8

Trade's Enforcement Conundrum

KATHLEEN CLAUSSEN

8.1 Introduction

International law scholars have spilled much ink on questions of institutional design surrounding dispute settlement. Commentators over the last forty years have praised the concept of third-party dispute settlement as a great achievement in our sovereigntist discipline.[1] Yet, reviews of "dispute settlement mechanisms" tend to concentrate on courts on the one hand and on tribunals on the other. These are typically State-to-State mechanisms, although not exclusively so. Thus, when we consider "compliance" in international law, most questions of design concentrate on these institutions in which one State maintains that another has violated the latter's commitments.

Today, however, the targets of international legal obligations are changing and with them, the concept of compliance, especially in trade law on which this chapter concentrates. By focusing on dispute settlement as the primary means by which to achieve compliance, the literature tends to constrain the sources it consults and the range of devices that may be appropriate to achieve its predetermined goals. It is overly limited to these now widely shared ideals about dispute resolution, operating within a closed set of options.

That our ideas of compliance are limited to settlement of disputes is the consequence of another limitation in thinking: that of the purpose and aims of international law more generally. We examine State behavior because one of the primary goals of international law is to shape that

Many thanks to PluriCourts for the invitation to be a part of this volume. I am also especially grateful for comments on an earlier draft from colleagues in the International Economic Law and Policy Workshop.

[1] See e.g., A Keck and S Schropp, "Indisputably Essential: The Economics of Dispute Settlement Institutions in Trade Agreements" (2008) 42 *Journal of World Trade* 785; T Schoenbaum, "WTO Dispute Settlement: Praise and Suggestions for Reform" (1998) 47 *International & Comparative Law Quarterly* 647.

behavior. That is true likewise in trade: commitments made in trade agreements seek to install reciprocal behavioral constraints. The primary mechanism for holding States accountable in trade is, like elsewhere, third-party dispute settlement. The culmination of that exercise is license to a State to impose economic penalties (often in the form of suspension of concessions) on the party that has acted in breach of the agreement.

The "compliance" story is complicated by the terminology that practitioners and scholars apply. Trade officials and other stakeholders regularly call for greater "enforcement." By that, they mean holding other States accountable when those other States act in a way believed to breach a trade agreement.[2] But recent innovations in trade agreements have concentrated on how to enhance compliance with agreement norms by both State actors and especially non-State actors. In these new iterations, "compliance" appears to encompass ideas beyond individual State action in dispute settlement, unlike "enforcement," although they are not used precisely. Few have studied these innovations in detail and those that have tend to concentrate on the substance of the commitment or the procedures behind the tool.[3] This chapter, in contrast, queries how these evolving concepts of trade "enforcement" might enhance "compliance" by diverse stakeholders – some of whom may not be readily identifiable by the governments that negotiate these agreements in the first place. It peels back the layers of the trade agreement compliance apparatus.

Recently, and as will be discussed further, some of these innovative mechanisms for compliance have gained considerable public attention. They have garnered notice for their innovativeness as well as for their considerable reach and emphasis on "trade-plus" as seemingly more important than "ordinary trade" matters. They have altered the conversation on the meaning of "compliance" and "enforcement." These recent mechanisms have implications for how we think about trade agreements as instruments and the power of States to precipitate change behind the border.

The chapter proceeds in three parts. First, it analyzes the trade enforcement/compliance conundrum through examples arising under these

[2] In fact, the term "enforcement" is used indiscriminately by many political actors as part of a "be tough" campaign. See e.g., K Claussen, "Arguing about Trade Law beyond the Courtroom" in I Johnstone and S Ratner (eds), *Talking International Law* (Oxford University Press 2021).

[3] See e.g., M Bronckers and G Gruni, "Retooling the Sustainability Standards in EU Free Trade Agreements" (2021) 24 *Journal of International Economic Law* 25.

innovative mechanisms in recent trade agreements. Second, it turns to an assessment of trade non-compliance mechanisms (NCMs) and argues that they both exhibit significant potential for an expansive reach and also suffer from shortcomings. Finally, the chapter closes by mapping these normative evaluations onto conventional compliance theories to draw conclusions about those theories' resilience and flexibility before making recommendations both for trade law and international law more generally.

