Chapter 13

The Stabilization of Regime Governance

Cooperation as understood in the present study is based on the emergence of normative expectations common to a number of actors that guide their behaviour in a way that promises the overcoming of sub-optimal outcomes. Cooperation emerges when actors act according to their common normative expectations. Its success is therefore closely related to the effective link between the sphere of communication in which norms are generated and the sphere of action in which cooperation may be realized. While hierarchically organized societies may, at least to some degree, enforce compliance with norms, this link can be established in the decentralized international system only through the voluntary implementation of common norms by the cooperating actors. Institutionalized cooperation will fall apart if actors ignore these norms.

Cooperation is not only threatened by anticipated free riding due to mutual distrust. Even successfully established cooperation is jeopardized by tacit destabilization that gradually produces mutual distrust. The adoption of realistic and mutually beneficial cooperative arrangements does not suffice to improve sub-optimal outcomes once and for all. These arrangements, i.e. the norms and institutions reflecting cooperation, must be permanently reproduced and restabilized. An explanation of international regimes and their operation cannot avoid addressing the problem of stabilizing institutionalized cooperation over time.

The stabilization of international regimes and their norms is closely related to their moulding. Successful stabilization confirms established normative expectations shared by the members of an international regime. The unsuccessful stabilization of challenged norms may straightaway lead to the modification of common normative expectations. Norm-moulding and norm-application are two sides of the same coin.

The present Chapter explores mechanisms to stabilize cooperative arrangements within dynamic international regimes. It starts with an analysis of situations that may destabilize an established international regime (Section 1). Two problems are important besides classic free riding in which a beneficiary of cooperation attempts to gain extra profits by unilateral defection. Norms may be unclear or ambiguous and therefore lead to conflict among actors, particularly if they must be interpreted unilaterally. Norms may also outdate because underlying conditions, e.g. the constellation of interests in the issue-area, change. Hence, destabilizing effects stem from a number of sources that include, but are not limited to, classic free riding.

Generally normative expectations may be stabilized, reproduced and developed by three different mechanisms. The task may be discharged in the sphere of action as part of an integrated interaction process that does not require institutional devices (Section 2.1.). For simple normative systems this mechanism has been developed in
Chapter 9. Since its effectiveness relies on direct interaction among actors and their unilateral decisions, it involves the risk of reproducing the original sub-optimal outcome that regime establishment was intended to overcome. Regime norms may also be stabilized through established institutions for third party dispute settlement, e.g. courts (Section 2.2.). This mechanism relies entirely on a norm-rational discourse about the appropriate application of existing norms in given contexts. In practice, negotiated norms must enter the system of positive international law. However, judicial decision-making does not take into account the specific interests of the actors concerned. It always involves the risk of rendering decisions that lack relevance in the sphere of action.

Lastly, regime norms may be stabilized by continued communication among the members of a community of actors (Section 2.3.). In this case the community members decide themselves whether and how to stabilize, develop or replace a challenged norm. The moulding of norms and their application are integrated in a comprehensive communicative process that does not disregard the function of regimes to support mutually beneficial cooperation, nor the necessary link to the interests of actors.

The Chapter then explores norm-stabilization within the two international regimes on ozone and acid rain (Section 3). It reveals a process of differentiation in which specific procedures and organs for norm-rational decision-making develop within the institutional framework of dynamic international regimes. The Chapter concludes that organized communication about norms is the suitable mechanism to stabilize cooperative arrangements within dynamic international regimes.

1. The Problem Refined

The establishment of an international regime and the adoption of a cooperative arrangement do not necessarily guarantee successful cooperation. Regime norms may be broken. The envisaged improvement of initially sub-optimal outcomes may fail. Accordingly, a community of actors with common normative expectations must actively reproduce cooperation and continuously stabilize the regime governing a given issue-area.

The interaction model developed for simple normative systems conceives norm-moulding as a process of interaction within a group of actors. Interaction produces normative expectations shared by the participating actors and in this way institutionalizes norms (upward process). Subsequently, these norms address the members of the relevant community and guide their decision-making (downward process). Community members respond to non-compliant behaviour within the same interaction process that led to the emergence of norms. Response action will stabilize existing norms if it is successful. The same action will automatically contribute

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1 See above, Chapter 9, pp. 361-369.
2 See Luhmann, Rechtssoziologie, pp. 64-80.
to changes of common normative expectations if it fails. Accordingly, in simple normative systems the stabilization of existing norms and their adaptation to changing circumstances are parts of an integrated interaction process.

Yet, the norms of international regimes emerge by definition from negotiations, i.e. from organized communication, and not from direct interaction. The use of international regimes as devices for the deliberate modification of action relies on this divorce of the spheres of communication and action. The integrated interaction process must be interrupted. Although parochial interests and bargaining power intervene into negotiations, they do not link norms closely enough to the sphere of action to reproduce an interaction process that integrates the moulding, stabilization and development of norms. Therefore, negotiated norms always risk remaining or becoming dead letters.

The present discussion starts from two interrelated assumptions. First, it assumes that the actors participating in negotiations have the intention of elaborating common norms that motivate adaptations of behaviour and lead to the improvement of outcomes in situations that so far yield sub-optimal results. Hence, actors negotiate seriously and welcome effects on behaviour. Second, it is assumed that actors will only accept a cooperative arrangement if they conceive of the underlying cooperation as serving their perceived interests. Hence, actors are assumed not to disguise 'real' interests by accepting arrangements whose outcomes they do not support. However, they are not assumed to act altruistically, although such behaviour would be conceptionally unproblematic.

Under these assumptions the common acceptance of regime norms changes the decision-making context for regime members fundamentally. Indicating appropriate behaviour in relevant situations, agreed norms inform the actors how mutual gains may be achieved. Normative expectations of actors within the community become homogeneous. Community members expect that the behaviour of their co-members be in conformity with common norms. Actors are aware that they ought to behave in conformity with these norms to achieve the envisaged joint gains.

These norms are not mere dead letters. They really guide the actors determining their behaviour. The actors will re-define their interests in the light of common norms and homogeneous expectations of their co-actors. There are good reasons to generally comply with these norms because they promise joint gains and incorporate, to the greatest extent possible, the interests of the participating actors. Nevertheless, institutionalized norms do not prevent actors from adopting non-compliant behaviour and from disputing over norms. Three fundamentally different types of non-compliance may be distinguished.

First, the norms of international regimes allow interpretation. They may be ambiguous and do not always provide clear-cut guidance for decisions in specific

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3 On the definition of international regimes, see above. Chapter 10, p. 397.
4 It includes the marginal case of, for instance, a border treaty, in which actors codify existing behaviour to avoid undesirable change.
situations. Frequently norms must be balanced with each other. This will be particularly true if existing norms are applied to problems that were not thought of at the time of norm-moulding. Actors may disagree over the proper application of recognized norms. They may exploit the margin of interpretation to further their interests and to justify their action. Hence, the very fact of non-compliance may be disputed among the members of the community.

Second, the classic 'free rider' problem may re-appear even if cooperation has been successfully established. The actors concerned decide in the light of common norms and anticipate improved outcomes. They desire stability of both guiding norms and resulting cooperation. But, depending on the relevant constellation of interests, they retain a certain incentive to defect unilaterally. As soon as community members begin to doubt whether their co-actors intend to comply, cooperation may unravel altogether, because rational actors will cease to cooperate, if the minimum cooperative group (k-group) is undercut. Even successful cooperation is permanently threatened by the loss of support of the necessary number of cooperators and cooperative arrangements require continuous stabilization or reproduction.

Third, a completely different form of non-compliance may occur over time, if the legitimacy of a cooperative arrangement diminishes. Legitimacy is rooted in two factors, namely a satisfactory balance of interests and the conviction of actors that they have elaborated a reasonable agreement.

The legitimating effect of the decision process decreases almost automatically over time. It is closely related to a specific process of communication involving particular actors during which arguments are exchanged and disputes settled by conviction. As time passes, actors lose their ability to recall the precise reasons for specific decisions. This development does not matter as long as the final results of negotiations, i.e. the regime norms, are themselves perceived as reasonable. However, new arguments may be advanced that were not discussed in the negotiations and some others may lose their convincing power although they did influence the negotiated outcome. For example, initially reasonable predictions may prove to be wrong or measures may turn out to cause unexpected and adverse side-effects. Actors may assume that a new round of negotiations would produce a different set of norms.

