

ARTICLE

## CHASING HAMLET'S GHOST: STATE RESPONSIBILITY AND THE USE OF COUNTERMEASURES TO COMPEL COMPLIANCE WITH MULTILATERAL ENVIRONMENTAL AGREEMENTS

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*Even if you are on the right track, you will get run over if you just sit there.*  
– Will Rogers

*Thou shalt be both the plaintiff and the judge of thine own cause.*  
– William Shakespeare

### INTRODUCTION

The past twenty years have witnessed an explosion in the number of international instruments dealing with the environment. From climate change to biological diversity and from the protection of endangered species to the restriction of the transboundary movement of hazardous wastes, the length and breadth of international environmental law is its own topic, one that includes a variety of multilateral-, regional-, and bilateral-agreements as well as their compliance regimes. How effective are these regimes in compelling compliance? And more so, where a compliance regime cannot effectively compel a non-compliant party to perform its legal obligations is there recourse to the Law of State Responsibility and to the use of countermeasures?

This paper examines the interaction between the Law of State Responsibility, as explained by the International Law Commission's ("ILC") *Draft Articles on the Responsibility of States*

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for *Internationally Wrongful Acts*<sup>1</sup> (“Draft Articles”) and Multilateral Environmental Agreements (“MEAs”). In particular, I am interested in the role of countermeasures in compelling compliance, where the compliance regime of a MEA has failed. This paper will not address the legal consequences for provable environmental damages to an injured state, but will focus instead on the thorny issue of the collective interests of non-injured states. It will also not address regional- or bilateral-agreements, and the host of legal consequences that arise under those mechanisms.

Every breach of a norm of international law by a state, whether from treaty, custom, general principle of international law, or other source of law, gives rise to state responsibility and legal consequences. But when is an act or omission of a state a breach? To this end, a number of international instruments attempt to codify norms of international law. For treaties, the *Vienna Convention on the Law of Treaties*<sup>2</sup> (“VCLT”) sets out the basic rules of treaty interpretation and operation. In the case of state responsibility, the Draft Articles adopted by the UN General Assembly in 2001 codifies the principles of state responsibility for breaches of the norms of international law and the legal consequences that flow therefrom.<sup>3</sup>

This paper will show that recent developments in international law restrict the role of legal consequences of general application when a state fails to fulfil its obligations under a MEA. These legal consequences, codified in the Draft Articles, may include the use of countermeasures. A countermeasure, or reprisal, is a form of self-help by a state in international law aimed at restoring the *status quo* between the parties where there is a material or less-than-material breach of a treaty.

While not foreclosing the possible use of countermeasures, the limitations inherent in current MEAs and the restrictions posed by the Draft Articles make the use of countermeasures unlikely, except in the case of persistent and egregious breaches of international duties. It is more likely that the use of countermeasures will most often be ruled out by the compliance regimes employed under most MEAs, and restrictions on countermeasures under international law will prevent their use in most other situations. Thus, similar to the moral dilemma portrayed in Shakespeare’s *Hamlet*, retribution or reprisal have their own costs. It may place an aggrieved party “offside” at international law, making the enforcement of international environmental norms difficult to achieve. For many breaches of international environmental norms, the existing compliance regime represents a “complete code” and if the regime provides no remedy an aggrieved party may have no adequate solution except to “take arms against a sea of troubles” and hope that their conduct is considered reasonable.

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1. ILC, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001) chp. IV.E.1. [Draft Articles].
  2. *Vienna Convention on the Law of Treaties*, 1155 U.N.T.S. 331 [VCLT].
  3. It is important to note that the Draft Articles are not law in the sense that they have not been adopted by states or even the UN General Assembly. Although not law, as one scholar notes, “the general concept reflects the shared opinion of the international community of States”: see Karl Zemanek, “Does the Prospect of Incurring Responsibility Improve the Observance of International Law?” in Maurizio Ragazzi, ed., *International Responsibility Today, Essays in Memory of Oscar Schachter* (Leiden, Nld.: Martinus Nijhoff, 2005) 125 at 126.

## I. WHAT IS THE RELATIONSHIP BETWEEN THE LAW OF STATE RESPONSIBILITY AND MULTILATERAL ENVIRONMENTAL AGREEMENTS?

Compliance regimes attached to MEAs are a relatively new concept in public international law. Most spring from a renewed optimism in the 1990s that international organizations and instruments could be used to compel states to honour their environmental commitments, coinciding with a general concern by all states for the environment. Compliance regimes developed while the ILC wrestled with the codification of the Law of State Responsibility, yet surprisingly the nexus between the two is less than obvious. The jurisprudence has not addressed this problem directly, although the International Court of Justice (“ICJ”) touches upon the relationship between environmental law and the Law of State Responsibility in *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*<sup>4</sup> (“*Gabčíkovo*”). Compliance regimes and the Law of State Responsibility overlap. In order to get to countermeasures, I propose to examine first the relationship between compliance regimes and the Law of State Responsibility.

### A. The Law of State Responsibility

The Law of State Responsibility, as codified in the Draft Articles,<sup>5</sup> creates secondary obligations on the conditions that give rise to state responsibility and the legal consequences that flow from a finding of state responsibility.<sup>6</sup> The Draft Articles do not in themselves determine the content of an international obligation, the breach of which gives rise to state responsibility. They interpret and supplement primary obligations, such as an obligation under a MEA. That is, the Draft Articles set out norms of general application.

Under the Law of State Responsibility an internationally wrongful act occurs when a state breaches an international obligation,<sup>7</sup> leaving the nature of the breach to be determined by the particular rule, custom or instrument in question. There are a number of exceptions for consent, self-defence, lawful countermeasures, force majeure, distress, necessity, and compliance with peremptory norms.<sup>8</sup> When an internationally wrongful act is committed, the wrongdoer: (a) has a continued duty to perform its legal obligations; (b) has a duty to cease

4. *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, [1997] I.C.J. Rep. 7 [*Gabčíkovo*]. For a general discussion on the jurisprudence, see Malgosia Fitzmaurice, “The International Court of Justice and the Environment” (2004) 4 *Non-State Actors & Int’l. L.* 173.

5. While the Draft Articles are not binding law, having only been noted and annexed by the U.N. General Assembly, “the Draft Articles have already exerted considerable influence on international practice and judicial decisions.”: Hugh A. Kindred *et al.*, eds., *International Law Chiefly as Interpreted and Applied in Canada*, 7th ed. (Toronto: Emond Montgomery, 2006) at 635.

6. On the Draft Articles generally, see James Crawford, Pierre Bodeau & Jacqueline Peel, “The ILC’s Draft Articles on State Responsibility: Toward Completion of a Second Reading” (2000) 94 *Am. J. Int’l. L.* 660; Pierre-Marie Dupuy, “A General Stocktaking of the Connections between Multilateral Dimension of Obligations and Codification of the Law of Responsibility” (2002) 13 *E.J.I.L.* 1051; Marina Spinedi, “From One Codification to Another: Bilateralism and Multilateralism in the Genesis of the Codification of the Law of Treaties and the Law of State Responsibility” (2002) 13 *E.J.I.L.* 1099; Linos-Alexander Sicilianos, “The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility” (2002) 13 *E.J.I.L.* 1127; and ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001* (New York: United Nations, 2008) [Commentaries, Draft Articles].

7. Draft Articles, *supra* note 1, Art. 2.

8. *Ibid.*, Arts. 20-26.

the wrongful conduct and provide assurances for its non-repetition; and (c) has a duty to make reparations for injuries caused by its wrongful conduct.<sup>9</sup>

A primary obligation is owed to an injured state for a breach of an obligation owed to it pursuant to a treaty, convention or rule of international law.<sup>10</sup> Primary obligations between states are sometimes referred to as bilateral obligations.<sup>11</sup> The injured state is directly affected by the breach of a primary obligation owed to it. As a result, the injured state is entitled to take reasonable action to protect its interests or to restore a loss suffered by it. Joint action by aggrieved states is approved in international law where the obligation breached is owed to a group of states, including a moving state, and the obligation is established to protect a *collective interest*, or where the obligation breached is owed to the *international community as a whole*.<sup>12</sup> That is, action is permitted where the breach “specifically affects” a state. Joint action is permitted where a breach “radically [changes] the position of all the other states” with respect to the further performance of an obligation (interdependent obligations or obligations *erga omnes partes*),<sup>13</sup> or where the breach is to an obligation owed to the international community as a whole (integral obligations or obligations *erga omnes absolute*).<sup>14</sup>

It is highly unlikely that an obligation under a MEA creates an obligation *erga omnes absolute*. *Barcelona Traction, Light and Power Co. Case (Belgium v. Spain)*<sup>15</sup> (“*Barcelona Traction*”) limits obligations *erga omnes absolute* to acts of aggression, acts of genocide, and basic human rights. However, the multilateral nature of MEAs gives rise to obligations *erga omnes partes* to protect a collective interest of the member states. The wide range of subject-matter forming the basis of regional and multilateral treaties indicates the variety of collective interests expressed by states, the environment being one of them. However, even in environmental law the collective interests are diverse.

#### i. Collective Interests under MEAs

What are the collective interests expressed in MEAs? These principles include the protection of human health and the environment and the duty to notify other states of any adverse environmental effects, but also recognize the special difficulties of developing countries, the importance of state sovereignty, the desire for economic development to proceed sustainably and the need for cooperation between states. These principles are found in the preambles and texts of most MEAs, such as the *Rio Declaration on Environment and Development*<sup>16</sup> and the *Convention on Biological Diversity*.<sup>17</sup> Intuitively, the protection of human health and the environment is a primary collective interest, but there is no established hierarchy of principles in international law despite the impact of *jus cogens*

9. *Ibid.*, Arts. 29-31.

10. *Ibid.*, Art. 42(a).

11. Dupuy, *supra* note 6 at 1072.

12. Draft Articles, *supra* note 1, Art. 48(1).

13. *Ibid.*, Art. 42(b)(ii).

14. Dupuy, *supra* note 6 at 1072-73. See also the discussion in the Commentaries, Draft Articles, *supra* note 6 at 126-28.

15. *Barcelona Traction, Light and Power Co. Case (Belgium v. Spain)*, [1970] I.C.J. Rep. 3 at 32 [*Barcelona Traction*].

16. *Rio Declaration on Environment and Development*, 1992, 31 I.L.M. 874.

17. *Convention on Biological Diversity*, 1992, 31 I.L.M. 822.

in international legal scholarship.<sup>18</sup> The collective interests enshrined in each MEA must be assessed and balanced on their own merits.

