International Private Rights of Action: A Cost-Benefit Framework

PHILIP M. MOREMEN*

TABLE OF CONTENTS

* Assistant Professor, John C. Whitehead School of Diplomacy and International Relations, Seton Hall University. I thank Joel P. Trachtman, Alfred P. Rubin, and William Moomaw for their comments on prior versions of this work. I also thank Alan E. Untereiner for editorial suggestions and Michael O'Bryan and Chelsea Carr for logistical and research assistance.

I. INTRODUCTION

At present, private parties—whether individuals, entities, groups, or organizations—possess limited rights under international law to bring claims before an international forum for violations of international law.[1] In recent years, legal scholars have engaged in a spirited debate about the desirability of using PRAs in the international context. Some commentators—with an overly sanguine view of what law can accomplish—have argued zealously for broader use of PRAs, perhaps seeking to replicate the liberal[2] landscape of the American legal system in the international arena.[3] Other scholars have taken a more theoretical

1. *See* DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 78 (2001).
2. The term liberal is used here to mean liberal political theory, not ideology.
3. For sources arguing for the addition of PRAs to the WTO dispute resolution system, see, e.g., John A. Ragosta, *Unmasking the WTO—Access to the DSB System: Can the WTO DSB Live Up to the Moniker "World Trade Court"?*, 31 L. & POL'Y INT'L BUS. 739 (2000); Glen T. Schleyer, *Note, Power to the People: Allowing Private Parties to Raise Claims Before the WTO Dispute Resolution System*, 65 FORDHAM L. REV. 2275 (1997); G. Richard Shell, *The Trade Stakeholders Model and Participation By Nonstate Parties in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 359 (1996); G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829 (1995); Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 331 (1996). *But see* Philip M. Nichols, *Extension of Standing in World Trade Organization Disputes to Nongovernment Parties*, 17 U. PA. J. INT'L ECON. L. 295

approach while, nonetheless, concluding that PRAs can provide enforcement benefits.[4] Still other scholars, with an unduly dim view of the prospects for legalized dispute resolution mechanisms, have sought to throw cold water on the use of independent tribunals in the international setting.[5]

This article seeks to chart a different course, by developing and applying an analytical cost-benefit framework, for assessing the costs and benefits of PRAs to enforce international law before an international forum. This framework is drawn from various literatures. For example, there is much to be learned about the potential benefits and costs of PRAs in the international setting from the rich literature comparing domestic PRAs with domestic regulation in the American context. More broadly, the article employs a comparative institutional approach, using a comparison between PRAs and regulatory enforcement mechanisms to shed light on their respective costs and benefits. My overarching goal is to develop an analytical framework that will clarify and facilitate an assessment of PRAs, while at the same time identifying some initial conclusions that flow from the cost-benefit analysis.[6]

(1996). For calls to apply or create various forms of environmental PRAs, see, e.g., Wynne P. Kelly, *Citizens Cannot Stand for it Anymore: How the United States' Environmental Actions in Afghanistan and Iraq Go Unchecked by Individuals and Non-Governmental Organizations*, 28 FORDHAM INT'L L.J. 193 (2004) (exploring PRAs in U.S. courts regarding environmental damage in Iraq and Afghanistan under domestic and international law); Peggy Rodgers Kalas, *The International Environmental Dispute Resolution and the Need for Access by Non-State Entities*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 191 (2001) (favorably assessing a proposal for the development of an international environmental court); David A. Wirth, *Reexamining Decision-Making Processes in International Environmental Law*, 79 IOWA L. REV. 769 (1994); Amadeo Postiglione, *An International Court for the Environment?*, 23 ENVTL. POL'Y. & L. 73 (1993) (calling for an International Court of the Environment); Philippe J. Sands, *The Environment, Community and International Law*, 30 HARV. INT'L L.J. 393, 411-12, 417 (1989); David Scott Rubinton, *Toward a Recognition of the Rights of Non-States in International Environmental Law*, 9 PACE ENVTL. L. REV. 475 (1992).

4. *See* LEGALIZATION AND WORLD POLITICS: A SPECIAL ISSUE OF INTERNATIONAL ORGANIZATION (Judith Goldstein, Miles Kahler, Robert O. Keohane, and Anne-Marie Slaughter, eds., 2000) (the special issue begins at 54 INT'L ORG. 385) [hereinafter LEGALIZATION]; Laurence Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997); Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899 (2005).

5. *See, e.g.*, Eric A. Posner & John Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 (2005); Eric A. Posner & John C. Yoo, *Reply to Helfer and Slaughter*, 93 CAL. L. REV. 957 (2005).

6. Elsewhere, I have used this framework of costs and benefits to conduct a comparative institutional analysis of PRAs and other international enforcement mechanisms. *See*, Philip M. Moremen, *Private Rights of Action to Enforce Rules of*

Many of the costs and benefits of PRAs involve two related factors: independence and discretion. The presence of PRAs in enforcement mechanisms increases the independence of that mechanism from state control and at the same time reduces the ability of the mechanism to exercise discretion in enforcement. Another set of related characteristics is centralization and decentralization. Enforcement mechanisms that are regulatory in nature are centralized, whereas enforcement mechanisms that incorporate PRAs are decentralized. Variation in all of these characteristics results in different benefits and costs for enforcement mechanisms.

The most important benefit of independent PRAs is the potential for increased enforcement of international rules, which could help realize greater benefits from those rules and from international agreements. Independent PRAs can also provide credible commitments guaranteeing state obligations. Reducing discretion in enforcement can help to avoid mutual non-enforcement of rules by states and potential capture of enforcement mechanisms by private interests.

In addition, PRAs may have some efficiency benefits. Private plaintiffs may have greater immediate incentives to pursue violations than, say, enforcers in an enforcement bureaucracy. In some contexts, moreover, private plaintiffs will have informational advantages over regulatory enforcers or states. In a business context, for example, the victim is likely to know the identity of the violator, or may be familiar with the nature of the harm, or the particular market involved.

PRAs can impose "sovereignty costs" because increased enforcement constrains state action. As a result, states may resist compliance, or may balk at becoming a party to a regime that features PRAs. The lack of prosecutorial discretion inherent in PRA mechanisms can also impose various costs. For example, in some situations, a cooperative approach—requiring the exercise of discretion—may be more successful than an adversarial approach. Reduced discretion may also reduce flexibility in the enforcement of rules, rendering them brittle and reducing the possibility of efficient breach. The decentralized nature of enforcement under PRAs, moreover, could result in repetition of effort and lack of strategic direction.

Finally, PRAs essentially shift international law-making from states to private parties and judicial bodies, or other decision-making mechanisms. Perhaps this is not an issue if private interests are better able to represent

---

International Regimes 79 TEMPLE L. REV. (forthcoming 2006); Philip M. Moremen, *Costs and Benefits of Adding a Private Right of Action to the World Trade Organization and the Montreal Protocol Dispute Resolution Systems*, 11 UCLA J. INT'L L. & FOREIGN AFF. (forthcoming 2006).

the collective interests of individuals than states. Nonetheless, the existence of these and other potential costs suggest that PRAs are not unquestionably desirable. The balance of costs and benefits will depend on the institutional design of the particular mechanism and the context in which it operates—and how PRAs stack up against competing alternatives.

II. DEFINITIONS AND FUNDAMENTAL CONCEPTS

This section sets out certain definitions and basic concepts to provide a background for further analysis. Because this article concentrates on a comparison between PRAs and regulatory enforcement mechanisms, this section will define those mechanisms and will describe their operation in the international context. The section also explores the different functions of PRAs and regulation.

