be hoped, be taken as a sign of the increasing robustness of global environmental accords.[348] It responds to the lessons from the

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[344] See chapter II, above, at B.3 and B.4; for the question whether such incentives are at all necessary in the context of the Kyoto Protocol and whether they are sufficient to change the incentive structures of the game, see the discussion in chapter V, below.
[345] See for this point under chapter II, above, at B.3.
[346] *Ibid.* at XI.
[347] See for the background of the negotiations Wiser, "Report to CAN", *supra* note 333 at 3.
[348] Compare e.g. Wiser, "Powerful Punch", *supra* note 25 (arguing that those legal procedures make the Kyoto Protocol more robust than other previous MEAs).

Montreal Protocol that formalisation of the decision rules can enhance compliance. At the same time, such an appeal to the entire MOP has the potential to increase the fairness of the procedures, because decisions will be double-checked for due process. As fair procedures are an important element of legitimacy,[349] the possibility of an appeal can thus be seen as fostering the legitimacy of the decisions taken by the Compliance Committee. It might also have made the inclusion of penalties more acceptable to reluctant Parties, thus contributing further to overall legitimacy.[350]

On the other hand, the appeal slightly diminishes the position of the Compliance Committee. This could have negative repercussions as the regime is less flexible under a weaker Compliance Committee. However, the Montreal Protocol has nevertheless proven to be sufficiently flexible despite the weaker role of the IC, which is much more dependent on the MOP than the Compliance Committee of the Kyoto Protocol. Besides, the appeal possibility is very limited and can not seriously affect the independence of the Compliance Committee.

c) Dispute settlement (Article 19 of the Kyoto Protocol & Article 14 of the FCCC)

The Kyoto Protocol also contains a dispute settlement possibility which runs parallel to the processes described above. Article 19 of the Kyoto Protocol provides for this possibility by ensuring that Article 14 of the FCCC applies *mutatis mutandis* to the Protocol. Under this provision, Parties can opt for adjudication by the ICJ or for the creation of a conciliation commission.[351]

As the relationship between Article 14 of the FCCC dispute settlement and the compliance response procedures is not further regulated, the Parties have in principle two separate ways of solving problems of compliance with the treaty. This gives rise to the question whether the recourse to one of the two can exclude the other.

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[349] As put forward by Brunnée & Toope, Koh and Chayes & Chayes, see chapter II, above.
[350] Compare Jutta Brunnée, "A Fine Balance", *supra* note 120 at 267.
[351] *FCCC*, *supra* note 12, Arts.14(2) and 14(6).

While a proper discussion of the legal problems involved is beyond the scope of this thesis,[352] it should be considered that the compliance response system is essentially a political process which deals with the settlement of obligations that are owed to all Parties and not only bilaterally. Thus, the recourse to Article 14 FCCC dispute settlement can not be barred by ongoing negotiations due to the principle that political processes can not bar dispute settlement.[353] Furthermore, the explicit wording of Article 19 of the Kyoto Protocol should be respected in the sense that recourse to dispute settlement remains possible even despite decisions by the Compliance Committee.

The fact that the Parties have agreed upon these compliance procedures as a unique way to solve non-compliance of obligations owed to all Parties simultaneously shows that the reverse, namely an exclusion of the non-compliance response procedures due to pending dispute settlement, was not intended either. The Parties can be seen as having waived their right to exclusionary dispute settlement by the Article 14 FCCC procedures once they have committed by decision or amendment to the multilateral non-compliance procedures.[354]

The most extreme case would be a clash of a pending ICJ case and the non-compliance response of the Enforcement Branch of the Compliance Committee issuing, for example, a suspension of treaty rights. It has been argued that the non-compliance procedures should be suspended (but not ended) until the judgement is announced.[355] While it would be undesirable to have competing results from both processes regarding the same matter, it seems inconsistent with what has been said about the multilateral and political character of the non-compliance

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[352] For a detailed discussion of the legal problems arising under the parallel recourse possibilities in the case of the Montreal Protocol see Koskenniemi, *supra* note 16 at 155-161.
[353] *Ibid.* at 158; see also *Case concerning Military and Paramilitary Activities in and around Nicaragua (Nicaragua v. United States)* [1984] ICJ Rep. 392 at 438-441, online: ICJ <http://www.icj-cij.org/icjwww/icases/inus/inus_ijudgment/inus_ijudgment_19841126.pdf> (The ICJ is pointing out that political negotiations, even if they are multilateral and touching the questions of dispute settlement process, do not bar the jurisdiction of the Court mainly because Art.103 of the UN Charter stipulates that the Charter must prevail, thus including ICJ jurisdiction).
[354] For a similar argument regarding the specificity of the Montreal Protocol's non-compliance procedures for solving differences regarding obligation with *erga omnes* character see Koskenniemi, *supra* note 16 at 158-159.
[355] *Ibid.* at 159.

procedures to consider a decision of the Compliance Committee which opposes an ICJ decision as illegal. However, the Compliance Committee should strive to avoid such a case in order not to undermine the legitimacy of its decisions and thus considerably hurt the potential of the procedure as a whole. Therefore, a self-imposed suspension seems suitable to resolve such a situation.

The discussion shows that it will hardly be possible for a Party to avoid the non-compliance procedures by engaging in Article 14 FCCC dispute settlement. The Party-to-Party trigger ensures that the non-compliance procedures are invoked. Once invoked, they can not be legally excluded. Experience supports this: under the Montreal Protocol, which also contains a parallel dispute settlement procedure, this procedure has never been used. Since the non-compliance procedures can neither be excluded nor avoided, it remains doubtful whether the FCCC dispute settlement will have any real function in the procedures regarding compliance with the Protocol.

