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# **Violations of Rights of the Accused at International Criminal Tribunals: The Problem of Remedy**

**DANIEL NAYMARK\***

## **Introduction**

International criminal tribunals pose a unique set of legal challenges, both substantive and procedural. Since the 'renaissance' of the international tribunal in the 1990s,<sup>1</sup> these challenges have proved fertile ground for commentary by criminal law scholars and international law scholars alike. One prominent area of scholarship has addressed the question of the protection of the rights of accused in the context of international criminal proceedings. Commentary in this area has typically addressed the normative question of which rights ought to be protected by the tribunals. Focus has centred on analyses of applicable sources of human rights law and identification of structural and political obstacles to protection,<sup>2</sup> with most commentators concluding that there are gaps in the existing protection and suggesting ways in which protection may be strengthened.<sup>3</sup>

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\* JD (University of Toronto); Clerk, Ontario Superior Court of Justice. This article was written in a personal capacity and does not reflect the views of the Ontario Superior Court of Justice or the Ministry of the Attorney General. The author would like to thank two anonymous reviewers for their insightful and helpful comments.

<sup>1</sup> Marked by the establishment of the first such tribunals since Nuremberg and Tokyo: the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993, the International Criminal Tribunal for Rwanda (ICTR) in 1994 and International Criminal Court (ICC) in 2002.

<sup>2</sup> For a discussion of the sources of human rights norms at the existing international criminal tribunals, see Göran Sluiter, "International Criminal Proceedings and the Protection of Human Rights" (2003) 37 New Eng.L. Rev. 935, developed further in Alexander Zahar & Göran Sluiter, *International Criminal Law* (Oxford: Oxford University Press, 2008) at Chapter 8. For an attempt to systematically describe the obstacles to due process protection, as well as a detailed discussion of the history of institutional protection of human rights at international criminal tribunals, see Gregory Gordon, "Toward an International Criminal Procedure: Due Process Aspirations and Limitations" (2007) 45:3 Colum. J. Transnat'l L. 635.

<sup>3</sup> Other tribunal-specific criticisms include: Andrew J. Walker, "When a Good Idea is Poorly Implemented: How the International Criminal Court Fails to be Insulated from International Politics and to Protect Basic Due Process Guarantees" (2004) 106 W. Va L. Rev. 245 and Sara Stapleton, "Ensuring a Fair Trial in the International Criminal Court: Statutory interpretation and the Impermissibility of Derogation" (1999) 31 N.Y.U. J. Int'l L. & Pol. 535 with respect to the ICC; and Aparna Sridhar, "The International Criminal Tribunal for the Former Yugoslavia's Response to the Problem of

While the ‘what’ has therefore been given considerable attention, few commentators have given fulsome consideration to *how* rights accepted as falling within the scope of the tribunal process are to be protected. This question is particularly relevant in the context of providing remedies for rights violations, an area which, I argue, raises significant issues.

This article sets aside questions of ‘what’—what human rights norms apply to international criminal tribunals, what institutional means are to be applied for their guarantee—and focuses on the substantive question of ‘how’: how can tribunals adequately and effectively remedy rights violations in respect of individual accused? It argues that the unique situation of international criminal tribunals renders traditional remedies inadequate. As a result, principled reform is needed in order for tribunals to function effectively while, at the same time, vindicating the principles underlying due process protection.

I first identify current systemic obstacles to the provision of effective remedies within the international criminal tribunal context. I then examine the provision of remedies within a number of national jurisdictions in order to draw out underlying principles. The article focuses primarily on Canadian law but includes an overview of approaches in other jurisdictions, which show significant common ground in their underlying values. Ultimately, these principles are evaluated in light of the unique context of international criminal tribunals and used to rethink and reformulate a more effective remedy scheme in the tribunal context.

### **Problems in Remedyng Violations of Rights of Accused**

It is undisputed that, as in domestic proceedings, international tribunals must meet violations of (recognized) rights of the accused with adequate, effective remedies.<sup>4</sup> In practice, however, tribunals are presented with two distinct but mutually reinforcing systemic obstacles to the identification and application of such remedies in specific instances. Both obstacles stem from the unique severity of

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Transnational Abduction” (2006) 42 Stan. J Int'l L. 343 and Scott Johnson, “On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal for the Former Yugoslavia” (1998) 10:1 Int'l Legal Persp. 111 with respect to the ICTY.

<sup>4</sup> This requirement has been explicitly recognized, for example, in *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72 Decision (November 3, 1999) (International Criminal Tribunal for Rwanda, Appeals Chamber) [*Barayagwiza*, “Decision”].

the charges with which international criminal tribunals are concerned.

The first barrier is a political one. The *Barayagwiza* case provides an epitomizing example of this problem:<sup>5</sup> Jean-Bosco Barayagwiza, considered the “lynch-pin of the conspiracy [to commit genocide against the Tutsis],”<sup>6</sup> was detained for an illegally lengthy period of time prior to his transfer to the ICTR.<sup>7</sup> Accordingly, the Appeals Chamber issued a stay of proceedings in November 1999 due to ‘abuse of process’. The legitimacy of the tribunal was severely undermined in Rwandan public opinion; the Rwandan government immediately threatened to suspend cooperation with the ICTR and supported this threat by filing its own international arrest warrant and extradition request.<sup>8</sup> Within the space of five months, the Appeals Chamber had been reconstituted under a new President, accepted, on questionable grounds, the Prosecutor’s appeal of its initial decision,<sup>9</sup> and overturned the decision to stay the proceedings, calling instead for an appropriate remedy to be determined after Barayagwiza’s trial.<sup>10</sup>

This chain of events illustrates the potential force of political opposition to any meaningful remedy when the accused is regarded

<sup>5</sup> *Ibid.* and *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, Decision on the Prosecutor’s Request for Review or Reconsideration, (March 31, 2000) (International Criminal Tribunal for Rwanda, Appeals Chamber) [*Barayagwiza*, “Decision on the Prosecutor’s Request”].

<sup>6</sup> *Prosecutor v. Nahimana et al.*, ICTR-99-52-T, Judgement and Sentence (December 3, 2003) at para. 1100 (International Criminal Tribunal for Rwanda, Trial Chamber) [*Nahimana*].

<sup>7</sup> The fact that this case dealt with lengthy detention makes it an even more appropriate illustration; the problem of pre-trial detention is likely the single biggest due process challenge currently facing international criminal tribunals (Zahar and Sluiter, *supra* note 2 at 286).

<sup>8</sup> William A. Schabas, “International Decisions: *Barayagwiza v. Prosecutor* (Decision, and Decision (Prosecutor’s Request for Review or Reconsideration))” (2000) 94 Am. J. Int’l L. 563 at 565.

<sup>9</sup> *Ibid.* at 567: “In the second decision, the appeals chamber ultimately distorts the law in an effort to achieve the desired result--to compensate for its previous decision and... to enable the prosecution of Barayagwiza to proceed.” Schabas’ view was echoed by former ICTR Associate Legal Director Mercedes Momeni in “Why Barayagwiza is Boycotting his Trial at the ICTR: Lessons in Balancing Due Process Rights and Politics” (2001) 7 ILSA J Int’l & Comp L 315 at 316: “[t]he Tribunal’s fear of the Rwandan threats [to sever relations with the ICTR] becoming a reality was in all likelihood, partly the reason for its poorly reasoned, but properly concluded, reversal of the November decision.”

<sup>10</sup> *Barayagwiza*, “Decision on the Prosecutor’s Request”, *supra* note 5 at 75.

by an entire society as a villain of the highest order. Such opposition can do more than undermine the reputation of tribunals; it can erode the support among stakeholders necessary for the establishment and continued functioning of such highly politicized institutions. Momeni put it succinctly in commenting on the *Barayagwiza* crisis:

When the Tribunal puts itself in situations where it is faced with non-cooperation from Rwanda, and forces the Appeals Chamber to render decisions with negative implications for the reconciliation process, it damages not only its own reputation, but also hampers the pursuit of international justice by extension.<sup>11</sup>

The second obstacle to adequate and effective remedy is a substantive legal one. In establishing remedies, the seriousness of the allegations against an accused inevitably enters the analysis. In the case of international criminal tribunals, where allegations can include crimes against humanity and war crimes, their consideration makes the implementation of effective remedies difficult. Sometimes, this difficulty arises due to an explicit requirement that, when considering the appropriate remedy, judges must balance the gravity of the violation against the gravity of the charges.<sup>12</sup> Such a requirement entails that the more serious the alleged offence, the higher the level of tolerable human rights abuse against the accused. For serious breaches of international humanitarian law, it is extremely difficult to justify throwing out a case no matter what abuse the accused has suffered, either directly through a setting aside of jurisdiction or indirectly through the exclusion of evidence necessary to prove the charges.<sup>13</sup>

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<sup>11</sup> Momeni, *supra* note 9 at 324. As a corollary, it should be noted that this problem is present with respect to any international criminal tribunal but is especially pertinent with respect to ad hoc tribunals; while the ICC can 'fail' in respect of a given situation without failing entirely as an institution, the former are set up to address only a single situation.

<sup>12</sup> As is the case, for example, with respect to applications for stays of proceedings (see *Prosecutor v. Nikolic*, IT-94-2-PT, Decision on the Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal (October 9, 2002) at para. 72 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II)).

<sup>13</sup> Sometimes this is the case more from a legal realism perspective than with respect to explicit analysis. In *Brdjanin*, for example, the judge seriously bent provisions on exclusion in order to admit the evidence. *Prosecutor v. Brdjanin*, IT-99-36-T, Decision on the Defence "Objection to Intercept Evidence" (October 3, 2003) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II).

The seriousness of the charges may also enter the remedy analysis indirectly as, for example, ultimately occurred in *Barayagwiza*.<sup>14</sup> As previously noted, the Appeals Chamber in the second *Barayagwiza* decision held that a remedy for Barayagwiza's illegal detention was to be determined following his trial. Specifically, it ruled that Barayagwiza was to receive financial compensation in the event of his acquittal and a sentence reduction in the case of conviction.<sup>15</sup> Accordingly, in sentencing Barayagwiza following his conviction three years later, the Trial Chamber reduced his sentence from life to 35 years.<sup>16</sup> One can question the significance of this reduction, as it entailed Barayagwiza's imprisonment into his 80s—quite likely a life sentence in effect.<sup>17</sup> This judgment illustrates that, at least in respect of sentence reduction, it is difficult to impose a practically meaningful remedy when the accused is convicted on charges infinitely more serious than those carrying maximum sentences in domestic criminal law schemes. Where is the practical remedy in sentencing an accused found to be responsible for the deaths of 500,000 people as if he had only been responsible for the deaths of 100,000 people, for example?

### **Principles Underlying Remedies for Violations of Rights of the Accused**

Part of the difficulty in determining the applicability of international human rights law to international criminal tribunals lies in the fact that the body of law has been developed with state actors in mind. As a result, commentators such as Sluiter have found it necessary to break down, rethink and reformulate human rights law in order to adapt it to the tribunal context.<sup>18</sup> A similar approach is required with respect to determining appropriate remedies for violation of rights of

<sup>14</sup> *Supra* note 6.

<sup>15</sup> *Barayagwiza*, "Decision on the Prosecutor's Request", *supra* note 5 at para. 75.

<sup>16</sup> *Supra* note 6 at 1106–1107. Barayagwiza's two co-accused each received life sentences. The Appeals Chamber later overturned conviction on some charges, reducing the sentences (Barayagwiza's to 32 years), *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Judgement (November 28, 2007) (International Criminal Tribunal for Rwanda, Appeals Chamber)

<sup>17</sup> The Court was perhaps aware of the ineffectiveness of this remedy when it stated, "[t]he Chamber considers that a term of years, being by its nature a reduced sentence from that of life imprisonment, is the only way in which it can implement the Appeals Chamber decision," *ibid.*

<sup>18</sup> Sluiter, *supra* note 2.

accused; as the above discussion has shown, there are serious barriers to tribunals' application of the remedies available to domestic courts. To this end, this section will elaborate the underlying principles behind remedies for due process violations and attempt to reformulate them into remedies applicable to international criminal tribunals, having regard to both the nature and the objectives of tribunals. In elucidating these principles, reference will be made to Canadian laws and jurisprudence, which provide a nuanced example of due process protection and one whose principles translate well to the tribunal context. This examination will be supplemented by an overview of approaches in other jurisdictions, which reveals surprisingly consistent underlying principles.

#### *Remedies for Due Process Violations in Canada*

The *Canadian Charter of Rights and Freedoms* sets out all constitutionally protected civil and political rights of individuals in Canada.<sup>19</sup> Section 24 details the remedies available for a breach of a *Charter* provision. S. 24(1) is an extremely broad general provision entitling those whose rights have been violated to seek judicial remedy. General principles attached to this provision are that remedies should be responsive,<sup>20</sup> effective and meaningful.<sup>21</sup> The Canadian Supreme Court has also stressed the importance of a flexible judicial approach to remedies in order to meet evolving challenges and circumstances.<sup>22</sup>

In Canada, as in other jurisdictions, there are two specific remedies that typically apply in cases of due process violation: exclusion of evidence and stay of proceedings. The former is specifically provided for under s. 24(2), which is worth reproducing here:

Where... a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the

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<sup>19</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Charter].

<sup>20</sup> That is, having regard to the purpose of the infringed right.

<sup>21</sup> *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3.

<sup>22</sup> *Ibid.*

proceedings would bring the administration of justice into disrepute.<sup>23</sup>

This provision entails a noteworthy implication: due process violations do not automatically entail a remedy.<sup>24</sup> In analyzing a motion for the exclusion of evidence, courts are explicitly required to examine not only the nature of the *Charter* violation on which the motion is founded, but also ‘all other circumstances’ that may impact the effect of that evidence’s admission on the reputation of the judicial process. Specifically, this analysis entails considerations of trial fairness,<sup>25</sup> the seriousness of the violation,<sup>26</sup> and the effect of excluding the evidence on the public reputation of the administration of justice, an effect dependent, *inter alia*, on the importance of the evidence to the prosecution and on the seriousness of the alleged offence.<sup>27</sup>

Specific policy considerations supporting the remedy of exclusion can be seen to include not only the provision of a personal remedy but also judicial integrity and the deterrence of future rights violations.<sup>28</sup> On the other hand, these considerations must be balanced against the loss of reliable evidence and potential loss of public confidence. These considerations can be further distilled into basic principles: violations should be compensated by personal remedies, trials should be fair, criminals should be punished, and judicial integrity must be preserved both actually and in the mind of the public.

The requirements for granting a stay of proceedings are further instructive. This remedy is provided on the basis of s. 24(1).

<sup>23</sup> *Charter*, *supra* note 20, s. 24(2).

<sup>24</sup> An implication explicitly confirmed by several provincial courts of appeal, including *R. v. Erickson*, [1984] 5 W.W.R. 577 (B.C.C.A.); *R. v. Cutforth* (1987), 81 A.R. 213 (C.A.); *R. v. Blanchard* (1988), 11 M.V.R. (2d) 161 (Y.T.C.A.); *R. v. Davidson* (1988), 11 M.V.R. (2d) 95 (N.S.C.A.); *R. v. Simpson* (1994), 117 Nfld. & P.E.I.R. 110 (Nfld. C.A.). An accused may nevertheless have recourse to a civil action: *R. v. Davidson*; *R. v. Mailman* (1990), 96 N.S.R. (2d) 337 (N.S.C.A.).

<sup>25</sup> If a trial would be rendered unfair by the admission of evidence, that evidence is automatically excluded. However, trial fairness in this case is limited to a narrow analysis principally based on whether the evidence was brought into existence by the violation (see *R. v. Stillman*, [1997] 1 S.C.R. 607 at paras. 73-74).

<sup>26</sup> Which includes, *inter alia*, regard to good or bad faith on the part of the violator.

<sup>27</sup> *R. v. Collins*, [1987] S.C.R. 265 at paras. 89, 94-95.

<sup>28</sup> *Ibid.*; *R. v. Clayton* (2005), 194 C.C.C. (3d) 289 (Ont. C.A.), reversed on other grounds *R. v. Clayton* 2007 SCC 32.

The threshold for granting a stay is quite high; stays are considered exceptional remedies to be granted only in the ‘clearest of cases’ of abuse of process,<sup>29</sup> where either the prejudice to the ability of the accused to make full answer and defence cannot otherwise be remedied or the integrity of the judicial system would suffer “irreparable prejudice.”<sup>30</sup> Abuse of process exists where, “[C]ompelling an accused to stand trial would violate those fundamental principles of justice which underlie the community’s sense of fair play and decency” as a result of “oppressive and vexatious proceedings.”<sup>31</sup> On the basis of the principle of flexibility noted above, judges enjoy very broad discretion to craft alternative remedies, including discretion to alter trial procedures.<sup>32</sup>

The reputation of the administration of justice can thus be seen to play a central role in determining both whether an abuse of process has taken place and whether this abuse should result in a stay of proceedings. The related principle of trial fairness, specifically as regards the ability of the accused to make full answer and defence, is also a fundamental principle underlying this analysis. Thus, for example, the analysis for whether a delay in being brought to trial has been so unreasonably long as to warrant a stay of proceedings includes not only considerations of the complexity of the case and the inherent limits on judicial resources, but also looks at the respective actions of the prosecution and the accused and at the degree of prejudice suffered by the accused.<sup>33</sup>

To summarize, several principles govern the application of judicial remedies for breaches of due process rights:

- Criminals should be punished;
- Trials should be fair;
- Due process violations should be deterred;
- Where occurring, violations should be rectified by personal remedies that are responsive, effective and meaningful; and

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<sup>29</sup> *R. v. O'Connor*, [1995] 4 S.C.R. 411 at para. 68.

<sup>30</sup> *R. v. Carosella*, [1997] 1 S.C.R. 80.

<sup>31</sup> *R. v. Young* (1984), 46 O.R. (2d) 520 (C.A.) at 329, affirmed in *R. v. Jewitt*, [1985] 2 S.C.R. 128 at para 25.

<sup>32</sup> *R. v. T. (J.N.)* (1995), 99 Man. R. (2d) 150 (Man. Q.B.).

<sup>33</sup> *R. v. Morin*, [1992] 3 S.C.R. 286 at 13.

- Judicial integrity and the reputation thereof are of paramount importance, a principle which encompasses regard to the severity of the charges.

These principles compete with each other, requiring judges to balance them in each case in order to determine the proper exercise of their discretion. The reputation of the administration of justice is ultimately the decisive, subsuming factor, serving as a lens through which other interests are balanced.<sup>34</sup>

#### *Remedies in Other Jurisdictions*

While a full comparative review of remedies for due process violations in countries around the world is beyond the scope of this article, it is worth briefly touching on the subject to show that the principles underlying the Canadian remedy analysis, with one important exception, inform the analyses of other countries as well. The focus here will be on rules for the most common remedy for due process violations, the exclusion of evidence.

Broadly speaking, there are three approaches to admitting illegally obtained evidence: general admissibility, discretionary exclusion and automatic exclusion. The general admissibility approach ignores the method of evidence's procurement, focusing narrowly on its relevance and probative value in determining admissibility. As attention to human rights has increased, however, this model has begun to disappear.<sup>35</sup> Today, most countries employ either an automatic exclusionary rule, following the example of the United States,<sup>36</sup> or a discretionary exclusion rule, following the example of Canada and England.<sup>37</sup> Even when the general

<sup>34</sup> While the ability of an accused to make full answer and defence is expressed as a separate heading under the stay of proceedings analysis, the right to a fair trial is subsumed into the overarching principle of reputation under 24(2). Under the 24(2) analysis, an unfair trial automatically entails prejudice to the reputation of the administration of justice and warrants the exclusion of evidence. A similar framing is possible with respect to the stay of proceedings analysis.

<sup>35</sup> See Craig M. Bradley (ed.), *Criminal Procedure: A Worldwide Study* (Durham, NC: Carolina Academic Press, 1999) at 230-1, 333-5 (describing South Africa and Israel as examples of countries that formerly employed this model and have since moved towards a discretionary exclusion approach based largely on Canada's-Israel more gradually, South Africa wholesale through its 1997 Constitution).

<sup>36</sup> *Ibid.* at 405, 17, 258-259 and 295 (other countries adopting the approach—at least nominally—include Argentina, Italy and Russia).

<sup>37</sup> See *ibid.* at 113, 155 and 195-6 (describing Germany and France as employing what could be termed a 'mixed' approach, whereby evidence produced by certain violations is

admissibility model was more popular, it was accompanied by alternative means of deterring due process violations such as disciplinary actions against violators as well as imposing civil or even criminal liability.<sup>38</sup>

Under the discretionary exclusion approach, judges have discretion as to whether to admit or exclude illegally obtained evidence. Countries employing this approach have developed a range of tests for exclusion, including impact on trial fairness,<sup>39</sup> balance between the seriousness of the violation and the interest in truth-finding,<sup>40</sup> and degree of harm to the defendant's interests.<sup>41</sup> Despite the variety of tests, however, similar fundamental public interests are implicitly balanced in each case: punishing wrongdoers, deterring police misconduct, and the moral interest in upholding human rights.<sup>42</sup> The specific factors considered in the Canadian test for exclusion are typical of those considered in respect of these broad interests elsewhere, including the seriousness of the violation, the importance of the infringed interest, the relevance of the evidence for the resolution of the case, and the seriousness of the offence.<sup>43</sup>

As its name implies, the automatic exclusionary approach always excludes illegally obtained evidence. The difference between this approach and the discretionary exclusion approach is based not on a difference in fundamental interests but on a different balance between the *same* interests; in this model, the interests in protecting human rights and deterring misconduct outweigh the interest in punishing wrongdoers. This latter interest is nevertheless present and can influence the analysis, for example, through greater judicial reluctance to deem police conduct 'illegal'.<sup>44</sup>

It can thus be seen that the fundamental principles underlying the Canadian approach—punishment of criminals, ensuring fair trials, deterring due process violations and providing

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automatically excluded while other illegally obtained evidence is excludable at the judge's discretion).

<sup>38</sup> Eg. *ibid.* at 231 and 333.

<sup>39</sup> See *ibid.* at 113 (describing the standard in England and Wales).

<sup>40</sup> See *ibid.* at 195-196 (describing the German standard).

<sup>41</sup> See Bradley, *supra* note 35 at 155 (describing the French standard).

<sup>42</sup> See e.g. *ibid.* at 113.

<sup>43</sup> See e.g. *ibid.* at 195-6.

<sup>44</sup> See e.g. *ibid.* at 406.

personal remedies where they occur—are the same principles underlying other countries' approaches. The originality of the Canadian model lies in its incorporation of the judiciary's reputation for integrity as an overarching principle within which these other principles are balanced.<sup>45</sup> In other words, Canada considers the same factors as other countries employing the discretionary exclusion approach, but introduces greater coherence through its use of reputation as a unifying interpretive principle. As we shall see, the explicit use of the reputation principle will be valuable in approaching the issue of remedies at international criminal tribunals.

### **The Underlying Principles Applied to International Criminal Tribunals**

#### *The Objectives of International Criminal Tribunals*

In order to adapt these principles to the international tribunal context, it is necessary to keep in mind not only the unique practical situation of such tribunals, as discussed above, but also the unique purposes served by their existence. Perhaps unsurprisingly, given the political complexity of their origins, it is difficult to articulate a single motivating political objective behind the formation of international criminal tribunals, either individually or as a collective (aside from the superficial objective of prosecution of those responsible for serious humanitarian criminal violations). However, it is possible to derive certain objectives from the preambles of the establishing instruments of the various tribunals,<sup>46</sup> which reveal significant common ground. The general objectives that can thus be gleaned are the promotion of peace and stability, the punishment of those responsible for serious humanitarian crimes, and the facilitation of transitional justice (through redress and reconciliation). Included in these broad objectives is the promotion of democracy (at least in the

<sup>45</sup> *Ibid.* at 344 (other countries have begun to adopt the Canadian reputation-based approach, for example South Africa).

<sup>46</sup> Specifically, see regarding the ICTY UN SCOR, 48th Year, 3175th Mtg., UN Doc. S/RES/808 at Preamble, iterations 8 and 9; UN SCOR, 48th Year, 3217th Mtg., UN Doc. S/RES/827 (1993) at Preamble, iterations 6-8. See, regarding the ICTR, *Statute of the International Criminal Tribunal for Rwanda* (ICTR Statute), UN SCOR, 49th Year, 3453rd Mtg., Annex, UN Doc. S/RES/955 (1994) (notably similar but with an additional reference to "the process of national reconciliation"). See, regarding the ICC, *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9\* (1998) at Preamble.

case of the ICTY),<sup>47</sup> the stigmatization and deterrence of humanitarian abuses,<sup>48</sup> and the establishment of a historical record. In addition to these *ex ante* political objectives, international tribunals have other desirable effects, most notably with respect to uniformity in the application and development of international law.<sup>49</sup>

#### *The Applicability of the Underlying Principles*

The principles derived from the Canadian example, including the overarching principle of reputational integrity, are arguably even more resonant in the tribunal context than in the domestic one.

The principle of punishing criminals is, of course, directly relevant, given the tribunals' basic objective of punishing those responsible for serious humanitarian crimes.

In addition, the inherent focus of tribunals on human rights necessitates an exceptional emphasis on their own rigid adherence to human rights standards in their dealings with accused. The need for this emphasis is reinforced by the unique position of tribunals as interpreters and developers of international law, a sphere in which human rights law plays a dominant role. As such, the principles of fair trials, deterring due process violations, and providing meaningful personal remedies to compensate for violations possess great significance.

The goal of promoting democracy (in which rights protection is inherent) not only reinforces the significance of these principles, it also requires tribunals to maintain strong reputations for integrity.<sup>50</sup> Indeed, reputation is of the utmost importance for international criminal tribunals, not only to aid in promoting democracy specifically, but also because recognition of their authority is essential to their general promotion of peace and stability and to their ability

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<sup>47</sup> John Hagan & Sanja Kutnjak Ivkovich, "War Crimes, Democracy, and the Rule of Law in Belgrade, the Former Yugoslavia, and Beyond" (2006) 605 Annals 130 at 132.

<sup>48</sup> Antonio Cassese, *International Law*, 2<sup>nd</sup> Ed. (Oxford: Oxford University Press, 2005) at 460.

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

<sup>50</sup> Hagan & Ivkovich, *supra* note 47 at 132-133, put it well: "intervention was necessary to help reestablish a functional democracy in the former Yugoslavia. Yet for such intervention to be successful in advancing democracy, it is not only necessary to meet procedural and due process standards in doing so but also to be broadly *perceived* as meeting these standards by members of the public who identify with both the victims and the parties accused of perpetrating crimes against them."

to facilitate projects of transitional justice. If a tribunal comes to be seen as an instrument of victor's justice without true regard to justice and human rights, it will necessarily fail in these objectives, even if it succeeds in punishing perpetrators of humanitarian crimes. At the same time, if it comes to be seen as a lame duck, unable to effectively prosecute accused due to an over-emphasis of the most minor due process violations, it will likewise fail in its objectives.

In assessing reputation, tribunals need to also be mindful of their situation within a broader project of international justice. The reputation to uphold is not only the narrow reputation of the tribunal itself, but also that of this broader project<sup>51</sup> This approach is analogous to domestic courts' focus on the reputation of the domestic administration of justice generally rather than the reputation of the specific court itself.<sup>52</sup>

### **Implications for Remedy Application at International Criminal Tribunals: Proposals for Reform**

#### *A Discretionary Approach; the Importance of Reputation*

It is therefore reasonable, in assessing appropriate remedies, to continue the discretionary approach currently used by tribunals, while explicitly acknowledging a balancing between the underlying principles as the basis for exercising judicial discretion. In particular, tribunals should clearly establish the principle that they must uphold the reputation of the project of international justice with which they are associated. This overarching principle can then be used as an interpretive lens through which the interests represented by the other underlying principles are balanced. The application of reputation as an overarching principle is even more appropriate in the tribunal context than domestically, given tribunals' unique objectives of promoting peace and stability and facilitating transitional justice.<sup>53</sup>

<sup>51</sup> In the case of *ad hoc*, situation-specific tribunals such as the ICTY and ICTR, the reputation they must uphold is that of the specific international intervention that gave rise to their creation. The ICC, whose remit extends across numerous situations, should focus on the reputation of the administration of international justice more generally.

<sup>52</sup> An added benefit of this broader approach to reputation is that it allows courts to take into account the actions of officials over which they do not have jurisdiction, such as improper arrests or treatment at the hands of national or international police and armed forces. For a discussion of this problem see Zahar & Sluiter, *supra* note 2 at 281.

<sup>53</sup> See *Barayagwiza*, "Decision", *supra* note 4 at 112. The first Appeals Chamber Decision in *Barayagwiza* recognizes the importance of reputation: "Nothing less than

This approach will help bring coherence to what is currently a largely piecemeal scheme. Accordingly, the balancing of the rights of the accused and the interest of the public in prosecution in the test for the determination of a stay of proceedings<sup>54</sup> should be subsumed into a more general analysis of the impact of trial continuation on the project of international justice's public reputation. Likewise, analyses of evidence exclusion under Rules 89(D) (with respect to assessing trial fairness) or 95 (with respect to assessing judicial integrity) of the ICTY and ICTR Rules of Procedure and Evidence (RPE)<sup>55</sup> and Articles 69(4) and (7) of the ICC's<sup>56</sup> should also apply reputation as an interpretive lens.<sup>57</sup>

*Implications of the Discretionary Approach: the Persistence of the Obstacles to Effective Remedies*

It is not enough, however, to recognize the applicability of these principles to the tribunal context and to suggest a discretionary approach to remedy provision: rather than avoid the obstacles to effective remedy provision at international criminal tribunals that were discussed above, this approach directly imports them into the principled remedy analysis.

The political obstacle of pro-punishment sentiment among victim populations is relevant because reputation must be considered not simply with respect to a hypothetical 'public' but with respect to very real stakeholder constituencies, given a tribunal's role in promoting peace and stability and facilitating transitional justice.

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the integrity of the Tribunal is at stake in this case. Loss of public confidence in the Tribunal, as a court valuing human rights of all individuals—including those charged with unthinkable crimes—would be among the most serious consequences of allowing [Barayagwiza] to stand trial in the face of such violations of his rights."

<sup>54</sup> A test set out in *Nikolic*, *supra* note 12.

<sup>55</sup> International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, UN Doc. IT/32/Rev.41, entered into force 14 March 1994, as amended 28 February 2008, online: <<http://www.un.org/icty/legaldoc-e/index-t.htm>>; International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, UN Doc. ITR/3/Rev.1, adopted 29 June 1995, as amended 14 March 2008, online: <<http://69.94.11.53/default.htm>>.

<sup>56</sup> International Criminal Court, Rules of Procedure and Evidence, UN Doc. ICC-ASP/1/3, adopted 9 September 2002, online: <[http://www.icc-cpi.int/library/about/officialjournal/Rules\\_of\\_Proc\\_and\\_Evid\\_070704-EN.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rules_of_Proc_and_Evid_070704-EN.pdf)>.

<sup>57</sup> Although it is perhaps difficult to justify this inclusion on the basis of the wording of the provisions as they currently read. Some minor statutory revision may be a precondition for the application of such an analysis.

Furthermore, as the example of Canada and other countries employing discretionary approaches shows, the balancing of underlying interests (and resulting impact on reputation) is partly dependent on the severity of the allegations against the accused. As such, the second, substantive obstacle to the provision of effective remedies—the outweighing of the interests of the accused by the severity of their charges—can also be seen to have a legitimate basis in the fundamental principles underlying the establishment of remedies for due process violations.

The legitimate grounding of the systemic obstacles to the provision of effective remedies in the very principles according to which remedies should be established is problematic. . Given the range of criminal charges represented in national courts and the absence of broad victim groups in individual cases, the application of the discretionary, interest-balancing approach yields a balance between remedy application and denial that serves to uphold the domestic judiciary's reputation. In the case of international criminal tribunals, however, there is a long-term reputation problem. Tribunals demonstrate the observable trend of subsuming the principles of fair trial, deterrence of due process violations, and the provision of meaningful personal remedies to the interest in seeing the accused prosecuted. The unique obstacles to effective remedy faced by international criminal tribunals render the traditional methods of remedy—exclusions of evidence and stays of proceedings in particular—almost impotent in the tribunal context.

#### *Proposals for Effective Remedy Provision*

The solution cannot be to accept the status quo and permit a system which rarely remedies violations of due process. Indeed, such a system risks entirely undermining the reputation of the projects of which tribunals are part, resulting in a self-contradictory application of their own underlying principles. Why establish a tribunal in the first place if accused will never receive fair trials? The necessary alternative is to reformulate the remedy scheme in a way that more adequately responds to the need to vindicate its underlying principles.