The structure of an issue-area governed by an international regime may also change over time. Interests of actors may alter, e.g. due to the development of knowledge about underlying problems. New actors may become relevant within the issue-area and affect the constellation of interests. A modification of the issue-area structure undermines the structural basis of a cooperative arrangement. A hypothetically re-

6 On normative ambiguity, see Chen, Introduction into International Law, p. 13.
7 Free riding must be kept below a certain level, it does not, however, have to be prevented entirely; see Young, International Cooperation, pp. 71-72; and Chayes/Chayes, On Compliance, pp. 197-201.
8 See above, Chapter 11, pp. 421-422.
9 In Chapter 8, pp. 348-349, some sources of rapid change in the two issue-areas explored in the present study have been discussed.
negotiated cooperative arrangement would differ from the existing one. The interests of some actors could be better accommodated than they actually are. These actors are disadvantaged by the existing institution. If their costs of cooperation outweigh their benefits they will leave the regime or disregard its norms. However, even if they still gain from cooperation, the cooperative arrangement will be (partially) deligitimatized because it does not any more lead to the expected distribution of gains.

In short, regime members may not any more be content with an existing cooperative arrangement although they were at the time of its adoption. These actors are still interested in cooperation in the issue-area concerned, but they demand changes of the governing norms and their intended effects. They may use non-complying behaviour as a means to force the relevant community to pay attention to their claims for an adaptation of the cooperative arrangement to modified circumstances.

Non-compliant behaviour may thus be founded on fundamentally different motives. Incidents of non-compliance may be caused by the normative ambiguity of guiding norms. They may also reflect the attempt of actors to take a free ride while still favouring stable norms and continued cooperation. They may be caused by actors promoting modifications of the terms of cooperation. Or they may stem from a combination of these motives. Hence, like the norms of simple normative systems international regimes do not merely exist and guide actors' behaviour. They will quickly dissolve if the relevant community of actors does not actively stabilize and develop them.

2. Three Mechanisms of Regime Stabilization

While international regimes and their cooperative arrangements shall always emerge from negotiations, their stabilization may take place in different ways. It may entirely resort to the sphere of action. It may entirely rely on norm-rational (legal) communication. Or it may once again combine rational argument and balancing of interests within a process of organized communication among the regime members.

2.1. Direct Interaction: Resort to the Sphere of Action

International regimes and their negotiated norms may be stabilized and developed within the sphere of action. In this case, the members of a community do not any more decide collectively, they merely act unilaterally or in small groups. In fact, interaction takes place in the mode of game in which actors 'communicate' by action\(^\text{10}\). This mechanism will be particularly relevant for static international

\(^{10}\) On the interaction mode of game, see above, Chapter 11, pp. 403-404.
regimes because in this type of international institution organized communication about norms terminates upon adoption of a set of norms. For an evaluation of the impact of regime stabilization in the sphere of action two interrelated dimensions of action must be distinguished. The action itself, i.e. the behaviour of a given actor, may be observed by co-actors. However, mere observation of the action does not usually reveal the motives behind the decision of an actor to behave in a certain way. Actors determine their action always unilaterally, but they cannot explain the motives for their behaviour unless they also communicate.

A community member desiring to comply with common norms must interpret regime norms unilaterally. Normative ambiguity and uncertainty about the precise content of obligations may force him to 'make his own law'. Another actor may deliberately opt for a free ride to pursue his parochial interests. Yet another regime member may trespass on common norms with the intention of instigating normative change.

All these actors decide unilaterally in the light of common regime norms and act. Their co-actors observe this action and may appraise it in the light of common norms as they perceive them. They may distinguish between compliant and non-compliant behaviour, but they will not be aware of the motives underlying the observed action. Therefore, they cannot distinguish between involuntary non-compliance due to normative ambiguity, classic free riding, and the promotion of normative change by non-compliant action.

Bilateral negotiations entered into by the disputing actors to settle a substantive conflict within an issue-area governed by an international regime do not fundamentally change this fact, although they constitute a form of communication among actors. In the place of a unilaterally deciding actor, it is now two negotiating actors who must take into account the normative expectations of the community at large.

Assume that the bilaterally negotiating actors endeavour to accommodate their preferred outcomes with the normative expectations shared within the relevant community. In this case, the valid norms determine the limits of agreement. The bilateral conflict over substantive advantages will be partially transferred into a normative conflict, that is, a dispute over possible interpretations of valid and mutually recognized norms. The negotiating actors develop a bilateral understanding of what 'the law' is in the particular situation. They jointly determine the limits set by accepted regime norms. For this purpose, they must invoke valid norms and argue.

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11 On the conceptional distinction between 'static' and 'dynamic' international regimes, see above Chapter 10, pp. 398-399.
12 Bilateral negotiations are the predominant way of settling conflicts in the international system; see Bilder, International Dispute Settlement, p. 137.
13 Therefore, bilateral understanding may nevertheless address 'triadic' norms that stem from beyond the control of the negotiating actors; on the distinction between 'dyadic' and 'triadic' norms, see Franck, The Structure of Impartiality, pp. 1-45.
they must engage in a norm-rational discourse. Mechanisms of social choice such as bargaining and voting will be largely inappropriate. Within the limits established by common normative expectations, the disputing actors are free to determine the outcome according to their preferences. The relevance of the norm-rational discourse diminishes. The actors may argue or bargain and any settlement will, in fact, establish a limited bilateral cooperative arrangement in the shadow of a larger agreement.

Hence, the bilaterally negotiating actors occupy the role of the unilaterally deciding actor. They determine their bilateral perception of community expectations and may over-interpret their margin of choice due to normative ambiguity. They may also agree to disregard valid norms and jointly take a free ride, or they may adopt non-compliant behaviour to instigate a process of normative change. Again, their co-actors observe the action of two regime members and may merely distinguish between compliant and non-compliant behaviour. They are not aware of the underlying motive of a bilaterally agreed decision. What counts is exclusively action, although this action is now based on (bilateral) communication.

The behaviour of any regime member will be observed by his co-members and appraised in the light of existing norms. Non-compliant behaviour disturbs the smooth operation of a normative system and jeopardizes cooperation. Response action (sanctioning) may be desirable to stabilize an existing cooperative arrangement. However, it may be costly, and successful action will benefit all regime members alike. Response action is a collective good for the community members. While the cooperating actors will prefer the sanctioning of free riders to stabilize cooperation, any one of them may refrain from incurring the costs involved. Provision of this collective good reproduces the dilemma of cooperation and may lead to 'second order free riding'. The dilemma is difficult to overcome unless a community of actors acquires the ability to organize 'second order cooperation' in the sphere of communication, i.e. to adopt decisions collectively and coordinate behaviour.

If actors intervene at all to stabilize common norms, they will do so primarily in their own interest. Powerful regime members may be more successful than weaker ones in stabilizing norms of their specific interest. Therefore, some norms of an international regime will be stabilized more effectively than others. Over time the validity of some normative expectations will be undermined and cease to serve as guidelines for decision-making, while the relevance of others will increase. Accordingly, normative expectations may tacitly develop even within fairly stable issue-areas. They will be even more sensitive to structural change and undermined legitimacy.

14 The norm-rational discourse is not limited to a discussion of norms but includes going back and forth between norms and facts. On the 'artfulness' of this type of discourse, see Krasnoff, Rules, Norms and Decisions, p. 240.

15 Negotiations in the shadow of valid norms are 'quasi-procedural settlements'. On this form of procedural settlement, see Rawls, A Theory of Justice, p. 362, and above, Chapter 11, pp. 411-412.

16 See Reisman, International Incidents.

In effect, cooperative arrangements reproduced in the sphere of action are transferred into fictitious simple normative systems. Despite their emergence from organized communication, they are treated as if they had emerged from the sphere of action. Negotiated norms constitute a limited input into the integrated process of direct interaction that stabilizes, develops and eventually replaces norms. The integration of interaction in the mode of game and debate (arguing and bargaining) is replaced by exclusive interaction in the mode of game that does not allow explanation and justification of behaviour toward the community of actors and prevents the collective response to problems.