3. Legal nature of the non-compliance mechanisms

Although the compliance mechanisms to the Kyoto Protocol were unanimously accepted by the COP, it remains "the prerogative of the Conference of the Parties serving as the meeting of Parties...to decide on the legal form of the procedures and mechanisms relating to compliance...."[356] This has to be seen in combination with Article 18 of the Kyoto Protocol, which leaves the approval of the non-compliance procedures to the MOP and requires that "binding consequences" can only be adopted by amendment to the Kyoto Protocol.[357] Such an amendment enters into force with ratification by individual Parties.[358] This means that either the non-compliance procedures will be "non-binding", or they must be ratified. Given that the participation in the flexible mechanisms is not linked to ratification, non-ratification by individual Parties could create the untenable situation that countries trade emissions without participating in the non-compliance procedures. Regarding this danger, a simple decision to adopt the

[356] See *Marrakech Accords, supra* note 26, Decision 24/CP.7, at the preamble.
[357] See *Kyoto Protocol, supra* note 13, Art.18.
[358] *Ibid.*, Art.20(4).

non-compliance procedures as non-binding seems preferable for the overall effectiveness.[359]

As was explored in the theoretical chapter, international law influences actors not because it is called binding or not, but to a large extent because the rules present the shared understandings of the parties to an MEA and shape the discourses between them.[360] Viewed from this perspective, effectiveness of the rules does not seem to be governed by whether or not they are binding. Besides, there exists no authority to force any state to comply with the rules whether they are binding or not.[361]

On the other hand, the care with which states generally negotiate intensively over the bindingness of the rules suggests that the formal distinctions between binding and non-binding do matter.[362] This might be due to the fact that in practice, the question may arise whether the Kyoto Protocol's provisions and thus the decision of the MOP or the Compliance Committee represent a definite legal settlement of the matter which goes further than pure practical coordination.[363] For example, a Party in non-compliance might contest the decision of the MOP or IC/CC to suspend treaty rights on the ground that it is not legally valid. Such an argument would have less weight or even be dismissed before the ICJ[364] if decisions are "legally binding." These potential difficulties could be overcome by declaring the rules to be legally binding.

A declaration in that sense can also enhance the effectiveness of the procedures as countries might perceive "legally binding" rules as more authoritative. This is suggested by the importance of the issue at negotiations. If the non-compliance procedures are declared "legally binding" by the Parties, then this perception of authority could be used to enhance persuasion in discourse,

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[359] Compare Jutta Brunnée, "Testing Ground", *supra* note 11 at 270.
[360] See already in chapter II, above, at B.5.
[361] *Ibid.;* Glenn Wiser, "Report to CAN", *supra* note 333 at 4.
[362] Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, "The Concept of Legalization" (2000) 54 Int'l Org. 401 at 411.
[363] Koskenniemi, *supra* note 16 at 162.
[364] Such a possibility remains open due to the applicability of Art.14 FCCC as an effect of Art.19 Kyoto Protocol. The non-compliance procedures will operate "without prejudice" to Art.19 of the Kyoto Protocol and thus to the Dispute Settlement of the FCCC, see *Kyoto Protocol non-compliance procedures*, *supra* note 26 at XVI.

leading to an increase in the overall acceptance of the rules. It would enhance the power of the rules with regard to shaping interaction and thus positively influence the identities of states as is emphasised by interactional theory.

However, such advantages would be largely outweighed by the disadvantage arising from a regime in which the non-compliance procedures are not applicable to all Parties. Thus, only if participation in the market mechanisms was being made contingent on ratification of the mechanisms would it make sense to enter a process of ratification and strive for "legally binding" compliance mechanisms.[365]

C. Conclusion

This chapter has presented the compliance mechanisms of the Kyoto Protocol. I have endeavoured to show that these mechanisms introduce many innovations which go over and beyond the compliance procedures of the Montreal Protocol, but also that they build upon experiences from this precedent.
Furthermore, it was possible to identify elements in the compliance mechanisms that correspond to the theoretical insights gained in chapter II. The stage is therefore set to organise the results and further assess the compliance mechanisms in an attempt to apply the criteria from chapters II and III.

[365] Since the question is rather hypothetical and is not decisive for the effectiveness of the procedures, the discussion evolving around this issue will not be enlarged any further.

Chapter V

Assessment of the effectiveness of the compliance mechanisms of the Kyoto Protocol in promoting compliance

When assessing the influence and effectiveness of such mechanisms and procedures, it must be kept in mind that the influence of the mechanisms on the outcome, i.e. on compliance, is limited. External factors also play important roles.[366] For example, factors such as the characteristics of the targeted activity, state-level factors such as the political and economic system as well as social and cultural values of a country, system-level factors such as power configurations or focusing events such as the 'ozone hole' over Antarctica can all have a great influence on state compliance.[367] The characteristics of the accord including financial mechanisms and compliance procedures are thus only a small part of the whole picture.[368]

However, unlike other factors, the design of compliance mechanisms can be deliberately shaped by the international community of states in order to positively influence state compliance with MEAs. Thus, within the limited influence that the mechanisms might have due to the influence of other factors and the limited influence of international law in general,[369] a careful design of its instruments becomes important to fully benefit from the leverage that international law has to offer.[370]

In the following, I will attempt to use the insights from chapters II and III in order to assess whether the design of the compliance mechanisms as presented in chapter IV is adequate to fully exploit the influence that international legal rules can have on the behaviour of states. And since the non-compliance mechanisms are an important part of the treaty system, a positive assessment will suggest that

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[366] With "external", I mean factors other than the characteristics of the treaty of which the non-compliance procedure is a pArt.
[367] Jacobson & Brown Weiss, "Framework", *supra* note 92 at 6-8; Victor, Raustiala & Skolnikoff, "Introduction and Overview", *supra* note 16 at 13.
[368] Jacobson & Brown Weiss, "Framework", *ibid.* at 6; Victor, Raustiala & Skolnikoff, *ibid.* at 12.
[369] See for a detailed discussion of the influence of international law on compliance already chapter II, above.

the treaty will be more effective in achieving its goals. In addition to the assessment of effectiveness, the analysis should allow the identification of positive trends and difficulties that might arise and which might require an adjustment of the mechanisms. Finally, the assessment should help to understand the underlying reasons why certain elements of the compliance mechanisms are included in the procedures.

