Multilateral Environmental Agreements and the Compliance Continuum

INTRODUCTION

> [T]he gap between the burgeoning hundreds of international environmental laws and the actual condition of the environment – [is] perhaps one of the largest contradictions of our time.
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> Alexander Gillespie, "International Environmental Law and Policy"[1]

The high number of multilateral environmental agreements ("MEAs") negotiated by the international community is impressive. There are over 500 MEAs, covering such diverse issues as loss of biological diversity, pollution of the atmosphere, ocean degradation and deforestation.[2] Moreover, the commentators suggest that compliance with the obligations agreed to in MEAs is generally high.[3] Yet, despite the large number of MEAs, and high compliance rate, there is growing concern that the state of the environment continues to deteriorate at an unprecedented scale.[4]

One reaction to the observation that MEAs are not effectively addressing environmental problems has been a call to intensify the obligations assumed by the parties to MEAs. That is, resolution of global environmental problems requires "deeper

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[1] Alexander Gillespie, *International Environmental Law and Policy*, *in* ENVIRONMENTAL LAW FOR A SUSTAINABLE SOCIETY 67, 77 (Klaus Bosselmann & David Grinlinton eds., 2002).

[2] *International Environmental Governance Multilateral Environmental Agreements: A Summary*, U.N. Environment Programme, 1st mtg., Provisional Agenda Item 3 at 3, UNEP/IGM/1/INF/1 (2001) *at* http://www.unep.org/IEG/docs/working%20documents/MEA_summary/IGM-1-INF-1.doc. See the ECOLEX website *at* http://www.ecolex.org/ and the Environmental Treaties and Resource Indicators website *at* http://sedac.ciesin.org/entri/ for current information on the number and diversity of MEAs.

[3] *E.g.* David D. Victor, *Enforcing international law: implications for an effective global warming regime*, 10 DUKE ENVTL. L. & POL'Y F. 147, 151 (1999).

[4] For example, Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L L. 259, 263 (1992) comments there is a strong argument that despite the proliferation of MEAs, "the environmental situation in the world became worse and is deteriorating further." *See also* Jacqueline Peel, *New State Responsibility Rules and Compliance with Multilateral Environmental Obligations: Some Case Studies of How the New Rules Might Apply in the International Environmental Context*, 10 REV. EUR. COMMUNITY & INT'L ENVTL. L. 82 (2001); Victor, *id.*

cooperation."[5] The most recent example of this is the climate change regime. To respond to the problem of global warming, the United Nations Framework Convention on Climate Change[6] ("FCCC") outlines a framework of action for Parties to stabilize greenhouse gas emissions.[7] At the first meeting of the Conference of the Parties however, the adequacy of the commitments in the FCCC was a critical issue.[8] The Parties entered negotiations to strengthen efforts to address global climate change resulting in the adoption of the Kyoto Protocol.[9] In contrast to the FCCC, which merely encouraged Parties to stabilize greenhouse gas emissions, the Kyoto Protocol sets quantifiable greenhouse emission limitation and reduction commitments for certain developed country Parties.[10]

The introduction of emission commitments in the Kyoto Protocol was accompanied by negotiations concerning not only how to ensure compliance with those commitments,

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[5] Depth of cooperation refers to the extent to which a treaty "requires states to depart from what they would have done in its absence." George W. Downs, David M. Rocke & Peter N. Barsoom, *Is the good news about compliance good news about cooperation?*, 50 INT'L ORG. 379, 383 (1996). See discussion below under the heading "The Enforcement Model: Political Economics Theory."

[6] United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, 31 I.L.M. 849 (entered into force Mar. 21, 1994), *available at* http://unfccc.int/resource/conv/conv.html [hereinafter FCCC].

[7] Article 2 of the FCCC.

[8] Joanna Depledge, *Tracing the Origins of the Kyoto Protocol: An Article-By-Article Textual History*, Prepared under contract to UNFCC, FCCC/TP/2000/2 (2000) 6, *at* http://unfccc.int/resource/docs/tp/tp0200.pdf. *See also* International Institute for Sustainable Development, *Summary of the First Conference of the Parties for the Framework Convention on Climate Change: 28 March – 7 April* (1995) 12(21) EARTH NEGOTIATIONS BULL. 1, *at* http://www.iisd.ca/linkages/download/pdf/enb1221e.pfd.

[9] The Kyoto Protocol to the Framework Convention on Climate Change, Dec. 11, 1997, 37 I.L.M. 22 (not yet in force), *available at* http://unfccc.int/resource/docs/convkp/kpeng.pdf [hereinafter the Kyoto Protocol]. To enter into force the Kyoto Protocol requires ratification by 55 Parties to the FCCC including Annex I parties accounting for at least 55 percent of the total carbon dioxide emissions of that group in 1990 (Article 25). Presently, 110 parties have ratified the Kyoto Protocol representing 43.9 per cent of total carbon dioxide emissions. FCCC website *at* http://unfccc.int/ (last modified on June 6, 2003). Given the current position of the United States against ratification, to enter into force the Kyoto Protocol will need Russia's ratification.

[10] Article 3 of the Kyoto Protocol.

but also possible enforcement mechanisms in the case of non-compliance.[11] Despite the reportedly high compliance rate with many other MEAs, in the face of binding emission commitments in the Kyoto Protocol, the Parties wanted assurance that these would be backed by a credible compliance system.[12] However, this increased attention to compliance is not restricted to the climate change regime. It is part of a recent development in the negotiation of MEAs to introduce treaty specific compliance regimes, as well as to introduce enforcement mechanisms.[13] Therefore, the question addressed in this paper is: is stronger enforcement necessary to secure compliance with MEAs?

To consider that question, this article reviews the recent literature on compliance with international law and applies the leading theories to MEAs. This literature increased dramatically at the end of the last century as scholars from various disciplines including law, political science and political economics endeavored to explain the causal link between state behavior and compliance with international law.[14] The scholars sought an answer to the compliance question: "why do nations obey international law?"[15]

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[11] Fiona Mullins, *Kyoto Mechanisms, Monitoring and Compliance From Kyoto to the Hague: A selection of recent OECD and IEA analyses on the Kyoto Protocol*, Organization for Economic Cooperation and Development, Paris (2001) 41, *at* http://www.oecd.org/pdf/M00023000/M00023447.pdf.

[12] G.H. Addink, Working Paper for the 10th session of the Subsidiary Body for Implementation and the Subsidiary Body for Scientific and Technological Advice, *Joint Working Group Compliance on the Kyoto Protocol: An Overview of Suggestions on Compliance* 8 (1999) *at* http://www.library.uu.nl/publarchief/jb/artikel/addink/full.pdf. In general the traditional international law remedies are viewed as inadequate to secure compliance with MEAs. See discussion below under the heading: "I. Conceptual Framework: B. The Starting Block."

[13] M. A. Fitzmaurice & C. Redgwell, *Environmental Non-Compliance Procedures and International Law*, 31 NETH. Y.B. INT'L L. 35, 42 (2000).

[14] ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY (1995); THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995); George W. Downs et al., *supra* note 5; Oran R. Young et al., *Regime Effectiveness: Taking Stock*, *in* THE EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL REGIMES 249 (Oran R. Young ed., 1999). For a summary of earlier theories on compliance and international law see Harold Hongju Koh, *Why do nations obey international law*?, 106 YALE L.J. 2599, 2603 (1997).

[15] Koh, *id*.

This discussion is divided into three parts. Part I sets up a conceptual framework for understanding the literature. First, I define the terms "compliance," "enforcement" and "effective." Secondly, I set out the underlying assumptions most authors make either explicitly or implicitly, before they consider the compliance question.

Part II of this discussion sets out the compliance continuum[16] by identifying the contemporary schools of thought on why nations comply with international law: the managerial school, fairness theory, transnational legal process, reputational theory, international relations theory and the enforcement model. In considering each theory, I outline what the scholars tell us about the compliance question, focusing specifically on MEAs. I also consider what each theory tells us about whether enforcement is a necessary component of a compliance regime in the MEA context.

Part III of this discussion then provides an analysis of the literature, noting where the theories converge, the key points of contention among the leading scholars, and suggestions for further research.

