

AN INTRODUCTION TO THEORIES OF WHY STATES AND FIRMS DO (AND DO NOT) COMPLY WITH LAW

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SUMMARY

Theories about compliance provide different accounts of why States, firms, and individuals comply with or do not comply with international and domestic laws. The discussion in this paper focuses on theories of compliance behavior at two principal levels of governance – international and domestic – and the interplay between them.

1 INTRODUCTION

Theories about compliance provide different accounts of why international and domestic actors – States, firms, and individuals – comply with or do not comply with international and domestic laws. These theories are useful lenses for viewing and understanding compliance-related behavior and the reasons behind that behavior. Because they provide distinct perspectives on what motivates compliance and non-compliance, these theories suggest different approaches that state and non-state actors can use to influence States and firms to comply with laws designed to further environmental protection and sustainable development.

Theories about international compliance are largely about the behavior of States – about how and why they comply with international law. Theories about domestic compliance, on the other hand, focus more on the behavior of firms and

individuals. In two important ways, however, theories about international and domestic compliance are remarkably similar.

First, international law, especially in the environmental realm, generally is given effect through implementation of domestic laws and regulations. So on the practical level, theories of domestic compliance are in many instances also theories about international compliance. According to one prominent author, “no significant distinction exists between international regimes and the rules of purely domestic regimes once the international rules have been domesticated through the passage of implementing legislation.”¹ Of course, important distinctions remain between the domestic and international spheres. International agreements must be agreed to by States, and States must pass implementing legislation and provide the resources for enforcement and compliance, at least for environmental agreements. In addition to providing frameworks for domestic regula-

tion, treaties also can regulate the conduct of States, as with nuclear test ban treaties. The international and domestic realms also differ in the tools, resources, and strategies available to encourage compliance.

Second, both domestic and international theories of compliance can be grouped into similar categories. Broadly speaking, they tend to fall into either:

- (1) "rationalist" models that focus on deterrence and enforcement as a means to prevent and punish non-compliance by changing the actor's calculation of benefits and costs, or
- (2) "normative" models that focus on cooperation and compliance assistance as a means to prevent non-compliance. Both domestic and international compliance theories also vary according to the degree they disaggregate the targets of regulation, either treating States and firms as unitary entities or recognizing that both are made up of multiple actors.

2 THE LOGIC OF BEHAVIOR: CONSEQUENCES VS. APPROPRIATENESS

At the broadest level, questions of compliance are questions about behavioral motivations. What leads a State, firm, or individual to act in compliance with laws? In *The Institutional Dynamics of International Political Orders*, James March and Johan Olsen divided the basic logic of human action into the "logic of consequences" and the "logic of appropriateness."² The "logic of consequences" views actors as choosing rationally among alternatives based on their calculations of expected consequences, whereas the "logic of appropriateness" sees actions as based on identities, obligations, and conceptions of appropriate action. While not mutually exclusive, these broad categories provide a useful starting point for discussing the particular international and domestic theories of compliance, and the specific approaches that flow from these different logics of action.

3 THEORIES OF INTERNATIONAL COMPLIANCE

Scholars in international law and international relations have developed a variety of theories about why States do (or do not) comply with international law; each theory provides useful and often complementary insights into the puzzle of compliance.

3.1 Logic of Consequences: Rationalist Theories

Rationalist theories, following the logic of consequences, are utilitarian at their core. They posit States as unitary, rational, self-interested actors that calculate the costs and benefits of alternative actions in an anarchic international world order. Given this view of States as rational-choice actors, rationalist theories – at least those that see international law as having any effect – suggest that enforcement and deterrence are the main ways to prevent non-compliance.

The principal rationalist theories that view international law as having little or no effect are realism and neorealism, in which "considerations of power rather than of law determine compliance."³ Combined, the two realist theories explain compliance with international rules as being a result of one of three situations:

- 1) a hegemonic State or group of powerful States forces other States to comply;
- 2) the international rules merely reflect current practice or expected future practice; or
- 3) the international treaty resolves a situation in which no party has an incentive to violate the treaty.