The following assessment builds upon the criteria developed in chapters II and III and applies them to the compliance mechanisms as presented in chapter IV. This chapter thus strives to analyse the likely effectiveness of the Kyoto Protocol's compliance mechanisms with the help of the insights from compliance theory and from practical experiences with compliance mechanisms.[371]

A. Fora for interaction to create and foster shared understandings and acceptance (criteria developed in chapter II)

Shared understandings between actors which evolve in interactional processes provide the basis for the functioning of law and for its power to bring about compliance. It could be seen throughout the presentation of the compliance mechanisms of the Kyoto Protocol that several elements of the mechanisms foster shared understandings or help with their emergence.

First of all, the compliance mechanisms are based on decisions by the COP which are the outcome of extensive negotiations. Not only have the Parties negotiated the mechanisms for a long time at numerous conferences, but the MOP will have to embrace the compliance procedures at the first meeting.[372] In addition, there exist numerous possibilities in the Compliance Committee or the MOP to engage in *continuous discourse*.

Second, shared understandings are fostered by transparent information sharing and monitoring regulations which help to secure an atmosphere of trust and openness. These are conditions in which understandings about common goals can

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[370] Victor, *Collapse of Kyoto*, *supra* note 278 at XIII (Preface).
[371] See for the justification and explanation concerning these criteria and variables already in chapters II and III.
[372] See *Kyoto non-compliance procedures*, *supra* note 26 at the preamble.

arise and endure.[373] Equally important for the emergence of shared understandings is the active involvement of experts in the process of review as well as the participation of the IPCC and NGOs in the procedures.[374]

B. Legitimate rules and fair procedures (criteria developed in chapters II and III)

Legitimacy as a quality of the rules is, according to compliance theory and the experience with the Montreal Protocol, an essential element for achieving compliance. In the interactional view, it increases the impact norms can have on discourse, thus providing the basis for the constitution of state identities and interests.[375] As seen in the experience with the Montreal Protocol as well as the theoretical approaches to compliance, increased legitimacy could be achieved through fair, non-discriminatory, transparent, predictable and equitable compliance mechanisms. Numerous elements in the design of the compliance mechanisms have the potential to enhance the legitimacy and acceptance of the compliance mechanisms.

First, the compliance mechanisms leave an important role to epistemic communities. Independent experts are involved in reviewing the reporting data and in reporting problems with compliance. The global network of climate change experts of the IPCC provides for the scientific standards on which the procedures are built, thus mitigating the difficulties that arise with the complexity and scientific uncertainty of controlling GHGs. The involvement of these expert communities ensures that the basis for any non-compliance response measure, i.e. the reporting and monitoring, is perceived as being fair and equitable. The reason for this is that the experts work independently from any political entity, be it states, the Compliance Committee or the MOP. Their involvement thus guarantees objectivity. The political independence is in turn to some extent guaranteed by the geographical balanced selection process from which experts are drawn. The

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[373] See for more on this point already chapter IV, above, at B.1.
[374] For the role of epistemic communities in enhancing the legitimacy and the internalisation of norms, see in this chapter, below.
[375] See for the role legitimacy plays in interactional theory chapter II, above, at B.5.

reliance on expert communities can also contribute to more authoritative rules and procedures simply because of the authority that is naturally attributed to experts.

A similar effort to provide for fair and accepted procedures can be seen in *the independent role given to the Compliance Committee*, which can take its decisions independently from the more political organ of the MOP. As the members of the Compliance Committee are chosen according to *equal geographical representation*, this strength in decision-making can de-politicise the process and give the procedures as a whole the image of an equitable process. Decisions might be perceived as less biased and thereby potentially fairer.

However, a counter-argument against the increase in fairness through the equal participation of developing countries in the Compliance Committee could be made on the ground that the decision-making regarding compliance is strongly influenced by countries that do not have any concrete obligations to reduce their emissions. Such a view does not necessarily imply that the differentiation in commitments is unfair, but simply that non-compliance should not be decided by actors not concerned with compliance themselves. A feeling of unfair treatment in that regard could arise, for example, when economies in transition are confronted with decisions of the Compliance Committee through the participation of those developing countries which do not have any commitments in the first commitment period.

However, this danger can be addressed by careful and flexible treatment of cases of non-compliance by economies in transition. Indeed, the decision of the MOP on compliance addresses the need for a flexible treatment of Annex I countries undergoing the transition to a market economy, pursuant to Article 3 paragraph 6, of the Kyoto Protocol, and Article 4 paragraph 6 of the FCCC. [376] This should be used as a tool to pre-empt any potential difficulties with respect to fairness.

Still, developed countries could fear being subjected to politically motivated decisions by developing countries in the Enforcement Branch. However, this fear has been addressed by requiring a double majority rule for decisions of the

[376] See *Kyoto Protocol non-compliance procedures*, *supra* note 26, Annex, at II.11.

Enforcement Branch.[377] Nevertheless, since decisions under the current system have to be acceptable in the eyes of Annex I countries, the equal geographical representation in the Compliance Committee is not necessarily a tool to improve compliance by these states.