In sum, based on the current literature, my conclusion is that in general, nations comply with MEAs because of shallow cooperation; states spend significant time and resources negotiating agreements reflecting no more that current domestic policies. This explains the observation that global environmental degradation is continuing despite the

[16] See Fitzmaurice & Redgwell, *supra* note 13, at 42 who refer to the compliance 'continuum' in the context of analyzing non-compliance procedures.

high compliance rate with MEAs. Therefore, to meaningfully address global environmental problems, we must introduce more onerous obligations in MEAs, thereby increasing the depth of our co-operation. However, ensuring compliance with increased obligations requires not only stronger, but legitimate enforcement mechanisms, as illegitimacy was one of the primary justifications for theories against the use of stronger enforcement mechanisms. By creating stronger, legitimate enforcement mechanisms, we may be able to move beyond compliance, and begin to tackle the issue of effectiveness in international environmental law.

I. CONCEPTUAL FRAMEWORK

A. Definitions

The key terms used in the literature are "compliance," "enforcement" and "effectiveness." These concepts are discussed below.

Compliance refers to whether states meet their obligations in an accord,[17] or put another way, whether their behavior conforms with legal rules.[18] These obligations can be both procedural, such as a requirement to report, and substantive, such as an undertaking to control an activity.[19] Additionally, some scholars extend the concept of compliance to incorporate whether the spirit or intent of the treaty has been met,[20]

[17] Edith Brown Weiss & Harold K. Jacobson, *A Framework for Analysis, in* ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS 1, 4 (Edith Brown Weiss & Harold K. Jacobson, eds., 1998) [hereinafter ENGAGING COUNTRIES].
[18] Note however, the concept is not uncontested. See Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law, in* INTERNATIONAL COMPLIANCE WITH NONBINDING ACCORDS (Edith Brown Weiss ed., 1997) 49 who argues that the meaning of compliance "cannot be taken as shared," but depends on which legal theory of international law is applied.
[19] Weiss & Jacobson, s*upra* note 17.
[20] *Id*.

although this conceptualization presents obvious empirical analysis difficulties.[21] A compliance mechanism is a provision in a treaty designed to encourage compliance, including positive incentives such as financial or technical assistance.

In contrast, enforcement is the implementation of consequences for non-compliance with obligations in an accord.[22] These consequences can vary from financial penalties, the withdrawal of privileges, or sanctions including trade, military and economic sanctions.[23] Enforcement can either be external to the international agreement, or part of a treaty specific non-compliance procedure.[24] A compliance regime may incorporate both compliance and enforcement mechanisms, as both are designed to secure compliance.[25]

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[21] Ronald B. Mitchell, *Compliance Theory: An Overview*, *in* IMPROVING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL LAW 3, 5 (James Cameron, Jacob Werksman & Peter Roderick, eds., 1996).

[22] See George W. Downs, *Enforcement and the Evolution of Cooperation*, 19 MICH. J. INT'L L. 319, 320 (1998) who notes that in political economic literature "enforcement generally refers to the overall strategy that a State or a multilateral adopts to establish expectations in the minds of state leaders and bureaucrats about the nature of the negative consequences that will follow from noncompliance." He comments that international lawyers tend to focus only on formal enforcement provisions under international law, rather than "extra-legal" enforcement strategies.

[23] See Harold K. Jacobson & Edith Brown Weiss, *Assessing the Record and Designing Strategies to Engage Countries*, *in* ENGAGING COUNTRIES, *supra* note 17, at 511, 542-547 for a discussion of different strategies for encouraging compliance.

[24] See Fitzmaurice & Redgwell, *supra* note 13 at 36 who note recent MEAs incorporating non-compliance procedures include, inter alia, the Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 3, 26 I.L.M. 1541 (entered into force Jan. 1, 1989), *available at* http://www.unep.ch/ozone/pdf/Montreal-Protocol2000.pdf [hereinafter the Montreal Protocol], and the Kyoto Protocol.

[25] See for example, the Kyoto Protocol compliance regime in the *Report of the Conference of the Parties on its Seventh Session*, Held at Marrakesh from Oct. 29 to Nov. 10, 2001, Addendum, Part Two: Action Taken by the Conference of the Parties, Decision 24/CP.7, Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol, *at* http://unfccc.int/resource/docs/cop7/13a03.pdf which sets up a compliance committee with a facilitative branch and an enforcement branch.

Securing compliance, however, does not guarantee the effectiveness of the international agreement; effectiveness goes beyond adherence to legal obligations.[26] Raustiala identifies the "common-sense notion" of effectiveness is whether the treaty solves "the underlying problem."[27] Ehrmann suggests that in the MEA context effectiveness refers to, "whether the condition of the environment is improved."[28] Yet, although the problem-solving definition of effectiveness is intuitive, there may be many factors that contribute to resolving an environmental problem. The difficulty lies in isolating the role of an MEA.[29] Accordingly, many scholars ask a different question in considering the effectiveness of an MEA, namely, whether the MEA contributed to influencing a change in behavior.[30] Finally, although compliance and effectiveness are conceptually distinct, Mitchell observes, "compliance can provide a valuable proxy for effectiveness … ."[31] Several authors consider that understanding why nations comply with international law can help in analyzing how to increase the effectiveness of international law.[32]

B. The Starting Block

Current academic thought on the compliance question begins from the same starting block: the claim that based on empirical observations compliance with international law

[26] See Fitzmaurice & Redgwell, *supra* note 13, at 43 n.35.
[27] Kal Raustiala, *Compliance & Effectiveness in International Regulatory Cooperation*, 32 CASE W. RES. J. INT'L L. 387, 393 (2000). *See also* Arild Underdal, *One Question, Two Answers*, *in* ENVIRONMENTAL REGIME EFFECTIVENESS 3, 4 (Miles et al. eds. 2002).
[28] Markus Ehrmann, *Procedures of Compliance Control in International Environmental Treaties*, 13 COLO. J. INT'L ENVTL. L. & POL'Y 377, 377 (2002). Note Ehrmann, at 378 defines effectiveness to incorporate the problem solving meaning and also whether a treaty can change behavior.
[29] Raustiala, *supra* note 27, at 393 and 394.
[30] *Id*. at 394.
[31] Mitchell, *supra* note 21, at 25.
[32] *See e.g.* Raustiala, *supra* note 27, at 412.

is high.[33] Most authors agree that the famous assertion by Louis Henkin that, "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time,"[34] is an accurate description of contemporary state behavior.[35] The field of international environmental law is often cited to support this claim.[36] For example, a study by Weiss and Jacobson on compliance with MEAs found that for the five treaties studied, compliance was comparable, or better than compliance with national laws and regulations within the United States, and with Community regulations and directives within the European Union.[37]

Linked to the observation that nations generally comply with international law, is a general consensus that understanding *why* they comply is one of the central questions currently challenging international legal scholarship. As Guzman comments:

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[33] Victor, *supra* note 3; Koh, *supra* note 14; Downs, *supra* note 5.
[34] LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2d ed., 1979) (emphasis omitted).
[35] Note many authors omit, as I have, the introductory words to Henkin's quote "[i]t is probably the case that" *E.g*. Koh,*supra* note 13, at 2599; Kyle Danish, *Management v. Enforcement-The New Debate on Promoting Treaty Compliance*, 37 VA. J. INT'L L. 789 (1997). However, this claim is not entirely uncontested. *See* Peter M. Haas, *Why Comply, Or Some Hypotheses in Search of an Analyst, in* INTERNATIONAL COMPLIANCE WITH NONBINDING ACCORDS, *supra* note 18, at 21, 23; Peel, *supra* note 4, at 82. Note also that the area of human rights provides a disturbing exception to the conventional view that international law is complied with. Chayes & Chayes, *supra* note 14, at 16.
[36] Chayes & Chayes, *id.*; Victor, *supra* note 3.
[37] *Supra* note 23, at 512. The five treaties covered by the study are: World Heritage Convention, Nov. 16, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151 (entered into force Dec. 17, 1975), *available at* http://sedac.ciesin.org/pidb/texts/world.heritage.1972.html; Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (entered into force July 1, 1975), *available at* http://sedac.ciesin.org/pidb/texts/cites.trade.endangered.species.1973.html; Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (the London Convention of 1972), Dec. 29, 1972, 26 U.S.T. 2403, 1046 U.N.T.S. 120 (entered into force Aug. 30, 1975) *available at* http://sedac.ciesin.columbia.edu:9080/entri/texts/marine.pollution.dumping.of.wastes.1972.html; 1983 International Tropical Timber Agreement, Nov. 18, 1983, Misc 11 (1984); Cmnd 9240 (entered into force Apr. 1, 1985) *available at* http://sedac.ciesin.org/pidb/texts/tropical.timber.1983.html and the Montreal Protocol.