## B. Toward a Purposive Approach

MEAs create international obligations for party states, the breach of which gives rise to internationally wrongful acts.<sup>19</sup> The Law of State Responsibility establishes secondary rules, rules designed to assess the legal consequences of a breach of an international obligation. In this light, the Draft Articles are interpretative guidelines and gap-fillers where a MEA is otherwise silent or ambiguous as to the legal consequences that follow a breach. This is made clear by the *lex specialis* provision of Article 55,<sup>20</sup> which holds special rules as presumptively either an *elaboration of*, or an *exception to*, a general rule.<sup>21</sup>

There is nothing inherently wrong with states contracting out of general rules of customary international law. The ILC notes: “[t]hat treaty rules enjoy priority over custom is merely an incident of the fact that most of general international law is *jus dispositivum* so that parties are entitled to derogate from it by establishing specific rights or obligations to govern their behaviour.”<sup>22</sup> Compliance regimes create those *special rules*. What then is the effect of MEA compliance regimes?

Malgosia Fitzmaurice sees MEA compliance regimes as “a softer approach” aimed at “assisting party states to achieve compliance rather than punishing non-compliance.”<sup>23</sup> They are “not intended to establish culpability” but “to aid” a non-compliant party in meeting their obligations.<sup>24</sup> The compliance regime must carefully balance the need to obtain full compliance with state sovereignty,<sup>25</sup> keeping in mind the capacity of the non-compliant party to achieve its obligations. According to Jutta Brunnée, the focus should be on compliance rather than non-compliance,<sup>26</sup> on positive actions rather than negative responses. To this end, most MEAs focus on facilitation, capacity-building, and assistance — a “help desk approach.”<sup>27</sup>

The shift from the traditional, confrontational approach to a “more flexible, non-confrontational and cooperative approach” is perceived by many scholars as more effective.<sup>28</sup>

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18. On the development of “*jus cogens*” on international law, see Ulf Linderfalk, “The Effect of *Jus Cogens* Norms: Whoever Opened Pandora’s Box, Did you Ever Think About the Consequences?” (2007) 18 E.J.I.L. 853.

19. Draft Articles, *supra* note 1, Art. 12 states, “There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.”

20. *Ibid.*, Art. 55.

21. *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ILC, 58th Sess., UN Doc. A/CN.4/L.682 (2006) at 35, 54-59 [*Fragmentation of International Law*].

22. *Ibid.* at 45.

23. Malgosia Fitzmaurice, “The Kyoto Protocol Compliance Regime and Treaty Law” (2004) 8 S.Y.B.I.L. 23 at 25.

24. *Ibid.* at 26.

25. Jutta Brunnée, “A Fine Balance: Facilitation and Enforcement in the Design of a Compliance Regime for the Kyoto Protocol” (2000) 13 Tul. Envtl. L. J. 223 at 226.

26. *Ibid.* at 227.

27. Rosalind Reeve, “Wildlife Trade, Sanctions and Compliance: Lessons from the Cites Regime” (2006) 82 Intl. Aff. 881 at 885.

28. Svitlana Kravchenko, “The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements” (2007) 18 Colo. J. Int’l Envt’l. L. & Pol’y 1 at 28.

Fitzmaurice distinguishes the compliance mechanism in MEAs from the Law of State Responsibility:

The underlying logic is that the failure to fulfil these obligations will affect the achievement of the common goals of a treaty, such as a treaty which has the protection of the environment as its principal aim. These treaty regimes are designed to protect the environment in such areas where the pace, magnitude and irreversibility of environmental damage render remedial measures futile and preventive action to forestall environmental damage imminent. Thus, *inter partes* punitive enforcement is ineffective in any event and compliance regimes are now focused on creating procedures that aid in securing compliance so as to prevent or forestall environmentally harmful activities in the first instance.<sup>29</sup>

So, how does this mechanism affect the collective interests of the member states? There is a fine balance between two sometimes opposing values in MEAs: between, on the one hand, the protection of human health and the environment and, on the other, the need to secure compliance through cooperation and capacity-building, while being mindful of state sovereignty. The need to balance invites a purposive approach. The interpretative section of the VCLT, Article 31(1) states: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>30</sup> Thus, object and purpose are central interpretative guides.

A purposive approach restricts and limits the use of the Law of State Responsibility in applying legal consequences. First, a “help desk” approach, focused on facilitation and assistance, suggests that the legal consequences for a breach of a MEA is intended to be soft — more carrot than stick. Second, the creation of compliance regimes independent of customary international law moves MEAs toward “complete codes” or “special regimes” that limit or restrict the use of legal consequences of general application. Most compliance regimes create their own internal set of legal consequences of specific application. Third, legal consequences under the Law of State Responsibility often flow from an injury to a state, whether directly or indirectly. In some cases it is not possible to point to a specific injury or injured state, precluding the use of countermeasures for breaches.

#### **i. The “Help Desk” Approach as Special Rule: Compliance by Carrot**

The “help desk” approach to compliance seeks to facilitate, build capacity and assist the non-compliant party. Examples of the “help desk” approach are seen in the *Montreal Protocol on Substances that Deplete the Ozone Layer*<sup>31</sup> (“Montreal Protocol”) and the *Basel Convention on Transboundary Movement of Hazardous Wastes and Their Disposal*<sup>32</sup> (“Basel Convention”). The approach explicitly recognizes the financial and technical needs of de-

29. Fitzmaurice, *supra* note 23 at 26-27.

30. VCLT, *supra* note 2, Art. 31(3).

31. Ozone Secretariat, UNEP, *The Montreal Protocol on Substances that Deplete the Ozone Layer* (Nairobi: United Nations Environment Programme, 2000) [Montreal Protocol].

32. *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, 1989, 28 I.L.M. 657 [Basel Convention].

veloping countries while respecting state sovereignty. Capacity-building is a central feature of this approach. The “help desk” approach is generally adopted in a MEA where potential non-compliant parties lack the capacity to fully implement a treaty on their own.

First, the purpose of the “help desk” approach is capacity-building. A primary obligation of member states is to cooperate with and assist the non-compliant party to build the infrastructure necessary to effectively manage their obligations. It does so by recognizing a state’s right to implement internal laws and, where those laws are insufficient, by providing both financial and technical assistance. The goal of capacity-building may have precedence over other collective interests. It becomes a *special rule* of implementation and enforcement.

Second, the conduct of a non-compliant party is “coloured” by their lack of capacity, rendering the breach not necessarily wrongful. While wrongfulness or moral culpability is not necessarily a requirement of legal consequences in international law, it may be necessary where there is no specific injury to a specific injured party. The school of *subjective responsibility* holds that a state is only responsible for wrongfulness or moral culpability.<sup>33</sup>

The school of *objective responsibility*, on the other hand, holds a state responsible where its conduct results in injury.<sup>34</sup> A state that fails to meet its obligations, not from a lack of effort but a lack of capacity, should therefore not be penalized. Where there is neither a culpable act nor a specific injury, upon what basis may a non-injured state interfere with a non-compliant state’s right to sovereignty? While an injurer can be held accountable for its conduct on the basis of strict liability, objective responsibility implies an injury.<sup>35</sup> Without a discernible injury, a party whose conduct is not also a culpable act appears to fall through the cracks.

Third, many compliance regimes are not intended to be punitive. They were designed with consensus in mind. Patrick Széll suggests that many states are strongly encouraged to endorse and ratify a MEA during the negotiation phase, before they are in a position to implement their treaty obligations.<sup>36</sup> Often, states are encouraged by the promise of capacity-building and assistance measures offered within the compliance mechanisms of a MEA. The general view adopted by the international community is that more parties to a treaty are better because more parties indicate a high degree of international consensus about a problem. However well-meaning such an approach is for developing broad-based international treaties, it comes at a cost with regard to enforcement. First, it weakens the *pacta sunt servanda* principle codified in Article 26 of the VCLT,<sup>37</sup> since some parties do not feel obliged to meet standards until some unspecified time in the future: a time when they have developed sufficient capacity to fulfil their obligations. Second, it makes treaty obligations contingent on collateral agreements for assistance. It becomes easy for a non-compliant state to blame their non-compliance on a lack of adequate assistance. As a result, some states simply don’t take their obligations as seriously as they should.

33. See Mansour Jabbari-Gharabagh, “Type of State Responsibility for Environmental Matters in International Law” (1999) 33 R.J.T. 59 at 66-69.

34. *Ibid.* at 69-73.

35. The Commentaries, Draft Articles, *supra* note 6 at 36, para. 10 is unclear about the role of fault in the Law of State Responsibility. According to the Commentaries, the rules exclude fault if it means an intention to harm. Otherwise, the Draft Articles leaves it to the terms of the particular instrument to decide if a mental element is required for a finding of liability. Where an instrument does not expressly require a finding of fault, absolute liability is presumed.

36. Patrick Széll, “Supervising the Observance of MEAs” (2007) 37 *Env’tl. Pol. & L.* 79 at 79.

37. VCLT, *supra* note 2, Art. 26.

Here, I will outline two examples of the “help desk” approach to MEA compliance, the Montreal Protocol and the Basel Convention. The Montreal Protocol, entered into force in 1989,<sup>38</sup> is a classic example of the “help desk” approach. It is an “outstanding example” of the integration of financial and technical assistance.<sup>39</sup> Eric Neumayer calls it the “closest to the ideal model of the carrot approach.”<sup>40</sup> It is a protocol to the 1992 *United Nations Framework Convention on Climate Change*<sup>41</sup> (“The Framework Convention”). The Montreal Protocol regulates the production, trade, and consumption of ozone-depleting substances.<sup>42</sup> It requires parties to license the import and export of controlled substances<sup>43</sup> and imposes trade restrictions on the import and export of those controlled substances.<sup>44</sup>

The target states of the compliance mechanism are developing countries and countries in transition. The Montreal Protocol establishes a Compliance Committee with the power to investigate instances of non-compliance, and report and make recommendations to the Meeting of the Parties<sup>45</sup> (“MOP”). Anyone, including a party in breach, may report non-compliance to the Ozone Secretariat.<sup>46</sup> The MOP may provide assistance, issue a caution and suspend rights and privileges under the Montreal Protocol.<sup>47</sup>

What are the consequences of a breach? In a number of instances, the MOP has issued cautions along with a recommendation for further financial assistance. There are no reported suspensions in the 111 cases of non-compliance up to 2007.<sup>48</sup> Of the 11 requests for a change of baselines, all were approved.<sup>49</sup> The mechanism works largely because of the financial assistance<sup>50</sup> and technology transfer<sup>51</sup> aspects that serve to build capacity and make compliance by developing countries and countries in transition attractive.<sup>52</sup> So far, no punitive action has been taken under the Montreal Protocol. The goal of capacity-building is given primacy over other collective interests, even over the protection of the ozone layer.