As a substantive reform, the *cumulative* risk of inadequate protection should itself be incorporated into analyses respecting remedy. Specifically, in balancing interests, the inherent risk that the principles of fair trials, deterring due process violations and providing meaningful personal remedies will always go unfulfilled—

thereby seriously undermining the project of international justice's reputation—should automatically be taken into account as a potential detriment to reputation, weighing in favour of providing the remedy in question. This incorporation would, in practice, serve as a counterbalance to the severity of charges and thereby help to preserve the project's reputation for integrity.

Additionally, a more flexible, responsive approach to remedies must be taken. The second Appeals Chamber decision in *Barayagwiza* is commendable for proposing two alternative remedies—financial compensation and sentence reduction—after rejecting a stay.<sup>58</sup> While exclusions of evidence and stays of proceedings remain important potential remedies, courts must attempt to provide alternative remedies where exclusions and stays cannot be awarded despite a rights violation or where such an alternative would be more appropriate in a given situation. In order to be responsive, effective and meaningful, such remedies will have to be crafted with regard to the specifics of each case; it is therefore impossible to compose a comprehensive list *ex ante*. However, such remedies could include sentence reductions and financial compensation as in *Barayagwiza*,<sup>59</sup> return of unreasonably seized property, or adaptations to trial procedures. Hopefully, the process initiated in *Barayagwiza* will build upon itself, with each new alternative remedy awarded providing inspiration for future situations.<sup>60</sup>

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<sup>58</sup> *Barayagwiza*, "Decision on the Prosecutor's Request", *supra* note 5 at 74-75. These two remedies were presented as alternatives, the former in the event of acquittal and the latter in the event of conviction.

<sup>59</sup> With the caveat that sentence reductions must be meaningful, in conformity with the principle of meaningful, effective and responsive personal remedies, notwithstanding the difficulties noted earlier. (*Barayagwiza*'s sentence reduction, as discussed, was not.) The rhetorical question that I posed earlier—should an accused be sentenced as if he had only been responsible for the murder of 100,000 people, instead of 500,000—is misleading. The appropriate principle is that the accused's sentence should be reduced such that he is actually released from custody earlier than otherwise. Admittedly, courts may be reluctant to apply this remedy in the cases of the most serious violators.

<sup>60</sup> A non-inherent obstacle has also arisen with respect to the ICTY and ICTR, namely, the lack of budgetary or Statutory provision for financial compensation available to accused whose rights have been violated (For example, *Prosecutor v. Rwamakuba*, ICTR-98-44C-T, Decision on appeal against Appropriate Remedy, (September 13, 2007) (International Criminal Tribunal for Rwanda, Appeal Chamber). The ICC Statute, however, apparently ensures that compensation will be available (Zahar & Sluiter, *supra* note 2 at 317). The availability of compensation funds is a necessity.

Finally, the principle that due process violations should be deterred can be partially vindicated without reliance on personal remedies through enhanced accountability for violating officials. Punishing violators of due process rights, for example through professional discipline or civil or criminal liability (as in many nation jurisdictions) could help compensate for the difficulty of providing personal remedies to the victims. Current provisions on misconduct of officials are quite narrow, especially in the case of the ICTR and ICTY, and are rarely applied.<sup>61</sup> Tribunal RPE must provide for the possibility of sanctions against all court officials responsible for violating the rights of accused.<sup>62</sup> Such rules could build on the existing provisions in the ICC RPE and must be detailed enough to provide for different levels of sanctions depending on the degree of responsibility.

Though controversial—and certainly unlikely to be popular among those involved in prosecutions—this proposal is justified by the heightened need of tribunals to deter due process violations and ensure fair trials and the limited availability of personal remedies.<sup>63</sup> It should be stressed that this proposal provides a complement, not a substitute, to the provision of personal remedies, and only in respect of the principles of violation deterrence and ensuring fair trials. The provision of personal remedies is itself a prominent principle. As such, courts must be careful not to allow increased personal accountability of perpetrators to serve as an excuse for not providing a personal remedy to victims.

<sup>61</sup> Currently, limited accountability for Prosecutors can be inferred from rule 46 of the ICTR and ICTY Rules of Procedure and Evidence (RPE), *supra* note 55, which permit the tribunal to impose sanctions against ‘counsel’, including removal from a case and referral to the counsel’s national bar. However, while theoretically applicable to prosecuting counsel responsible for due process violations, this provision has been used only with respect to misconduct of defence counsel (Momeni, *supra* note 9 at 327). The ICC RPE, *supra* note 56, contain much broader provisions relating to discipline against court officials, including not only Prosecutors and Deputy Prosecutors but also judges, Registrars and Deputy Registrars (see rules 23-32). Disciplinary measures provided for are reprimands, fines, and removal from office.

<sup>62</sup> A further problem is that violators are typically non-court officials, for example INTERPOL officers or soldiers in national armies or international ones such as NATO. While the ideal would be to hold these violators personally accountable as well, doing so will pose a serious practical challenge. The adoption of a reputation-based approach focused broadly on the reputation of the project with which a tribunal is associated does, however, allow tribunals to take the actions of such officials into account in applying personal remedies (see also note 52).

<sup>63</sup> Such a proposal is put forward by Momeni, *supra* note 9 at 328.

### **Conclusion**

The above analysis points to a need to reform current practices respecting the application of remedies for the violation of the rights of accused. Any reform should take into account certain fundamental principles: fair trials; deterrence of violations; responsive, effective and meaningful remedies; and, as an overarching principle, maintenance of the project of international justice's reputation for integrity. Accordingly, this article's proposals for reform seek to overlay the *ad hoc* and often inconsistent approach of tribunals to their discretion to apply personal remedies with a unifying set of interpretive principles and to supplement it with complementary means of vindicating these principles.

The specific proposals contained in this article represent a first step towards reform. They are by no means the only possible way forward; rather, it is my hope that this article will spark further thought on the subject.

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## **Delegation and Accountability in the Clean Development Mechanism: The New Authority of Non-State Actors**

**JESSICA F. GREEN\***

### **Introduction**

It is fashionable these days to speak of the rise of public-private partnerships; surprisingly, however, there is relatively little scholarship on the interaction between states and private actors at the supranational level. This paper offers an in-depth case study of the Clean Development Mechanism (CDM)—one of the three market mechanisms of the Kyoto Protocol—which features a prominent role for non-state actors. Drawing from the principal-agent literature, this paper analyses the mechanics of the complex—and increasingly fragmented—institutional arrangements of the CDM, and draws some conclusions about the functioning of the mechanisms created to ensure the accountability of private agents.

The CDM provides incentives for reducing greenhouse gas emissions by allowing developed countries to purchase emissions credits for abatement activities undertaken in developing countries, and to apply these credits against their overall targets. Since all developed countries that are party to the Protocol<sup>1</sup> have committed to meeting specific reductions by the end of 2012, the CDM allows them to do so in what is, theoretically, the most cost-efficient manner—by purchasing emissions reductions where they are most cheaply produced, i.e. in the developing world.

The CDM has delegated considerable authority to private actors. The complexities of creating and regulating a new market in greenhouse gas (GHG) emissions have prompted the creation of a number of subsidiary bodies. In turn these bodies have been delegated authority to create and implement rules, help resolve

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<sup>1</sup> This of course does not include the United States, which remains the sole developed nation that has not ratified the Protocol.

disputes, monitor and verify participants' behaviour and award emissions reductions credits. These subsidiary bodies use private actors both as consultants and as agents to carry out specific measuring and monitoring tasks.

To evaluate how well the principal—in this study, the Executive Board of the CDM—is able to control the agents—the “Designated Operational Entities”—I conducted an analysis of 752 projects submitted to the Executive Board between December 2004 and June 2007. The results are of this analysis are mixed. Although many of the oversight procedures in place appear to be functioning well, there are some fundamental structural issues that may contribute to agents acting in rent-seeking ways, to the detriment of the principals. Specifically, the small number of firms qualified to carry out monitoring and verification raises concerns of monopoly and collusion. Moreover, the pace of accrediting new private agents is proceeding very slowly. There are considerable barriers to entry, including the knowledge and expertise that potential agents must first acquire, as well as the lengthy process to become an accredited Designated Operational Entity (DOE). Finally, there is little evidence that the “police patrol” oversight mechanisms are functioning well. In sum, the data indicate that though the CDM was designed in a way to maximize the Executive Board’s control over the Designated Operational Entities, in practice, we cannot be assured that these private agents are not pursuing their own goals, at the cost of those delegated to them.

Given the vast literature on international organizations, why look at a small subsidiary body such as the CDM? There are two answers which explain the significance of this case study. First, although there is talk of the “death” of the Kyoto Protocol, the CDM is thriving—and growing exponentially. As of July 1, 2008, the CDM had granted over 160 million credits or “certified emissions reductions” (CERs) through more than 1100 projects.<sup>2</sup> Currently, there are approximately 3000 additional projects in the pipeline, estimated to represent over 2.7 billion CERs.<sup>3</sup> One CER is equivalent to one metric ton of carbon dioxide (or the equivalent amount of

<sup>2</sup> UNFCCC, “CERs Issued,” online: <[http://cdm.unfccc.int/Issuance/cers\\_iss.html](http://cdm.unfccc.int/Issuance/cers_iss.html)> (accessed July 1, 2008).

<sup>3</sup> UNFCCC, “CDM Statistics,” online: <<http://cdm.unfccc.int/Statistics/index.html>> (accessed April 21, 2008).

other greenhouse gases). The price of CERs has fluctuated, but ranges between €13 and €16 per metric ton of carbon dioxide.<sup>4</sup>

Second, and more importantly, the CDM, along with the two other “flexibility mechanisms” in Kyoto, are emerging as the backbone of a larger emissions trading scheme.<sup>5</sup> It is very likely that the intergovernmental arrangement that follows Kyoto (which is set to expire in 2012) will include provisions for emissions trading. Moreover, the CDM is no longer the only emissions trading initiative. A number of national and sub-national emissions trading initiatives have emerged around the globe—many of which are taking their cues from Kyoto’s flexibility mechanisms. They are using many of the same methodologies, oversight structures and importantly, many of the same private firms for monitoring and verification activities as the CDM. Thus, the CDM can be viewed as a significant anchor in a larger emerging market in carbon dioxide emissions. If this market continues to grow and to delegate key regulatory tasks to private firms, it is then important to look carefully at the institutional mechanisms in place to constrain them.

This paper seeks to describe and analyze the principal-agent relationship in the CDM. It is not meant to offer definitive conclusions about the nature of private agents in global regulatory institutions; indeed, without examining the variation across institutions, any conclusions would be misleading. Moreover, the paper does not seek to explain the specific reasons that motivated the Parties to delegate certain functions within the treaty. The question of which functions states choose to delegate (and to whom) is an important one, but it will not be directly addressed here. Finally, given that the delegation patterns in emissions trading are likely to persist, I take the structure of the institution as given, and examine the extent to which there is deviation between the expectations of the principals and the activities of the agents.

The paper is structured as follows. In the first section, I situate my research within the relevant literatures in law and political

<sup>4</sup> The more commonly cited price of carbon is the one in the European Emissions Trading Scheme (EU-ETS), which is a much larger market than the CDM. The price of a metric ton of CO<sub>2</sub> in the EU market is much more volatile than in the CDM, and has ranged from between €18 to €33. On historic prices of CO<sub>2</sub> in the CDM and the EU market, see Point Carbon, online: <<http://www.pointcarbon.com/news/historicprices/>>.

<sup>5</sup> Jessica F. Green, “The Regime Complex for Emissions Trading” (Paper presented at the International Studies Association, March 2008) [unpublished].

science and discuss links between them. Second, the paper defines delegation and the principal-agent framework used in the analysis. Third, it turns to an in-depth examination of the structure and functions of the CDM. Fourth, I discuss the accountability mechanisms in place in the CDM. In this section, I also examine trends in the behaviour of some of the private agents involved in the CDM. I show the extent to which principals and agents differ in their assessments of projects' conformity to the rules of the regime. The final section draws some general conclusions about the accountability of private agents in the CDM.

### I. Relevant literatures

In this section I outline how this investigation fits into current discussions in the political science and legal literatures. By focusing on the act of delegation, this paper aims to bring together debates in the delegation and global administrative law literatures, emphasizing their similarities and the potential contributions of each analytical frame to the other.

Derived from economics, delegation theory has only recently been used to explain the principal-agent relationship between states and international organizations.<sup>6</sup> In economic theory, the primary challenge of economic organization is "to explain the conditions that determine whether the gains from specialization and cooperative production can be better obtained within an organization like the firm, or across markets."<sup>7</sup> This calculus is often referred to as the "make or buy" question. However, this decision is complicated by what Alchian and Demsetz refer to as the "metering problem" in team production: it is difficult to measure the individual inputs to a given

<sup>6</sup> See Curtis A. Bradley & Judith G. Kelley, "The Concept of International Delegation" (2007) Prepared for Duke Workshop, "The Law and Politics of International Delegation" (February 2007); Darren G. Hawkins, David A. Lake, Daniel L. Nielson and Michael J. Tierney, *Delegation and Agency in International Organizations* (Cambridge: Cambridge University Press, 2006); Jonas Tallberg *Leadership and Negotiation in the European Union* (Cambridge: Cambridge University Press, 2006); Daniel L. Nielson & Michael J. Tierney, "Delegation to International Organizations: Agency Theory and World Bank Environmental Reform" (2003) 57:3 Int'l Org. 241; Mark Pollack, *The Engines of European Integration: Delegation, Agency and Agenda Setting in the EU* (Oxford: Oxford University Press, 2003); Karen Alter, "Who Are The 'Masters of the Treaty'? European Governments and the European Court of Justice" (1998) 52:1 Int'l Org. 121.

<sup>7</sup> Armen A. Alchian & Harold Demsetz, "Production, Information Costs and Economic Organization" (1972) 62:5 American Economic Review 777 at 777.

output and distribute rewards accordingly.<sup>8</sup> Without accurate metering, rewards will not correspond appropriately to effort, and an incentive to shirk emerges: to exercise less effort with the hope that this behaviour will go undetected and the reward will be the same to all agents irrespective of level of input. Of course, firms can make greater efforts to monitor behaviour, but this is not without cost. Thus, there is a general tendency for agents to “shirk”, pursuing their own interests at the expense of the principal. The massive body of work spawned by this fundamental problem had the following “punch line,” according to Epstein and O’Halloran: “principals can usually mitigate conflicts of interest [between principal and agent] through the careful design of incentive contracts but can rarely control agents perfectly.”<sup>9</sup>

Political scientists have borrowed the principal-agent paradigm to examine relations between branches of government.<sup>10</sup> Yet it has only recently been used in analyses of international politics. However, within the realm of international politics, there is little work extending it to private actors. Thus, this examination of the CDM presents an opportunity to use current theories of delegation on a new population to see how principal-agent theory applies when agents are non-state actors.

To date, studies of international politics offer similar explanations of delegation: States delegate to reduce transaction costs and solve problems that allow mutually beneficial cooperation. Specifically, “principals decide to delegate powers to an agent...because that agent will reduce the transaction costs of policy-making either by producing expert information for the principals or by allowing the principals to commit themselves credibly to their agreed course of action.”<sup>11</sup> Recent work by Hawkins *et. al.* reiterates and expands upon this point: the authors explain five mechanisms through which delegation can confer benefits to agents by lowering

<sup>8</sup> *Ibid.* at 778-81.

<sup>9</sup> David Epstein & Sharyn O’Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers* (Cambridge: Cambridge University Press, 1999) at 28. Note, however, that there is considerable debate about how well such mitigation tools function.

<sup>10</sup> See Terry M. Moe, “Political Institutions: The Neglected Side of the Story” (1990) 6 Journal of Law, Economics and Organization 213; D. Roderick Kiewiet & Matthew D. McCubbins, *The Logic of Delegation: Congressional Parties and the Appropriations Process* (Chicago: University of Chicago Press, 1991); Epstein & O’Halloran, *ibid.*

<sup>11</sup> Pollack, *supra* note 6 at 21.

the costs of cooperation. Delegation can help: reduce defection; facilitate collective decision-making; resolve disputes; enhance credibility through enforcement; and “lock in” certain practices.<sup>12</sup> A variant of the efficiency rationale is presented in the literature on public-private partnerships. Streck argues that delegation is motivated by governments’ inability to address problems adequately. The most efficient solution, then, is to delegate to actors most capable of finding solutions.<sup>13</sup> Thus, although the body of literature is small, efficiency is the dominant explanation for delegation to public agents on the international level. Efficiency may come in different stripes—lowering transaction costs, facilitating agreement, and creating credibility—but it provides the same motivation for delegation.

This paper also draws on and contributes to the literature on global administrative law (GAL). The emerging body of literature on GAL is derived, in part, from research on domestic administrative legal systems, which examines rules and mechanisms for controlling government agents.<sup>14</sup> The GAL literature asks a similar question on the international level: given the increasing amount of delegation to both public and private actors, how can international regimes ensure the accountability of these various actors? It aims to illustrate the problems of accountability in the new “global administrative space” and proposes ways to apply administrative principles to promote the accountability of both state and private actors.<sup>15</sup>

GAL examines both a wide variety of actors—supranational, domestic, public, private and hybrid—as well as a diverse range of issues—from accounting standards to international organizations to forestry certification.<sup>16</sup> In this sense, it can be viewed as a means to

<sup>12</sup> Hawkins *et. al.*, *supra* note 6 at 13-20.

<sup>13</sup> Charlotte Streck, “New Partnerships in Global Environmental Policy: The Clean Development Mechanism” (2004) 13:3 J. Env. & Dev. 295.

<sup>14</sup> See, e.g. Richard Stewart, “The Reformation of American Administrative Law” (1975) 88 Harv. L. Rev. 1667.

<sup>15</sup> Benedict Kingsbury, Nico Krisch & Richard B. Stewart, “The Emergence of Global Administrative Law” (2005) 68 Law & Contemp. Probs. 15. For a helpful review, see Sabino Cassese, *Global Administrative Law: Cases and Materials* (Rome: University of Rome, 2006), online: <<http://www.iilj.org/GAL/GALcasebook.asp>>.

<sup>16</sup> On accounting, see Walter Mattli & Tim Buthe, “Global Private Governance: Lessons from a National Model of Setting Standards in Accounting” (2005) 68 Law & Contemp. Probs. 225; on international organizations see, e.g. Jonathan A. Fox & L. David Brown (eds.), *The Struggle for Accountability: The World Bank, NGOs and Grassroots Movements* (Cambridge, MA: MIT Press, 1998); on forestry see e.g. Benjamin Cashore,

address the “governance trilemma” described by Slaughter: interdependence has created a need for global rules without centralized power, but with ways to hold rule-makers accountable through different political mechanisms.<sup>17</sup>

Discussion both in the delegation and GAL literatures begins from the premise that “complex interdependence”—the ways that states are linked and therefore mutually dependent on each other—is prompting changes in the ways states address problems.<sup>18</sup> Kingsbury *et. al.* note that the growth in transnational regulation has contributed to the rise in GAL, since “important regulatory functions are no longer exclusively domestic in character.”<sup>19</sup> Applying the lens of political science suggests that many of these regulatory functions are instances of delegation, where a variety of actors undertake administrative activities. GAL comprises delegation both at the national level, where domestic agents come together in transnational networks,<sup>20</sup> and at the supranational level, where states delegate specific tasks to IOs, hybrid intergovernmental arrangements, or private institutions.<sup>21</sup>

Both literatures wrestle with the challenge of accountability.<sup>22</sup> How can states control agents? How can they manage global rule-making? However, each operationalizes this concept in a different way. GAL tends to cast accountability in a normative light, invoking concerns about democracy, representation

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Graeme Auld & Deanna Newsom, *Governing through Markets: Forest Certification and the Emergence of Non-State Authority* (New Haven: Yale University Press, 2004).

<sup>17</sup> Anne-Marie Slaughter, *A New World Order* (Princeton, N.J.: Princeton University Press, 2004) at 8–9.

<sup>18</sup> Robert O. Keohane & Joseph S. Nye Jr., *Power and Interdependence in World Politics* (Boston: Little Brown, 1977) at 8.

<sup>19</sup> Kingsbury *et. al.*, *supra* note 15 at 25.

<sup>20</sup> Slaughter, *supra* note 17.

<sup>21</sup> Kingsbury *et. al.*, *supra* note 15 at 20–23.

<sup>22</sup> To be clear, there are a number of other literatures—for instance those on the EU, international organizations, global civil society—that take up issues of accountability in international law. A review of all of these is beyond the scope of this paper. Curtin and Nollkaemper provide a helpful, succinct analysis of the shared feature of these various literatures: “The main virtue of the concept of accountability in the context international law is that it allows us to move the conceptual discussion beyond the traditional concept of responsibility of states or international organizations as the primary accountability mechanism in international law.” Deirdre Curtin and Andre Nollkaemper, “Conceptualizing Accountability in International Law” (2005) 36 *Nethl. Y.B. Int'l. L.* 3 at 9.

and liberal views about rights. The principal-agent literature, by contrast, often has a narrower treatment of accountability, focusing on efficiency considerations. That is, the principle-agent literature asks: did principals achieve the desired outcome, for a “reasonable” investment in oversight? GAL scholars, by contrast, are more likely to ask: did delegation produce a normatively desirable outcome, and if so, for whom? Of course, these are generalizations of two complex literatures, with many scholars espousing views between these two poles. However, it is important to note the emphasis by P-A scholars on success defined by adherence to principals’ preferences, as this will be the departure point for my evaluation of private agents in the CDM. I recognize that this approach aligns more closely with political science analyses of accountability, but as the discussion below indicates, I also highlight why and how this approach might be overly narrow.

Each of these perspectives has weaknesses. The GAL literature focuses largely on how delegation affects accountability mechanisms, but it does not look closely at the temporally prior issue of the costs and benefits of the act of delegation. To address this gap, I begin from the premise that we must understand the mechanics of delegation—including the costs, benefits and politics involved—before delving into its consequences. Moreover, this analysis calls attention to the interrelation between politics and GAL mechanisms; sometimes the disjuncture between GAL procedures and practices can undercut efforts to hold global actors accountable.

The literature examining delegation to supranational actors also has shortcomings. First, unlike GAL, it has focused almost exclusively on delegation to public actors—either agents of the state at the domestic level or international organizations (and even this is a relatively new development). In international relations, the literature has largely sidestepped the issue of private actors. Indeed, some have argued that there is little work on agents of either type within IR, despite the vast principal-agent literature.<sup>23</sup> As a result, delegation theory in international relations takes agents to be relatively unitary; thus control mechanisms will operate similarly on similar types of agents. Second, the work on delegation assumes that holding agents accountable is largely a matter of a cost/benefit calculation. That is, if states are willing to devote the resources necessary to monitoring

<sup>23</sup> Darren G. Hawkins & Wade Jacoby, “How Agents Matter” in Hawkins *et al.*, *supra* note 6 at 199-228.

and constraining agents, then the proper control mechanisms can be designed and implemented.<sup>24</sup> The analysis in Section IV suggests that this logic does not hold in the case of the CDM.

For the purposes of this evaluation, and following Grant and Keohane, I define accountability as a situation in which “some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met.”<sup>25</sup> In this paper, I use the term “accountability mechanisms” to describe this process of elaborating standards, evaluating performance, and exacting sanctions as appropriate. While accountability is generally *ex-post*—power wielders are held to account after they have performed certain tasks—I also address *ex-ante* mechanisms to increase the likelihood that power wielders will behave in accordance with the preferences of those delegating power.

## II. Defining delegation

In this section, I define delegation and explain how it is operationalized in this study. I then turn to the aspects of the principal-agent relationship that are particular to private agents.

Following Moe, delegation is present in situations in which “the principal considers entering into a contractual agreement with another, the agent, in the expectation that the agent will subsequently choose actions that produce outcomes desired by the principal.”<sup>26</sup> In this study, I use treaties and decisions of subsidiary bodies as evidence of delegation. Thus, the initial act of delegation by states was the creation of the CDM in Article 12 of the Kyoto Protocol. The scope of the authority delegated was further refined in the Marrakesh Accords, which details the modalities of the CDM.<sup>27</sup> Since then, a number of subsequent decisions by the Executive Board of the CDM

<sup>24</sup> Kiewit & McCubbins *supra* note 10.

<sup>25</sup> Ruth W. Grant & Robert O. Keohane, “Accountability and Abuses of Power in World Politics” (2005) 99:1 American Political Science Review 29 at 29.

<sup>26</sup> Terry M. Moe, “The New Economics of Organization” (1984) 28:4 Am. J. Pol'l Sci. 739 at 756.

<sup>27</sup> UNFCCC, 7<sup>th</sup> Meeting of the Conference of the Parties, FCCC/CP/2001/13/Add.2 (2002). The Marrakesh Accords are a lengthy agreement laying out many aspects of the implementation of the Kyoto Protocol; the modalities of the CDM are one component of the document.

have further delegated authority to various Panels and ad-hoc bodies that are responsible for acts of rulemaking and implementation. These will be discussed in detail in the following section. For now, the important fact is that these acts of delegation have been explicit and are carefully documented in the decisions of the Meeting of the Parties to the Kyoto Protocol, the ultimate decision-making body in the Protocol.<sup>28</sup>

There are two additional characteristics of delegation that are relevant to this study. First, delegation can be either *direct* or *indirect*. In a situation of direct delegation, a state delegates to an IO or private actor to carry out a specific task; the agent then implements according to its mandate. In indirect delegation, the agent then delegates to a third party who carries out the required tasks.<sup>29</sup> We can think of the many instances when states delegate to IOs, who in turn contract with NGOs or private firms to implement programmes as an instance of *indirect delegation*. The state thus delegates to the third party indirectly, as mediated by the IO.

Second, traditional theories of delegation generally present three distinct models of the principal. In the first, a single principal delegates to a single agent; this is often the model we see when we describe how domestic governments delegate to implementing agencies. In the second, multiple distinct principals delegate to a single agent. In the third—the one most relevant for this study—a collective principal delegates to a single agent. In this third mode, the principals jointly agree upon and design the arrangement which governs the agent. The model of the collective principal includes most IOs, and supranational arrangements such as the European Union. The case of the CDM is a clear example of a collective principal—where the ultimate principal is the Parties to the Kyoto

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<sup>28</sup> I distinguish between the ‘Meeting of the Parties’—the intergovernmentally-constituted body that is the ultimate decision-maker in the Kyoto Protocol—and the ‘Parties’ more generally, which refers to one or more states that have ratified the treaty, but *not* the official decision-making body.

<sup>29</sup> The terminology in the literature is inconsistent. Bradley & Kelley, *supra* note 6 at 5 use the term “re-delegation” to describe indirect delegation. They define re-delegation as situations in which “after states delegate to international bodies, these bodies often have the power to re-delegate that authority to other international bodies or to other actors such as non-governmental organizations.” Hawkins *et. al.*, *supra* note 6 use re-delegation in an entirely different way, to refer to those occasions in which states change the terms of delegation to an IO. To avoid the confusion of these two different usages of the same term, I will use the term “indirect delegation” to refer to those instances when states delegate to IOs, which in turn delegate some portion of these delegated tasks to a third party. I thank Christina Davis for this point.

Protocol. The proximate principal, which delegates to the implementers of the CDM, is the Executive Board. In general, when the paper refers to the principal of the CDM, this means the Executive Board.

### **III. Structure and function of the CDM**

This section offers a description of how the process of approving, implementing and monitoring of CDM projects works, and of the structure of the CDM and its various component parts. As will become evident, the structure of the CDM is complex. This thick description is necessary to understand the tasks and authority that have been delegated to private and actors. Moreover, the author is not aware of any other in depth examinations of the structure of the CDM.<sup>30</sup>

#### *A. An overview of the CDM project cycle*

The CDM is a market-based mechanism that allows developed, or Annex I (AI) countries to receive credits, or “certified emissions reductions” (CERs) for projects that they finance in developing, or Non-Annex I (NAI) countries. It therefore allows AI countries some flexibility in the manner in which they choose to meet their emissions reductions targets. The logic of the CDM is that the marginal cost of emissions reductions will be lower in the developing world, thus achieving global reductions in the most cost-efficient manner.

The CDM is an ambitious attempt to create a new currency, the CER, which can be bought and sold on the open market.<sup>31</sup> Each project that wishes to participate in the CDM must undergo a rigorous application process.<sup>32</sup> The applicants—generally the purchaser(s) of the credits and the project implementer (often an energy company) must first submit a Project Design Document (PDD) to the Executive Board (EB). The PDD requires detailed information about the project activities, estimated emissions

<sup>30</sup> The only other analysis of the CDM which focuses on its hybrid form is Streck, *supra* note 13. However, her discussion mainly focuses on the Designated Operational Entities, without any treatment of the CDM’s other panels.

<sup>31</sup> David Victor & Joshua House, “A New Currency: Climate Change and Carbon Credits” (2004) 26:2 Harv. Int’l Rev. 56 at 56-59.

<sup>32</sup> For a succinct description of the project cycle, see Hugh Wilkins, “What’s New in the CDM?” (2002) 11:2 Review of European Community and International Environmental Law 144.

reductions, plans for monitoring, and perhaps most importantly, information about baselines and leakage.<sup>33</sup> Estimating the emissions reductions requires employing a counterfactual, or baseline: how much carbon dioxide (or its equivalent) would be generated in the absence of this project? The CDM has created a number of complex methodologies and a number of subsidiary bodies to establish and advise about these baselines and their implementation. Each proposed project must use one of these extant methodologies (or successfully petition for the inclusion of a new one) against which to measure its activities. It must show that the planned emissions reductions will be “additional” to what would have occurred in the absence of the project.<sup>34</sup> This concept is known as “additionality” and is the core of any CDM project. The PDD also requires that the project design avoid the problem of “leakage,” so that the CO<sub>2</sub> producing activities are not simply shifted to another area beyond the project boundaries. Finally, the PDD must demonstrate that stakeholders were consulted in the planning process and that project planners took “due account” of their comments.<sup>35</sup>

Once this document is prepared, it must be validated by an accredited Designated Operational Entity (DOE) of the CDM.<sup>36</sup> Currently, there are eighteen accredited DOEs, many of which are large multinational firms with annual budgets in the tens and hundreds of millions.<sup>37</sup> The DOE makes a recommendation to the EB about whether the project should go forward, based on criteria set forth in the methodologies for various project types, and those outlined in Article 12 of the Protocol. If the EB approves the PDD, the project is registered. (Section IV conducts an in-depth analysis

<sup>33</sup> Complete documentation about rules of procedure and modalities can be found in UNFCCC 2002, *supra* note 27; provisions for the contents of the PDD can be found in Annex B of that document.

<sup>34</sup> *Ibid.* at para 43 states that: “A CDM project activity is additional if anthropogenic emissions of greenhouse gases by sources are reduced below those that would have occurred in the absence of the registered CDM project activity.”

<sup>35</sup> Stakeholders are defined in *ibid.* at Annex, para. 1(e) as “the public, including individuals, groups or communities affected, or likely to be affected, by the proposed clean development mechanism project activity.” Most recent PDD version available online:

<[http://cdm.unfccc.int/Reference/Documents/cdmpdd/English/CDM\\_PDD.pdf](http://cdm.unfccc.int/Reference/Documents/cdmpdd/English/CDM_PDD.pdf)>.

<sup>36</sup> The validation process is outlined in *ibid.* at Annex, paras. 35-42.

<sup>37</sup> Based on a review of the DOEs’ Annual Reports available on line. Not all DOEs had this information available. Eight of the 18 DOEs had annual budgets upwards of US\$30M. Number of DOEs listed on CDM website as of 21 April, 2008.

about the EB's decisions to approve, review or reject the projects validated by the various DOEs.) A different DOE is then responsible for monitoring the project, verifying the specified activities and finally, certifying that the reductions have actually taken place. Certification by the DOE constitutes a formal request to the EB that the CERs should be issued to the project funder. Once the EB approves the request, the CERs are transferred to the investing Party into the CDM Registry. The Registry is administered by the Secretariat and is the official repository for credits generated through the CDM.<sup>38</sup>

#### *B. The Executive Board*

The EB is the main governing body of the CDM. It reports to the Meeting of the Parties (MOP). The EB is comprised of ten representatives of Parties to the Protocol—five members and five alternates—who may serve for a total of four consecutive years.<sup>39</sup> There is one representative from each of the five UN regions, two additional representatives from both AI and Non-Annex I (NAI) nations, and one representative from Small Island Developing states. EB members must sign a written oath declaring that they have no financial interests at stake in the CDM, and are obligated not to disclose confidential or proprietary information both during and after their tenure as Board members. The Board generally works by consensus, but in the case of disagreement, can take decisions with a three-fourths majority.

In order to carry out its responsibilities to review and approve projects, the EB is given broad latitude to establish committees, panels or working groups to assist the EB in carrying out its duties: “The executive board may establish committees, panels or working groups to assist it in the performance of its functions. The executive board shall draw on the expertise necessary to perform its functions, including from the UNFCCC roster of experts.”<sup>40</sup>

This seemingly insignificant rule of procedure has given rise to a sizable set of supporting bodies, including the aforementioned

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<sup>38</sup> The International Transaction Log became operational in November 2007 but has yet to ‘go live’ for Parties to use in real time.