> [T]he failure to understand the compliance decision is troubling because compliance is one of the most central questions in international law. Indeed, the absence of an explanation for why states obey international law in some instances but not others threatens to undermine the very foundations of the discipline.[38]

The question is central to international law "from both a theoretical and practical perspective … ." [39] From a practical perspective, we need to understand why nations comply to know how to design international accords to ensure future compliance.[40] Furthermore, we have no assurance that compliance will remain high if we do not understand the causal link. From a theoretical perspective, the question is fundamental because if compliance with international law is merely a coincidence, it begs the question why have international law at all.

The final point of consensus in the compliance literature relates to the inadequacy of the Law of State Responsibility to either explain the high compliance rate, or to secure compliance with MEA obligations. The Law of State Responsibility prescribes the legal consequences and the procedures for implementing those consequences for breach of an international legal obligation, in the absence of specific provision in an international agreement.[41] However, in general this law is viewed as unsuitable to enforce MEAs.[42]

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[38] Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1826 (2002).
[39] Koh, *supra* note 14, at 2599. See also Victor, *supra* note 3, at 164: "[a]t stake is not only a theory of compliance, but also dramatically different policy prescriptions for how to design effective mechanisms for addressing non-compliance."
[40] Jose E. Alvarez, *Why Nations Behave*, 19 MICH. J. INT'L L. 303, 305 (1998).
[41] See the Draft Articles on Responsibility for Internationally Wrongful Acts, in *Report of the International Law Commission Fifty Third Session*, GA Fifty-Sixth Session, Supp. No. 10 (A/56/10) (2001) *at* http://www.un.org/law/ilc/reports/2001/2001report.htm.

One of the difficulties with the Law of State Responsibility is identifying a state injured by breach of an MEA obligation. [43] This is evident in the case of environmental damage caused by the cumulative effects of activities by multiple states, such as ozone depletion or global warming.[44] Moreover, the remedies of restitution or compensation under the Law of State Responsibility are inappropriate in the environmental context, particularly where the aim of a regime is to prevent irreversible environmental damage.[45] Therefore, although not all authors explicitly discuss this issue, it seems reasonable to infer the high compliance rate with international law is not explained by a fear of the general sanctions under the Law of State Responsibility.[46] This inference is also supported by the trend in MEA negotiations to introduce non-compliance procedures.[47]

Overall, scholars generally agree that compliance with international law is high, especially with MEAs. However, the Law of State Responsibility does not explain the high compliance levels. Therefore, we need an adequate explanation of why compliance is high, to encourage future compliance, especially as the obligations agreed to in MEAs increase, as well as to justify the existence of international law. The literature differs on explanations for the "why" question. While most authors begin from the same starting block, they take different paths on the compliance continuum.

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[42] *See* Martti Koskenniemi, *Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol,* 3 Y.B. INT'L ENV. L. 123 (1992); Ehrmann, *supra* note 28 at 379.
[43] Jacob Werksman, *Compliance and the Kyoto Protocol: Building a Backbone into a "Flexible" Regime,* 9 Y.B. INT'L ENV. L. (1999) 48, 60.
[44] Ehrmann, *supra* note 28 at 380.
[45] Fitzmaurice & Redgwell, *supra* note 13.
[46] Note that the law of treaties is another traditional avenue available under international law to secure compliance. In the climate change context there are similar difficulties associated with the law of treaties as for the Law of State Responsibility. Werksman, *supra* note 43, at 58.
[47] The Kyoto Protocol provides the most recent example of this. Fitzmaurice & Redgwell, *supra* note 13.

II. THE COMPLIANCE CONTINUUM

The compliance continuum is the range of theories explaining why nations comply with international law. It is bordered at one end by the managerial school of Abram and Antonia Chayes, and at the other by the enforcement model of George Downs. The continuum represents a general transition from legal theorists relying on normative arguments and against using enforcement to secure compliance with international law, to political economists relying on instrumentalist arguments who advocate for the use of enforcement in instances where the stakes are high. Moreover, as the debate moves more towards supporting enforcement, effectiveness becomes a key focus, rather than just compliance with international law, especially in the MEA context.

A. The Managerial School: Or the "Chayesian approach"

The *New Sovereignty* by Abram and Antonia Chayes marks one end of the compliance continuum and the start of the contemporary discussion on understanding compliance with international law. One of the central arguments of *The New Sovereignty* is that coercive enforcement mechanisms are not only rarely used to ensure compliance with international treaties, but they are also likely to be ineffective if used.[48] According to the Chayeses, "the fundamental instrument for maintaining compliance with treaties at an acceptable level is an iterative process of discourse among the parties, the treaty organization, and the wider public."[49] The Chayeses argue that management tools, such as transparency, reporting, verification and monitoring, dispute resolution and capacity

[48] Chayes & Chayes, *supra* note 14, at 2.
[49] *Id.* at 25.

building are the key to designing a compliance regime to encourage compliance. This theory is commonly referred to in the literature as the "managerial school."[50]

The managerial school argues that reasons relating to efficiency, interests and norms explain the general propensity of states to comply with international law.[51] First, compliance is an efficient strategy because it saves recalculating the costs and benefits of not complying.[52] Secondly, it is generally in a state's self interest to comply, as states are unlikely to negotiate and consent to agreements contrary to their interests.[53] Finally, norms contribute to the general propensity of states to comply. The Chayeses define norms as "*prescriptions for action in situations of choice*, carrying a sense of obligation, a sense that they *ought* to be followed."[54] They argue that compliance with a treaty is motivated by agreement with the norms enunciated in the treaty.[55] Also, one of the fundamental norms of international law, *pacta sunt servanda*, "treaties are to be obeyed" encourages compliance. Finally, the managerial school argues that where non-compliance does occur, this is not the result of willful disobedience.

The Chayeses identify three factors as the causes of non-compliance with international law. These are ambiguity in the terms of an obligation, lack of capacity to carry out an obligation and a change in circumstances.[56] Given these factors, coercive enforcement would not, according to the managerial school prevent non-compliance. Sanctions are

[50] *E.g.* Downs et al., *supra* note 5, at 379.
[51] Chayes & Chayes, *supra* note 14, at 4.
[52] *Id*.
[53] *Id*.
[54] *Id*. at 113.
[55] Abram Chayes, Antonia Handler Chayes & Ronald B. Mitchell, *Managing Compliance: A Comparative Perspective*, *in* ENGAGING COUNTRIES, *supra* note 17, at 39, 42.
[56] Chayes & Chayes, *supra* note 14, at 10.

futile as a response to non-compliance because of the costs imposed on both the sanctioning state and the sanctioned state. Illegitimacy is also identified by the Chayesian approach as explaining the futility of sanctions, particularly where the sanctions are imposed unilaterally. The Chayeses argue that, *inter alia*, unilateral sanctions fail the requirement applicable to all law enforcement: that crucial determinations should be made by basically fair procedures.[57]

At the core of the managerial school of thought is an emphasis on the interdependence of the community of states. The need to belong to that community encourages compliance with international norms and therein lies the Chayeses' "New Sovereignty." They comment that "[c]onnection to the rest of the world and the political ability to be an actor within it are more important than any tangible benefits in explaining compliance with international regulatory agreements."[58] Koh captures their thesis as, "the impetus of compliance is not so much a nation's fear of sanction, as it is fear of diminution of status through loss of reputation."[59]