The process of regime stabilization in the sphere of action may now be modelled. It starts when a community of actors adopts a set of negotiated norms and actors have generated commonly shared normative expectations. The stage of Prescription by Negotiation constitutes simultaneously the final stage of norm-moulding and the first stage of norm-application. From this stage onwards, actors' decisions are guided by their commonly accepted norms.

Figure 13.1: Regime Stabilization in the Sphere of Action

Negotiated norms replace former normative expectations based on direct interaction. If they shall be stabilized in the sphere of action, they must be assumed to be supported by action. In the intermediate stage of Transformation actors transfer regime norms into fictitious simple norms. Negotiated norms now occupy the same status as norms emerging from the sphere of action.

Existing norms inform actors how they ought to behave but they do not assure compliance. Community members will therefore observe action of their co-actors and compare it with commonly prescribed behaviour. Like the stage of Information in the norm-moulding process, the stage of Verification is concerned with collecting knowledge about the activities of community members. However, information is now selected according to its relevance for the stabilization of cooperation.

Discovery of an incident of non-compliance is a necessary but not a sufficient condition for an active response. An actor may be aware of non-compliant behaviour of

18 On the process of norm-moulding during regime formation, see above, Chapter 11, p. 428.
a co-actor and still refrain from responding to it, e.g. due to high costs and/or dis-advantageous power relations. However, non-action is also a form of response. It implicitly confirms deviant behaviour because it does not effectively reject it. In the stage of Response Action actors decide about their behaviour and act accordingly.

The reaction of community members to an incident of non-compliance determines the future of a valid norm. The validity of a norm may be reproduced and its guiding function reinforced. Its validity may also be challenged and its guiding function undermined. In any case the interaction of community members, i.e. the sequence of non-complying behaviour and reactions thereto, affects the content of the norm. Hence, in the stage of Prescription by Action both the content of a given negotiated norm and its relevance are re-determined. In the future actors will not (only) refer to the negotiated norm but (also) to the parallel norm based on direct interaction.

The model (Figure 13.1.) illustrates the nature of regime stabilization in the sphere of action. The mechanism relies entirely on unilateral decision-making and does not require an institutional apparatus. It produces extraordinarily low transaction costs. Moreover, its outcomes are realistic and meaningful in the sphere of action. However, the mechanism involves the risk that prescription by action replaces negotiated (regime) norms and undermines mutually beneficial cooperation. It threatens to re-establish the original sub-optimal outcome.

International regimes that lack institutional mechanisms or organized communication for the adaptation of negotiated norms to changing circumstances will be more suitable to govern fairly stable issue-areas than rapidly developing ones because change in the issue-area may accelerate modifications of behaviour and the replacement of negotiated norms. These regimes will also be more appropriate to govern issue-areas with a comparatively low number of participants because small communities may more easily re-establish ad hoc communication about norms, if necessary. Hence, it is not surprising that bilateral regimes, i.e. international regimes of the marginal (smallest possible) type, frequently do not dispose of any institutional apparatus, while major international regimes hardly resemble the static type.

2.2. Third-party Dispute Settlement: Institutionalizing Norm-rational Debate

Third party dispute settlement is another way of stabilizing the norms of international regimes and their cooperative arrangements. Occasionally, third party decision-making contributes successfully to settling conflicts in the international system. It is the existence of commonly accepted norms that enables conflicting

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19 Bilateral regime are marginal because interaction necessarily involves the entire community.
20 See Müller, Die Chance der Kooperation.
21 The International Court of Justice has, for example, settled a number of disputes on the delimitation of maritime boundaries. Judicial decision-making also constitutes an important institutional mechanism for the integration of the European Community, see Weiler, The Transformation of Europe, Mancini, The Making of a Constitution for Europe, Rasmussen, On Law and Policy in the European Court of Justice.
parties to submit their disputes to courts or similar third party agents, e.g. arbitration commissions. The actors involved in a conflict may explain their behaviour and invoke commonly accepted norms. They may argue over the precise content of prescriptions relevant for the decision of a given case.

Institutions for third party dispute settlement are established by a community of actors. They function as agents of this community. Their decisions should not rest on the distribution of power among the disputing actors and their parochial interests. They should not take into account aspects that are not legally relevant. Rather, third party decisions must be accompanied by convincing reasons submitted by the deciding court or arbitration commission. Exclusive reliance on convincing legal argument and complete exclusion of bargaining reflect the ideal of judicial decision-making. Hence, adjudication is entirely based on the successful conduct of norm-rational discourses. It amounts to (almost) exclusive interaction in the mode of debate and is diametrically opposed to the stabilization of regime norms by action.

Many hopes rest on adjudication. It is believed to be a form of international dispute settlement that supports the 'rule of law' in the international system. For example, the Convention for the Protection of the Ozone Layer envisages, within a multifaceted mechanism, the settlement of disputes by the International Court of Justice (ICJ) or an ad hoc Arbitration Commission. Many founding members of the regime even favoured compulsory jurisdiction of the ICJ. However, third party dispute settlement raises a number of serious problems that contribute to its comparatively low relevance in the international system.

First of all, norms must be transformed into international law. A court or arbitration commission is an agent that discharges the function of norm-rational decision-making for a community of actors. This agent must be aware which norms the community considers as relevant for its operation. It cannot immediately refer to 'normative expectations' of community members because these expectations are an inter-subjective phenomenon of the actors concerned. It requires 'objective' standards of behaviour and criteria for their identification. These criteria may be 'rules of recognition', or a doctrine of the 'sources of law'.

22 On arbitration, see Schlochauer, Arbitration.
23 See the self-description of the function of the International Court of Justice. It held that 'it is a court of law... Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise it is not a legal service that would be rendered...'; South West Africa Cases; ICJ-Reports 1966, p. 34.
24 Habermas, Faktizität und Geltung, pp. 219, emphasizes that judicial decision-making produces a high degree of discursive rationality. See also Alexy, Theorie der juristischen Argumentation.
25 See Vienna Convention, article 11; under the provisions of this Convention arbitration shall be in accordance with international law, as well as the provisions of this Convention and any protocols concerned, article 5 of the Arbitration Procedure, see UNEP/OzL.Conv.1/5, Annex II.
26 See above, Chapter 5, pp. 215-216.
28 On the relevance of a sources of law doctrine for court decision-making, see Luhmann, Die juristische Rechtsquellenlehre.
Positive international law provides these criteria\(^\text{29}\). It disposes of a doctrine of law\(^\text{30}\) that recognizes in particular international treaties, international custom, and general principles of international law\(^\text{31}\). If they are to become relevant for third party decision-making, the norms of an international regime must be related to one of the sources of international law, in practice usually to that of international treaty law.

The generation of positive legal norms does not extinguish the inter-subjective normative expectations shared within a community of actors. It merely redoubles them. However, not all collective decisions and not all normative expectations generated by the actors concerned may simply be transferred into formal international law. There may be good reasons to refrain from formalizing obligations\(^\text{32}\). Within the international regime for the protection of the ozone layer, for example, a multi-million dollar fund was established without a clear formal legal basis. And yet, this decision formed part of a comprehensive package that included agreement by important developing countries to accept (formal) membership of the regime\(^\text{33}\).

Moreover, normative expectations of actors may be highly flexible, while formal rules of international treaties are comparatively static. Over time, the former may develop and depart from the latter. For example, the members of the ozone regime initially agreed on a high threshold for the adoption of control measures, while later on they preferred a more flexible approach. Therefore, the requirements for the entry into force of the London Amendment to the Montreal Protocol are not any more covered by the treaty language of the Vienna Convention\(^\text{34}\). And vice versa, courts or arbitration commissions do not exclusively apply the norms of a given international regime. They rely on international law in general and may particularly refer to established principles of the international law of treaties and other general rules that have not been subject to deliberation within the norm-moulding process of the international regime.

Accordingly, the members of an international regime may generate normative expectations that are not, or not fully, reflected in formal international law. These norms may be difficult to invoke in a third party dispute settlement procedure although they form part of a cooperative arrangement. Instead, other norms that do not form part of this arrangement may be invoked and will be applied. Hence, the transformation of the norms of an international regime into formal international law sacrifices the nature of the regime as an independent sectoral normative system and may influence the content of applicable norms.

