



INTRODUCTION

The Secretariat of the International Network for Environmental Compliance and Enforcement (INECE), working with the Institute for Governance and Sustainable Development, and its affiliated Program on Governance for Sustainable Development at the Bren School of Environmental Science & Management, UC Santa Barbara, has compiled the best of the literature from a variety of sources and disciplines into *MAKING LAW WORK: ENVIRONMENTAL COMPLIANCE & SUSTAINABLE DEVELOPMENT* in an attempt to help us analyze why our legal systems are not yet strong enough to deal with our worsening environmental problems. This book is a bridge between the worlds of academics and practitioners, exposing practitioners around the world to some of the best literature from the fields of law, politics, international relations, economics, and the social sciences. *MAKING LAW WORK* draws from books, journals, articles, speeches, papers by practitioners, and INECE Conference Proceedings. This book provides insights into a framework for diagnosing what currently ails international and domestic environmental governance and offers suggestions for making improvements.

The goal of this book is not only to provide insights and answers, however, but also to raise questions for further exploration and to direct researchers towards the critical questions. *MAKING LAW WORK* serves as an introduction to literature on a wide range of subjects, which means that many subjects are not covered as exhaustively as they could be. This book has preserved the original footnotes from the excerpted literature, to enable further individual research efforts on promoting environmental compliance and sustainable development. An extensive bibliography will be posted on the INECE web site, at www.inece.org.

Sustainable development is not just a technical, political matter or an environmental concern. It is a global problem – an ethical obligation we all share to improve the lives of the present generation and to ensure a high quality of life for future generations. INECE aims for this book to catalyze thinking and action to build the framework of equitable, strong, and effective laws needed to manage humanity's interaction with the Earth and build a fair and sustainable society – a society that protects



the environment and natural resources for future generations, eliminates poverty, and promotes economic, social, and cultural development.¹

Actors at all levels and of all types have important roles to play in this endeavor of promoting sustainable development and compliance with environmental law. MAKING LAW WORK aims to empower these actors by explaining the critical issues that animate compliance with domestic and international law, describing a range of strategies to induce and enable compliance, exploring what works and what does not, and showing how being strict on environmental compliance can also be good for the competitiveness of firms and nations.

DEFINITIONS OF TERMS

To start, it is worthwhile to define “compliance” and to differentiate it from two related but distinct terms: “implementation” and “effectiveness”.

Compliance can be defined as “a state of conformity or identity between an actor’s behavior and a specified rule,” regardless of the motivations, circumstances, or causes that lead to that conformity.² In other words, an actor is in compliance if the actor is doing what the law says the actor must be doing.

Implementation is “the process of putting ... commitments into practice”,³ whether those are international commitments, domestic rules, or other sources of law that are not self-executing. Compliance can happen without implementation (as when the commitment reflects current practice or when external factors result in compliance), and implementation may not lead to compliance (as when external factors outweigh the implementation efforts).⁴ However, implementation is generally an essential predicate for compliance.

Effectiveness can be seen as a measure of how successful law is in solving the problem it was designed to address.⁵ As with implementation, laws

¹ See, e.g., UNESCO, *Key Themes of the UN Decade of Education for Sustainable Development*, available at http://portal.unesco.org/education/en/ev.php-URL_ID=38457&URL_DO=DO_TOPIC&URL_SECTION=201.html.

² KAL RAUSTIALA & ANNE-MARIE SLAUGHTER, *International Law, International Relations and Compliance*, in HANDBOOK OF INTERNATIONAL RELATIONS 539 (2002).

³ *Id.*

⁴ *Id.*

⁵ ORAN R. YOUNG & MARC A. LEVY, *The Effectiveness of International Environmental Regimes*, in THE EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL REGIMES 3-4 (Oran Young, ed., 1999).