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38. Montreal Protocol, *supra* note 31, Art. 16.

39. OECD, *Experience with the Use of Trade Measures in the Montreal Protocol on Substances that Deplete the Ozone Layer*, Doc. No. COM/ENV/TD(97)107 (Paris, OECD, 1997).

40. Eric Neumayer, *Multilateral Environmental Agreements, Trade and Development: Issues and Policy Options Concerning Compliance and Enforcement* (Jaipur, India: Consumer Unit & Trust Society, undated) at 43.

41. *United Nations Framework Convention on Climate Change*, U.N. Doc. A/AC.237/18 (Part II)/Add.1 and Corr. 1 (1992) [The Framework Convention].

42. Montreal Protocol, *supra* note 31, Art. 2 and Annexes A to E. These include CFCs, halons, other fully halogenated CFCs, carbon tetrachloride, methyl chloroform, hydrochlorofluorocarbons, hydrobromofluorocarbons, methyl bromide, and bromochloromethane.

43. *Ibid.*, Art. 4B.

44. *Ibid.*, Arts. 4.1, 4.2.

45. Ozone Secretariat, *Implementation Committee under the Non-compliance Procedure of the Montreal Protocol on Substances that Deplete the Ozone Layer, Primer for Members* (Nairobi: UNEP, 2007) at 7-8 [Primer for Members].

46. *Ibid.* at 7.

47. *Ibid.* at 8.

48. Ozone Secretariat, *Decisions of the Parties Related to the Non-Compliance Procedure of the Montreal Protocol on Substances that Deplete the Ozone Layer* (Nairobi, UNEP, 2007) at 31-114 [Decisions of the Parties]. In the past, the MOP treats with leniency even chronic repeat offenders such as the Russian Federation, Nepal, and Pakistan.

49. *Ibid.* at 25-27.

50. Montreal Protocol, *supra* note 31, Art. 10.

51. *Ibid.*, Art. 10A.

52. Shawkat Alam, “Trade Restrictions Pursuant to Multilateral Environmental Agreements: Development Implications for Developing Countries” (2007) 41 *J. World Tr.* 983 at 993-1000.



As a result, breaches to the Protocol are dealt with by pledges of further assistance, easing of baselines and extensions of time for compliance rather than punishment.

The Basel Convention, restricting the movement of certain listed hazardous and other wastes,<sup>53</sup> creates a slightly different problem. It is the result of the collective action of developing countries concerned about the unregulated global trade in hazardous wastes.<sup>54</sup> The Basel Convention operates on a system of prior informed consent, which requires the exporting state to notify and obtain the consent of the importing state and any state of transit of a trans-boundary movement of restricted hazardous or other wastes.<sup>55</sup> Any movement of restricted wastes without proper notification or consent is illegal.<sup>56</sup>

While the target of the Basel Convention is developed countries and countries in transition (as the exporters of hazardous wastes), capacity-building is aimed instead at the monitoring capacity of developing countries and the development of environmentally sound management practices. The obvious problem with the Basel Convention is that it does not make the actual movement of hazardous wastes illegal, only the failure to do so without proper notice and consent.<sup>57</sup>

The compliance mechanism, agreed to at the *Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*<sup>58</sup> (“COP-6”) in 2002, is “non-confrontational,” “preventative” and “non-binding.”<sup>59</sup> Similar to the Montreal Protocol, a Compliance Committee is authorized to investigate, report and make recommendations to the Conference of the Parties (“COP”). Akiho Shibata considers this “one of the most important legal achievements” since the Basel Convention came into force in 1992 because of its comprehensiveness.<sup>60</sup> The focus of compliance under the Basel Convention is on facilitation, first through the specific facilitation procedure,<sup>61</sup> and second, where there is persistent non-compliance,<sup>62</sup> through rec-

53. Basel Convention, *supra* note 32. Article 4 sets out the obligations of the Parties. Controlled wastes are categorized according to their waste stream (where they come from) and their constituent parts (the chemical composition); see Basel Convention, Annex I. Some wastes are specifically controlled (Annex VII) and some wastes are only controlled if they also have special characteristics (Annex VIII).

54. In particular, the high volume of hazardous wastes OECD countries dump on non-OECD countries, see Alam, *supra* note 52 at 1000.

55. Basel Convention, *supra* note 32, Art. 6.1.

56. *Ibid.*, Art. 9.

57. The Ban Amendment, if adopted, would ban the movement of specific hazardous wastes from OECD nations to non-OECD nations. It will come into force upon the ratification of at least three-fourths of those who accepted the amendment. See *The Basel Convention Ban Amendment*, COP-3, Dec. III/1, UNEP (1995), online: Basel Convention <<http://www.basel.int/pub/baselban.html>>. So far only 65 countries have ratified the Ban Amendment. See Basel Convention, *Ban Amendment to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal Geneva* (22 September 1995), online: Basel Convention <[http://www.basel.int/ratif/ban\\_alpha.htm](http://www.basel.int/ratif/ban_alpha.htm)>.

58. *Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, COP-6, Dec. VI/12, UN Doc. UNEP/CHW.6/40 (2003) [COP-6, Dec. VI/12].

59. *Ibid.* at para. 2.

60. Akiho Shibata, “The Basel Compliance Mechanism” (2007) 12 *RECIEL* 183 at 183. However, the effectiveness of the compliance mechanism is still open to debate.

61. COP-6, Dec. VI/12, *supra* note 58 at para. 19.

62. *Ibid.* at para. 20. The Implementation Committee may recommend further measures to the COP only after: (1) undertaking the facilitation procedure in paragraph 19; (2) taking into account the cause, type, degree and frequency of the compliance difficulties; (3) taking into account the capacity of the Party, and; (4) considering the objective and nature of the compliance mechanism. It should come as no surprise that a referral to the COP is rare.

ommendations about support or for the issue of a cautionary statement.<sup>63</sup> Since the compliance mechanism is non-binding, the failure to adopt a decision of the COP is probably not a breach of an international obligation under Article 2 of the Draft Articles.<sup>64</sup>

## ii. Special Regimes: Compliance by Carrot and Stick

The idea of a “special regime” in international law is not new.<sup>65</sup> In *Case of the S.S. “Wimbledon”*<sup>66</sup> (“*Wimbledon*”), a decision of the Permanent Court of International Justice in 1923, the transit provisions for the Kiel Canal in the Treaty of Versailles were found to be a special regime — they would lose their *raison d’être* if supplemented and interpreted. A special regime sets down a state’s legal obligations, while anticipating their future breach and specifying the remedies to counter that breach.<sup>67</sup> It represents the idea of a “complete code” in international law. The difficulty, and the centre of debate, is the extent to which a special regime is *porous* to rules of general application. In the view of Special Rapporteur Willem Riphagen, a “self-contained regime” is a part of a more or less closed system, functioning in concert with other subsystems.<sup>68</sup> The system is closed, the special regime is not. Gaetano Arangio-Ruiz, his successor, sees a “self-contained regime” as itself more or less closed.<sup>69</sup> Bruno Simma limits the term “self-contained regime” to subsystems with a full set of secondary rules that “exclude more or less totally the application of the general consequences of wrongful acts.”<sup>70</sup>

According to Bruno Simma and Dirk Pulkowski, *lex specialis* is “the methodological tool” that connects a special regime to rules of general application.<sup>71</sup> This is the approach Special Rapporteur James Crawford takes in formulating the final version of Article 55 of the Draft Articles, leaving it open to interpretation on a case-by-case basis.<sup>72</sup> States are free to negotiate special regimes and, in fact, the very process of negotiating a special regime gives those rules “particular importance” so that in the absence of “a clear indication, [those] special rules must be deemed to embody a particular commitment.”<sup>73</sup> In other words, the

63. *Ibid.* at paras. 20(a), (b).

64. Draft Articles, *supra* note 1, Art. 2.

65. The term often used in the literature is “self-contained regime.” The ILC notes in the Fragmentation of International Law that “the notion of a ‘self-contained regime’ is simply misleading. Although the degree to which a regime or responsibility, a set of rules on a problem or a branch of international law needs to be supplemented by general law varies, there is no support for the view that anywhere general law would be fully excluded. ...[S]uch exclusion may not be even conceptually possible. Hence, it is suggested that the term ‘self-contained regime’ be replaced by ‘special regime.’” See Fragmentation of International Law, *supra* note 21 at 82.

66. *Case of the S.S. “Wimbledon”* (1923), P.C.I.J. (Ser. A) No. 1 at 23-24.

67. In the *United States Diplomatic and Consular Staff in Tehran*, [1980] I.C.J. Rep. 3 at 40, the Court said: “The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State’s obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse.”

68. For a summary of Willem Riphagen’s functional approach, see Fragmentation of International Law, *supra* note 21 at 74-78.

69. For a summary of Gaetano Arangio-Ruiz’s view, see *ibid.* at 78-79.

70. Bruno Simma, “Self-Contained Regimes” (1985) 14 N.Y.I.L. 115 at 115-16.

71. Bruno Simma & Dirk Pulkowski, “Of Planets and the Universe: Self-contained Regimes in International Law” (2006) 17 E.J.I.L. 483 at 510.

72. For a summary of James Crawford’s approach, see Fragmentation of International Law, *supra* note 21 at 80-81.

73. Simma & Pulkowski, *supra* note 71 at 507.

rules established by a specific MEA are preemptory and take precedence over rules of general application.

I have spoken about the Basel Convention and the Montreal Protocol as leading examples of the “help desk” approach. It is useful to examine two additional MEAs as better examples of “complete codes” in international environmental law. In the case of the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*<sup>74</sup> (“CITES”), entered into force in 1975, the COP has imposed trade sanctions on non-compliant parties and non-parties in a number of instances.<sup>75</sup> CITES regulates the trade in endangered species.<sup>76</sup> It operates through permits, certification and licenses, and it requires that parties submit annual reports.<sup>77</sup> The target of compliance is developing countries and countries in transition, although the Standing Committee did impose trade sanctions against Italy for trading in illegal goods.<sup>78</sup>

CITES does not include a Compliance Committee as do the previously discussed MEAs; rather, the power to recommend action resides with a Standing Committee of the COP.<sup>79</sup> The Standing Committee makes its recommendations to the COP. The CITES compliance regime includes limited technical assistance, a national legislation project, a written caution, action plans, warnings and, as a last resort, trade sanctions.<sup>80</sup> The focus of compliance is largely capacity building, although limited financial resources require firmer action. However, trade sanctions are *subject-specific*, focusing on the suspension of trade in CITES listed species.<sup>81</sup>

So far, CITES has met with “only limited success.”<sup>82</sup> As an instrument for protecting species at risk, it has not been particularly effective.<sup>83</sup> Despite this limited success, no state has resorted to legal consequences outside the terms of CITES and the COP to compel compliance; trade sanctions internalize compliance, banning trade in CITES-listed species.