A. Regulatory Enforcement and Private Enforcement

1. Stages of Enforcement

There are at least two stages in private and regulatory enforcement: an initiation stage and an adjudication stage.[7] The initiating and the adjudicating functions may be conducted by the same body, or by different bodies.[8] The two functions may be combined in atypical ways, mixing elements of both private and regulatory mechanisms. Indeed, comparing models of private enforcement and regulatory enforcement is one way to think about the possible mix of actors who engage in initiation and adjudication.

---

7. *See generally* John Knox, *A New Approach to Compliance with International Environmental Law*, 28 ECOLOGY L.Q. 1 (2001) (assessing the effectiveness of enforcement mechanisms by focusing on differences in the process of review initiation and types of review body); Robert O. Keohane, Andrew Moravcsik, & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT'L ORG. 457 (2000) (in assessing legalized international dispute resolution mechanisms, the authors implicitly recognize the distinction).

8. In regulatory enforcement, there may be so much overlap between initiation and adjudication that there may be a third stage. That is, there are a number of enforcement actions and decisions that a regulatory enforcement body may take short of formal adjudication that require an application of law to facts and a determination of responsibility.

2. *Regulatory Enforcement*

Domestic regulation is defined as "the public administrative policing of a private activity with respect to a rule prescribed in the public interest."[9] Domestic regulatory enforcement can apply a range of persuasive and coercive tactics. At the informal end of the spectrum government inspectors may simply encourage a regulated entity to comply with the law. At the formal end of the spectrum, regulatory enforcement can include the application of administrative penalties, civil suit, or even criminal prosecution. The ability of public enforcers to apply civil or criminal penalties provides them with leverage they can use to compel regulated entities to cooperate short of taking formal action–public enforcers operate in the shadow of the law.[10]

Various international bodies—commissions, secreatriats, prosecutors—engage in administrative or regulatory action,[11] including regulatory enforcement. Enforcement can involve monitoring and verification, investigation, prosecution, internal adjudication, or prosecution before a separate, independent body. At the aggressive end of the spectrum are the European Commission and the Prosecutor for the International Criminal Court, entities that perform enforcement functions akin to those of domestic regulatory bodies.

In regulatory enforcement, an enforcement body investigates and pursues violations of the relevant rules. The enforcement body—as opposed to private parties—has the primary authority to initiate enforcement action. The enforcement body may submit matters for adjudication to an internal administrative body,[12] or it may refer enforcement matters for adjudication to an external tribunal.[13]

---

9. Barry M. Mitnick, THE POLITICAL ECONOMY OF REGULATIONS: CREATING, DESIGNING, AND REMOVING REGULATORY FORMS 7 (1980).

10. See Lewis Kornhauser & Robert Mnookin, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

11. *See* Benedict Kingsbury, Nico Krisch & Richard Stewart, *The Emergence of Global Administrative Law* 5-6, IILJ Working Paper 2004/1 (2004), *available at* http://www.iilj.org/papers/2004/documents/2004.1KingsburyKrischStewart.pdf, *revised version reprinted at* 68 LAW & CONTEMP. PROBS., Autumn 2005, at 15, 17-18 (specifying rule-making, administrative adjudication, and other forms of decision and management, including informal decisions).

12. This is the approach under the International Labor Organization (ILO) regular system of supervision, or the Montreal Protocol Non-Compliance Procedure.

13. For example, the European Commission and the Prosecutor of International Criminal Court refer matters to the European Court of Justice and the International Criminal Court, respectively.

3. Private Enforcement

The essential distinction between public and private enforcement of public law is the identity of the enforcer, or the initiator of action. In private enforcement, private citizens or entities are the primary enforcers, relying only on the public officials in the judicial system.[14] Whereas there is usually only one public enforcer, it is possible for there to be a number of private enforcers.

Private enforcement tends to be identified with the use of independent courts or tribunals as the adjudication mechanism, especially in the domestic context. While this may be the dominant arrangement, there is no inevitable link between private initiation or enforcement and courts. Indeed, in the international context, bodies that seem more regulatory in nature may carry out adjudication connected with PRAs. That is, they consist of commissions, secretariats, or similar bodies that are more subject to political control than independent adjudicators. Under the NAFTA environmental side agreement, for example, an administrative body accepts private submissions regarding state violations, which it investigates and assesses, supervised by a political body. The initiator is private, but the adjudicator seems more like a regulatory body.

This article focuses on enforcement by private parties through formal enforcement mechanisms. A PRA at the international level could involve a complaint before an international forum, or administrative review board, when a state has failed to implement its international obligation or has failed to enforce it. Private parties can consist of individuals, businesses, or other kinds of private groups.

a. Personal and Public PRAs

A distinction exists between private enforcement by victims and private enforcement by non-victim private parties. I will call suits by victims "personal PRAs" and suits by non-victims "public PRAs." Personal PRAs belong to individuals, permitting a remedy for harm done to them that also harms the public good. Public PRAs, in contrast, may be brought by one or more plaintiffs on behalf of the public generally, regardless of whether they have suffered injury as a result of the defendant's action. In reality, both types overlap, but it is useful for analytical

14. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 367 (4th ed., 1992) (distinction between common law method of regulating and public regulation).

purposes to keep them distinct. International PRAs could be personal or public.

The main distinctions between personal and public PRAs relate to the standing of plaintiffs and the incentives they provide to plaintiffs. As for standing, in personal PRAs, only the victim of wrongdoing has the right to bring a claim. Under public PRAs, anyone can bring a claim on a "first-come, first-served" basis.

As for incentives, the incentives in personal PRAs can include not only a potential financial judgment, but also retribution and deterrence.[15] The motivation in public PRAs may be financial, as a plaintiff may be able to obtain a monetary judgment or a bounty. The motivation may also be ideological, in the sense that a favorable judgment may further the ideological agenda of a private plaintiff, such as a non-governmental organization.

III. COMPARISON OF COSTS AND BENEFITS OF PRAS

The development of the cost-benefit framework is informed by the method of comparative institutional cost-benefit analysis.[16] Comparative institutional analysis emphasizes the necessity of comparison in assessing institutions because no institution is perfect; an institution's costs and benefits can only be understood in comparison to alternatives. Accordingly, this article sets the cost-benefit analysis in the context of a comparison between PRAs and regulatory enforcement mechanisms.[17]

---

15. *See* Steven Shavell, *The Optimal Structure of Law Enforcement*, 36 J. L. & ECON. 255, 266-67 (1993).

16. The article follows an approach to comparative institutional analysis drawn from the New Institutional Economics. This particular approach was developed by Neil Komesar and Joel Trachtman, among others. *See* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994); Joel P. Trachtman, *The Theory of the Firm and the Theory of the International Economic Organization; Toward Comparative Institutional Analysis*, 17 NW. J. INT'L L. & BUS. 470 (1996-1997) [hereinafter Trachtman, *Theory of the Firm*]; Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393 (1996). This approach pays particular attention to transaction costs and to costs of interest group influence over the operations of institutions. Thus, comparative institutional analysis draws on public choice and other interest group theories. These interest group theories assert that narrow interest groups within society can greatly influence government administration, including public enforcement activities, thereby "capturing" these political processes.

17. There are several reasons to focus on PRAs and regulatory enforcement mechanisms. First, comparing PRAs with regulatory enforcement mechanisms helps us to compare enforcement with private participation and enforcement without. Second, the costs and benefits of each are, in many respects, complementary. Finally, these two mechanisms are the most direct analogues to PRAs and regulatory enforcement in the United States, and it may be helpful to apply insights from literature about the domestic analogues to the international context.