8.2 Trade's Enforcement/Compliance Conundrum: The Mechanisms

Apart from international criminal law that seeks to hold individuals accountable for their actions in contravention of international law, international law focuses largely on State behavior. Central to that enterprise is the law on State responsibility which sets out generalized norms for appropriate responses to breaches of international law by States. To supplement those amorphous norms, treaties and other forms of agreements often develop their own closed set of responses to breaches of an individual agreement. Those mechanisms are most robust in international economic law where both individuals and other States have means by which to hold States accountable to their commitments under trade agreements and investment treaties. In these contexts, where the emphasis has been on securing State compliance with obligations made by States in those agreements, "enforcement" and "compliance" were often viewed as synonymous, and those terms were in turn synonymous with "dispute settlement," even though in common parlance they are undoubtedly not synonyms. States could invoke the dispute settlement chapter of a trade agreement as a means by which to ensure that other States were complying – in effect, to enforce the agreement.

Traditionally, trade agreements have relied on adjudication for enforcement, where they have had any enforcement mechanism at all. The trade "enforcement" system is generally one of State-to-State dispute resolution carried out by a neutral panel which makes a recommendation that then must be adopted by a larger community of States or by the parties, at risk of economic penalty. In recent years, trade agreements have expanded their scope both in substance[4] and in terms of their

[4] See e.g., C Ryngaert, "EU Trade Agreements and Human Rights: From Extraterritorial to Territorial Obligations" (2018) 20 *International Community Law Review* 374; K Milewicz,

https://doi.org/10.1017/9781009373913.013 Published online by Cambridge University Press

enforcement mechanisms.[5] The reach of traditional adjudicatory mechanisms has been extended from, originally, economic measures to what some have called "trade-plus" measures: areas with an impact on and part of trade broadly defined such as intellectual property, labor, environment, sustainable development, and more. Consequently, trade agreement NCMs have begun to shift the compliance landscape not just on trade but also in trade-adjacent areas as will be described. Central to this thesis is that new moves in the trade law and policy space are changing how we think about compliance, and the central actors behind the agreements.

While trade negotiations have always reflected a cacophony of views and interests, the issues surrounding enforcement of trade-plus matters are even more muddled than those generally complex debates. Actors from various political backgrounds have advocated for different institutional structures to address complications in supply chains, migration, the perceived effects of globalization, and domestic economic policies. Many States still do not subject the bulk of those "trade-plus" measures to ordinary dispute settlement, making their enforceability seem elusive to some advocates.[6] In other instances, however, States have gone beyond ordinary State-to-State dispute settlement in their trade agreements on these "trade-plus" matters.

8.2.1 Innovations in Trade-Plus Enforcement

New mechanisms seek to shift the enforcement effort toward other actors including but not limited to the State. Most of these come from the US experience where the voices of advocates for greater domestic penetration by trade agreements are loudest. The most recent and most celebrated example of this move comes from the 2020 economic agreement signed by the North American countries known as the United States–Mexico–Canada Agreement (USMCA) which launched a new tool: the

J Hollway, C Peacock and D Snidal, "Beyond Trade: The Expanding Scope of the Nontrade Agenda in Trade Agreements" (2016) 62 *Journal of Conflict Resolution* 743.

[5] See generally, JB Velut, D Baeza-Breinbauer, M de Bruijne, M Garnizova et al., "Comparative Analysis of Trade and Sustainable Development Provisions in Free Trade Agreements", LSE Trade Policy Hub, February 2022.

[6] These examples are discussed in the LSE Trade Policy Hub report (n 5) as well as in the ILO's database on Labor Provisions in Trade Agreements, available at www.ilo.org/global/research/projects/trade-decent-work/publications/WCMS_835562/lang–en/index.htm.

"Facility-Specific Rapid Response Labor Mechanism" (RRM).[7] This tool was the product of an intense deliberation between the Democrats in the US Congress and the Trump Administration in which the former sought greater labor protections in the USMCA text.

The RRM is a novel compliance tool and a supplement to the State-to-State dispute settlement system. Operating in addition to the traditional adjudicatory mechanism for disputes about the interpretation and application of the labor chapter, the RRM is a unilateral means for any of the parties to seek to force individual worksites in the territory of another party to comply with domestic law.[8] It has a relatively straightforward aim: to ensure remediation of a denial of collective bargaining rights. Contrast this with one of the primary aims of most other labor chapters in US trade agreements to date: to ensure that each party does not fail "to effectively enforce labor laws through a sustained or recurring course of action." Rather than hold governments accountable for the administration of their domestic law, the RRM is a way to handle a specific denial of the right of free association and collective bargaining by a private entity at a *particular worksite*. It still turns on engagement between the relevant two governments and the use of an arbitral panel, but it is far more incident-specific than the traditional adjudicatory labor compliance mechanisms.