The Kyoto Protocol,<sup>84</sup> which is a protocol to The Framework Convention,<sup>85</sup> was adopted in 1997 and came into force in 2005. Of the 184 signatories to the Kyoto Protocol, all are parties except Kazakhstan and the United States. It requires developed countries and countries

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74. *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 1973, 993 U.N.T.S. 243 [CITES].
75. Between 1985 and 2006 the MOP has issued trade suspensions 41 times against both parties and non-parties: see Reeve *supra* note 27 at 890-91.
76. CITES, *supra* note 74, Arts. III-V.
77. *Ibid.*, Arts. VI, VIII.
78. *Recommendations of the Standing Committee Concerning Italy*, Convention on International Trade in Endangered Species of Wild Fauna and Flora, 24th Meeting of the Standing Committee, No. 675 (30 June 1992); *Interpretation and Implementation of the Convention, Review of Alleged Infractions and Other Problems of Implementation of the Convention, Report of the Secretariat*, Convention on International Trade in Endangered Species of Wild Fauna and Flora, Doc. 9.22 (Rev.) [undated] at 521; and *Summary Report*, Convention on International Trade in Endangered Species of Wild Fauna and Flora, 31st Meeting of the Standing Committee, SC31 (1994) at 24.
79. Reeve, *supra* note 27 at 882-83.
80. Guide to CITES compliance procedures, Conference of the Parties, COP-14, Annex, Conf. 14.3 at paras. 29-30.
81. Reeve, *supra* note 27 at 886, 888-92.
82. *Ibid.* at 885.
83. Neumayer, *supra* note 40 at 45.
84. *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, UNFCCC, COP-3, UN Doc. FCCC/CP/1997/L.7/Add.1 (1998) [Kyoto Protocol].
85. See generally the Framework Convention, *supra* note 41.

in transition, so-called Annex I countries, to limit and reduce their emissions of six major greenhouse gases, so-called anthropogenic carbon dioxide equivalent emissions,<sup>86</sup> below 1990 levels.<sup>87</sup> It places no new commitments on non-Annex I countries. For this reason, it is a significant departure from the Montreal Protocol and CITES, which I noted earlier focus on developing countries and countries in transition.

The main provisions of the Kyoto Protocol impose legally binding emissions limitations and reductions on Annex I countries<sup>88</sup> and a series of monitoring and reporting commitments.<sup>89</sup> To help Annex I countries meet their “qualified emission reduction and limitation commitments” (“QELRCs”), Annex I countries have access to a number of “flexibility mechanisms,” such as clean development mechanisms,<sup>90</sup> joint implementations<sup>91</sup> and emissions trading.<sup>92</sup>

Some scholars view the Kyoto Protocol as a significant step forward from other MEAs because the compliance regime has “teeth”<sup>93</sup> — though small and not particularly sharp. Unlike the previously-mentioned MEAs that rely on decisions of the COP/MOP, the Kyoto Protocol establishes a separate Enforcement Branch with “the power to actually *apply* the consequences, not just recommend action to the COP.”<sup>94</sup> In addition, the procedure is “fully *predetermined*.”<sup>95</sup> The Enforcement Branch need only ascertain whether a party is in breach and the consequence is “automatic.”<sup>96</sup> There is no discretion.

The Marrakesh Accords<sup>97</sup> to the Kyoto Protocol create a compliance regime that imposes “punitive consequences”<sup>98</sup> on Annex I countries who fail to comply with the Kyoto Protocol. The Marrakesh Accords establish a Compliance Committee with two branches: a Facilitative Branch and an Enforcement Branch. The Facilitative Branch is “managerial and not confrontational”<sup>99</sup> and aims to assist developing countries and countries in transition by providing advice, facilitating implementation and promoting compliance (the “help desk” approach).<sup>100</sup> The Enforcement Branch is new to MEAs; it is an “adjudicative-type

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86. These are identified in Annex A as carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), nitrous oxide (N<sub>2</sub>O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulphur hexafluoride (SF<sub>6</sub>). Kyoto Protocol, *supra* note 84.

87. Generally, the commitment is between 5-8 percent, however, there are notable exceptions for Australia, Iceland, New Zealand, Norway, the Russian Federation, and the Ukraine. Canada’s commitment is 6 percent. The United States committed to a 7 percent reduction. See Kyoto Protocol, *supra* note 84, Annex B.

88. *Ibid.*, Art. 3.

89. *Ibid.*, Arts. 5, 7.

90. *Ibid.*, Art. 12.

91. *Ibid.*, Art. 4.

92. *Ibid.*, Art. 6.

93. Anita Halvorssen & Jon Hovi, “The Nature, Origin and Impact of Legally Binding Consequences: The Case of the Climate Regime” (2006) 6 Intl. Env’tl. Ag. 157 at 158.

94. *Ibid.* at 162 [emphasis in original].

95. *Ibid.* [emphasis in original].

96. *Ibid.*

97. *Procedures and mechanisms relating to compliance under the Kyoto Protocol*, UN FCCC, 8th Sess., Dec. 24/CP.7, UN Doc. FCCC/KP/2001/13/Add.3 (2001) [Procedures].

98. Halvorssen & Hovi, *supra* note 93 at 158.

99. *Ibid.* at 160.

100. *Procedures*, *supra* note 97, s. IV.6.

body”<sup>101</sup> that targets only Annex I countries. It may investigate and determine whether an Annex I country is complying with its QELRCs, the monitoring and reporting requirements, and the eligibility requirements for clean development mechanisms and emissions trading.<sup>102</sup> The Enforcement Branch may impose a specific set of consequences for non-compliance by: (1) issuing a declaration of non-compliance;<sup>103</sup> (2) issuing a development plan;<sup>104</sup> (3) imposing a 30 percent fine on a country’s second commitment period;<sup>105</sup> (4) suspending eligibility for clean development mechanisms;<sup>106</sup> and (5) suspending eligibility for emissions trading.<sup>107</sup> The consequences are intended to be soft-handed, “aimed at the restoration of compliance to ensure environmental integrity” and to provide non-compliant parties with “an incentive to comply.”<sup>108</sup> In applying consequences, the Enforcement Branch is to consider “the cause, type, degree and frequency of the non-compliance.”<sup>109</sup>

The compliance mechanism is not legally binding, though it probably holds significant political weight for a non-compliant party. Article 18 of the Kyoto Protocol *specifically* requires an amendment to impose binding consequences.<sup>110</sup> The compliance mechanism has not been passed as an amendment yet, despite its adoption by the parties at COP/MOP-1 in Montreal in 2005. Decisions of the COP are not usually considered legally binding.<sup>111</sup> Consequently, without amendment there are no legal consequences *within* the Kyoto Protocol system. Even if the amendment is passed — which is unlikely — it is not binding on a non-compliant party until the non-compliant party ratifies it. In addition, a party may simply withdraw from the Kyoto Protocol, upon one year written notice to the Depository, any time after three years from the date it came into force for that party.<sup>112</sup>

The Kyoto Protocol is the nearest thing we have to a *complete code* in international environmental law. It is a more complete carrot and stick approach than CITES because CITES merely imposes trade sanctions in the subject-matter, while the Kyoto Protocol seeks to impose penalties. As such, Fitzmaurice suggests that the Kyoto Protocol may be a species of *lex specialis*, containing a form of collective action and elements of both material treaty breach and countermeasure.<sup>113</sup>

What then are the consequences for a breach of the Kyoto Protocol? While fines for non-compliance were discussed by parties,<sup>114</sup> the final compliance mechanism adopted under the Marrakesh Accords to the Protocol mentions no fines. Penalties under the Kyoto Pro-

101. Halvorssen & Hovi, *supra* note 93 at 160.

102. Procedures, *supra* note 97, s. V.4.

103. *Ibid.*, ss. XV.1(a) and XV.5.

104. *Ibid.*, ss. XV.1 and XV.5(b).

105. *Ibid.*, s. XV.5(a).

106. *Ibid.*, s. XV.4.

107. *Ibid.*, ss. XV.4 and XV.5(c).

108. *Ibid.*, s. V.6.

109. *Ibid.*, s. XV.1. This echoes the compliance mechanism under the Basel Convention, see COP-6, VI/12, *supra* note 58 at para. 20, and CITES: see Guide to CITES, *supra* note 80 at para. 32(b).

110. Kyoto Protocol, *supra* note 84, Art. 18.

111. Brunnée, *supra* note 25 at 242.

112. Kyoto Protocol, *supra* note 84, Art. 27.

113. Fitzmaurice, *supra* note 23 at 40.

114. Brunnée, *supra* note 25 at 249.

tocol are limited to the consequences set out in Sections XIV and XV.<sup>115</sup> These provisions provide for non-binding, self-punishment when a state fails to meet its QELRCs. Despite its appearance, the Kyoto Protocol is very much a tool of voluntary compliance based on “self-punishment.”<sup>116</sup> Even if the compliance procedures were legally binding, they would make “only a modest difference” to compliance.<sup>117</sup> All the Enforcement Branch can do is exclude the non-compliant party from participating in Protocol flexibility mechanisms or assess a penalty for the second commitment period under the Kyoto Protocol. As Anita Halvorsen and Jon Hovi point out, only the non-compliant party can implement the decision to impose a lower target for the second commitment period.<sup>118</sup> The targets for a second commitment period require the approval of the non-compliant party, an amendment and ratification. What if the non-compliant party refuses to do so? A non-compliant party is not penalized for failing to comply with a decision of the Enforcement Branch, either.<sup>119</sup> For that reason, a decision of the Enforcement Branch is likely to be a hollow one. As a last resort, a non-compliant party can simply withdraw from the Kyoto Protocol or refuse to take on a second commitment period. If a party decides not to proceed with a second commitment period, the penalty amounts to nothing.

Does this lack of enforceability preclude the use of legal consequences of general application, such as countermeasures, for a serious breach of a MEA? The ILC has yet to directly answer this question.<sup>120</sup> We have no legal opinion on the interaction between MEAs and the Law of State Responsibility. Still, it is possible to venture an educated guess. It is likely that rules of general application are residual, so the use of countermeasures is not precluded. However, the legal consequences established by the special regime take precedence over legal consequences of general application. Some scholars call for a move to an integrated compliance regime,<sup>121</sup> which would close the gaps in MEA compliance regimes and further restrict the potential use of countermeasures. Before members can resort to legal consequences of general application there must be an effort to guide a non-compliant party within the framework of the compliance regime. The internal process must come to its logical conclusion, unless the non-compliant party’s conduct is flagrant or causes immediate harm. Only a persistent and egregious violation of a MEA could justify filling the gap using the Law of State Responsibility.

