Sanctions in Case of Non-Compliance and State Responsibility: *pacta sunt servanda – Or Else?*

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Let me start with a quote from Jean Combacau, in this Institute’s *Encyclopedia of Public International Law*: “The concept of sanctions lies at the centre of the debate on the effectiveness or even the existence of international law.”¹ He then goes on to say, though, that ‘sanctions’ is the wrong term and that he would have preferred the term ‘countermeasures’ instead – a preference ostensibly shared by some of the academia present at this meeting.² I shall confess at the outset that I don’t like the term ‘sanctions’ either; but neither do I like the term ‘countermeasures’ in this context, and therefore will opt for yet another term, after a quick overview of current terminology:

As we all know, the UN Charter does not use the word ‘sanctions’, and simply speaks of ‘measures’ in Chapter II (Art. 39 onwards). The same is true for virtually all the multilateral environmental agreements with which we are dealing here:

– the 1987 Montreal Protocol merely refers to the ‘treatment’ of Parties in Art. 8, and then specifies ‘steps’ and ‘measures’ to induce compliance, under its 1990 Non-Compliance Procedure (recommending an ‘indicative list of measures’);
– the 1992 OSPAR Convention refers to ‘steps’ for bringing about full compliance (Art. 23/b, including assistance ‘measures’);
– the 1997 Kyoto Protocol refers to ‘consequences’ of non-compliance (Art. 18), some of which are outlined in the 2001 Marrakesh Agreement (Art. 14, including ‘suspension’ of eligibility for credit transfers under Art. 17);
– the 2000 Cartagena Protocol to the Biodiversity Convention refers to ‘additional measures’ in cases of repeated non-compliance, under its 2004 Non-Compliance Procedure (Art. VI/2/d).

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Not surprisingly therefore, both the 2002 UNEP Guidelines and the 2003 UN/ECE Guidelines on compliance and enforcement/implementation of MEAs refer to ‘potential measures’, now the politically correct euphemism: MEAs avoid the term ‘sanctions’, it seems, like the devil shunning holy water (as we say in German). As Jutta Brunnée rightly points out, this is generally true for the term ‘enforcement’ as well; indeed, most commentators on MEA compliance procedures seem to lean over backwards to re-define their sanctions terminology so as to imply that enforcement really does not have to be coercive to be effective.

One of the reasons why international lawyers – including international environmental lawyers – sound so apologetic about enforcement and sanctions language apparently is their belief that there are no enforceable sanctions in existing multilateral treaties. In his commentary on the ILC Draft Articles on State Responsibility, James Crawford thus states with regard to the invocation of countermeasures by States other than an ‘injured state’: “Such cases are controversial and the practice is embryonic”. Similarly, in their seminal study of The New Sovereignty, Abram and Antonia Chayes boldly claim that “sanctioning authority is rarely granted by treaty, rarely used when granted, and likely to be ineffective when used”.  

I shall try to show that both Crawford and the Chayes are wrong. Among the existing MEAs, there is one at least which has consistently and very successfully used coercive sanctions for 20 years now – which is a fairly long life-span for an ‘embryo’. And the authors of The New Sovereignty themselves concede that sanctions under one specific MEA “have often had their desired effect”: The reference, of course, is to the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), which has made effective use of coercive trade sanctions since 1985, in at least 40 well-documented cases to date. As this happens to be one environmental treaty in the implementation of which I have had some practical ex-

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3 UNEP(DEPI)MEAs/WG.1/3, adopted by Governing Council Decision SS.VII/4 (17 February 2002); and ECE/CEP/107, endorsed by the 5th Ministerial Conference “Environment for Europe” (Kiev, 23 May 2003).