In the modern international arena, States are no longer the only actors that can exert sufficient power by themselves to influence the behavior of other States; major sources of finance such as multinational corporations and multilateral development banks are increasingly important players in international power dynamics, as are NGOs. Regardless of the source of

influence, realist theories view “compliance” with international law as largely either a coincidence or a result of international power dynamics.

Unlike realist theories, institutionalism sees a role for international institutions, namely to facilitate cooperation that is in the States’ long-term interests and to prevent short-term defections that might jeopardize those long-term interests. Institutionalism, unlike realism, sees compliance with international law as strategic. One strain of institutionalism known as enforcement theory or political economy theory focuses more on the costs end of the cost-benefit compliance calculation. As international agreements get “deeper” – demanding greater changes in the actors’ behavior from the status quo – enforcement theory argues that the incentives for States to violate the agreement also grow, thereby requiring greater punishments to deter non-compliance and sustain cooperation. These punishments can be retaliatory, monetary, political, or reputational.

Liberalism or liberal international relations theory is largely a rationalist model, but it discards the assumption that States are properly viewed as unitary rational agents. Liberalism disaggregates the State and places the focus on domestic political processes. Compliance comes from the favorable effect of international law and legal institutions on domestic interests, who mobilize to pressure the government to comply – a phenomenon more likely to be found in liberal States. While losing the simplicity and clarity of the theories just discussed, liberalism seems to more fully capture the complexity of state decision-making, and highlights the role that NGOs, businesses, the media, and international organizations, including financial institutions, can play in generating compliance.

3.2 Logic of Appropriateness: Normative Theories

Normative theories, following the logic of appropriateness, focus more on the normative power of rules, the persuasive power of ideas and legal obligations, and

the influence of shared discourse and knowledge on States’ interests. Accordingly, normative theories suggest a more cooperative approach to obtaining compliance. Even though they provide a different lens on compliance behavior than “rationalist” models, normative models do not assume States are acting irrationally; rather, they broaden the focus to include influences that are not as readily reducible to costs and benefits. Compliance, under this view, is less about rational calculation or imposed sanctions and more about norms of behavior and norms of obligation flowing from law’s special role as an ordering principle of societies.

The banner of normative theory encompasses a range of perspectives. One theory in this vein, articulated most prominently by Thomas Franck, is legitimacy theory, which maintains that “in a community organized around rules, compliance is secured – to whatever degree it is – at least in part by the perception of a rule as legitimate by those to whom it is addressed.”⁴ Legitimacy – which is largely based on process, clarity, and fairness – determines the rules’ “compliance-pull” on governments.

Managerialism, developed by Abram and Antonia Chayes, starts with the premise that States have a propensity to comply with their international commitments because:

- (1) treaties generate legal norms, which carry a widely accepted obligation of obedience;
- (2) States rationally have an interest in complying with rules they helped to create;
- (3) compliance is efficient from a bureaucratic inertia or internal decisional perspective.⁵

Given this propensity, managerialism argues that instances of non-compliance are often inadvertent, stemming from lack of capacity or resources, ambiguous commitments and provisions, and time lags between commitment and performance. As such, these sources of noncompliance can

be managed by routine, non-confrontational international political processes – such as dispute resolution procedures, technical and financial assistance, and transparency – aimed at the collective improvement of performance.

Transnational legal process, a theory put forth by Harold Koh, posits that States obey international rules when they internalize the norms and incorporate them into their own value system.⁶ This process begins when one or more transnational actors (diplomats, NGOs, issue networks, etc.) work with other such actors on a legal issue, over time requiring interpretation and enunciation of the norms applicable to the interaction. These norms are then internalized into domestic structures through executive, judicial, and legislative action. Repeated international participation leads to a continued process of creating and internalizing legal norms, which leads nations to reconstitute their own interests and identities, and to obey international law. Like liberalism, this theory disaggregates the State, highlighting the role that non-state parties such as NGOs, businesses, scientists, and networks can play in enunciating norms in the international arena and internalizing them domestically.