<sup>39</sup> This section draws heavily on the Rules of Procedure for the Executive Board, which is found in UN Framework Convention on Climate Change 2005. UNFCCC, 1st Meeting of the Parties, FCCC/KP/CMP/2005/8/Add.1 (2005) at Decision 4/CMP.1, Annex I.

<sup>40</sup> UNFCCC 2002, *supra* note 27 at Annex, para 18.

designated operational entities, as well as an Accreditation Panel, an ad-hoc accreditation team, and panels focusing on methodologies, afforestation and reforestation, small scale projects and registry and issuance.<sup>41</sup>

In addition to creating and overseeing these various panels, the EB also has powers to review recommendations by the DOEs, either before registration of the project or before CERs are issued. These reviews are undertaken by two Board members and members of the Registry and Issuance Team, which was established by the EB “to assist Board members in their task to consider requests for registration of project activities and requests for issuance of CERs submitted to the Board by DOEs.”<sup>42</sup> In both phases of the project, a review is triggered either by a request of the project participants, or by three members of the EB. This review process is discussed at length in Section IV.

### *C. The Designated Operational Entities*

The Designated Operational Entities (DOEs) are at the crux of the design and implementation of the CDM. They are private firms that serve two functions: 1) to validate the proposed projects and then, 2) to verify and certify project activities. (I refer to these two separate activities as “validate” and “verify.”) Most DOEs are private companies, often large risk management firms, which specialize in functions such as standardization, certification, verification, inspection and testing. A small number are non-profit organizations. DOEs must apply for accreditation to the EB, a process that will be outlined in the following section. As of 21 April 2008, there were 18 accredited DOEs. CDM projects are divided into 15 “sectoral scopes”—ranging from activities such as energy distribution to agriculture to waste handling—within which there are a number of approved methodologies for conducting the projects. DOEs are only permitted to validate or verify projects within those sectoral scopes for which they are accredited. For example, a DOE accredited to evaluate transport projects is not permitted to evaluate afforestation

<sup>41</sup> Further guidance for the EB on Panels and Working Groups is found in UNFCCC Executive Board, “General Guidelines for Guidelines/Working Groups” (2005) Report of the 20<sup>th</sup> meeting of the Executive Board, Annex I, online: <<http://cdm.unfccc.int/EB/020/eb20repan01.pdf>>.

<sup>42</sup> UNFCCC Executive Board, “Terms of Reference and Procedure for a Registration and Issuance Team” (2006) Report of the 25<sup>th</sup> meeting of the Executive Board, Annex 14, online: <[http://cdm.unfccc.int/EB/029/eb29\\_repan14.pdf](http://cdm.unfccc.int/EB/029/eb29_repan14.pdf)> at para 1.

Entity Name (short name)	Sectoral scopes for validation	Sectoral scopes for verification
Japan Quality Assurance Organization (JQA)	1, 2, 3, 4, 5, 6, 7, 10, 11, 12, 13	
JACO CDM., Ltd (JACO)	1, 2, 3	1, 2, 3
Det Norske Veritas Certification AS (DNV Certification AS)	1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15	1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15
TÜV SÜD Industrie Service GmbH (TÜV-SÜD)	1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15	1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15
Tohmatsu Evaluation and Certification Organization Co., Ltd (TECO)	1, 2, 3	
Japan Consulting Institute (JCI)	1, 2, 13	
Bureau Veritas Certification Holding S.A. (BVC Holding S.A.)	1, 2, 3	1, 2, 3
SGS United Kingdom Ltd. (SGS)	1, 2, 3, 4, 5, 6, 7, 10, 11, 12, 13, 15	1, 2, 3, 4, 5, 6, 7, 10, 11, 12, 13, 15
The Korea Energy Management Corporation (KEMCO)	1	
TÜV Rheinland Japan Ltd. (RWTÜV)	1, 2, 3, 13	
KPMG Sustainability B.V. (KPMG)	1, 2, 3, 13	
British Standards Institution (BSI)	1, 2, 3	
Spanish Association for Standardisation and Certification (AENOR)	1, 2, 3	1, 2, 3
TÜV NORD CERT GmbH (RWTUV)	1, 2, 3, 4, 5, 6, 7, 10, 11, 12, 13	1, 2, 3
Lloyd's Register Quality Assurance Ltd (LRQA)	1, 2, 3, 4, 5, 6, 7, 10, 11, 12, 13	
Colombian Institute for Technical Standards and Certification (ICONTEC)		1, 2, 3
Korean Foundation for Quality (KFQ)	1, 2, 3	
PricewaterhouseCoopers - South Africa (PwC)	1, 2, 3	

**Table 1:** List of DOEs and their scope accreditation.

Source: UNFCCC, "List of DOEs", online:  
<http://cdm.unfccc.int/DOE/list/index.html><sup>43</sup>

<sup>43</sup> The list of which DOEs are authorized to validate and verify in various sectoral scopes has changed slightly since this table was compiled in July 2007. However, for consistency with the data analysis presented in Section IV, I retain the list as it existed at the time.

and reforestation projects, unless it applies for and receives accreditation to do so. The project purchaser, usually a government, pays the DOE for both its validation and verification services.

Put simply, although eighteen appears to be a small number, when looking at the DOEs accredited in specific scopes, the number shrinks even further. There are only eight DOEs permitted to do *any* verification at all—a figure that has not changed in almost a year. Table 2 also shows the considerable overlap between those DOEs accredited to validate and verify. This is not surprising given that the majority of the DOEs are specialized in only one or two sectoral scopes. In earlier phases of the CDM, there were scopes in which there was only one DOE accredited to validate and verify, and hence was responsible for evaluating its own work. Thus, although in principle, these two activities must be undertaken by separate DOEs, in some cases this has not been possible. Hence, the EB has a little-publicized provision that permits this practice.<sup>44</sup> Accreditations have expanded such that there are at least two firms accredited in each scope. However, there are two sectoral scopes—mining/mineral production and metal production—in which there are only two accredited DOEs, guaranteeing that they will also be reviewing each others' work. This arrangement introduces possible incentives for reciprocity, which will be discussed in the following section.

#### *D. Accrediting the DOEs: The CDM-AP and the CDM-AT*

Since the activities of the DOEs hinge on their accreditation, it is worth a brief review of how that process works, and which actors are involved in deciding whether or not a DOE applying for accreditation is approved.<sup>45</sup> There are two panels that work under the EB in the accreditation of the DOE: the CDM Accreditation Panel (CDM-AP) and the CDM Assessment Team (CDM-AT). To apply to be accredited, applicants must pay a non-refundable US\$15,000 fee

<sup>44</sup> See UNFCCC, “Designation of an operational entity,” online: <<http://cdm.unfccc.int/DOE/grapgaccrproc.html>>, at fn. 1.

<sup>45</sup> See UNFCCC Executive Board, “Procedure for accrediting operational entities by the Executive Board of the Clean Development Mechanism” (2007). Report of the 34<sup>th</sup> Meeting of the Executive Board, Annex I, online: <[http://cdm.unfccc.int/Reference/Procedures/accr\\_proco1\\_v08.pdf](http://cdm.unfccc.int/Reference/Procedures/accr_proco1_v08.pdf)>. This is an extremely involved process, and the following only characterizes the main steps. It is sufficiently complicated that the Executive Board created a handbook for potential applicants. UNFCCC Executive Board, “Handbook of Accreditation of Operation Entities by the Executive Board of the CDM,” R-CDM-ACCR01, online: <[http://cdm.unfccc.int/Reference/Guidclarif/accr\\_handbook.pdf](http://cdm.unfccc.int/Reference/Guidclarif/accr_handbook.pdf)>.

(applicants from Non-Annex I countries only have to pay half of the fee up front) and cover the costs incurred by the accreditation teams.

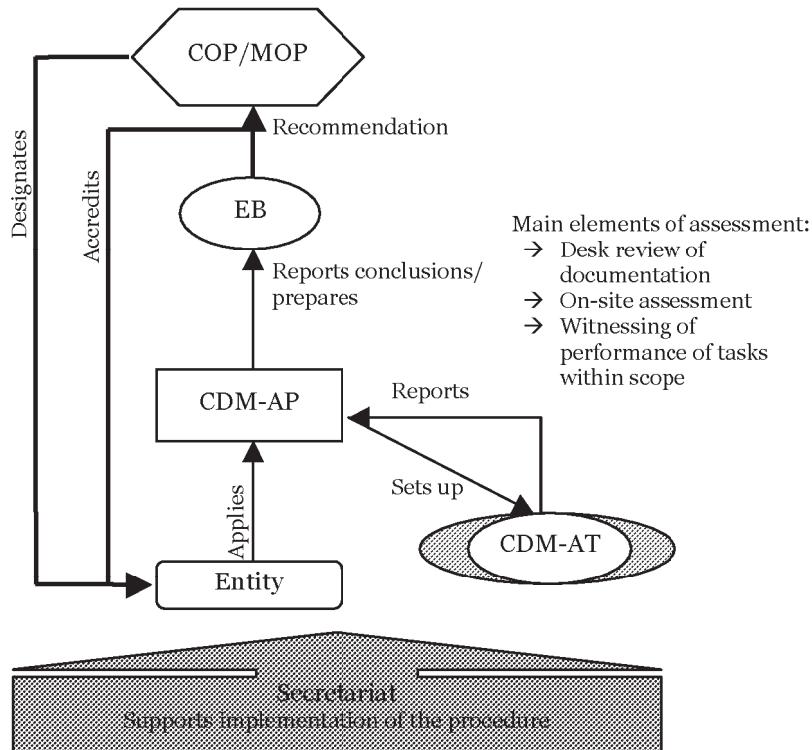
The Accreditation Panel is responsible for preparing the recommendation to the EB regarding the accreditation of the applicant. This recommendation is based on an in-depth evaluation undertaken by the Assessment Team, which involves a desktop review of the application; on-site assessment that verifies that the applicant is capable of carrying out tasks required by a DOE in a given sectoral scope; and witnessing of the performance of those tasks by the applicant.<sup>46</sup> Based on this evaluation, the Assessment Team prepares a document that details how the applicant performed, and makes its recommendation for consideration by the CDM-AP. Based on the input of the Assessment Team, the CDM-AP decides whether or not to recommend accreditation of the applicant to the EB. Figure 1 illustrates this process graphically. As we will see in the following section, this careful screening process is the first of a number of accountability mechanisms built into the CDM's design (in this case, *ex-ante*).

The CDM-AP and the CDM-ATs are composed of members of the Executive Board, as well as private actors who apply to be considered as experts to serve on each body. Provided that they meet the qualifications set forth in the respect terms of reference, they are added to a "Roster of Experts". The Executive Board then selects individuals from the Roster to carry out specific assessment activities.<sup>47</sup> The only stated selection criteria (beyond meeting the basic competency requirements) is ensuring a regional balance in the composition of the body. Experts do *not* have to be nominated by their governments. It is worth noting here that the CDM-AP in particular has expressed concern about the lack of experts available to undertake the necessary assessments, and has suggested contracting with a set of experts on a longer term basis. Recent rule changes to reflect this concern have removed any time limits on how long an expert may serve, and no longer limits them to serving on only one panel at a time.<sup>48</sup>

<sup>46</sup> The CDM-AP decides who will serve on the CDM-AT, but the Secretariat provides suggestions. Each CDM-AT must have at least three members, including the team leader. Depending on the size of the applicant firm, or the number of scopes the applicant is seeking accreditation for, the CDM-AT may be larger.

<sup>47</sup> UNFCCC Executive Board 2006, *supra* note 42 at Annex I.

<sup>48</sup> UNFCCC Executive Board, (2008) Report of the 37<sup>th</sup> Meeting of the Executive Board, online: <[http://cdm.unfccc.int/EB/037/eb37\\_repano1.pdf](http://cdm.unfccc.int/EB/037/eb37_repano1.pdf)> at Annex I, para. 24.



**Figure 1:** Accreditation procedures for DOEs

Source: UNFCCC EB-26 Meeting Report, Annex I.

#### IV. Accountability Mechanisms in principle and in practice

To help make sense of this complex institutional landscape, this section outlines some of the main mechanisms for accountability in the CDM—that is, the various ways in which the principal may constrain the DOEs once they have been accredited. I group these mechanisms into four broad categories: public participation, screening, accountability mechanisms and rights of review.<sup>49</sup> These draw from both the participatory and legal mechanisms emphasized by GAL as well as the control and sanctions mechanisms that are the focus of the P-A literature. I first examine what mechanisms exist; I

<sup>49</sup> For two varying conceptions of different accountability mechanisms see Grant & Keohane, *supra* note 25 and Richard Stewart, "Accountability and the Discontents of Globalization: US and EU Models for Regulatory Governance" (Paper presented to the Hauser Globalization Colloquium, September 2006), online: <[www.law.nyu.edu/kingsburyb/fallo6/globalization/Stewart,Accountability9-20-06.doc](http://www.law.nyu.edu/kingsburyb/fallo6/globalization/Stewart,Accountability9-20-06.doc)>.

then turn to an examination of the extent to which they have been used to challenge or overturn the recommendations of the DOEs.

#### *A. Accountability Mechanisms in Principle*

##### *i) Screening*

The principal-agent literature points to screening as an important protection against shirking. Principals can carefully screen agents to try to prevent delegating to those who they believe will be more likely to shirk.<sup>50</sup> As already detailed in the previous section, the accreditation process for DOEs is rigorous and lengthy. Reviews by the CDM-AP and CDM-AT ensure careful scrutiny of the applicant entity (the would-be DOE). Finally, each DOE must be accredited for specific scopes, thus ensuring that applicants have sufficient expertise in a given area, and that DOEs applying for additional scopes will be re-examined to ensure their competence.

##### *ii) Public participation*

As Cassese notes, participation rights—both on the domestic and global levels—are important because “process control or voice encourage people’s cooperation with authorities and lead to legitimacy.”<sup>51</sup> There are a number of provisions in the CDM that allow for public participation, or encourage it through transparency. First, all of the documentation, including meeting notes, is available on the website. Although meetings are not open to the public, interested groups can see webcasts of the meetings via the UNFCCC website. Second, when Executive Board meetings overlap with other meetings of the UNFCCC, EB members often meet with interested actors. Third, the project planning process requires public consultations. These consultations are not pro-forma; the states and firms participating in the project must demonstrate that the issues raised in these consultations were duly considered. Fourth, public participation is further encouraged through notice and comment

<sup>50</sup> The ally principle suggests that principals are more likely to delegate to agents whom they believe have preferences close to their own. On this point, see Jonathan Bendor, A. Glazer & T. Hammond, “Theories of Delegation” (2001) 95:4 Annual Review of Political Science 235.

<sup>51</sup> Sabino Cassese, “A Global Due Process of Law?” (Paper presented to the Hauser Globalization Colloquium, September 2006), online: <<http://www.law.nyu.edu/kingsburyb/fallo6/globalization/papers/Cassese.doc>>.

periods during which all methodologies under consideration are posted to the website. Similarly, the Project Design Document must be made available to the public for a 30-day period; project participants are required to show that they have considered any feedback received through this comment period.<sup>52</sup> Fifth and finally, participants in CDM projects, NGOs accredited with the UNFCCC or stakeholders affected by CDM projects may also participate through registering complaints with the EB about DOEs activities. (We will see that in practice this fifth mechanism is not used.)

These mechanisms for transparency and participation have had concrete effects. Large international environmental NGOs as well as smaller more focused groups such as CDMWatch and SinksWatch monitor the discussions and decisions made by the EB. They comment publicly or directly to the EB on current developments. In addition, the wealth of information has permitted independent analyses of the functioning of the CDM. Such an analysis led one researcher to conclude that there were “accounting tricks that allow participants to manufacture CERs at little or no cost.”<sup>53</sup> The recognition that the CDM allows the production of these “empty credits” has prompted the EB to respond to the problem.<sup>54</sup>

### *iii) Accountability*

There are two main types of accountability mechanisms present in the CDM structure: supervisory and legal. I discuss each in turn. By supervisory accountability, I refer to those situations where “one organization acts as principal with respect to specified agents.”<sup>55</sup> In this case, the EB serves as the principal, and the DOEs are the agents.

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<sup>52</sup> UNFCCC Executive Board, “Revised CDM-PDD form” (2006) Report of the 25<sup>th</sup> meeting of the Executive Board at Annex 15, online: <[http://cdm.unfccc.int/EB/025/eb25\\_repan15.pdf](http://cdm.unfccc.int/EB/025/eb25_repan15.pdf)>.

<sup>53</sup> Michael Wara, “Measuring the Clean Development Mechanism’s Performance and Potential” (2006) Working Paper #56, Programmes on Energy and Sustainable Development, Stanford University at 8.

<sup>54</sup> FCCC 2005, *supra* note 39 at Decision 8/CMP.1. The EB noted that “issuing certified emission reductions for hydrofluorocarbon-23 (HFC-23) destruction at new HCFC-22 facilities could lead to higher global production of HCFC-22 and/or HFC-23 than would otherwise occur and that the clean development mechanism should not lead to such increases.” UNFCCC, Subsidiary Body for Scientific and Technological Advice, 25th Sess., “Implications of the establishment of new hydrochlorofluorocarbon-22 (HCFC-22) facilities seeking to obtain certified emission reductions for the destruction of hydrofluorocarbon-23 (HFC-23)” FCCC/SBSTA/2006/MISC.11 (2006) at para. 1.

<sup>55</sup> Grant & Keohane, *supra* note 26 at 36.

The accreditation process for the DOEs is perhaps the most carefully monitored component of the CDM. This is logical, since the DOEs are at the core of a functioning market for CERs, and careful screening can help mitigate situations of wide preference divergence between agent and principal.<sup>56</sup> As discussed in the previous section, the accreditation process includes a long chain of actors, each responsible for reviewing and evaluating the work of the previous one. Thus, the Assessment Team reports to the Assessment Panel, which in turn makes a recommendation to the EB.

Once a DOE is accredited, the EB can review any recommendations that it finds questionable. The EB enlists the help of the Registration and Issuance Team to ensure that the DOEs have acted according to protocol and made appropriate decisions with respect to validating projects and certifying CERs. The Team is comprised of 34 members, selected from a public call for experts. Like the other experts described above, they are a self-selected group; they are *not* nominated by their governments.<sup>57</sup> Because they serve in their private capacity, the UNFCCC Secretariat was unwilling to share any information about them. Thus, it is unclear whether they have any links to the DOEs, personal or professional. However, they are required to disclose any potential conflicts of interest, which results in assigning a different expert to a given review.

In addition to oversight by the EB and the Registration and Issuance Team, the separation of validation from verification activities is intended to reduce the incentive for DOEs to approve projects solely to ensure that they receive payment. However, as discussed in the previous section, given the small number of DOEs accredited in certain sectoral scopes, this provision does not always apply. In some scopes, only one DOE is accredited to both validation and verification. Moreover, given the small number of DOEs, there could easily be an incentive to approve *other* DOEs' projects with the

<sup>56</sup> Nielson & Tierney, *supra* note 6.

<sup>57</sup> The original Terms of Reference for the Registration and Issuance team in November 2005 (at that point, simply the registration team) had six members on the team. Since then the number has grown incrementally to 34. See UNFCCC Executive Board, "Terms of Reference and Procedure for a Registration Team" (2005) Report of the 22<sup>nd</sup> meeting of the Executive Board at Annex 19, p. 2, online: <[http://cdm.unfccc.int/EB/022/eb22\\_repan19.pdf](http://cdm.unfccc.int/EB/022/eb22_repan19.pdf)>. See also UNFCCC Executive Board, "Procedures for Accrediting Operational Entities", *supra* note 45. The most recent figures were supplied to me through a personal communication, Judith Adrian 4 July 2007.

expectation that such a favor would be reciprocated. This possibility will be investigated further below.

Provisions for legal accountability of private actors involved in the CDM are less well-developed. Legal accountability can be understood as: “a participatory element in any legal system that allows citizens to sue powerful entities for failures of responsibility.”<sup>58</sup> The CDM currently relies on domestic legal systems for this type of accountability. DOEs, for example, are expected to have insurance coverage as well as “sufficient arrangements to cover legal and financial liabilities arising from its activities.”<sup>59</sup> There are no further specifications about legal consequences of failure to comply with CDM procedure. The most serious penalty is revocation of accreditation, though this has not yet occurred. Moreover, there is an unresolved issue about the legal status of non-state actors involved in the CDM’s various panels and working groups. These experts are understandably concerned about their potential liability in decisions taken based on their advice. Currently, these actors are not protected from legal action, though Parties have recognized that this presents potential legal problems. The Secretariat has taken some measures to address these issues, and discussions among the Parties are ongoing.<sup>60</sup> As Cafaggi points out, without enforceable liability rules, regulators may not have proper incentives to do their job or to do it well.<sup>61</sup> Thus far, these rules are not in place in the CDM.

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<sup>58</sup> Grant & Keohane, *supra* note 25 at 36.

<sup>59</sup> UNFCCC 2005, *supra* note 39 at Appendix A, para 1(d).

<sup>60</sup> At its May 2006 meeting, the Subsidiary Body for Implementation discussed how to address problem of “privileges and immunities” of those serving on expert review teams. See International Institute for Sustainable Development, “Twenty-Fourth Sessions of the Subsidiary Bodies of the UNFCCC and First Session of the *ad hoc* Working Group under the Kyoto Protocol: 17–26 May 2006” (2006) 12:306 Earth Negotiations Bulletin 1, online: <[www.iisd.ca/download/pdf/emb12306e.pdf](http://www.iisd.ca/download/pdf/emb12306e.pdf)> and UNFCCC, Subsidiary Body for Implementation, 24th Sess., “Administrative, financial and institutional matters. Privileges and immunities for individuals serving on constituted bodies established under the Kyoto Protocol”, UN Doc. FCCC/SBI/2006/L.10 (2006). For measures taken since then, see UNFCCC, 3d Sess., “Privileges and immunities for individuals serving on constituted bodies under the Kyoto Protocol: implementation of decision 9/CMP.2” UN Doc. FCCC/KP/CMP/2007/2 (2007).

<sup>61</sup> Fabrizio Cafaggi, “Rethinking Private Regulation in the European Regulatory Space” (2006) European University Institute Working Paper LAW no. 2006/13 at 44-56.

*iv) Rights of Review*

The governance of the CDM provides two separate opportunities for review and challenge of DOE and EB recommendations. In the beginning of the project cycle, before a project is formally registered, any actor participating in the project or the EB can request a review of the DOE's recommendation to the EB. In this case, the EB assembles a review team, which includes both EB members and members of the Registration and Issuance Team. The review team makes a recommendation to the EB, which then takes a final decision: to register the proposed project, to require changes to the proposed project or to reject it outright. The decision of the EB is final, though it is required to make public the reasons for its decision.

At the end of the project cycle, participants can also request a review before the final issuance of the CERs. This is largely to prevent against "fraud, malfeasance or incompetence of the designated operational entities."<sup>62</sup> In this situation, either a party involved in the project or three members of the EB can request a review after the CERs are certified but before they are formally issued.<sup>63</sup> The EB undertakes the review, and has thirty days to take a decision: to approve the issuance, to request further action by the DOE or to reject the issuance of CERs. In some situations, such as when the DOE is found to have conducted itself fraudulently, it may be asked to reimburse the EB for the cost of the review. Again, the decision of the EB is final and is not subject to appeal.

*B. Accountability Mechanisms in Practice*

As the previous section illustrates, there are multiple accountability mechanisms in place designed to constrain the DOEs and minimize shirking. The relevant question then becomes: Are they effective in practice? That is, to what extent do the DOEs act in ways that the principals want them to? In this section, I offer mixed evidence to answer this question.

Before doing so, a caveat is in order. Ideally, an evaluation of the empirical relationship between principal and agent would compare the functioning of the accountability mechanisms to a "perfect" system. Clearly, no such system exists. A second best

<sup>62</sup> UNFCCC 2005, *supra* note 39 at Annex III and Annex IV, para 2.

<sup>63</sup> See UNFCCC *supra* note 61 at Annex III. The rules of procedure were further clarified in UNFCCC Executive Board, "Procedures for Accrediting Operational Entities", *supra* note 45.

solution might be to compare the current CDM design to a counterfactual, which examined what the CDM would look like without any accountability mechanisms in place. Again, this is not possible. Thus, I make some assumptions about preferences of principal and agent, and conjectures about what types of conditions would adversely affect the current accountability mechanisms.

First, I scrutinize the relationship between the EB and the DOEs—by examining how often the EB disagrees with DOE recommendations in the registration of projects.<sup>64</sup> Then, I look at the substance of these disagreements. Although I cannot use the reasons given to infer the *intentions* of the DOEs (i.e. whether they meant to shirk or not), they do help shed light on whether the actions of the DOEs could have compromised the effectiveness of the CDM itself. Here I assume that the most important preference of the EB is to ensure the “additionality” of credits granted, and thus the credibility of the CDM as a market mechanism. Second, I investigate the possibilities for monopoly by looking at the distribution of validation and verification activities by the DOEs. The data here address the “market share” of the DOEs in practice. I also assume that monopoly provides the enabling conditions for shirking, since monopolists are less reliant on reputation to ensure their competitiveness.

The data are drawn from the Executive Board decisions taken from December 2004 (when the first projects were reviewed) to June 2007. During this time, the Executive Board registered 728 projects.<sup>65</sup> I coded all of the decisions that the EB took with respect to registration of projects. A total of 752 projects were submitted for registration. Of these, 24 were never registered: 20 were rejected by the EB, and four were withdrawn.<sup>66</sup>

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<sup>64</sup> I look only at the registration process, and not the decision by the EB to *issue* CERs, for two reasons. First, presumably the initial scrutiny of project design before registration is intended to eliminate problems with issuing credits toward the end of the process; thus, there may be systematic bias underestimating disagreement at the final stage of verification. Second, the N for issuance is too small to be illustrative. Only six projects have been formally reviewed at the stage of issuance, and of those, only two were rejected (suggesting that such bias may indeed exist). These figures come from an analysis of the dataset I compiled, and are also available on the CDM website; all data on file with the author.

<sup>65</sup> This includes all projects registered from 18 November 2004 (reported in the December meeting) to 8 July 2007. The total N for the analysis is 752 projects, which includes all of those projects which were rejected and withdrawn.

<sup>66</sup> Data compiled from CDM website, online: <<http://cdm.unfccc.int>>. All data on file with author.

The vast majority of projects, 81%, were registered without incident. That is, the EB did not require any changes of the documentation submitted, nor did they undertake a formal review. 144 of the 752 projects—about one-fifth—required additional scrutiny by the EB before registration was granted. Although there is no “optimal” level of review, this figure suggests that the EB is at least reasonable in exercising its oversight powers: it is neither wasting resources assessing every project that comes through, nor is it registering all projects without a second thought. As we will see, the substance of the EB’s concerns to those projects that are reviewed suggests that they are not frivolous in the objections that it does raise.

Of those projects that attracted the attention of the EB, the majority required only minor changes to their project documentation before registration. The EB can ask a DOE to clarify a particular issue in the project proposal and then grant registration upon the receipt of a satisfactory response, or it can grant registration outright, requiring small modifications. Once these modifications are received, the project is officially registered. The majority of projects that raised some EB objections, 63.8%, fall into the “minor revisions” category, and did not trigger a formal review.

Of greater interest are those projects which do trigger a formal review. These are relatively few in number: only 52 projects, or 7.1% of the total number of registered projects, underwent a review before being registered. Of these, 24 were subsequently accepted and 27 were rejected.<sup>67</sup> Because the number of reviewed projects is relatively small, I also examine which DOEs are involved in them, and the reasons given by the EB for acceptance or rejection.

Of the 52 reviewed projects, 46.1% were rejected and 51.9% were approved.<sup>68</sup> As Table 3 shows, the majority of reviewed projects—both accepted and rejected—were validated by Det Norske Veritas Certification AS (DNV). DNV also validated three projects that were eventually withdrawn from the registration process. This might suggest that DNV has a higher incidence of unsatisfactory work. However, when examined as a proportion of the total projects each DOE registered, the numbers change considerably. DNV has

<sup>67</sup> These numbers do not add up to 52 because there is one project that began the review process, but the EB said that it could not be completed, and no further record of the project exists. See CDM Executive Board, “Review Conclusions: Olavarria Landfill Gas Recover Project” (2005). Report of the 19<sup>th</sup> Meeting of the Executive Board, Annex 13, online: <<http://cdm.unfccc.int/EB/019/eb19repan13.pdf>>.

<sup>68</sup> Again, percentages do not add up to 100 for the reason stated in note 67.

validated nearly half of all CDM projects (see Figure 2 below); given this fact, the rate of rejection is quite small. The same is true for TUV Sud and SGS: Their overall rejection rates are quite low, given the large volume of projects they have validated. By contrast, some of the less active DOEs, such as AENOR and BVQI have the highest overall rejection rates.

DOE	Total number of projects registered by each DOE	Number of projects formally reviewed	Number of projects rejected after review	Rejection rate of those reviewed	Rejection rate over total number of projects registered by each DOE
AENOR	14	2	2	100%	14.3%
BVQI	40	5	4	80%	10%
DNV	374	18	14	77%	3.7%
JCI	3	1	0	0	0
JQA	10	2	0	0	0
SGS	92	6	4	66%	4.2%
TUV Sud	174	7	3	42%	1.7%

**Table 3:** Breakdown of projects registered, reviewed and rejected by DOE.

Source: Data compiled from UNFCCC, online: <<http://cdm.unfccc.int>>.

When the EB requests a review or rejects a project, it is required to give reasons for doing so. This requirement is not only a safeguard against arbitrary rulings, but also allows insight into the types of objections that the EB raises. As noted earlier, the frequency with which certain DOEs have their projects reviewed cannot show whether the gap between principals' expectations and agents' behaviour was intended by the DOE or simply an accident. Though the issue of intent cannot be definitively resolved, an examination of the types of objections stated by the DOE can help shed further light on the question of shirking.

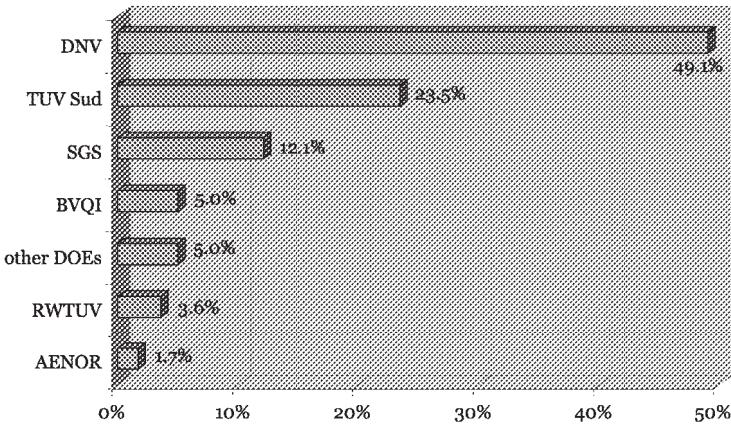
For each formal review, I recoded the reasons given by the EB into two categories: procedural and measurement-related. Procedural reasons for review include issues about the proper ways to fill out the project documents and validation reports; as well as the consultations, assessments and authorizations required in the process. Measurement reasons concern the choice of baselines and methodologies in measuring emissions, as well as evidence of

“additionality.” Additionality is at the crux of the CDM: without it, the credits issued have no value, and the CDM loses all environmental effectiveness and feasibility as a market mechanism. Since the primary function of the EB and its subsidiary bodies is to develop baselines and methodologies that ensure additionality, I assume that the main preference of the Executive Board is to ensure that all projects produce additional GHG reductions. I classify all reasons related to measurement as central to the issue of additionality.

67% of all reasons given by the EB for triggering a review were related to additionality (note that there may be more than one reason per project). Among those projects eventually rejected, 81% of the trigger reasons and 82% of the rejection reasons stated doubts about project additionality.

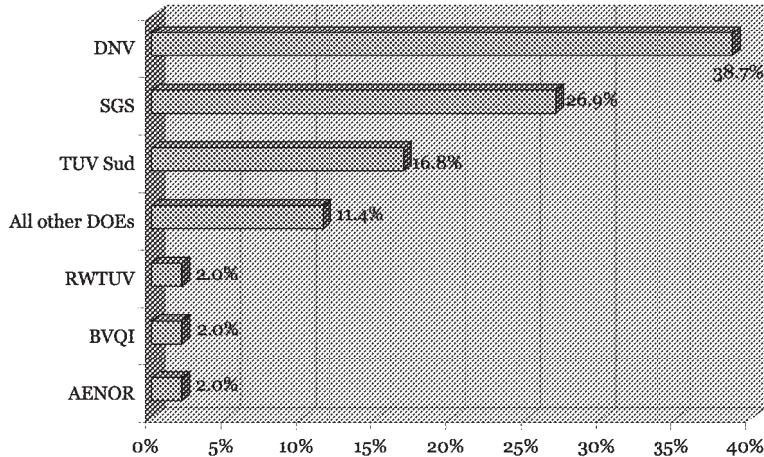
These figures have two important implications. First, the EB is invoking its oversight powers over concerns that are central to the efficacy and credibility of the CDM rather than for relatively less important procedural ones. Second, the dominance of additionality reasons as a trigger for review and a reason for rejection suggests that DOEs are not making small procedural errors in their evaluations of projects, but that there are more serious problems in need of attention. Again, one cannot then infer that such infractions were the product of intentional deception on the part of DOEs. Nonetheless, these miscalculations—whether by accident or intention—have significant implications for the efficacy of the CDM.