Another feature of the USMCA trade-plus compliance machinery is similar to that used in other US trade agreements: public engagement. As in the context of other US trade agreements, each of the three governments in the USMCA has devised a system for receiving information about possible denials of rights at worksites, although at the time of writing, the governments had not committed to making publicly available information they received. This mechanism expands the reach of each of the governments, allowing individual actors and civil society to bring to the attention of the authorities problems of which they are aware.

Following a multi-step investigation process, governments can prompt the constitution of a neutral panel of labor experts to make a determination on whether workers are being denied their rights at the factory in

[7] United States–Mexico–Canada Agreement, entered into force July 1, 2020, Annex 31-A.

[8] There are in fact two annexes here with Rapid Response Mechanisms: one to address issues between the United States and Mexico and another to address issues between Canada and Mexico. The two annexes are the same with only the smallest of adjustments in the footnotes to accommodate the two countries' different domestic processes.

question.[9] Where the panel identifies that the factory is denying workers' rights, the responding government may choose to hold consultations with the complaining government before the complainant then "impose[s] remedies."[10] Importantly, those "remedies" or penalties are not against the respondent but rather against the worksite company itself. The complainant can choose a remedy which "may include" suspending preferential tariff treatment for the goods made at that worksite or other "penalties" on the goods.[11] At the least, the agreement text specifically notes that the complainant may deny entry to goods from the company in question in instances of repeat offenses. The complainant is limited only by some imprecise principles of proportionality. The "remedy" continues to be applied until the denial of rights has been "remediated."[12]

But relatively broad language in the agreement suggests the complaining government is not limited in its choice of remedies other than in their magnitude. That is, the agreement provides a non-exhaustive list of possible "remedies" against a worksite or the home government and only requires that the complaining government's selection be proportional. As of the time of writing, there had been no test of the panel or remedies aspect of the RRM.

The United States activated the RRM tool twice during the summer of 2021 and once more in May 2022. In the first instance, it reached agreement with Mexico on how to remediate the situation. In the second, the United States reached out directly to the company and its US parent company to develop a means to address the worksite issues. The third remains ongoing at the time of writing.

A second innovative and recent model for trade-related compliance may be found in the United States–Peru Trade Promotion Agreement (PTPA) which entered into force in 2009.[13] The PTPA contains a unique Environment Chapter and Annex on Forest Sector Governance, which includes a requirement for Peru to conduct audits of particular timber producers and exporters, and upon request from the United States, perform verifications of shipments of wood products from Peru. The United States may then take action directly against the shipment that is subject to the verification if it is not satisfied with the results. The purpose

[9] USMCA, Article 31A-4.
[10] Ibid.
[11] Ibid., Article 31A-10.
[12] Ibid.
[13] United States–Peru Trade Promotion Agreement, entered into force February 1, 2009.

of this Annex is to protect against illegal logging that threatens to deplete forests and exacerbate climate change. The Annex also creates an Interagency Committee on Trade in Timber Products from Peru to monitor Peru and its companies' actions in this respect.

The PTPA Forest Annex was and remains the first of its kind, although some of the aspects of the USMCA RRM resemble its features. The PTPA offers an illustrative list of actions the United States may take with respect to the shipment or enterprise that is the subject of the verification. For example, the United States may deny entry to certain products for up to three years, or until the Timber Committee determines that the company in question has complied with all applicable laws, regulations, and other measures of Peru governing the harvest of and trade in timber products, whichever is shorter.