There are other important reasons that justify such an equal participation. The necessity to build a sense of a community of states that will eventually lead to concrete responsibilities for the developing world requires such a regulation. In that respect, the participation of developing countries in the decision-making of the Compliance Committee could possibly contribute to creating shared understandings and a community of like-minded states in which feelings of responsibility for the common project can prosper. This can lead to closer cooperation and improve compliance.

As was seen in the non-compliance case of the Russian Federation, *predetermination of consequences* for non-compliance can be an instrument to encourage the acceptance of decisions issued by the Enforcement Branch. Under the Kyoto Protocol's compliance mechanisms, the listing of possible measures to be taken by the Enforcement Branch is very detailed and provides exactly when and how consequences will be applied to cases of non-compliance. As such, the decisions are more predictable, which will make them more widely accepted and thereby heighten their legitimacy.

Furthermore, the list of measures puts into effect a response mechanism which displays a *standard of proportionality* in the application of the measures. For example, the non-compliance with reporting commitments can lead to a declaration of non-compliance and the demand of a plan how to implement the requirements. But only non-compliance with the reduction commitments[378] can lead to more severe consequences such as the suspension of eligibility to participate in the flexible mechanisms.[379] Such a proportionality combined with the predetermination of measures can lead to the perception that the procedures

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[377] Wiser, "Report to CAN", *supra* note 333 at 2; see for the detailed regulations already chapter IV, above, at B.2.b)(2).

[378] *Kyoto Protocol*, *supra* note 13, Art.3.

[379] See for the list of consequences of the Enforcement Branch already chapter IV, above, at B.2.b)(2).

are fair and thus more legitimate than otherwise. The downside is the lower flexibility.[380]

Finally, the *possibility of an appeal* when a state feels that the due process has been disregarded further contributes to actual fairness by ensuring that the complex procedures agreed upon are actually followed. The appeal procedure thereby increases the perception that each Party is being treated equally. This clearly increases the fairness of the procedures and can be seen as another important contribution to the perceived legitimacy of the rules and to their acceptance.

Overall, the analysis has shown that Parties to the Kyoto Protocol were very careful in creating rules that would be perceived as legitimate. In that respect, the compliance mechanisms contribute to an effective regime because legitimacy enhances compliance.

C. Compliance management and non-confrontational approach (criteria developed in chapters II and III)

Similar to the Montreal Protocol, the Kyoto Protocol's compliance mechanisms put in place the complete arsenal of a managerial strategy as recommended by Chayes & Chayes. They contain design features which make it possible to address, as early as possible, causes for non-intentional non-compliance such as capacity limitations, ambiguity of norms and change in circumstances.[381] In addition, they promote a climate of transparency and a non-confrontational atmosphere.

First of all, facilitation through *financial and technological assistance* including capacity building is institutionalised in the Facilitative Branch of the Compliance Committee. The assistance foremost addresses non-intentional non-compliance rooted in capacity limitations.

Moreover, one of the main functions of the Facilitative Branch is to address difficulties with reporting, national registering and reduction of emissions through

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[380] See for this point the further assessment in this chapter, part F., below.

[381] See for these causes of non-compliance chapter II, above, at B.4.; Chayes, Chayes & Mitchell, "Managing Compliance", *supra* note 62 at 61.

the use of managerial tools of assistance and persuasion in the early phase of the regime, i.e. before the beginning of the commitment period. At that point, assistance is more effective to overcome capacity limitations because there is more time available to build up the capacity. In addition, strategies can be revised at an early stage and mistakes can be avoided more easily.

This emphasis on early and more effective warnings and early facilitation is reinforced by the *linkage between reporting and compliance assessment* established already in the annual reports of Annex I states. Not only does this linkage increase transparency and trust between the actors as the reports can be translated into a compliance assessment more easily. It also facilitates compliant behaviour because countries can determine what measures they should take to prevent non-compliance early on.[382] The *early warning and facilitation approach* is also mirrored in the design of the expert review process, because the review of the data allows for an early identification of problems.

Overall, employing the managerial tools of (financial and technological) assistance as well as persuasion and warnings early in the process enhances the effectiveness of the mechanisms because problems of capacity limitations or bad strategies can be best overcome at that point without having to opt for more drastic measures. Underlying incentives to comply with the recommendations of the Facilitative Branch are the implicit threat of Enforcement Branch procedures as well as the incentives to receive financial and technological assistance (for developing countries) or assistance with capacity building projects (for economies in transition). Regarding these incentives, the Facilitative Branch could develop a strategy similar to that of the IC under the Montreal Protocol by making the assistance contingent on compliance with its recommendations.

Remarkable is also the highly *sophisticated reporting and monitoring system* which *guarantees a transparent regime*. In addition to the "usual" reporting and monitoring, it requires the establishment of national registries and puts into place a review process which assesses not only the completeness, but also the quality of the data in the reports and in the registries. This review under the Kyoto Protocol

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[382] See Jutta Brunnée, "A Fine Balance", *supra* note 120 at 239.

can be considered as a first step towards an improvement of the data utility.[383] In addition, the IPCC is formally included for making sure that reports are based on a common methodology. This will decrease uncertainty about what the reports mean, thereby ensuring a transparent reporting system in a scientifically complex system. The involvement of the IPCC as an independent international analytical body also leads to improved data.[384]

Altogether, this increases transparency and trust as doubts about the reliability of data from other states are diminished. Trust is also generated by rules concerning the independence and the geographically equitable representation in the expert groups and through the independent authority of the IPCC, guaranteed by the global spectrum of participating scientists in the IPCC. Besides, the reliance on IPCC experts and expert teams also contributes to a *separation of factual assessment from compliance issues.* This leads to a further de-politicisation of the process, making it more reliable since experts are free from considerations of political consequences.