B. Fairness Theory: Legitimacy and Equity

Thomas Franck's fairness theory "admirably mirrors and complements" the Chayesian approach to compliance.[60] Although Franck does not specifically set out to answer the compliance question, he argues that a perception that the law is fair

[57] *Id*. at 106.
[58] *Id*. at 27.
[59] *Supra* note 14, at 2636.
[60] Koh, *id*. at 2644.

encourages compliance.[61] His theory is presented as an analytical framework for a critique of international law, where fairness is the defining criterion. Franck refers to such a critique as engaging in fairness discourse.[62]

Franck defines fairness as having dual components: substantive and procedural. Substantive fairness refers to distributive justice, or equity. While noting the difficulty in defining equity, Franck argues that equity is developing into an important aspect of the international legal system.[63] He contends that the allocation among states of scarce resources provides an area where notions of distributive justice are accepted as relevant in international law.[64]

Legitimacy, the second component of Franck's fairness, refers to "that attribute of a rule which conduces to the belief that it is fair because it was made and is applied in accordance with 'right process.'"[65] "Right process" is based on the contractarian underpinnings of the sources of international law.[66] According to Franck, indicators of right process or legitimacy are determinacy (the clarity of the rule),[67] symbolic validation (cues signaling authority),[68] coherence (treating like cases alike and relating in a

[61] As Koh, *id.* at 2641 notes, Franck's central question is not why do nations obey international law, but is international law fair?
[62] *Supra*, note 14 at 9.
[63] *Id*. at 79.
[64] *Id*. at 56.
[65] *Id*. at 26.
[66] *Id*. at 29.
[67] *Id*. at 30.
[68] *Id*. at 34.

principled fashion to other rules of the same system),[69] and adherence (conformity with the international community's procedural and institutional framework).[70]

Both aspects of fairness are important to encourage compliance with international law. However, Franck recognizes that considerations of equity and legitimacy may not always "pull in the same direction."[71] The legitimacy component privileges order, yet equity privileges change by incorporating superceding notions of justice where to do so would be more distributively just than the established rules. While acknowledging this dichotomy, Franck believes it is not an insurmountable hurdle in the search for fairness. Rather, fairness provides the conceptual tool to manage the change-order tension.[72]

One of Franck's preconditions for analyzing fairness in international law is a sense of community.[73] Similar to the Chayesian approach, Franck suggests that sovereignty has a new meaning in current international relations owing to the "contemporary state of global interdependence."[74] Again, similar to the managerial school, his theory is normative, as Franck argues that states obey international law because they believe they ought to. Franck relies on the compliance pull of international norms developed through discourse.

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[69] *Id*. at 38.
[70] *Id*. at 41.
[71] *Id*. at 7.
[72] Franck does not set out how fairness manages the two variables, but merely suggests that it is possible. But see Gerry J. Simpson, *Is International Law Fair?*, 17 MICH. J. INT'L L. 615, 626 (1996) who reviews Franck's theory and notes Koskenniemi (MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (1989)) has demonstrated it is impossible to reconcile procedural and distributive justice.
[73] *Supra* note 14, at 10. The other precondition is moderate scarcity, which Franck argues describes the existing situation.
[74] *Id*. at 4. Note this part of Franck's framework has attracted substantial criticism as many scholars dispute the existence of a global community. Phillip R. Trimble, *Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy*, 95 MICH. L. REV. 1944 (1997); Dino Kritsiotis, *Imagining the International Community*, 13 EUR. J. INT'L. L. 961 (2002).

"If a decision has been reached by a discursive synthesis of legitimacy and justice, it is more likely to be implemented and less likely to be disobeyed."[75] The field of MEAs provides useful examples of how according to Franck, this works in practice.

Franck discuses the negotiation of the Vienna Convention for the Protection of the Ozone Layer ("Vienna Convention")[76] and the Montreal Protocol on Substances that Deplete the Ozone Layer ("Montreal Protocol") as an example of fairness discourse in action. The ozone agreements created a regime where richer countries help poorer countries to meet their undertakings to reduce, and eventually phase out all ozone depleting substances.[77] Franck argues that this is an acknowledgment of lesser-developed countries' fairness claims: "to exemption, to technology transfer, and to compensatory financing."[78] For richer countries, providing the necessary assistance was seen as fair, as well as efficient.[79] Moreover, Franck suggests that the evidence of a substantial reduction in the rate of emissions of ozone-depleting substances by 1993 supports his case that fair agreements are more likely to be complied with.[80]

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[75] *Supra* note 14, at 481.
[76] Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, 1513 U.N.T.S. 293, 26 I.L.M. 1516 (entered into force Sep. 22, 1988), *available at* http://www.unep.ch/ozone/vc-text.shtml [hereinafter the Vienna Convention].
[77] Articles 5, 9 and 10 of the Montreal Protocol.
[78] S*upra* note 14, at 384.
[79] Franck *id.* at 381 comments, "[t]he industrial world, which at first rejected all resource transfer, came to realize that it would be both fair, and ultimately, cheaper, for the rich nations to help the poor to adapt to the changes that global ozone layer protection will require of them."
[80] *Id.* Note that current figures show the production and consumption of global ozone depleting substances has reduced by more than 80 % and that the size of the ozone hole was smaller in 2002. However, the ozone recovery may be attributable to natural atmospheric variations. International Institute for Sustainable Development, *Summary of the Fourteenth Meeting of the Parties to the Montreal Protocol and the Sixth Conference of the Parties to the Vienna Convention: 25-29 November 2002* 19(24) EARTH NEGOTIATIONS BULL. (2002) *at* http://www.iisd.ca/linkages/download/pdf/enb1924e.pdf.

In terms of compliance regimes for MEAs in general, Franck's analysis suggests that the current approach is on the right track. He argues the contemporary approach to MEAs including, framework agreements (such as the Vienna Convention, or the FCCC), secretariats generating scientific and economic data to assist implementing conferences, and third-party processes for resolving disputes create "legitimate and legitimating regimes."[81]

However, contrary to the Chayeses' analysis, which explicitly discusses sanctions, the efficacy or otherwise of coercive enforcement is not a prominent feature of Franck's fairness theory. The logical inference of his theory is that if a rule is seen to be fair, then coercive enforcement will be unnecessary. Despite this, he does not explicitly rule out sanctions as an effective mechanism to secure compliance in some areas of international law. For example, in the area of collective security, while not supporting the use of sanctions, Franck notes they may have had some effect in causing Rhodesia and South Africa to comply with international mandates.[82] It is a logical extension of Franck's theory that if enforcement is employed, to be effective the mechanism will need legitimacy. Franck's theory however, has not gone uncriticized.[83]

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[81] *Supra* note 14, at 412.
[82] *Id.* at 290.
[83] For example, Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT'L L.J. 487, 493 (1997) comments, "[f]or instance, Franck describes a rule's compliance 'pull power' as 'its index of legitimacy.' Yet legitimacy is said to explain 'compliance pull,' making the argument circular." *See also Review Essay Symposium: Thomas M. Franck's Fairness in International Law and Institutions (1995)* in 13 EUR. J. INT'L L. 901-1030 (2002); Book Reviews: Chin Lim, *Managing Competing Claims for Distributive Justice and Due Process Within the Contemporary Global Legal Order*, 16 LEGAL STUD. 254 (1996); Simpson, *supra* note 75; Phillip R. Trimble, *Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy*, 95 MICH. L. REV. 1944 (1997).