The overall rejection rates per DOE raise another important issue: the breakdown of validation activities across DOEs. As noted earlier, and shown in Tables 1 and 2, each DOE is only permitted to validate projects in the sectoral scope in which it is accredited to do so. Tables 1 and 2 show that the majority of DOEs—two-thirds of them—are accredited in four scopes or fewer. Only four DOEs are accredited in 10 or more scopes. An analysis of the number of projects validated by each DOE brings this divide into even sharper contrast. Two DOEs—DNV and TUV Sud—are responsible for the validation of fully 72.6% of CDM projects. When SGS is included, the figure rises to 84.7%. Figure 2 shows the percentage of projects each DOE has validated.



**Figure 2:** CDM projects validated, by DOE

Source: Data compiled from UNFCCC, online: <<http://cdm.unfccc.int>>.



**Figure 3:** CDM projects verified, by DOE

Source: Data compiled from UNFCCC, online: <<http://cdm.unfccc.int>>

Similar patterns exist for verification. After the project is underway, DOEs verify that the stated activities and reductions have indeed occurred, and recommend whether credits should be issued. Figure 3 shows that the same three firms—DNV, TUV Sud and SGS—

dominate the verification process as well, representing 84% of all projects verified.<sup>69</sup>

As mentioned earlier, the modalities of the CDM mandate that different DOEs undertake the validation and verification of each project to avoid potential conflict of interest (a given DOE would have an incentive to approve projects to please its client). There is a provision that allows for exceptions, and an analysis of the projects that have been verified shows that it is invoked quite frequently. 27% of all projects for which credits have been issued were validated and verified by the same DOE. Table 4 breaks down this figure by DOE. The three biggest DOEs have a fewer number of projects for which they served as both validator and verifier, though the percentages are still quite high—much higher than the occasional exception that is outlined in the CDM modalities.

DOE	Number of projects validated	Of validated projects, number "auto-verified" (by the same DOE)	Percentage of projects validated and verified by same DOE
AENOR	6	3	50%
BVQI	35	13	37%
DNV	116	37	32%
JACO	1	1	100%
RWTUV	6	5	83%
SGS	81	6	7%
TUV Sud	51	14	27%

**Table 4:** Projects validated and verified by the same DOE

Source: Data compiled from UNFCCC, online: <<http://cdm.unfccc.int>>

It is also noteworthy that the three most active DOEs often validate or verify each others' projects—increasing the potential payoff of reciprocity. Since it is extremely likely that one of two firms will be verifying the work of the third, there is a benefit to approving their projects increases, as well as a potential cost to not doing so. DNV, SGS and TUV Sud verify each others' work very frequently within the framework of the CDM. When DNV serves as validator,

<sup>69</sup> As of 19 July 2007, there have been 296 separate verifications, though these include multiple verifications of the same project during different time periods. See UNFCCC, "CERs Issued," *supra* note 2 for a complete list.

SGS and TUV Sud verify its work in 80% of projects. When SGS validates, TUV Sud and DNV together verified 96% of its projects. The same proportion was true of TUV Sud, which had 96% of the projects it validated and verified by DNV and SGS.

Figures 2 and 3 and Table 4 reaffirm that the concerns about monopoly are valid. A small number of firms lowers competition among them, and the importance of maintaining reputation to ensure business. In turn, this increases the possibility that DOEs can engage in shirking or rent-seeking behaviour without consequence. In the case of validation of projects, rent-seeking behaviour would mean that DOEs sign off on projects that may not abate GHG emissions, or do not do so at the level stated in the project's documentation. There is a risk of monopoly with a small number of firms, but this risk is exacerbated by the fact that an even smaller number—only three—represent almost three-quarters of all validation activities. Admittedly, concerns about shirking could be mitigated by the fact that the review and rejection rates for these three DOEs are relatively low. However, these low numbers could also be construed as evidence that these three DOEs are simply more practiced at presenting projects in a favorable light and escaping formal reviews.

There are three additional factors which may affect the functioning of the accountability mechanisms in practice. Again, there is no “ideal” system of accountability to which we can compare the CDM; this makes evaluating the facts more challenging. However, there are three reasons that suggest that the accountability mechanisms are not working as well as their designers intended. First, although project participants are invited to monitor the behaviour of the DOEs, there are *no instances* of this type of “fire alarm” monitoring. The CDM modalities provide that a request from a project participant may also trigger a formal review of a DOE’s validation, but as described above, all formal reviews were triggered by EB requests, not by participants. This is not surprising: it is in the fiscal interest of the project participants to ensure that the project is approved and the credits issued. Thus, this monitoring mechanism has thus far proven to be without impact.

Second, the volume of projects (especially the recent influx) taxes the ability of the EB to examine each one thoroughly. Indeed, it was precisely because of the number of projects and the amount of work of the EB that the “conditional” registration procedure was put

in place.<sup>70</sup> This change allows the EB to request changes of projects without the lengthy review process. The steady increase in the number of projects registered in this manner over the short life of the EB is testimony that the costly and time-consuming process of a formal review is not feasible in many cases, given the sheer volume of projects.

Finally, as mentioned earlier, the EB works with members of the Registration and Issuance Team to undertake reviews of the DOEs submissions when needed. However, there are only 32 members on the team.<sup>71</sup> One member of the R&I Team must serve on each review; currently there are 43 projects either under review or for which a review has been requested.<sup>72</sup> The heavy workload for the EB in general, and the R&I Team in particular, is a hindrance to the effective implementation of the oversight mechanisms in place. It increases the likelihood that some projects will not be reviewed, or only cursorily reviewed to facilitate the functioning of the CDM and prevent bottlenecks in the process.

In sum, this analysis presents a mixed assessment of the behaviour of the DOEs as private agents and the functioning of the accountability mechanisms in place to constrain their behaviour. One on hand, the EB appears to be taking its oversight role seriously—but not so seriously as to cripple the registration process with innumerable reviews. It formally reviews only about 7% of all projects, but has developed streamlined processes through which projects requiring smaller adjustments may be revised as needed, and it has made thorough use of this new capacity. The EB is also trying to standardize procedures for the DOEs and for the evaluation of their work. It is in the process of creating a “validation and verification manual” to create a clear and transparent standard for

<sup>70</sup> UNFCCC 2005, *supra* note 39 at Annex 15. Paragraph 10 states: “If the Board decides to register the activity it may do while requesting the DOE and project participants to make corrections based on the findings from its consideration of the request of review before proceeding with registration. This revised documentation shall be checked by the secretariat, in consultation with the registration team member and/or the Chair of the Executive Board, if needed, before the activity is displayed as registered.”

<sup>71</sup> As of 22 April 2008. Members of the Registration and Issuance Team can be found at: UNFCCC, “Registration and Issuance Team (RIT),” online, <<http://cdm.unfccc.int/Panels/RIT/index.html>>.

<sup>72</sup> This figure is as of 1 July 2008. The updated tally of projects under review and for which there is a request for review is compiled by the UNFCCC, “Project Activities,” online: <<http://cdm.unfccc.int/Projects/index.html>>.

DOEs as they evaluate individual projects.<sup>73</sup> Even if the manual does not have the desired effect of improving consistency of outputs, it will clarify and codify the expectations set out for the DOEs, increasingly procedural accountability.

On the other hand, the dominance of a small sub-group within an already small number of DOEs raises legitimate concerns about monopoly. One might argue that this is simply due to the fact that this is a new market, and it will take time for firms to develop the expertise to be accredited. This may be true; however, the slow pace of the accreditation perpetuates existing possibilities for monopolistic behaviour. There are only eleven additional firms that have applied to become DOEs (four of these have done so only in the last three months). Moreover, this is a lengthy process. There are some firms that have been waiting three or even four years for the final elements of their assessments to be completed, and their accreditation to be formally granted.<sup>74</sup> Thus, an influx of a large number of DOEs in the near future seems unlikely. Eventually, new DOEs will be accredited, but the key question is, will the rate of accreditation keep pace with the demand for validation and verification of a large number of new projects? Until there are many more DOEs accredited in a range of sectoral scopes, concerns about monopoly—and the associated risks of shirking—will persist.

As noted earlier, the evaluation of the accountability of DOEs in the CDM is based largely on the principal-agent framework. In evaluating whether DOEs are accountable to the EB, I have asked, “To what extent do they perform according to the preferences of the EB?” The answer is clearly mixed. This suggests that future research might examine more closely other “GAL”-type mechanisms, such as participation, rights of review or legal coherence. This analysis would

<sup>73</sup> The Parties first requested the document in UNFCCC 2007, 3d Sess., “Further Guidance on the Clean Development Mechanism” FCCC/KP/CMP/2007/L.3 (2007) at para 15.

<sup>74</sup> This delay is due to the ‘witnessing’ requirement. The CDM-Assessment Panel, which is responsible for evaluating whether or not an applicant should be accredited, must witness the firm undertaking the activities, to whether the applicant is truly competent in implementing the tasks, procedures and policies needed in both validation and verification of projects. The CDM-AP must witness in each scope for which the applicant applies, and in both validation and verification processes. See UNFCCC Executive Board, “Procedure for accrediting operational entities by the Executive Board of the Clean Development Mechanism” (2007). Report of the 34<sup>th</sup> Meeting of the Executive Board, Annex I, online: <[http://cdm.unfccc.int/Reference/Procedures/accr\\_proco1\\_v08.pdf](http://cdm.unfccc.int/Reference/Procedures/accr_proco1_v08.pdf)>.

help give a fuller picture of the degree to which these private agents are accountable.

### **Conclusion**

This paper has analyzed the principal-agent relationship as embodied in the Clean Development Mechanism of the Kyoto Protocol. The data paint a mixed picture of the accountability of the agents. Oversight by the EB appears to be working reasonably well, but conditions for monopoly and collusion are ripe. The accountability mechanisms put in place in the CDM allow the EB a certain degree of control over the DOEs. Given limited human and financial resources, the EB has done a reasonable job of requiring changes to problematic projects, and denying registrations to those deemed unacceptable. Their concerns about additionality suggest earnest efforts at preserving the environmental efficacy of the CDM. However, because perfect control of agents is impossible, it is difficult to know how many projects get approved without meeting the EB's additionality criteria. This is complicated by the fact that the measurement issues involved with GHG abatement are extremely complex, and quite new.

Because of these difficulties, and because one cannot know the true preferences of the DOEs, it is impossible to know how much shirking is occurring. However, it is clear that the conditions are ripe for DOEs to exploit their position as quasi-monopolists on the market. Moreover, the high level of interaction between DOEs as validators and verifiers of each others' work increases the incentive for collusion.

The CDM was a pivotal piece of the political bargain that enabled both the drafting and the ratification of the Kyoto Protocol.<sup>75</sup> It will likely persist in the next incarnation of the Kyoto Protocol. Moreover, as other emission trading markets expand, their relationship to the CDM—the largest intergovernmentally-agreed market mechanism—will be of great importance. But the proper functioning of the CDM relies on honest behaviour of the DOEs; thus a fully functional and *sustainable* system for monitoring them will be paramount to the future of emissions trading.

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<sup>75</sup> David Victor, *The Collapse of the Kyoto Protocol and the Struggle to Slow Global Warming* (Princeton: Princeton University Press, 2001).

<b>Sectoral Scope</b>	<b>DOEs accredited for validation</b>	<b>DOEs accredited for verification</b>	
1 – Energy industries (renewable - / non-renewable sources)	JQA DNV-CUK SGS-UKL TUEV-SUED TUEV-RHEIN JACO JCI AENOR BVQI	KPMG RWTUV KEMCO KFQ TECO BSI PriceWaterhouse- Coopers LRQA Ltd	DNV-CUK SGS-UKL TUEV-SUED JACO AENOR BVQI RWTUV ICONTEC
2 – Energy distribution	JQA DNV-CUK SGS-UKL TUEV-SUED TUEV-RHEIN JACO JCI AENOR	BVQI KPMG RWTUV KFQ TECO BSI PriceWaterhouse- Coopers LRQA Ltd	DNV-CUK SGS-UKL TUEV-SUED JACO AENOR BVQI RWTUV ICONTEC
3 – Energy demand	JQA DNV-CUK SGS-UKL TUEV-SUED TUEV-RHEIN JACO AENOR BVQI	KPMG RWTUV KFQ TECO BSI PriceWaterhouse- Coopers LRQA Ltd	DNV-CUK SGS-UKL TUEV-SUED JACO AENOR BVQI RWTUV ICONTEC
4 – Manufacturing industries	JQA DNV-CUK SGS-UKL	TUEV-SUED RWTUV LRQA Ltd	DNV-CUK SGS-UKL TUEV-SUED
5 – Chemical industries	JQA DNV-CUK SGS-UKL	TUEV-SUED RWTUV LRQA Ltd	DNV-CUK SGS-UKL TUEV-SUED
6 – Construction	JQA DNV-CUK SGS-UKL	TUEV-SUED RWTUV LRQA Ltd	DNV-CUK SGS-UKL TUEV-SUED

**Table 2:** List of DOEs by Sectoral Scope. Continued on page 55.Source: UNFCCC, online: <<http://cdm.unfccc.int/DOE/scopes.html>, July 2007>.

<b>Sectoral Scope</b>	<b>DOEs accredited for validation</b>		<b>DOEs accredited for verification</b>
7 – Transport	JQA DNV-CUK SGS-UKL	TUEV-SUED RWTUV LRQA Ltd	DNV-CUK SGS-UKL TUEV-SUED
8 – Mining/ mineral production	DNV-CUK TUEV-SUED		DNV-CUK TUEV-SUED
9 – Metal production	DNV-CUK TUEV-SUED		DNV-CUK TUEV-SUED
10 – Fugitive emissions from fuels (solid, oil and gas)	JQA DNV-CUK SGS-UKL	TUEV-SUED RWTUV LRQA Ltd	DNV-CUK SGS-UKL TUEV-SUED
11 – Fugitive emissions from halocarbons and SF <sub>6</sub>	JQA DNV-CUK SGS-UKL	TUEV-SUED RWTUV LRQA Ltd	DNV-CUK SGS-UKL TUEV-SUED
12 – Solvent use	JQA DNV-CUK SGS-UKL	TUEV-SUED RWTUV LRQA Ltd	DNV-CUK SGS-UKL TUEV-SUED
13 – Waste handling and disposal	JQA DNV-CUK SGS-UKL TUEV-SUED TUEV-RHEIN	JCI KPMG RWTUV LRQA Ltd	DNV-CUK SGS-UKL TUEV-SUED
14 – Afforestation and reforestation	TUEV-SUED		
15 – Agriculture	DNV-CUK SGS-UKL TUEV-SUED		DNV-CUK SGS-UKL TUEV-SUED

**Table 2, cont.**: List of DOEs by Sectoral Scope. Continued from page 54.

Source: UNFCCC, online: <<http://cdm.unfccc.int/DOE/scopes.html>, July 2007>

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# A Long ‘TRIP’ Home: Intellectual Property Rights, International Law and the Constructivist Challenge

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## Introduction

The question of why sovereign states comply with the seemingly powerless rules of international law has engaged scholars for decades. Over the years, international relations scholars have sought to formulate compliance theories in their myriad attempts to unravel the complex factors and processes that animate state behaviour in the international legal order. The debate amongst compliance scholars has centred largely on the issue of whether coercive measures such as military force and sanctions can play a viable role in the design and management of international regimes.<sup>1</sup> These scholars may be broadly divided into two camps: the “enforcement school”, which advocates the use of punitive mechanisms to punish errant conduct, and the Chayes’ “managerial school”,<sup>2</sup> which proposes that compliance is more effectively fostered through dialogic interactions between states that seek to persuade and socialize, rather than

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<sup>1</sup> See, generally, Kenneth W. Abbott, “Modern International Relations Theory: A Prospectus for International Lawyers” (1989) 14 Yale J. Int’l L. 335; Kenneth W. Abbott, “The Trading Nation’s Dilemma: The Functions of the Law of International Trade” (1985) 26 Harv. Int’l L.J. 501; Kenneth W. Abbott, “‘Trust But Verify’: The Production of Information in Arms Control Treaties and Other International Agreements” (1993) 26 Cornell Int’l L.J. 1; Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge: Harvard University Press, 1995); George W. Downs, David M. Rocke and Peter N. Barsoom, “Is the Good News about Compliance Good News about Cooperation?” (1996) 50 Int’l Org. 379; Kyle Danish, “Management v. Enforcement: The New Debate on Promoting Treaty Compliance” (1997) 37 Va. J. Int’l L. 789; George W. Downs, “Enforcement and the Evolution of Cooperation” (1998) 19 Mich. J. Int’l L. 319; 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; Jutta Brunnée & Stephen J. Toope, “Persuasion and Enforcement: Explaining Compliance with International Law” (2002) 13 Finnish Ybook. Int’l L. 273.

<sup>2</sup> See Chayes & Chayes, *ibid.*

coerce, them into voluntary adherence to the principles of international law.

While international lawyers and international relations theorists have traditionally focussed their energies on issues of compliance relating to areas of international law such as the use of force,<sup>3</sup> environmental law,<sup>4</sup> and human rights,<sup>5</sup> relatively few scholars have studied the field of international intellectual property regulation from a “compliance theory” perspective. In this article, I seek to explore some of the major compliance issues arising under the Agreement on Trade-Related Aspects of Intellectual Property Rights<sup>6</sup> (the “TRIPS Agreement”), which entered into force in 1995 under the purview of the World Trade Organization (“WTO”). By engaging in the study of intellectual property regulation at the multilateral level, I seek to draw connections between compliance theory and intellectual property law-disciplines that, until fairly recently, have had few intersections.<sup>7</sup> In my view, the growing interdisciplinary interest in compliance theory has inspired a vast and rich body of scholarship

<sup>3</sup> See Oscar Schachter, “In Defence of International Rules on the Use of Force” (1986) 53 U. Chicago L. Rev. 113; Niels Blokker, “Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by ‘Coalitions of the Able and Willing’” (2000) 11 Eur. J. Int'l L. 541.

<sup>4</sup> See James Cameron, Jacob Werksman & Peter Roderick, eds., *Improving Compliance with International Environmental Law* (London: Earthscan, 1996); David Victor, Kal Raustiala & Eugene B. Skolnikoff, eds., *The Effectiveness of International Environmental Commitments: Theory and Practice* (Cambridge, MA: MIT Press, 1998); Daniel Bodansky, “The Legitimacy of International Governance: A Coming Challenge for International Environmental Law” (1999) 93 Am. J. Int'l L. 596; Jutta Brunnée, “A Fine Balance: Facilitation and Enforcement in the Design of a Compliance Regime for the Kyoto Protocol” (2000) 13 Tulane Env. L.J. 223.

<sup>5</sup> See generally Harold Hongju Koh, “How Is International Human Rights Law Enforced?” (1998) 74 Ind. L.J. 1397; Linda Camp Keith, “The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?” (1999) 36 J. Peace Res. 95; Douglass Cassel, “Does International Human Rights Law Make a Difference?” (2001) 2 Chi. J. Int'l L. 121; Oona A. Hathaway, “Do Human Rights Treaties Make a Difference?” (2002) 111 Yale L.J. 1935; Ryan Goodman & Derek Jinks, “Measuring the Effects of Human Rights Treaties” (2003) 14 European Journal of International Law 171; Oona A. Hathaway, “Testing Conventional Wisdom” (2003) 14 European Journal of International Law 185.

<sup>6</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 1197 (1994).

<sup>7</sup> See Peter M. Gerhart, “Reflections: Beyond Compliance Theory—TRIPS as a Substantive Issue” (2000) 32 Case W. Res. J. Int'l L. 357, who notes, at 357, that “[t]his symposium proposes a union between compliance scholars and intellectual property scholars...apparently the two disciplines had not met before.”

from which intellectual property regulation, as an emerging field of international law, can draw valuable insights.

Intellectual property laws, which govern rights arising in products of creative or innovative endeavour,<sup>8</sup> have traditionally been the subject of sovereign jurisdiction, and implemented along geopolitical lines.<sup>9</sup> However, the advent of global free trade has challenged this state-centric paradigm by raising questions of applicable standards and jurisdiction as intellectual property goods cross national borders.<sup>10</sup> The "internationalization" of intellectual property norms, driven largely by the desire of innovation-rich countries for more rigorous and harmonized standards of protection,<sup>11</sup> has provided international lawyers with the opportunity to revisit their debate on the proper roles of enforcement and persuasion in the design of multilateral regimes. In particular, the TRIPS Agreement's introduction of punitive measures, traditionally used to discipline errant conduct in the realm of international trade,<sup>12</sup> to the sphere of intellectual property regulation has sparked renewed interest in the efficacy of sanctions in generating compliance and normative change in the international legal order.<sup>13</sup>

<sup>8</sup> W.R. Cornish, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, 4<sup>th</sup> ed. (London: Sweet & Maxwell, 1999) at 3-4.

<sup>9</sup> *Ibid.* at 343.

<sup>10</sup> *Ibid.*

<sup>11</sup> See Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis, *The World Trade Organization: Law, Practice and Policy* (New York: Oxford University Press, 2003), who note, at 397, that the entry into force of the TRIPS Agreement is largely an affirmation of the position of the industrialized world in the trade and intellectual property debate. See also Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis*, 2d ed. (London: Sweet and Maxwell, 2003), who observes the hegemonic role played by the United States in forging the link between intellectual property and trade; and Paul Goldstein, *International Intellectual Property Law* (New York: Foundation Press, 2001).

<sup>12</sup> Under Article 22 of the WTO's Dispute Settlement Understanding ("DSU"), the Dispute Settlement Body ("DSB") of the WTO may discipline member states that fail to rectify their conduct in accordance with WTO panel recommendations. The DSB may authorize the suspension of trading concessions against these member states. Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 33 I.L.M. 1197 (1994).

<sup>13</sup> See generally J.H. Reichman, "Compliance with the TRIPS Agreement: Introduction to a Scholarly Debate" (1996) 29 Vand. J. Transnat'l L. 363; J.H. Reichman, "The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?" (2000) 32 Case W. Res. J. Int'l L. 441; Kal Raustiala, "Compliance & Effectiveness in International Regulatory Cooperation" (2000) 32 Case W. Res. J. Int'l L. 387; Graeme

Since 1995, the “marriage”<sup>14</sup> between international trade regulation and intellectual property law under the institutional framework of the TRIPS Agreement has attracted commentary from many intellectual property lawyers. Interestingly, although the great majority of TRIPS commentators have not explicitly used “compliance theory” as their “optic of analysis”, many of them have expressed a preference for gentler, more consultative methods of regime management over formal, coercive and confrontational dispute resolution mechanisms. Their recommendations appear to derive insights from managerial theory, although the link has not been explicitly acknowledged.

In this article, I seek to build upon the existing commentary on the implementation of the TRIPS Agreement by exploring how a more explicit connection between compliance theory and intellectual property regulation offers valuable insights on the challenges of TRIPS regime management. Although many TRIPS commentators and intellectual property lawyers have correctly challenged the wisdom of uncritically relying on coercive measures to improve compliance, their recommendations have been pitched largely at the “horizontally”-oriented interactions between states. I argue that this horizontal, “inter-state” focus of the TRIPS debate neglects important dimensions of the compliance question. By drawing upon Harold Koh’s transnational legal process theory, I suggest that an overlooked aspect of the TRIPS compliance problem concerns the vertical transmission belt through which international norms filter down into domestic society<sup>15</sup> and are internalized or, metaphorically speaking,

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B. Dinwoodie and Rochelle C. Dreyfuss, “TRIPS and the Dynamics of Intellectual Property Lawmaking” (2004) 36 Case W. Res. J. Int’l L. 95; Laurence R. Helfer, “Mediating Interactions in an Expanding Intellectual Property Regime” (2004) 36 Case W. Res. J. Int’l L. 123; Gerhart, *supra* note 7.

<sup>14</sup> Gerhart, *ibid.* at 357.

<sup>15</sup> See Harold Hongju Koh, “Transnational Legal Process” (1996) 75 Nebraska L. Rev. 181 at 183–84, where Koh suggests that the crucial link in the puzzle of state compliance is the incorporation of shared norms into the internal value system of domestic and transnational actors within nation states through a process of norm interaction, interpretation and internalization. See also Harold Hongju Koh, “Bringing International Law Home” (1998) 35 Hous. L. Rev. 623 at 625–626: “Instead of focusing exclusively on the issues of “horizontal jawboning” at the state-to-state level as traditional international legal process theories do, a transnational legal process approach focuses more broadly upon the mechanisms of “vertical domestication,” whereby international law norms “trickle down” and become incorporated into domestic legal systems.”

"brought home"<sup>16</sup> by individuals and other non-state actors at the grassroots level. The absence of norm internalization by domestic communities in the TRIPS regime constitutes, in my view, an important explanation for why intellectual property infringement and piracy continue to be a problem on a global scale, despite the sanction-backed provisions of the TRIPS Agreement. I also offer some thoughts on *why* the TRIPS Agreement appears to have had little success in fostering voluntary obedience by domestic actors, and explore the "norm-based" and socio-political barriers to norm transmission that limit the effectiveness of transnational legal process in generating pathways of compliance with *existing* multilateral standards of intellectual property protection. Taking into account the features and peculiarities of the TRIPS legal and political landscape, I locate the power of transnational legal process in its capacity to engage domestic norm entrepreneurs in the *reconstruction* of existing understandings of intellectual property law, through emerging and non-conventional sites of transnational activity.

In Part I of this article, I explore the historical beginnings of the TRIPS Agreement and outline some of the major compliance problems that continue to plague intellectual property relations between states in the post-TRIPS era. I also survey the scholarly response to the TRIPS Agreement, and attempt to draw parallels between some of the recommendations made and insights gleaned from managerial theory. In Part II, I provide an overview of Harold Koh's transnational legal process theory and discuss Koh's critique of the managerial thesis. Finally, in Part III, I apply transnational legal process theory to the TRIPS Agreement, and explain how the lack of norm internalization by consumers at the domestic level furnishes an important explanation for continuing non-compliance by states in the intellectual property law context. I also highlight the role that transnational legal process can play in *reconstructing* existing understandings of intellectual property law through a shared dialogue about the proper balance to be drawn between its competing objectives of monopoly protection and the dissemination of knowledge to the public.

<sup>16</sup> Koh, "Bringing International Law Home", *ibid.* at 626: "[H]ow, precisely, do nations "internalize" or "domesticate" international law—what I will call in this lecture "bringing international law home"?"

## **I. An Overview of the TRIPS Agreement: History, Institutional Design and the Compliance Debate**

### *A. A Brief History*

Prior to the Uruguay Round negotiations of the GATT, intellectual property and trade were, for the most part, separate fields of international law. The earliest attempts to harmonize intellectual property standards at the multilateral level culminated in the adoption of a number of treaties, including the Paris Convention for the Protection of Industrial Property 1883<sup>17</sup> and the Berne Convention for the Protection of Literary and Artistic Works 1886,<sup>18</sup> both of which are currently administered by the World Intellectual Property Organization ("WIPO"). Around the 1970s, developed country members of these WIPO treaties began to express increasing concern that the WIPO treaty system failed, firstly, to establish adequate substantive standards of intellectual property protection, and secondly, to provide adequate mechanisms for enforcing treaty obligations.<sup>19</sup> They argued in favour of laying out more stringently defined standards and building up the institutional muscle necessary to enforce those standards.

These arguments were met with opposition from the developing countries, who were not persuaded that altering the existing WIPO system to strengthen intellectual property standards was necessary or appropriate.<sup>20</sup> Most of these countries felt that

<sup>17</sup> Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, as last revised at Stockholm, July 14, 1967, 25 Stat. 1372, 828 U.N.T.S. 305. The Paris Convention was signed in Paris, France on March 20, 1883 and sought, among other things, to establish, among state parties, minimum standards of protection for different forms of industrial property, such as patents, trade marks, utility models and industrial designs.

<sup>18</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised at Paris, July 24, 1971, S. Treaty Doc. No. 99-27, 828 U.N.T.S. 221. The Berne Convention was adopted in Berne, Switzerland, in 1886 and was instrumental in laying down the foundations for the mutual recognition and protection of copyright works between member states. Among other things, the Berne Convention stipulated that member states were to provide copyright protection in respect of authorial works for the life of the author plus fifty years (minimum term), although parties were free to provide longer terms of protection if they so wished. The European Union chose to do so, with its 1993 Directive on Harmonizing the Term of Copyright Protection, extending the term of its copyright protection to seventy years after the death of the author.

<sup>19</sup> See UNCTAD-ICTSD Project on IPRs and Sustainable Development, *Resource Book on TRIPS and Development* (New York: Cambridge University Press, 2005) at 3.

<sup>20</sup> *Ibid.*

intellectual property law was not sufficiently welfare-enhancing or economically advantageous for it to play a more pronounced role in their domestic legal systems.<sup>21</sup> Instead, they felt that their interests would be better protected if more emphasis were to be placed on the transfer of technology from developed to developing countries as well as on the limitation and stringent regulation of the exercise of IPRs in the legal systems of developing countries.<sup>22</sup>

Despite opposition from the developing countries, the developed countries eventually managed to shift negotiations on IPRs from the institutional framework of the WIPO to that of the General Agreement on Tariffs and Trade ("GATT").<sup>23</sup> It is important to note, however, that intellectual property standards were not the sole or even the central motivation behind the Uruguay Round negotiations. In fact, an initial issue faced by GATT negotiators prior to the commencement of the Uruguay Round was whether IPRs were sufficiently "trade-related" in order to constitute suitable subject

<sup>21</sup> It has been observed by Michael J. Trebilcock and Robert Howse that according to neoclassical trade theory, whether a particular country wants stronger or weaker intellectual property protection depends on whether its comparative advantage lies more in innovation or in the imitation of existing technologies. Trebilcock and Howse note that a country's comparative advantage in this respect is not necessarily directly related to its level of development. They cite examples of developed countries such as Canada and Japan, which have amassed much of their economic wealth from the imitation and adaptation of technologies that were first invented elsewhere. See Michael J. Trebilcock & Robert Howse, *The Regulation of International Trade*, 2<sup>nd</sup> ed. (London and New York: Routledge, 1999) at 310. Trebilcock and Howse also argue that stronger intellectual property laws are not necessarily welfare enhancing from an economic efficiency perspective as it is doubtful whether the increased rents obtained by intellectual property owners outweigh the detriment suffered by "imitator" nation states. See Trebilcock and Howse, *op. cit.*, at 311. In a similar vein, Alan Deardorff suggests that uniformly-strong intellectual property laws reduce the net benefits derived by the international community and that a suspension of such laws might in fact lead to a net welfare gain in nations whose comparative advantage lies in imitation of existing technologies. See Allan Deardorff, "Should Patent Protection Be Extended to All Developing Countries?" (1990) 13 World Economy 497.

<sup>22</sup> See generally, Frederick M. Abbott, "Bargaining Power and Strategy in the Foreign Investment Process: A Current Andean Code Analysis" (1975) 3 Syracuse J. Int'l L. & Com. 319, where he discusses the technology regulations put in place by the Andean Community in the early 1970s to limit and regulate the exercise of IPRs; Surendra J. Patel, Pedro Roffe & Abdulqawi Yusuf, *International Technology Transfer: The Origins and Aftermath of the United Nations Negotiations on a Draft Code of Conduct* (The Hague: Kluwer Law International, 2000); Susan Sell, *Power of Ideas: North-South Politics of Intellectual Property and Antitrust* (New York: State University of New York Press, 1998).

<sup>23</sup> General Agreement on Tariffs and Trade (GATT), Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.

matter for discussion at an international trade forum. Nevertheless, the Uruguay Round went into session in 1986, and IPRs were introduced for the first time into international trade negotiations. Developing countries generally remained resistant to the idea of more stringent intellectual property standards,<sup>24</sup> but their objections were suppressed by the developed countries through a combination of concessions (on agriculture and textiles) and threats of trade sanctions.<sup>25</sup>

The TRIPS Agreement represented a fulfillment of the developed countries' wishes in several respects. Firstly, it made the major substantive provisions of the Berne and Paris Conventions binding on all members of the WTO.<sup>26</sup> This meant that a much larger membership of nations was required by international law to abide by a common set of international intellectual property standards. Secondly, the TRIPS Agreement introduced new obligations above and beyond those enshrined in its predecessor intellectual property treaties, bringing a heightened level of specificity and stringency to the protection of IPRs in the international context.<sup>27</sup> Thirdly, there were provisions in the TRIPS Agreement that were designed to give member states some degree of "wiggle room"<sup>28</sup> or flexibility in incorporating TRIPS standards into their domestic legislation.<sup>29</sup>

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<sup>24</sup> There was, however, some sympathy among the developing countries for providing basic protection against copyright piracy and trade mark counterfeiting. See, generally, Frederick M. Abbott, "Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework" (1989) 22 Vand. J. of Transnat'l L. 689; J. H. Reichman, "From Free Riders to Fair Followers: Global Competition Under the TRIPS Agreement" (1996) 29 New York University Journal of International Law and Politics 11; UNCTAD, "The TRIPS Agreement and Developing Countries" (1996), United Nations Publication, Sales No. E.96.II.D.10.