In sum, the regulations reflect the importance that states have placed upon a reliable reporting and monitoring system as the basis for a successful compliance response system. The rules respond to the challenge *to provide for the integrity of the market mechanisms.* Reliable information on emissions and a tracking of transactions is important to promote trust in the market, prevent dangers such as overselling and as a basis for the evaluation of units that are traded.[385]. Trust in the validity of the market is to a large extent based on a reliable emission trading mechanism.

As previous chapters have shown, part of a managerial strategy can also be the *non-confrontational character* of the mechanisms. Lessons from the Montreal Protocol have been learned, as indicated by the inclusion of the possibility of self-initiation of the non-compliance response procedures by a non-compliant Party. This can be used by the Compliance Committee as an argument to continue to treat a state as a "Party in good standing" despite possible non-compliance.

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[383] Victor, *Collapse of Kyoto*, *supra* note 278 at 112.
[384] *Ibid.* at 113.
[385] See for this argument also Brunnée, " Testing Ground", *supra* note 11 at 270.

However, the flexibility to do so is curtailed because the detailed list of consequences requires the Enforcement Branch to react according to the list, e.g. by having to declare that a Party is in non-compliance. This indicates that the Kyoto Protocol goes beyond the purely facilitative non-confrontational character of the procedures. In addition, the existence of an *Enforcement* Branch also shows that the compliance mechanisms of the Kyoto Protocol are not strictly non-confrontational.

D. Reputation and respected membership (criteria developed in chapters II and III)

As has been explained in previous chapters, reputation and notions of membership are important for rationalist institutionalism, but also for constructivist theory. The tool of shaming, which builds directly on these notions, is employed by the compliance mechanisms through the use of a declaration of non-compliance which can be issued by the Enforcement Branch. Such a declaration can generate international or domestic pressure, but it is especially effective as a threat, because the interests of a country in political and economic relations or the self-perception of a country, i.e. its identity, calls for the leaders to avoid such a declaration. The compliance mechanisms of the Kyoto Protocol make extensive use of this tool, thereby implementing an important element for more effective compliance mechanisms and a more effective regime. However, as the measure can be very effective as a threat, but destroy notions of community of states and membership in its actual application, it would have been an advantage to keep the possibility that the IC used successfully under the Montreal Protocol, namely to continue to treat the Party as "Party in good standing" without issuing such a declaration. The lower flexibility of the Kyoto Protocol's compliance mechanisms in that regard is a trade-off for the higher predictability achieved with the list.

E. Incentives and disincentive strategies (criteria developed in chapters II and III)

In addition to the elements of a managerial approach which are present in the compliance mechanisms of the Kyoto Protocol, the consequences of non-compliance, such as the suspension of eligibility to participate in the flexible mechanisms or the penalty rate that can be applied by the Enforcement Branch, display the turn towards "enforcement" in the form of incentives and disincentives. The strategy thereby pursued by the non-compliance procedures corresponds to the demands of Downs *et al.* if the Kyoto Protocol is a case of "deep cooperation." Such enforcement-oriented elements can contribute to compliance if they correspond to the necessities of the regime.

While discussing the effectiveness of such measures, however, one should not forget that such "enforcement" can only be successful if it is complementary to the elements outlined by constructivist and interactional theory, i.e. that it has to be grounded on shared understandings encorporated in the law and that it must be based upon a perception of the rules as legitimate by the participating actors.[386] In an attempt to assess the potential to promote compliance through the inclusion of these enforcement-oriented consequences, I will next address the need for such measures and assess whether the measures correspond to the need.

1. Need for enforcement?

It could be seen in the case of non-compliance of the Russian Federation that economic incentives such as trade and financial aid played an important role in bringing about compliance. But the need for strong incentives or disincentives and the insufficiency of a purely managerial strategy is even higher under the Kyoto Protocol than under the Montreal Protocol, for reasons that have to do with the special characteristics of this treaty.

First, the reduction commitments under the Kyoto Protocol are to be undertaken by developed countries and countries with economies in transition. While facilitative measures such as financial assistance may be able to address

capacity limitations as the source of non-compliance and present incentives for economies in transition, this is hardly the case for developed market economies. Capacity limitations will not be the main reason for eventual non-compliance for the these countries. Therefore, while a managerial strategy can be helpful in the early stages of the regime, it is less appropriate when addressing problems of non-compliance by developed countries at a later stage.[387] In these cases, additional enforcement-oriented measures must be contemplated.

Second, unlike the Montreal Protocol, the Kyoto Protocol presents the kind of "deep cooperation case" referred to by Downs *et al.* It requires substantial changes in the behaviour of states and their citizens.[388] For example, the nature of the problems requires a reorientation in many areas of industrial and private activity, since GHGs are produced in almost all industrial processes and because the economic model of most of the world is oriented towards growth. At the same time, the Kyoto Protocol, although certainly falling short of what is required to seriously challenge the current trend in climate change, requires not only a minor reduction of emissions. As emission trends since the adoption of the Kyoto Protocol have further increased with growth, most countries now have to reduce their emissions by much more than the original percentage.[389] In the case of mitigating climate change, it is also much more difficult to find substitution for the substances than in the case of the Montreal Protocol as this requires new ways of energy production. Furthermore, when considering the external factor of the international environment, the absence of the largest polluter and most powerful economic and political power in the world from the Protocol creates further difficulties for compliance by Parties, especially when facing competition from US companies that produce without restrictions.

