THE NEW SOVEREIGNTY

COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS

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Harvard University Press
Cambridge, Massachusetts
London, England
1995

Printed in the United States of America

Library of Congress Cataloging-in-Publicatiōn Data

Chayes, Abram, 1922–
The new sovereignty : compliance with international regulatory agreements / Abram Chayes, Antonia Handler Chayes.
p. cm.
Includes bibliographical references and index.
ISBN 0-674-61782-7 (cloth : alk. paper)
1. Treaties. 2. Compliance. 3. Sovereignty.
I. Chayes, Antonia Handler, 1929– . II. Title.
JX4165.C43 1995
341.3'7—dc20
95-21960

Preface

We did not start out to write this book. We started out to teach together. The only area in which we both had professional qualifications was arms control—Abe, starting in 1963 as Legal Adviser to the State Department, was involved in the Limited Test Ban Treaty, and Toni, as Undersecretary of the Air Force in the Carter administration, was involved in the MX missile deployment. Our course, "Law, Doctrine, and Politics in Nuclear Weapons Management," which we taught for more than a decade, increasingly focused on the question of why, in an environment of inveterate ideological confrontation, mutual suspicion, and hostility, the two superpowers continuously sought to negotiate arms control agreements—and substantially complied with the obligations they assumed.

This question seemed to grow somewhat less urgent with the end of the cold war and the dissolution of the Soviet Union. So we began to ask ourselves whether some of the things we had learned would be applicable to the problem of treaty compliance in general. In particular, we had been impressed with the work of a little-known body, the Standing Consultative Commission (SCC), established by the SALT agreements to "consider questions concerning compliance with the obligations assumed and related situations which may be considered ambiguous." It is perhaps not surprising that, as lawyers, we assumed that the question of compliance with legal obligations would have something to do with the institutions for the settlement of disputes about their interpretation and application. The SCC was interesting because, although it had no adjudicative or enforcement authority and was little more than a negotiating forum, it was the instrument through which some important issues between the treaty parties were resolved, even

when, as in the early Reagan years, the confrontation between them was at its height.

So our course became "Dispute Settlement under International Agreements." It did not take us long to realize that "dispute settlement," at least in the form that lawyers traditionally conceive it or even in the broader sense that has come to be known in the United States as alternative dispute resolution, or ADR, was only a small part of the compliance problem. We began to see that a treaty regime in operation is a hugely complex interactive process that engages not only states and their official representatives but also, increasingly, international organizations and their staffs, nongovernmental organizations, scientists, business managers, academics, and other nonstate actors, and that it penetrates deeply into domestic politics. This book is an attempt at mapping that process. We try to look across the wide range of international regulation to find insights and elements that transcend differences in subject matter, specificity, and importance to the states that are involved or affected.

Both of us are lawyers by profession. We are students, observers, and sometime practitioners of international relations by avocation. We are not number crunchers, and little in this book betrays a strong bent for quantitative or correlational methods. Although we claim no expertise in economics, rational choice theory, game theory, or jurisprudence, we have tried to use such insights as we have been able to glean from these pursuits. We knew from our work in arms control that there was much to be learned from cognate disciplines—international relations, game theory, security studies, and the like. So in our broader enterprise, as well, we looked for help to these bodies of knowledge outside our own field. In particular, we found much to sustain us in the emerging work on regime theory and, more generally, in work by the new institutionalists in international relations and elsewhere—although they tended to be discomfited by our insistence that most of what they were talking about was really international law. We do not pretend to an exhaustive mastery of the literature of these disciplines, but we have referred to the authors and works that have stimulated us and helped advance our thinking.

Our basic methodological sympathy lies with what Oran Young calls "causal analysis"—the use of detailed studies of cases to illuminate the sources of actor behavior—but we have surely not pursued it with the rigor he would insist on (see Oran R. Young and Marc A. Levy, *The Effectiveness of International Regimes*, forthcoming). Our method is primarily descriptive, with prescriptive overtones. Essentially we have made use of existing secondary

material on the treaties and regimes that are the principal subjects of the book. For some, there is considerable scholarly analysis. For others, we have had to rely mainly on official materials or press accounts. Except for occasional interviews and interaction with officials, we do not base our analysis on original empirical investigations that we have conducted.

