



CHAPTER TWO

COMPLIANCE THEORIES

INTRODUCTION

This chapter introduces a selection of the best literature on compliance theory, an issue central to the rule of law. Theories about compliance provide accounts of why different 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. As such, they 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. They also inform the discussion of the more specific topics discussed later in this book, including those on the role of courts, tribunals, and liability; the contribution of non-governmental organizations; the function of information regulation and indicators; the choice of strategies by regulators; and the role of networks such as INECE in strengthening compliance.

The discussion in this chapter focuses on compliance at two principal levels of governance, and the interplay between them. 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 regulation, 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.

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? The first article excerpted in this chapter, by James March and Johan Olsen, divides 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,

¹ ORAN R. YOUNG, *Is Enforcement the Achilles’ Heel of International Regimes?* in GOVERNANCE IN WORLD AFFAIRS 93 (1999).

² James G. March & Johan P. Olsen, *The Institutional Dynamics of International Political Orders*, 52(4) INT’L ORG., 949-54 (1998). See also Thomas Risse, *‘Let’s Argue!’: Communicative Action in World Politics*, 54(1) INT’L ORG., 3-7 (2000) (discussing March & Olsen).



obligations, and conceptions of appropriate action.³ 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.

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. The second and third articles excerpted in this chapter, by Kal Raustiala and Ronald Mitchell, lay out the basic causal theories of state behavior, the different conceptions of compliance and non-compliance, and the implications for strategies for eliciting compliance at the international level.⁴

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.

³ For a discussion of the “logic of consequences” and the “logic of appropriateness” in the context of the effects of the new compliance mechanisms in the Kyoto Protocol’s climate regime, see RONALD B. MITCHELL, *Flexibility, Compliance and Norm Development in the Climate Regime*, in IMPLEMENTING THE CLIMATE REGIME: INTERNATIONAL COMPLIANCE 65, 76-80 (Olav Schram Stokke, Jon Hovi, & Geir Ulfstein, eds., 2005).

⁴ Kal Raustiala, *Compliance & Effectiveness in International Regulatory Cooperation*, 32 CASE W. RES. J. INT’L L. 387, 399-411 (2000); and Ronald B. Mitchell, *Compliance Theory: An Overview*, in IMPROVING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL LAW, 3-28 (James Cameron, Jacob Werksman, & Peter Roderick, eds., 1996). Other good overviews are laid out in Ronald B. Mitchell, *Regime Design Matters: Intentional Oil Pollution and Treaty Compliance*, 48(3) INT’L ORG., 425-58 (1994); and in KAL RAUSTIALA & ANNE-MARIE SLAUGHTER, *International Law, International Relations and Compliance*, in HANDBOOK OF INTERNATIONAL RELATIONS (2002). For a good overview with application to international human rights, see Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002). For a good discussion of non-compliance with EU law, see Tanja A. Börzel, Tobias Hofmann, & Carina Sprungk, *Why Do States Not Obey the Law? Non-Compliance in the European Union*, paper prepared for presentation at Leiden, June 11-12, 2004, available at http://www.boerzel.uni-hd.de/forschung/docs/boerzel_hofmann_sprungk_2004.pdf.

The principal realist 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.”⁵ Realist theories thus view “compliance” with international law as largely either a coincidence or a result of international power dynamics.⁶

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.⁷ Institutionalism, unlike realism, sees compliance with international law as strategic.

One strain of institutionalism known as *enforcement theory* or *political economy theory*, described in the fourth article excerpt by George Downs, focuses more on the costs end of the cost-benefit compliance calculation.⁸ 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.⁹ These punishments can be retaliatory, monetary, political, or affect reputation.¹⁰

Liberalism or *liberal international relations theory* is largely a realist 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.¹¹ Compliance comes from the

⁵ HANS JOACHIM MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE*, 299 (5th ed. 1978). See also Hathaway, *supra* note 4, at 1944-46.

⁶ 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.

⁷ Hathaway, *supra* note 4, at 1947-49 (citing, e.g., ROBERT O. KEOHANE, *AFTER HEGEMONY* (1984); ROBERT O. KEOHANE, *Institutional Theory and the Realist Challenge After the Cold War*, in *NEOREALISM AND NEOLIBERALISM: THE CONTEMPORARY DEBATE* 269, 271 (David A. Baldwin ed., 1993). See also RAUSTIALA & SLAUGHTER, *supra* note 4, at 540 (explaining “regime theory”).

⁸ George W. Downs, *Enforcement and the Evolution of Cooperation*, 19 MICH. J. INT’L L. 319 (1998).

⁹ *Id.* at 329, 335; YOUNG, *supra* note 1, at 86-87; RAUSTIALA & SLAUGHTER, *supra* note 4, at 543 (citing George W. Downs, David Rocke, & Peter Barsoom, *Is the Good News about Compliance Good News about Cooperation*, 50(3) INT’L ORG., 379-406 (1996)).