<sup>25</sup> See UNCTAD-ICTSD Project on IPRs and Sustainable Development, *supra* note 19 at 4.

<sup>26</sup> See Articles 9(1) and 2(1) of the TRIPS Agreement.

<sup>27</sup> See, for instance, Article 18 of the TRIPS Agreement, which provides that the initial registration, and each renewal of registration of a trademark, shall be for a period of no less than seven years (subject to the possibility of the mark being renewed indefinitely). See also Article 33, which stipulates that the term of patent protection shall last for at least twenty years counted from the filing date of the patent.

<sup>28</sup> See Reichman, "The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?", *supra* note 13 at 448, 454, 459 and 463. Reichman observes that apart from exploiting the flexibility and "wiggle room" existing in the international minimum standards of intellectual property protection, the developing countries retain broad powers to tax and regulate intellectual property owners in ways that could significantly undermine their commercial expectations. States also have the option of

One of the most important contributions that the TRIPS Agreement was perceived as having made to the international intellectual property law landscape relates to dispute resolution and enforcement. Under the pre-TRIPS framework of intellectual property treaties administered by the WIPO, disputes arising under the Berne and Paris Conventions could only be resolved before the International Court of Justice, which lacked the means to enforce its own judgments and to ensure strict adherence by errant states to prescribed targets or deadlines.<sup>30</sup> The TRIPS Agreement appeared to address this problem by making available WTO dispute settlement and enforcement mechanisms to the resolution of trade-related intellectual property disputes between WTO members. Under the TRIPS framework, disputes are adjudicated upon by panels appointed by the WTO's Dispute Settlement Body ("DSB"), which has the power to authorize the suspension, by aggrieved state parties, of trading concessions against states found to be in violation of their TRIPS obligations.

It is important to note, however, that the TRIPS Agreement requires disputing states to undergo a mediatory process of negotiation and review before the formal judicial procedure of the WTO may be invoked. In order to implement this mediatory process, a new institution, the Council on Trade Related Aspects of Intellectual Property Rights (henceforth "TRIPS Council"), was created to monitor issues of compliance in domestic legal systems and to provide guidance and advice to member states. Under the TRIPS Agreement, all member states are required to notify the Council of the domestic laws and regulations that they have in place for intellectual property protection.<sup>31</sup> The TRIPS Council may also provide, pursuant to Article 68, a forum for consultation between nation states, on issues such as the proper interpretation of the Agreement. The Council can then provide advisory opinions or act as a mediator in the factual scenario presented before it. The TRIPS

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using competition law to limit the social costs of higher standards of intellectual property protection. See Articles 8(2) and 40 of the TRIPS Agreement.

<sup>29</sup> See, for instance, Article 1(1) of the TRIPS Agreement, which provides, *inter alia*, that "Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice."

<sup>30</sup> See Cornish, *supra* note 8 at 28.

<sup>31</sup> See Article 63(2) of the TRIPS Agreement.

Council is not, however, equipped with dispute resolution powers, and its role is more of an administrative, rather than judicial one.

*B. 'Not a Panacea': Residual Concerns with the TRIPS Agreement*

Despite the grand strides in the protection, implementation, consultative interpretation and enforcement of IPR principles that the TRIPS Agreement appeared to make over the existing intellectual property treaties administered by WIPO, it did not completely solve the problems inherent in the WIPO treaty system. The main shortcomings of the Berne and Paris Conventions, in the view of the developed countries, was that they failed, firstly, to afford adequate protection to IPRs, and secondly, to provide a satisfactory institutional framework for the enforcement of the enshrined principles. While the TRIPS Agreement succeeded in heightening the level of intellectual property protection at the multilateral level, this elevation in the standard of protection was not matched by a proportionate increase in the capacities for compliance on the part of technologically disadvantaged WTO states.<sup>32</sup> Although the TRIPS Agreement had provided developing and least developed countries ("LDCs") with a transitional period within which to bring their state practices into compliance with their obligations,<sup>33</sup> several commentators have observed that these time periods were a little too optimistic.<sup>34</sup> The expiry of the transitional period for developing countries in 2000 and for least-developed countries (LDCs) in 2006 brought to light the frightening reality that many developing countries were still unprepared to assume the full weight of their

<sup>32</sup> See Reichman, "The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?", *supra* note 13 at 444.

<sup>33</sup> See Articles 65(2) and 66(1) of the TRIPS Agreement.

<sup>34</sup> See Rochelle Cooper Dreyfuss, "Coming of Age with TRIPS: A Comment on J.H. Reichman, 'The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?'" (2001) 33 Case W. Res. J. Int'l L. 179, who notes, at 179, that while a transitional period of five years or so might seem like an eternity for fast-paced technological nations to wait for their less developed counterparts to achieve full compliance with rigorous intellectual property standards, it is not enough time for an emerging nation 'to absorb the world's knowledge base and develop a creative community'. Dreyfuss emphasizes that accepting new ideas is a 'gradual process' and that it is difficult to imagine how a nation that is committed to democratic government can possibly, in a short span of just a few years, persuade its electorate to reallocate rights in such important matters as informational and cultural property. See also Sue Ann Mota, "TRIPS-Five Years of Disputes at the WTO" (2000) 17 Ariz. J. Int'l & Comp. Law 533; Reichman, "The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?" *supra* note 13.

TRIPS obligations. A sizeable number of both developing and least-developed WTO nations continue to lack the legislative and technical expertise to introduce and implement intellectual property rules within their own legal systems.

In addition, the TRIPS Agreement fails to adequately account for the problems created by emerging forms of intellectual property, which do not always fit neatly within the existing paradigms of copyright, trade mark and patent law.<sup>35</sup> One notable omission from the TRIPS Agreement is its lack of attention to newer forms of information technology, such as the transmission, reproduction and use of digitized works,<sup>36</sup> as well as to the legal implications arising from "unintentional" forms of copying in the digital age, such as computer "caching"—the storage of images and data to facilitate faster downloading of websites—that occurs automatically during routine Internet use. The TRIPS Agreement also neglects to address the wide

<sup>35</sup> See, generally, Reichman, *supra* note 32; J.H. Reichman, "Legal Hybrids between the Patent and Copyright Paradigms" (1994) 94 Colum. L. Rev. 2432 at 2483-2488; J.H. Reichman, "Charting the Collapse of the Patent-Copyright Dichotomy: Premises for a Restructured International Intellectual Property System" (1995) 13 Cardozo Arts & Ent. L.J. 475; Charles R. McManis, "Taking TRIPS on the Information Superhighway: International Intellectual Property Protection and Emerging Computer Technology" (1996) 41 Vill. L. Rev. 207 at 232-286; International Association for the Advancement of Teaching and Research in Intellectual Property, *Emergent Technologies and Intellectual Property: Multimedia, Biotechnology and Other Issues* 13-56 (Kraig M. Hill & Laraine Morse eds., 1996); Frederick M. Abbott, "The Enduring Enigma of TRIPS: A Challenge for the World Economic System" (1998) 1 J. Int'l Econ. L. 497 at 514-516; Thomas Cottier, "The Protection of Genetic Resources and Traditional Knowledge: Towards More Specific Rights and Obligations in World Trade Law" (1998) 1 J. Int'l Econ. L. 555 at 557-584; Rosemary J. Coombe, "Intellectual Property, Human Rights & Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity" (1998) 6 Ind. J. Global Legal Stud. 59.

<sup>36</sup> See Cornish, *supra* note 8 at 356. It is important to note, however, that Article 10(1) of the TRIPS Agreement does provide that computer programs, whether in source or object code, are to be protected as literary works under the Berne Convention (1971). The second limb of Article 10 also provides that compilations of data are to be 'protected as such', without prejudice to any copyright subsisting in the compiled materials. Furthermore, in December 1996, there was a WIPO Diplomatic Conference on basic norms relating to the transmission of literary and artistic works in cyberspace. It is as yet unclear when these norms will be incorporated in the TRIPS Agreement at a future round. See Reichman, "The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?", *supra* note 13 at 458; Pamela Samuelson, "The US Digital Agenda at WIPO" (1997) 37 Va. J. Int'l L. 369; World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 65; World Intellectual Property Organization Performances and Phonograms Treaty, Dec. 20, 1996; S. Treaty Doc. No. 105-17, 36 I.L.M. 76; Agreed Statements Concerning the WIPO Copyright Treaty, adopted Dec. 20, 1996, WIPO doc. CRNR/DC/96.

divergences in state practice relating to the scope of intellectual property protection. There is still a considerable amount of contention relating to the subject matter of basic patent law, such as the patentability of computer programs and biotechnology, the standards of novelty and non-obviousness, and the exceptions that member states are allowed to make.<sup>37</sup> In copyright law, some uncertainty continues to exist in relation to the scope of protection, despite a higher level of systemic harmonization achieved under the Berne Convention.<sup>38</sup> In trade mark law, the question of whether famous marks should be conferred additional protection beyond traditional trade mark principles remains unsettled. This state of affairs indicates that the international trading community has yet to reach a common understanding on many aspects of intellectual property law. The sense of fundamental indeterminacy that pervades the global community's perception of both basic and emerging intellectual property norms compounds the difficulty of drawing a bright line between compliant and non-compliant conduct in the context of the TRIPS regime.

Another difficulty faced by WTO members relates specifically to the question of dispute resolution and enforcement. As I have mentioned earlier, an important objective of the TRIPS Agreement was to create a formal mechanism for the resolution of trade-related intellectual property disputes through a multi-layered process of consultative interpretation (involving the TRIPS Council), adjudication and enforcement (involving the WTO Dispute Settlement Body and appointed panels of experts). Under section 22 of the WTO's Dispute Settlement Understanding ("DSU"), an aggrieved state may, after negotiations with the offending state have failed to produce a change in behaviour or agreement on mutually-acceptable compensation, apply to the DSB of the WTO for permission to suspend trade concessions against the offending state. The act of suspending WTO concessions as a punitive measure for

<sup>37</sup> See J.H. Reichman, "The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?", *ibid.* at 457; Reichman, "From Free Riders to Fair Followers", *supra* note 24 at 27-42.

<sup>38</sup> See J.H. Reichman, "The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?", *ibid.* at 457-458; Kenneth D. Crews, "Harmonization and the Goals of Copyright: Property Rights or Cultural Progress?" (1998) 6 Ind. J. Global Legal Stud. 117 at 132-38; Pamela Samuelson, "Challenges for the World Intellectual Property Organization and the Trade-Related Aspects of Intellectual Property Rights Council in Regulating Intellectual Property Right in the Information Age" (1999) 21 Eur. Intell. Prop. Rev. 578.

acts of violation has occasionally, albeit with increasing frequency, been referred to in trade policy jurisprudence as the imposition of "sanctions".<sup>39</sup> The primary effect of a trade sanction is to make an errant state suffer economically as a result of the temporary removal of its trading privileges as a member of the WTO. The imposition or threat of sanctions thus appears to be a highly potent measure of deterring future non-compliant conduct by states under the WTO/TRIPS framework.

The practice of using WTO sanctions as a method of correcting misbehaviour has, however, been subjected to serious challenge by trade scholars.<sup>40</sup> Charnovitz, for instance, argues that the use of sanctions undermines the international trading system and advocates the use of "softer measures" to facilitate deeper compliance among member states. He notes that trade sanctions are hardly ever authorized by the DSB, and on the rare occasions when they are actually imposed, do not always produce their intended effects.<sup>41</sup> This

<sup>39</sup> See John H. Jackson, *World Trade and the Law of GATT* (Indianapolis: Bobbs-Merrill, 1969) at 763; John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (Cambridge, MA: MIT Press, 1989) at 110; Gerard Curzon, *Multilateral Commercial Diplomacy: GATT and its Impact on National Commercial Policies and Techniques* (London: Michael Joseph, 1965) at 43; Eric Wyndham-White, "Negotiations in Prospect", in Fred Bergsten, ed., *Toward a New World Trade Policy: The Maidenhead Papers* (Lexington, MA: Lexington Books, 1975) 321 at 329; Chayes & Chayes, *supra* note 1 at 30.

<sup>40</sup> See generally Gary Clyde Hufbauer, Jeffrey J. Schott & Kimberly Ann Elliot, *Economic Sanctions Reconsidered: History and Current Policy*, 2d ed. (Washington, DC: Institute for International Economics, 1990) at 93 (noting the limited effect of economic sanctions on state behaviour); Robert A. Pape, "Why Economic Sanctions Do Not Work" (1997) 22:2 International Security 90 at 93, 96-97 (challenging the earlier study by Hufbauer *et al.*, and drawing attention to the importance of distinguishing between the actual impact of sanctions and results achieved through the threat or use of military force); Kimberly Ann Elliot, "The Sanctions Glass: Half Full or Completely Empty?" (1998) 23:1 International Security 50 at 50-51 (noting that while it is not true to say that sanctions "never work", they are of limited utility in achieving foreign policy goals that depend on compelling the target country to take action it "stoutly resists", and also observing that the overall rate of success of sanctions has declined sharply over time, particularly in cases where the United States acts unilaterally); Robert A. Pape, "Why Economic Sanctions Still Do Not Work" (1998) 23:1 International Security 66 at 76-77 (reiterating the significant human costs that economic sanctions often inflict on the populations of target states, and the accompanying risk that sanctioned states may resort to force); Daniel W. Drezner, *The Sanctions Paradox: Economic Statecraft and International Relations* (New York: Cambridge University Press, 1999) (noting that sanctions are likely to be more effective in inducing modest changes in a friendly state than bringing about regime change in a totalitarian state).

<sup>41</sup> See Steve Charnovitz, "Rethinking WTO Trade Sanctions" (2001) 95 A.J.I.L. 792 at 794-797, where he discusses the limited effect of sanctions on economically powerful states that possess the resources to "absorb" or diffuse the economic harm caused by the

indicates that sanctions, despite giving the appearance of providing the WTO system with “teeth”, are apparently not always sharp enough, or perhaps focussed enough, to produce the desired changes in state behaviour.<sup>42</sup>

Charnovitz expresses his disapproval for the use of sanctions on the ground that they are blunt instruments that cause collateral damage to innocent parties. According to Charnovitz, sanctions have a chilling effect on commercial activity within the state and violate the human right of individuals to engage in enterprise. Sanctions also have an injurious effect on aggrieved states, who are made to suffer twice from a single act of violation: firstly from the act of non-compliance by the guilty state and secondly from the increased domestic cost of foreign goods targeted for retaliation due to the imposition of punitive tariffs or duties.<sup>43</sup> Furthermore, the use of sanctions by states is tantamount to “banning trade” in response to violations by others and this contradicts the entire ideology of the WTO. The act of restricting trade in order to promote free trade may give the impression of employing means that are contradictory to its goals.

#### *C. The Scholarly Response: TRIPS Commentary and the Implicit Link with Managerialism*

In light of the difficulties outlined above, TRIPS scholars have come out strongly in favour of adopting a cooperative approach to the management of compliance with international intellectual property standards. Their recommendations appear to share much common

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suspension of trading concessions. See in particular Charnovitz’s discussion of the two cases prior to the end of 2001 in which sanctions were formally imposed on the European Communities, without much success: *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS27/AB/R (Sept. 9, 1997) and *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998).

<sup>42</sup> *Ibid.* at 797. Charnovitz notes that proponents of the view that sanctions are not ‘sharp’ enough have succeeded in getting the United States Congress to enact a ‘carousel’ provision in the Trade and Development Act of 2000 (Pub. L. No. 106-200, § 407, 114 Stat. 251, 293) to rotate the product targets for trade sanctions every six months, so as to broaden the impact of the disciplinary measure on the sanctioned state. But rotating the product targets does not, of course, insulate the *sanctioning* state from the ill-effects of higher domestic costs of foreign goods due to the punitive tariffs being imposed, nor does it avoid the problem of inflicting economic losses on innocent parties at the domestic level.

<sup>43</sup> *Ibid.* at 814-816.

ground with the “managerial” model of compliance formulated by Abram and Antonia Handler Chayes in their seminal work *The New Sovereignty*.<sup>44</sup> The Chayes suggest that the key to fostering compliance with international law in the post-Cold War age of complex inter-dependence<sup>45</sup> lies in the iterative processes of justificatory discourse and persuasion between states that lead to greater identity convergence.<sup>46</sup> Formal methods of enforcement are, in their view, irrelevant and sometimes even detrimental to the goal of shaping state interests and identities.<sup>47</sup> Instead, the primary motivation for states to comply with international law in the era of the “new sovereignty” lies in the desire to remain “a member in good standing of the international system”.<sup>48</sup> As such, states seek to participate in international regimes with the intention to comply with their obligations, and breaches of international law are often caused by norm ambiguities or incapacity rather than by volitional factors.<sup>49</sup> Consequently, strategies based on information sharing, discourse, capacity building and the provision of aid are likely to be more effective at “jawboning”<sup>50</sup> states into compliance than formal methods of enforcement.

In response to the Chayes, George Downs, with various co-authors, has launched a powerful rationalist challenge against the managerial approach, claiming that it suffers from selection bias, and prematurely celebrates the success of treaty regimes based on compliance with shallow, unchallenging norms. Downs *et al.* argue that it is more important to look at the *depth* of compliance generated by treaty obligations as a measure of cooperative evolution, and the extent to which states have changed their default behaviour in their attempt to honour their obligations.<sup>51</sup> In particular, Downs *et al.* emphasize that sanctions or formal enforcement mechanisms may be necessary in regimes which reflect “mixed-motive games”, and where

<sup>44</sup> Chayes & Chayes, *supra* note 1.

<sup>45</sup> *Ibid.* at 27: In the post Cold-War age, states, according to the Chayes, have become enmeshed in a “complex web of international arrangements.”

<sup>46</sup> *Ibid.* at 25-26.

<sup>47</sup> *Ibid.* at 32-33: “[S]anctioning authority is rarely granted by treaty, rarely used when granted, and likely to be ineffective when used.”

<sup>48</sup> *Ibid.* at 28.

<sup>49</sup> *Ibid.* at 10-15.

<sup>50</sup> *Ibid.* at 25.

<sup>51</sup> See Downs, Danish & Barsoom, *supra* note 1 at 466.

there are considerable incentives for states to defect from their obligations.<sup>52</sup>

Bearing in mind the concerns relating to the “enforceability” of intellectual property norms that originally led to the conception of the TRIPS Agreement, it is interesting to note the counter-intuitive way in which the compliance debate has unfolded in the TRIPS context. Important aspects of the Chayes’ discursive methodology have surfaced in the recommendations of scholars who have studied the implementation of the TRIPS regime, although the link with managerialism is not explicitly mentioned. For instance, Professor Jerome Reichman proposes that adopting a “hard-nosed”, confrontational approach towards the implementation of TRIPS standards may backfire by exposing the full extent of the underlying dispute between TRIPS members, as reflected in conflicting state practices.<sup>53</sup> Excessive pressure applied on developing countries by the governments of technology-rich states to conform to TRIPS standards might also exacerbate existing levels of disillusionment with and alienation from the regime, causing developing nations to resist any further attempts at harmonization.<sup>54</sup> Instead Reichman advocates a more cooperative approach to the post-transition phase when dealing with developing countries, and suggests that member states treat the TRIPS Agreement as “a basic set of default rules” that they have “bargained around”, with a view to obtaining “win-win” positions for all the players.<sup>55</sup>

In addition, Kal Raustiala has adopted a similar position to the TRIPS compliance question,<sup>56</sup> agreeing in large part with the key roles that information sharing, transparency and constructive state dialogue play in generating deeper co-operative evolution among the

<sup>52</sup> Downs, Rocke & Barsoom, *supra* note 1 at 382.

<sup>53</sup> Reichman, “The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?”, *supra* note 13 at 458.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.* at 463. See also J.H. Reichman & David Lange, “Bargaining Around the TRIPS Agreement: The Case for Ongoing Public-Private Initiatives to Facilitate Worldwide Intellectual Property Transactions” (1998) 9 Duke J. Comp. & Int'l L. 11 at 49-65. In a similar vein, Martine de Koning frowns upon the ‘GATT approach’ to fostering state compliance, which she typifies in her article as being ‘coercion based’. She examines in some detail how a cooperation based approach could function in the Asia-Pacific region. See Martine de Koning, “Why the Coercion-Based GATT Approach is Not the Only Answer to Piracy in the Asia-Pacific Region” (1997) 19 Eur. Intell. Prop. Rev. 59.

<sup>56</sup> Raustiala, “Compliance & Effectiveness in International Regulatory Cooperation”, *supra* note 13.

players in the TRIPS regime. In Raustiala's view, placing too much analytical focus on the strict notion of "compliance" can be misguided and even counter-productive. Instead, he argues that it is often more instructive for international relations scholars to examine the causal nexus between adherent conduct and effectiveness, in particular the *causal impact* of legal rules on behaviour. In other words, if a treaty regime requires member states to do what they are already doing, then the causal connection between the treaty rules and state behaviour is very low. In such a situation, it can be said that the legal rule only has a marginal impact on behaviour.<sup>57</sup> Likewise, compliance may be brought about by a supervening event of irresistible force that is beyond the control of the state. As an illustration of this point, Raustiala cites the economic collapse of the Soviet Union as an example of how an event in history produced perfect, albeit coincidental, compliance by the former Soviet territories with many environmental treaties.<sup>58</sup> The causal connection between the legal rules and the fact of compliance in this case was practically non-existent.

Having considered the importance of studying the causal impact of legal rules on behaviour as an indication of regime effectiveness, Raustiala turns his gaze to some of the compliance problems inherent in the TRIPS regime, such as the fact that intellectual property is still a relatively novel field of law to many WTO countries, and that different understandings of the conceptual basis and utility of intellectual property law are likely to lead to different approaches.<sup>59</sup> Raustiala argues that a regime strategy based on "systems of implementation review" ("SIRs") that appears to have worked well in the design of several multilateral environmental agreements can also be applied to the TRIPS context,<sup>60</sup> since this strategy is useful in fostering collective learning in cases where knowledge is scant, uncertainty is high and regime norms are still in the process of being crystallized. In short, SIRs are based on a process of data collection, review of material, meetings with state officials and experts, and the negotiated adjustment of treaty commitments in

<sup>57</sup> *Ibid.* at 393, 396-399.

<sup>58</sup> *Ibid.* at 393.

<sup>59</sup> *Ibid.* at 431.

<sup>60</sup> Raustiala recognizes that SIR mechanisms already exist in the TRIPS structure, such as the mandate of the TRIPS Council to monitor legislative developments in member states and to oversee compliance with TRIPS norms. *Ibid.* at 434-436.

light of new information and experiences.<sup>61</sup> Building on his ideas for an SIR-centred TRIPS regime design strategy, Raustiala advocates the extensive use of a flexible, less judicialized approach to the management of TRIPS compliance in line with managerial theory through the provision of interpretive dialogue, technical assistance and capacity-building tools to non-compliant states in the regime.<sup>62</sup>

By emphasizing the depth of cooperation over the mere fact of compliance as an indication of regime success, Raustiala himself acknowledges certain similarities between his point about effectiveness and the rationalist views of George Downs and his co-authors.<sup>63</sup> However, Raustiala goes further by asserting that the way to higher regime effectiveness in the context of the TRIPS Agreement lies in a facilitative, consultative and discursive approach through information sharing, review of legislation and the provision of aid, and not through the legalistic and rigid insistence on the strict letter of the TRIPS provisions.

It is interesting to note that even TRIPS/WTO scholars who are in favour of stronger intellectual property protection suggest that the proper way to attain that goal is through some form of funding and assistance from the more privileged members of the regime to the less privileged. Alan O. Sykes has argued, for instance, that stronger patent protection for pharmaceutical products is beneficial for the economies of developing countries in the long run, and expresses concern that the results of the WTO Ministerial Conference in Doha might be leading the international trading community in the wrong direction.<sup>64</sup> The Conference concluded with a Ministerial interpretation of the TRIPS Agreement in the form of a "Declaration on the TRIPS Agreement and Public Health",<sup>65</sup> which awarded the developing countries many of the interpretive clarifications that they were seeking.<sup>66</sup> The chief complaint put forward by many developing countries was that their populations were unable to afford the patented antiviral medications necessary to treat HIV/AIDS and

<sup>61</sup> Raustiala, *supra* note 56 at 415.

<sup>62</sup> *Ibid.* at 416 and 433.

<sup>63</sup> *Ibid.* at 409 (note 99).

<sup>64</sup> Alan O. Sykes, "Public Health and International Law: TRIPS, Pharmaceuticals, Developing Countries, and the Doha "Solution"" (2002) 3 Chi. J. Int'l L. 47.

<sup>65</sup> World Trade Organization, *Declaration on the TRIPS Agreement and Public Health*, WTO Doc WT/MIN(01)/DEC//2 (Nov 14, 2001).

<sup>66</sup> See Sykes, *supra* note 64 at 48.

other viral diseases, and the Doha Declaration is, according to Sykes, likely to embolden these countries to adopt measures that will reduce the economic returns to the holders of pharmaceutical patents. These measures include the award of compulsory licences during a national emergency to manufacture patented antiviral drugs (with reduced royalties to patent holders) and the acceptance of parallel imports from countries where medications are sold at cheaper prices.<sup>67</sup> Nevertheless Sykes suggests that the better way to alleviate developing country concerns in the field of pharmaceuticals is through the formulation of aid programs and the provision of public funds for public health, which produce fewer economic distortions than the imposition of implicit taxes on the rents of pharmaceutical patent holders.<sup>68</sup>

It would seem from the discussion above that the general preference among TRIPS commentators is for gentler, more persuasive methods of compliance management rather than through the formalistic, aggressive enforcement of rights. The adjudicatory and confrontational aspects of the WTO/TRIPS dispute resolution process accordingly seem incompatible with the general managerial strategy that is implicitly becoming more prevalent in the scholarly discourse on international intellectual property regulation. A large part of the compliance debate in the TRIPS context has, however, been centred on the horizontal interactions between TRIPS members at the multilateral level, and little has been said about the vertical process through which norms are exchanged between the international and domestic legal orders. While some WTO/TRIPS scholars have hinted<sup>69</sup> at the importance of provoking domestic legal change in order to foster deeper state compliance with international

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.* at 67.

<sup>69</sup> See, for instance, Charnovitz, *supra* note 41 at 832, recognizing that "the current WTO approach is too coercive and state-centric" and suggesting that "to achieve better compliance with international trade law, the WTO should explore ways to promote internal domestic change." See also Oona A. Hathaway, "Between Power and Principle: An Integrated Theory of International Law" (2005) 72 U. Chi. L. Rev. 469 at 473 and at 493-494. Hathaway acknowledges that state behaviour is the result of complex interactions between political players at the domestic level, and cannot be explained as simply resulting from power-maximizing behaviour. She also notes that domestic commitment to a treaty norm is an essential prerequisite to state compliance. By focusing on the voluntary nature of international treaty law, Hathaway suggests that an awareness of the political interplay between countries' decisions to commit on the one hand and their decisions to comply on the other is essential to a more complete understanding of the influence of international treaty law.

intellectual property law, a close examination of the precise role that transnational legal processes play in domestic intellectual property norm internalization has yet to be undertaken. In the next two sections, I shall outline Harold Koh's transnational legal process theory and explain how the "statist" gap in the compliance literature can be bridged by an understanding of the pathways through which international norms may influence actor behaviour and identities at the grassroots level of domestic society.

## **II. 'Bringing International Law Home': Bridging the 'Statist' Gap through Vertical Processes of Norm Internalization**

Professor Koh defines "transnational legal process" as a description of the theory and practice of how public and private actors (including nation states, international organizations, multinational enterprises, non-governmental organizations and private individuals) in a variety of fora (private, public, national, international) make, interpret, enforce and ultimately internalize rules of transnational law.<sup>70</sup> But Koh is also quick to point out that this process is not merely descriptive, but normative as well—as it "focuses not simply on how international interaction among transnational actors shapes law, but also on how law shapes and guides future interactions".<sup>71</sup> The cyclical nature of the process may be inferred from the way in which interaction and norm generation intersect: new rules and norms are derived from interactions among states and non-state actors, and these new rules and norms then provoke and inspire further norm-generating interaction. Other distinctive features that Koh attributes to transnational legal process are its "non-traditional" nature, "non-statist" emphasis and "dynamic" character.<sup>72</sup> Koh argues that transnational legal process is non-traditional in the sense that it breaks down conventional dichotomies between the international and the domestic, the private and public. It is also non-statist in the sense that it shifts the optic of analysis away from inter-state discourse to the interactions between non-state actors. In addition, its "dynamic" character is brought out in the transformative effect of transmitting norms from one forum to another, allowing percolation and transmutation of values and practices to take place along channels of

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<sup>70</sup> Harold Hongju Koh, "Transnational Legal Process", *supra* note 15 at 183-184.

<sup>71</sup> *Ibid.* at 184.

<sup>72</sup> *Ibid.*

communication. At the heart of Koh's model lies the three-stage process of "interaction, interpretation and internalization", through which international rules "trickle down" and become integrated into national law, thereby assuming the status of "internally binding" domestic legal obligations.<sup>73</sup>

Although Koh's empirical research has focussed largely on the actors and mechanisms involved in the transmission of international human rights norms,<sup>74</sup> he does not limit the application of transnational legal process to specific regimes, but instead sees a general role for his model in prescribing compliance strategies for international legal rules "of any kind".<sup>75</sup> In the paragraphs that follow, and in the next section, I explain how Koh's transnational legal process theory sheds light on the TRIPS compliance debate by augmenting the Chayes' managerial model in several important respects.

In his review of the Chayes' model,<sup>76</sup> Koh critiques the managerial thesis, arguing that it appears incomplete in four respects.<sup>77</sup> Koh's first contention is that the Chayes' emphasis on the strength of the managerial model and the weakness of the enforcement model might lead one to assume erroneously that the two models are alternatives. In Koh's view, however, the two models strongly complement each other.<sup>78</sup> He asserts that the success of the

<sup>73</sup> See Koh, "Bringing International Law Home", *supra* note 15 at 625-626; Koh, "Transnational Legal Process", *ibid.* at 203-205.

<sup>74</sup> See for instance Koh, "Bringing International Law Home", *ibid.* at 663-673, where he discusses the norm against torture in United States law and the implementation of the European Convention on Human Rights in the United Kingdom to illustrate the workings of transnational legal process in embedding international human rights law at the domestic level.

<sup>75</sup> Koh, "How is International Human Rights Law Enforced?", *supra* note 5 at 1399 and 1401: "The first question, why do nations obey international human rights law, is really a sub-set of a much broader question: why do nations obey international law of any kind? ... the most effective form of law-enforcement is not the imposition of external sanction, but the inculcation of internal obedience."

<sup>76</sup> Harold Hongju Koh, "Why Do Nations Obey International Law?" (1997) 106 Yale L.J. 2599.

<sup>77</sup> *Ibid.* at 2639.

<sup>78</sup> It is important to note that Koh does not dismiss entirely the utility that 'enforcement-based' approaches may have in regulatory regimes. He does suggest, however, that 'rationalistic, state-centred' theories work far less well in areas such as human rights, debt restructuring and international commercial transactions, where "non-state actors abound and pursue multiple goals in complex nonzero-sum games" in both formal

managerial model is contingent upon the availability or threat of coercive measures in the background, even if the prospect of such measures being deployed is extremely remote.<sup>79</sup>

Secondly, Koh challenges the *Chayesean* contention that the ultimate impetus for compliance comes from the fear of loss of reputation in an age where countries strive to be members in good standing of an inter-dependent global community of nations. This contention is inaccurate in Koh's mind because "the interpretive community that determines whether a norm has been violated is far larger than just the nation states who are parties to the treaty."<sup>80</sup> In the field of international human rights law, for instance, Koh notes that nation states that are parties to the United Nations Convention on Genocide do not have the sole or exclusive authority to sketch the contours of the treaty norm on genocide. Other credible interpreters of the norms of genocide, according to Koh, are "domestic, regional, and international courts; ad hoc tribunals; domestic and regional legislatures; executive entities (such as the U.N. Security Council or the President of the United States); international publicists; and nongovernmental organizations".<sup>81</sup> The concern of "loss of reputation" among fellow nation states is, in this sense, a rather nebulous one, since a norm's "interpretive regime" encompasses more than just state parties to the treaty in question.