This comparison generates some of the cost-benefit factors and helps to illustrate the application of others. Additional comparisons will be made with the existing predominant international enforcement mechanism: state-to-state dispute resolution.[18]

The article refers to several literatures in identifying particular costs and benefits of enforcement mechanisms. Comparative institutional analysis emphasizes the role of interest group influence on institutions and the importance of transaction costs. American legal scholars have compared PRAs and regulatory enforcement mechanisms in the United States. Particularly useful in this regard is the law and economics literature. Scholars in international law and international relations, moreover, have addressed compliance with international norms. Finally, literature regarding the enforcement of both domestic and international rules has proposed useful models for different approaches to enforcement.[19] The enforcement model calls for strict application of rules and imposition of sanctions. The managerial approach prescribes cooperative measures, such as financial assistance, combined with the application of persuasion and coercion.

The cost-benefit analysis consists of a qualitative assessment of factors, in many ways common to traditional legal interest balancing—it is not a quantitative assessment. The analysis proceeds primarily by analyzing logical groupings of associated costs and benefits, often reciprocal, rather than assessing benefits together and then costs together. For example, one great disadvantage of the discretion available in regulatory enforcement is the potential for capture, yet the availability of regulatory discretion provides a number of benefits that are lost when discretion is curtailed.

---

18. State-to-state dispute resolution is the default approach to international enforcement. The costs and benefits of state-to-state dispute resolution are much the same as the costs of regulatory enforcement, except in degree. This is because the benefits and costs of both regulatory enforcement and state-to-state dispute resolution largely derive from the availability of prosecutorial discretion and of political control over dispute resolution. In contrast, the benefits and costs of PRAs relate primarily to the comparative independence of PRA mechanisms from political influence and from the unavailability of discretion. On a continuum, regulatory enforcement lies between PRAs and state-to-state dispute resolution in its degree of political control/independence and availability of discretion.

19. *See* ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY (1995); George W. Downs, David M. Rocke, & Peter N. Barsoom, *Is the Good News About Compliance Good News About Cooperation?*, 50 INT'L ORG. 379 (1996).

A. Increased Constraint and the Optimal Level of Enforcement

The balance of costs and benefits imposed on states by enforcement mechanisms will be termed "constraint."[20] Constraint means the influence, pressure, or restraining force that particular enforcement mechanisms bring to bear on the behavior of target entities, either national governments or individuals. Constraint can consist of attractive pressures or inducements as well as negative pressures.[21]

The main potential advantage of PRAs—and the one most cited by proponents—is that they can increase the level of enforcement of international law rules, or the level of constraint applied by the enforcement mechanism. Increased enforcement may lead to greater compliance by states with rules and agreements, therefore increasing the benefits of cooperation. The increased number of private enforcers compared to regulation (so the logic goes) increases monitoring, and thus increases the probability of detection and the imposition of sanction. This may be particularly true on the international plane, where regulatory capacity is thin and states may refrain from making claims against one another. Increased enforcement may be a benefit of PRAs, but, as explored below, in certain circumstances it may not be a benefit, or may be countered by significant costs. Furthermore, it may make better sense to increase enforcement through other institutional means, such as regulatory enforcement.

B. Discretion Versus Increased Legalization

1. In General

A potential advantage of regulatory enforcement is the availability of greater discretion in regulation than in private enforcement. Enforcement bodies can apply a wide range of discretion in making enforcement decisions and often have a wide variety of enforcement options—ranging from informal investigation to referral to an adjudicatory body. At the adjudication phase of enforcement, there may be more discretion in an

---

20. This approach applies a rational choice view of state behavior. Under rational actor models, "states and the individuals that guide them are rational self-interested actors that calculate the costs and benefits of alternative courses of action. . . ." Oona Hathaway, *Do Human Rights Treaties Make A Difference?* 111 YALE L.J. 1935, 1944 (2002).

21. A significant international relations literature has developed in the last ten years regarding the effectiveness and legalization of international dispute resolution mechanisms. Several authors have developed similar models or typologies of these mechanisms, identifying the factors that contribute to their effectiveness. *See* Keohane, *et al.*, *supra* note 7; Karen J. Alter, *Regime Design Matters: Designing International Legal Systems for Maximum or Minimum Effectiveness*, (paper presented at International Studies Association Conference, Mar. 14-16, 2000) (Version 1.1, Mar. 7, 2000; on file with the author); Helfer & Slaughter, *supra* note 4.

internal regulatory adjudication than in a judicial one. For the private enforcer, on the other hand, the window for the operation of discretion is narrower. While there may be opportunities to exert pressure for settlement, there are fewer enforcement options, usually limited to a decision to make a claim in the first place. In addition, when there are numerous potential plaintiffs, the exercise of overall discretion is impossible: one plaintiff's exercise of discretion to desist can be trumped by another plaintiff's decision to proceed. There is competition in enforcement.

Among the potential benefits of discretion, described in more detail below, is greater enforcement effectiveness in some contexts and greater flexibility. The disadvantage of discretion is the increased possibility of capture, shirking, and mutual non-enforcement. PRAs necessarily render the application of agency discretion impossible. Should an agency decide not to prosecute a particular violation, private parties can step in and do so. As a result, implementation of a coherent enforcement policy—designed to maximize enforcement and social cost—will be impossible and societal resources as a whole may be squandered. Furthermore, enforcement under PRAs will become much more legalistic and much less flexible, which may not be the most effective enforcement strategy.

2. Advantages of Discretion

a. Efficient Breach

The concept of efficient breach suggests that, in some cases, despite a clear breach of obligation, flexibility in holding parties to their obligations makes sense from an efficiency perspective. That is, society might permit, or even encourage, breach of contract where the benefit to society of allowing the breach exceeds the harm caused by the breach. In WTO law, for example, an acceptance of efficient breach in certain circumstances is demonstrated by GATT's escape clause.[22]

In these cases, maximum compliance or enforcement is not desirable. PRAs for individual claimants could void the benefits of an efficient breach approach because individual plaintiffs will have no incentive to desist in appropriate cases. The notion of efficient breach may be more applicable in some circumstances than in others, however. For example, we might be less willing to accept efficient breach in the enforcement of

22. *See* Alan O. Sykes, *Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" With Normative Speculations*, 58 U. CHI. L. REV. 255 (1991).

jus cogens[23] norms, which have an absolute character. In the economic sphere—as under the WTO regime—efficient breach may be more attractive.

b. Compliance Advantages

In domestic enforcement, scholars have identified differences between a deterrence approach and a compliance approach to enforcement.[24] The deterrence approach relies on detection and punishment of violators to deter violations. This approach tends to rely on formal legal process as its primary tool. The compliance approach, in contrast, attempts to prevent violations and remedy underlying problems through cooperation.

The compliance approach emphasizes the role of negotiation in the relationship between the enforcer and the violator. Most violations are resolved through negotiated settlement rather than through official legal action, although enforcers can take advantage of the shadow of the law to induce agreement. The compliance approach tends to operate in the context of an on-going relationship between regulators and the regulated community, where both sides have an incentive to preserve the ongoing cooperative relationship and to avoid the costs of formal enforcement. Thus, among the ostensible advantages of a compliance approach is increased cooperation in compliance on the part of the regulated community.

Regulatory enforcement tends to operate on the compliance end of the spectrum, though it can take a harder, deterrent approach. PRAs, in contrast, operate on the deterrence end of the spectrum. The deterrence approach embodied in PRAs leaves less room for negotiation and persuasion, although settlement is always possible. Instead, PRAs invoke the formal legal process, taking an adversarial approach in which the opportunities for negotiation and persuasion may be diminished. Because there is less likely to be an on-going relationship between private enforcers and their targets—and so less chance than in regulatory enforcement for repeat interactions—there may be less incentive to settle disputes.

---

23. *Jus cogens* norms are norms that are so significant that they invalidate norms created by treaty or custom. *See* MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 62-63 (4th ed., 2003).