C. Transnational Legal Process: Koh's "Missing Link"

Harold Koh argues that while both the Chayeses and Franck provide insights into understanding why nations comply with international law, neither theory is complete.[84] Koh argues that both theories emphasize voluntary obedience and internalized compliance, but neither Franck nor the Chayeses explain how norm-internalization occurs. Koh believes that transnational legal process provides the missing link.[85]

Transnational legal process is defined by Koh as "the process whereby an international law rule is interpreted through the interaction of transnational actors in a variety of law-declaring fora, then internalized into a nation's domestic legal system."[86] Professor Koh views this process as comprised of three phrases. The process starts with an interaction provoked by one or more transnational actors, causing interpretation of an applicable global norm.[87] Koh notes that the aim of this provocation is not to coerce the other party to comply with the norm, but to "*internalize* the new interpretation of the international norm into the other party's internal normative system."[88] A new legal rule is created which will guide transnational interactions between the parties in the future, as well as the internalization of these norms through future interactions.[89] In sum, the three phases are interaction, interpretation, and internalization.[90]

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[84] Koh, *supra* note 14, at 2602.
[85] *Id.* at 2656.
[86] Harold Hongju Koh, *Bringing International Law Home*, 35 HOUS. L. REV. 623, 626 (1998).
[87] *Supra* note 14, at 2646.
[88] *Id*.
[89] Koh, *id.*, uses as his one of his primary example the Anti-Ballistic Treaty Reinterpretation Debate concerning the Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3435 between the U. S. and the former U.S.S.R., *available at* http://www.state.gov/www/global/arms/treaties/abm/abm2.html [hereinafter the ABM Treaty]. The ABM

Koh's theory not only explains why nations obey international law, but also suggests a course of action for persuading nations to continue to obey.[91] Although his essay is a preliminary theory as he has a book forthcoming,[92] part of Koh's strategy for encouraging compliance includes empowering more actors to participate in the process.[93] He also proposes that further study of the transnational legal process is required. Using human rights as an example, Koh suggests subjects of inquiry include the role of intergovernmental organizations, nongovernmental organizations, private business entities and "transnational moral entrepreneurs," and available fora for norm-enunciation and elaboration.[94]

Similar to Franck, Koh does not engage in the debate about the effectiveness of coercive enforcement. As Koh theorizes that nations obey international law because the norms are internalized into domestic legal systems, enforcement through coercive mechanisms is not an issue. Rather, Koh argues that we should seek to acquire a greater understanding of the transnational legal process.

Treaty banned the development of space-based systems for territorial defense. The U.S. government attempted to reinterpret the treaty to allow a proposed Strategic Defense Initiative. Koh argues that transnational legal actors, including a U.S. Senator and non-governmental organizations provoked a series of interactions with the U.S. government challenging the broad interpretation of the ABM Treaty to allow the Strategic Defense Initiative. This process eventually led to the U.S. government executive branch adopting the narrow interpretation and ensured U.S. compliance with international law.

[90] *Id.*

[91] *Id.* at 2655.

[92] HAROLD KOH, WHY NATIONS OBEY: A THEORY OF COMPLIANCE WITH INTERNATIONAL LAW (forthcoming).

[93] *Supra* note 14, at 2656.

[94] *Id.*

It is not clear however, how transnational legal process applies to MEAs as Koh draws most of his examples from the area of human rights and security. Yet, other authors who also note the importance of internalization of international norms have applied the theory to the environmental context. Victor, while not opposed to the use of enforcement (discussed below) comments on the significance of transnational legal process in encouraging compliance. He suggests that, "[p]olicymakers could focus commitments on 'liberal states' in which internal public pressure, for example, from environmental groups, and robust legal systems make it possible to enforce international commitments from inside (ground-up) rather than outside (top-down)."[95]

Similarly, Young, a prominent international relations theorist emphasizes the importance of incorporating international law into domestic politics.[96] However, not all authors agree that transnational legal process satisfactorily answers the compliance question.

D. Reputational Theory: Rational Self-interested States

A newcomer to the compliance debate, Andrew Guzman challenges the theories of the Chayeses, Franck and Koh for inadequately explaining the causal question, why nations obey.[97] Rather, Guzman argues that all three authors merely assert that they do.[98] While

[95] *Supra* note 4, at 148.
[96] Young, *supra* note 14, at 249, although Young takes a slightly different tack.
[97] Guzman, *supra* note 38.
[98] *Id.* at 1832 and 1836.

still grounded in legal theory, Guzman draws on international relations literature to develop a reputational theory of compliance.[99]

Guzman contends that reputational concerns and direct sanctions explain why states comply with international law.[100] His theory is founded on a model of rational self-interested states.[101] He argues that states will defect from international law when the benefits outweigh the costs, applying classical prisoner's dilemma game theory in mixed motive problems.[102] In the domestic setting, law solves the prisoner's dilemma by providing a penalty for defections.[103] Guzman argues in international law that sanctions prevent defection. He defines sanctions as "all costs associated with such a failure, including punishment or retaliation by other states, and *reputation* costs that affect a state's ability to make commitments in the future."[104] When the costs of sanctions outweigh benefits of defecting, nations will obey the law. According to Guzman, the converse is also true. When sanctions, including the reputation effect of violating an international norm do not outweigh the benefits of complying, states will defect. Guzman argues that his theory provides an explanation for non-compliance with international law, overlooked by some traditional legal scholarship.[105]

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[99] See Jutta Brunnee and Stephen J. Toope, *Environmental Security and Freshwater Resources: Ecosystem Regime Building*, 91 AM. J. INT'L L. 26 (1997) for another legal theory relevant to compliance, which draws on international relations literature.
[100] Guzman, *supra* note 38, at 1886.
[101] *Id.* at 1852.
[102] *Id.* at 1847 where Guzman uses the prisoner's dilemma game model to illustrate the reputational effects.
[103] *Id*. at 1844.
[104] *Id*. at 1845 (emphasis added).
[105] *Id.* at 1849.

Given the paucity of existing enforcement mechanisms in international law and MEAs in particular, reputation is the key to Guzman's theory. He argues that the reputation of a state has value.[106] For example, a reputation for compliance with international law encourages cooperative relations with other states. Accordingly, violating international law compromises that reputation and will affect future relations. Where, as sometimes occurs, a country does not want to foster a reputation for high compliance, direct sanctions provide the mechanism for securing compliance.

In putting reputational concerns at the hub of his theory, Guzman's theory appears similar to the Chayeses' "New Sovereignty." The Chayeses make a similar claim that part of the answer to the compliance question is that states comply to avoid a bad reputation on the world stage. Where Guzman and the Chayeses differ, is their reasons for non-compliance. Guzman argues states defect where the cost of defection is not as great as the benefits. Conversely, as noted above, the Chayeses argue defection occurs because of ambiguity in the terms of the treaty, lack of capacity and a change in circumstances.

However, both Guzman and the Chayeses agree that sanctions can be costly (on both sanctioned and sanctioning states) and involve issues of legitimacy. Similar to the Chayeses, one of the key legitimacy issues noted by Guzman is that sanctions are generally imposed unilaterally by injured party states, rather than by a neutral third party.[107] Despite this problem, in some situations, sanctions can provide an efficient

[106] *Supra* note 38, at 1849.
[107] *Id*. at 1867.

incentive to comply. Guzman argues that sanctions will work best in bilateral relationships, and complex, ongoing relationships.[108]

Guzman notes that his reputational theory of compliance has its limits. In areas where the stakes are high, such as state security, the compliance pull of maintaining a good reputation weakens.[109] He argues that loss of reputation will not outweigh the benefits of defecting where the issue is of critical importance to the state.[110] In the area of trade and environmental regulation, however, Guzman asserts the stakes are smaller, and international law can have real impact.[111]

Despite concluding that that environmental regulation is an area where international law can have real impact, Guzman does not apply his theory in any depth to international environmental law.[112] Additionally, Guzman does not consider the argument presented in the introduction, that while compliance with MEAs is high, this is in large part because of the shallowness of the agreements. If MEAs are to have any real effect in responding to global environmental problems, it appears likely that the depth of cooperation must increase. The Kyoto Protocol provides the most recent example where the Parties have introduced more onerous obligations to address the environmental problem.[113] That is, the stakes have risen and Guzman's conclusion becomes less applicable. Here the debate

[108] *Id.* at 1868.
[109] *Id.* at 1883.
[110] *Id.* at 1874, 1883.
[111] *Id.* at 1885.
[112] To illustrate the practical application of his reputational theory of compliance Guzman, *id*. at 1851 discusses bilateral investment treaties and their effect on country behavior. He argues that international law will have greater effect on economic issues than on military issues.
[113] Werksman, *supra* note 43, at 49 notes that these commitments "are arguably the most ambitious environmental commitments ever set by an international agreement."

moves beyond compliance, into addressing the effectiveness of international environmental law.