The company-specific aspect of the Annex was tested first in October 2017 when the Trump Administration denied entry of timber products and exports by a Peruvian company. Peru was unable to verify that the shipment complied with all applicable Peruvian laws and regulations. Again, in July 2019, the US Trade Representative directed US Customs and Border Protection to block future timber imports from a different Peruvian exporter based on illegally harvested timber found in its supply chain. The Trump Administration characterized this move as a way to "ensur[e] that [US] trading partners live up to their [trade agreement] obligations" by not allowing illegally harvested timber to be exported to the United States.[14]

8.2.2 *Drivers of Change*

What has motivated these shifts in the US trade agreement compliance context? To be sure, examining the wide variety of motivations from multiple sectors and among multiple actors exceeds the scope of this chapter. But when we ask where these moves come from and why they have emerged, there appear to be two important features: first is a frustration with trade liberalization and second is recognition that existing or traditional means to countervail what many see as the

[14] Office of the United States Trade Representative, "USTR Announces Enforcement Action to Block Illegal Timber Imports from Peru," July 26, 2019, available at www://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/july/ustr-announces-enforcement-action (accessed 20 January 2020).

negative effects of liberalization have failed to do so.[15] Thus, the obligations have shifted and the NCMs have followed. It is a two-step design story. The agreement provides for the home State to ensure the State maintains certain domestic commitments, often modelled after international standards, such as those found in the International Labor Organization Conventions. Where the State cannot deliver on those, the new mechanisms allow the other State to exact demands on private actors within the territory of the other State. While States still enter into reciprocal commitments in these trade-plus areas, they do not rely on State action to ensure those commitments are upheld.

One can again trace this two-step move in the debates surrounding the mechanisms for enforcing labor commitments in the USMCA leading to the RRM. Some lawmakers insisted that the US Government devise a unilateral enforcement mechanism such as that which emerged; others argued for an inspection system through which US officials would visit Mexican factories; some sought third-party dispute settlement with enhancements of various types; and still others preferred the status quo.[16] It was one of the most exploratory and expansive debates on institutional design for labor since the development of the original North American Free Trade Agreement (NAFTA) labor protections in the early 1990s.

The final product of the RRM and likewise the United States–Peru logging arrangement seek to replicate and supplement the domestic enforcement chain by outsourcing the ultimate compliance pressure to the complaining State. These mechanisms that reach beyond the border into the territory of a trading partner extend the traditional trade law institutional design questions from actions taken by that trading partner to actions taken by private actors on the ground. They empower the receiving or complaining State to penalize firms that are violating domestic law. By shifting the roles and responsibilities through these NCMs, these developments have upended the traditional discussions on enforcement institutional design in trade law and called into question whether the field has a reliable and consistent theory of compliance at all.

[15] See generally T Meyer, "Free Trade, Fair Trade, and Selective Enforcement" (2018) 118 *Columbia Law Review* 491 (collecting views).

[16] See M Curi, "Neal: USTR 'Favorably' Received USMCA Working Group's Counterproposal" (*Inside U.S. Trade*, October 4, 2019).

8.3 Assessing these New Tools: Costs, Benefits, and the Space Between

Trade NCMs like public complaint processes regarding labor rights violations or environmental abuse are not a new concept, but their latest experimental forms advance their promise. While these advances have benefits, they also have shortcomings. This section briefly assesses the behind-the-border direct compliance obligations along two dimensions. First, it will evaluate the practical consequences of such a scheme. Second, it will turn to the transformative power of this approach.

8.3.1 Practical Problems

There are at least seven issues that behind-the-border compliance schemes raise and that some critics have noted as creating potential problems for the legitimacy of such tools: transparency, predictability, selection bias, irony or hypocrisy, aggrandizement of authority, extraterritoriality, and judicial review. I will take up each in turn.

First is transparency. The present iterations of these tools are largely internal guiding schemes, but they do little to require governments to make publicly available the documentation or reasoning behind the steps taken. Transparency is not a problem unique to behind-the-border schemes in trade law[17] but the problem is surprisingly acute in these new tools – perhaps as a result of their newness.

Second is predictability. These tools do not create any degree of consistency in outcome. While there are some guidelines and the commitments are articulated to a limited degree, some private companies have noted that there is not enough information available to them to be able to comply effectively with the substantive and procedural requirements involved. They have raised questions of due process and coordination which they claim mechanisms lack.

Third is selection bias and power differentials. Although the tools are reciprocal,[18] the expectation, and so far, the practice, has been one-sided. That is, in the case of the RRM, only the United States has taken action against companies operating in Mexico, rather than the other way

[17] See e.g., K Claussen, "Trade Transparency: A Call for Surfacing Unseen Deals" (2022) 122 *Columbia Law Review Forum* 1.