Overall, it does not seem overstated to conclude that major changes in the way the economy and society work today are required to comply with the Kyoto Protocol. It thus *presents a case of deep cooperation* as defined by Downs. In

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[386] See the discussion under chapter II; see also Brunnée, *ibid.* at 279 (for the argument that persuasion and disincentives can be complementary).
[387] See Brunnée, "A Fine Balance", *supra* note 120 at 256.
[388] As discussed earlier in this chapter, above.
[389] See already for the statistics *supra* note 14.

such a case, strong incentives must complement legitimate rules and managerial measures to provide a more powerful and effective compliance regime.

Another justification for the necessity of incentives that go beyond pure management are the unique flexible mechanisms employed by the Kyoto Protocol.[390] These mechanisms create the necessity not only of a compliance system that guarantees trust in and stability of the markets, but also of compliance mechanisms that can provide for the necessary integrity of emission permits.[391] Ensuring such integrity requires to achieve high levels of compliance under circumstances which are not favourable to such compliance, because the value of the permits increases the incentives for non-compliance, for example in form of "overselling."[392]

One way to ensure the integrity of the permits and to avoid overselling is the above mentioned maintenance of the national registries and the review mechanisms including in-country visits of these registries.[393] Another is that transactions of emission units are only valid if a country maintains units above the level of the commitment period reserve. This would establish a form of buyer liability because the units, if transferred nonetheless, will not be valid and can not be counted towards compliance.[394] This will mitigate the danger of overselling because buyers will be careful and the transactions can not lead to large quantities of reduction units that are not mirrored by actual reductions. However, the possibility remains that a country is selling above its assigned amounts, thus infringing Article 3 requirements.[395]

The non-compliance procedures have to reply to this danger by establishing a mechanism that declares countries ineligible to participate. This is one reason for

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[390] See for the mechanisms chapter IV, above, at A.2.
[391] See already chapter IV, *ibid.*; Victor, *Collapse of Kyoto, supra* note 278 at 13.
[392] See for the problem of overselling already chapter IV, *ibid.*; see also Nordhaus *et al.*, *supra* note 273 at 10837; Victor, *Collapse of Kyoto*, *supra* note 278 at 18.
[393] This is ensured through a transaction log which checks for the reserve and eligibility standards at the time of the transaction. Normally, transactions should be stopped in the case of a discrepancy with the requirements. However, transactions can nonetheless happen if they are not cancelled by the selling registry. See *Marrakech Accords*, *supra* note 26, Decision 19/CP.7 at paras.42(b) and 43(b).
[394] See chapter IV, above, at A.2.
[395] Art.3 of the Kyoto Protocol establishes the reduction commitments, see *Kyoto Protocol, supra* note 13, Art.3.

the importance of the compliance response which declares a Party ineligible and thereby controls the reduction commitments. In other words, the declaration of ineligibility is needed as a tool to control the transactions.

But are those measures sufficient to assure a stable and reliable market? Despite those measures, the danger remains that countries cheat and thereby endanger the trading system as buyers lose trust. A lack of the trust in the market would make it impossible even for entities with valid emission credits to trade them.[396] Even more importantly, this trust can not be fully established by monitoring and the transaction log check because there will always exist a considerable time lag between the selling of emissions and the assessment and measurement of the emission reductions within a country.[397] Confidence in the market therefore needs some kind of deterring consequence for non-compliance that makes compliance more beneficial for the Parties.[398]

2. Adequacy of the consequences to promote compliance

a) Declaration of non-compliance

Such a declaration, relying on reputation and membership notions, is an important tool to promote compliance not only because it appeals to notions of self-perception and identity of states in the society of states. It is also an important rationalist, often economic incentive, especially as the interdependence of states increases. States are dependent on a good reputation and acceptance as a member of the international community in order to be able to pursue their interests in international economic and political relations and thus maintain their sovereignty.[399] This measure is an adequate response to non-compliance with reporting commitments as it provides an additional incentive to comply.

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[396] Jeffrey C. Fort & Cynthia A. Faur, " Can Emissions Trading work beyond a national program?: Some practical observation on the available tools" (1997) 18 U. Pa. J. Int'l Econ. L. 463 at 470.
[397] Nordhaus *et al.*, *supra* note 273 at 10846-10847.
[398] *Ibid.*
[399] See chapter II, above, at B.4.

b) Suspension of eligibility to participate in the flexibility mechanisms as a response to non-compliance with the reduction commitments

As was previously mentioned, the suspension of eligibility is necessary as an option in the system to prevent overselling, because this allows for an invalidation of transactions if a country is not in compliance with the reduction commitments. Thus, it ensures the stability of the markets by serving as a controlling device.

This can not, as was seen before, completely solve the problem of overselling. Therefore, one has to ask how effectively such a measure can serve as an incentive or disincentive to promote compliance and in this manner contribute to the avoidance of overselling.

The suspension of eligibility in participating in the flexibility mechanisms seems to be a powerful tool since the costs of achieving the reductions required might be dramatically lowered by using the flexibility mechanisms. In addition, companies participating in international trading or in the CDM could have an interest in continuous eligibility, thus using their lobbying power to exert pressure on a Party to comply.

But there are also shortcomings to the usefulness of this tool. First, the deterrent value is limited to potential participants in the emission trading.[400] It can not enforce domestic implementation. Second, and more importantly, this sanction lessens the number of Parties participating in the system and precludes any reparation of the harms that have been done to the overall environmental effectiveness.[401] Third, whereas the exclusion of countries from participating in the market mechanisms seems to establish a linkage between compliance and participation in trade as was the case under the Montreal Protocol, there is a difference in the nature of trade with emissions and with substances. The emission trading is a virtual trade which does not directly lead to profits but is only important in order to achieve compliance with the treaty at lower costs. Thus, the

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[400] Compare Glenn M. Wiser & Donald M. Goldberg, "Restoring the Balance: Using Remedial Measures to Avoid and Cure Non-Compliance under the Kyoto Protocol" (2000), online: Center for International Environmental Law <http://www.ciel.org/Publications/restoringbalance.pdf> (last accessed 17 October 2003).

incentive builds upon the assumption that the respective country is willing to comply.