Continued



can be effective even without high levels of compliance, and high levels of compliance may not indicate an effective law or set of laws (it may just indicate easily met and ineffective standards).⁶ “Having said that, however, compliance can provide a valuable proxy for effectiveness, since greater compliance will produce more environmental improvement so long as the rules do not have perverse effects....”⁷

STRUCTURE OF THE BOOK

MAKING LAW WORK presents selections of the best literature on the issue of compliance with laws to protect the environment and promote sustainable development. The book ranges from the broadest perspectives on the issue – theories of why States and firms do or do not comply with domestic and international laws – to detailed practices for inspections and monitoring and specific strategies for non-governmental organizations, government regulators, courts, and others.

MAKING LAW WORK begins in Chapter One by exploring the critical connections between compliance, the rule of law, good governance, and sustainable development. Weak legal and judicial systems – where laws are not enforced and non-compliance and corruption are the norm – undermine respect for the rule of law, engender environmental degradation, and undermine progress towards sustainable development. Good governance and the rule of law do not in themselves ensure that society is well-run nor do they guarantee sustainable development and compliance with environmental laws. However, their absence severely limits the potential for securing environmental compliance and sustainable development. Donor agencies and other actors thus must focus efforts on advancing the rule of law and good governance – not just on reforming the laws themselves and strengthening law-related institutions, but also on instilling norms of law compliance to replace the culture of corruption, and on empowering citizens to participate in governance and to build up the internal political will needed for reform.

The book then turns in Chapter Two to an exploration of the various theories developed to explain why States, firms, and individuals do or do not comply with law. Some theories focus only on States or firms as unitary actors, while others recognize that numerous other players within these entities have enormous influence on what occurs. Some theories

Young & Levy also present more nuanced definitions of effectiveness – exploring legal, economic, political, and other approaches. *Id.* at 3-6.

⁶ *Id.*

⁷ RONALD B. MITCHELL, *Compliance Theory: An Overview*, in *IMPROVING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL LAW* 25 (Cameron, Werksman, & Roderick, eds., 1996).



view actors as rational and calculating, willing to violate the law whenever the costs and benefits of non-compliance outweigh those of compliance. Other theories view actors as wanting to comply with the law and to act appropriately, in accord with general norms. Compliance theories thus provide lenses for seeing and understanding compliance-related behavior. As such, these theories are a critical backdrop for the other issues discussed in MAKING LAW WORK. In order to be able to design the right combination of strategies, one needs to understand the sources of non-compliance and the motivations of the relevant actors. Theories of compliance provide these critical perspectives.

From this broad beginning, MAKING LAW WORK moves to the more practical and empirical, focusing on case studies, experiences with what has and has not worked, and discussions of strategy. The move to a more empirical perspective is important. Theories and hypotheses 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, we need to keep moving towards a system in which we implement programs, determine if they are really working, and then adjust accordingly.

This more empirical part of the book starts in Chapter Three with a selection of the best literature on multilateral environmental agreements (MEAs) in action, analyzing our practical experiences with the currently dominant form of international environmental governance. MEAs have been adopted to address a range of global environmental problems, yet many of these problems continue to deteriorate. MEAs have not been as effective as we need them to be, lacking muscle, money, or other tools. We are still looking for the right combination of environmental compliance and enforcement tools. We need to study our experiences with MEAs to learn what works, what does not, and why. but with few exceptions e.g., the Montreal Protocol, these MEAs have thus far not always been effective in solving the problems they were designed to solve and have often lacked the muscle to turn the agreements into an effective legal system. We have not yet found the right combination of environmental compliance and enforcement tools.

MAKING LAW WORK moves from MEAs to a detailed examination of what the various approaches are for environmental compliance and enforcement. First and foremost, practitioners need to have a good understanding of *deterrence* – how it's achieved and who the critical actors are – since a strong framework based on enforcement and deterrence are



the foundation of many environmental compliance efforts. 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.”⁸

Chapter Four reviews the enforcement options available at the domestic level to boost deterrence, focusing on inspections, monitoring, and sanctions. These activities can be essential to compliance, since they increase the likelihood of discovering violations and the cost of violations. In Chester Bowles’ terms, inspections, monitoring, and sanctions help ensure “that the 5 percent will be caught and punished.”