24. *See* Keith Hawkins & John M. Thomas, *The Enforcement Process in Regulatory Bureaucracies*, *in* KEITH HAWKINS & JOHN M. THOMAS, ENFORCING REGULATION 3, 13 (1984). *See also* KEITH HAWKINS, ENVIRONMENT AND ENFORCEMENT (1984); Raymond J. Burby & Robert G. Paterson, *Improving Compliance with State Environmental Regulations*, 12 J. POLICY ANALYSIS & MNGMT. 753 (1993) (surveying literature regarding deterrence and compliance approaches); David Vogel & Timothy Kessler, *How Compliance Happens and Doesn't Happen Domestically*, *in* EDITH BROWN WEISS & HAROLD K. JACOBSON, ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS 19, 27-30 (1998).

In the international context, the compliance and deterrence approaches have been recast as the enforcement and managerial schools of enforcement.[25] The enforcement approach emphasizes the necessity for sanctions to compel states. The managerial approach relies more on bargaining with violators, on applying diplomatic pressure, and on providing assistance to enable violators to comply. These two approaches can also be seen as a reflection of John Jackson's conception of a continuum between pragmatic and legalistic dispute settlement, or politics and law, in international trade.[26]

In the international context, negotiation and persuasion may be more important tools than in the domestic context. This is because constraint or enforcement levels normally available in international law are thin. Accordingly, of necessity, the goals and tactics of enforcers may have to be less coercive and more persuasive.

c. Efficiency in Enforcement

Another advantage of discretion may be conservation of prosecutorial resources. Though most applicable in domestic enforcement, this concern may carry over to the international context. Negotiation and persuasion saves the costs of actual, formal prosecution, while discretion allows prosecutors to choose the most significant cases and ignore the less significant. In fact, there may be several reasons why a decision not to pursue a violation would be appropriate, such as when a violation is relatively minor, when a particular violator has a good compliance record in the past, or when a settlement for a lesser penalty will conserve resources. Private enforcers may not see the broader picture, possibly focusing on discrete violations and immediate incentives rather than on generalized compliance over time.

d. PRAs Take Control Away From States

Both PRAs and a developed regulatory body could take control away from states in a number of ways. PRAs are more likely to do so because a regulatory body would be more likely to answer to states, due to state influence over the process. States would lose control of enforcement decisions, including the prosecutorial discretion to bring suits, because

25. *See* CHAYES & CHAYES, *supra* note 19; Downs, Rocke, & Barsoom, *supra* note 19.

26. JOHN H. JACKSON, THE WORLD TRADING SYSTEM 109-111 (2nd ed., 1997).

private parties could bring suits states decline to bring. States would also lose the ability to settle the suits they do bring, because private parties could recommence suits that states chose to drop.[27] Accordingly, informal accommodation between states through persuasion and negotiation will be difficult.

Most importantly, providing private parties with the right to bring claims would give private parties an agenda-setting role in litigation, which would essentially provide them with a law-making role.[28] The legal decisions emerging from adjudication will create precedent that can have legal effect.[29] In the domestic context, the legislature can simply engage in legislative reversal by addressing an unwelcome precedent. In the international context, however, legislation—treaty revision and amendment—is particularly difficult and relatively rare. Nevertheless, it may be that adjudication meets a demand for law-making in the international context that otherwise would not be met. The question of whether states or private parties should control the dispute settlement agenda raises issues of comparative legitimacy and accountability of government and of private interests, discussed further below.

e. Flexibility

Flexibility allows states to adapt to circumstances as they change, which is particularly useful since treaties are difficult to amend.[30] In addition, the existence of this kind of flexibility may entice states to enter into stronger commitments, knowing that there is potentially an

---

27. Where multiple persons have rights to litigate the same matter, settlement or diplomatic compromise will be made more difficult. *See* Clifford G Holderness, *Standing*, 3 NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 505 (1998). "When standing is granted to an open or amorphous class, by definition it will be impossible to contract with all class members." *Id.* at 506.

28. *See* Joel P. Trachtman & Philip M. Moremen, *Costs and Benefits of Private Participation in WTO Dispute Settlement: Whose Right Is It Anyway?*, 44 HARV. INT'L L.J. 221, 238-239 (2003) (discussion of deterrence and compliance models). Alternatively, adjudication may usurp the legislative right of "inertia." *See* Frieder Roessler, *Are Judicial Organs Overburdened*, *in* EFFICIENCY, EQUITY, LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENIUM, 308 (Roger B. Porter *et al.* eds., 2001).

29. The traditional international law rule is that international decisions do not create binding precedent for other parties and other cases, but international tribunals refer all the time to their own earlier decisions and to the decisions of other courts. *See, e.g.*, Statute of the International Court of Justice, 26 June 1945, art. 38, 59, 33 UNTS 993 (decisions of the ICJ have no binding force except between the parties regarding the particular case, but decisions of international courts are a subsidiary means of determining international law).

30. *See* John H. Jackson & Alan O. Sykes, *Questions and Comparisons*, *in* IMPLEMENTING THE URUGUAY ROUND 457, 462 (John H. Jackson & Alan O. Sykes eds., 1997).

escape valve. Flexibility may allow states to maintain compliance with the spirit of an agreement, or with parts of an agreement, while allowing some divergence. Escape clauses, or equivalent features, may allow a regime to bend, rather than break. Examples of these types of features include the escape clause in GATT and a clause in the European Convention on Human Rights allowing for specified suspensions of rights in time of public emergency.[31]

3. Disadvantages of Discretion

On the other hand, of course, too much flexibility can reduce the value of state commitments and reduce the incentives or disincentives for compliance. Those in the deterrence camp argue that the compliance approach is not rigorous enough, allowing too many violations to go unpunished and weakening overall deterrence. Other related disadvantages of the compliance approach are the enhanced possibility of capture and the lack of transparency. Adding PRAs to the mix, either in conjunction with regulation or as a stand-alone mechanism, may help to avoid these disadvantages.

a. Capture and Shirking

A potential benefit of PRAs is counteracting capture of regulatory enforcement processes by special interests. This article accepts the proposition of the interest group theories that there exists a potential for bureaucratic capture by private interests. Capture of bureaucratic agencies occurs when well-organized private interest groups influence the decisions of the regulatory bodies designed to oversee them. Thus, regulators will favor better-organized interests, such as business interests, over more diffuse interests, such as environmental interests.[32]

PRAs might also mitigate the moral hazard problems associated with regulatory enforcement, such as shirking or opportunistic behavior. Because bureaucrats are rational self-interest maximizers, they will attempt to satisfy their preferences when possible, even when those preferences diverge from social preferences. It would be extremely difficult to identify accurately the nature and extent of those preferences,

31. European Convention for the Protection of Human Rights & Fundamental Freedoms, *opened for signature* Apr. 11, 1950, § 1, art. 15, 213 U.N.T.S 222.

32. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).

however. There are various theories—often contradictory—regarding the general nature of bureaucrats' preferences, including the various interest group theories asserting the likelihood of government capture.[33] We may merely be able to say that that bureaucrats will sometimes seek to maximize their own divergent preferences at the expense of their agency's mission.

Where public enforcers fail to enforce the law because of capture or shirking, private enforcers can make an end-run around public enforcers to enforce the law directly. As a result, not only is capture rendered ineffective, but the competition from private enforcers conceivably could encourage or shame public enforcers to be more aggressive. Furthermore, PRAs could also create political pressure for increased political oversight of enforcement.

b. Capture and Mutual Non-enforcement at the International Level

PRAs in international enforcement processes could ameliorate capture, as well as the related problem of mutual non-enforcement by states. A public choice analysis suggests that interest groups could have some influence on international regulatory bodies and international enforcement processes more generally, including state-to-state dispute resolution systems.[34] Because the actions of national politicians and international bureaucrats are more obscured from the scrutiny of domestic citizens than in the domestic context, they may be more susceptible to special interests. Where international enforcement mechanisms are undeveloped and there is little bureaucracy, however, capture is obviously not yet a problem.