### iii. The Injured State Problem: Obligations *Erga Omnes*

Although the Law of State Responsibility is primarily concerned with the injured state,<sup>122</sup>

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115. The consequences in Procedures, Section XIV refer to those set by the Facilitation Branch and are therefore applicable to developing countries. This relates to the “help desk” approach previously described. See Procedures, *supra* note 97.

116. Halvorsen & Hovi, *supra* note 93 at 167.

117. *Ibid.* at 171.

118. *Ibid.* at 166.

119. *Ibid.*

120. See Christian Sano Homsí, “‘Self-Contained Regimes’ – No Cop-out for North Korea!” (2000) 24 Suffolk Transnat’l L. Rev. 89 at 106-08.

121. See Sebastian Oberthür, “Clustering of Multilateral Environmental Agreements: Potentials and Limitations” (2002) 2 Int’l Env’t’l Agreements: Pol. L. & Econ. 317 and Udo E. Simonis, “Advancing the debate on a world environment organization” (2002) 22 The Env’t’list 29. Oberthür is less convinced of integration in a later article: Sebastian Oberthür & Thomas Gehring, “Reforming International Environmental Governance: An Institutional Proposal for a World Environment Organisation” (2004) 4 Int’l Env’t’l. Agreements: Pol. L. & Econ. 359.

122. Draft Articles, *supra* note 1, Art. 42.

it does contemplate circumstances where a non-injured state may demand that a wrongdoer cease a wrongful act, provide assurances for its non-repetition and demand that reparations be made.<sup>123</sup> As noted above, the school of objective responsibility imposes responsibility on a state where there is an injury. In *Avena and Other Mexican Nationals (Mexico v. United States of America)* (“*Mexican Nationals*”), the ICJ said:

The general principle on the legal consequences of the commission of an internationally wrongful act was stated by the Permanent Court of International Justice in the *Factory at Chorzów* case as follows: “It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.” (*Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9, p. 21.*) What constitutes “reparation in an adequate form” clearly varies depending upon the concrete circumstances surrounding each case and the precise nature and scope of the injury, since the question has to be examined from the view point of what is the “reparation in an adequate form” that corresponds to the injury.<sup>124</sup>

In some cases there is a clear wrongdoer, a clear injury, and a clear injured state. In 1978, Cosmos 954 crashed in northern Canada, scattering radioactive debris over a 500 mile area. The Liability Convention,<sup>125</sup> entered into force in 1972, establishes an absolute liability regime for damages caused by the re-entry of space objects. It requires the launching state to pay compensation for any damages caused by its space objects.<sup>126</sup> Compensation is guided by the principle of *restitutio in integrum*, to restore the injured state to the position it would have been in had the accident not occurred.<sup>127</sup> Where the parties cannot agree on liability or damages, either party can request the creation of a Claims Commission.<sup>128</sup> The Claims Commission may decide the claim on the merits and determine the amount of compensation payable.<sup>129</sup> However, the procedures are not mandatory and the Commission’s decision is not binding.<sup>130</sup> This is thus a “political” dispute settlement,<sup>131</sup> rather than a legal one.

In the Cosmos 954 incident, the procedures were never invoked as the parties negotiated an *ex gratia* settlement in 1982, without the USSR admitting legal responsibility or liability for the damages and with Canada accepting \$3 million, less than half of its claim (and about 20% of its actual costs).<sup>132</sup> As a result of the political nature of negotiated settlements between states in general, Steven Freeland anticipates that attempts to compensate under the

123. *Ibid.*, Art. 48.

124. *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, [2004] I.C.J. Rep. 12 at 59, para. 119.

125. UN, *Convention on International Liability for Damage Caused by Space Objects, United Nations Treaties and Principles on Outer Space* (U.N. Doc. ST/SPACE/11) (New York: United Nations, 2002) 13 [Liability Convention].

126. *Ibid.*, Art. II.

127. *Ibid.*, Art. XII.

128. *Ibid.*, Art. XIV.

129. *Ibid.*, Art. XVIII.

130. Kevin D. Heard, “Space Debris and Liability: An Overview” (1986) 17 *Cumb. L. Rev.* 167 at 188, 192-93.

131. Steven Freeland, “There’s a Satellite in my Backyard! – Mir and the Convention on International Liability for Damage Caused by Space Objects (2001) 24 *U.N.S.W.L.J.* 462 at 483.

132. *Ibid.* at 473.

Liability Convention will do little to actually restore victims.<sup>133</sup> The Cosmos 954 incident serves to demonstrate that compliance often remains a political, rather than a legal, act between states.

In other cases, it is not clear who is harmed by a breach of a treaty such as a MEA. In the case of a breach of the Basel Convention's notice and consent requirements for the transit of hazardous wastes, for example, is a state of transit harmed by the breach? Let us suppose that a transport filled with listed hazardous wastes leaves State A. It passes through the territorial waters of State B bound for storage and incineration at a facility in State C. State B discovers the breach after the hazardous wastes are incinerated at the facility in State C. All are parties to the Basel Convention. If State A fails to inform State B, is State B harmed? Since the incident has already transpired, there is no conduct to cease and assurances of no future incidents rings hollow. The remedy under the Law of State Responsibility is limited to reparation for injury, as codified under Chapter II of the Draft Articles.<sup>134</sup> But reparation for what injury? There are no reparable damages to give rise to restitution or compensation. And while reparations also include satisfaction, which may include declarations and formal apologies,<sup>135</sup> I am not convinced that vindication of an aggrieved state is an effective legal strategy. Legal rules that do not deter future wrongful conduct are at best weak normative rules. In our example above, what effect does State A's apology to State B really have? The answer to that question will depend on the importance each state places on their international relations and the relationship between the parties.

In the absence of damages, on what basis can legal consequences be applied? Attila Tanzi argues that legal consequences can be applied where there is an obligation *erga omnes*.<sup>136</sup> This might mean the protection of a collective interest or a duty owed to the international community as a whole. But the latter is restricted to situations such as war, aggression, genocide and serious violations of human rights.

Let us take as another example a state party to the Montreal Protocol that fails to provide annual reports on the manufacture and use of restricted pesticides, though it adheres to its quotas. What harm is done to other member states? There is no discernible injured state or specific injury. The duty to report is unlikely to be characterized as an obligation *erga omnes* absolute because the protection of the ozone layer is a collective interest and reporting furthers that interest. The problem lies in that there are a number of collective interests, not one, and that there is no hierarchy between those interests. Even if reporting were so fundamental to the goal that without it the effort to protect the ozone layer would be severely hampered, the protection of the ozone layer must be balanced with other goals such as capacity-building and state sovereignty.

While a breach of a MEA gives rise to an internationally wrongful act, without damages or provable damages it is unclear what remedies are available to non-injured states, or even how they can justify countermeasures to compel compliance. Countermeasures are used

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133. *Ibid.* at 483.

134. Draft Articles, *supra* note 1, Art. 31.

135. *Ibid.*, Art. 37. It is interesting that the Draft Articles expressly provide for compensatory goals (restitution and compensation) and vindication (satisfaction) but not for general deterrence. According to P. S. Atiyah, a liability regime should seek three objectives: compensation, vindication or satisfaction, and deterrence. See P. S. Atiyah, *Accidents, Compensation and the Law*, 2d. ed. (London: Weidenfeld and Nicholson, 1975) at 475-560.

136. See generally Attila Tanzi, "Is Damage a Distinct Condition for the Existence of an Internationally Wrongful Act?" in Marina Spinedi & Bruno Simma, eds., *United Nations Codification of State Responsibility* (New York: Oceana Publications, 1987) 1.



when a non-compliant state refuses to comply after being notified of its breach of obligation and informed that action will be taken against them. Without damages, how is the collective interest furthered by actions outside the MEA compliance regime? As noted above, capacity-building is a central feature of MEAs. A state cannot be sanctioned if the failure is due to a lack of capacity. So long as a state in breach of its international obligations makes its best efforts to comply, countermeasures are an inappropriate remedy. It is not the fact of non-compliance, but rather the belligerence of a non-compliant state, that attracts legal consequences under the Law of State Responsibility. In other words, where there are no damages, international law requires bad faith or belligerence on the part of the non-compliant state to bring about the conditions necessary for countermeasures.

## II. HOW SHOULD COUNTERMEASURES BE APPLIED TO BREACHES OF OBLIGATIONS UNDER MEAS?

If countermeasures are not precluded by a MEA, then under what conditions are countermeasures permissible to compel compliance? According to Simma and Pulkowski, a state may “fall back” on rules of general application based on the following process:

- (1) If states create new law — whether it be in the field of human rights, trade or regional cooperation [or environmental law] — there is a presumption that such rules embody a particularly strong commitment.
- (2) General international law vests a state with certain capacities to ensure that its rights be respected, including a restricted right to unilateral enforcement action (countermeasures).
- (3) Among several possible constructions, the principle of effective interpretation requires adopting the interpretation that best gives effect to the norm in question. Effectiveness includes the notion of enforceability. Consequently, it cannot be easily inferred that a state was willing to give up “the rights or *facultés* of unilateral reaction it possessed under general international law” by complementing special primary obligations with a specific set of secondary obligations. If states create new substantive obligations along with special enforcement mechanisms, they merely relinquish their *facultés* and under general international law in favour of a special regime’s procedures to the extent that and as long as those procedures prove efficacious. When such procedures fail, enforcement through countermeasures under general international law becomes an option.<sup>137</sup>

According to Simma and Pulkowski’s view, a non-compliant party has expressed a strong commitment to the legal obligations of a MEA such that another member state may enforce its rights against the non-compliant state, including a restricted right to countermeasures, and the rules of general application act as gap fillers. Every member of a MEA has a restricted right to countermeasures and may use them to compel compliance. But what are those restrictions? To answer this, I propose to first explain the law of countermeasures and then examine the practical limitations to their use.

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137. Simma & Pulkowski, *supra* note 71 at 508-09.