The critical actors in deterrence go beyond inspectors and regulators, however. In Chapter Five, *MAKING LAW WORK* explores the crucial role that courts and tribunals at all levels – domestic and supranational – can play in securing effective deterrence and in promoting compliance with environmental laws. As noted by judges from around the world in the *Johannesburg Principles on the Role of Law and Sustainable Development*:

[T]he Judiciary, well informed of the rapidly expanding boundaries of environmental law and aware of its role and responsibilities in promoting the implementation, development and enforcement of laws, regulations and international agreements relating to sustainable development, plays a critical role in the enhancement of the public interest in a healthy and secure environment.⁹

As one of the principal mechanisms for sanctioning, courts and other tribunals can provide a strong disincentive to non-compliance; the risk of being called to account or potentially held liable can keep in line a firm or State that would otherwise be in Bowles’s “5 percent”.

Non-governmental actors also play a key role in deterring potential violators, enforcing environmental compliance, and promoting sustainable development. In Chapter Six, this book presents a selection

⁸ CHESTER BOWLES, *PROMISES TO KEEP: MY YEARS IN PUBLIC SERVICE, 1941-1969*, 25 (Harper Collins ed., 1971). For further discussion on deterrence, see Chapter Four: Domestic Enforcement Strategies. This bell curve of regulated actors is an important reference point to consider when evaluating strategies suggested in this book.

⁹ *Johannesburg Principles on the Role of Law and Sustainable Development*, adopted at the Global Judges Symposium held in Johannesburg, South Africa, on 18-20 August 2002, available at http://www.inece.org/wssd_principles.html.



of the best literature on strategies for non-governmental organizations (NGOs) to use government institutions (such as courts) to promote environmental compliance – strategies that include citizen suits and participation in international tribunals. Over the past 25 to 30 years, NGOs have emerged as a potent form of “non-governmental regulation” that can and will help States overcome some of their capacity limitations. MAKING LAW WORK discusses how to empower these important non-governmental actors even further.

By using and publicizing information about a firm’s (or State’s) environmental performance, NGOs and others in civil society can play an additional role in deterring violations of environmental law and environmental norms. The public disclosure of a firm’s environmental performance has the potential to unleash various forces: markets, civil society, even government regulators. Similarly, as the Yale Center for Environmental Law and Policy, the Center for International Earth Science Information Network (CIESIN) at Columbia University, and the World Economic Forum have shown with the Environmental Sustainability Index – a composite index tracking a diverse set of socioeconomic, environmental, and institutional indicators that characterize and influence environmental sustainability at the national scale – the public disclosure of a State’s environmental performance, especially in comparison to the performance of other States, can trigger domestic pressures for reform.¹⁰ In Chapter Seven, this book explores “information regulation”, a potential supplement to command-and-control regulation and an important means of securing compliance via non-governmental and non-judicial third-party sanctions.

In Chapter Eight, MAKING LAW WORK turns to an analysis of one of the benefits of having a strong enforcement and deterrence framework, namely the ability to create an emissions-trading market that allows firms greater flexibility to choose the most cost-effective methods for meeting mandatory reductions in pollution. Emissions-trading is an increasingly prevalent approach to pollution control, with the EU implementing a carbon-trading regime, with a new carbon-trading regime serving as a central feature of the newly in-force Kyoto Protocol on Climate Change, and with a trading scheme having been the key to the United States’ successful reductions of SO₂ during the 1990s. While enabling greater flexibility than command-and-control approaches, emissions trading

¹⁰ See Yale Environmental Performance Measurement Project, 2005 *Environmental Sustainability Index*, available at <http://www.yale.edu/esj/>. See also Marie Woolf, “Britain’s Record on Environment Rated Below Bangladesh,” THE INDEPENDENT (LONDON), Feb. 6, 2004, at 10; “Poor Score Should Serve as Alert on Environment,” CHINA DAILY, Jan. 31, 2005.