More to the point, states may, in a sense, capture state-to-state dispute resolution processes through mutual non-enforcement. That is, states may enter into tit-for-tat deals not to enforce particular international rules.[35] Indeed, states may be unwilling to enforce international rules more generally, because they do not wish to have international rules

33. For a survey of theories of bureaucratic behavior, see Mark A. Cohen, *Monitoring and Enforcement of Environmental Policy*, *in* THE INTERNATIONAL YEARBOOK OF ENVIRONMENTAL AND RESOURCE ECONOMICS: 1999/2000: A SURVEY OF CURRENT ISSUES 44, 51-55 (Henk Folmer & Tom Tietenberg eds., 1999). These theories include Niskanen's bureaucratic behavior theory, which asserts that bureaucrats are driven to enhance their agencies' budgets in order to derive such benefits as higher salaries, perks, and stature. Another approach holds that bureaucratic enforcers are motivated not to maximize social welfare, but to maximize compliance with the law. Under another theory, the median voter model, legislators enact strong laws that voters want, but because voters cannot observe enforcement, government enforcement of those laws is less stringent.

34. *See, e.g.*, Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 J. INT'L L. BUS. 681 (1996-1997).

35. *See* Trachtman & Moremen, *supra* note 28, at 240-41.

enforced against them. All of these forms of mutual non-enforcement undermine the integrity of the international rules at issue and may leave individual rights unprotected.

C. Independence in Adjudication

Like regulators, judges and other adjudicators can be analyzed as agents of a principal, the lawgiver.[36] In the international context, the lawgiver consists primarily, though not exclusively, of states. Some accounts assume that judges always faithfully apply the rules proscribed by the lawgiver, or, the lawgiver's intent.[37] But, like regulators and other political actors, judges may have their own agendas and face incentives that encourage disloyalty.

Scholars have developed several theoretical approaches to the roles of judges in the domestic American legal system and have conducted empirical analyses. The various theories often conflict. The empirical analyses suggest some conclusions, but are often inconclusive or contradictory, and tend to support aspects of several theoretical approaches.[38] Accordingly, it is hard to determine how the various incentives will effect judges.

Certainly, however, judges will not always be faithful agents and their disloyalty can result in various costs. Where judges are not independent, they are less likely to apply the rules of regime in a good faith manner, if at all. Even where judges are relatively independent, they may still decide to shirk, or otherwise not apply the rules of a regime. Alternatively, as discussed more fully below, judges may decide to use their discretion to develop the law in ways that are inimical to the interests of states. When this legal development makes the regime more constraining, the resulting sovereignty costs on states could result in backlash against the regime.

---

36. *See generally* Paul B. Stephan, *Courts, Tribunals, and Legal Unification—The Agency Problem*, 3 CHI. J. INT'L L. 333 (2002).

37. *See id.* at 333.

38. *See* Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism* U. ILL. L. REV. 819, 833 (2002); Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 615 (2000). Heise and Schauer provide brief surveys of these schools and the literature. The various theoretical approaches can be identified as behavioralism, attitudinalism, a legal model, public choice, and institutionalism. The attitudinal approach has the most empirical support and dominates the literature. *See* Heise, *supra* note 38, at 833. Attitudinal approaches focus on the judge's ideology as an influence on judicial decisions.

Examples of independent legal development by tribunals include the European Court of Justice's development of European Community law and the NAFTA Chapter 11 arbitral tribunals' development of regulatory takings rules.[39]

D. PRAs as Credible Commitments

To make their commitments more credible, parties to a contract may take certain steps to impose checks on their freedom of action or to impose costs on themselves if they violate those commitments.[40] An historical example is the exchange of hostages to guarantee a truce agreement. The establishment of PRAs by governments or states can be considered just such a credible commitment.

That is, placing some enforcement responsibility in the hands of third parties to an agreement can serve as a guarantee that the rules will be enforced. This may be particularly important in the international context, as states are notoriously reluctant to enforce international rules. Such credible commitments can also reassure states parties about the intentions of their partners, thus discouraging anticipatory defections. In the trade and investment contexts, moreover, credible commitments can reassure private business that states are less likely to change the legal rules governing these activities.

E. Sovereignty Costs

A cost of more legalized and constraining international compliance processes—and PRAs may serve to increase legalization and constrain significantly the impact on state sovereignty.[41] Abbot and Snidal characterize this impact as "sovereignty costs,"[42] and their analysis

---

39. *See* Alan O. Sykes, *Public vs. Private Enforcement of International Economic Law: Of Standing and Remedy*, 34 J. LEGAL STUD. 631 (2005) (decrying the development of regulatory takings rules by the NAFTA Chapter 11 tribunals).

40. *See* OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 167-70 (1996) (discussing the concept applied to contracts and firms); OLIVER E. WILLIAMSON, THE MECHANISMS OF GOVERNANCE 335-36 (1996) (discussing the application of the concept to political institutions).

41. *See* Kenneth W. Abbott, *et al.*, *The Concept of Legalization*, 54 INT'L ORG. 401, 416 (2000) (The extent to which individuals and private groups can initiate a legal proceeding is a significant variable in legalization). The more legalized a mechanism is, the "harder" it becomes, applying greater levels of constraint. Hard legalization in general imposes high sovereignty costs, "especially the classic legal model with centralized judicial institutions capable of amplifying the terms of agreements in the course of resolving disputes." Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 439 (2000).

42. Abbott & Snidal, *supra* note 41, at 436-441. Of course, definitions of sovereignty are highly variable and subject to disagreement. For present purposes, it is not necessary

provides a useful framework. Sovereignty costs include (1) the potential for inferior outcomes on particular issues, (2) the loss of authority over decision making in an issue area, and (3) fundamental encroachments on areas of state sovereignty.

First, sovereignty costs attach when states make legal commitments that limit their behavior in particular circumstances—leading to less favorable outcomes on short term issues. States may often find these costs to be acceptable because the outcomes achieved by the relevant agreements outweigh the costs. Second, sovereignty costs exist when states accept the operation of external authority in decision making on significant issues. This external authority can take the form of requiring changes in domestic laws, or can take the form of substituting international actors in decision making processes. Objections to the "faceless bureaucrats" in the WTO dispute resolution process are a typical domestic reaction to this type of sovereignty cost.[43]

Finally, high sovereignty costs exist when international agreements intervene between a state and its citizens or territory, or interfere in activities or attributes that are seen as closely related to perceived core functions of government. The operation of international human rights regimes or questions of national security may impose this type of sovereignty cost. Other examples might include easing border restrictions and free trade rules that limit discretion on labor, safety, or environmental regulations.[44]

Sovereignty costs to states are particularly significant to the ultimate success of compliance mechanisms and the regimes they serve. Sovereignty costs affect states' willingness to join a regime to begin with and to continue complying with the regime's rules or decisions once they have joined.[45] Where sovereignty costs reach particularly high

---

to posit a precise definition of sovereignty, as the important point is that states "often perceive international legalization as infringing on state sovereignty, broadly construed." *Id.* at 437 n.47.

43. *See id.* at 437.

44. Of course, there are also issues where sovereignty costs are low, as in the area of technical standards. There, state interests are more closely aligned and the nature of cooperation often involves simple coordination of policies.