E. Beyond the Law: International Relations Theory

The effectiveness of international law, rather than compliance is the traditional concern of international relations theorists.[114] While a detailed examination of the various international relations' perspectives is beyond the scope of this essay,[115] one of the leading international relations scholars, Oran Young, engages in the compliance debate.[116] Young focuses on regimes, defined as "social institutions consisting of agreed upon principles, norms, rules, procedures, and programs that govern the interactions of actors in specific issue areas."[117] His concern is understanding the effectiveness of regimes, measuring effectiveness by behavioral consequences. That is, "whether regimes or governance systems play a role in shaping or guiding the behavior of those … whose behavior is targeted by a regime's provisions."[118] Therefore, Young's analysis is focused not on why nations comply, but rather on what are the sources of effective regimes.[119]

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[114] See ENVIRONMENTAL REGIME EFFECTIVENESS, *supra* note 26 for a recent in depth analysis of the effectiveness of international environmental law from the perspective of international relations theory.
[115] See Guzman, *supra* note 38, at 1836 for a "thumbnail sketch" of three schools of thought in international relations literature: neorealist theory, institutionalist theory and liberal theory.
[116] ORAN R.YOUNG, GOVERNANCE IN WORLD AFFAIRS (1999); THE EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL REGIMES, *supra* note 14.
[117] Marc A. Levy, Oran R. Young & Michael Zurn, *The Study of International Regimes,* 1 EUR. J. INT'L REL. 267, 274 (1995), cited in Young & Levy, *The Effectiveness of International Environmental Regimes*, *in* THE EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL REGIMES 1, *id*, at 1.
[118] YOUNG, GOVERNANCE IN WORLD AFFAIRS, *supra* note 116, at 110.
[119] *Id*. at 115 and 117.

However, despite concentrating on effectiveness, Young engages in the compliance debate. Young's view is that the management approach to compliance is generally preferable to enforcement. He argues it is simplistic to rely on enforcement to capture collective benefits, as the relationship between actor behavior and compliance is more complex.[120] In an analysis of the effectiveness of several international regimes addressing environmental problems, Young and his colleagues identify several mechanisms, or behavioral pathways that operate to influence state behavior.[121] They conclude that all mechanisms influence the effectiveness of regimes, and that the degree of influence varies across different regimes.[122]

Nonetheless, Young falls towards the far end of the compliance continuum as he is not entirely opposed to enforcement. "Rather, [his] analysis suggests that enforcement is more important under some conditions than others and that circumstances exist in which enforcement mechanisms can operate effectively in the absence of anything we would normally call a "government."[123]

Again, similar to the Chayeses and Guzman, Young points out that sanctions may pose legitimacy concerns.[124] Moreover, legitimacy emerges as an important factor in several of the regimes identified by Young *et al*. as effective. Legitimacy falls under one the behavioral mechanisms labeled "Regimes as Bestowers of Authority," where "social norms rooted in considerations of legitimacy or authoritativeness often guide the

[120] *Id.* at 106.
[121] Young & Levy, *supra* note 117, at 19.
[122] Oran R. Young et al., *supra* note 14, at 260.
[123] YOUNG, GOVERNANCE IN WORLD AFFAIRS, *supra* note 116, at 80.
[124] *Id.* at 100.

behavior of individuals and collective entities alike."[125] Young concludes that in many of the cases studied the model of a regime as a bestower of authority was an important dynamic contributing to the effectiveness of the regime.[126] For example, successes relating to the international oil pollution regime are partly attributable to the legitimacy and authority accorded by states and non-state actors to the regime, allowing the promulgation of regulations to address vessel-source marine pollution.[127]

F. The Enforcement Model: Political Economics Theory

The final theory on the compliance continuum is the enforcement model of political economists Downs et al..[128] They argue that while coercing compliance is not a panacea, enforcement should not be ruled out as an option. Their theory directly challenges the Chayesian approach. The key critique of the enforcement model is that the managerial school misinterprets the evidence. Downs et al. argue it is a mistake to infer that enforcement is unnecessary from the relatively high compliance levels and lack of enforcement mechanisms.[129] Downs and his co-authors point out that as treaty obligations are the result of consensual agreements, states are unlikely to either negotiate, or enter into, agreements that contain obligations they are unable to meet.[130] They characterize the basis for state selection as "depth of cooperation."

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[125] Young & Levy, *supra* note 118 at 23. Note Young & Levy refer to THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990) in explaining this model.
[126] Young et al., *supra* note 14, at 261.
[127] Ronald Mitchell et al., *International Vessel-Source Oil Pollution*, *in* THE EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL REGIMES, *supra* note 15, at 34, 84.
[128] *Supra* note 5.
[129] *Id.*
[130] Downs et al., *id.* at 382, discuss an orchestra selecting a piece of music to perform at a concert to illustrate their point. In their hypothetical story funding of musical education has been reduced. To consider the effects of the cut backs, the number of mistakes made by an orchestra within a district not subject to the funding cuts, and an orchestra subject to the funding cuts is measured. The number of

Depth of cooperation refers to the extent to which a treaty "requires states to depart from what they would have done in its absence."[131] According to the Downsian[132] view, deep cooperation is rare in international accords.[133] Downs et al. discuss the set of arms agreements made by the United States post 1945 to support their case. Specifically, the Outer Space Treaty,[134] the Seabed Arms Control Treaty[135] and the Antarctic Treaty[136] are cited as examples of agreements to maintain the status quo. Neither the Soviet Union, nor the United States had either a strategic mission for a major weapons system in these areas, or cost-effective plans at the time the treaties were signed.[137] Downs et al. comment:

> While we are not denying that obtaining tangible reassurance of a rival's intentions through a treaty is valuable, it is difficult to argue that these treaties exhibit the deep cooperation that would have taken place if the superpowers had

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mistakes is low for both, despite reduced rehearsals for the orchestra subject to funding cuts. Downs et al. argue it is a mistake to conclude from this that funding for rehearsals does not improve performance. They argue that it is likely that the orchestra with fewer rehearsals chose a less demanding piece. That is, orchestras are likely to choose their performance repertoire to match their level of ability, preferring not to play a demanding piece where they might make mistakes. Similarly, states enter treaties they know they can comply with.

[131] *Supra* note 5 at 383.

[132] Anastasia A. Angelova, *Compelling Compliance with International Regimes: China and the Missile Technology Control Regime*, 38 COLUM. J. TRANSNAT'L L. 419, 434 (1999) (refers to the political economic theory as "Downsian.")

[133] Downs et al., *supra* note 5, at 388.

[134] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18(3) U.S.T. 2410, 610 U.N.T.S. 205 (entered into force Oct. 10, 1967), *available at* http://www.state.gov/www/global/arms/treaties/space1.html

[135] Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in The Subsoil Thereof, Feb. 11, 1971, 23(1) U.S.T. 701; 955 U.N.T.S. 115 (entered into force May 18, 1972), *available at* http://www.state.gov/www/global/arms/treaties/seabed1.html.

[136] Antarctic Treaty, Dec. 1, 1959, 12(1) U.S.T. 794, 402 U.N.T.S. 71 (entered into force June 23, 1961), *available at* http://www.state.gov/t/ac/trt/4700.htm.