The third ground upon which Koh bases his critique of *Chayesean* managerialism is that it fails to explain how managerial discourse at the international level actually re-shapes and re-constitutes national interests and identities at the grassroots level. The missing piece in the compliance puzzle, therefore, is the transnational link between the domestic and international levels. Managerialism, according to Koh, can only work effectively if norms are internalized by the constituents of the domestic legal order, through, for instance, executive acceptance, legislative incorporation or judicial interpretation.<sup>82</sup> The interlocking effects of horizontal

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institutional settings and other fora. See Koh, "Transnational Legal Process", *supra* note 15 at 201.

<sup>79</sup> See Koh, "Why Do Nations Obey International Law?" *supra* note 76 at 2639. Koh likens the resolution of disputes in treaty regimes to the public law litigation model, which he claims succeeds not because the litigants "talk through the judge, but because the judge wields the power of ultimate sanction".

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.* at 2640.

<sup>82</sup> *Ibid.* at 2640-2641.

discourse and vertical norm internalization need therefore to be taken into account in order to satisfactorily piece together the compliance puzzle.

A fourth criticism that Koh levels against the Chayes' managerial approach is that it focuses too much on process and passes too lightly over the substance of the legal rules in question.<sup>83</sup> In particular, managerial processes of justificatory discourse arguably presuppose that the treaty rules in question are fair. Indeed, although the Chayes themselves concede that the legitimacy of their approach is premised on the fairness and equity of the applicable regime norms,<sup>84</sup> they do not account for how considerations of fairness may be accommodated within their theoretical framework.

On the fourth ground relating to fairness, Koh notes that Thomas Franck's treatise on *Fairness in International Law and Institutions*<sup>85</sup> posits that the persuasiveness of international law lies in its legitimacy or internal consistency. A fair rule of international law, according to Franck, generates a "compliance pull" that fosters voluntary obedience by state participants in a regime. While Koh agrees with both the Chayes and Franck that getting states to voluntarily obey international law is clearly superior to the coercion of "grudging compliance",<sup>86</sup> he observes that neither the Chayes nor Franck explains the pathway through which such obedience is fostered.

The central contribution that Harold Koh makes to the compliance debate is thus a description of the vertical transmission belt through which norms are created, interpreted, and exchanged between the international and domestic legal orders. The key to voluntary obedience with international law lies in the internalization of norms by the various constituents of domestic society. In his article, Koh distinguishes between different kinds of internalization, in particular, social, political and legal internalization.<sup>87</sup> Social internalization of a norm, Koh states, occurs when the norm acquires

<sup>83</sup> *Ibid.* at 2641.

<sup>84</sup> See Chayes & Chayes, *supra* note 1 at 127, where they recognize the major role that considerations of fairness play in the discursive process between states.

<sup>85</sup> Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1995).

<sup>86</sup> See Koh, "Why Do Nations Obey International Law?", *supra* note 76 at 2646 and 2655.

<sup>87</sup> *Ibid.* at 2656.

"so much public legitimacy that there is widespread general obedience to it."<sup>88</sup> Political internalization, on the other hand, is achieved when the political elites of a nation state accept a norm as part of government policy.<sup>89</sup> Legal internalization, meanwhile, is brought about when an international norm is "incorporated into the domestic legal system through executive action, judicial interpretation, legislative action, or some combination of the three."<sup>90</sup>

The vertical process of norm emergence, interaction, interpretation and internalization that forms the backbone of Koh's transnational model is attractive in several respects. Firstly, it recognizes that the most effective way of fostering deeper state compliance is by initiating and *sustaining* endogenous change to a nation state's cognitive make-up, interests and identities from within a state's territorial borders. Koh underscores the often overlooked point that a state is most likely to modify its behaviour in light of international norms when those norms have been incorporated as part of domestic society's internal value system. International law thus has to be actively "brought home", in Koh's view, through the vertical transnational belt that bridges the divide between the international and domestic legal orders. In speaking of compliant conduct existing along a sliding scale of normativity, Koh asserts that there lies an important distinction between mere compliance and obedience. States, as rational agents, may choose to alter their behaviour to comply with an international rule out of convenience, fear, or in furtherance of some pressing material interest. However, if that rule has become internalized into the personal value system of a rational agent, then it has been transformed from an "external sanction ... [into] an internal imperative".<sup>91</sup> It is this voluntary acceptance by a rational agent of a rule's legitimacy, bindingness and persuasive force that creates a profoundly powerful self-limiting constraining force that the agent exerts upon itself.<sup>92</sup> The instinctive compulsion to act in accordance with an internalized principle of law

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<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.* at 2656-2657.

<sup>90</sup> *Ibid.* at 2657.

<sup>91</sup> See Koh, "How is International Human Rights Law Enforced?", *supra* note 5 at 1400-1401.

<sup>92</sup> See Hathaway, *supra* note 69 at 473, who asserts that voluntary domestic compliance to a treaty is an important prerequisite to state compliance.

thus operates to constrain a rational agent's behaviour even in the absence of external sanctions.

Secondly, it is submitted that Koh's model captures essential nuances of the international law-making process that are missing from the managerial picture of horizontal, state-centric justificatory discourse.<sup>93</sup> Koh recognizes the important role that sub-state entities such as activists, "norm entrepreneurs", non-governmental organizations, epistemic communities and transnational issue networks play in championing normative change at the domestic level and in steering state policy toward greater congruence with international legal norms. By shifting the optic from the macroscopic view of horizontal inter-state dealings to the microscopic view of intra-state interactions at the grassroots level, Koh highlights how domestic influence from within a nation's territorial boundaries can act as a complement to external forces such as political power, economic incentives and communitarian pressures in shaping a state's ideological propensities. Transnational legal process accordingly provides the pathways through which the voice of domestic actors finds expression in international discourse and norm interaction.

### **III. Applying Transnational Legal Process to the TRIPS Context: Intellectual Property Norms, Incomplete Internalization, and the Politics of Piracy**

#### *A. Illuminating the TRIPS Compliance Debate: Explaining Non-Compliance with Intellectual Property Norms*

The emphasis placed by transnational legal process on vertical pathways of internalization and the role of domestic actors in moulding international legal norms has important implications for the question of state compliance under the TRIPS regime. In this section, I discuss how transnational legal process theory provides valuable insights on how to address the compliance problems that continue to plague intellectual property relations between states in the post-TRIPS era.

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<sup>93</sup> See Koh, "How is International Human Rights Law Enforced?", *supra* note 5 at 1412, where he notes that the horizontal state to state process account "does not capture the full picture of how international human rights norms are currently generated, brought into domestic systems, and then brought back up to the international level."

Although the TRIPS Agreement was designed to overcome the problem of intellectual property infringement on a global scale, piracy continues to be a significant problem in both developed and developing countries. According to a recent report by the United States Trade Representative, current estimates of U.S. losses arising from the piracy of copyrighted material in China alone range from between \$2.5 billion and \$3.8 billion annually.<sup>94</sup> It has been noted that China has acquired an international reputation as a global manufacturing base and clearinghouse for counterfeit products.<sup>95</sup> Chinese counterfeiting networks have become so sophisticated that it has become virtually impossible for consumers to distinguish between genuine and fake goods at the retail level.<sup>96</sup> In addition, the United States Customs Service reportedly made more than 13,600 seizures in 2007, confiscating close to \$200 million worth of counterfeit and pirated products.<sup>97</sup>

Non-compliance with TRIPS is not, however, unique to China or to developing countries. Contrary to popular belief, the developed world is not immune from the scourge of intellectual property piracy. The rise of the Internet and the emergence of digital technologies have significantly heightened the ease with which "modern day pirates" can reproduce and distribute intellectual content, such as digital music and movies, across vast distances. A large number of unauthorized Harry Potter websites have sprouted up in North America and Europe, which feature infringing material, such as stories, images and characters based on the popular series by author J. K. Rowling.<sup>98</sup> It has been observed that illegal street vendors selling pirated DVDs in major U.S. cities is no longer an uncommon sight.<sup>99</sup> Further, recent studies by the Business Software Alliance ("BSA") have also revealed surprisingly high levels of

<sup>94</sup> See United States Trade Representative, "Special 301 Report: Executive Summary" (2005), online: <[http://www.ustr.gov/assets/Document\\_Library/Reports\\_Publications/2005/2005\\_Special\\_301/asset\\_upload\\_file195\\_7636.pdf](http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_Special_301/asset_upload_file195_7636.pdf)> at 16.

<sup>95</sup> See Andrew C. Mertha, *The Politics of Piracy: Intellectual Property in Contemporary China* (Ithaca, New York: Cornell University Press, 2005) at 167.

<sup>96</sup> *Ibid.*

<sup>97</sup> See International Anti-Counterfeiting Coalition, on-line: <[http://www.iacc.org/resources/07\\_annual\\_seizures.pdf](http://www.iacc.org/resources/07_annual_seizures.pdf)>.

<sup>98</sup> Peter K. Yu, "From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China" (2006) 55 Am. U.L. Rev. 901 at 979.

<sup>99</sup> *Ibid.* at 936.

intellectual property infringement in developed countries with fairly mature intellectual property systems. According to the Second Annual Global Software Piracy Study conducted by the BSA in 2004, the United States had a software piracy rate of 21%, while developed countries in Western Europe such as Italy and France were afflicted with levels of piracy that were more than *twice* that of the United States, with rates ranging between 45 and 50%.<sup>100</sup> The BSA's Fourth Annual Global Software Piracy Study released in 2007<sup>101</sup> indicates little change in the levels of piracy in France, Italy and the United States, reflecting rates of 45%, 51% and 21% respectively in 2006.<sup>102</sup>

These troubling statistics suggest that the global challenge of fostering compliance with intellectual property norms is not exclusively a "developing country problem", nor is it solely a question that can be resolved at the "inter-governmental" level between states. Rather, it is a concern that relates to the behaviour of domestic consumers in states all over the world.<sup>103</sup> Despite the availability of formal dispute settlement procedures and enforcement mechanisms under the WTO framework, the TRIPS Agreement has had limited success in controlling the unauthorized production and distribution of pirated goods. What then is the explanation for the disturbingly high rates of piracy in the post-TRIPS era? I suggest that an important explanation for continuing non-compliance with TRIPS is the absence of norm internalization by domestic communities. Intellectual property norms existing merely in the "abstract" or on statute books are unable to effect endogenous change within

<sup>100</sup> See Business Software Alliance & International Data Corp., "Second Annual BSA and IDC Global Software Piracy Study" (2005), online: <<http://www.bsa.org/globalstudy/upload/2005-Global-Study-English.pdf>> at 3, 8 and 9, cited in Yu, *ibid.* at 927. See also Helena Stalson, *Intellectual Property Rights and U.S. Competitiveness in Trade* (Washington: National Planning Association, 1987) at 28-29, who cites a 1984 report by the International Trade Commission as indicating a large concentration of counterfeiting activity in the United States, particularly with respect to merchandise such as apparel and footwear, watches, computers, electronic components and aircraft parts.

<sup>101</sup> Business Software Alliance & International Data Corp., "Fourth Annual BSA and IDC Global Software Piracy Study" (2007), online: <<http://w3.bsa.org/globalstudy//upload/2007-Global-Piracy-Study-EN.pdf>>.

<sup>102</sup> *Ibid.* at 12.

<sup>103</sup> See, for instance, Tom R. Tyler, "Compliance with Intellectual Property Laws: A Psychological Perspective" (1997) 29 N.Y.U. J. Int'l L. & Pol. 219, who notes, at 219, that: "[N]oncompliance with laws governing the copying of books, journals, tapes, Compact Disks [CDs], and videocassettes is widespread, both within the United States and throughout the world."

domestic society without first having been “brought home” to the actors and agents whose cooperation is indispensable in the fight against piracy.

Transnational legal process provides valuable insights on the TRIPS compliance debate in two respects. Firstly, it highlights the importance of fostering voluntary obedience, or internalized acceptance, in generating long-term adherence to enshrined norms. This form of “self-bindingness” is more lasting and permanent than coerced compliance because the sense of obligation to a norm acts as an internal imperative, rather than an external sanction.<sup>104</sup> In the absence of an internal imperative to comply with intellectual property norms, the coercive effect of formal methods of enforcement in generating compliant behaviour is likely to be short-lived. In such circumstances, non-compliant behaviour will resurface once the source of the coercion is removed.<sup>105</sup>

The introduction of dispute resolution and enforcement mechanisms to the international intellectual property framework through the TRIPS Agreement has accordingly failed to generate obedience to enshrined norms because these mechanisms continue to operate largely at an external, exogenous level, without changing the internal normative make-up of its intended audience. By distinguishing between the different levels of normativity by which behaviour can be defined, transnational legal process yields valuable insights into why superficial and temporary compliance obtained

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<sup>104</sup> Koh, “How is International Human Rights Law Enforced?”, *supra* note 5 at 1400-1401.

<sup>105</sup> The ‘cycles of futility’ that have characterized U.S. attempts to ‘enforce’ intellectual property standards in China in the pre-TRIPS era are an instructive illustration of this phenomenon. In each ‘cycle’, the United States would begin, pursuant to its Omnibus Trade and Competitiveness Act, by threatening China with trade sanctions for the latter’s failure to protect American intellectual property interests. China would then retaliate with counter-sanctions for an equivalent amount, and after a protracted period of ‘bickering and posturing’, the two states would sign a last minute agreement. Intellectual property protection in China would then improve for a short time, but infringing practices would quickly re-establish themselves once international attention was diverted from the Chinese piracy problem. At this point, American companies would then complain to their government again and the entire cycle would repeat itself. For a detailed discussion of the ‘cycles of futility’ in Sino-American intellectual property relations prior to China’s entry into the WTO, see Gregory S. Feder, “Enforcement of Intellectual Property Rights in China: You Can Lead a Horse to Water, But You Cannot Make It Drink” (1996) 37 Va. J. Int’l L. 223 at 250-51 and Peter K. Yu, “From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century” (2000) 50 Am. U.L. Rev. 131 at 134.

through coercion should not be confused with long-term, stable adherence to a set of internalized values.

A second lesson that may be drawn from transnational legal process is its focus on the role of actors and norm entrepreneurs at the grassroots level in fostering normative change. Transnational legal process highlights the incompleteness of "horizontally-oriented" strategies of compliance between states by drawing attention to the vertical processes through which international norms filter down into domestic society. This vertical dimension of norm compliance is especially important in the intellectual property context, given the nature of intellectual property infringement. Unlike other branches of public international law, such as arms control or the use of force, compliance with intellectual property law requires a fairly high level of cooperation and involvement by actors *other* than state governments. While the governing authorities of TRIPS member states do play an important role in enacting and implementing intellectual property legislation within their domestic jurisdictions, their participation as norm sponsors in the domestic reception of intellectual property standards is only part of the picture.

In formulating his transnational legal process theory, Koh acknowledges the composite nature of domestic society by refuting the notion that the state is a solitary unit with a static, exogenously defined identity.<sup>106</sup> In particular, Koh highlights the fact that an international norm may be received to varying extents by the different components that constitute "domestic society". In this regard, Koh's effort to highlight the differences between political, legal and social internalization<sup>107</sup> is particularly important in the context of the TRIPS regime, bearing in mind the impact of social practices and behaviour at the grassroots level on a state government's record of "compliance" with its international intellectual property obligations.

The success of an intellectual property regime is heavily dependent on the attitudes and behaviour of domestic consumers and the public with respect to the use of information and ideas. It is important to note, in this respect, that intellectual property infringement often takes place in private, and is "insidious" in the

<sup>106</sup> See Koh, "Bringing International Law Home", *supra* note 15 at 674: "[M]y analysis does not take domestic regime structures as fixed or given".

<sup>107</sup> Koh, "Why Do Nations Obey International Law?", *supra* note 76 at 2656-2657; Koh, "Bringing International Law Home", *ibid.* at 642-643.

sense that it is not always easy to detect.<sup>108</sup> The advancement of technology has, for instance, made it remarkably simple for consumers to download music, video content, and share digital media with one another through the click of a mouse.<sup>109</sup> In our increasingly “wired” world, the phenomenon of intellectual property piracy and infringement is often embedded in the myriad forms of discourse and communication that animate human interaction in the present age. In addition, the difficulty of monitoring and punishing non-compliant conduct is compounded by the fact that the dividing line between acceptable use and infringement is not always clearly defined. For instance, the act of reproducing a reasonable portion of an intellectual work, such as a book or a movie, for the purpose of criticism or review is permissible under copyright rules,<sup>110</sup> but the same act of copying for the purpose of unauthorized distribution to the public is not. Hence, the size of the portion of the work that is copied as well as the purpose for which the copy is made both involve questions of fact that can only be resolved by reference to the particular circumstances governing each case.

The challenges of effectively implementing intellectual property rules in the domestic legal order accordingly mandate a cautious approach to the question of “compliance” in the TRIPS context. Bearing in mind the often elusive, private and surreptitious nature of intellectual property infringement, particularly the copyright infringement of protected digital media and content, compliance strategies that adopt an exclusively “state-centric” or “coercive” methodology are unlikely to be successful in fostering allegiance to TRIPS norms by important, yet often overlooked, norm

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<sup>108</sup> See Tyler, *supra* note 103 at 223: “[I]ntellectual property is an area in which the opportunities for cheating are widespread. Little actual risk accrues to people who free ride on the efforts of others by copying articles, CDs, or tapes.”

<sup>109</sup> See Viktor Mayer-Schönberger, “In Search of the Story”, in Nico Stehr & Bernd Weiler, eds., *Who Owns Knowledge? Knowledge and the Law* (New Brunswick, N.J.: Transaction, 2008) 237 at 244: “[Modern] technology, especially digital technology, has made it not only easy and cheap to copy, it also has practically eradicated the notion of original and copy. A digital file of a book manuscript can be copied—the result is two identical files...In these instances the copy is as perfect as the original—in fact it is the original.”

<sup>110</sup> See, for instance, sections 29 and 30 of the UK Copyright, Designs and Patents Act 1988; section 29 of Canada’s Copyright Act, R.S.C. 1985, c. C-42 and §107 United States Copyright Act of 1976 (title 17 of the United States Code), which provide for the ‘fair dealing’ or ‘fair use’ of a work. These provisions protect the right of the third parties to engage in reasonable uses of copyright works for activities such as private study or research, education, news reporting and criticism and review.

addressees and non-state actors operating at the grassroots level of domestic society. As a theory on compliance with international law, transnational legal process opens new channels of inquiry into the relationship between law and behaviour, and challenges the dominant paradigm of thought that conceives of states as the primary players in the field of international lawmaking. These insights are particularly relevant to normative regimes that involve participation by actors in domestic society. By recognizing and harnessing the role and power of the individual as a participant in the normative evolution of international law, transnational legal process provides us with a richer, more nuanced conception of "compliance" and regime management in the context of international intellectual property regulation.

*B. The Challenges of Activating Transnational Legal Process in the Intellectual Property Context*

An important question which nevertheless needs to be considered relates to the specific mechanisms and pathways through which international intellectual property norms can be "brought home", taking into account the significant impact of domestic actors on global piracy distribution patterns. Koh himself notes that transnational legal process is not self-activating,<sup>111</sup> and is often dependant on the *proactive* efforts of transnational norm entrepreneurs in provoking iterative dialogue and debate in the larger community, thereby applying democratic pressure on state governments to take action in specific issue areas, such as banning the use of landmines,<sup>112</sup> promoting respect for the rights of refugees<sup>113</sup> or signing human rights conventions.<sup>114</sup>

As in other areas of international law and regulation, the task of getting domestic actors to internalize TRIPS norms is not a spontaneous process. Complying with stringently-defined intellectual property standards often entails significant sacrifices at both the governmental and grassroots levels of society. Policing and punishing infringing activity can be a costly affair for governments, given the

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<sup>111</sup> See Koh, "How Is International Human Rights Law Enforced?", *supra* note 5 at 1416, where he speaks of the "need for individuals to activate transnational legal process".

<sup>112</sup> *Ibid.* at 1412.

<sup>113</sup> *Ibid.* at 1415-1416.

<sup>114</sup> Koh, "Bringing International Law Home", *supra* note 15 at 675.

difficulty of tracking and monitoring non-compliant conduct by domestic actors.<sup>115</sup> Similarly, domestic actors such as software pirates, counterfeiters and Internet users are likely to find that intellectual property laws will restrict their ability to access and commercially exploit protected content. Embracing intellectual property norms would accordingly require these private users to voluntarily abstain from free-riding on the creative and inventive efforts of others.<sup>116</sup>

Whilst providing a useful prescriptive framework for inculcating voluntary obedience to norms through internalization, Koh's transnational legal process model does not always provide guidance on how internalization works in specific cases. It has been observed, for instance, that transnational legal process has only limited predictive value since it does not specify the circumstances under which certain types of norms will be internalized or are likely to persuade a given community of actors.<sup>117</sup> Another concern that has been raised in the literature is the relevance of the liberal democracy factor to the success of transnational legal processes in promoting normative change, since the reception of an international norm into a domestic system may be dependent on the existence of well-defined democratic channels through which political pressure can be applied by grassroots organizations on their governing authorities.<sup>118</sup> "Norm-

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<sup>115</sup> Tyler, *supra* note 103 at 223.

<sup>116</sup> *Ibid.* at 224.

<sup>117</sup> See Kal Raustiala & Anne Marie Slaughter, "International Law, International Relations and Compliance" in Walter Carlsnaes *et al.*, eds., *Handbook of International Relations* (London: Sage Publications, 2002) 538 at 544; Hathaway, "Do Human Rights Treaties Make a Difference", *supra* note 5 at 1962; Hathaway, *supra* note 69 at 483. Other scholars have also attempted to shed light on *when* internalization is likely to occur. See for instance Thomas Risse, Stephen C. Ropp & Kathryn Sikkink, eds., *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999), where they draw on the work of social constructivists to explore the conditions under which human rights norms are internalized in domestic practices. Finnemore and Sikkink, on the other hand, suggest that norms affect behaviour in accordance with a three-stage 'life cycle': norm emergence, norm cascade and norm internalization. According to their theory, an international norm can only begin to gain acceptance once it reaches a threshold, or 'tipping point', when a critical mass of 'norm leaders' embrace the norm, thereby enabling it to "become institutionalized in specific sets of international rules and organizations". See Martha Finnemore & Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) 52:4 Int'l Org. 887 at 895-906.

<sup>118</sup> See Robert Keohane, "When Does International Law Come Home?" (1998) 35 Hous. L. Rev. 699 at 709-710. Keohane argues that "liberal democracy" is an integral aspect of the compliance question that deserves closer attention. See also Anne-Marie Slaughter, "International Law and International Relations Theory: A Dual Agenda" (1993) 87 Am.

interested" international law scholars have also faulted Koh's transnational legal process model for assuming the availability of legal norms and then going on to trace their internalization, without specifying the substantive features or characteristics of those norms that would make them compatible with the process that he delineates.<sup>119</sup>

In considering the extent to which intellectual property norms can be effectively internalized by domestic actors, it is accordingly important to be mindful of the different socio-political conditions that animate state-society relations in a given case. In a totalitarian regime or communist state, for instance, where the Rule of Law finds only limited expression, the absence of democratic channels may obstruct the process through which international norms get transmitted into the domestic legal order. Robert Keohane notes, for instance, that norms dependent on the "state-society" pathway for internalization require the presence of liberal democratic institutions in order to be effectively transmitted.<sup>120</sup> He distinguishes this from the "exclusion from a club" pathway, which is likely to be active only when state governments are isolated both from their own publics and from the international community on a specific issue area.<sup>121</sup> In the latter case, political and communitarian pressure from other states and transnational actors in the global community might be powerful enough to jawbone a rogue state into compliance with its international obligations, even in the absence of democratic channels *within* the state. This is particularly the case if an extensive network of nations subscribes to a common set of goals and standards, and there exist significant incentives in favour of coordinating behaviour in accordance with widely accepted norms.<sup>122</sup> However, transnational legal process is not likely to be an available mechanism for compliance in cases where norms are cleaved along jurisdictional lines, and where distinctive "national" approaches to norm

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J. Int'l L. 205 and Anne-Marie Slaughter, "International Law in a World of Liberal States" (1995) 6 European J. Int'l L. 503.

<sup>119</sup> See Jutta Brunnée & Stephen J. Toope, *supra* note 1 at 291; Markus Burgstaller, *Theories of Compliance with International Law* (Leiden, The Netherlands: Martinus Nijhoff, 2005) at 157.

<sup>120</sup> Keohane, *supra* note 118 at 701.

<sup>121</sup> *Ibid.* at 703-707.

<sup>122</sup> *Ibid.* at 704.

implementation exist.<sup>123</sup> This is because state governments would find it easier in such cases to galvanise support from their national communities for the position that they are taking in relation to an international obligation, and to stigmatize minorities who endorse the “transnational movement” as “unpatriotic”.<sup>124</sup>

In the case of intellectual property law, it is by no means clear that the “norm cleavage” and “liberal democracy” arguments raised by Keohane can simply be dismissed as being irrelevant. Although non-compliance with TRIPS can be considered to be a “global phenomenon”, national approaches to intellectual property do vary widely among member states of the WTO, and the chasm between the innovative capacities of developed and developing countries can certainly affect the extent to which TRIPS standards are viewed favourably in different national jurisdictions. For instance, stringently enforced multilateral patent standards that are pitched at the technological capacities of a major “innovation-driven” country like the United States are likely to be viewed with some unease and even hostility by WTO states with a comparative advantage in the adaptation and imitation of existing technologies. Similarly, the absence of “moral rights” from the panoply of rights protected under the copyright section of the TRIPS Agreement<sup>125</sup> might alienate communities in Continental Europe such as Germany and France, where the concept of *droit d'auteur* has traditionally embraced both the *personal* and the *economic* rights of an author in relation to her work.<sup>126</sup> Further, consumers in developing countries with infant

<sup>123</sup> *Ibid.* at 712.

<sup>124</sup> *Ibid.*

<sup>125</sup> Article 9.1 of the TRIPS Agreement provides, *inter alia*, that: “Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6<sup>bis</sup> of [the Berne Convention for the Protection of Literary and Artistic Works] or of the rights derived therefrom.” Article 6<sup>bis</sup> of the Berne Convention confers protection on the ‘moral rights’ of the author, as a set of rights that are independent of their ‘economic rights’.

<sup>126</sup> See Cornish, *supra* note 8 at 444. The TRIPS Agreement’s implicit emphasis on the material or economic dimensions of copyright is likely to offend authors and artists who cling strongly to romantic notions of the ‘individual god author’ and who are of the view that copying amounts to a “universal moral offence”. See Peter Drahos & John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (London: Earthscan Publications Ltd, 2003) at 38. The TRIPS Agreement’s exclusion of moral rights from its scope of copyright protection also provides an interesting contrast to Article 27 of the Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A (III), UN Doc. A/810 (1948), which gives equal weight to both the *moral* and *material* aspects of authorship.

intellectual property systems might view TRIPS standards as pandering largely to the economic interests of powerful states with high innovative and creative output, such as the United States and Western Europe. The norm cleavages present in the disparate national approaches to intellectual property protection suggest that multilateral efforts at improving TRIPS compliance need to be combined with grassroots pressure and activism from *within* the state in order to produce deep-seated endogenous change in domestic legal systems.

It is nevertheless important to note that national differences constitute only part of the reason why TRIPS norms have had limited success in engendering internalized obedience to intellectual property norms. The divide between developed and developing countries, as well as that between innovator and adaptor countries, while instructive in some respects, neglect certain characteristics, *inherent* to intellectual property norms, that affect the internalization process.<sup>127</sup> I seek to demonstrate in the following paragraphs that the uneasy tension between the competing, internally constitutive goals of intellectual property doctrine<sup>128</sup> weakens their normative thrust as a collective body of legal norms. This feature affects the general compliance pull that TRIPS norms exert on consumers and users of information, constituting a barrier to internalization that cuts across national and geopolitical boundaries. It is accordingly important not to oversimplify the TRIPS compliance debate by focusing exclusively on national differences and neglecting to consider the "norm-based" challenges to internalization that affect the power of intellectual property norms to persuade.

An interesting and important feature of intellectual property law is the mutually limiting effect that its internally constitutive goals—monopoly protection and dissemination—have on each other. The dynamic interplay between these two competing objectives is clearly reflected in Article 7 of the TRIPS Agreement, which provides

<sup>127</sup> Koh himself is of the view that the effectiveness of vertical internalization depends far less on the domestic legal system in question than on the type of rule or norm for which internalization is sought. He observes that there are many international rules that so-called 'illiberal' states internalize, such as the commercial rules regarding letters of credit, and the principles of diplomatic immunity. For Koh, the key determinant of whether states obey international rules is the extent to which these rules have been internalized, and not so much 'the nature and permeability' of the legal system as a whole. See Koh, "Bringing International Law Home", *supra* note 15 at 674-675.

<sup>128</sup> See Abraham Drassinower, "A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law" (2003) 16 Can. J. L. & Juris. 1 at 5.

that the protection and enforcement of intellectual property rights should contribute *both* to the “promotion of technological innovation”, as well as to the “transfer and dissemination of technology”. Both of these objectives should be pursued to the “mutual advantage of producers *and* users” in a manner conducive to “social and economic welfare” and to “a balance of rights and obligations”.<sup>129</sup> However this balance between the monopoly control and distribution of knowledge-based goods is often a delicate one, and the proper level of protection to be afforded to intellectual property in a given case is not always easy to define.<sup>130</sup>

Striking a proper balance between intellectual property’s competing objectives has significant cultural implications for the long-term health of the public domain. For instance, an excessive requirement to forebear from using existing knowledge in the creation of new works until a pre-determined later date may retard the overall cultural and intellectual advancement of society by placing artificial constraints on the wellspring of knowledge from which creators may draw in the course of their intellectual activity. This state of affairs may prevent the (spontaneous) conception of works that would have been created in the absence of such constraints. Gordon has observed, for instance, that the public can be rendered “worse off” if a creation is offered and then limited in its use than if it had never been made in the first place.<sup>131</sup> It might be argued, in this respect, that intellectual property law employs means (i.e. temporary restrictions on use) that are not always compatible with its ends (i.e. the dissemination of knowledge and long-term cultural growth and renewal). The uneasy tension between monopoly protection and

<sup>129</sup> See TRIPs Article 7 on “Objectives”.

<sup>130</sup> See for instance William D. Nordhaus, *Invention, Growth and Welfare: A Theoretical Treatment of Technological Change* (Cambridge, MA: MIT Press, 1969) (suggesting that the term of protection should be calibrated to balance the incentive benefits of protection against the deadweight loss of monopoly pricing, as well as the restrictions on dissemination that are imposed as a result); Suzanne Scotchmer, “Standing on the Shoulders of Giants: Cumulative Research and the Patent Law” (1991) 5 J. Econ. Perspectives 29 at 38 (arguing that excessively high protection for “first generation inventions” can hinder subsequent stages of innovation); William M. Landes & Richard A. Posner, “The Optimal Duration of Copyrights and Trademarks” in William M. Landes & Richard A. Posner, eds., *The Economic Structure of Intellectual Property Law* (Cambridge, MA: Belknap Press of Harvard University Press, 2003) 210, (where they toy with the idea of having a system of ‘perpetual copyright’ in the United States that is based on a series of short, ‘fixed-term’ renewals).

<sup>131</sup> Wendy Gordon, “A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property” (1993) 102 Yale L.J. 1533 at 1593.

dissemination is likely to affect the ability of intellectual property norms to convey a clear, readily internalizable message to their target audience.

The dichotomous nature of intellectual property's internal structure affects the strength of its persuasive power and its capacity to "guide" the behaviour of actors in the TRIPS regime. Unlike a simple rule such as a "no-smoking" prohibition in public areas, intellectual property laws do not issue a directive that is as straightforward as "do not copy" or even "do not copy from works that you have not authored or produced". Instead, intellectual property law appears to convey the message, "Copying is prohibited in some circumstances but perfectly legal in others." The mixed message that intellectual property conveys is, in many respects, necessary to ensure that private property rights in intangible goods do not stave off many "fair-dealing" activities necessary to ensure the continued cultural growth of human civilization through the communication of ideas and information, such as news reporting, criticism and review, study, research, education, and so forth.<sup>132</sup> Yet what constitutes fair dealing is often a question of fact, to be determined in light of the existing circumstances surrounding the allegedly infringing act.<sup>133</sup> The uncertain scope of the fair dealing / dissemination arm of intellectual property doctrine blurs the divide between compliant and non-compliant conduct, thereby affecting the ability of users and consumers of information to discern the legality of their behaviour.

Taking into account the specific norm features of intellectual property law and the importance of state-society pathways to the TRIPS compliance question, multilateral efforts at promoting adherence to regime standards should be mindful of the need to work *around* these barriers to norm internalization. The challenge facing an international organization like the WTO in implementing intellectual property standards lies not just in regulating the conduct

<sup>132</sup> See for instance section 29 of Canada's Copyright Act, R.S.C. 1985, c. C-42.