Introduction

schemes only function if they achieve very high compliance; without heightened deterrence – such as in the form of constant, comprehensive, real-time monitoring – emissions-trading markets would fail.

The whole point of a deterrence-based compliance framework is to provide a disincentive to firms and States to prevent them from choosing to violate the law. But that assumes that compliance is really even a choice for the targeted actors. A great deal of non-compliance, however, is caused by a lack of knowledge or a lack of capacity to comply, which means that sanctions and increased monitoring would not help. Within the deterrence-based framework, therefore, we need to strongly promote more compliance assistance, particularly for weak States at the international level and small- and medium-sized enterprises at the domestic level. Chapter Nine provides a selection of the best literature on compliance assistance from the state and the private sector. Chapter Nine also provides some of the literature on “beyond compliance” efforts, which seeks to encourage those that *do* have the capacity to comply to voluntarily meet an even higher level of environmental performance. At their core, compliance assistance and “beyond compliance” are important ways of getting compliance without doing so based on increasing the costs of non-compliance. It is vital to enable and encourage the 95% of actors who are inclined to comply to do so, by providing more robust compliance assistance, fostering the internalization of sustainable development and law compliance norms, and constructing laws that draw on our deepest values and principles.

Given this wide range of environmental compliance and enforcement tools and strategies, and given the reality of the limited resources of most public agencies, *MAKING LAW WORK* reviews in Chapter Ten how public agencies make the challenging decision of what balance of environmental instruments are appropriate for specific problems. The goal is to assist agencies in strategically determining what the most effective and efficient ways are to ensure compliance.

In the last part of the book, *MAKING LAW WORK* looks at three exciting and empowering newer developments in environmental governance and sustainable development. In Chapter Eleven, the book presents a selection of the best literature on indicators, which are part of a movement to a more empirical, data-driven, systems approach with feedback loops and adaptation. Indicators are an important way for agencies to determine if they made the right strategic decisions in their choice of environmental compliance and enforcement tools. By getting and using



more hard data for decision-making, public agencies and other actors can gauge the effectiveness of compliance and enforcement efforts and modify the programs to work better.

In Chapter Twelve, this book addresses the rise of transgovernmental networks – a new vision of global environmental governance. This vision of governance envisions complex global webs of transgovernmental networks, with the component institutions of States – including regulators, legislators, judges, and enforcement and compliance officials – interacting directly with their peers around the world. Transgovernmental networks represent a potentially more powerful way of strengthening enforcement and compliance and building capacity for sustainable development, particularly when dealing with global challenges. By working directly peer-to-peer, transgovernmental networks can quickly disseminate and distill information, enhance enforcement cooperation, harmonize laws and regulations, and address common problems from a shared perspective shaped by experience and expertise. INECE is an example of such a network.

Finally, this book addresses one of the fundamental questions that readers may ask: *So what will compliance cost?* In Chapter Thirteen, MAKING LAW WORK presents Professor Michael E. Porter’s and Class van der Linde’s innovative and persuasive “Porter Hypothesis”, which demonstrates that competitiveness and compliance are not necessarily in conflict – that States can design, implement, and strictly enforce the right kinds of laws and save money, potentially even making a profit for the regulated firms because of technological innovation. This is the holy grail of environmental regulation – win-win solutions – where firms might be forced to take strong medicine to clean up their pollution and protect the public, but where the medicine would save the firms money and make them, and the countries where they are located, healthier competitors in the long run.

If knowledge truly is power, then MAKING LAW WORK has the potential to be a very powerful book. The insights, concepts, and strategies contained in MAKING LAW WORK will empower actors of all types at all levels – individuals, NGOs, the media, businesses, certifiers, lawyers, scientists, financial markets, government regulators, legislators, courts, networks, negotiators, international tribunals, development banks – to take action to promote sustainable development, ensure compliance with environmental law, and make law work.

The Editors