### A. The Use of Countermeasures

Before I discuss countermeasures it is important that I restate the difference between bilateral obligations, interdependent obligations, and integral obligations. An injured state or group of states may take countermeasures against a wrongdoer for breach of a bilateral or interdependent obligation.<sup>138</sup> The state or states are injured and entitled to a remedy by the principle of objective responsibility; the injury caused by the wrongful conduct is sufficient to justify the countermeasure. The status of the non-injured state is less certain.<sup>139</sup> Non-injured states may also take action against a wrongdoer to protect a collective interest of a group of states<sup>140</sup> because of the multilateral nature of the obligation (interdependent obligation without harm), but as I've pointed out above, only in limited cases of persistent egregious conduct. This specifically includes breaches of environmental law.<sup>141</sup> Non-injured states may also take action against a wrongdoer for breaches of an obligation owed to the international community as a whole (integral obligation).<sup>142</sup> However, these cases refer to situations of war, aggression, genocide, and serious violations of human rights. The Draft Articles permit a non-injured state to take lawful measures in these cases.<sup>143</sup>

The ILC, in the Draft Articles, uses the term lawful measures instead of countermeasures.<sup>144</sup> It appears that the ILC expects that lawful measures by non-injured states would be limited to actions to address breaches of *erga omnes* absolute obligations, with the Commentaries referring to Chapter VII of the UN Charter and actions taken by an international organization.<sup>145</sup> However, the content of lawful measures is not defined; it is open-ended. The Law of State Responsibility does not preclude the use of countermeasures by non-injured parties. Nevertheless, as Linos-Alexander Sicilianos suggests, lawful measures include countermeasures if the measures used are otherwise consistent with the Draft Articles.<sup>146</sup> What then are lawful measures? Lawful measures may include, but are certainly not limited to, retortion,<sup>147</sup> countermeasures or reprisals, and collective military action. For my purposes, I am only interested in countermeasures.

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138. Draft Articles, *supra* note 1, Arts. 22, 42, 49. An injured state may take lawful countermeasures against a wrongdoer. An injured state or group of states may invoke state responsibility for a breach of an obligation owed to it. In the case of a group of state, injured states may invoke state responsibility where the breach specifically affects them or the breach radically changes the position of all the other states relative to the further performance of the obligation.

139. According to Brigitte Stern, the distinction between injured states and non-injured states was adopted to address the problem created by the integration of countermeasures in the Draft Articles, see Brigitte Stern, "A Plea for 'Reconstruction' of International Responsibility based on the Notion of Legal Injury" in Maurizio Ragazzi, ed., *International Responsibility Today, Essays in Memory of Oscar Schachter* (Leiden, Nld.: Martinus Nijhoff, 2005) 93 at 102-03.

140. Draft Articles, *supra* note 1, Art. 48(2)(a).

141. Commentaries, Draft Articles, *supra* note 6 at 126, para. 6.

142. Draft Articles, *supra* note 1, Art. 48(2)(b).

143. *Ibid.*, Art. 54.

144. *Ibid.* Article 54 uses the term "lawful measures" instead of countermeasures. It permits a state "to take lawful measures ... to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached."

145. Commentaries, Draft Articles, *supra* note 6 at 137, para. 2.

146. Sicilianos, *supra* note 6 at 1143. See Draft Articles, *supra* note 1, Arts. 22, 49-53.

147. Retortion refers to "an unfriendly act against another State with the object to persuade that State to end its harmful conduct": see Peter Malanczuk, "Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness in the International Law Commission's Draft Articles on State Responsibility" in Marina Spinedi & Bruno Simma, eds., *United Nations Codification of State Responsibility* (New York: Oceana Publications, 1987) 197 at 207.

A countermeasure, or reprisal, is a form of self-help by a state in international law.<sup>148</sup> It is aimed at “regaining equivalence” between the parties in response to a material or less-than-material breach of a treaty.<sup>149</sup> For Enzo Cannizzaro, countermeasures are “instrumental.”<sup>150</sup> It may be used by an injured state<sup>151</sup> in response to a current and continuing wrong<sup>152</sup> after the injured state has provided proper notice to the wrongdoer.<sup>153</sup> The measure must be proportional in all the circumstances, aimed only at inducing the wrongdoer to comply with its obligations and must cease once the wrongdoer complies.<sup>154</sup>

Crawford would have non-injured parties taking a backseat to an injured party’s choice and desires.<sup>155</sup> To Crawford, the injured party drives the process. This approach places some practical constraints on non-injured parties taking up the cause on behalf of an injured party. The approach makes sense because countermeasures are not used for the breach, but in the failure by the wrongdoer to address the consequences of its breach. The failure of a wrongdoer to address the consequences of its breach impacts the injured party directly.

Countermeasures arise because there is no central authority with the power to compel compliance in international law. Without a central authority, an aggrieved state<sup>156</sup> may find it necessary to resort to some form of self-help. In a global village in which states are constantly bumping into each other, a form of “outlawry” or “blacklist” is not a practical option. While community pressure (retortion) and the revocation of certain privileges may be viable options available to an aggrieved state, these may prove insufficient to compel a non-compliant party to comply with its obligations. As a result, countermeasures, often in the form of trade sanctions, are frequently employed by an injured state against a wrongdoer.

The central problem with countermeasures lies with its self-judging nature.<sup>157</sup> In Hans Kelsen’s view, countermeasures are necessary in a decentralized system of law, but should

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148. See generally Mary Ellen O’Connell, “Controlling Countermeasures” in Maurizio Ragazzi, ed., *International Responsibility Today: Essays in Memory of Oscar Schachter* (Leiden, Nld: Martinus Nijhoff, 2005) 49 at 50.

149. Sano Homs, *supra* note 120 at 114.

150. Enzo Cannizzaro, “The Role of Proportionality in the Law of International Countermeasures” (2001) 12 E.J.I.L. 889 at 891.

151. Draft Articles, *supra* note 1, Art. 49(1).

152. *Ibid.*, Art. 52(3).

153. *Ibid.*, Art. 52(1).

154. *Ibid.*, Art. 51.

155. Crawford, *supra* note 6, states at 671-72: “The primacy of the interests of the actual victim needs to be acknowledged in the taking of countermeasures. Where a state is the victim of a breach (and other states’ interests, if any, are more general), the victim state should have the right to decide whether and what countermeasures should be taken, within the overall limits laid down by the draft articles. ...Countermeasures by third states may thus be taken only at the request and on behalf of an injured state, subject to any conditions that it lays down and to the extent that it is itself entitled to take those countermeasures.”

156. I think it is important to differentiate between an “aggrieved state” and an “injured state.” An aggrieved state may simply have a moral right to complain about the wrongful conduct but is not necessarily injured. An injured state, on the other hand, has a calculable loss as a result of the wrongful conduct, and may be entitled to take countermeasures in international law. It is unclear whether an aggrieved state, who is not also an injured state, has the right to take countermeasures in international law. The *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, [1986] I.C.J. Rep. 14 at 127 suggests otherwise. In that case, the Court held that only the victim of wrongful conduct may take lawful countermeasures against the wrongdoer. The commentary in Article 54 of the Draft Articles is a useful starting point. Article 54 specifically permits an aggrieved state to take “lawful measures” to compel compliance and to exact reparations. It is not certain if “lawful measures” equates to “countermeasures” as the question remains unanswered in international law.

157. O’Connell, *supra* note 148 at 50.

be set, monitored and approved through an objective third-party decision maker such as an arbitrator or tribunal.<sup>158</sup> In Quincy Wright's view, when a state acts as both judge and sheriff, the remedy is not a legal sanction at all, but an act of policy.<sup>159</sup>

Countermeasures may also offend principles of fairness since they are more likely to be used by powerful states against weaker states.<sup>160</sup> In a decentralized system, such as that existing in international law today, the use of unilateral enforcement is a function of power.<sup>161</sup> Weaker states are unlikely to seek countermeasures against a more powerful wrongdoer, largely because the impact on the more powerful wrongdoer is likely to be minimal and the benefits of association with the non-compliant party will often outweigh the costs. This is particularly problematic in environmental law, where the target of the compliance regime is often developing countries or countries in transition.

Even if a countermeasure takes into account the gravity of the wrongful conduct and is commensurate with the injury suffered, the measure taken may have a disproportionate effect. The measure itself could become wrongful.<sup>162</sup> This outcome is demonstrated by *Gabčíkovo*, where neither the response of Hungary nor Slovakia was lawful, both failing to take measures proportional to the breach and failing to negotiate an appropriate settlement.

As a background, *Gabčíkovo* involved a dispute between Slovakia and Hungary over an agreement to build a series of dams along the Danube River at the border between them for the generation of hydroelectric power, flood control, and the better navigation of the river.<sup>163</sup> Shortly after the collapse of the Eastern Bloc, Hungary terminated its involvement in the project, claiming the project would unduly interfere with the natural ecosystem of the river and Budapest's fresh water supply. After negotiations failed to resolve the impasse, Slovakia proceeded with its own project, Variant C, wholly on Slovakian territory and without Hungary's consent. Variant C, built on the Danube upstream from Hungary, inevitably interfered with the flow of the Danube on the Hungarian side.

The ICJ held that Slovakia's Variant C was not a proportionate response to Hungary's refusal to proceed with the project, since Variant C interfered with the Danube on the Hungarian side and the benefits of the hydroelectric dam were intended to be shared by both parties.<sup>164</sup> Equally, Hungary's refusal to complete its works were not reasonable since there was no imminent danger to the natural ecosystem or to Hungary's water supply from the project that, at the time Hungary breached the agreement, negotiations could not resolve.<sup>165</sup>

Countermeasures may also lead to escalation, as the target state may consider the application of a particular countermeasure wrongful in itself and take counter-countermeasures. The result may be a prolonged and costly trade war, or in the case of environmental measures, further environmental degradation.

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158. See reference to Hans Kelsen, *ibid.* at 52.

159. See reference to Quincy Wright, *ibid.* at 53.

160. Lance Davis & Stanley Engerman, "History Lesson, Sanctions: Neither War nor Peace" (2003) 17 J. Econ. Perspectives 187.

161. Zemanek, *supra* note 3 at 128.

162. Draft Articles, *supra* note 1, Art. 22. Article 22 permits a countermeasure to the extent that the measure meets the requirements set out by Part III, Chapter II. This implies that a disproportionate measure is not lawful.

163. For a history of the dispute between Slovakia and Hungary, see the discussion in *Gabčíkovo*, *supra* note 4 at paras. 15-45.

164. *Ibid.* at para. 85.

165. *Ibid.* at paras. 105-10.

Despite these problems, countermeasures are an established part of customary international law.<sup>166</sup> As Oscar Schachter notes, “as long as unilateral countermeasures are considered acceptable measures of law enforcement, it is surely in the common interest to try to prevent their illicit and arbitrary use.”<sup>167</sup> The Draft Articles enshrine them and by doing so authorize their use. Karl Zemanek opines that countermeasures may be effective where a state values “reciprocity,”<sup>168</sup> because it strikes at the relations between states.