\(^{29}\) Positive international law is attractive to international lawyers precisely because it favours the appraisal of behaviour of (state-) actors from the judge's perspective; see in this regard Sin., Völkerrechtswissenschaft und Lehre von den internationalen Beziehungen.

\(^{30}\) See Kratochwil, Rules, Normsand Decisions, p. 192.

\(^{31}\) See Statute of the International Court of Justice, Article 38. The Court recognizes, however, also some less well defined sources, such as unilateral declarations made 'with the intention of being bound' see Nuclear Test Cases, ICJ-Report 1974, pp. 267 and 472.

\(^{32}\) See the discussion on the merits of formalization of international obligations, above Chapter 11, pp. 423-426.

\(^{33}\) See above, Chapter 7, pp. 296-302, and Gehring, International Environmental Regimes, p. 50.

An even more serious problem of third party decision-making is related to the choice involved in the application of general rules to a specific case. Frequently, norms, particularly formalized rules, are normatively ambiguous. Where existing norms are clear, actors do not need third party settlement. Where they are indeterminate or ambiguous, it is doubtful whether the correct decision of a case may be derived exclusively from the application of 'the law' to a specific case. It has been observed above that valid norms frequently define only an interval inside which they allow more than one solution. While the limits of this interval may be determined by norm-rational reasoning, the determination of the exact outcome may not. Rather, room exists for other mechanisms of social choice, e.g. bargaining. The interval of free choice does not disappear by submission of a dispute to third party decision-making. However, the criteria for decision-making change. It is now the court or arbitration commission that chooses one out of a number of possible options. And it does so by its own criteria, e.g. by reference to norms of a higher order (principles).

Therefore, adjudication may amount to an extension of the norm-rational discourse to areas that are not (fully) determined by existing norms. In these areas skillful adjudication must bridge gaps of normative ambiguity or indeterminacy. Since there is no single correct solution, different outcomes may be justified norm-rationally. Moreover, different third party agents may render different decisions; the outcome will not least depend on the specific agent chosen. Nevertheless, a judicial decision authoritatively selects the valid interpretation of relevant norms in a given context. The agent of the community of (state-) actors determines 'the law' in the specific context. It implicitly introduces a degree of supranationalism into the international system.

The supranationalism implicit in court decision-making may be unfortunate for the disputing actors, but it produces even worse effects for the community at large. Admittedly, a decision is primarily directed at the disputing actors. The Statute of the ICJ emphasizes this direction and expressly recognizes that »the decision of the Court has no binding force except between the parties and in respect of that particular case«. However, a third party agent that bridges lacunae in the law and...
renders authoritative decisions inevitably influences the normative system at large. Implicitly, it instigates normative development that will affect all members of the relevant community of actors. Hence, a court settling a contentious issue by authoritative interpretation of an international treaty that forms part of an international regime necessarily influences the future interpretation of this treaty. The interpretation will have an impact on the precise content of a given cooperative arrangement. It will thus affect the interests of all members of the regime.

Another problem ensues immediately. The authority of a judicial decision and the power of norm-rational arguments accompanying this decision are limited to the system of positive international law. Normative development takes place within this system in the form of dogmatic evolution. Upon the decision of a court the relevant community of regime members is faced with an interpretation of formal legal norms, but it is not at all clear whether these actors will follow the legal development and adjust their shared normative expectations accordingly. The community members may adopt the view of the court and accept it as guideline for their own decision-making, but they may well choose to ignore it. To have an impact on the decisions of actors, modified formal norms must be re-transformed into shared normative expectations.

This observation reveals the peculiar nature of positive international law. It is a legal system that is at the same time open and closed. It operates entirely according to its own criteria. It applies its own criteria for the distinction of international legal norms from other norms. It determines according to its own criteria whether an invocation of legal norms is apt to trigger the process of adjudication. And it selects according to its own criteria information and arguments that may influence the outcome of this process. Judgements must meet its internal standards. The members of an international regime cannot change these standards, they may merely choose whether they want to meet them.

Despite its operative closedness, the system of positive international law is responsive to intervention from outside. Communities of negotiating actors decide about the policies prescribed by valid norms. They decide collectively to conclude a formal international treaty and introduce its norms into the system of positive international law. Actors may invoke valid norms and transform substantive disputes into normative ones. Neither of these interventions takes place without the activity of actors, either collectively or unilaterally. And yet, the relevance of all interventions is judged according to the internal standards of the legal system.

The cycle of norm-application by third party decisions (Figure 13.2.) illustrates this phenomenon. As usually, the application of regime norms starts with Prescription by Negotiation. At this stage shared normative expectations develop among the members of a community. To become operative for third party dispute settlement, these inter-subjective normative expectations must be formalized. Therefore, at the
stage of *Transformation* norms are introduced into the system of formal international law.

As in all other types of norm application actors observe the behaviour of their co-actors. At the stage of *Verification* actors compare the action of their co-actors with formally valid norms. An incident of non-compliance cannot become subject to any type of application unless co-actors become aware of it. Cognitive awareness is the pre-condition for the *Invocation* of norms, i.e. the characterization of action in terms of its conformity (or non-conformity) with existing norms. Claims for social choice may well contradict each other. In so far Invocation is similar to Promotion in the norm-moulding process\(^45\). However, claims are now deliberately related to existing norms. A normative dispute emerges on the basis of a substantive conflict and opens the opportunity for a norm-rational discourse and for third party dispute settlement.

**Figure 13.2: Application of Norms by Third Parties**

![Diagram showing the stages of application cycle](image)

In the stage of *Application* a third party authoritatively decides a substantive dispute on the basis of valid norms. While the stages of Verification and Invocation are largely subject to unilateral activity, Application is performed by an agent empowered by the relevant community of actors. This stage is necessarily based on a hierarchical arrangement between the deciding third party and the actors immediately participating in the conflict. Judicial decisions do not only settle disputes. They also affect the content of norms by reproducing, stabilizing and developing them. They establish, beside negotiation among actors, a second source of norm-moulding by communication. *Judicial Prescription* addresses the normative dimension of a conflict and reflects the dogmatic development of the system of formal international law. Like the stage of Application it rests on a hierarchy with the deciding third party (acting as an agent of the community) at the top and the single regime members at the bottom.

The model of the application cycle illustrates that norm application in the system of positive international law *operates* independently of the (state-) actors concerned,

\(^45\) On the process of norm-moulding during regime formation, see above, Chapter 11, pp. 427-429.
although it is responsive to their interventions. From the perspective of the actors, individually and collectively, judgements are mere recommendations. Disputing actors may accept a decision rendered in the stage of Application, but they may also reject it and refuse implementation. Likewise, the members of an international regime may accept a normative development emerging from Judicial Prescription and adjust their normative expectations accordingly, but they may also refuse to do so. In contrast to interaction in the sphere of action, the outcomes of third party decision-making are not immediately related to the actors of the international system. The contribution of third party decision-making to the stabilization of international regimes depends entirely on the voluntary acceptance of decisions by these actors.

This contribution may now be assessed according to the three types of conflicts outlined above. In the case of normative ambiguity, two parties may agree to submit a substantive conflict to an international court or arbitration commission rather than endeavour to settle it by negotiation or direct interaction. These actors voluntarily frame their substantive conflict in normative terms. They use adjudication for dispute settlement and conceive it as a suitable procedure to overcome disagreement. Adjudication serves the interests of these actors, although it involves choice of the court and amounts to a 'quasi-pure procedural settlement'.

In fact, the joint submission of a dispute to third party settlement reflects a limited incident of cooperation among the actors concerned. It includes the preparedness of the participating actors to implement the decision. The conflict will remain unsolved, unless the actors accept the decision and act accordingly. The interest of the actors concerned to settle their conflict and their common acceptance of adjudication as the proper procedure raise the probability of voluntary implementation of the judicial decision. The actors concerned establish a firm link between the legal system and the sphere of action. Likewise, normative developments triggered by the court are not mere dogmatic constructs. They become relevant in the sphere of action if the actors addressed by a decision immediately act accordingly. Hence, a decision of this type may contribute to stabilizing norms in the international system.