Our underlying notion is that it is important to understand what states, international organizations, officials, and other actors actually do when they are trying to implement regulatory treaties. That process occupies vast amounts of time and energy of many people—often competent and dedicated people—in the United States and abroad. The first step to criticism and improvement is to understand what they are doing and what they think they are doing. That is not at all obvious, either from the scholarly literature or from journalistic or personal accounts. It has to be pieced together and inferred from sympathetic observation of a considerable range of experience and practice.

We have tried to provide a persuasive account of these activities—what Ronald Dworkin might call an interpretation of the practice in its best light (see Ronald Dworkin, *Law's Empire,* Harvard University Press, 1986). We think our analysis and conclusions are controversial enough that scholars will test their validity—and value—in the context of specific treaty regimes that they choose to study firsthand.

An earlier version of this book's first chapter appeared in *International Organizations,* and the argument is presented in condensed form in the chapters "Regime Architecture: Elements and Principles," in *Global Engagement: Cooperation and Security in the 21st Century,* edited by Janne E. Nolan (Washington, D.C.: Brookings Institution, 1994), and "Managing Compliance: A Cooperative Perspective," in *National Compliance with International Environmental Accords,* edited by Harold Jacobson and Edith Brown Weiss (Social Science Research Council, forthcoming).

Portions of the book in various stages were presented, discussed, and criticized at numerous academic seminars, conferences, and meetings at Harvard and elsewhere. All of those critiques contributed greatly to the final work. A special role was played by Robert Keohane and the group of remarkable graduate students he gathered around him in the years this book was being written—among them, Ronald Mitchell, Marc Levy, Edward Parson, and Beth deSombre. The Program on Negotiations at the Harvard Law School gave us a home when we began to turn our attention to the broad problems of international dispute settlement, and ever since, we have been codirectors of the Project on International Compliance and Dispute Resolution.

The major funding for the book was provided by the Pew Charitable Trusts. The basic research plan was developed under a planning grant from the Carnegie Corporation of New York. "Regime Architecture: Elements and Principles" received financial assistance from the cooperative security project of the Carnegie Corporation, and "Managing Compliance" from the Social Science Research Council.

Since the book is so much an outgrowth of our teaching, it is only fitting that most of the shoe-leather research was performed by our students. There is one, Jan Martinez, of whom it can be truly said that without her the book would not have been written. She started as a member of the class and gradually assumed the role of straw boss and dear friend. Others who made substantial contributions include Daly Bryk, Sean Coté, Melissa Crow, Amy Deen, David Huntington, Rima Hartzenbach, Michael Rinzler, and Manley Williams. But all of them—whether they were associated with the project only briefly or longer, whether their research eventually turned up in these pages or turned out to be a dead end, whether we have appropriated their ideas, mangled them, or rejected them—have been part of the enormously exciting intellectual ferment that these past years have been for us, and to all of them we are grateful. They are: Kathleen Campbell, Eric Dolin, Monica Eppinger, Ellen Goodman, Cathy Hampton, Karen Hunter, Karl Irving, Frederic Jacobs, David Laws, Matthew Lorin, Sharmini Mahendran, Linda Netsch, Carol Reardon, Lisa Roberts, Christopher Rossomondo, Alan Schwarts, Greg Shapiro, Alex Tselos, Lily Vakili, Anthony Winden, and Michael Woods.

The age of computers means we can omit the usual thanks to devoted secretaries for typing the manuscript. Nevertheless, we are deeply indebted to Marilyn Byrne, Abe's devoted secretary, for countless services and for bearing with us through the long gestation period of this book.

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Note

The names of treaties are almost as elaborately embellished as chapter headings in picaresque novels. To avoid cluttering up the text with inessential verbiage, treaties referred to or canvassed in this book are listed in the appendix by their official name, with a full citation and a popular name or acronym where applicable. Almost all references to treaties in the text use acronyms or popular names and, where necessary, an indication of the relevant provision, without further citation.

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A Theory of Compliance

In an increasingly complex and interdependent world, the negotiation, adoption, and implementation of international agreements are major elements of the foreign policy activity of every state. In earlier times, the principal function of treaties was to record bilateral (or sometimes regional) political settlements and arrangements. But in recent decades, the main focus of treaty practice has moved to multilateral regulatory agreements addressing complex economic, political, and social problems that require cooperative action among states over time. Chief among the areas of concern are trade, monetary policy, resource management, security, environmental degradation, and human rights.