4 THEORIES OF DOMESTIC COMPLIANCE

Theories of compliance at the domestic level study responses not of States, but of citizens and firms, to laws and legal commands. At the domestic level, coercive enforcement measures are usually more readily available than at the international level; indeed, many theorists mark the absence of formal sanctioning authority at the international level as a critical distinction between domestic and international law. (Although in States that lack capacity to impose meaningful sanctions, this distinction may be irrelevant in practice.) While there are significant similarities between international and domestic theories – including the distinction between rationalist and normative approaches – they also differ as they address, and are

shaped within, a different context.

4.1 Logic of Consequences: Rationalist Theories

Like its international counterpart, the rationalist model of domestic compliance follows the logic of consequences, positing regulated firms as rational actors that act to maximize their economic self-interest. Accordingly, these theories emphasize enforcement and deterrence to change the firm's calculation of benefits and costs.

Seminal early work on domestic theory of compliance and enforcement was done by Gary Becker, addressing the enforcement of criminal law.⁷ His basic insight is that potential offenders respond to both the probability of detection and the severity of punishment if detected and convicted. Thus, deterrence may be enhanced either by raising the penalty, by increasing monitoring activities to raise the likelihood that the offender will be caught, or by changing legal rules to increase the probability of conviction.

Deterrence theory extends the Becker model to corporate non-compliance and maintains that there must be a credible likelihood of detecting violations; swift, certain, and appropriate sanctions upon detection; and a perception among the regulated firms that these detection and sanction elements are present. The job of an enforcement agency under this view is to make penalties and the probability of detection high enough that it becomes irrational for firms to violate the law. As with the more nuanced international rationalist models such as institutionalism, a view of "costs" broader than merely monetary costs opens up a range of enforcement options, including extra-legal "punishments" such as moral stigma and loss in reputation.

Behavioral decision theory adds a deeper dimension to rationalist theories by acknowledging the role that people's cognitive biases can play in their "rational" calculations and highlighting the importance of factors such as how a particular choice is framed (e.g., people choose differently

when a choice is framed as the number of lives that will be saved instead of the number of lives that will be lost) or how probabilities of detection, prosecution, and punishment are presented (e.g., people choose differently when probabilities for each stage in a chain of events are presented instead of when the overall probability is presented).

4.2 Logic of Appropriateness: Normative Theories

As in the international arena, normative theories of domestic compliance follow the logic of appropriateness, viewing regulated entities as good-faith actors that want to obey the law but cannot. The heart of normative theories is that firms are institutions that are generally inclined towards compliance with environmental laws, whether because of civic motives, social motives, or internalization of societal norms favoring environmental protection. But generally, the theory holds that firms comply because of a “compliance norm”, fueled by the belief that laws that are developed and implemented fairly should be followed. As in some of the international normative theories, compliance is expected to be higher when individuals and firms believe the rules are legitimate and fairly applied. Under the normative model, this compliance norm affects behavior even absent legal sanctions.

Like their international counterparts, normative domestic theories posit that noncompliance occurs largely because of the regulated entities’ lack of “capacity” (knowledge of the rules, and financial and technological ability to comply) and “commitment” (determined by norms, perceptions of the regulators, and incentives for compliance). Accordingly, these theories call for a more cooperative approach to ensuring compliance, with the full range of compliance assistance strategies such as dissemination of information, technological assistance, and inspections designed to enable inspectors to provide compliance advice.

The complexity critique, although

more about bureaucratic and administrative limitations than about norms, focuses on the “capacity” of the regulated firm, charging that environmental regulations are:

- (1) too numerous,
- (2) too difficult to understand,
- (3) too fluid, or ever-changing, and
- (4) too hard to find.⁸

According to proponents of this critique, most firms do not know what constitutes perfect compliance and so cannot achieve it. This would particularly be the case for small businesses, which generally lack the resources to stay apprised of complicated, changing regulatory requirements.