<sup>133</sup> The Supreme Court of Canada has, for instance, endorsed a six-factor test for determining whether the use of a copyright work is 'fair'. The six factors are: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work. The Supreme Court held that this list of factors provides a useful 'analytical framework' to govern determinations of fairness in future cases, although not all the factors might be relevant in every case. See *CCH Canadian Ltd. v. Law Society of Upper Canada* [2004] 1 S.C.R. 339 at para. 53.

of states, but also in engaging domestic actors, such as consumer groups, "fair copyright" advocates and human rights organizations, in constructive dialogue about the proper scope of their intellectual property obligations. Bearing in mind the substantial cost of intellectual property compliance on domestic users and consumers of intangible goods, international policymakers need to find ways to trigger transnational legal processes by sponsoring "norm entrepreneurship" among librarians, academics, artists and other local groups whose livelihoods are closely connected with the production and dissemination of intellectual content to the public. By ensuring that transnational channels of communication are opened up to domestic norm entrepreneurs, international organizations such as the WTO and the WIPO can play an important role in reducing the "democratic deficit" in trade-based intellectual property relations between states. Such transnational avenues of communication would also enable domestic actors to be active participants in the law making process, instead of mere recipients of norms that are imposed on them by virtue of "formally binding" state consent to treaty principles at the multilateral level.

Critics of the TRIPS Agreement have often attacked its unrealistically high standards of protection, and the futility of its "one size fits all" blanket approach to intellectual property regulation.<sup>134</sup> The potential of transnational legal process in the TRIPS context lies not so much in fostering obedience to existing standards of protection, but in harnessing existing discourse to *re-shape* and *re-construct* intellectual property norms and values in the post-TRIPS era. The key step in this reconstruction of the TRIPS landscape lies in engaging a greater diversity of transnational actors in re-situating the dividing line between monopoly control and dissemination, so that fair uses of information, ideas and technology can be preserved.

Already, new sites of transnational discourse and rhetorical activity are emerging in less conventional venues. For instance, copyright scholar Michael Geist of the University of Ottawa recently

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<sup>134</sup> See Peter K. Yu, "International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia" (2007) Mich. St. L. Rev 1 at 3; Peter K. Yu, "World Trade, Intellectual Property, and the Global Elites: An Introduction" (2002) 10 Cardozo J. Int'l & Comp. L. 1 at 2-3 (arguing that 'universal templates' created in the lawmaking process are modeled after laws in developed countries and fail to take into consideration the socio-economic conditions of less developed countries.) See also David Vaver, "Need Intellectual Property Be Everywhere? Against Ubiquity and Uniformity" (2002) 25 Dalhousie L. J. 1 (arguing that imposing 'developed country standards' of intellectual property standards on the developing world is unlikely to be helpful to either side).

started a group on Facebook to protest proposed legislation in Canada that was similar to provisions in the Digital Millennium Copyright Act (DMCA) of the United States.<sup>135</sup> The DMCA prohibits the circumvention of access controls placed by copyright owners on digital content, and has come under fire for its failure to preserve fair use activities that are protected under traditional copyright rules.<sup>136</sup> Under considerable domestic and diplomatic pressure to fortify the rights of copyright owners, the Canadian Liberal government introduced Bill C-60 in 2005 to bring about "DMCA-like" changes to Canadian copyright legislation.<sup>137</sup> The Bill was abandoned when the Conservative government came to power but was later revived when it was announced that new copyright legislation was imminent.<sup>138</sup> The purpose of Geist's Facebook group was to advocate against such reforms and to campaign for balanced copyright laws in Canada. Although this group was started with modest expectations, its membership ballooned to a startling 40,000 Canadians within weeks. The fervour generated by Geist's Facebook Group prompted members to speak to their elected representatives about their concerns, to spearhead educational initiatives about "fair copyright" in their local communities and to launch public protests.<sup>139</sup> This flurry of activity induced the Canadian government to delay the introduction of the proposed legislation.<sup>140</sup> The key challenge facing international policymakers lies in tapping into these emerging spheres of transnational discourse so as to forge a shared consensus about the proper scope of intellectual property rules, and to

<sup>135</sup> 17 U.S.C. §1201. The DMCA implements two treaties administered by the WIPO: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

<sup>136</sup> See Pamela Samuelson, "Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised" (1999) 14 Berkeley Tech. L.J. 519 at 539, where she argues that courts should distinguish between circumvention aimed at getting unauthorized access to a work and circumvention aimed at making non-infringing (i.e. 'fair') uses of a lawfully obtained copy. Technological barriers imposed by copyright owners are incapable of distinguishing, in many cases, between infringing and non-infringing uses. See also Julie E. Cohen, "Some Reflections on Copyright Management Systems and Laws Designed to Protect Them" (1997) 12 Berkeley Tech. L.J. 161 at 174-176.

<sup>137</sup> See Laura J. Murray & Samuel E. Trosow, *Canadian Copyright: A Citizen's Guide* (Toronto: Between the Lines, 2007) at 4.

<sup>138</sup> *Ibid.*

<sup>139</sup> See "Facing up to Facebook: The Fight for Fair Copyright in Canada", available on Michael Geist, "Fair Copyright for Canada", online: <<http://www.faircopyrightforcanada.ca/>>.

<sup>140</sup> *Ibid.*

encourage the transmission of rhetorical knowledge and normative values across national and institutional boundaries. The Internet, as the new “borderless” realm of communication in the information age, is a good place to start reaching out to the individuals whose attitudes and behaviour are likely to shape and re-shape contemporary understandings of intellectual property protection.

The versatility of the Internet as a new communication medium can also be used to forge shared understandings of intellectual property protection with grassroots organizations and communities in developing countries. Through educational initiatives that seek to foster respect for the rights of local inventors, authors and artists, TRIPS policymakers can stimulate the interactive processes of norm internalization by recruiting local groups as norm advocates for a more balanced body of intellectual property rules. This requires the adoption of a “regime-sensitive” attitude to “fair” intellectual property protection that takes into account the varying socio-political and economic factors that animate the domestic systems of WTO member states.

The limits of transnational legal process as a “predictive” compliance mechanism are instrumental in helping us to understand that not all norms convey messages that are “readily internalizable”, and that not all political systems are equally receptive to the internalization process that Koh prescribes. Yet, it is just as important to note that the effects of transnational legal process are not confined to the generation of compliance with *existing* norm structures and legal frameworks. The very idea of transnational legal process is rooted in *change*, not stasis, and conceives of values, interests and identities as constantly evolving constructs that are shaped and moulded through interaction and persuasion. While the uneasy tensions that exist at the heart of intellectual property regulation might render TRIPS norms resistant to the internalization process, the power of transnational legal process in the TRIPS context lies in its capacity to *reconstruct* existing understandings of how these norms shape behaviour by engaging domestic norm entrepreneurs in a shared discourse about the proper balance to be drawn between monopoly protection and users’ rights.

By the same token, the reconstructive potential of transnational legal process need not always depend on conventional “democratic” pathways of norm transmission for its success, as it may be activated through justificatory discourse in non-traditional and

emerging sites of transnational activity, such as the many pockets of civilization taking root in the "borderless" realm of cyberspace.<sup>141</sup> The path ahead for the internalization of TRIPS principles may nevertheless be a long and winding one—and the major challenge facing international policymakers is in persuading domestic norm entrepreneurs and grassroots organizations that intellectual property norms are, indeed, worth "bringing home".

### **Conclusion**

Although the debate on the roles of persuasion and enforcement in the management of regimes is no longer new, the continuing evolution of international law has forced us to constantly rethink our assumptions and pre-conceived notions in challenging and exciting ways. The emergence of intellectual property as a "new" branch of "enforceable" international law is but one example of how attitudes toward formal sanctions have shifted in a way that has defied our expectations. More importantly, the application of compliance theory to intellectual property regulation reveals important yet overlooked dimensions of fostering lasting respect for norms among the actors from whom obedience is demanded. The words of Confucius, who clearly understood the power of internalized obedience in generating compliance with law, are instructive in this regard:

"Govern the people by [ ] chastisements...and they will flee from you. Govern them by moral force...and they will [ ] come to you of their own accord."<sup>142</sup>

The task of "bringing international law home", the key mechanism that lies at the heart of Koh's transnational legal process theory, is thus an integral step in fostering a sense of "internal" or "self-bindingness" to regime norms. I have argued that this internal dimension of bindingness is particularly important in the context of compliance with intellectual property norms, taking into account the nature of intellectual property infringement, as well as the central position that information and ideas occupy in human discourse and communication at the grassroots level of domestic society. While many TRIPS member states have taken steps to enact domestic

<sup>141</sup> There is a growing interest, particularly among the younger generation of Internet users, in 'on-line communities' and networking resources, such as 'My Space' and 'Facebook'.

<sup>142</sup> Arthur Waley, trans., *The Analects of Confucius*, book II (Vintage, 1989) at 3.

legislation that is compliant with their international intellectual property obligations,<sup>143</sup> such legislation does not necessarily translate into compliant behaviour among domestic consumers. The distinction between enacted legislation and effective implementation is clearly borne out by the disturbingly high levels of piracy and infringement not only in developing nations but also in societies with mature intellectual property systems. I attribute this widespread phenomenon to the lack of intellectual property norm internalization by consumers at the domestic level. This lack of *social* internalization, I have argued, provides an important, albeit oft-overlooked, explanation for continuing non-compliance with intellectual property principles on a global scale in the post-TRIPS era.

The key challenge facing the TRIPS community lies, therefore, in getting individuals in domestic society, as well as state governments, to “bring intellectual property norms home” by embracing them as part of their internal value set.<sup>144</sup> In this regard, transnational legal process serves as an important bridge between the articulation of norms at the international level and the reception of norms into domestic society. In addition, transnational legal process sheds light on the causes of non-compliance with TRIPS in two important respects. Firstly, it distinguishes between “grudging compliance”<sup>145</sup> obtained through the use of threats, coercion or sanctions, and voluntary, self-constraining obedience inculcated through processes of facilitative consultation, iterative dialogue, persuasion and identity convergence. The latter form of compliance, which has been termed the “managerial approach” by the Chayes, has

<sup>143</sup> One commentator has noted that China, despite its struggles with piracy, has, ‘on the books’, one of the most comprehensive sets of intellectual property laws in the world. See Hanson Hu Li, “Piracy, Prejudice and Profit: A Perspective from US-China Intellectual Property Rights Disputes” (2006) 9:6 *Journal of World Intellectual Property* 727 at 731. Li notes that Chinese copyright law grants protections that are not available even in the United States, such as the protection of the right of integrity in one’s work regardless of the medium. See also Peter K. Yu, “Piracy, Prejudice and Perspectives: An Attempt to Use Shakespeare to Reconfigure the U.S.-China Intellectual Property Debate” (2001) 19 *B.U. Int’l L.J.* 1 at 2, who observes that merely “putting intellectual property laws on statute books”, without more, does not magically produce effective results. In this vein, it has been suggested that the problem with China’s intellectual property system is that it has “too much law, and too little legality”. See William P. Alford, “How Theory Does—and Does Not—Matter: American Approaches to Intellectual Property Law in East Asia” (1994) 13 *UCLA Pac. Basin L.J.* 8 at 21 and Yu, *supra* note 98 at 975.

<sup>144</sup> Koh, “Bringing International Law Home”, *supra* note 15 at 627.

<sup>145</sup> *Ibid.* at 676.

been endorsed by many TRIPS commentators as being the more effective compliance strategy for intellectual property regime management. Koh's model, however, goes further by highlighting the incompleteness of horizontally-oriented compliance strategies that focus on states as the primary actors in international affairs. Individuals and other non-state actors at the grassroots level do indeed have an important role to play in beginning the long and arduous process of translating and reconstructing international intellectual property norms into a form that coheres with their closely-held values and beliefs. In the absence of such a translation, any compliance with TRIPS norms is likely to be merely superficial and short-lived, a result, in Confucius' words, of "fearing chastisement" rather than of a deeply-held belief in their moral force.

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## **The Problem of Unequal Treaties in Contemporary International Law: How the Powerful have Reneged on the Political Compacts within which Five Cornerstone Treaties of Global Governance are Situated**

SHIRLEY V. SCOTT\*

This article considers a phenomenon common to five cornerstone treaty regimes of global governance: those founded on the Charter of the United Nations (UN Charter),<sup>1</sup> the Treaty on the Non-Proliferation of Nuclear Weapons (NPT),<sup>2</sup> the Third United Nations Convention on the Law of the Sea (LOSC),<sup>3</sup> the General Agreement on Tariffs and Trade and Marrakesh Agreement establishing the World Trade Organization (GATT/WTO),<sup>4</sup> and the United Nations Framework Convention on Climate Change (UNFCCC).<sup>5</sup> The vast majority of States have given their consent to these treaties, begging the question as to why the less powerful have agreed to treaties that in several instances appear to have favoured the interests of the most powerful. It will be seen that in each case the less powerful States agreed to the terms of the treaty as part of what they perceived to be a broader political compact with the most powerful States in that treaty regime. In each case the most powerful have reneged on their side of that compact. Viewing five of the cornerstone treaties of global governance as each situated within a political compact on which the most powerful have reneged can help us better to understand the depth of disappointment which has underpinned accusations of non-compliance in some of these regimes and the difficulty of reaching fresh political accommodations between powerful and less powerful

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<sup>1</sup> *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7.

<sup>2</sup> *Treaty on the Non-Proliferation of Nuclear Weapons*, 1 July 1968, 729 U.N.T.S. 169.

<sup>3</sup> *United Nations Convention on the Law of the Sea*, 10 December 1982, 18 U.N.T.S. 3, 21 I.L.M. 1261 (entered into force 16 November 1994).

<sup>4</sup> *General Agreement on Tariffs and Trade*, 30 October 1947, 58 U.N.T.S. 187, Can. T.S. 1994 No. 27 (entered into force 1 January 1948) [GATT 1947].

<sup>5</sup> *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 U.N.T.S. 107, 31 I.L.M. 849 (entered into force 21 March 1994).

being experienced within other regimes. The article concludes that the dissatisfaction emanating from a perception that the most powerful have consistently reneged on compacts made during the negotiation of treaties central to the emergent system of global governance may well have contributed to a diminishing association of international law with justice and to the 'legitimacy deficit' from which the contemporary system of international law is said to suffer.

### **International Law in the Emergent System of Global Governance**

International law serves as the framework for the emergent system of global governance. It provides the constitutive treaties by which intergovernmental organizations are established and it serves as the vehicle through which States negotiate the means of addressing issues that require a coordinated response. Issues for which multilateral treaties currently embody the principal means of coordinating the international response include the possession of nuclear weapons, climate change, usage of the oceans, and the functioning of a system of world trade. One of the most basic principles of the international law of treaties is that a treaty does not create either obligations or rights for a third State without its consent.<sup>6</sup> The negotiation, conclusion and successful entry into force of the cornerstone treaties of the contemporary international order has therefore been a considerable undertaking and it has been strikingly successful if we consider the participation rates of the five treaties under review. The UN Charter has 191 States Parties; the NPT, 189; LOSC, 149; the UNFCCC, 189; and the WTO, over 150 members.<sup>7</sup> While such high rates of consent might easily be taken for granted, the challenges lying ahead in the production of a post Kyoto treaty on climate change as well as the difficulties that have faced those attempting to bring to a successful conclusion the Doha Round of negotiations in the WTO, serve as a reminder of just how difficult it can be to attain political accommodation amongst members of such a large and diverse group of States.

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<sup>6</sup> Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, art. 34.

<sup>7</sup> Figures taken from Shirley V. Scott, ed., *International Law and Politics: Key Documents* (Boulder, Colorado: Lynne Rienner, 2004) at 831-836 and from World Trade Organization, "Understanding the WTO – members", online: <[http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)>.

The fact that the less powerful agreed to the UN Charter and the NPT might seem particularly surprising. Both could be labelled ‘unequal treaties’, in that they each accord very different rights and responsibilities to different sets of States.<sup>8</sup> In both treaties the group accorded special rights represents only a very small minority of the States Parties; even given the smaller number of States at the time, it could be considered surprising that these treaties received the requisite support. The fault lines vary slightly between issue areas. In the case of nuclear weapons, the basic division has been between nuclear weapon States and non-nuclear weapon States members of the non-aligned movement; there is a developing - developed country divide in the WTO, although there is no single developing country coalition;<sup>9</sup> and there were a number of cleavages at the Third United Nations Conference on the Law of the Sea, of which the North-South divide was a particularly important one.<sup>10</sup> Let us begin by briefly reviewing the significance of the UN Charter and NPT to the contemporary international legal order and consider the manner in which the provisions of each could be deemed unequal.

#### *The Charter of the United Nation as an Unequal Treaty*

The Charter of the United Nations is the closest we have to an international constitution. It contains a general prohibition on the use of force in inter-State relations,<sup>11</sup> with exceptions for self-defence<sup>12</sup> and use of force when authorized by the Security Council.<sup>13</sup> By article 25 of the UN Charter, States Parties agree to accept and carry out the decisions of the Security Council, and by article 103, obligations under the Charter are to prevail over obligations arising from any other international agreement. The position of power accorded the P5 by the Charter was extraordinary. Substantive decisions of the Security Council are made by an affirmative vote of nine members, including the concurring votes or abstentions of the

<sup>8</sup> Werner Morvay, “Unequal Treaties” in Rudolf Bernhardt ed., *Encyclopedia of Public International Law*, vol. IV. (New York: North Holland, 2000) 1008 at 1010.

<sup>9</sup> Robert O’Brien & Marc Williams, *Global Political Economy: Evolution and Dynamics*, 2<sup>nd</sup> ed. (New York: Palgrave Macmillan, 2007) at 160.

<sup>10</sup> Jonathan Charney “Law of the Sea: Breaking the Deadlock” (1977) 55:3 Foreign Affairs 598.

<sup>11</sup> *Charter of the United Nations*, *supra* note 1, art. 2(4).

<sup>12</sup> *Ibid.*, art. 51.

<sup>13</sup> *Ibid.*, arts. 39, 41 and 42.

five permanent members (US, Russia, United Kingdom, France, and China).<sup>14</sup> Their veto in Council decisions on substantive matters is echoed in the provisions on Charter amendment.<sup>15</sup> Even article 109(3), which made it easier to hold a review conference if none had been held within ten years, left any resulting amendment of the Charter subject to the veto.

It is easy to become *blasé* about the enormity of the change in inter-State relations represented by the introduction into international law of a prohibition on the use of force in inter-State relations. Previous to the Covenant of the League of Nations, which had served as a sort of tentative trial run, war had been an acceptable activity for a sovereign State, but equally accepted was the right of third parties to remain neutral. Prohibiting war for national purposes meant that States using force were now readily classifiable as in the right or in the wrong. In contrast to the nineteenth century presumption of a right to remain neutral, the bulk of States were, through their acceptance of article 25 of the UN Charter, effectively accepting a duty to support whoever had been deemed 'in the right'.<sup>16</sup> This was a considerable undertaking for most States.

#### *The Treaty on the Non-Proliferation of Nuclear Weapons 1968 as an Unequal Treaty*

The NPT is one of the cornerstone treaties of the emergent world polity because it addresses the question of who can possess nuclear weaponry. Some regard the treaty as second in importance to the UN Charter.<sup>17</sup> When the NPT was concluded in 1968, the then non-nuclear weapon States pledged in article II never to become nuclear weapon powers and, by article III (1), to accept International Atomic Energy Agency (IAEA) safeguards to verify their compliance with this obligation. This treaty has functioned to retain, or at least retard change to, the nuclear weapon status quo as it existed in 1968. With but a few exceptions it has been successful in this role. While the contribution of the NPT to restricting the spread of nuclear weaponry may be welcome, it is nevertheless striking that the P5 are allowed

<sup>14</sup> *Ibid.*, art. 27(3).

<sup>15</sup> *Ibid.*, arts. 108 and 109.

<sup>16</sup> See Roderick Ogle, *The Theory and Practice of Neutrality in the Twentieth Century* (London: Routledge & Kegan Paul, 1970) at 98.

<sup>17</sup> Richard Butler, *Fatal Choice: Nuclear Weapons and the Illusion of Missile Defense* (Crows Nest, NSW: Allen & Unwin, 2001) at 52.

nuclear weapons but international law forbids Iran, for example, to enhance its national security through this means. Indeed, the International Court of Justice has subsequently not ruled out the possibility that the threat or use of nuclear weapons might be lawful in an extreme circumstance of self-defence.<sup>18</sup>

### **How did we come to get Unequal Treaties with Virtually Universal Participation?**

The term ‘unequal treaty’ is usually regarded as of primarily historical interest and used in connection with the treaties imposed on China, Siam and Japan in the nineteenth century.<sup>19</sup> Many were concluded at gunpoint,<sup>20</sup> and typically included provisions on “extraterritoriality, nonreciprocal tariff and most-favoured nation privileges, territorial cessions and leases, the stationing of foreign military units, and many other humiliating restrictions upon sovereignty.”<sup>21</sup> By article 52 of the Vienna Convention on the Law of Treaties, a treaty is void “if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations,”<sup>22</sup> yet the term ‘unequal treaty’ is not recognized in contemporary international law. In legal terms it does not matter if a treaty is unequal, so long as it was not achieved with coercion. Many might assume that, absent coercion, unequal treaties are unlikely to be concluded.<sup>23</sup> Smaller States have generally occupied the majority in the large-scale post 1945 multilateral negotiations and so it would also be reasonable to assume that this would make it unlikely that the

<sup>18</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] I.C.J. Rep. 226.

<sup>19</sup> Grotius and Vattel had advocated the transposition of the doctrine from the law of contracts to the law of treaties. Lucius Caflisch, “Unequal Treaties” (1993) 35 German Yearbook of International Law 52 at 52.

<sup>20</sup> Ingrid Detter, “The Problem of Unequal Treaties” (1962) 11 I.C.L.Q. 1069 at 1073.

<sup>21</sup> Jerome Alan Cohen & Hungdah Chiu, *People’s China and International Law: A Documentary Study*, vol. 2 (Princeton: Princeton University Press, 1974) at 1114. See also Peter Wesley-Smith, *Unequal Treaty 1898-1997: China, Great Britain and Hong Kong’s New Territories* (Hong Kong: Oxford University Press, 1980).

<sup>22</sup> Malawer provides an account of the drafting of article 52 in Stuart S. Malawer, “A New Concept of Consent and World Public Order: “Coerced Treaties” and the Convention on the Law of Treaties” (1970-71) 4 Vand. Int’l 1 at 28.

<sup>23</sup> Malawer commented in 1977 that unequal treaties concluded without the threat or use of some form of force have not existed often. Stuart S. Malawer, *Imposed Treaties and International Law* (Buffalo: Hein, 1977) at 9.

requisite proportion of States would have agreed to fundamentally inequitable treaties.<sup>24</sup> Given that we have already identified the UN Charter and NPT as having inequitable provisions, how then are we to understand acceptance of those treaties on the part of the less powerful?

There would seem to be two dimensions to the answer to this question. The first relates to the perceived necessity of order. As World War Two neared an end, the overwhelming need for all States was peace. The great powers presented a united front on the question of the veto, despite considerable opposition from smaller powers. At one stage during the San Francisco conference, divisions - including that in relation to the veto - meant that there was a real possibility that there would be no United Nations.<sup>25</sup> But the world needed peace above all else and, however reluctantly, the 'peoples' opted for order over justice.<sup>26</sup> A second aspect of the answer to the puzzle as to why less powerful States gave their consent to unequal treaties lies in the fact that the inequality was in each case lessened somewhat by a quid pro quo. In the case of the UN Charter, the enormous powers granted the P5 were to some extent balanced by their assuming the burden of the "primary responsibility for maintaining international peace and security."<sup>27</sup> And Article 109, by which it would be easier to hold a conference to review the UN Charter after a decade if no review had been held earlier, can be understood as a provision to appease the less powerful for the impossibility of peacefully amending the Charter without the concurrence of the permanent members.<sup>28</sup>

The quid pro quo extended beyond the treaty text. In relation to the veto, a 'Five Powers' statement' of 7 June 1945 intimated that the permanent members would not use their veto power wilfully to obstruct the operation of the Council.<sup>29</sup> The fact that the smaller

<sup>24</sup> Onuma Yasuaki, "International Law in and with International Politics: The Functions of International Law in International Society" (2003) 14 E.J.I.L 105 at 117.

<sup>25</sup> See Stanley Meisler, *United Nations: The First Fifty Years* (New York: Atlantic Monthly Press, 1995) at 19.

<sup>26</sup> See Paul Hasluck, *Workshop of Security* (Melbourne and London: R.W. Cheshire, 1948) at 130.

<sup>27</sup> *Charter of the United Nations*, *supra* note 1, art. 24(1).

<sup>28</sup> Shirley V. Scott, "The Question of UN Charter Amendment, 1945-1965: Appeasing 'the Peoples'" (2007) 9 J. Hist. Int'l L. 83.

<sup>29</sup> The statement is reproduced in U.S., Senate Foreign Relations Committee Subcommittee on the United Nations Charter, *Review of the United Nations Charter: a*

powers acquiesced in the P5 gaining their weighty powers over the legitimate use of force because of the perceived need for international order could be said to have been premised on an implicit bargain: that that power be used only for the common good of maintaining international peace and security. It was not to be abused by the waging of aggressive war. While the letter of the law would arguably have been met if the Security Council authorized use of force in the interests of the P5 so long as the Council had passed a resolution identifying a threat to the peace, breach of the peace or act of aggression, this was far from the understanding on which the less powerful gave their consent to the vastly inequitable terms of the Charter.

As with the UN Charter, the NPT goes some way towards incorporating a quid pro quo for the 'second tier' of States. In return for agreeing never to become nuclear weapon States, non-nuclear weapon States were to retain the right to develop research, production and use of nuclear energy for peaceful purposes and to receive assistance to do so.<sup>30</sup> Nuclear weapons States gave both positive assurances of assistance in the event that an NPT party is the victim of an act of, or object of, a threat of aggression in which nuclear weapons are used, and negative assurances that nuclear weapons will not be used against them.<sup>31</sup> From the non-nuclear weapon State perspective the most significant part of the bargain was, however, article VI, by which nuclear-weapon States were to "undertake ... to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control." The United States and Soviet Union would have preferred not to have disarmament mentioned other than in the preamble,<sup>32</sup> but the non-nuclear weapon States were adamant that it be included. In fact, the non-nuclear weapon States would have preferred to include

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*Collection of Documents* (Washington, D.C.: United States Government Printing Office, 1954) at 562.

<sup>30</sup> *Treaty on the Non-Proliferation of Nuclear Weapons*, *supra* note 2, arts. IV and V.

<sup>31</sup> See Jean DuPreez, "The Role of Security Assurances: Is Any Progress Possible?" (April, 2004) NTI Issue Brief, online: NTI Research Library <[http://www.nti.org/e\\_research/e3\\_45a.html](http://www.nti.org/e_research/e3_45a.html)>.

<sup>32</sup> Nicole Deller, Arjun Makhijani & John Burroughs, eds., *Rule of Power or Rule of Law? An Assessment of U.S. Policies and Actions Regarding Security-Related Treaties* (New York: Apex, 2003) at 22.

reference to concrete steps leading in the direction of nuclear disarmament—such as a comprehensive test ban and an agreement to cease the production of fissile material for weapons purposes.<sup>33</sup> From the perspective of the non-aligned, non-nuclear weapon States, the incorporation of a definite commitment to disarmament on the part of the existing nuclear weapon States was a question of principle even more than a question of security.<sup>34</sup> In refusing to have the concrete disarmament measures outlined in the treaty, the Soviet delegation argued that such provisions would make agreement on non-proliferation contingent on agreement on measures whose negotiation, experience had shown, would take years to complete.<sup>35</sup> In the end, reference to disarmament was incorporated into the Treaty, but without specific targets that would serve as benchmarks against which to measure compliance on the part of nuclear weapon State Parties.

**Does the Existence of the More Equitable Political Compacts Mean that the Contemporary International Legal Order has escaped the ‘problem’ of unequal treaties?**

If the UN Charter and NPT are read at face value, their provisions appear inequitable. If, however, the inbuilt quid pro quo and implicit understandings are taken into account, the degree of inequality does not appear so stark. Does this mean, then, that the UN Charter and NPT have successfully avoided engendering the humiliation and resentment that accompanied the unequal treaties of the colonial era? Unfortunately this question must be answered in the negative. In both these cases there have been allegations of non-compliance with key components of the treaties. In the case of the UN Charter, the most serious recent issue has been that of the use of force on the part of the United States, United Kingdom and Australia against Iraq in 2003. The vast majority of international lawyers believe that that war was illegal—that the US did not abide by the Charter in its use of force.<sup>36</sup>

<sup>33</sup> E.L.M. Burns, “The Nonproliferation Treaty: Its Negotiation and Prospects” (1969) 23:4 *International Organization* 788 at 802.

<sup>34</sup> Mohamed I. Shaker, *The Nuclear Non-Proliferation Treaty: Origin and Implementation 1959-1979*, vol. II (London: Oceana, 1980) at 564.

<sup>35</sup> Burns, *supra* note 35 at 802.

<sup>36</sup> A significant proportion would likely agree with Andrew Byrnes that the justification put forward was ‘untenable’, falling outside the range of acceptable arguments. See

The depth of opposition to the US invasion of Iraq goes beyond what might be expected from a straightforward case of non-compliance. Viewing opposition to the invasion from the perspective of the US having reneged on the implicit compact that accompanied the consent of the less powerful to an ostensibly inequitable treaty offers a context within which to understand the depth of reaction to that act of illegality. It was, for example, not difficult to see the 2003 invasion of Iraq as a war motivated by self-interest for which the Charter was to be a pretext, a war that has so far given rise to less, rather than more, international order. In waging that war the United States and United Kingdom were reneging on a compact of which the Charter provisions on the use of force were a part. To argue for the legality of the invasion on the basis of the letter of the law did absolutely nothing to improve the legitimacy of the invasion because the invasion had ridden roughshod over the spirit of the law, the political basis on which the 'peoples' had acquiesced with the terms of an unequal treaty. This has given rise to a much more fundamental grievance than simply a failure of the United States and allies to comply with the letter of international law.

The nuclear weapon States were for many years able to capitalize on the more ambiguous wording of their legal obligations in the NPT in maintaining that they were complying fully with the Treaty. At the review and extension conference held in 1995, members of the non-aligned movement again expressed their concern that nuclear weapon States had not fulfilled their article VI obligations and that agreeing to the indefinite extension of the Treaty would "ratify inequality in international relations once and for all, and relegate the non-nuclear countries to second-class status."<sup>37</sup> The matter was addressed through a further deal. The NPT was to be extended indefinitely as part of a package including a resolution on

Andrew Byrnes, "'The Law was Warful': The Iraq War and the Role of International Lawyers in the Domestic Reception of International Law" in H. Charlesworth *et al.*, *The Fluid State: International Law and National Legal Systems* (Annandale, NSW: Federation Press, 2005) 229 at 247. One who has accepted the legal basis of the invasion as a tenable and defensible one is Dominic McGoldrick. See Dominic McGoldrick, *From '9/11' to the 'Iraq War 2003': International Law in an Age of Complexity* (Oxford: Hart, 2004) at 85.

<sup>37</sup> Mr. Ibrahim (Indonesia), 1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons Final Document Part III. Summary and Recommendations, UN Doc. NPT/CONF.1995/32(Part III) at 35, online: <[http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=NPT/CONF.1995/32\(PARTIII\)&Lang=E](http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=NPT/CONF.1995/32(PARTIII)&Lang=E)>.

the Middle East, a decision on “Strengthening the Review Process of the Treaty”, and a decision entitled “Principles and Objectives for Nuclear Non-Proliferation and Disarmament”.<sup>38</sup> States committed, *inter alia*, to complete the negotiation of a Comprehensive Test-Ban Treaty no later than 1996 as well as to the “determined pursuit” on the part of the nuclear-weapon States of “systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goals of eliminating those weapons, and by all States of general and complete disarmament under strict and effective international control.” The text also stated that “further steps should be considered to assure non-nuclear-weapon States party to the Treaty against the use or threat of use of nuclear weapons. These steps could take the form of an internationally legally binding instrument.” This deal subsequent to the initial NPT bargain can be understood as having extended the period during which an observer might reasonably expect the nuclear weapon States to live up to their side of the initial non-proliferation-disarmament bargain.

The Comprehensive Nuclear Test-Ban Treaty was concluded in 1996,<sup>39</sup> but to date China has not ratified it, and the US has made clear that it does not intend to do so. It is not of course illegal to refrain from ratifying a treaty, but in failing to do so, the US and China have reneged on the political bargain by which the NPT was extended. The 1996 ICJ Advisory Opinion on the Legality of Nuclear Weapons confirmed that article VI required more than talks; the Court found unanimously that “there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”<sup>40</sup> At the 2000 Review Conference all States Parties to the NPT agreed to a ‘Thirteen Steps’ Plan of Action on Nuclear Disarmament.<sup>41</sup> Practically every speech at the 2005 Review Conference mentioned the importance of early entry into force of the

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<sup>38</sup> *Principles and Objectives for Nuclear Non-Proliferation and Disarmament: Proceedings of the Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, New York, 11 May 1995* (New York: United Nations, Dept. for Disarmament Affairs, 1995), (Part I), Annex.