Scholarship on international regimes teaches that these cooperative efforts take place within a dense and complex web of norms, rules, and practices. What is less clear from the work on regimes is that at the center there is almost always a formal treaty—sometimes more than one—that gives the regime its basic architecture. These treaties are the concern of this book.[1]

The agreements vary widely in scope, number of parties, and degree of specificity, as well as in subject matter. Some are little more than statements of principle or agreements to agree. Others contain detailed prescriptions for behavior in a defined field. Still others may be umbrella agreements for consensus building in preparation for more specific regulation later. Often they create international organizations to oversee the enterprise.

The focus on treaties does not imply that they are the only source of international legal or normative obligation. International lawyers have long recognized an unwritten "customary" or "general" international law comprising, indeed, some of the most fundamental principles of the system. The

International Court of Justice has held that a state is bound by its unilateral statement intended to convey that it was accepting a firm obligation.[2] A wide variety of instruments, declarations, joint statements, and expressions, loosely categorized as "soft law," are accepted and enforced as constraints by processes that differ little from those applicable to formal legal undertakings. And, as regime theorists constantly point out, the formal pronouncements are enshrouded in a maze of informal and tacit customs and practices that orient behavior and flesh out the scope of the obligations. But what they are less willing to acknowledge is that, in complex regulatory regimes, the armature on which the whole is constructed is commonly an act of formal lawmaking—a treaty.[3]

If treaties are at the center of the cooperative regimes by which states and their citizens seek to regulate major common problems, there must be some means of assuring that the parties perform their obligations at an acceptable level. To provide this assurance, political leaders, academics, journalists, and ordinary citizens frequently seek treaties with "teeth"—that is, coercive enforcement measures. In part this reflects an easy but incorrect analogy to domestic legal systems, where the application of the coercive power of the state is thought to play an essential role in enforcing legal rules. Our first proposition is that, as a practical matter, coercive economic—let alone military—measures to sanction violations cannot be utilized for the routine enforcement of treaties in today's international system, or in any that is likely to emerge in the foreseeable future. The effort to devise and incorporate such sanctions in treaties is largely a waste of time.

The deficiencies of sanctions for treaty enforcement are related to their costs and legitimacy. The costs of military sanctions are measured in lives, a price contemporary publics seem disinclined to pay except for the most urgent objectives, clearly related to primary national interests. The costs of economic sanctions are also high, not only for the state against which they are directed, where sanctions fall mainly on the weakest and most vulnerable, but also for the sanctioning states. When economic sanctions are used, they tend to be leaky. Results are slow and not particularly conducive to changing behavior. The most important cost, however, is less obvious. It is the serious political investment required to mobilize and maintain a concerted military or economic effort over time in a system without any recognized or acknowledged hierarchically superior authority.

Because the political cost is high, efforts to impose sanctions will be intermittent and ad hoc, responding not to the need for reliable enforcement of treaty obligations, but to political exigencies in the sanctioning states. There

is nothing inherently wrong with these characteristics. But an effort that is necessarily ad hoc cannot be systematic and evenhanded. Like cases are not treated alike. Such an effort to ensure compliance with treaty obligations is fatally deficient in legitimacy. Moreover, to have a chance of being effective, military and, especially, economic sanctions must have the support and participation of the most powerful states. In practice, active support if not direction by the United States is decisive for the success of any important sanctioning action. It is evident that the United States neither could nor would nor should play such a universal policing role for ordinary treaty obligations. In any event, a system in which only the weak can be made to comply with their undertakings will not achieve the legitimacy needed for reliable enforcement of treaty obligations. We return to the question of legitimacy in Chapter 5.

As against this "enforcement model" of compliance, this book presents an alternative "managerial model," relying primarily on a cooperative, problem-solving approach instead of a coercive one.[4] It is less easy to give a succinct and satisfying description of this alternative to sanctions, and much of this book is devoted to the attempt.

The Propensity to Comply

We start with a somewhat novel conception of compliance and the compliance problem. The position of mainstream realist international-relations theory goes back to Machiavelli: "[A] prudent ruler cannot keep his word, nor should he, where such fidelity would damage him, and when the reasons that made him promise are no longer relevant."[5] This rational-actor conception of compliance may be useful for theory or model building, but no calculus can supply rigorous, nontautological support for the proposition that states observe treaty obligations—or any particular treaty obligation—only when it is in their interest to do so.