The willingness to comply, however, also depends on the costs of compliance amongst other features. By considerably lowering the cost of GHG abatement, the market mechanisms help, from a rationalist perspective, to alter the cost-benefit structure in favour of compliance. Once countries have ratified on this ground and assuming that they remain dedicated to the process, continuous eligibility to participate in the mechanisms is a real incentive. At the same time, some of the arguments put forward by Chayes & Chayes against enforcement, namely that it can be too costly politically and often lacks legitimacy,[402] do not apply to the measure because it can be applied relatively easily by invalidating the transactions in the transaction process.

While far from being the perfect remedy for non-compliance, the ineligibility to participate in the mechanisms is therefore an adequate instrument to respond to the requirements of the regime and to promote compliance. This is the case because it serves as a real economic incentive and as an valid tool to address the danger of overselling.

c) Penalty rate of 1.3 for excess tons of emissions at the end of the commitment period

This non-compliance response measure is designed to deter countries from simply deferring efforts to reduce emissions by carrying the obligations over to the next commitment period. The incentives for such behaviour could be numerous. In the early phases of the regime, new technologies to reduce or avoid emissions are more expensive, change might be difficult for lack of public support or political will and science is still uncertain. In addition, it is always easier to postpone difficult measures.

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[401] Brett Frischmann, "Using the Multi-Layered Nature of International Emissions Trading and of International-Domestic Legal Systems to Escape a Multi-State Compliance Dilemma" (2001) 13 Geo. Int'l Envtl. L. Rev. 463 at 495.

[402] Chayes & Chayes, *supra* note 36 at 2.

By issuing a penalty rate, countries have an incentive to act in the first commitment period. However, given the greater costs of early action, this rate is considered the absolute minimum of what it takes to deter a country from non-compliance.[403] In addition, the risk remains that countries will attempt to inflate their amounts through negotiations after the first commitment period in order to de facto circumvent the penalty.[404] However, no country can count on that as other Parties are aware of such attempts. Still, a drawback of this tool is the uncertainty about the next commitment period and the fact that it can only be issued at the end of the commitment period. In a worst case scenario, the penalty might even motivate countries to exit the process after the first commitment period, because it makes compliance ever more difficult. Therefore, although this response seems preferable to other forms of sanctions because of its reliance on non-monetary assets, the analysis suggests that it will not sufficiently deter countries from non-compliance.[405]

Viewed on its own, the penalty is probably not an adequate tool to bring about compliance, but it can still be considered a tool to promote compliance if it is applied in combination with a variety of other elements, as is the case under the compliance mechanisms of the Kyoto Protocol. It is an incentive for countries if they are committed to the overall process and can contribute to the stability of the markets as it sends out a signal that countries in non-compliance will be punished. This psychological factor might be even more effective than the actual cost-benefit calculations in stabilising the system. Finally, such a penalty contributes to the perception of the rules as fair, because active countries will not feel that their early efforts are not recognised by the system. As such, the response measure ensures legitimacy of the procedures and in that way also promotes compliance.

In sum, the penalty rate has disadvantages. Considering that it is only one part of an overall strategy, however, it can contribute to enhancing compliance. Of course, harsher financial penalties would have provided the trading markets with more trust. But it should not be forgotten that enforcement measures must be

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[403] Wiser & Goldberg, *supra* note 400.
[404] Nordhaus *et al.*, *supra* note 273 at 10844; Vespa, *supra* note 25 at 415.
[405] Frischmann, *supra* note 401 at 496-497.

grounded on legitimacy and acceptance of the rules, which means that the enforcement measures have to be carefully measured and should not push countries out of the process. Given such a need to find a balance between enforcement-oriented measures and maintenance of the regime, the penalty rate is acceptable and a useful tool to promote compliance with the Kyoto Protocol.

F. Participation of civil society and expert groups (criteria developed in chapters II and III)

The compliance mechanisms of the Kyoto Protocol are allowing access to non-state actors in several ways: Epistemic communities are given a strong role. The IPCC provides the methodological basis for reporting and expert groups review the information. As previously emphasised, the expert groups also play an important part in triggering the non-compliance procedures following their identification of implementation problems. This integration of epistemic communities in the process can do more than enhance the perceived authority of the procedures.[406] It will also promote compliance as the scientists that participate in the process will encourage the compliance of their governments with the treaty as well as contribute to an acceptance of the treaty's norms by the population. Such an impact of epistemic communities on internalisation does, however, depend on the way that those scientists are embedded in national policy-making and public opinion formation.[407] Without being able to fully discuss the impact of epistemic communities, it can be concluded that the strengthening of their role and participation under the compliance mechanisms of the Kyoto Protocol can be vital in fostering compliance.

Equally important for internalisation of the rules and identity formation is the participation of the public and of NGOs. The latter can participate by submitting factual information to the Compliance Committee. The public is informed as this

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[406] Such authority is based on the power resource of such epistemic communities. As Peter M. Haas notes, "an epistemic community's power resource ....is its authoritative claim to knowledge", see Peter M. Haas, in *Saving the Mediterranean: The Politics of International Environmental Cooperation* (New York, Oxford: Columbia University Press, 1990) at 55.