[137] Downs et al., *supra* note 5, at 389.

each agreed to terminate major modernization programs or dramatically reduce their defense budgets.[138]

Moreover, they also suggest the probability that if either state significantly broke an agreement, the other state would retaliate in kind, supports their case that enforcement contributes to compliance.[139]

Downs et al. argue that an absence of deep cooperation is also evident in international environmental law. [140] For example, in contrast to Franck, who cites the Montreal Protocol as an effective MEA, Downs et al. are not as convinced. They refer to studies that suggest the Montreal Protocol did not contribute to altering state behavior, as states were already committed to reducing chlorofluorocarbon emissions.[141] Another example discussed by Downs et al. is the Mediterranean Plan,[142] which responds to pollution in the Mediterranean Sea. Downs et al. argue the Plan has no meaningful restrictions on dumping and pollution has increased.[143]

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[138] *Id.*
[139] *Id*.
[140] *Id.* at 391.
[141] Scott Barrett, *Self-enforcing international environmental agreements*, 46 OXFORD ECON. PAPERS 878, 892 (1994); James C. Murdoch & Todd Sandler, The voluntary provision of a pure public good: The case of reduced CFC emissions and the Montreal Protocol 2 (Typescript, 1994), *cited in* Downs et al., *supra* note 4, at 391.
[142] Convention for the Protection of the Mediterranean Sea Against Pollution, Feb. 16, 1976, (entered into force Feb. 12, 1978, (revised in Barcelona, Spain, on June 10, 1995 as the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, not yet in force), *available at* http://www.unep.ch/seas/main/med/medconvi.html [hereinafter the Mediterranean Action Plan].
[143] *Supra* note 4, at 396. See Jon Birger Skjærsh, *The Effectiveness of the Mediterranean Action Plan, in* ENVIRONMENTAL REGIME EFFECTIVENESS, *supra* note 26, at 311 for an analysis from international relations theory considering the effectiveness of the Mediterranean Action Plan.

Additionally, Downs et al. argue that where they believe MEAs have been successful, enforcement played a greater role than the managerialists would credit. For instance, they argue that the creation of the 200-mile exclusive economic zone improved the effectiveness of fishing agreements issued under international fisheries commissions, as it made enforcement easier. Before the creation of the exclusive economic zone, Downs and his colleagues argue compliance was problematic because states were not pressuring their fisherman to obey the rules.[144] The key problem was lack of incentive to obey the rules where it was perceived others are likely to disobey.[145]

In sum, the crux of the Downsian view is that there is a connection between the depth of cooperation and the level of punishment necessary to maintain compliance where there are strong incentives to defect. "The political economy theory predicts that … [an] increase in the incentive for defection will have to be offset by increases in the size of the threatened punishment."[146] As Downs notes, there are difficulties in testing this theory, such as the lack of enforcement mechanisms in MEAs. Moreover, if there are enforcement mechanisms that are not used, the effect on negotiations, which took place in the "shadow of a more formal enforcement process," is difficult to determine.[147] Despite these difficulties, Downs cites an analysis of fifty environmental agreements as evidence supporting the enforcement model. Each agreement was assigned a depth of cooperation score and a level of enforcement score.[148] The result was that the strongest

[144] *Supra* note 5, at 395.
[145] *Id*.
[146] George W. Downs, *Enforcement and the Evolution of Cooperation*, 19 MICH. J. INT'L L. 319, 333 (1998).
[147] *Id*. at 332.
[148] *Id*. at 333.

enforcement provisions accompanied the agreements requiring the deepest cooperation.[149]

The Downsian view is a persuasive critique. As noted in the introduction, despite the proliferation of MEAs addressing an extensive range of global environmental problems, environmental issues are not being solved. The enforcement model is the only theory in the compliance continuum providing a compelling explanation for this reality. Furthermore, Downs is not alone in his caution against dismissing the efficacy of coercive enforcement mechanisms, especially where more onerous obligations are introduced.[150] For example, Victor agrees with Downs et al. that coercive enforcement measures are sometimes needed, particularly when the cooperation is deep and incentives to defect are high.[151] Victor is also critical of the current record of MEAs, concurring with Downs that the high compliance rate is explained by shallow cooperation. One of the examples Victor discusses to support his claim that in international cooperation "the lowest common denominator prevails,"[152] is the regulation of sulfur oxide emissions under the 1985 Sulfur Protocol.[153] He comments that because sulfur was a leading cause

[149] *Id.*
[150] Although not in the MEA context, Angelova, *supra* note 132, at 445 supports the Downsian view that enforcement should not be ruled out as an effective compliance mechanism. She discusses the Missile Technology Control Agreement ("MTCA"), which aims to limit the spread of missiles and missile technology. Angelova makes two points that concur with Downs' view. First, she argues that original members of the MTCA achieved high compliance rates as the agreement was shallow; member states agreed to only minimal behavior changes. Second, when new states entered that had incentives to defect, their compliance was secured through sanctions (although the sanctions were external to the MTCA regime and imposed unilaterally by the United States).
[151] Victor, *supra* note 3, at 152 also notes this theory is difficult to prove, as there are few strong enforcement mechanisms to analyze.
[152] *Id.* at 153.
[153] Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on the Reduction of Sulphur Emissions or Their Transboundary Fluxes by at Least 30 Per Cent, July 8, 1985, 1480 U.N.T.S. 215 (entered into force Sep. 2, 1987) *available at*

of urban air pollution several countries were already regulating sulfur oxide emissions prior to the conclusion of the 1985 Sulfur Protocol.[154] In sum, Victor's answer to the compliance question concurs with Downs: "high compliance is the consequence of shallow cooperation."[155]

III. TAKING STOCK

A. Converging Theories?

Overall, the literature reveals that there is no general consensus on why nations comply with international law in general, or specifically with MEAs. However, some scholars have suggested that general compliance principles can be drawn from the theories, even the ostensibly contradictory views of the management school and the enforcement model.

Danish argues that an analysis of the substance of the managerial school reveals the Chayeses are not as opposed to enforcement as they assert.[156] He notes that elements of the managerial school, such as verification and deterrence are in fact elements of enforcement.[157] Also, relying on threats of disapproval affecting a state's reputation to secure compliance falls closer to enforcement, rather than management. According to Danish, "[n]o matter how they frame it, the regimes of the New Sovereignty would do

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http://sedac.ciesin.columbia.edu:9080/entri/texts/transboundary.air.pollution.protocol.sulphur.emissions.1985.html.

[154] *Supra* note 3, at 153.

[155] *Id.* at 152.

[156] *Supra* note 35, at 804.

[157] *Id.*

more than merely offer technical and financial assistance. They would also coerce."[158] He re-conceptualizes the Chayesian approach as a managerial strategy and a social enforcement strategy,[159] where social enforcement refers to enforcement through leveraging loss of reputation and standing in the international community.[160]

Perhaps Danish is correct in suggesting that some of the differences between the Chayeses and Downs et al. are semantic, depending on how each theory defines enforcement. Even so, it is clear that the Chayeses are opposed to enforcement in the form of sanctions,[161] and that Downs et al. are not. Additionally, as will be further discussed below, both approaches fundamentally differ as to the reasons for instances of non-compliance.

Keohane also seeks to reconcile the two ends of the compliance continuum, labeling the divergent views as the instrumentalist and the normative optic. [162] The instrumentalist optic focuses on interests. According to instrumentalists, "rule and norms will matter only if they affect calculations of interests by agents."[163] Instrumentalism is largely the domain of political scientists and thus falls at the end of the continuum with international relations theory. Keohane's normative optic describes international legal theory, where the legitimacy of rules explains compliance. Both Franck's fairness theory and the Chayeses' managerial approach are classified as normative.

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[158] *Id*.
[159] *Id.* at 809.
[160] *Id.* at 807.
[161] Chayes & Chayes, *supra* note 14, at 2: "[t]he effort to devise and incorporate such sanctions [coercive economic or military] in treaties is largely a waste of time."
[162] Keohane, *supra* note 83.
[163] *Id*. at 489.