45. See Abbot & Snidal, *supra* note 41, at 436. *See also* David G. Victor, *The Operation and Effectiveness of the Montreal Protocol's Non-Compliance Procedure, in* THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS 137, 166 (David G. Victor, Kal Raustiala, & Eugene B. Skolnikoff eds., 1998), citing Patrick Széll, *The Development of Multilateral Mechanisms for Monitoring*

levels, states may be willing to defect altogether. The benefits of the regime may need to be correspondingly high to counteract such costs, as in, for example, the WTO.[46]

F. Efficiency Issues

1. Private Party Incentives In General

The successful operation of a system of private rights of action depends upon "getting the prices right" to induce private regulators to engage in socially optimal behavior. It is likely that, in a system of private enforcement—especially one involving public PRAs—the private incentives for enforcement will not easily align with social incentives. Accordingly, when these private incentives are misaligned, there may be costs to society, either of underenforcement or overenforcement. In addition, society's relative lack of control over private party enforcers will make it difficult to bring private incentives in line with social incentives. The nature of the incentives facing private parties is more significant than the nature of the incentives facing public regulators because private enforcement depends entirely on a structure of incentives to operate.

Insights regarding the nature of incentives facing private enforcers derive from a varied economic literature regarding enforcement, mostly in the domestic context. Accordingly, the following analysis will concentrate first on the analysis in the domestic context and then on the international arena. In the case of personal PRAs, private enforcers possess significant incentives for pursuing their claims, including, for example, the potential financial gains of a court judgment, the ability to stop current harm or to deter future harm, and the desire for retribution. Another motivation might be to hobble a business competitor. In the case of public PRAs, it is usually necessary to provide some sort of reward, or for there to be some other type of incentive for a private party to act. Sometimes an ideological motive can serve this purpose.

2. Contextual Factors that Affect Incentives

There are certain contexts in which the incentives favor personal PRAs, on the one hand, or regulation or public PRAs, on the other.[47] For example, in cases involving actual harm, the victim may have certain

---

Compliance, *in* SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW 107 (Winfried Lang ed., 1995).

46. *See* Abbott & Snidal, *supra* note 41, at 439.

47. Public PRAs or regulation are often appropriate alternatives in the same circumstances. The choice between public PRAs and regulation must be evaluated on the basis of other cost-benefit factors.

informational advantages that render a personal PRA most efficient. In a business context, a victim is likely to appreciate the extent of the harm and the nature of the relevant market better than a third party or a public enforcer. Most importantly, the victim is likely to know the identity of the rule-breaker, for example, in common-law tort or contract cases. In these cases, it makes sense for the victim to pursue the violator because the costs of investigation are negligible.[48]

Where some investigation must be undertaken to identify a violator, regulation or public PRAs may be more effective.[49] Regulatory enforcers will have the advantage of greater resources to locate violators. Situations in which the perpetrator is not easily identified include criminal violations, violations of regulatory rules designed to prevent harm, and, sometimes, environmental cases.[50]

3. Incentives, Overenforcement, and Underenforcement

a. The Economically Efficient or Optimal Level of Enforcement

Economic analysts of enforcement in the domestic context[51] have adopted a theoretical model of the optimal level of enforcement.[52] Economic theorists use the model to predict what would happen to the level of

48. It is not surprising, then, say law and economics scholars, that the U.S. legal system leaves enforcement of torts and breaches of contract to private enforcement by victims. *See* William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 34 (1975).

49. *See* Steven Shavell, *The Optimal Structure of Law Enforcement*, 36 J. L. & ECON. 255, 268-69 (1993).

50. *See id.* at 266-67. A similar analysis distinguishes between centralized (government operated) "police patrols" and decentralized (privately operated) "fire alarms." *See* Kal Raustiala, *Police Patrols & Fire Alarms in the NAAEC*, 26 LOY. L.S. INT'L & COMP. L. REV. 389 (2004); Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. POL. SCI. REV. 165 (1984); Christina R. Sevilla, *A Political Economy Model of GATT/WTO Trade Complaints* (Working Paper, 1996) (on file with the author). Police patrols attempt to maintain general surveillance of the regulated community to detect violations. Fire alarms rely on a system of rules and procedures that allow decentralized private parties to detect violations and make complaints. *See* McCubbins & Schwartz, *supra*, at 172.

51. *See* Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1 (1974); Landes & Posner, *supra* note 48; A. Mitchell Polinsky, *Private versus Public Enforcement of Fines*, 9 J. LEGAL STUD. 105 (1980); Shavell, *supra* note 49.

52. A 1968 article by Gary Becker on the economic analysis of crime is the seminal article in this area. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

enforcement in various circumstances, for example, to examine how strictly private enforcement would affect the overall level of enforcement. Although it would be operationally impossible to actually know the optimal level of enforcement, the theorists examine the extent to which reality conforms to the model.[53]

In this model, overall social welfare in the case of harmful acts can be expressed as the sum of the gains individuals obtain from committing harmful acts, less the harms caused, and less the costs of law enforcement.[54] The socially optimal sanction as expressed in a fine, therefore, will equal the value of the social harm[55] divided by the probability of imposing the penalty. The penalty would be optimal because an individual would commit a harmful act only if the gain he would derive from it would exceed the harm he would cause, taking into account the likelihood of being caught. That is, deterrence is a function of both the magnitude of the sanction and the probability of imposing the penalty.

The function of enforcement, then, is to choose a mix of policies that will maximize social welfare in this sense by adequately (but not overly) deterring potential lawbreakers.[56] This leads to an "efficient" level of law breaking. Most law breaking is punished, but a small level of violations is tolerated, under the model, when the benefits of those violations exceed the social cost. The model may explain why we do not see perfect enforcement of rules in reality. Less than absolute enforcement of the speed limit by traffic police is a perfect example of this dynamic in action: the social harm created by the marginal increase in speed is offset by the cost of stopping all who minimally exceed the limit.

---

53. *See, e.g.*, Shavell, *supra* note 49, at 255 (the "basic questions about the observed structure of law enforcement can be answered by reference to the theoretically optimal structure of enforcement; the actual pattern of enforcement seems to be broadly consistent with the pattern that is most effective in theory.").

54. Louis Kaplow & Steven Shavell, *Economic Analysis of Law*, *in* HANDBOOK OF PUBLIC ECONOMICS 1661, 1747-48 (Alan J. Auerbach & Martin Feldstein, eds., 2002).

55. Because the analysis is a theoretical model, it is not affected by the precise definition of harm adopted. Nevertheless, harm can be defined as the consequence of an act falling in a socially undesirable category of consequences. Harm usually means physical injury or damage to property, but could, in principle, extend to any consequence said to be harmful, including indirect effects. *Id.*

56. *See* Cohen, *supra* note 33, at 57.

b. Implications for Private Enforcement Compared to Regulatory Enforcement

Using this model of enforcement,[57] law and economics scholars[58] generally contend that private enforcement tends toward over or under-enforcement, in that private and social incentives to find liable parties can be misaligned.[59] Private parties may have a socially inadequate motive to pursue liable parties, resulting in under-enforcement, or they may have too much of an incentive, resulting in over-enforcement. Misalignment costs of private enforcement may be significant.

Landes and Posner argue that private parties using public PRAs may have an incentive to over-litigate.[60] Laws are written in an over-inclusive way and private party enforcement would lead to fuller enforcement of those laws than public enforcement. Regulation is over-inclusive because it is less costly for legislators to write over-inclusive regulations than to tailor a rule precisely to every potential application. Public prosecutors can employ discretion, thereby reducing the costs of over-inclusion,[61] but private enforcers may not be as restrained or as consistent.[62]

As discussed above, this economic analysis is theoretical and cannot be applied to real situations. In addition, it assumes that regulatory enforcement is more likely to approach the social optimum, which is not clear. Still, public enforcement levels are more easily subject to change or control. The real question in a comparative institutional analysis, moreover, is whether increased enforcement is desirable in spite of the increased costs.[63]

---

57. The economic model is designed to assess a private enforcement system in which private enforcers operate competitively on a first-come, first-served basis and compare it with regulatory enforcement. That is, the model focuses, essentially, on a system of public PRAs, so that its conclusions about misincentives largely apply to public PRAs. Nevertheless, personal PRAs can exhibit misincentive problems as well, following similar logic. *See* Shavell, *supra* note 49, at 269-70.