[18] Not all tools are reciprocal. There is no power for Peru to regulate US logging, for example.

around, consistent with the expectation of many. The reasons for this lopsided situation include (1) the United States has limited the scope of actions that Mexico could take toward US companies to a very limited set;[19] (2) the power dynamics of the unions in the United States; and (3) power dynamics between the countries. While these are still instruments to which States agree, the bargains are not always reciprocal. The result is often advanced and wealthy economies pursuing compliance by not just developing States but now entities in developing States, including multinationals from the wealthy State. These are tools through which the United States and other countries can exert force directly on companies operating in places like Mexico and Peru and not because of any characteristic of the product that those companies seek to import, but rather based on their behavior behind the border in those other States.

Fourth is irony, or what some would call hypocrisy. Concern about the operation of the RRM is not just limited to the selection of what might be subject to the RRM. It is also a bias in result – what some would call hypocrisy or irony. This is where considerable criticism has been raised about the application of the RRM to date. The mechanism permits US Government actors to demand of companies operating in Mexico labor practices that it cannot demand from US companies operating just a few kilometers across the border.[20] A related point is the selection bias in the types of societal problems these US-designed tools are intended to solve. One does not see – yet – similar tools focused on private action to address carbon emissions, for example.

Fifth is aggrandizement of authority. The experience of the United States with its second RRM situation at a company called Tridonex in Mexico has led to some criticism about the possible aggrandizement of authority on the part of US authorities. In that context, rather than reach agreement with Mexico about a course of remediation as provided by the agreement, the US Trade Representative entered into an agreement with the company, in which the company promised to take certain actions in the interests of the workers at the identified worksite. Nothing about the RRM language or the United States implementing legislation provides authority to the US Trade

[19] The United States has limited the range of circumstances to which the RRM extends in a footnote in the Agreement. For a discussion and explanation of how this limitation operates, see D LeClercq, "Biden's Worker-Centered Trade Policy: Whose Workers?" (*International Economic Law and Policy Blog,* May 16, 2021); K Claussen, "A First Look at the New Labor Provisions in the USMCA Protocol of Amendment" (*International Economic Law and Policy Blog*, December 12, 2019).

[20] LeClercq (n 19).

Representative to enter into agreements with companies. Thus, this agreement, apart from raising questions of legality, has also suggested to some outsiders that these compliance moves are means through which US executive branch agencies may grow their authority.

Sixth is extraterritoriality. In the State-to-State context, some governments have traveled to the other State to carry out in-person investigation of the measure or practice, or they have relied on their government officials already on the ground in those places. Indeed, as noted, for some trade-plus areas, public submission or consultation opportunities have allowed foreign civil society actors to provide information from inside the breaching State to the complaining government to expand their reach. But the RRM and the Peru mechanism go still further in two respects. One way is by targeting individual companies not operating in the United States. Second is by taking action against companies for their violations of domestic labor law in Mexico (and likewise for their violation of domestic law in Peru).

And seventh, finally, is judicial review. Although one of the aforementioned mechanisms (the RRM) involves the possibility for review by a neutral panel, the actions undertaken by the US agencies involved in raising these accusations and taking such actions are not subject to review. Although their actions are regulatory, much like anti-dumping and countervailing duty actions taken by US Customs and Border Protection or the US Department of Commerce, companies affected do not have means to challenge their targeting. They cannot bring claims to a judicial body to raise concerns about the process through which they have been prosecuted.

8.3.2 Achievements

Despite these criticisms, advocates celebrate the new compliance tools for making positive change in the lives of many workers, as well as in combatting climate change in the case of the Peru logging situation. Further, we can respond to each of the criticisms above to defend the deployment of these tools. Some of the criticisms are about the application of the tools to date rather than the existence of the tools themselves, for example. To take one, the hypocrisy critique may be seen as shortsighted, given that these tools may assist with norm-building at the international level, even if US institutions will not permit those norms to be entrenched at home. Like elsewhere, we may be able to achieve internationally what we cannot achieve domestically due to political constraints. Similarly, the extraterritoriality claims are somewhat

tempered by the fact that these do not involve US authorities arriving at Mexican companies or at Peruvian logging sites and arresting people. The action that the US Government can take is limited to that which it can exert at its borders. In theory, companies that come into focus for compliance may direct their goods elsewhere.