What then are the conditions for their use? A state may invoke countermeasures under Article 48 and 54 of the Draft Articles. For Sicilianos, the only issue is the “threshold of seriousness” required for a party to trigger countermeasures.<sup>169</sup> It is only where the wrongdoer continues the wrongful conduct or refuses to pay reparations that a state may resort to countermeasures.<sup>170</sup> This is an important point. Countermeasures are not designed to respond to a breach of obligation, but rather a non-compliant party’s refusal to stop the wrongful conduct or to pay reparations upon notice. That is, it is not invoked because of the seriousness of the breach of a MEA, but the seriousness of the non-response.

What then are the elements of a lawful countermeasure? In *Gabčíkovo*, decided on other grounds, the Court lists the elements of a lawful countermeasure. A countermeasure may be justified if it meets certain conditions:<sup>171</sup>

- (a) It must be taken in response to a previous international wrongful act of another State and must be directed against that State (the wrongdoer);
- (b) The injured State must have called upon the wrongdoer to discontinue the wrongful conduct or to make reparations;
- (c) The effects of the countermeasure must be commensurate with the injury suffered, taking into account the rights in question;<sup>172</sup> and
- (d) Its purpose must be to induce the wrongdoer to comply with its international obligations, and so the measure used must be reversible.

To this list should be added the elements of *urgency* and *necessity*.<sup>173</sup> Article 52(2) allows an injured state to “take such *urgent* countermeasures as are *necessary* to preserve its rights.”<sup>174</sup> By logical extension, a non-injured state cannot do more than the injured one, so the lawful measures of non-injured states must also be urgent and necessary. Urgency and necessity are interrelated concepts. At once, there must be a circumstance that seriously impairs an injured state’s rights as well as a detriment from the continued breach that other

166. See Zemanek, *supra* note 3 at 125.

167. Oscar Schachter, “Dispute Settlement and Countermeasures in the International Law Commission” (1994) 88 *Am. J. Int’l. L.* 471 at 477.

168. Zemanek, *supra* note 3 at 129.

169. Sicilianos, *supra* note 6 at 1140.

170. See Crawford, *supra* note 6 at 671.

171. *Gabčíkovo*, *supra* note 4 at 55-57.

172. This is taken almost directly from Article 51 of the Draft Articles, *supra* note 1, which states that “[c]ountermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.”

173. As Denis Alland points out, self-defence and reprisals invoke a state of necessity: see Denis Alland, “International Responsibility and Sanctions: Self-Defence and Countermeasures in the ILC Codification of Rules Governing International Responsibility?” in Marina Spinedi & Bruno Simma, eds., *United Nations Codification of State Responsibility* (New York: Oceana Publications, 1987) 143 at 151.

174. Draft Articles, *supra* note 1, Art. 52(2) [emphasis added].

avenues, such as negotiation or arbitration, cannot adequately remedy. As Denis Alland points out, “the concept of necessity is ... the force that gives rise to countermeasures: in practice, necessity takes the form of urgency.”<sup>175</sup> In *Gabčíkovo*, both Hungary and Slovakia argued necessity to justify their actions as lawful countermeasures, but the Court concluded that neither party could evoke necessity to justify their actions.<sup>176</sup> The parties should have continued negotiations under the treaty.

## B. The Duty to Negotiate or Settle in Good Faith

A state contemplating the use of countermeasures must provide prior notice to the wrongdoer and offer to negotiate.<sup>177</sup> Does this impose a duty to negotiate? According to the *Air Service Agreement Case*:

Their aim is to restore equality between the Parties and to encourage them to continue negotiations with mutual desire to reach an acceptable solution. ... Counter-measures therefore should be a wager on the wisdom, not on the weakness of the other Party. They should be used with a spirit of great moderation and be accompanied by a genuine effort at resolving the dispute.<sup>178</sup>

The *Naulilaa* case, which is viewed as the foundation for the customary law on countermeasures, permits reprisals *only after an unfulfilled demand* for reparation.<sup>179</sup> On this basis, it would seem that an injured party has a duty to negotiate before taking countermeasures. However, good faith negotiations neither end countermeasures nor prevent them. On balance, the Draft Articles rank the right to take countermeasures higher than the duty to negotiate. The Draft Articles are concerned with restoring the *status quo ante*. It encourages negotiation but does not demand it. A state is not required to submit to dispute resolution prior to taking countermeasures.<sup>180</sup> An injured state may continue countermeasures so long as the wrongful conduct continues.<sup>181</sup> What triggers the suspension or termination of countermeasures is the cessation of the wrongful conduct and the seizing of the matter by a competent authority with the power to bind the parties.<sup>182</sup> A competent authority is left only to resolve the question of reparations.<sup>183</sup>

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175. Alland, *supra* note 173 at 161.

176. *Gabčíkovo*, *supra* note 4.

177. Draft Articles, *supra* note 1, Art. 52(1).

178. *Case Concerning Air Services Agreement of 27 March 1946 between the United States of America and France* (1978), 18 R.I.A.A. 417 at 444-45 [*Air Services Agreement case*].

179. *Naulilaa*, 2 R.I.A.A. 1025.

180. *Air Services Agreement case*, *supra* note 178 at 444-46.

181. Draft Articles, *supra* note 1, Arts. 52(3) and 53.

182. *Ibid.*, Art. 52(3)(b). Under Article 52(3)(b), countermeasures must be suspended where the wrongful act ceases and the matter is before a court or tribunal with the authority to make decisions binding on the parties.

183. *Ibid.*, Arts. 52(3)(b), (4). This principle derives from the discussion in the *Air Services Agreement case*, *supra* note 178 at 445-46.

### C. The Harm Principle and Proportionality

Even though culpability and damages are not explicit features of the Draft Articles, they are implicit factors when assessing proportionality.<sup>184</sup> Either a wrongdoer is acting in bad faith or its conduct has caused harm. A wrongdoer, acting in good faith, who has not caused injury, would simply cease the wrongful conduct upon request. There would be no need to impose countermeasures. So in the absence of injury it is the failure to comply with its obligations in bad faith that brings about the possibility of countermeasures. In the absence of damages, countermeasures are aimed at non-compliant parties.

Let us take our prior example of the state who fails to inform another state, under the Basel Convention, that a shipment of hazardous wastes is passing through its territory. State B discovers the shipment while the transport ship is passing through State B's territory. State B informs State A of the breach prior to its arrival at State C. This situation is resolved by State A providing proper notice and obtaining the consent of State B. State B could send warships out and redirect the transport ship out of its territorial waters, but that does not seem to be proportional in the circumstances. If State A is in the habit of not advising State B of the same conduct, then the persistence of the breach creates culpability and indicates bad faith on State A's part. State B calling out the navy may be proportional in those circumstances. What about the position of State D, a non-injured member of the Basel Convention? What right does State D have to take countermeasures against State A, even where State A has habitually failed to obtain the proper informed consent from State B? Can State D call out its navy? In the absence of injury and without culpability or bad faith on the part of State A, a countermeasure by State D would likely be wrongful. Such action by State D will almost always lack proportionality until the protection of the environment has the same normative value in international law as war, aggression, genocide, and serious violations of human rights.

How is proportionality to be addressed? In essence, proportionality requires that the measure be commensurate with the injury suffered, taking into consideration both the gravity of the wrongful act and the rights in question.<sup>185</sup> That is a tall order. Without injury it is hard to imagine a circumstance so grave that it requires a countermeasure, except persistent and egregious violations of an obligation. Brigitte Stern calls for the principle of "legal injury" to be adopted into the Draft Articles, as the justification for legal consequences for breach of obligations.<sup>186</sup> I agree, but go further and call for an explicit finding of wrongfulness or culpability where there is no specific injury. Otherwise, on what basis can countermeasures be justified in the absence of injury?

What is the role and content of proportionality? A useful theoretical framework is set out by Cannizzaro. For Cannizzaro, proportionality links means and aims:

Proportionality requires not only employing the means appropriate to the aim chosen, but implies, above all, an assessment of the appropriateness of the aim itself. The latter requirement fills a lacuna in the legal

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184. Article 51 of the Draft Articles, *supra* note 1, states that "[c]ountermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question." Any assessment of what is a commensurate response, and also the gravity of the wrongful conduct and the rights of the parties *vis-à-vis* the subject-matter of the dispute, necessarily implies resort to considerations of culpability and damages.

185. *Ibid.*, Art. 51.

186. Stern, *supra* note 139 at 98-106.

discipline of countermeasures. A state is free to determine the aim of its action in self-redress. However, international law curtails this otherwise unbounded discretion by requiring that the aim pursued is not manifestly inappropriate to the situation, considering the structure and content of the breached rule.<sup>187</sup>

Depending upon the aim of the measure, Cannizzaro suggests four possible standards: (1) a normative standard, (2) a retributive standard, (3) a coercive standard, and (4) an executive standard.<sup>188</sup>

A *normative standard* attempts to restore the balance that arises from the breach in a reciprocal relationship.<sup>189</sup> It is best used where the obligations of one party are balanced by similar obligations of another. The breach of the obligation justifies a reciprocal response by the moving party. It might go as far as to include *exceptio non adimpleti contractus*, the expulsion of the wrongdoer from the treaty.<sup>190</sup> In the case of our Basel Convention situation, this might amount to State B refusing to provide notice to State A when it transports hazardous wastes through State A's territory. This response would create an unsatisfactory situation for both parties, as well as all other members to the Basel Convention. A normative standard entails functional equivalency. In the collective interest, the other members of the Basel Convention, through the action of the MOP, may terminate or suspend the wrongdoer's rights and benefits, including the right to financial and technical assistance. In certain serious cases, it could lead to the suspension of State A from the treaty.

A *retributive standard* imposes a cost on the wrongdoer for the injury caused by its wrongful conduct.<sup>191</sup> This approach invites a quantitative assessment to ensure the measure taken produces costs roughly equivalent to those caused by the original breach. It also expects rough identity between the wrong and the response. In our Basel Convention example, a quantitative assessment might impose the costs of investigating, monitoring, and verifying the transport of hazardous wastes leaving State A (and likely passing through the territory of State B) on State A. The assessment of costs imposes a quantitative measure. It should attempt equivalency, but only approximately so. The costs of investigating, verifying and monitoring are not exact but a rough equivalency.

