I. Introduction

In contemplating how to approach the topic of enforcement mechanisms, I went to my bookshelf and consulted the indexes of a random selection of major textbooks on public international law and international environmental law. I looked for entries on “enforcement” and “compliance,” respectively. It may not be all that surprising that many international environmental law textbooks listed entries for “compliance,” but not for “enforcement”.  

By contrast, it may be more surprising that, with some exceptions, the public international law textbooks not only did not index “compliance,” but also had no entries for “enforcement.”

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As I sat back to contemplate why “enforcement” was missing from so many of the textbook indexes, I wondered whether what Prosper Weil once referred to as the couple diabolique obligation-sanction had cast its long shadow yet again. In other words, one of the possible explanations for the lack of focus on enforcement is that there remains a nagging sense that there is little of it in international law, let alone in international environmental law. In turn, the absence of enforcement might feed a lingering sense that international law lacks effectiveness, something best left unsaid.

International lawyers may be tired of seeing this old idea dragged to the surface again. But, whatever the reasons for the lack of textbook focus on enforcement, it is striking how common it remains among observers of international law to draw inferences regarding its binding quality or effectiveness from the perceived absence of sanctions. Political scientists often refer to the lack of enforcement of international law to confirm their view that international law is “epiphenomenal”, which, according to David Bederman, “is a nice way of saying it is stupid.” In Canada, we have seen national political leaders make a virtue out of the epiphenomenon, reassuring constituents that seemingly intrusive international norms are not genuinely enforceable. For example, in the context of the debate about Canada’s ratification of the Kyoto Protocol, then Deputy Prime Minister, John Manley, was quoted in the press as saying that although “Canada should take its Kyoto obligations seriously if the pact is ratified…. the accord is not a legally enforceable contract.” But we need not look to political scientists or politicians for doubt. At least in Canada, judges too seem to question international law’s effect. For example, Justice Louis LeBel of the Canadian Supreme Court recently observed that “[a]s international law is generally non-binding or without effective control mechanisms, it does not suffice to simply state that international law requires a certain outcome.”