[407] See Haas, *ibid.* at 57 (for the argument about the dependency of the influence of epistemic communities on their embeddedness in national policy making).

information and the decisions of the Compliance Committee are publicly accessible.[408] This connection between the norms and the non-state actors can increase public pressure, but also favour the formation of a compliance oriented identity of the participating states. It is therefore crucial as a means to progress towards eventual voluntary obedience to the rules where enforcement measures are less and less necessary.

G. General institutional setting: multiple actors and institutions including expert teams, an independent standing compliance body, and formalised and predetermined decision rules (criteria developed in chapter III)

The compliance mechanisms of the Kyoto Protocol include the participation of a variety of actors and institutions, e.g. the Secretariat, Compliance Committee, expert teams, IPCC, and NGOs. As was deduced from the experience with the Montreal Protocol, this setting has the potential to provide flexible solutions in response to non-compliance cases.

The necessary guidance can be provided by the powerful Compliance Committee which enjoys a relatively independent role from the MOP in its decision-making. Such independence is especially important in establishing speedy procedures which can quickly decide on the eligibility of a country to participate in the flexible mechanisms. This is essential in order to prevent overselling and achieve stable market mechanisms.

However, this important independence is curtailed by the possibility of an appeal and the very specific and predetermined rules on non-compliance responses. While the predetermination of the response can increase the acceptance of the decisions and thus the legitimacy of the whole process, the Compliance Committee will be less able than the IC of the Montreal Protocol to apply innovative solutions in a flexible manner. The rules are more formalised and thus less flexible in their application, which could possibly prevent solutions that could have promoted compliance. Obviously, such an assessment is vague as it is

[408] The access to the information can be restricted by the branch; for the regulations in detail see chapter IV, above, at B.2.b).

impossible to foresee if any other solutions, in addition to the ones outlined in the non-compliance procedures, will be necessary.

Another interesting institutional aspect is the separation of the Compliance Committee into separate branches which enables specialisation and thus higher expertise and experience when dealing with the cases. Given the complexity of the questions involved in the Kyoto Protocol, such a regulation is necessary. Besides, the separation is likely to be beneficial to the regime because it can lead to speedier procedures and thus to more effective mechanisms.

The increased formalisation of the rules and the inclusion of an appeal process focusing on "due process" are a step towards the successful and highly formalised dispute settlement of the WTO and especially the Appellate Body procedures.[409] Such formalisation can strengthen the influence of law on behaviour as discourse is increasingly constrained to formal procedures and legal argumentation. Especially from an interactional perspective, this development enhances compliance because discourse is more often framed in legal procedures and arguments. Consequently, the influence of law on behaviour is likely to increase and compliance with the rules promoted.[410]

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[409] See *WTO Dispute Settlement Understanding, supra* note 112; see for this argument Jutta Brunnée, "Testing Ground", *supra* note 11 at 276.

[410] See for this approach, which combines constructivist thinking with an emphasis on the unique influence of law, in chapter II, above, at B.5.c).

Chapter VI

Conclusion and summary

In a first step, theories of compliance were consulted with a view to establishing the theoretical understanding for compliance and to identify elements which can enhance compliance of states with international law. These elements served as the basis for a first set of criteria that could later be used for the assessment of compliance mechanism. The theoretical background has provided a deeper understanding of the role of international law in influencing and constituting states. It can be seen that enforcement plays an important part in an effective compliance regime when high incentives for defection exist, but that it is not the key to compliance because it depends on the acceptance of the rules by the addressees. Such acceptance can be enhanced by level of perceived legitimacy of legal rules. Legitimate legal rules can have a distinct influence as their particular ability to frame discourse and provide authoritative arguments can constitute the identity of actors and thus their interests. Given the interest to comply, a managerial strategy can efficiently complement this constitutive role in the practical daily life of a regime by solving problems of involuntary non-compliance. In addition, incentive structures can support such a strategy in cases of deep cooperation.

In a second step, the practical side of the issue was illuminated by analysing the compliance mechanisms of the Montreal Protocol. Trying to draw lessons from their design and their practical application, these mechanisms provided further insights that to a large extent supported the theoretical findings and gave rise to a second set of criteria to be used for the assessment in chapter V. The combination of management and incentive structures seemed to have worked for the Montreal Protocol, where problems were dealt with in a non-confrontational manner and with a flexible application of the rules.

In a third step, the Kyoto Protocol and its compliance mechanisms were explained and innovative elements that account for innovation as well as design features that have the potential to be effective mechanisms were identified. It

became clear that the innovative approach of the Kyoto Protocol requires carefully drafted compliance mechanisms as the emission markets demand stability for proper functioning. The relationship with the dispute settlement procedures as well as the necessity of "legal bindingness" of the non-compliance procedures was briefly addressed.

After having laid this groundwork, the fifth chapter assessed the compliance mechanisms of the Kyoto Protocol, thereby drawing upon elements already identified in the previous chapters and taking them further. In an application of the developed criteria from chapters II and III, the assessment could show how the compliance mechanisms in their entirety provide an innovative system capable of responding to the special challenges of the Kyoto Protocol. Despite drawbacks of the individual features, the compliance mechanisms display a mixture of managerial and enforcement tools as well as a balance between those rational elements and more constructivist features. Accordingly, it was found that the compliance mechanisms of the Kyoto Protocol to a large extent build upon legitimate rules and possibilities to achieve shared understandings in the processes. The compliance mechanisms therefore implement a strategy that corresponds for the main part to the criteria drawn from theory and practice. They thus represent a tool which can promote compliance in difficult times.

The criteria established can not be understood as a blueprint for compliance mechanisms, nor can this assessment claim validity for the actual application in practice. However, paying attention to the identified compliance enhancing elements should provide a useful guide for the further developments of the compliance mechanisms of the Kyoto Protocol and other of similar treaties.

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