A *coercive standard* attempts to induce the wrongdoer to cease the breach and comply with its obligations.<sup>192</sup> It is an exceptional measure based not on equivalence but on appropriateness. The measure may impose damages on the wrongdoer that are far greater than the injury caused by the original breach. Coercive measures may be used for breaches of interdependent and integral obligations, those that involve collective interests or obligations to the international community as a whole. It is usually limited to obligations *erga omnes* absolute, for serious breaches such as war, aggression, genocide, or serious violations of human rights. It is not aimed at breaches of environmental law, although it could be anticipated

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187. Cannizzaro, *supra* note 150 at 897. For Cannizzaro, there are two conceptual operations to proportionality: (1) external proportionality — the means must be appropriate to the subjective aim, but the aim must be reasonable and appropriate to address the specific breach; and (2) internal proportionality — the content of the measure adopted must be appropriate for the result sought to be achieved, see Cannizzaro, *supra* note 150 at 899.

188. *Ibid.* at 900.

189. *Ibid.* at 900-05.

190. Malanczuk, *supra* note 147 at 208-10.

191. *Ibid.* at 905-08.

192. Cannizzaro, *supra* note 150 at 905-08.



that some breaches of environmental law could be so persistent and egregious that coercive measures are appropriate. In my Basel Convention example, this could include trade sanctions by State B against State A, which are not equivalent but may be appropriate. This might mean a refusal of State A's ships in State B's ports. It might also include State B calling out the navy and turning the transport ship out of State B's territorial waters.

An *executive standard* tries to reverse the adverse effects of a breach and restore the benefits back to the injured party.<sup>193</sup> This represents true “self-help” in that it aims at securing the benefits of a treaty without the cooperation of the wrongdoer, much as the Slovak response in *Gabčíkovo* by its sole construction of Variant C. It amounts to a legal substitution, whereby the benefit owed to the moving party by the wrongdoer is of such great importance that the moving party is entitled to wrestle those benefits back, including by unilaterally reordering the legal relations between the parties. It is only intended for the most serious breaches of integral obligations, such as egregious violations of human rights. It is highly unlikely this would apply to enforcement of MEAs. In my Basel Convention example, such a remedy would amount to State B boarding the transport ship by force and impounding it until State A provided assurances of non-repetition and paid appropriate reparations for breaching its duty to notify State B. The sheer ludicrousness, and potential folly, of this proposition demonstrates the tenuous position of pure “self-help” measures, not just in environmental law but in international law generally.

In the case of MEAs, countermeasures should compel a non-compliant party to comply with its obligations. As Alland points out, “[c]ountermeasures ought only to exist for the purpose of stopping a State, which has committed an internationally wrongful act, from persevering in its illegal action or to force it to make reparation if he refuses to do so. The idea of punishment in this connexion is not only pointless and premature, it is downright dangerous.”<sup>194</sup> Considering both the means and the aim of countermeasures, a response to a breach of a MEA that attempts to restore the balance or to impose equivalent costs may be justified; however, more coercive measures are probably not. What does that leave? It appears to leave only those measures already contemplated within the compliance regimes of most MEAs: termination or suspension, withdrawal of the benefits, trade sanctions in the subject-matter and imposition of the costs of compliance (i.e., investigation, verification, and monitoring) on the non-compliant party. If this is the case, countermeasures hover close to the existing mechanisms already in place under most MEAs and would act as gap fillers where a compliance regime fails to specify the measure to be taken. For the most serious breaches of a MEA, it might be possible to impose trade sanctions in the subject-matter or to expel a non-compliant party from a treaty.

#### D. A Brief Discussion of Sanctions under GATT/WTO

Despite its appeal, the imposition of trade sanctions, even in the subject-matter of the MEA, may pose problems for the sanctioning party. For example, suppose Denmark decided to impose trade sanctions on plastic containers imported from Canada and manufactured using “unclean” petroleum products and manufacturing processes connected to Canada's failure to adhere to its greenhouse gas emission targets under the Kyoto Protocol. Beyond the difficult question of attributing Canada's failure to meet its emission targets to

193. *Ibid.* at 911-13.

194. Alland, *supra* note 173 at 176.

a particular manufacturing process, a trade sanction against Canadian plastic products may trigger a General Agreement on Tariffs and Trade (“GATT”)<sup>195</sup>/World Trade Organization (“WTO”) dispute. A measure, even one contemplated within the framework of a MEA, may be an unfair treatment of a “like product.” In the case of countermeasures, this measure is more problematic, as a countermeasure is “directed against”<sup>196</sup> a state rather than a “product.” In our example, Denmark may, by countermeasure, ban the import of Canadian plastic products made from a manufacturing process that contributes to greenhouse gas emissions above Canada’s target under the Kyoto Protocol. However, if Denmark does not also ban all “like products,” that is, all plastic containers, wherever made, the trade sanction is not legal under the GATT. All “like products” must be treated the same no matter from where the product originates. It is a wholly different matter to ban the import of products made from endangered species under CITES, such as elephant tusks, tortoise shells or even sealskin boots.

In the case of the GATT/WTO system, trade sanctions act in the reverse to countermeasures. It is the imposition of trade restrictions against a wrongdoer that triggers a potential breach of GATT. Article I of GATT requires that any advantage, favour, privilege or immunity granted by a WTO member for any product originating in or destined for any other country shall be accorded the same status for the “like product” of all other WTO members.<sup>197</sup> By imposing trade sanctions for a breach of a MEA, such as the restriction on trade with non-parties to the Montreal Protocol, a party may be in breach of the GATT’s Most Favoured Nation provisions. Article III requires imported and domestic “like products” to be treated the same for the purpose of internal regulations and taxes.<sup>198</sup> Article XI prohibits import or export bans.<sup>199</sup> Finally, Article XIII requires that “like products” coming from or going to all countries be treated the same.<sup>200</sup> The use of export and import licenses may violate this requirement. However, the unfair treatment of a non-party may be justified under Article XX.<sup>201</sup>

A countermeasure may be struck down under GATT/WTO, as in the Tuna/Dolphin cases,<sup>202</sup> if it is not a direct measure to ban or restrict a specifically enumerated product. A derivative product, created from a method of production that uses a banned or restricted product, is a “like product” under Article III, and therefore not subject to trade restrictions. In 1972 the US enacted the *Marine Mammal Protection Act*<sup>203</sup> (“MMPA”) to reduce the in-

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195. *General Agreement on Tariffs and Trade, Text of the General Agreement* (Geneva: WTO, 1986) [GATT].

196. *Gabčíkovo*, *supra* note 4 at 55-56, para. 83.

197. GATT, *supra* note 195 at 2.

198. *Ibid.* at 6-7.

199. *Ibid.* at 17.

200. *Ibid.* at 21-22.

201. *Ibid.* at 37.

202. The Tuna/Dolphin cases involved two GATT disputes over the implementation of the US *Marine Mammal Protection Act*, used to ban the import into the United States of tuna caught using commercial fishing methods that resulted in the incidental killing of marine mammals above those standards set out by the Act. The first Tuna/Dolphin case in 1991 involved Mexico: see *United States – Restrictions on Imports of Tuna* (1993), GATT Doc. DS21/R, 39<sup>th</sup> Supp. B.I.S.D. (1993) at 155. The second Tuna/Dolphin case, three years later, involved the European Union: see *United States – Restrictions on Imports of Tuna* (unpublished decision), GATT Doc. DS29/R (June 23, 1994). In both cases, the GATT held that the U.S. Act violated Article XI by adopting quantitative restrictions.

203. 16 U.S.C. § 1371(a)(2)(1988 & Supp. II 1990).

cidental killing of marine mammals from commercial fishing.<sup>204</sup> The MMPA imposed an import ban on any fish products that derived from the incidental killing of marine mammals. The embargo was characterized as a quantitative trade restriction under Article III, which was not saved by the exemptions of Article XX. By ignoring the principles underlying MEAs in rendering its decision, the GATT panel “made soft law even softer.”<sup>205</sup>

## CONCLUSION

So where does this leave us? Basically, it leaves us in an unsatisfactory position. The compliance regimes of many MEAs create special regimes with the goal of capacity-building and assistance. In many cases, parties have joined MEAs lacking the capacity to meet their targets, with the expectation that financial and technical assistance will be made available. The purpose of these special regimes is to encourage compliance, but there are exceptions. In the case of the Kyoto Protocol, for example, the parties established punitive measures for non-compliance that anticipates both breach and countermeasures. In the case of CITES, which also anticipates punitive measures, trade sanctions have been used, but have not been particularly successful. Nevertheless, the general movement of MEAs is toward complete codes that restrict the operation of legal consequences of general application. While countermeasures may be used as gap fillers there are serious limitations to their use in protecting collective interests. Countermeasures may be used against non-compliant states who refuse, after proper notice, to cease their wrongful conduct or to make reparations. It is not intended as a fall back in support of the existing compliance regime, but rather as a means to compel a non-compliant state to return to the table. Except in the case of obligations *erga omnes* absolute, proportionality seems to require equivalent measures. This simply returns us back to the measure contemplated within the compliance regime; that is, termination or suspension, withdrawal of the benefits, trade sanctions in the subject-matter and imposition of the costs of compliance on the non-compliant party. We thus return to where we started, a bit like chasing ghosts.

If countermeasures and legal consequences of general application are merely gap fillers, then the road for greater compliance is clear. Compliance requires stronger and more meaningful conformity within existing MEA compliance regimes, taking into account the high value placed on capacity-building. It requires a firm commitment by members to addressing both breaches and internal countermeasures. The particular importance placed on a specific MEA by each member indicates their commitment to the terms of the treaty. The continued development of the internal regulation of the treaty is encouraged through the MOP/COP.

The Law of State Responsibility is clearest at the extremes. In the case of bilateral obligations and internal obligations where there is injury, the law provides for specific remedies. An injured state may impose countermeasures against a non-compliant state because it is injured. Non-injured states may also take action in defence of the injured state. Where there is no specific injury, the law requires bad faith or culpability. While non-injured states may impose countermeasures against a non-compliant state for the protection of collective interests (obligations *erga omnes partes* without harm), how are collective interests to be

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204. For a detailed examination of the cases, see Robert Weir, “The GATT and the Unmaking of International Environmental Law” (1996) 5 *Dalhousie J. Legal. Stud.* 1.

205. *Ibid.* at 13.

balanced? The protection of the environment has not reached the same status as the protection of fundamental human rights, so without a hierarchy of collective interests, it must always be carefully balanced against other interests such as state sovereignty. This area of the law needs further development and advancement.

Finally, despite the formal removal of injury as a factor to be considered in the Law of State Responsibility, it remains an implicit feature of the Draft Articles and a real factor in its interpretation. Some scholars call for an explicit return to the principle of “legal injury,” but I would suggest that in the absence of injury there must be a finding of wrongfulness or culpability in order to invoke countermeasures against a wrongdoer. Countermeasures are a special case.