The situation differs fundamentally as soon as an actor intends to take a free ride. If jurisdiction is compulsory, another actor may instigate court proceedings without the agreement of his counterpart. He may unilaterally transform the substantive conflict into a normative one. His counterpart is forced to accept judicial proceedings, including the outcome, or must defect openly. There is a slight prospect that the very fact of judicial proceedings motivates an actor to comply with valid norms, even though he did not intend to do so initially.

However, as soon as the actor continues to trespass against these norms, the problem ceases to be one of the interpretation of norms and becomes one of their enforcement. Here the influence of norm-rational decision-making terminates. The

47 Note that the identification of parties injured by the breach of a multilateral norm is not always evident; see Sachariew, State Responsibility for Multilateral Treaty Violations, pp. 276-281.
Community of regime members is now faced with a clear incident of non-compliance that cannot easily be neglected because the court has eliminated normative uncertainty. More than before the incident threatens to undermine cooperation. The response action of community members may link the judicial decision to the sphere of action. The real addressee of the decision changes accordingly. It is not the non-compliant actor any more but the observing co-members of the community who might sanction the trespasser and enforce compliance with valid norms. However, no state-actor will do so automatically, i.e. without taking into account his own interests.

Accordingly, this type of court decision involves high risks. It may harden the dispute between the trespassing actor and the remainder of the community and enhance the level of conflict in the issue-area. It may also reveal that the community is not in a position, or unwilling, to respond effectively to non-compliant behaviour and thus contribute to the destabilization of existing norms. A judicial decision of this type is relevant in the sphere of action but it may have a highly negative impact on the stability of regime governance.

Lastly, non-compliant behaviour may indicate a growing pressure for normative change. Changing circumstances may have deligitimatized outdated but still (formally) valid norms. Courts may, to some degree, remedy the situation by creative normative development through judicial prescription. However, the general separation of norm-moulding (by negotiations among the actors concerned) and norm-application (by an agent acting on behalf of the community) limits the flexibility of the legal system. Over time formal international legal norms will increasingly reflect outdated expectations. Their application will either become irrelevant in the sphere of action, or it will cause irritations within the community of actors and may even create new conflicts.

To sum up, third party dispute settlement is an ambiguous device for the stabilization of international regimes. It relies on the discursive exchange of reasonable arguments and thus promises to render largely community-oriented decisions on the basis of agreed norms. However, legal decision-making in the highly specialized form of norm-rational communication does not ensure that decisions are implemented in the sphere of action. The successful stabilization of international regimes based on judicial decision-making in the system of positive international law always rests on the ex post acceptance of judgements by the actors concerned. The decision of an international court or arbitration commission threatens to create an unfortunate distinction between normative expectations generated and accepted by the members of an international regime and dogmatically founded norms derived by

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48 On neglect as a strategy norm stabilization, see Luhmann, Rechtssoziologie, pp. 60-63. See also above, Chapter 9, p. 368.
49 See Reisman, The Enforcement of International Judgements.
50 As soon as a community of actors is sufficiently integrated, a well-operating legal system will be accompanied by other functional sub-systems, e.g. for the making of norms. The combination of several functional sub-systems increases the relevance of the legal system dramatically. This is true not only for modern domestic
legal reasoning. In some instances third party dispute settlement may reinforce norm-governance, but in other cases it will have adverse effects or be, at best, irrelevant in the sphere of action.

2.3. Stabilizing Regime Governance by Negotiations

In dynamic international regimes the stabilization of regime governance may be integrated in the on-going process of regime-specific communication. In this case, part of the norm-governing process does not have to be referred to institutions beyond the regime's confines, such as courts or arbitration commissions, nor to direct interaction and unilateral decision-making. Rather, a community of actors having established a dynamic international regime may itself respond to incidents of non-compliance threatening to destabilize common norms and undermining mutually beneficial cooperation because it retains the ability to adopt decisions collectively.

International governance by dynamic international regimes may thus avoid the awkward choice of stabilizing regime norms either in the interaction modes of game or in that of debate. It allows a combination of these pure modes of interaction in the hybrid form of negotiations. Decisions may be realistic and take into account the interests of the actors concerned without threatening to reproduce, sooner or later, the original sub-optimal outcomes. They may also be based on an exchange of reasonable arguments without being too idealistic to be implemented by the actors concerned. In negotiations actors may bargain and argue. They may balance their interests and convince each other (thus influencing their perception of problems and their views of options for action). They may jointly promote their common interest of overcoming sub-optimal outcomes and individually pursue their interest as to the distribution of joint gains.

The stabilization of regime norms within the comprehensive communication process of dynamic international regimes overcomes the separation of norm-moulding and norm-application. It reproduces in the sphere of communication the integrated interaction process that was observed for simple normative systems in the sphere of action. The norms of a dynamic international regime are moulded in the same interaction process in which they are reproduced and eventually replaced. The relevant community of actors related to a dynamic international regime establishes its own criteria for the application of its norms. Its overall selection criterion is consensus. As long as the original consensus as to appropriate behaviour in a given

societies, but also for the European Community, see Gehring, Internationale Kooperation und Europäische Gemeinschaft.

51 In practice, there is little prospect that states will use options for third-party dispute settlement in the field of international environmental affairs; see Sund, Lessons Learned in Global Environmental Governance, pp. 21-22. On the limited role of international adjudication, see also Bilder, International Third Party Dispute Settlement.

52 On the merits of these 'pure' interaction modes, see above, Chapter 11, pp. 403-406.

53 See above, Chapter 9, pp. 366-369.
situation remains stable, established norms will be reinforced by collective
decisions. Incidents of non-compliance may be responded to by coordinated action
of the community members. As soon as consensus develops, both norms and their
application will change. In dynamic international regimes the subject of stabilization
is not a particular regime norm, rather it is regime governance\textsuperscript{54}.

However, there is a slight difference between norm-moulding in the regime forma-
tion phase and the reproduction and development of norms in later phases. Now,
negotiations and collective decision-making take place in the shadow of valid norms
and established cooperation. The members of the relevant community have already
agreed on common norms that prescribe behaviour promising improved outcomes.
An actor refusing to comply with these norms undermines mutually beneficial coop-
eration. Therefore, in the typical conflict situation a single regime member (or a
small number of regime members) refusing compliance with regime norms will
have to face the remainder of the community.

An actor accused of disregarding common norms and defecting from cooperation
will be forced to explain his behaviour\textsuperscript{55}, if he desires to remain a member of the
relevant community. Generally, he may accept established norms as valid standards
for the appraisal of behaviour, or he may refuse to do so. In the first case, the actor
will have to justify his behaviour on the basis of these norms. An exchange of
arguments between him and his co-actors as to their appropriate interpretation may
settle existing ambiguities. The communication may thus include a norm-rational
discourse on the basis of established expectations of the community about appropri-
ate behaviour in a given context\textsuperscript{56}. In the latter case, the accused actor challenges
the appropriateness and justification of established norms that are invoked against
him. Now these norms do not provide agreed criteria for community decisions any
more. Instead, they become themselves subject to an exchange of arguments. It is
not questioned any more whether a particular action is in conformity with common
norms, it is now questioned whether existing norms are (still) acceptable in the light
of changing circumstances. This dispute leaves the limits of a norm-rational
discourse and requires a new round of norm-moulding\textsuperscript{57}.

Hence, a regime member accused of acting not in conformity with regime norms
may generally choose the criteria for the ensuing communication, but he must
accept judgement of his own behaviour by the relevant community founded on these
criteria. If he accepts established norms as the appropriate standards, he will have
to explain his behaviour in their terms\textsuperscript{58}. If he rejects these standards, he will have

\textsuperscript{54} See also Young, The Effectiveness of International Institutions, pp. 178-182.
\textsuperscript{55} See Schachter, The Uses of Law in International Political Organs.
\textsuperscript{56} On the particularities of the normative discourse, see Kratochwil, Rules, Norms and Decisions, pp. 212-248.
On the distinction between a 'legal' and a 'political' process, see Higgins, Policy Considerations and the International Judicial Process.
\textsuperscript{57} If actors are enabled to challenge the appropriateness of norms, observers cannot any more determine their
\textsuperscript{58} Fisher, Improving Compliance with International Law, pp. 29-33, draws attention to the fact that critical
incidents of non-compliance with norms usually occur in the form of disputes over their content. What matters
to explain his implicit assumption that the foundations of regime governance have changed and that *there are good reasons* to modify and renegotiate norms.