<sup>39</sup> *Comprehensive Nuclear Test Ban Treaty*, 24 September 1996, 35 I.L.M. 1439.

<sup>40</sup> *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 20.

<sup>41</sup> Online: <<http://www.reachingcriticalwill.org/legal/npt/13point.html>>.

CTBT,<sup>42</sup> but the US refused even to mention the CTBT,<sup>43</sup> and the conference failed to adopt a consensus final declaration; the president of the 2005 conference concluded that the present crisis is the worst in the 34-year history of the NPT.<sup>44</sup> Other than China, all nuclear weapon States are opposed to making negative security assurances legally-binding. The US stated: “[w]e fail to see any justification for expanding NSAs [negative security assurances] to encompass global-legally binding assurances. This proposal has no relation to contemporary threats to the NPT.”<sup>45</sup> In contrast, the representative of Iran to the 2005 review conference referred to “the unfulfilled commitments and promises on a legally binding instrument on Negative Security Assurances in the framework of...the 2000 Final document.”<sup>46</sup>

It seems that in respect of both the UN Charter and the NPT, the consent of the less powerful States to the treaty inclusive of unequal provisions was premised on the most powerful fulfilling their side of an implicit compact broader and more equitable than the treaty text. This makes intuitive sense for it helps explain why so many sovereign States should have agreed to inequitable treaty provisions not imposed through coercion.

<sup>42</sup> Rebecca Johnson “Politics and Protection: Why the 2005 NPT Conference Failed” (2005) 80 Disarmament Diplomacy, online: <<http://www.acronym.org.uk/dd/dd80/8onpt.htm>>.

<sup>43</sup> The Hon. Douglas Roche, OC, “Deadly Deadlock: A Political Analysis of the Seventh Review Conference of the Non-Proliferation Treaty” (Paper presented to the 2005 Review Conference of the Parties to the Treaty on Non-Proliferation of Nuclear Weapons, 2-27 May 2005) at 2, online: Global Security Institute Middle Power Initiative <<http://www.gsinstiute.org/mpi/docs/2005NPTpoliticalanalysis.pdf>>.

<sup>44</sup> J. Dhanapala & R. Rydell, *Multilateral Diplomacy and the NPT: An Insider’s Account* (Geneva: United Nations, 2005) at 98.

<sup>45</sup> *Preparatory Committee for the 2005 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons: United States statement*, 3d Sess., UN Doc. NPT/CONF.2005/PC.III/WP.28 (2004), online: <<http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=NPT/CONF.2005/PC.III/WP.28&Lang=E>>.

<sup>46</sup> H.E. Dr Karim Kharrazi, Minister of Foreign Affairs of the Islamic Republic of Iran, to the Seventh NPT Review Conference (3 May 2005), online: <<http://www.un.org/events/npt2005/statements/npto3iran.pdf>>.

### **Other Cornerstone Treaty Regimes Situated within broader Political Compacts**

Let us now look to some other cornerstone treaties of global governance: the LOSC, the GATT/WTO, and the UNFCCC, to briefly review their significance to the emergent global polity and to see if they can similarly be understood to be situated within broader political compacts.

#### *The Third United Nations Convention on the Law of the Sea*

This treaty is regarded as having established a constitution for the oceans. When the negotiations for the Third United Nations Law of the Sea Convention (LOSC) commenced in 1973, the law of the sea was in a state of uncertainty. The issue was often presented in terms of establishing order. US Ambassador Richardson stated at the 1977 negotiations: “[r]arely has any generation had so clear a choice to make between order and anarchy.”<sup>47</sup> It was believed that, without a treaty, the world would witness “the biggest smash and grab” since the Berlin Conference.<sup>48</sup> The US and USSR were ‘prime movers’ for the Convention, motivated largely by concerns that the new offshore claims of coastal states to twelve nautical miles threatened to overlap and possibly close some 134 straits.<sup>49</sup> States of the Third World were, however, seeking to have the deep seabed outside national jurisdiction declared the ‘common heritage of mankind’ (CHM). Although there was no precise definition of the CHM concept, it was understood to incorporate the ideas that neither the CHM area nor its resources can be owned or subject to appropriation of any kind, that the CHM must be managed in common by all humankind, that there must be an active sharing of benefits derived from exploration and exploitation of the CHM, and that the CHM area must be used solely for peaceful purposes.<sup>50</sup>

Negotiations for the Convention proceeded by way of consensus on the overall package as opposed to on an issue-by-issue

<sup>47</sup> Cited in Richard G. Darman, “The Law of the Sea: Rethinking U.S. Interests” (1978) 56 Foreign Affairs 373 at 381.

<sup>48</sup> Lord Ritchie Calder, quoted in John Temple Swing, “Who Will Own the Oceans?” (1976) 54 Foreign Affairs 546.

<sup>49</sup> David L. Larson, “The Reagan Rejection of the UN Convention” (1985) 14 Ocean Devel. & Int'l L. 337 at 338.

<sup>50</sup> Annica Carlsson, “The US and UNCLOS III – The Death of the Common Heritage of Humankind Concept?” (1997) 95 Maritime Studies 27 at 28.

basis. Once again, the most powerful made what could be described as a political compact with the other negotiating States. As David Larson describes it:

After several years of negotiation, the United States was able to achieve in May 1975 what was essentially unimpeded transit passage through international straits and territorial waters, including the passage of submerged SSBNs, in several articles noted for their constructive ambiguity. In return for this concession by the LOSC Group of 77 (G-77), Henry Kissinger in August 1975 made an implied concession to go along with the international regulation and control of deep seabed mining, and the 200 nautical mile "Exclusive Economic Zone". This understanding became one of the central trade-offs, or compromises reflected in the "package deal" of the Revised Single Negotiating Text...<sup>51</sup>

Part XI of the LOSC, which dealt with the deep seabed as the common heritage of mankind, represented for many, "that great aspiration of the less fortunate in the international community."<sup>52</sup> Negotiations, inclusive of the trade-off, had been virtually completed by the end of 1980. In March 1981 the new Reagan Administration began a review of the draft treaty, the outcome of which was that US negotiators returned to the table with a hard-line negotiating position inclusive of 'frontier' seabed mining provisions by which the first company to stake a claim owns the resources.<sup>53</sup> When negotiations reached a conclusion in 1982, the US broke with the consensus method that had been used throughout the long negotiations and called for a vote on the text. The United States was the only Western industrialized country to vote against the treaty, the outcome being 130 in favour, four against, and 17 abstentions. The 'trade-off/package deal' worked out between the United States and the Group of 77 from 1970 to 1976 had broken apart.<sup>54</sup> Few developed

<sup>51</sup> Larson, *supra* note 51 at 338-339.

<sup>52</sup> Kenneth Rattray, "Assuring Universality: Balancing the Views of the Industrialized and Developing Worlds" in Myron H. Nordquist & John Norton Moore, eds., *Entry Into Force of the Law of the Sea Convention* (The Hague: Martinus Nijhoff, 1995) 55 at 55.

<sup>53</sup> Leigh S. Ratiner, "The Law of the Sea: A Crossroads for American Foreign Policy" (1982) 60 Foreign Affairs 1006 at 1012.

<sup>54</sup> Larson, *supra* note 51 at 354.

States ratified the Convention within the first decade of its being open for signature.<sup>55</sup>

On 1 September 1989, the Chairman of the Group of 77, Mumba Kapumpa of Zambia, declared that the Group of 77 was “ready to talk” with any delegation or group of delegations “because the universality of the Convention has always been the objective of the Group of 77.”<sup>56</sup> The UN Secretary-General conducted consultations between 1990 and 1993; the resulting 1994 Implementing Agreement effectively amended the Convention so as to remove the application of the Common Heritage principle.<sup>57</sup> LOSC entered into force on 16 November 1994. Although the area of the deep seabed beyond national jurisdiction is still called and declared the common heritage of mankind, “the term has lost its original meaning and substance when it symbolized the interests, needs, hopes and aspirations of a large number of poor peoples. The principle has lost its lustre and soul.”<sup>58</sup> And yet, the US has still not ratified the LOSC, meaning that the treaty has bound the world at large to the provisions the US wanted while the US itself, preferring to rely on customary international law of the sea,<sup>59</sup> has effectively reneged on the initial deal.

#### *The United Nations Framework Convention on Climate Change*

One of the key tasks of global governance has been to tackle environmental problems of a global nature. Climate change is the quintessential global environmental issue. As with other environmental issues, there are economic dimensions to the issue and to its mitigation. There was some agreement as early as the 1972 United Nations Stockholm Conference on the Human Environment that developed and developing countries would have different roles to play in the amelioration of environmental problems and this

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<sup>55</sup> Of the sixty States required to ratify LOSC before it could enter into force, 58 were developing States. D.H. Anderson, “Further Efforts to Ensure Universal Participation in the United Nations Convention on the Law of the Sea” (1994) 43 I.C.L.Q. 886 at 889, n. 10.

<sup>56</sup> Quoted by Rattray, *supra* note 54 at 57.

<sup>57</sup> *Agreement Relating to the Implementation of Part XI of the United Nations Convention of the Law of the Sea of 10 December 1982*, 28 July 1984, 33 I.L.M. 1309 (entered into force 28 July 1996). Carlsson, *supra* note 52 at 28.

<sup>58</sup> R.P. Anand, *Studies in International Law and History* (Leiden: Martinus Nijhoff, 2004) at 196.

<sup>59</sup> Ratiner, *supra* note 55 at 1012.

approach was successfully trialled in the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer.<sup>60</sup> The 1992 UN Conference on Environment and Development formalized the principle of 'common but differentiated responsibilities' (CDR), stating in principle 7 of the Rio Declaration on Environment and Development:

In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.<sup>61</sup>

Climate change came on to the international agenda in the late 1980s. The nature of global warming meant that a convention to contain the phenomenon could have wide-ranging economic implications; "a climate convention could constitute a major multilateral economic agreement. The sharing of costs and benefits implied in the convention could significantly alter the economic destinies of individual countries."<sup>62</sup> The CDR principle was incorporated into the Framework Convention on Climate Change. This treaty, which sought the "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system," stated in article 3(1) that the Parties would protect the climate system "on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof." The principle of common but differentiated responsibilities thus embodied a deal between developed and developing countries: while all countries in the world would need to cooperate to mitigate environmental degradation, the developed countries would take the lead, both because of their greater responsibility for the environmental degradation and because of their economic capacity to

<sup>60</sup> *Montreal Protocol on Substances that Deplete the Ozone Layer*, 16 September 1987, 26 ILM 1550.

<sup>61</sup> Reproduced in Patricia W. Birnie & Alan Boyle, eds., *Basic Documents on International Law and the Environment* (Oxford: Clarendon, 1995) at 9-14.

<sup>62</sup> Chandrashekhar Dasgupta, "The Climate Change Negotiations" in Irving M. Mintzer and J. Amber Leonard, *Negotiating Climate Change: The Inside Story of the Rio Convention* (Cambridge: CUP, 1994) 129 at 131.

take action.

In not ratifying the Kyoto Protocol,<sup>63</sup> the United States could be seen as having reneged on the political deal of which the details of the Kyoto Protocol were a part, and indeed on a broader ethical compact embodied in the legal concept of CDR.<sup>64</sup> Despite accepting as a legal obligation the application of the CDR principle to climate change, leading industrialized countries had already signalled their reluctance to proceed on that basis, even ahead of the Kyoto meeting to set legally binding reduction targets. The Protocol therefore contained concessions to developed countries: that carbon ‘sinks’ such as forests as well as sources of greenhouse gases could be counted toward meeting a country’s obligations and that countries could trade their emissions targets so that the rich could buy credits in order to emit more than their initial allotment.<sup>65</sup> The Kyoto Protocol, designed to operationalize the Framework Convention, is now frequently referred to as a failure, for this, the major treaty addressing arguably the greatest security threat facing humankind, does not commit the world’s two top greenhouse gas emitters to any legally binding reductions. At the Bali Conference in December 2007, the United States came under attack for its failure to provide leadership on climate change. While the US did not prevent a ‘Roadmap’ being secured by consensus, this was not before developing countries had indicated their preparedness to take on measurable, reportable and verifiable actions to reduce emissions if supported by technological and financial capacity building. It is not an exaggeration to say that the ‘world is waiting’ to see if the United States shows a preparedness to act decisively to achieve a dramatic drop in its emissions levels and thereby assume a leadership role in the issue area as required by the principle of CDM.

#### *The World Trade Organization*

The WTO had its origins in the 1947 General Agreement on Tariffs and Trade (GATT). The American and British post war governments,

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<sup>63</sup> *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 16 March 1998, 37 I.L.M. 22 (entered into force 16 February 2005).

<sup>64</sup> Australia also failed to ratify the Protocol but did so on 12 December 2007 after a new Labor government had taken office.

<sup>65</sup> Stephen Gardiner, “The Global Warming Tragedy and the Dangerous Illusion of the Kyoto Protocol” (2004) 18 Ethics and International Affairs 23, describing this as a “deal”.

which were largely responsible for planning the post War trading order, argued that, despite the fact that the North had benefited from protection during its development, freer trade would now be to the benefit of all.<sup>66</sup> While in this instance the provisions are in a formal sense equal, in practice this has translated into a lack of equality. Developing countries long argued for special and differential treatment in international trade on the basis that the application of the same rules to the developed and the developing would put the developing countries at a great disadvantage. Despite the fact that GATT 1947 covered trade in all goods, the free trade principles were initially applied to goods and services of most interest to the industrialized countries, rather than to agriculture, which for developing countries represents up to 40% of GDP and 35% of exports, and as much as 70% of employment.<sup>67</sup> During the 1980s agricultural trade protectionism in the US, EU and Japan increased significantly.<sup>68</sup>

Many developing countries recognized that they would be at a disadvantage in GATT negotiations and chose not to join or participate in its international trade negotiations other than as observers.<sup>69</sup> But, from the end of the Tokyo Round in 1978 to 1987, 44 countries acceded to the GATT, 43 of them developing countries.<sup>70</sup> For the first time in the history of free trade negotiations, developing countries participated in the 1986-94 Uruguay Round of negotiations as full-scale members.<sup>71</sup> GATT was transformed by the Uruguay Round into the World Trade Organization, which has been described as "the most prominent, powerful, and controversial institution of

<sup>66</sup> Joan Edelman Spero, *The Politics of International Economic Relations*, 3<sup>rd</sup> ed. (London: George Allen & Unwin, 1985) at 221-225.

<sup>67</sup> Patrick Messerlin, "Agricultural Liberalization in the Doha Round" (2005) 5:4 Global Economy Journal, online: The Berkeley Electronic Press <<http://www.bepress.com/gej/vol5/iss4/2>>.

<sup>68</sup> Jennifer Clapp, "WTO Agriculture Negotiations: Implications for the Global South" (2006) 27 Third World Quarterly 563 at 564.

<sup>69</sup> Spero, *supra* note 68 at 224.

<sup>70</sup> J. Michael Finger, "Implementing the Uruguay Round Agreements: Problems for Developing Countries" (2001) 24 The World Economy 1097 at 1098, n. 1.

<sup>71</sup> Ramesh Adhikari & Prema-chandra Athukorala, "Developing Countries in the World Trading System: an Overview" in Ramesh Adhikari & Prema-chandra Athukorala, eds., *Developing Countries in the World Trading System: The Uruguay Round and Beyond* (Cheltenham, UK: Edward Elgar, 2002) 1 at 2.

global economic governance.”<sup>72</sup> By the end of 2000, developing countries made up four fifths of WTO membership.<sup>73</sup>

The life of the General Agreement on Tariffs and Trade proceeded by way of negotiating ‘rounds’. The Uruguay Round, held from 1986 to 1995, was the largest trade negotiation ever held. By what Sylvia Ostry has referred to as the ‘Grand Bargain’, developing countries came to the Uruguay Round prepared to take on significant commitments on ‘new issues’ including intellectual property and services, in return for developed countries opening up in areas of export interest to developing countries: agriculture and textiles/clothing.<sup>74</sup> From a developing country perspective the implicit deal all along was that if the richer countries really meant what they had since 1945 preached about the wonders of free trade, the agricultural interests of developing countries would surely one day be accorded treatment comparable to that of manufactures. Developing countries were now prepared to make reciprocal concessions in order to realize the promised benefits.

The Uruguay outcomes were disappointing for developing countries; indeed, they have sometimes been referred to as a betrayal.<sup>75</sup> The Uruguay Round gave rise to the 1994 Agreement on Agriculture,<sup>76</sup> but in practice the agricultural sector remained highly distorted after the Agreement. “In general, the commitments developing countries have undertaken to reduce trade barriers and to reform trade procedures and regulations far outweigh the gains from market access commitments given by the industrial countries in areas where developing countries have a comparative advantage, particularly agriculture, textiles and clothing.”<sup>77</sup> Added to this, the obligations developing countries took on in ‘new areas’ such as intellectual property and services meant costly new implementation

<sup>72</sup> Sol Picciotto, “The WTO’s Appellate Body: Legal Formalism as a Legitimation of Global Governance” (2005) 18 *Governance: An International Journal of Policy, Administration and Institutions* 477 at 477.

<sup>73</sup> Adhikari & Athukorala, *supra* note 73 at 2-3.

<sup>74</sup> S. Ostry, “The Uruguay Round North-South Grand Bargain: Implications for Future Negotiations” (Paper presented to the The Political Economy of International Trade Law Conference, 15-16 September 2000), online: Centre for International Studies <<http://www.utoronto.ca/cis/Minnesota.pdf>>.

<sup>75</sup> Donald McRae, “Developing Countries and ‘The Future of the WTO’” (2005) 8 *J. Int’l Econ. L.* 603 at 603.

<sup>76</sup> 15 April 1994, 1867 U.N.T.S. 410.

<sup>77</sup> Adhikari & Athukorala, *supra* note 73 at 8.

burdens because the regulation was to apply not so much to trade but to the structure of the domestic economy.<sup>78</sup> Aware of weaknesses of the Agreement, developing country negotiators of the 1994 Agreement ensured the inclusion of a provision by which the Agreement was to be renegotiated starting in 2000. The negotiations on the modalities were to be completed by March 2003 for adoption at the Fifth Ministerial meeting to be held in Cancun in September 2003. This timetable was not met.<sup>79</sup>

The first major round of multilateral trade negotiations since the Uruguay Round was launched at the Doha Ministerial Meeting of the WTO in November 2001. Although this was touted as a 'development round' and agricultural trade liberalization was a central concern of developing countries, progress in the negotiations was tortuous and the promises of the Grand Bargain remain unfulfilled.<sup>80</sup> On 24 July 2006 the negotiations were suspended indefinitely, due in large part to the difficulty in finding any way forward on the issue of agricultural liberalization. The treatment of textiles and clothing remained another subject of particular contention. While the developing world was still demanding that the industrialized fulfil the bargain to ensure greater market access for their agricultural products, the perspective of the North was that, whether fair or not, the deal had been done and any concessions from developed countries would have to be matched by new concessions on the part of developing countries.<sup>81</sup>

Here we have the context within which to understand the intractable nature of the Doha stalemate. With the GATT/WTO institution having been in place several decades and compliance with its rules being enforceable via its dispute resolution system, the Doha Round negotiations on farm trade subsequent to the 1994 Agreement on Agriculture effectively stalled. The developed world, including the US, Japan and the EU sought to broker further deals by which reform to their agricultural sector would depend upon reciprocal measures by developing countries on non-agricultural market access and

<sup>78</sup> Finger, *supra* note 72 at 1098.

<sup>79</sup> Clapp, *supra* note 70 at 566.

<sup>80</sup> Amrita Narlikar, "Fairness in International Trade Negotiations: Developing Countries in the GATT and WTO" (2006) 29 *The World Economy* 1005 at 1022.

<sup>81</sup> Arvind Panagariya, "Developing Countries at Doha: A Political Economy Analysis" (2002) 25 *The World Economy* 1205 at 1225.

services,<sup>82</sup> but leaders of the developing world reiterated their position that they would not accept disproportionate demands to reduce their own industrial tariffs.<sup>83</sup> A ministerial meeting held in July 2008 broke down without achieving a breakthrough on agriculture. Developing countries claim that they have kept their end of the Uruguay Round bargain, whereas developed countries have not done so. The more powerful countries have been looking to make fresh bargains but the less powerful want the initial deal to be fulfilled before entering into a further compact.

### **The Place of International Law within the Political Deals**

If indeed the less powerful accepted several of the foundational treaties of the international order as part of broader political bargains, it may be tempting to conclude that international law equates with politics, to agree with John Bolton that international law is not law but merely "a series of political and moral arrangements that stand or fall on their own merits."<sup>84</sup> This would be to miss the point. The legal texts do not equate with the political compacts. Most basically, it is apparent that only part of the political deal has typically been written into the legal document. In some cases the obligations of the less powerful States were written in very explicit terms into hard law, while the obligations of the most powerful and corresponding benefits for the less powerful tend to have been couched in more ambiguous terms. Hence, despite a general perception that the NPT contains provisions on disarmament, article VI required only that nuclear weapon States 'pursue negotiations in good faith'. The original GATT did apply to both industrial and agricultural trade but it permitted countries to use some non-tariff measures and subsidies that would not normally have been allowed for industrial products. In this there is continuity with the unequal

<sup>82</sup> Surya P. Subedi, "Levelling the Playing Field: Is the GATT/WTO System up to it?" (The Ingram Lecture, delivered at the University of New South Wales, Sydney, Australia, 24 August 2005), online: University of New South Wales Faculty of Law <[http://www.law.unsw.edu.au/news\\_and\\_events/News.asp?type=&name=658&year=2005](http://www.law.unsw.edu.au/news_and_events/News.asp?type=&name=658&year=2005)>.

<sup>83</sup> International Centre for Trade and Sustainable Development, "G-20, G-33 Ministers Underline Priorities Before 'Decisive Phase' in Doha Talks" *Bridges Weekly Trade News Digest* 11:21 (13 June 2007), online: International Centre for Trade and Sustainable Development <<http://ictsrd.net/i/news/bridgesweekly/7602/>>

<sup>84</sup> John R. Bolton, "Is There Really 'Law' in International Affairs?" (2000) 10 Transnat'l L. & Contemp. Probs. 1 at 48.

treaties of the colonial era, which generally conferred nearly all rights upon the Western powers and imposed all corresponding duties on the other party.<sup>85</sup>

In the more recent of the treaties considered, the obligations of the most powerful and corresponding benefits for the less powerful have been written more explicitly into the treaty but this has not meant in practice that the powerful have become bound by provisions that might go any way towards tipping the scales in favour of the less powerful. The US agreement to accept the common heritage of mankind principle in relation to the deep seabed in exchange for its interests in navigation *was* written clearly into the text but when the time came the US simply refused to sign the Convention, leaving its preferred provisions to become custom and the treaty to be effectively amended so as to exclude the common heritage principle. In the UN Framework Convention on Climate Change the US accepted the application to climate change of the principle of common but differentiated responsibilities and even went on to sign the Kyoto Protocol in which it was operationalized, but never proceeded to ratification.

Not only have the legal obligations of the less powerful generally been written as very clear legal obligations while those of the most powerful have generally been left in looser terms (or expressed tightly in treaties that the powerful never ratified), the obligations of the less powerful are typically legally enforceable against them in a way that is not true vice versa. Sometimes this has been blatant. The non-nuclear weapon States were, for example, to be subject to IAEA inspections to which there is no equivalent for the most powerful.<sup>86</sup> It is more often the case, however, that the enforcement provisions are ostensibly equal for all; it is just that for one reason or other they advantage the powerful. The general prohibition on the use of force, of which the flip side could be a requirement to use force if called upon by the Security Council to do so, is clearly enforceable by the Security Council. But while article 2(4) is in legal terms equally applicable to all States, it is far less likely to be enforced against the most powerful because of the impossibility of doing so. International law served as a mechanism by which to halt

<sup>85</sup> Matthew Craven, "What Happened to Unequal Treaties? The Continuities of Informal Empire" (2005) 74 Nordic J. Int'l L. 335 at 350-1.

<sup>86</sup> *Treaty on the Non-Proliferation of Nuclear Weapons*, *supra* note 2, art. III.

the invasion of Kuwait by Iraq but it was not able to prevent the invasion of Iraq by the US, UK and Australia.

This sheds light on the depth of the reaction to the 2003 invasion of Iraq. Despite the less powerful acquiescing in a series of often inequitable treaty relations for the sake of global order, the most powerful have since reneged on their side of the political bargains of which the treaties were a part, while using the treaties to enforce the obligations of the less powerful. The basis for the US' argument in favour of the invasion was, after all, the need to 'enforce' resolutions of the Security Council.<sup>87</sup> International law has thus had a very particular role to play within some core political bargains of contemporary global governance. International law has served to reinforce the power differential between the most powerful and the rest, between developed and developing, rich and poor. This is a very different image of international law to the idealized notion of a law whose main purpose is "to achieve a fundamentally depoliticized global order of equality among States and universal respect for the individual."<sup>88</sup>

### **Conclusions**

International law has expanded rapidly in the years since 1945. Several of the cornerstone treaties of the emergent system of global governance concluded during this period could be regarded as unequal treaties. That the less powerful gave their consent to those treaties reflected in part an acceptance of the need for order over justice. In each case, however, that consent can best be understood as having been conditional, premised on the most powerful living up to their side of a compact of which the treaty was a part. The bargains were arguably necessary in the interests of global order and it may well be the case that the effectiveness of these cornerstone treaties has depended on the inequality built into their provisions.<sup>89</sup> But it is also a fact that, even with bargains being in their favour, the most powerful countries have by now proven their unwillingness to fulfil

<sup>87</sup> See George W. Bush, Address (Lecture presented to the UN General Assembly, Sept. 12, 2002), online: The White House <<http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html>>.

<sup>88</sup> Paul Kahn, "Speaking Law to Power: Popular Sovereignty, Human Rights and the New International Order" (2000) 1 Chicago Journal of International Law 1 at 9.

<sup>89</sup> See e.g. Joseph S. Nye, Jr., "NPT: The Logic of Inequality" (1985) 9 Foreign Policy 123.

their side of the compacts while using the language of international law enforcement against the less powerful. This may well have contributed to a weakened perceived association of international law with justice,<sup>90</sup> as well as to international law's perceived legitimacy deficit.<sup>91</sup>

Each of these cornerstone multilateral treaty regimes has run into roadblocks from which the way out and forward is not obvious. It has been said that with the 2003 invasion of Iraq, the "grand attempt" to subject the use of force to the rule of law via article 2(4) of the UN Charter has failed.<sup>92</sup> Following the disappointment of the 2005 world summit, the related Charter provisions on Security Council membership and voting appear virtually impossible to amend to any significant degree without a cataclysmic event such as world war. Negotiations in the current round of World Trade Organization (WTO) trade negotiations have broken down and analysts are debating whether the central treaty addressing the control of nuclear weapons has any future.<sup>93</sup> While in each case the issue is in one sense particular to the regime in question, on closer inspection it appears that there is a commonality to the blockages facing these key regimes: each is in need of some new accommodation between the most powerful and others, and this is proving very difficult to achieve.

Understanding the role of international law within core political bargains of global governance provides a better explanation of both the paralysis in, and disenchantment with, international law than does an explanation in terms only of the inequity of treaty

<sup>90</sup> Terry Nardin, *Law, Morality, and the Relations of States* (Princeton: Princeton University Press, 1983) at 255.

<sup>91</sup> See, *inter alia*, Daniel Bodansky, "The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?" (1999) 93 A.J.I.L. 596; Thomas M. Franck, "The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium" (2006) 100 A.J.I.L. 88; Nico Krisch & Benedict Kingsbury, "Introduction: Global Governance and Global Administrative Law in the International Legal Order" (2006) 17 E.J.I.L. 1; Daniel Esty, "The World Trade Organization's Legitimacy Crisis" (2002) 1 World Trade Review 7; Claire Cutler, "Critical Reflections on the Westphalian Assumptions of International Law and Organization: a Crisis of Legitimacy" (2001) 27 Review of International Studies 133.

<sup>92</sup> Michael J. Glennon, "Why the Security Council Failed" (2003) 82 Foreign Affairs 16 at 16.

<sup>93</sup> See *inter alia*, John Freeman, "Is Arms Control in Crisis?" (2004) 9 J. Confl. & Sec. L. 303; Chamundeeswari Kuppuswamy, "Is the Nuclear Non-Proliferation Treaty Shaking At its Foundations? Stocktaking after the 2005 NPT Review Conference" (2006) 11 J. Confl. & Sec. L. 141.

provisions or the lack of compliance on the part of the powerful. For one thing, the political bargains do not appear to have been as inequitable as the treaties within those compacts, helping to explain the preparedness of the bulk of States to become a part of the treaty regimes in the first place. It is the failure of the most powerful to fulfil their side of the political bargains that is the source of so much anger and humiliation. To argue that the P5 have not complied with article VI of the NPT is to sterilize the grievance; it goes no way towards capturing the depth of anger that comes from feeling cheated on such a fundamental issue as national security. With “China just ‘modernizing’, France ‘upgrading’, the United Kingdom ‘replacing’ and the United States and Russia ‘modernizing’ their nuclear capabilities”,<sup>94</sup> how can the non-nuclear weapon States believe that the nuclear weapon States are fulfilling their disarmament obligations in good faith?

While talk of inequitable treaty provisions and non-compliance of the powerful conjures up a sense that the issue is stable, understanding the issue in terms of deals not yet fulfilled emphasizes the temporal dimension—why the issue has got worse and why recent attempts at new deals have stalled. Creative ambiguity can be a useful tool in order to achieve agreement on a negotiated text, but it may also serve to delay rather than prevent confrontation over divergent positions. In the case of the Law of the Sea, the lack of preparedness of the United States to stand by its side of the bargain became clear as long ago as the conference at which the negotiations were concluded. That developing countries lent their support to the subsequent Implementing Agreement could be regarded as a North-South deal subsequent to the one done during the negotiations for the initial treaty, which had the effect of extending the time period during which the US could live up to at least some part of the initial bargain. And yet the US has still not even ratified the LOSC. In the case of Security Council reform the prospect of change at the 2005 Summit of Heads of State and Government kept the possibility alive until only recently.

Does this mean that the most powerful States should not have entered into bargains that they were never going to, and perhaps from a realist perspective never could, fulfil? It is difficult to argue that the world would have been better off without the UN Charter or the NPT. It is even more difficult to think that the world would have

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<sup>94</sup> Kuppuswamy, *ibid.*

been better off if the most powerful had complied with their side of the relevant bargains. This would have deprived the US and the UK, though not necessarily others, of the power to enable humanity to resist the imposition of governmental forms that do not respect human rights, should that prove necessary. Similarly, for the P5 to have assumed responsibility for maintaining international peace and security but to have permitted Charter amendments such that their power might at any time be diluted through the inclusion of additional permanent members is perhaps expecting a little much. Nor is it necessarily even the case that a larger and more democratic Security Council would be in any way more effective in maintaining international peace and security.

Inequality may not in itself be a basis for treaty termination,<sup>95</sup> but it is difficult to see how the cornerstone treaties of our emergent global polity can last indefinitely. Particularly in the case of the UN Charter and NPT, it is as if each contains a sunset clause, written in invisible ink. Ultimately, however, the danger may be less that the cornerstone treaties will collapse through discontent but simply that it becomes impossible to further expand global governance via multilateral treaty processes. The lack of progress at a multilateral level in the WTO is being overtaken by the proliferation of bilateral free trade agreements. Many ocean governance and WMD (weapons of mass destruction) issues are being addressed via non-treaty arrangements such as the Proliferation Security Initiative and through resolutions of the Security Council. It is nevertheless in relation to climate change that the repercussions of the inability to 'do a deal' may be most keenly felt. Efforts are currently focused on the Kyoto Plus agenda, but how will it be possible to bring the leading developing countries into the necessary compact if the US has never delivered on its previous undertaking?<sup>96</sup> It would not seem fair that, if the world fails to accommodate the interests of both rich and poor in a new climate change bargain, the brunt of the human security crisis caused by changes in the earth's climate is likely to be most keenly

<sup>95</sup> By article 62 of the *Vienna Convention on the Law of Treaties*, *supra* note 7, a fundamental change of circumstances does constitute grounds for termination or withdrawing from treaties where "the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and the effect of the change is radically to transform the extent of obligations still to be performed under the treaty."

<sup>96</sup> Paul G. Harris, "The European Union and Environmental Change: Sharing the Burdens of Global Warming" (2005-06) 17 Colo. J. Int'l Envtl. L. & Pol'y 309 at 317.

felt by those countries with the least capacity to adapt to rising sea levels and extreme weather conditions.