The role of regulated firms’ “commitment” is most evident when considering firms’ perceptions of the legitimacy of the regulatory authorities, which is influenced by the firms’ views of how fairly the regulations are created, implemented, and enforced.

4.3 Disaggregating the Firm and Broadening the Field of Players

Like some international theories, the usual forms of both the rationalist (deterrence-based) and normative (cooperative) domestic models treat the regulated entity as a unitary actor — the “firm” calculates penalties or the “firm” has a compliance norm. However, firms are composed of multiple actors. The focus on the unitary actor can mask strategies that incorporate a broader range of players, both within and outside the regulated entity.

By disaggregating the firm, for example, additional considerations enter into play as forces influencing compliance behavior. For instance, because firms are made up of human beings, the inner workings of firms are heavily influenced by the effect of norms on the behavior of firm employees. In a fascinating article, Michael Vandenbergh explored the influence of eight norms (law compliance, human health protection, environmental protection, autonomy, fair process, good faith, reci-

procuity, and conformity) on the environmental compliance decision-making of corporate managers.⁹ But norms, including the compliance norm, only become salient when the actor gets cues that indicate that the norm is relevant. This means that the compliance norm will only get triggered when the actor:

- (1) knows of the legal standard,
- (2) is aware of business activities that are potentially governed by the standard, and
- (3) believes that he or she has the authority and/or responsibility within the firm to initiate actions leading to compliance.¹⁰

This reality implicates the importance of intra-firm informational flows, organizational theory, and the interactions and potentially conflicting goals of shareholders, owners, senior managers, subordinate managers, and employees.

The focus of domestic compliance efforts can also be expanded further, taking a systems approach to describe a multi-player game. For instance, States can empower NGOs, investors, consumers, lawyers, competitors, and others through mandatory information disclosure laws, through citizen suit provisions, or simply by disclosing information about violators to the public and the media. Regulators also can facilitate the \$500 billion per year environmental goods and services sector to act as additional "enforcers", giving incentives to press their clients (and potential clients) to improve compliance. Designing effective compliance systems requires a detailed understanding of a range of entities, their relationships, and the motivations of their behavior.

4.4 Blending Rationalist and Normative Models

Both rationalist and normative models provide useful insights into behavior that leads to compliance. As in the international realm, these models are not mutually exclusive, but rather are different lenses for viewing and understanding influ-

ences on compliance behavior. Both are at play in compliance decisions.

A synthesis of the two theories presents a more realistic picture of enforcement and compliance as it actually occurs. The proper balance of the two models thus seems to be a compliance enforcement system that also encourages the norms and incentives that lead to voluntary compliance, while maintaining the bedrock foundation of enforcement and deterrence to alter the calculations of those less inclined to voluntarily comply. As noted by the eminent jurist H.L.A. Hart, "what reason demands is voluntary co-operation in a coercive system."¹¹

5 CONCLUSION

These theories provide important lenses for viewing compliance behavior. While they focus on different drivers of behavior, and thus implicate different compliance strategies, these theories should not be thought of as mutually exclusive. "It is perfectly possible to argue that soft compliance paths have great potential with regard to regulatory regimes without denying that there is a hard core of noncompliance that will not yield to such treatment."¹²

Compliance theories need to continue to help us understand the reality we face. The more they disaggregate the State and the firm and focus on the institutions and individuals within them, the more they reflect the reality of decision-making and empower actors of all types in governments and civil society.

Theories and hypotheses also need to be tested. Policies and strategies need to be informed by analyses of what works and what does not, so that these approaches can be modified. In other words, it is important to combine theory and empirical analysis, so that we can keep moving towards a system in which we implement programs, go out and determine if they are really working, and then adjust accordingly, "in a continuous information feedback loop that enables dynamic readjustment of policy and practice."¹³

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