The integration of norm-moulding and norm-application into a comprehensive communicative process provides the necessary institutional apparatus for the choice of criteria. It enlarges the options of a community of regime members to respond to behaviour that threatens to destabilize regime governance and cooperation. It thus increases the prospect for effective international governance. At least six different degrees of escalation of conflict about norms may be distinguished according to the motives underlying non-compliant behaviour.

First, two members of an international regime may be in dispute over a given action and desire an impartial third party settlement. They struggle over substantive advantages in the shadow of commonly accepted norms. This is the typical situation for successful third party dispute settlement. What is needed is an authoritative interpretation of relevant norms. It may be rendered by a collective decision of the relevant community of actors on the basis of a norm-rational discourse among regime members.

Second, an actor may wish to continue participation in an international regime and nevertheless fail to comply with its norms. This classic free rider does not intend to challenge the regime, nor a particular norm. The interest of the free rider in *continued regime participation* provides the community with sanctioning power. The community may decide about its response. Enforcement action may be coordinated, thus establishing 'second order cooperation'. If enforcement costs are high, the community may also (implicitly) choose not to recognize minor incidents of free riding and simultaneously reconfirm the remaining community members of the continued validity of regime norms.

Third, an actor may find himself unable to comply with obligations which he has committed himself to and ask permission for temporary non-compliance. This involuntary free rider does not challenge the normative system, nor a particular norm. His quest for a limited exception must be supported by convincing argument, but it will also be accompanied by the implicit threat to take a free ride. The community must appraise the reasons provided by the applying actor for his inability to comply and choose between granting and rejecting an exemption from common obligations. It may also adopt measures to reinforce the capacity of the actor concerned to implement his obligations.

Fourth, an actor may act according to his own extensive interpretation of a norm that is considered by some co-actors as amounting to non-compliance. This actor does not challenge the normative system, nor even a particular norm, but a common interpretation and an established mode of application. While the very fact of deviation is disputed, action nevertheless comprises a claim for modification of normative expectations. Community decisions may remove the grey zone of excessive deviation.

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*is, therefore, second-order compliance with authoritative decisions rather than first-order compliance with norms. With reference to the example of GATT, see also Kratochwil, Norms versus Numbers.*
unilateral interpretation between clear free riding and clear compliance and develop (or reconfirm) the original normative expectations of regime members.

Fifth, an actor may reinforce his claim for the modification of a norm by openly refusing compliance. This actor does not challenge the normative system and the communicative process on which it is based but a particular norm. The purpose of non-compliance reaches beyond the desire to take a free ride. It is directed at norm-moulding. Although this actor remains interested in the international regime, his action is not covered by its norms. To be successful, the claim for a change of the norm in question must be convincingly re-introduced into the process. It must be explained and accompanied by reasons.

Finally, an actor may not comply with his obligations and reject the constraints of the communicative process. This actor does not only challenge a particular norm but regime governance altogether. He chooses exit. Here communication terminates and interaction between him and his co-actors resorts to the sphere of action. However, within the community of remaining regime members possible reactions may still be coordinated by communication thus coping with the danger of second order free riding by establishing 'second order cooperation', i.e. cooperation of the community members to sanction their prior co-member\(^{59}\).

Within a dynamic international regime a community of actors may respond flexibly to different types of conflict about norms. It may apply norms strictly and invest them with new authority, if possible. It may also grant exceptions, adopt far-reaching interpretations or replace outdated norms by new ones, if considered appropriate. Moreover, it may collectively determine coordinated responses to free riders. In all of these situations communication among regime members and collective decision-making matter.

The unfortunate dichotomy of compliance and non-compliance prevailing in the sphere of action diminishes. Regime members are not forced any more to determine their response to non-compliant behaviour exclusively on the basis of observed action (and their own interests). They may take into account the motives of this behaviour. Different situations may be addressed differently, although all of them involve non-compliant behaviour.

International third party dispute settlement can only successfully address the first of these cases. Disputes resembling situations (3) to (5) escape norm-rational decision-making because they challenge the validity of established norms. Their settlement must combine the application and possible modification of norms, while a strictly norm-rational application of existing norms might force single regime members to openly refuse to comply or even leave the regime. The attempt to stabilize regime norms in these situations by court decision-making threatens to destabilize regime governance altogether. Any attempt by an international court to increase its flexi-

\(^{59}\) On the role of collective decision-making for international sanctioning, see Klein, Sanctions by International Organizations, pp. 101-113; and Heilbrunner, Sanctions and Third Parties and the Concept of International Public Order, pp. 10-11.
bility would necessarily lead to judicial activism and enhance the implicit supranationalism of judicial decisions. Situations (2) and (6) also escape norm-rational decision-making. In the former case, an actor chooses to ignore valid norms although he does not challenge their validity, in the latter case he ceases to recognize his obligations. These situations require responses of community members that cannot be decided upon by an independent third party.

The integration of norm-moulding and norm-application into a comprehensive negotiation process promises therefore more enduring international governance than any other mechanism discussed in the present chapter. Considering that the legitimacy of a cooperative arrangement relies on two elements, namely the general conviction of its appropriateness and a careful balance of interests, it is not surprising that decisions on the application of its norms may successfully rely on the same elements. In fact, any contentious issue regarding a collective decision arising within an issue-area governed by a dynamic international regime may best be settled by another collective decision of the relevant community.

However, the capacity of a community of actors to settle disputes by communication and consensus decision-making will be limited. The regime process may be overburdened if all issues must be treated alike. An overload of minor issues may threaten to prevent the actors from addressing more far-reaching questions of regime development and active policy-making. Not all disputes challenge valid norms. Within a dynamic international regime specific procedures may, therefore, be established to prepare decisions. As in the case of norm-mouldings, certain issues may be addressed separately from the main body of negotiations. Issues regarding the interpretation of norms may be prepared by expert groups on the basis of a norm-rational discourse. Solutions responding to difficult situations faced by individual members may be founded on an exchange of reasonable arguments accompanying claims for limited exemptions. The integration of norm-moulding and norm-application does not at all exclude differentiated decision-making in specialized fora. What matters is that the community of actors remains master of the process and retains the ability to adopt the final decision if agreement cannot be reached in the specialized fora.

Norm-application does not therefore necessarily coincide with norm-moulding. The norm-application cycle of dynamic international regimes (Figure 13.3.) illustrates

60 Stein, The Settlement of Environmental Disputes, pp. 296-297, emphasizes the relevance of 'tailored solutions'. Sceptical as to the regional and functional decentralization of international dispute settlement is Sohn, The Future of Dispute Settlement, p. 1132.

61 See above, Chapter 11, pp. 421-422.

62 In respect of GATT, the apparent contradiction of stabilizing cooperation by the continuous adaptation of regime norms to changing circumstances is referred to in the diplomatic 'bicycle theory': 'unless the Gatt sustains momentum in the fight to maintain a liberal trade regime, this regime will collapse as nations take unilateral actions to protect their producers from foreign competition'; Winham, The Prenegotiation Phase of the Uruguay Round, p. 46.

63 See above, Chapter 11, pp. 413-417.

64 By deciding about complaints, the regime-specific mechanism will discharge the law-declaring function for the sectoral normative system otherwise fulfilled by courts; on this function see Bilder, International Dispute Settlement, p. 150, and Meyer, The Ad hoc Chambers: Perspectives of the Parties and the Court, pp. 436-437.
the relationship of the two processes. As in all other forms of norm-application it starts with *Prescription by Negotiation*, the final stage of the norm-moulding process. However, unlike application by direct interaction and by third party dispute settlement it does not require transformation because norms are both made and applied by the members of the relevant community collectively. The regime members will compare the behaviour of their co-actors with their common normative expectations (*Verification*). They may characterize action in terms of its conformity (or non-conformity) with these norms and create a normative conflict (*Invocation*). The stages of Verification and Invocation will usually be performed by single regime members. However, a community that is apt to act collectively may establish collective verification mechanisms. Actors may, for example, be obliged to report their implementation activities, and secretariats may check this information as to its plausibility. This mechanism may also extend to the collective invocation of common norms independently of discrete decisions by individual community members⁶⁵.

