



CHAPTER NINE

COMPLIANCE ASSISTANCE & “BEYOND COMPLIANCE”

INTRODUCTION

This chapter introduces a selection of the best literature in the field of compliance assistance, including private sector efforts and “beyond compliance.”¹ At their core, these efforts are about enabling and encouraging actors to voluntarily comply with laws that protect the environment and promote sustainable development. Under the rationalist theory of compliance, (described in Chapter Two: Complinace Theories), rational actors base their decision to comply on a self-interested calculation, balancing the costs and benefits of compliance against the costs and benefits of non-compliance.² But compliance at both the domestic and international level generally is a more complicated affair for a range of reasons.

At the domestic level, small and medium-sized firms often lack the capacity to comply. This may be due to a lack of capital, technical expertise, technology, or other necessary resources. Cooperative measures are therefore important to supplement deterrence-based strategies, as explained in the first excerpt in this chapter from Malcolm K. Sparrow’s book *The Regulatory Craft*.³

At the international level, developing and transition countries often struggle to comply with Multilateral Environmental Agreements (MEAs) because of a lack of capacity. The Montreal Protocol is one of the few MEAs with a robust compliance assistance program to ensure broad

¹ Beyond compliance has been described as a “[v]oluntary overmeeting of environmental standards.” See Seema Arora & Shubhashis Gangopadhyay, *Toward a theoretical model of voluntary overcompliance*, 28 J. ECON. BEHAVIOR & ORG., 289 (1995). See also BEYOND COMPLIANCE: A NEW INDUSTRY VIEW OF THE ENVIRONMENT (Bruce Smart ed., 1992).

² See Kal Raustiala, *Compliance & Effectiveness in International Regulatory Cooperation*, excerpted in Chapter Two: Compliance Theories.

³ MALCOLM K. SPARROW, *THE REGULATORY CRAFT: CONTROLLING RISKS, SOLVING PROBLEMS, AND MANAGING COMPLIANCE* (2000).



compliance. Countries in non-compliance are eligible to receive financial and technical assistance designed to strengthen capacity and help implement and enforce domestic legislation required under the treaty.⁴

Additionally, the United Nations Environment Programme (UNEP), the United Nations Economic Council for Europe (UNECE), the Global Environment Facility (GEF),⁵ and others have produced guidelines to facilitate implementation and compliance with certain MEAs.⁶ The UNEP Guidelines, for instance, highlight several compliance assistance strategies, including sharing of experiences, evaluating the effectiveness of technology transfer, and drafting model legislation. But apart from these efforts, most MEAs do not have sufficient financial resources to provide significant compliance assistance.

At the regional level, the EU provides formidable financial and technical assistance to its Accession Countries to strengthen their institutional capacity to implement and ensure compliance with EU laws and regulations, as described in the second excerpt in this chapter, by Georges Kremlis and Jan Dusik.⁷ The EU provides such support for the many years needed to approximate the *environmental acquis* and to build sufficient capacity before formal accession.⁸

At the domestic level, small- and medium-sized enterprises (SMEs) often lack the capacity to bring their businesses into compliance with environmental standards. A recent study in the U.K. noted that SMEs

⁴ See K. Madhava Sarma, *Compliance with the Montreal Protocol*, excerpted in Chapter Three: Multilateral Environmental Agreements in Action (noting that from 1991-2004, the non-Article 5 Parties pledged nearly US\$ 1.89 billion and paid nearly US\$ 1.63 billion to the Multilateral Fund.). See also David G. Victor, *The Operation and Effectiveness of the Montreal Protocol's Non-Compliance Procedure*, in *THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE* (David G. Victor, Kal Raustiala, & Eugene B. Skolnikoff eds., 1998).

⁵ The GEF helps developing countries fund projects and programs that protect the global environment. GEF grants support projects related to biodiversity, climate change, international waters, land degradation, the ozone layer, and persistent organic pollutants. See <http://www.gefweb.org>.

⁶ See Elizabeth Mrema and Carl Bruch, *UNEP Guidelines and Manual on Compliance with and Enforcement of Multilateral Environmental Agreements (MEAs)*, excerpted in Chapter 3: Multilateral Environmental Agreements in Action (with Appendix, "A Survey of Other Guidance and Initiatives for Implementing MEAs").

⁷ Georges Kremlis & Jan Dusik, *The Challenge of the Implementation of the Environmental Acquis Communautaire in the New Member States*, 7th INECE Conference Proceedings (forthcoming 2005).

⁸ See ECOTEC, *The Benefits of Compliance with the Environmental Acquis for Candidate Countries*, available at http://europa.eu.int/comm/environment/enlarg/pdf/benefit_long.pdf.



comprise more than 99 percent of the 3.7 million businesses in the U.K. and generate about 60 percent of its commercial waste and as much as 80 percent of the pollution in England and Wales.⁹ The study revealed that 82 percent of the SMEs could not name any environmental legislation unprompted, and 77 percent had not taken any measures aimed at reducing harm to the environment. Non-compliance rates among SMEs in developing and transition countries presumably are even higher.

Because environmental laws are often complex, compliance assistance is especially appropriate for SMEs.¹⁰ For example, a study of dry cleaners in the Los Angeles area reported that there are more than 36,000 such businesses in the U.S., with 2,618 in California alone. Of the ones in California, the overwhelming majority were not in compliance.¹¹ In the third excerpt, Neil Gunningham and Darren Sinclair discuss compliance assistance programs for SMEs.¹² In the fourth excerpt, Paul Leinster, Jim Gray, Chris Howes, and Rosie Clark describe compliance assistance programs in the U.K.,¹³ while in the fifth excerpt Ramani Ellepola describes compliance assistance in Sri Lanka.¹⁴

In addition to compliance assistance from the state, the private sector also provides a form of compliance assistance through certification programs, Environmental Management Systems, and self-auditing. In the sixth excerpt, Dara O'Rourke elaborates on these emerging

⁹ The SME-nvironment 2003 survey was carried out by WS Atkins on behalf of NetRegs and covered 8,604 SMEs (defined as businesses with less than 250 employees) in 28 industries across the U.K. The survey found that only "23% of all respondents had implemented any measures aimed at reducing harm to the environment....". See http://www.environment-agency.gov.uk/commondata/acrobat/smenvironmnet_uk_2003.pdf.