In sum, while these new mechanisms create some problems, they also may make positive changes toward broader goals. It is too early to draw conclusions in evaluating these tools. Further, measuring success in these trade-plus NCMs is just as difficult as it is in measuring success in other areas. A wide range of metrics may be appropriate. One metric that is often raised is increased use: the more we use an NCM, the more successful it is, according to some lawmakers. But for tools that are intended to create penalties for bad behavior, the better metric may be that there are no instances of bad behavior and therefore the NCM has effectively created a deterrent effect. Likewise, an application of the tools is hardly a sign of success. Counting up their uses does not begin to take into account the possible ancillary effects they may have on communities or within workplaces and in other respects. In the case of the RRM, some commentators have raised concern about how the US engagement with the targeted worksites may exacerbate other local problems, whether related to violence or otherwise. There are not simply winners and losers in these stories; the impact is far more textured than meets the eye.

8.3.3 In Between

These tools have also precipitated ideological shifts and normative changes that are difficult to square as criticism or achievement, as cost or benefit. Those sorts of assessments shift easily with one's perspective. For example, some proponents of free trade have seen these tools as advancing protectionism, and have suggested that in so doing, they create avoidable costs for all. These critics argue that the creators and users of these tools aim to discourage US investment in Mexico and encourage US and multinational companies to invest instead in the United States. Through a combination of tariff tools and these behind-the-border mechanisms, the United States is seeking to ensure that US and other companies will not choose Mexico over the United States.[21] Others would say this is not just about keeping US businesses at home. To these

[21] It is not just the RRM that suggests this but also other changes made to what was formerly the NAFTA.

advocates, helping Mexican workers is paramount and these sorts of tools permit the US Government to help the Mexican Government achieve that goal, particularly in areas where the Mexican Government is constrained from making progress. In both camps are those for whom the best way to promote US economic competitiveness is by making sure competitors in Mexico are held to the same standards.

At the least, these tools recognize that changing State behavior is challenging and that States' comparative advantage, or at least that of the United States, may be in changing company behavior. That is a typical domestic law function. These tools position States to achieve these goals in new ways, to decide that certain types of trade are good and other types are bad, and to put a thumb on that scale. Thus, we can evaluate these tools as a matter of policy, and as a matter of practicality, but we might also consider whether one can judge the achievements of these new institutions merely by their concrete outcomes. We can likewise examine these tools based on principles about how laws are designed to operate, where the power lies, or the value of this particular legal practice.

The operation of these new compliance tools has multifaceted effects that space does not permit me to explore here, but we might ask the following questions as a means of further evaluation from either a trade perspective or a compliance perspective: Are they redistributive or wealth-producing? Do they produce better governance? Are they norm-enhancing? Are they gap-filling or capacity-building? Are they hand-tying (self-regarding or other-regarding)? These questions and others like them require greater exploration before we can draw conclusions about trade NCMs.

8.3.4 *Lessons for Compliance Theories in International Law*

The new trade NCMs with their behind-the-border compliance focus also offer lessons for compliance theories more generally in international law. I highlight just a handful here for further exploration in later work.

First, behind-the-border NCMs adjust the levers in the conventional compliance stories that have dominated international law scholarship.[22]

[22] See e.g., O Ben-Shahar and A Bradford, "Reversible Rewards" (2012) 15 *American Law and Economics Review* 156; O Hathaway and S Shapiro, "Outcasting: Enforcement in Domestic and International Law" (2011) 121 *Yale Law Journal* 252; RE Scott and PB Stephan, *The Limits of Leviathan* (2006); A Guzman, "A Compliance-Based Theory of International Law" 90 *California Law Review* 1826; B Simmons, "Compliance with International Agreements" (1998) 1 *Annual Review of Political Science* 75; B Kingsbury,

In addition to focusing largely on State compliance with agreements or with dispute settlement reports, prior scholars have sought to explain how international law serves as a constraint on behavior. The trade NCM experience of recent years aligns the features of our international law compliance story in different ways. The ordinary touchpoints of the realist or rational functionalist literature are not salient here. For example, reputation – a key input in the functionalist compliance theory – has a diminished role in the operation of trade NCMs. Rather, the trade NCM developments purport to align more with normative theories and identify normative aims of the States involved. But that analogy is likewise strained. The shifting targets are part of the categorization issue: there is no common view on the problem these tools are intending to solve, making the compliance discussion much harder to formulate.