¹⁰ Downs, *supra* note 8, at 324. For more on reputational costs, see Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823 (2002).

¹¹ Raustiala, *supra* note 4, at 409-11. See also Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51(4) INT’L ORG., 513 (1997). A classic form of this

continued



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.¹² 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.

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. Normative models do not assume states are acting irrationally, but rather broaden the focus to include influences that are not as readily reducible to costs and benefits.¹³ The concept of “compliance without enforcement” is explored more thoroughly in an article by Oran Young, the fifth excerpt in this chapter.¹⁴

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.”¹⁵ Legitimacy – which is largely based on process, clarity, and fairness – determines the rules’ “compliance-pull” on governments.¹⁶

Managerialism, developed by Abram and Antonia Chayes, argues that instances of non-compliance are often inadvertent, stemming from lack

theory is the “democratic peace” argument – that democratic states do not go to war with each other. See, e.g., Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 12 PHIL. & PUB. AFF. 205 (1983).

¹² Hathaway, *supra* note 4, at 1953 (citing Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 278 (1997) [excerpted *infra* in Chapter Five: Courts, Tribunals, & Liability].

¹³ Raustiala, *supra* note 4, at 405.

¹⁴ YOUNG, *supra* note 1.

¹⁵ Thomas M. Franck, *Legitimacy in the International System*, 82 AMER. J. INT’L L. 705, 706 (1988).

¹⁶ *Id.* For a related discussion in the domestic field, see TOM R. TYLER & STEVEN L. BLADER, *COOPERATION IN GROUPS: PROCEDURAL JUSTICE, SOCIAL IDENTITY, AND BEHAVIORAL ENGAGEMENT* (2000).



of capacity or resources, ambiguous commitments and provisions, and time lags between commitment and performance.¹⁷ As such, these sources of non-compliance can be managed by routine international political processes.¹⁸

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 systems.¹⁹ 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.²⁰

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.²¹ 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.

¹⁷ Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47(2) INT'L ORG., 175 (1993). See also CHAYES & CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995).

¹⁸ Chayes & Chayes, *supra* note 17, at 204.

¹⁹ Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997). See also Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397 (1998); RAUSTIALA & SLAUGHTER, *supra* note 4, at 544 (discussing Koh).

²⁰ For more information on the role of NGOs and networks, see *infra*, Chapter Six: NGO Compliance Strategies and Chapter Twelve: Transgovernmental Networks.

²¹ See, e.g., GREENING INTERNATIONAL INSTITUTIONS, xvi (Jacob Werksman, ed., 1996) (“[T]he absence of institutions empowered to enforce international obligations by compulsorily settling disputes between states has often been cited as the Achilles’ heel of the international legal system.”). Several of the articles in this volume illustrate that there are effective sanctions in some MEAs; other articles discuss more informal sanctions, including reputational sanctions, that can operate at the international level.



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 firms' calculations of benefits and costs.

Seminal early work on domestic compliance and enforcement theory was done by Gary Becker, addressing the enforcement of criminal law. Becker's article is the sixth excerpt in this chapter.²² 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.²³

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.²⁴ 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.²⁵

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

²² Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76(2) J. POLITICAL ECON., 169 (1968).

²³ *Id.* at 207-09; Mark A. Cohen, *Empirical Research on the Deterrent Effect of Environmental Monitoring and Enforcement*, 30 ELR 10245 (2000).

²⁴ CLIFFORD RECHTSCHAFFEN & DAVID L. MARKELL, REINVENTING ENVIRONMENTAL ENFORCEMENT AND THE STATE/FEDERAL RELATIONSHIP, 60-61 (2003). See also Jon D. Silberman, *Does Environmental Deterrence Work? Evidence and Experience Say Yes, But We Need to Understand How and Why*, 30 ELR 10523 (2000). See *infra* Chapter Four: Domestic Enforcement Strategies for a fuller discussion of deterrence.

²⁵ Cohen, *supra* note 23, at 10245-46. See also Mark A. Cohen, *Monitoring and Enforcement of Environmental Policy* 5, 45-47 (1998), available at http://www.worldbank.org/nipr/work_paper/cohen/cohen.pdf.



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).²⁶

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.²⁷ Like their international counterparts, normative domestic theories posit that compliance occurs (or does not occur) largely because of the regulated entities' "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).²⁸ 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.²⁹

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."³⁰ 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.³¹

²⁶ Jeff T. Casey & John T. Scholz, *Beyond Deterrence: Behavioral Decision Theory and Tax Compliance*, 25(4) L. & SOC'Y REV. (1991); Daniel Kahneman, *Maps of Bounded Rationality: A Perspective on Intuitive Judgment and Choice*, Nobel Prize Lecture, at 456-57 (Dec. 8, 2002). See also Cass R. Sunstein, *Moral Heuristics*, BEHAVIORAL & BRAIN SCIENCES, 9-11 (forthcoming 2005).