Keohane agues that neither the normative or instrumentalist optic adequately explains how predicted results follow from the theory's assumptions.[164] In an attempt to synthesize the two optics, he suggests that interests, reputations and institutions are common to the causal pathways of both optics. Instrumentalists' interests are "power, wealth, and position (position in the international system with regard to states and offices for individuals)."[165] However, while Keohane argues international lawyers also consider interests, he notes it is a legitimate concern (also raised by political scientists) that it can be difficult to identify whose, and which, interest.[166]

The importance of reputation in encouraging compliance is also common to both optics.[167] But, Keohane points out that reputation encompasses not only a reputation for keeping agreements, but can be "less savory," such as for punishing enemies and does not always encourage compliance.[168] Downs and Jones also argue reputation is not as simplistic as legal theorists suggest.[169] In considering the importance of reputation, Downs and Jones conclude that first, nations have varying levels of reliability in relation to different agreements.[170] Secondly, considerable evidence supports the contention that states possess multiple or segmented reputations.[171] In the MEA context Downs and Jones argue that presently, defection appears to have narrow implications for treaties in

[164] *Id.*
[165] *Id*. at 495.
[166] *Id*. at 496.
[167] *Id.*
[168] *Id*. at 498.
[169] George W. Downs & Michael A. Jones, *Reputation, Compliance and International Law* 31 J. LEGAL STUD. 95 (2002).
[170] *Id.* at 113.
[171] *Id.*

other areas. They conclude that in international environmental regulation reputation contributes the least to promoting compliance.[172]

The linchpin of Keohane's synthesis is institutions. Again, he argues both optics believe institutions matter.[173] However, Keohane emphasizes the importance of institutions as they allow the fusion of the normative and instrumentalist optic. According to Keohane, interests depend on reputations.[174] He argues that interests are changeable, depending on information, as well as causal beliefs and principled beliefs. Therefore, Keohane argues norms influence interests. Reputational concerns also influence interests. And, to complete the argument, reputations depend on institutions, as they "affect what kind of reputation it is most useful to acquire."[175]

Finally, in considering the possible convergence of the differing theories along the compliance continuum, legitimacy emerges as a crucial consideration. While only Franck puts legitimacy at the center of his analysis, the Chayeses, Guzman and Young all note that the use of enforcement raises legitimacy issues. Although not directly considering the compliance question in international law, Brunnee and Toope reach a similar conclusion, commenting that " … the penchant of some international lawyers for demanding "enforcement" of a supposed norm will often prove ineffective if there is no

[172] *Id.* at 112.
[173] Keohane, *supra* note 83, at 499.
[174] *Id.* at 500.
[175] *Id.*

common acceptance of the norm's legitimacy."[176] Moreover, Bodansky argues that the search for legitimacy is the coming challenge of international environmental law.[177]

Bodansky claims that to effectively respond to global environmental problems, stronger institutions and decision-making mechanisms not dependent on consensus among states are required.[178] Although consent has traditionally formed the justification of authority in international environmental law, consensus decision-making usually results in weak agreements,[179] or in Downsian terminology "shallow cooperation." However, stronger international governance based on non-consensual decision-making raises the question of legitimacy, defined by Bodansky as the "justification for authority."[180] He argues that owing to the lack of an international demos, democracy cannot fill the legitimacy deficit.[181] Therefore, Bodansky calls for further work on how to legitimize international environmental regimes.[182]

The most vocal proponent of enforcement, Downs, does not directly respond to the legitimacy challenge.[183] Nonetheless, it is not clear that Downs is only advocating for unilateral sanctions, which pose the biggest legitimacy threat. Therefore, attempting to legitimize the use of enforcement within a MEA framework may contribute to reconciling the key point of contention, whether enforcement encourages compliance.

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[176] *Supra* note 99 at 31.
[177] Daniel Bodansky, *The legitimacy of international governance: A coming challenge for international environmental law?,* 93 AM. J. INT'L. L. 596 (1999).
[178] *Id.* at 623.
[179] *Id.* at 607.
[180] *Id.* at 601.
[181] *Id.* at 615.
[182] *Id.* at 623.
[183] See *supra* note 147, at 321 where Downs comments on the political economic view of enforcement strategies noting "[t]he legitimacy of the strategy under international law is rarely an issue."

B. Key Points of Contention

The literature divides over the use of enforcement. The Chayeses advocate the extreme view that enforcement will not prevent non-compliance. In contrast, the instrumentalists say, that when there are incentives to defect, enforcement is required. The underlying disagreement is therefore, not why nations comply, but why sometimes, they do not.

The Chayeses argue non-compliance with an international law is not because of willful disobedience. Rather, as noted above, it is because of uncertainty in the terms of the treaty, lack of capacity or modified circumstances. Therefore, the use of sanctions would not have any effect on compliance, as it would not influence any of the causal factors leading to defection.

The instrumentalists challenge those reasons. According to Guzman and Downs et al., states disobey international law when it is in their interest to do so.[184] Moreover, Downs argues that it is difficult to test the managerial reasons of non-compliance, as they do not necessarily preclude premeditated defection.[185] First, Downs is cynical about the extent to which ambiguity really explains non-compliance. He notes the political economy model would "suspect that ambiguity is often built into the agreement intentionally as a device that negotiators can use strategically to reap the political benefits of reaching an agreement when one might otherwise not be achieved."[186] Secondly, Downs argues that capacity limitations may also be related to deliberate non-compliance. For example,

[184] *See* Downs et al., *supra* note 14; Guzman, *supra* note 38.
[185] *Supra* note 147, at 330.
[186] *Id*. at 330.

administrators responsible for implementing the detail of an agreement may not be under the perfect control of the policymakers responsible for signing the agreement. The administrator may, according to Downs, "find it more profitable or simply easier to do a less vigorous job of implementation than he might be capable."[187]

However, it is important to emphasize that Downs et al. only support enforcement when the stakes are high. This follows from their central contention that the shallowness of current MEAs explains the high compliance rate. If what has been agreed to represents current domestic policies, then non-compliance is not an issue. The Chayeses, Franck and Koh do not adequately respond to this. In doing so, the normative theories appear to overlook a key empirical observation relating to the shallowness of many MEAs.

To be fair, all three normative theories do not explicitly focus on compliance and MEAs. Rather, they are developing a general theory of compliance with international law. However, as a general theory, it should be applicable to any policy area. This essay suggests that either all three theories are incomplete, or that, understanding compliance with MEAs requires separate consideration.

C. Suggestions for Further Research

Accordingly, further research is required to ascertain whether any general theory of compliance is possible. The Chayeses, Franck, Koh and Guzman all consider the compliance question in the broader context of international law as a whole. It is not clear

[187] *Id.*

that any such general theory is possible. Young comments that, "[t]here is no reason to assume that international institutions – or any other social institutions will be equally effective (or ineffective) across space, time, and issue area."[188] For example, the reason nations may or may not comply with international humans rights law, may differ to international environmental law. Young also agues, that within the environmental context there may not be one model regime applicable to all environmental issues.[189] Rather than seeking for a "recipe" to apply across the board, he suggests we should interpret each problem based on understandings gained from in depth analysis of other problems.

Additionally, in evaluating whether the recent call for stronger enforcement is necessary to secure compliance with the Kyoto Protocol, and other MEAs, scholars should focus their research on why nations defect from MEAs, as this remains one of the key points of contention. As noted by Keohane, "[t]o understand success, we need to understand failure."[190]

Finally, further research is required into possible stronger enforcement mechanisms, as there are few models. In considering possibilities, scholars should concentrate on the legitimacy of these mechanisms, given that the lack of legitimacy is a common concern among theorists opposed to enforcement.

[188] Young & Levy, *supra* note 117.
[189] *Supra* note 116, at 131.
[190] Robert O. Keohane, *When does international law come home?* 35 HOUS. L. REV. 699, 713 (1998).

CONCLUSION

In conclusion, despite the recent proliferation of literature addressing the compliance question, scholars remain divided as to why nations obey international law. The literature reveals a contest between the Chayesian approach arguing for managing compliance, and the Downsian view supporting enforcement when there are high incentives to defect. While these two views represent both ends of the compliance continuum, not all scholars engage in the debate. Koh in particular, takes a different tack to the compliance question, focusing instead on the domestic internalization of international norms.

However, in the context of MEAs, as countries focus on implementing the numerous treaties in force, the resolution of the compliance question is a big issue. As noted in the introduction, during the Kyoto Protocol negotiations nations believed an increase in obligations beyond those in the FCCC should be accompanied by stronger enforcement mechanisms. Was that sentiment well founded?

My answer to the question do we need stronger enforcement mechanisms to secure compliance with MEAs, is yes, when there are strong incentives to defect. Moreover, increasing the effectiveness of the international response to global environmental problems calls for more onerous obligations, thereby creating stronger incentives to defect, and the depth of cooperation. To be effective, however, stronger enforcement mechanisms must posses legitimacy. Creating legitimate enforcement mechanisms to secure compliance with MEAs exhibiting deeper cooperation is the key to reconciling the

disparate ends of the compliance continuum, and address global environmental degradation.