Second, rather than look at trade NCMs as dispute resolution or "enforcement" tools for States, we might characterize this activity as "regulation." Then we might ask: What are the options, values, and scholarship that we might seek to integrate in examining such moves? What are the implications of characterizing them as one or the other? In the existing literature on compliance, some scholars have considered the role of sanctions and incentives when comparing an "enforcement model" with a "management model." Here, we are somewhere between those poles. Again, this comparison is constrained by the differences in levels of actors involved in this story and the regulatory nature of some of them. While the literature to date has looked at first and second-order compliance, these trade NCMs might be properly characterized as third-order, given bureaucratic attention to private actors. In third-order compliance, the bureaucracy deepens as trade agencies move from negotiation and litigation to regulatory monitors.[23]

Third, these NCMs often try to replicate the domestic enforcement chain through new institutions. They do not rely on domestic actors as in a complementary system, but they include multiple steps of review by

"The Concept of Compliance as a Function of Competing Conceptions of International Law" (1998) 19 *Michigan Journal of International Law* 345; A Chayes and A Chayes, *The New Sovereignty* (Harvard University Press 1995). Rachel Brewster and Adam Chilton have looked at second-order compliance in trade, namely US compliance with World Trade Organization Dispute Settlement Body reports, but here I am referring principally to first-order compliance issues. R Brewster and A Chilton, "Supplying Compliance: Why and When the United States Complies with WTO Rulings" (2014) 39 *Yale Journal of International Law* 200.

[23] I borrow the term from R van Loo, "Regulatory Monitors: Policing Firms in the Compliance Era" (2019) 119 *Columbia Law Review* 369.

bureaucratic actors. Putting bureaucrats at the center of these mechanisms may enhance their legitimacy in the eyes of a domestic public. This approach also allows that government to retain control over the process and its outcome, as compared to using international adjudicators. In these ways, these mechanisms go beyond what other scholars have tracked in international law, blurring the lines between domestic and international authority.

Fourth, trade theories usually instead speak in terms of remedies rather than sanctions and they do so with little emphasis on deterrence given that "dispute settlement" language conveys a sense of misunderstanding rather than bad behavior. This distinction is more than a matter of semantics. Rather, the new compliance models operate within this trend and foundational understanding of how States ought to interact with one another. It becomes impossible to isolate the impact of these new tools and norms from the broader backdrop on remedies rather than the typical punitive action. There are, in fact, multiple layers of compliance at work in ways not seen before.

Fifth, the trade NCM experience demonstrates how control has shrunk in importance while cooperation is more prominent. Query then, whether cooperation can constitute compliance. In each of the aforementioned tools, the States must cooperate, and ultimately the companies likewise. Even if they are not aimed at correcting State conduct that diverges from the text of international obligations, can they still qualify as compliance mechanisms? When the US Government works with companies to fix problems abroad, is that a matter of compliance? These trade NCMs do not rely on either dispute settlement, or domestic adjudication, or entities that use force as we can see in other areas of government and international law. Rather, the trade NCMs reconsider the dynamics among the parties and expand the meaning of "party" broadly, again making traditional compliance theories more difficult to apply here.

This review of the contributions made by trade NCMs to compliance theory suggests that these may merit a "new category" of transnational compliance ideas or theory that forces a reevaluation of the *structure* of the compliance problem. If that is so, then it is worth complicating the analysis somewhat further by examining whether the parties involved in shaping this mechanism have a shared understanding of its goals and objectives.

8.4 Conclusion

The conundrum of trade-plus enforcement is the absence of a shared understanding of what enforcement is for and what institutional designs

serve those likely diverse ends. Rather, the system has marched toward making commitments enforceable through third-party dispute settlement across a wide array of issue areas. For nearly twenty-five years, as free trade agreements have proliferated, most trade-plus advocates and members of civil society have advocated for third-party dispute settlement and the availability of the same remedies for trade-plus disputes, as for conventional commercial disputes as a means to serve their ends.[24] Opposition to this now-establishment view has manifested not based on effectiveness of the third-party mechanism, but rather based on concerns that the concrete remedies obtained through these types of mechanisms could create additional barriers to trade – direct and indirect. The result has been a narrow two-sided conversation about the range of possibilities for trade-plus enforcement.

This binary representation of trade-plus enforcement has diminished the relevance and prominence of a more fulsome conversation about institutional design. Today, the growing prevalence of trade NCMs pushes the boundaries of that conversation and opens a field for research in compliance theory that this chapter has sought to begin.

[24] e.g., W Krist, "The Labor Dilemma," in *Trade Policy in Crisis, The Wilson Center White Paper* (2007).