By contrast, foreign policy practitioners operate on the assumption of a general propensity of states to comply with international obligations. Foreign ministers, diplomats, and government leaders devote enormous time and energy to preparing, drafting, negotiating, and monitoring treaty obligations. It is not conceivable that they could do so except on the assumption that entering into a treaty commitment ought to and does limit their own freedom of action, and in the expectation that the other parties to the agreement will feel similarly constrained. The meticulous attention devoted to fashioning treaty provisions no doubt reflects the desire to limit the state's own com-

mitment as well as to secure the performance of others. But either way, the enterprise makes sense only if the participants accept (presumably on the basis of experience) that as a general rule, states acknowledge an obligation to comply with the agreements they have signed. For these officials, dealing with the occasional egregious violator is a distinct problem, but it is not the central issue of treaty compliance.

We identify three sorts of considerations that lend plausibility to the assumption of a propensity to comply: efficiency, interests, and norms. Of course these factors, singly or in combination, will not lead to compliance in every case or even in any particular case. But they support the assumption of a general propensity for states to comply with their treaty obligations, and they will lead to a better understanding of the real problems of noncompliance and how they can be addressed.

Efficiency

Decisions are not a free good. Governmental resources for policy analysis and decision making are costly and in short supply. Individuals and organizations seek to conserve these resources for the most urgent and pressing matters.[6] In these circumstances, standard economic analysis argues against the continuous recalculation of costs and benefits in the absence of convincing evidence that circumstances have changed since the original decision. The alternative to recalculation is to follow the established treaty rule. Compliance saves transaction costs. In a different formulation, students of bureaucracy tell us that bureaucratic organizations operate according to routines and standard operating procedures, often specified by authoritative rules and regulations.[7] The adoption of a treaty, like the enactment of any other law, establishes an authoritative rule system. Compliance is the normal organizational presumption. A heavy burden of persuasion rests on the proponent of deviation.

Interests

A treaty is a consensual instrument. It has no force unless the state has agreed to it. It is therefore a fair assumption that the parties' interests were served by entering into the treaty in the first place. Accordingly, the process by which international agreements are formulated and concluded is designed to ensure that the final result will represent, to some degree, an accommodation of the interests of the negotiating states.[8] Modern treaty making, like legislation in a democratic polity, can be seen as a creative enterprise through which the parties not only weigh the benefits and burdens of commitment

but also explore, redefine, and sometimes discover their interests. It is at its best a learning process in which not only national positions but also conceptions of national interest evolve and change.[9]

This process goes on within each state and at the international level. In a state with a well-developed bureaucracy, the elaboration of national positions in preparation for treaty negotiations requires extensive interagency vetting in what amounts to a sustained internal negotiation. For example, Philip Trimble's roll of the groups normally involved in arms control negotiations includes the National Security staff, the Departments of State and Defense, the Arms Control and Disarmament Agency, the Joint Chiefs of Staff, the Central Intelligence Agency, and sometimes the Department of Energy or the National Aeronautic and Space Administration (NASA).[10] These organizations themselves are not unitary actors. Numerous subordinate units of the major departments have quasi-independent positions at the table. Much of the extensive literature on U.S.-Soviet arms control negotiations is devoted to analysis of the Byzantine complexity of these internal interactions.[11]

The same process may be seen in every major U.S. international negotiation. For example, at the end of what Ambassador Richard Benedick calls "the interagency minuet" in preparation for the Montreal Protocol to the Vienna Convention for the Protection of the Ozone Layer, the final U.S. position "was drafted by the State Department and was formally cleared by the Departments of Commerce and Energy, The Council on Environmental Quality, EPA, NASA, NOAA, OMB, USTR, and the Domestic Policy Council (representing all other interested agencies)."[12] In addition to this formidable alphabet soup, White House units, like the Office of Science and Technology Policy, the Office of Policy Development, and the Council of Economic Advisors, also got into the act.