58. Becker and Stigler, however, argued early on that private competitive enforcement of fines could achieve the same socially optimal level of enforcement as public enforcement, potentially at less cost. Becker & Stigler, *supra* note 51.

59. *See* Shavell, *supra* note 49, at 269.

60. *See* Landes & Posner, *supra* note 48, at 34.

61. *See* POSNER, *supra* note 14, at 600.

62. Landes & Posner, *supra* note 48, at 38-41.

63. Even if there are costs associated with the incentive structure of private enforcement, that does not establish a case for preferring public enforcement. Landes and Posner themselves make this point. *Id.* at 15-16. Other benefits or costs associated with either mechanism could trump the ostensible efficiency losses of private enforcement.

To recap, the costs of private party enforcement related to incentives are twofold. First, there is the potential for misalignment of private incentives with social incentives, however measured. Second, there is a comparative lack of control on the part of society over private enforcers, complicating efforts to bring those private incentives in line with social incentives.

c. Incentives of Ideologically Motivated Plaintiffs

A wild card is the role of advocacy groups and NGOs in private enforcement. This is because the ideological motivation of advocacy groups provides a non-monetary incentive to bring enforcement suits that may be difficult to assess. Advocacy group participation in a private enforcement system could lead to increased overall enforcement activity and potential overenforcement. On the other hand, enforcement could be inadequate in some cases where the incentive is insufficient or where litigation cost is significant. For example, NGOs may have a small window to participate in the Montreal Protocol non-compliance procedure's review of state implementation, but have not sought to do so.[64]

Various monetary incentives and costs, including fluctuating transaction costs, can also shape the actions of advocacy groups in ways that may not be socially optimal. Increases or decreases in litigation costs could affect the willingness and ability of NGOs to bring suit, because of the limited resources available to them.[65] This cost sensitivity may not only determine the volume of suits, but also may lead groups to bring claims under certain laws and not others, or to bring claims against certain defendants and not others.[66]

d. Theory Applied to the International Realm

Although it may be difficult to analyze the extent to which reliance on international PRAs would lead to misalignment of private and social incentives for enforcement, we may be able to come to some rough conclusions. Most importantly, private parties do not necessarily receive a direct monetary award, especially in the case of public PRAs. In some

64. See Victor, *supra* note 45, at 153-54.

65. Cohen, *supra* note 33, at 91.

66. *See id.*; Wendy Naysnerski & Tom Tietenberg, *Private Enforcement of Federal Environmental Law*, 68 LAND ECON. 28, 46-47 (1992). For example, more environmental citizens' suits have been filed under the Clean Water Act in the United States than under other federal statutes. This is probably because the Act requires polluters to submit detailed monitoring reports, which disclose pollution violations to the public. Citizens can then use these reports as the basis for their claims.

cases, incentives could be ideological, with NGO plaintiffs responding to the possibility of exposing violators and increasing the application of penalties. Incentives for businesses could relate to competitive pressures, a significant incentive.

Underenforcement may be an issue where non-monetary incentives are inadequate. The possibility of over-enforcement seems remote because the level of enforcement of international rules is extremely low already. Nevertheless, if states really desire a low level of enforcement of international rules, PRAs could lead to over-enforcement compared to that standard. As in the domestic context, moreover, there would exist a lack of control over private parties. This would result in an inability to adjust or direct private party action in a centralized way to approach a social optimum level of enforcement, however defined.

As for an assessment of the incentives of states in state-to-state dispute resolution, states may have the level of incentives most close to optimal, because they are enforcing the rights for which they have bargained.[67] As we have seen above, however, states may not be actually willing to enforce their rights because of the incentives for discretionary non-enforcement. We could view this underenforcement as optimal—states get what they want—or we could view it as an issue of skewed incentives or misincentives.

4. Incentives, Coordinated Enforcement, Specialization, and Economies of Scale

An advantage for PRAs in general is the efficiency gain resulting from the availability of high incentives available to private enforcers. Private enforcers have an incentive not only to pursue their claims, they also have an incentive to reduce costs. The low incentives faced by regulatory enforcers could lead to less vigorous enforcement and to less cost-effective enforcement. As discussed above, however, these high incentives for private enforcement may cause behavior that does not coincide with social goals, or that may even result in shirking or cheating.[68]

The coordinated enforcement associated with regulation has a number of advantages over the uncoordinated enforcement that would prevail in

67. Trachtman & Moremen, *supra* note 28, at 243.

68. This issue can be seen as an agency problem—private party agents diverge from their public principal's goals—or it can be seen as a "probity hazard," as Williamson calls it. *See* Oliver E. Williamson, *Public and Private Bureaucracies: A Transaction Cost Economics Perspective*, 15 J.L. ECON. & ORG. 306, 321-24.

a private enforcement market. Most importantly, coordinated enforcement can eliminate duplication of prosecutorial efforts. In addition, as described above, enforcement agencies can exercise prosecutorial discretion and act strategically in determining how to proceed. Another advantage of regulation is that regulatory agencies are able to take advantage of economies of scale and often have access to a wide variety of resources and special skills. In a sense, these attributes of enforcement agencies may be thought of as natural monopolies.[69]

G. Set-up Costs and Operational Costs

1. Set-up Costs and Operational Costs

The costs of setting up and operating enforcement mechanisms are additional costs. Set-up costs, of course, are largely one-time capital costs. Because of set-up costs, existing mechanisms, or adaptations of them, may be preferred over the establishment of new mechanisms, all other things being equal.[70] The creation of private rights of action or regulatory enforcement mechanisms at the international level may require the establishment of new or expanded institutions that could entail significant set-up costs.

2. Cost-shifting

One advantage of PRAs, from the point of view of their political creators, is that private parties bear the cost of prosecution, rather than the government. Of course, this is not a cost savings to society as a whole, but rather a cost shift. In the international sphere, this cost-shifting effect may be appealing to states because states may be reluctant to spend money to create international bureaucracies. The initial appeal, however, may wear off, as states discover that PRAs may impose more constraint on their action than would an international bureaucracy.

H. Successful Private Parties

Under public choice and collective action theories, multinational corporations or other well-funded private interests may be able to

---

69. *See, e.g.*, Shavell, *supra* note 49, at 270 ("[t]he best technologies for finding liable parties often require coordination of many individuals, sometimes on a vast scale. Additionally, it is efficient for various information systems . . . to be developed, even though the benefits of these systems would be hard for the private sector fully to capture. Such information systems, as well as certain other enforcement technologies, may constitute natural monopolies . . . .").

70. Oliver E. Williamson, *The Politics and Economics of Redistribution and Inefficiency*, THE MECHANISMS OF GOVERNANCE 195 (1996).

organize for litigation more effectively than public interests, whether at the domestic or the international level. For example, in the trade context —were PRAs to be added to the WTO dispute resolution procedure— producer interests might predominate over consumer or environmental interests.[71] PRAs may not, therefore, ultimately provide an advantage to NGOs.

I. Legitimacy

NGOs are major plaintiffs in many existing international PRA mechanisms and will play an equivalent role in many future mechanisms. Most of the time, NGOs act as private attorneys general, enforcing rules ostensibly for the public good. Accordingly, the participation of NGOs in enforcement mechanisms raises several issues related to the concept of legitimacy. Among these are issues of democratic legitimacy, accountability, and procedural legitimacy.

A complete examination of these topics would raise issues of political theory and would require examination of various extensive literatures, both of which are tasks that are well beyond the scope of this article.[72] Much of the discussion regarding the legitimacy of NGOs, moreover, is normative and indeterminate. For example, different parties make normative claims about their relative democratic legitimacy that often cancel each other out, or are difficult to assess. In the WTO context, businesses may argue that their government does not adequately represent economic interests, constrained as it is by the influence of NGOs or by short-term political considerations. NGOs often argue that the government is failing to protect environmental, labor, or human rights standards, perhaps at the behest of business interests.