**Figure 13.3: Stabilizing International Governance within Dynamic International Regimes**

![Diagram of norm-moulding and norm-application cycles]

In the stage of *Application* the community of actors settles the normative conflict by collective decision. The community of actors may adhere to established norms and determine possible reactions to non-compliance. Application may thus amount to a norm-rational interpretation of established norms. In this case the outcome of Application will confirm and/or interpret negotiated regime norms and lead to *Prescription by Application* that reproduces and possibly develops initially established normative expectations. Prescriptions by Application are very similar to prescriptions by Negotiations. The only difference is that the former are the result of case-by-case decisions while the latter emerge from more general negotiations.

⁶⁵ The institutional design of dynamic international regimes may address and institutionalize all stages of the decision process, see Gehring, *Institutional Design for a Dynamic International Environmental Regime on Global Climate Change*.
However, Application may also reveal that existing norms are not any more appropriate or acceptable. It may thus instigate more general negotiations and a new round of norm-moulding. Hence, the norm-application cycle is not entirely closed but provides a direct outlet to norm-moulding.

Dynamic international regimes offer the opportunity to incorporate the stabilization of regime norms and issue-area specific governance into the comprehensive communication process of international regimes. Like norm-moulding, the application of norms may be based upon negotiations and collective decisions of the relevant community. Application does not rely on unilateral decision-making as in the sphere of action, or on independent agents that may render unacceptable decisions even if they perform their function perfectly well. Collective decisions are by definition acceptable if the actors participate seriously in the negotiations. And they may be taken with a view to reinforcing mutually beneficial cooperation. The decision-makers are aware of the relevance of their decisions for the support of cooperation, and they may collectively organize 'second order cooperation' to establish a (limited) sanctioning force. Hence, dynamic international regimes allow the stabilization of regime governance and for this purpose occasionally sacrifice the persistence of originally agreed norms.

The precondition for this type of regime stabilization is the establishment of a comparatively sophisticated institutional apparatus that includes continued, and for that reason costly, negotiations. Despite the institutional advantages of dynamic international regimes, their costs will be unacceptable regarding issue-areas that are comparatively small and unimportant or in which normative development and the prospect of non-compliance are negligible. Dynamic international regimes will be most suited for important and rapidly developing issue-areas in which a community of actors actively engages in policy-making.

3. The Stabilization of Regime Governance in Practice

The high rate of compliance with the main obligations of the two international environmental regimes explored in the present study may not least be attributed to the successful combination of realistic norm-moulding and the continued reproduction and development of shared normative expectations within a permanent process of organized communication among regime members. Broad unilateral interpretations and possible adverse long-term developments are thus kept under collective control and may be responded to already in an early stage by the community of actors.

The Meeting of the Parties to the Montreal Protocol, i.e. the principal policy-making organ of the international regime for the protection of the ozone layer, 66

66 See the comment by Schachter, The Nature and Process of Legal Development, p. 782: «It may be noted that the treaty-régimes, taken as a group, are characterized by a relatively high degree of compliance. This is attributable in part to the fact that they provide for institutional decisions by a representative organ or an executive body. Such institutional decisions tend to limit the sphere of auto-interpretation by the states of their obligations.»
settles numerous issues regarding the interpretation and appropriate implementation of the regime and its norms during its annual conferences. The Executive Body of the international regime on long-range transboundary air pollution generally discharges a similar function.

The closing of loopholes is a major aspect of day-to-day decision-making within the two regimes. For example, under the Montreal Protocol developing countries with a low consumption of ozone depleting substances enjoy preferential treatment. They are entitled to receive grants from the Multilateral Fund that is financed by the remainder of regime members and their control measures are subject to a ten-year grace period. Hence, it matters whether a country enjoys these preferences or not. However, the Protocol does not define the group of 'developing countries', nor is the membership of this group clearly determined within the United Nations. Some countries, e.g. Turkey, struggled tirelessly for preferential status. The Meeting of the Parties settled the dispute authoritatively and later determined the group of developing countries which exceeded the consumption limits and excluded them from preferential treatment. The Meeting of the Parties to the Montreal Protocol also adopted a number of definitions and clarifications of terms that have an impact on the amount of ozone depleting substances controlled.

In a similar way the Executive Body of the Geneva Convention remedied a normative gap within the SO₂-Protocol. The instrument provides for emission reductions of at least 30% by 1993 but it does not address the period after 1993. The Executive Body, «noted a common understanding among the Parties» to conceive of the Protocol as also committing the parties to the limit after 1993. Hence, in a number of cases an agreed interpretation removed a grey zone of normative uncertainty that might have been interpreted excessively by single countries.

In other cases the regime members had to respond to incidents of non-compliance short of classic free riding that nevertheless might have undermined a cooperative arrangement. For example, several EC member countries refused for a number of years to report their production figures for ozone depleting substances to the Secretariat of the regime. This behaviour clearly violated their obligations because under the Montreal Protocol of 1987 the European Community was not assessed as a single unit in respect of the production of controlled substances. The reason was that single members of the Community should not exploit the margin originating from over-implementation by other members. Yet, the separate assessment of production contradicted the Community concept of an internal market that includes the free movement of goods and the free allocation of production capacity.

Generally, reporting obligations provide the basis for the verification of compliance. In combination with other available information production figures may

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67 See Decision I/12E, UNEP/OzL.Pro.1/5 of 1989. Turkey was recognized only in 1991, see Decision III/5, UNEP/OzL.Pro.3/11. See also above, Chapter 7, pp. 264-265 and 272.
68 Decision III/3, UNEP/OzL.Pro.3/11, identifies four developing countries that do not operate under Article 5.
69 See Decisions I/11 and I/12A-F, UNEP/OzL.Pro.1/5.
70 Report of the seventh session of the Executive Body, ECE/EB.AIR/20, para. 22.
become subject to some professional plausibility control. They are of considerable relevance for the operation of the regime because other institutionalized mechanisms for the verification of the performance of regime members, e.g. the gathering of independent information, have not been established\(^\text{71}\). Hence, the open refusal of several major regime members to comply with their reporting obligations might have had the long-term effect of eroding the inclination of other parties to report sincerely. The matter was formally settled in favour of the EC by a modification of the existing norms in the framework of the first major revision of the Protocol\(^\text{72}\).

Another incident of non-compliance was far more serious because it touched on a central element of the regime for the protection of the ozone layer. A number of East European states obliged to contribute to the Multilateral Fund ceased to pay their contributions. In 1992 some of them formally requested relief from contributions in hard currency. The difficult economic situation of these countries was widely recognized, and the community of regime members did not attribute their non-complying behaviour to their intention to cheat. Yet, de facto non-compliance affected the interests of other regime members adversely. It reduced the size of the Multilateral Fund and endangered the careful balance of interests between industrialized and developing countries. The unilateral reduction of the size of the Fund by the group of contributing countries, however justified, was apt to undermine the preparedness of developing countries to comply with their obligations. Hence, this type of non-compliant behaviour threatened to unravel a central part of cooperation within the issue-area. The Meeting of the Parties endeavoured to keep control of the situation and established a new balance of interests acceptable to the three groups involved, namely the beneficiaries of the Fund, the would-be donor countries, and the remainder of the contributors\(^\text{73}\).

The permanent communication process of the regime provided the means to keep control of situations of this type. The community of regime members coped with entirely new situations determined by new constellations of interests and characterized by the relevance of new arguments, e.g. regarding the soundness of the relief-claim and its consequences for the Fund. In fact, limited norm-moulding processes were instigated and new cooperative arrangements hammered out.

Over time, complexity within the international regime for the protection of the ozone layer grew enormously\(^\text{74}\). An implementation mechanism was established not least for this reason. A ten-member Implementation Committee now reviews compliance of the regime members with their reporting obligations and compares reported figures on production and emission of ozone depleting substances with

\^\text{71} \text{Strict verification mechanisms have developed within the framework of security regimes, see Fischer, The Verification of International Conventions, pp. 4-7.}\n\^\text{72} \text{See Montreal Protocol, new Article 7.4.}\n\^\text{73} \text{See Decision IV/21, UNEP/OzL.Pro.4/15, and above, Chapter 7, pp. 304-305.}\n\^\text{74} \text{The increasing normative complexity of the international regime for the protection of the ozone layer led to the preparation of a handbook reflecting the Protocol in its relevant versions and the decisions of the Parties that relate to its interpretation as well as other material relevant to its operation; see Decision II/7, UNEP/OzL.Pro.2/3.}
amounts allowed under the Protocol. The Implementation Committee discharges thus a permanent function.