In the United States in recent years, the increasing involvement of Congress and, with it, nongovernmental organizations and the broader public has introduced a new range of interests that must ultimately be reflected in the national position.[13] Similar developments seem to be occurring in other democratic countries. Robert Putnam has described the process as a two-level game, in which the negotiations with the foreign parties must eventuate in a treaty that is acceptable to interested domestic constituencies.[14]

For contemporary regulatory treaties, the internal analysis, negotiation, and calculation of benefits, burdens, and impacts are repeated at the international level. In anticipation of negotiations, the issues are reviewed in international forums long before formal negotiation begins. The negotiating process itself characteristically involves an intergovernmental debate that

often lasts years, not only among national governments but also among international bureaucracies and nongovernmental organizations as well. The most notable case is the United Nations Conference on the Law of the Sea (UNCLOS III), which lasted for more than ten years and spawned innumerable committees, subcommittees, and working groups, only to be torpedoed by the United States, which, having sponsored the negotiations in the first place, refused to sign the agreement.[15] Bilateral arms control negotiations between the United States and the Soviet Union were similarly extended, although only the two superpowers were directly involved. Environmental negotiations on ozone and global warming have followed very much the UNCLOS III pattern. The first conference on stratospheric ozone was convoked by the United Nations Environment Program (UNEP) in 1977, eight years before the adoption of the Vienna Convention.[16] The formal beginning of the climate-change negotiations in February 1991 was preceded by two years of work in the Intergovernmental Panel on Climate Change, convened by the World Meteorological Organization (WMO) and UNEP to consider scientific, technological, and policy response questions.[17]

Especially in democracies, but to a certain extent elsewhere as well, this negotiating activity is open to some form of public scrutiny, triggering repeated rounds of national bureaucratic and political review and revision of tentative accommodations among affected interests. The two-level game gives some assurance that the treaty as finally signed and presented for ratification is based on considered and well-developed conceptions of national interest that have themselves been informed and shaped to some extent by the preparatory and negotiating process.

Yet treaty making is not purely consensual. Negotiations are heavily affected by the structure of an international system in which some states are much more powerful than others. It is no secret that the United States got its way most of the time in the negotiations over the post–World War II economic structure.[18] In the case of the law of the sea, after holding out for more than a decade, the United States was able to secure substantial revisions of the convention even after it had entered into force, on the basis of which, in 1994, it announced its intention to adhere.[19] And almost single-handedly, the United States was able to keep a firm commitment to reduction of carbon dioxide emissions out of the Framework Convention on Climate Change in Rio in 1992.

At the same time, a multilateral negotiating forum provides opportunities for weaker states to form coalitions and organize blocking positions. In

UNCLOS III, the caucus of "land-locked and geographically disadvantaged states," which included such unlikely colleagues as Hungary, Switzerland, Austria, Uganda, Nepal, and Bolivia, had a crucial strategic position. The Association of Small Island States, chaired by the republic of Vanuatu, played a similar role in the global climate negotiations.

Thus, like domestic legislation, the international treaty-making process leaves a good deal of room for accommodating divergent interests. In such a setting, not even the strongest state will be able to achieve all of its objectives, and some participants may have to settle for much less. The treaty is necessarily in some measure a compromise, "a bargain that [has] been made."[20] From the point of view of the particular interests of any state, the outcome may fall short of the ideal. But if the agreement is well designed—sensible, comprehensible, and with a practical eye to probable patterns of conduct and interaction—compliance problems and enforcement issues are likely to be manageable. If issues of noncompliance and enforcement are endemic, the real problem is likely to be that the negotiating process did not succeed in incorporating a broad enough range of the parties' interests, rather than willful disobedience.[21]

It is true that a state's incentives at the treaty negotiating stage may be different from those it faces at the stage of performance.[22] Parties on the giving end of the compromise, especially, might have reason to seek to escape the obligations they have undertaken. But the very act of making commitments entrenched in an international agreement changes the calculus at the compliance stage, if only because it generates expectations of compliance in others that must enter into the equation. Although states may know they can violate their treaty obligations if circumstances or their calculations go radically awry, they do not negotiate agreements with the idea that they can break them whenever the commitment becomes "inconvenient."

In any case, the treaty that comes into force does not remain static and unchanging. Treaties that last must be able to adapt to inevitable changes in the economic, technological, social, and political setting. Adjustment may be accomplished by formal amendment, or by the less cumbersome "non-amendment amendment" devices devised by modern treaty lawyers. The simplest method is to vest the power to "interpret" the agreement in some organ established by the treaty. The U.S. Constitution, after all, has kept up with the times not primarily by the amending process but through the Supreme Court's interpretation of its broad clauses. These adaptation processes are more fully discussed in Chapter 9.