Nonetheless, this section will consider some relevant concerns, focusing on democratic legitimacy. Democratic legitimacy means that the extent of the democratic nature of a governance mechanism determines the

71. *See* Trachtman & Moremen, *supra* note 28, at 247-48.

72. For discussion of legitimacy in the legal literature, see, e.g., Daniel M. Bodansky, *Legitimacy in International Environmental Law in* OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW (forthcoming 2007), *available at* SSRN Paper Collection, http://ssrn.com/abstract=899988; Paul B. Stephan, *The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U. COLO. L. REV. 1555 (1999); THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990).

legitimacy of its political authority.[73] Ruth Grant and Robert Keohane identify two basic alternative conceptions of democratic legitimacy, both of which provide bases for assessing the legitimacy of particular mechanisms.[74] Under the participation conception, each person has an equal say in collective decision-making; full participation is the ideal. Legitimate public power serves the interests of the people as a whole, which means that outcomes reflect what individuals desire.[75] Under the delegation conception, power is legitimate only when authorized by the consent of those who delegate it, and only as long as it operates within the given authority.[76] The obvious extreme archetypes for both of these models are direct democracy and representative democracy, respectively.

In terms of the delegation conception, NGOs have not been delegated law-making authority by anyone.[77] From the point of view of the participation conception, NGOs may have a better claim to democratic legitimacy, in that NGOs represent a group of like-minded people participating in law-making. The basic question, however, should be a comparative one: do states or NGOs best promote the interests of the people as a whole? At least in the case of representative democracies, it seems more likely that states will better realize collective preferences than NGOs with narrow agendas. Governments are a mechanism for reconciling the demands of different interests and of their populations.[78] NGOs, in contrast, represent only a sub-section of the broader society.

Perhaps, however, we should examine the democratic legitimacy of entire PRA mechanisms, not just NGOs. In other words, we might see a PRA mechanism as a competition between interest groups participating in the system, resulting in a representative decision for international society as a whole. Perhaps interest groups would counteract one another, in a sort of international transplantation of the (particularly American) liberal model of competing interest groups.[79]

---

73. *See* Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 1, 2 (1999).

74. *See id.*

75. *See id.*

76. *See id.* at 4.

77. *See, e.g.*, Jeremy Rabkin, *International Law Versus the American Constitution—Something's Got To Give*, NAT'L INT., Spring 1999, at 30. Nonetheless, even non-conservatives who generally approve of the role of NGOs in international policy-making express concern about legitimacy and accountability issues. *See, e.g.*, Peter J. Spiro, *The Democratic Accountability of Non-Governmental Organizations: Accounting for NGOs*, 3 CHI. J. INT'L L. 161 (2002).

78. *See* Trachtman & Moremen, *supra* note 28, at 228.

79. *See* Benedict Kingsbury, *First Amendment Liberalism as Global Legal Architecture: Ascriptive Groups and the Problems of the Liberal NGO Model of International Civil Society*, 3 CHI. J. INT'L L. 183, 185-86 (2002) (the inspiration for the role of NGOs in international civil society is "the global application of liberal principles akin to those associated in the Untied States with the First Amendment. NGOs operating

Transposition of an interest group competition model to the international environment presents difficulties, however.[80] The domestic context contains many checks—government, numerous adverse interest groups, the press—that simply do not exist to the same extent in the institutionally thin international context. Accordingly, the effects of bias toward particular interest groups will be more pronounced in an international litigation system that has significant lawmaking effect. Furthermore, the operation of an interest group competition model means that all interest groups would have a role. There is, then, little reasonable ground for objecting to businesses as private plaintiffs under NAFTA Chapter 11, for example.

Accordingly, NGO participation in PRAs—essentially in international lawmaking—is difficult to justify as legitimate in a democratic sense, especially compared to (democratic) governments. Lack of democratic legitimacy does not mean, however, that NGOs are completely unaccountable for their actions. They are accountable in a sense to their members and to other international actors, including their peer organizations.[81] It is necessary to weigh a lack of democratic legitimacy also against the instrumental value of PRAs, which depends for effectiveness on the participation of private actors with incentives to make claims.

In addition, private party participation may increase the perception of procedural legitimacy—the sense that an institution "operates in accordance with generally accepted principles of right process."[82] Private party participation may improve transparency, which may also enhance procedural legitimacy. To the extent that procedures are viewed as legitimate, they may exert a "compliance pull"[83] that enhances compliance with the operation of those procedures.

---

internationally are attracted by the notion in U.S. public law that anyone should be free to from a group, . . . and to advocate through it virtually any nonviolent political or moral position.").

80. *But see* Spiro, *supra* note 77; Paul Wapner, *The Democratic Accountability of Non-Governmental Organizations: Defending Accountability in NGOs,* 3 CHI. J. INT'L L. 197 (2002). Spiro and Wapner argue increased NGO competition can solve some of the accountability problems of international NGOs.

81. *See* Grant & Keohane, *supra* note 73, at 10. *See also* Wapner, *supra* note 80; Spiro, *supra* note 77.

82. *See* FRANCK, *supra* note 72, at 24.

83. *Id.* at 24-25.

IV. CONCLUSION

The most significant benefit of international PRAs is the potential for enhanced enforcement of international law, which could help realize greater benefits from cooperation. Second, international PRAs could serve to counteract the tendency of states to engage in a tit-for-tat relaxation of enforcement of international norms. Finally, PRAs can serve as a commitment device for states.

The disadvantages of PRAs mirror their primary advantages. Increased enforcement can impose sovereignty costs, which may lead states to resist compliance with an international regime, or to resist joining a regime. In addition, legalized enforcement through PRAs reduces the discretion and flexibility of enforcement, which can be a disadvantage in several ways.

Prosecutorial discretion permits a cooperative approach to enforcement, which may be more effective in achieving compliance in some circumstances than an adversarial approach. Prosecutorial discretion allows enforcers to take advantage of situations that call for efficient breach. Flexibility may also preserve the integrity of the rules, where the pressure that would result from compelled compliance might otherwise lead to defection of states.

Allowing private parties to initiate claims would also decentralize enforcement because of repetitive litigation, lack of strategic direction, and reduced economies of scale. Decentralized enforcement can be less efficient, with more repetition of effort, fewer economies of scale, and less strategic direction. Decentralized enforcement can also make settlement of disputes more difficult. More importantly, decentralized enforcement through PRAs would provide private parties, tribunals, and judges a greater law-making role in international society, at the expense of political decision-making by governments.

Therefore, although there are potential benefits to PRAs, there are also potential costs that can be significant. The balance of costs and benefits will depend on the design of the specific enforcement mechanism involved, on the institution in which it is embedded, and on the political interests of states. The question is not whether PRAs in general are good or bad, but whether they make sense in particular contexts. The trick is designing mechanisms that have a positive balance of costs and benefits.

A more profound difficulty is that states are still largely in charge of creating international enforcement mechanisms in the first place. In designing regimes, why should states be keen to abandon mechanisms over which they retain a degree of control? Nevertheless, in some circumstances, states will prefer the advantages of credible commitments

and more constraining arrangements, or will be pressured into such arrangements by international or domestic political concerns. In these circumstances, international regulatory enforcement, designed carefully, could serve as a palatable option.

The disadvantage of international regulatory enforcement for states is the development of international bureaucracies that may impose significant sovereignty costs and monetary costs. PRAs, while appearing less expensive in the short run, however, have the potential in the long-run to impose much greater sovereignty costs. A more general disadvantage may be the possibility that states will design PRA mechanisms that appear constraining, but that do not really overcome the problems of regulatory mechanisms.