However, at least as important is a mechanism to overcome suspicions by a regime member regarding the performance of another. For this purpose the regime for the protection of the ozone layer comprises a specific 'Non-compliance Procedure' that may be triggered by any regime member having reservations regarding another party’s implementation. Since it does not require the consent of the accused party, it amounts to compulsory dispute settlement. The Procedure may also be triggered by the Secretariat of the regime. While states may be reluctant to instigate proceedings fearing reciprocal invocations by their co-members, the Secretariat acts as an agent of the community at large. It may exploit information submitted by non-state actors, e.g. environmental NGOs. An active Secretariat may thus become a fairly independent 'guardian of the regime'. Lastly, the procedure may be triggered by a member finding itself unable to comply with its obligations. This dimension of the mechanism is directed at avoiding unilateral defection and gives priority to the collective control of contentious situations.

Proceedings under the Non-compliance Procedure take place before the Implementation Committee, i.e. a largely non-political body. The Committee scrutinizes the behaviour of actors in terms of its conformity with regime norms and may, for this purpose, engage in fact-finding. It operates under norm-rational criteria and discharges the norm-rational part of the application process. However, unlike a court that renders a judgement it has the task of reporting to the Meeting of the Parties and of recommending action. Recommendations may range from assistance to measures that raise the costs of defection significantly. The final decision is made by the Meeting of the Parties. Although at the time of writing no complaint has been submitted and processed according to the Procedure, it may be anticipated that the Meeting of the Parties will largely adopt the findings of the Implementation Committee, if a conflict is limited to the application of valid norms. It will have to decide itself, if the validity of existing norms is successfully challenged. In any case, however, the principal policy-making organ of the regime remains master of the decision.

75 See Decision IV/5 and Annex IV, UNEP/OzL.Pro.4/15; reprinted in Environmental Policy & Law 23 (1993), pp. 50-51. See also above, Chapter 7, pp. 314-319.
76 Except for its recommendations of sanctions, it is not bound to formal international law and may, therefore ignore certain rules of international law, if it does not consider their application desirable with respect to the particular circumstances. This may be the case, for example, with the rules on state responsibility and liability for possible damage due to non-compliance; on this dimension of international environmental disputes, see Gehring/Jachtenfuchs, Haftung für grenzüberschreitende Umweltschäden.
77 See the indicative list of ‘measures that might be taken by a Meeting of the Parties in respect of non-compliance with the Protocol’, UNEP/OzL.Pro.4/15, Annex V; reprinted in Environmental Policy & Law 23 (1993), p. 51.
78 This procedure closely resembles the dispute-settlement mechanism of GATT, except that in GATT ad hoc committees are established for a particular case and members function in a personal capacity. On the GATT mechanism, see Plank, An Unofficial Description of how a GATT Panel Works and Does not. See also van Bael, The GATT Dispute Settlement System; and Meng, Streitbeilegung im Gatt.
While a comprehensive implementation mechanism has been established within the regime for the protection of the ozone layer, there is a growing desire to establish a similar mechanism within the international regime on long-range transboundary air pollution. The signatories to the VOC-Protocol, adopted in 1991, envisaged that complaints regarding the compliance of its members may be submitted to the Executive Body of the regime, which will consider them at its following meeting. The second protocol on SO₂ emissions, to be adopted in 1994, may comprise provisions for the establishment of an implementation committee following the precedent of the ozone regime. Moreover, during 1994 it will become clear whether the members of the original SO₂-Protocol did in fact fulfill their obligation to reduce SO₂ emissions by 30%. Accordingly, the Executive Body may determine reactions to possible non-compliant members at its 1994 session.

To summarize, the integration of the making and application of common norms under the control of the members of the two international regimes explored in the present study did not prevent the establishment of specialized procedures and arenas for the regular assessment of compliance and for the settlement of disputes between regime members. These procedures and specialized arenas supplement political decisions of the relevant community of actors by expert deliberations. However, they are relevant only as offsprings of the comprehensive communication processes of the respective international regimes and only to the degree to which the regime members consider them as legitimate.

4. Conclusion

A successfully established international regime is not primarily endangered by the classic type of free riding in which a regime member supports cooperation but defects unilaterally to gain extra benefits. Successfully established cooperation implies that a sufficiently high number of participating actors adapt their behaviour according to regime norms and, for one reason or another, refrain from deliberate cheating. Apparently, these actors are satisfied with cooperation. However, over time their incentive to defect may increase, and a growing number of regime members may switch from cooperation to defection.

If the primary source of instability of established cooperation is not classic free riding, two other sources become important that are related to development. Over time conflicts about regime norms may arise from their application even in fairly stable issue-areas. Although regime norms should guide the behaviour of actors for a more or less extensive period of time, they were negotiated under specific circumstances. Future developments were not known and situations to which regime norms would apply were not always anticipated. Moreover, the two basic foundations of any international regime, namely an existing constellation of interests

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79 See VOC-Protocol, article 3(3); and above, Chapter 4, p. 180.
80 See above, Chapter 4, p. 192.
within the issue-area as the basis of a careful balance of interests and the conviction of regime members that regime norms are reasonable, may themselves modify and increase the incentive of actors not to comply any more with existing norms. The task of stabilizing long-term cooperation is thus not limited to coping with classic free riding. It must (also) address destabilizing effects from sources related to dynamic change within a given issue-area.

A conflict about norms reflected in an incident of non-compliance may be caused by any of these factors. It may indicate modifications of the structural foundations of a normative system, it also may stem from normative ambiguity of regime norms in a given context or from classic free riding not intended to challenge the validity of norms. Stabilization of cooperation over time requires therefore an integrated mechanism combining a norm-moulding dimension (responding to structural development) and a norm-application dimension (removing normative ambiguity) that is closely related to sources of power in the sphere of action (reacting to free riding).

Direct interaction establishes an integrated mechanism in the sphere of action that fulfils these conditions. It produces, reproduces and eventually replaces realistic normative expectations that effectively guide decisions of actors. However, this mechanism will frequently not suffice to reproduce and develop cooperation which is reflected in the negotiated norms of an international regime. After all, cooperation was established by organized communication precisely to improve sub-optimal outcomes produced by direct interaction. In contrast, third party dispute settlement is not part of an integrated mechanism. It violently separates a centralized and highly sophisticated mechanism for the application of regime norms from the preceding process of norm-moulding and from the subsequent process of the implementation and enforcement of decisions.

Permanent negotiations constitute another integrated mechanism for the moulding, reproduction and replacement of norms. Negotiations combine the interaction mode of game that prevails in the sphere of action and the mode of debate that reflects the rational discourse. In the shadow of existing norms, they allow the combination of a norm-rational discourse that uses valid norms as standards for the appraisal of actors' behaviour, a norm-moulding discourse on the appropriateness and further acceptability of these standards, and the balancing of interests. In addition, they enable a community of actors to decide collectively on response action to non-compliant behaviour of its members.

It may be surprising that negotiated norms are best stabilized by further negotiations although the problem of non-compliance appears in the sphere of action. However, the norms of international regimes must always be implemented voluntarily. Their influence on the sphere of action relies on their acceptance by actors and on the ability of the community to respond to non-compliant behaviour. The acceptance of norms may be raised by the reconfirmation of past decisions or by their adaptation to new circumstances. The capacity of the community to respond to non-compliant behaviour may be increased by coordination of response action among regime members. Implementation of community decisions necessarily remains a matter of
individual choice, but the probability of successful implementation may be enhanced.

Processing and deciding all types of conflicts within negotiations may rapidly overburden the capacity of a community of actors. The international regime for the protection of the ozone layer demonstrates that regimes of the dynamic type may develop procedures that discharge specific functions within the communicative process, including the preparation of decisions according to norm-rational criteria. The same phenomenon has been observed in Chapter 11 for the process of norm-moulding. It emphasizes that complexity may be coped with by functional differentiation. However, in contrast to international third party adjudication these procedures do not exist in isolation. They are fully integrated in the comprehensive communication process of a dynamic international regime and are relevant only within this context.