¹⁰ Michael P. Vandenberg, *Beyond Elegance: A Testable Typology of Social Norms in Corporate Environmental Compliance*, 22 STAN. ENVTL. L.J. 55, 83-84 (2003) ("[D]eterrence-based enforcement measures can undermine motivations to comply when directed at regulated entities that were motivated to comply but lacked the capacity to understand their obligations because of the complexity of the regulatory scheme."). See also Chapter Two: Compliance Theories.

¹¹ The rates of non-compliance were between 79% and 98%. See Timothy F. Malloy & Peter Sinsheimer, *Pollution Prevention as a Regulatory Tool in California: Breaking Barriers and Building Bridges* (2001), available at <http://www1.law.ucla.edu/~erg/pubs/MalloyBuildingBridgesReport.pdf>.

¹² NEIL GUNNINGHAM & DARREN SINCLAIR, *LEADERS & LAGGARDS: NEXT-GENERATION ENVIRONMENTAL REGULATION*, Chapter 2 (2002).

¹³ Paul Leinster, Jim Gray, Chris Howes & Rosie Clark, *Compliance Promotion in the United Kingdom*, 7th INECE Conference Proceedings (forthcoming 2005).

¹⁴ Ramani Ellepola, *Implementation of Industrial Pollution Control Programs in Sri Lanka*, 5th INECE Conference Proceedings, vol. 1 (1998), available at <http://www.inece.org>.



nongovernmental “regulations.” Then Tim Bartley describes the evolution and value of certification systems.¹⁵ A brief excerpt by Arnoldo Contreras-Hermosilla and Global Witness follows Bartley’s piece, describing a certification program in Bolivia.¹⁶ Clifford Rechtschaffen then outlines the value of mandatory audits and EMS programs for private firms.¹⁷

The incentives are different for firms that do have the capacity to achieve compliance. For these firms, there are other programs that encourage and reward activities that go “beyond compliance.”¹⁸ In the ninth excerpt in this chapter, Kathryn Harrison describes the workings of voluntary programs through four case studies in the U.S., Canada, the Netherlands, and Germany.¹⁹ Then, in this chapter’s final excerpt, the OECD describes a mixture of compliance assistance and voluntary compliance programs in Newly Independent States (NIS).²⁰

It is important to note that beyond compliance and voluntary compliance initiatives are most effective when they supplement deterrence-based strategies. As Chester Bowles said, “20 percent of the regulated population will automatically comply with any regulation, 5 percent will attempt to evade it, and the remaining 75 percent will comply as long as they think that the 5 percent will be caught and punished.”²¹ Every

¹⁵ Dara O’Rourke, *Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring*, 31(1) POL’Y STUDIES J., 1 (2003); Tim Bartley, *Certifying Forests and Factories: States, Social Movements, and the Rise of Private Regulation in the Apparel and Forest Products Fields*, 31(3) POLITICS & SOC., 433 (2003).

¹⁶ Arnoldo Contreras-Hermosilla & Global Witness, *Emerging Best Practices for Combating Illegal Activities in the Forest Sector* (2003).

¹⁷ Clifford Rechtschaffen, *Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S. CAL. L. REV. 1181 (1998).

¹⁸ See *supra* note 1. Another type of voluntary compliance includes programs that firms can opt into, such as voluntary emissions trading schemes. These types of voluntary programs may be useful to test new policy initiatives, but regulatory schemes that lack the threat of a sanction may not be as effective as those that do. See Daniel C. Esty, *Environmental Protection in the Information Age*, 79 N.Y.U. L. REV. 115 (2004) (“It is important to note that not all “voluntary” actions are truly voluntary. Some such actions are taken in response to consumer demands and should be seen, therefore, as an institutional offshoot of the marketplace. Others represent efforts to forestall regulation, such as the EPA’s 33/50 ‘voluntary’ toxics reduction initiative.”). See also Chapter Seven: Information Regulation; Chapter Thirteen: Compliance & Competitiveness: The Porter Hypothesis.

¹⁹ Kathryn Harrison, *Talking with the Donkey: Cooperative Approaches to Environmental Protection*, 2(3) J. INDUS. ECOLOGY 51(1998).

²⁰ OECD, *Environmental Compliance and Enforcement in the NIS: A Survey of Current Practices of Environmental Inspectorates and Options for Improvements* (2000).



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enforcement and compliance official has his or her own statistics to describe these categories, but they all recognize that deterrence remains vital for most compliance efforts. As the eminent jurist H.L.A. Hart explained: "[H]uman altruism is limited in range and intermittent ... 'Sanctions are therefore required not as the normal motive for obedience, but as a *guarantee* that those who would voluntarily obey shall not be scarified to those who would not. ... Given this standing danger, what reason demands is *voluntary* co-operation in a *coercive* system.'"²² Experience demands assistance to those who lack the capacity to comply.

²¹ CHESTER BOWLES, *PROMISES TO KEEP: MY YEARS IN PUBLIC SERVICE, 1941-1969*, 25 (1971). For further discussion on deterrence, see Chapter Four: Domestic Enforcement Strategies.

²² H. L. A. Hart, *THE CONCEPT OF LAW*, 196-198 (2nd ed. 1994).