²⁷ Timothy F. Malloy, *Regulation, Compliance and the Firm*, 76 TEMP. L. REV. 451, 454-55 (2003).

²⁸ Cohen, *Monitoring and Enforcement*, *supra* note 25, at 7 (citing Burby, R.J. & R.G. Paterson, *Improving Compliance with State Environmental Regulations*, 12(4) J. POLICY ANALYSIS & MGMT, 753-72 (1993)).

²⁹ Cohen, *supra* note 23, at 10245-46; RECHTSCHAFFEN & MARKELL, *supra* note 24, at 68, 70.

³⁰ David B. Spence, *The Shadow of the Rational Polluter: Rethinking the Role of Rational Actor Models in Environmental Law*, 89 CALIF. L. REV. 917, 931 (2001).

³¹ *Id.* at 973.



The role of regulated firms' "commitment" is most evident when considering firms' perceptions of the legitimacy of the regulatory authorities, which is influenced by how fairly the regulations are created, implemented, and enforced.³²

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.

The seventh excerpt in this chapter, by Timothy Malloy, reviews the two strands of compliance theory and, by disaggregating the firm, adds a third consideration: organizational theory, principal-agent theory, and the influence of intra-firm informational flows and conflicting goals as forces influencing compliance behavior.³³

The eighth excerpt in this chapter, by Michael Vandenberg, highlights the influence of eight norms (law compliance, human health protection, environmental protection, autonomy, fair process, good faith, reciprocity, and conformity) on the environmental compliance decision-making of corporate managers.³⁴

Disaggregation beyond that done by these two authors is also possible. Domestic compliance efforts can take a systems approach to describe a multi-player game. For instance, states can empower NGOs, investors, consumers, lawyers, competitors, and others through mandatory

³² Malloy, *supra* note 27, at 468-69 (referencing the normative framework in TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990), often characterized as the leading presentation of the normative model of compliance); RECHTSCHAFFEN & MARKELL, *supra* note 24, at 70; Spence, *supra* note 30, at 982.

³³ Malloy, *supra* note 27. For an interesting article about firms and employee sanctions in the environmental context, see Kathleen Segerson & Tom Tietenberg, *The Structure of Penalties in Environmental Enforcement: An Economic Analysis*, 23 J. ENVTL ECON. & MGMT, 179-200 (1992). For consideration of firms investing in "uninspectability" and other challenges to enforcement, see Anthony Heyes, *Implementing Environmental Regulation: Enforcement and Compliance*, 17(2) J. REGULATORY ECON., 110-113 (2000).

³⁴ Michael P. Vandenberg, *Beyond Elegance: A Testable Typology of Social Norms in Corporate Environmental Compliance*, 22 STAN. ENVTL. L. J. 55 (2003).



information disclosure laws, through citizen suit provisions, or simply by disclosing information about violators to the public and the media.³⁵ Regulators also can facilitate the US\$500 billion per year environmental goods and services sector to act as additional “enforcers,”³⁶ 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 motivations, and their relationships.

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 influences on compliance behavior. Both are at play in compliance decisions.³⁷

A synthesis of the two theories presents a more realistic picture of enforcement and compliance as it actually occurs. The ninth and final excerpt in this chapter, by Clifford Rechtschaffen and David Markell, concludes that a proper balance of the two models is 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.³⁸ As noted by the eminent jurist H.L.A. Hart, “what reason demands is *voluntary* co-operation in a *coercive* system.”³⁹

³⁵ For more discussion on information disclosure programs, empowerment of NGOs and other third parties, see Chapter Five: Courts, Tribunals, & Liability; Chapter Six: NGO Compliance Strategies; Chapter Seven: Information Regulation; Chapter Nine: Compliance Assistance & “Beyond Compliance”; and Chapter Twelve: Transgovernmental Networks.

³⁶ Cohen, *Monitoring and Enforcement*, *supra* note 25, at 43-45; John Hasseldine & Zhuhong Li, *More tax evasion research required in new millennium*, 31 CRIME, L. & SOC. CHANGE, 91, 93-94 (1999) (describing tax preparers as potential “enforcers” of tax law).

³⁷ Malloy, *supra* note 27, at 456, 474-75 (quoting IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE*, 31 (1992), describing firms as “bundles of contradictory commitments to values of economic rationality, law abidingness, and business responsibility. Business executives have profit-maximizing selves and law-abiding selves; at different moments, in different contexts, the different selves prevail.”).

³⁸ RECHTSCHAFFEN & MARKELL, *supra* note 24, Chapters 2 & 5.

³⁹ H. L. A. HART, *THE CONCEPT OF LAW*, 198 (2nd ed. 1994) (describing the “minimum content of natural law” necessary for any society to function).