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precedents. The process parallels that in a classic U.S. bureaucracy or corporation.

Even in the stark, high politics of the Cuban Missile Crisis, State Department lawyers argued that the United States could not lawfully react unilaterally, since the Soviet emplacement of missiles in Cuba did not amount to an "armed attack" sufficient to trigger the right of self-defense in Article 51 of the UN Charter. Use of force in response to the missiles would only be lawful if approved by the Organization of American States (OAS). Though it would be foolish to contend that the legal position determined President John Kennedy's decision, there is little doubt that the asserted need for advance OAS authorization for any use of force contributed to the mosaic of argumentation that led to the decision to respond initially by means of the quarantine rather than an air strike. Robert Kennedy said later, "It was the vote of the Organization of American States that gave a legal basis for the quarantine . . . and changed our position from that of an outlaw acting in violation of international law into a country acting in accordance with twenty allies legally protecting their position."[38] This was the advice he had heard from his lawyers, and it was a thoroughly defensible position. Nevertheless, many international lawyers in the United States and elsewhere disagreed because they thought the action was inconsistent with the UN Charter.[39]

CAPABILITY

According to classical international law, legal rights and obligations run among states and is an undertaking by them as to their future conduct. The object of the agreement is to affect state behavior. This simple relationship between agreement and relevant behavior continues to exist for many treaties. The LTBT is such a treaty. It prohibits nuclear testing in the atmosphere, in outer space, or underwater. Only states conduct nuclear weapons tests, so only state behavior is implicated in the undertaking. The state, by governing its own actions, without more, determines whether it will comply with the undertaking or not. Moreover, there is no doubt about the state's capacity to do what it has undertaken.

[38] Robert Kennedy, *Thirteen Days* (New York: W. M. Norton, 1971), p. 99. See also Abram Chayes "The Role of Law in the Cuban Missile Crisis."

[39] See, for example, Quincy Wright, "The Cuban Quarantine," *American Journal of International Law* 57 (July 1963), pp. 546–65; James S. Campbell, "The Cuban Crisis and the UN Charter: An Analysis of the United States Position" *Stanford Law Review* 16 (December 1963), pp. 160–76; and William L. Standard, "The United States Quarantine of Cuba and the Rule of Law," *American Bar Association Journal* 49 (August 1963), pp. 744–48.

Every state, no matter how primitive its structure or limited its resources, can refrain from conducting atmospheric nuclear tests.

Even when only state behavior is at stake, the issue of capacity may arise when the treaty involves an affirmative obligation. In the 1980s it was a fair assumption that the Soviet Union had the capability to carry out its undertaking to destroy certain nuclear weapons as required by the START agreement. In the 1990s, that assumption was threatened by the emergence of a congeries of successor states in place of the Soviet Union, many of which did not have the necessary technical knowledge or material resources to do the job.[40]

The problem is pervasive in contemporary regulatory treaties. Much of the work of the International Labor Organization (ILO) from the beginning has been devoted to improving its members' domestic labor legislation and enforcement. The current spate of environmental agreements poses the difficulty in acute form. Such treaties formally are among states, and the obligations are cast as state obligations for example, to reduce sulfur dioxide (SO_2) emissions by 30 percent against a certain baseline. However, the real object of such treaties is usually not to affect state behavior but to regulate the behavior of nonstate actors carrying out activities that produce SO_2, using electricity, or gasoline. The ultimate impact on the relevant private behavior depends on a complex series of intermediate steps. It will normally require an implementing decree or legislation followed by detailed administrative regulations. In essence, the state will have to establish and enforce a full-blown domestic regime designed to secure the necessary reduction in emissions.

The state may be "in compliance" when it has taken the formal legislative and administrative steps, and, despite the vagaries of legislative and domestic politics, it is perhaps appropriate to hold it accountable for failure to do so. However, the construction of an effective domestic regulatory apparatus is not a simple mechanical task. It entails choices and requires scientific and technical judgment, bureaucratic capability, and fiscal resources. Even developed Western states have not been able to construct such systems with confidence that they will achieve the desired objective.[41]

[40] Kurt M. Campbell, Ashton B. Carter, Steven E. Miller, and Charles A. Zraket, *Soviet Nuclear Fission: Control of the Nuclear Arsenal in a Disintegrating Soviet Union,* CSIA Studies in International Security, no. 1. Harvard University, Cambridge, Mass., November 1991, pp. 24, 25, and 108.

[41] Kenneth Hanf, "Domesticating International Commitments: Linking National and International Decision-making," prepared for a meeting entitled Managing Foreign Policy Issues Under Conditions of Change, Helsinki, July 1992.

Although there are surely differences among developing countries, the characteristic situation is a severe dearth of the requisite scientific, technical, bureaucratic, and financial wherewithal to build effective domestic enforcement systems. Four years after the Montreal Protocol was signed, only about half the member states had complied fully with the requirement of the treaty that they report annual chlorofluorocarbon (CFC) consumption.[42] The Conference of the Parties promptly established an Ad Hoc Group of Experts on Reporting, which recognized that the great majority of the nonreporting states were developing countries that for the most part were simply unable to comply without technical assistance from the treaty organization.[43]

The Montreal Protocol is the first treaty under which the parties undertake to provide significant financial assistance to defray the incremental costs of compliance for developing countries. The same issue figured on a much larger scale in the negotiations for a global climate change convention and in the UN Conference on Environment and Development, held in Brazil in June 1992. The last word has surely not been spoken in these forums, nor is the problem confined to environmental agreements.

The Temporal Dimension

Significant changes in social or economic systems mandated by regulatory treaty regimes[44] take time to accomplish. Thus, a cross section at any particular moment in time may give a misleading picture of the state of compliance. Wise treaty drafters recognize at the negotiating stage that

[42] See Report of the Secretariat on the Reporting of Data by the Parties in Accordance with Article 7 of the Montreal Protocol, UNEP/OzL.Pro.3/5, 23 May 1991, pp. 6–12 and 22–24; and Addendum, UNEP/OzL.Pro3/5/Add.l, 19 June 1991.

[43] For the establishment of the Ad Hoc Group of Experts, see Report of the Second Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, UNEP/ OzL.Pro.2/3, Decision 2/9, 29 June 1990, p. 15. At its first meeting in December 1990, the Ad Hoc Group of Experts concluded that countries "lack knowledge and technical expertise necessary to provide or collect" the relevant data and made a detailed series of recommendations for addressing the problem. See Report of the First Meeting of the Ad Hoc Group of Experts on the Reporting of Data, UNEP/OzL.Pro/WG.2/1/4, 7 December 1990.

[44] The now-classical definition of an international regime appears in Krasner, "Structural Causes and Regime Consequences," p. 2: "Regimes are sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations."

there will be a considerable time lag after the treaty is concluded before some or all of the parties can bring themselves into compliance. Thus modern treaties, from the IMF Agreement in 1945 to the Montreal Protocol in 1987, have provided for transitional arrangements and made allowances for special circumstances.[45] Nevertheless, whether or not the treaty provides for it, a period of transition will be necessary.

Similarly, if the regime is to persist over time, adaptation to changing conditions and underlying circumstances will require a shifting mix of regulatory instruments to which state and individual behavior cannot instantaneously respond. Often the original treaty is only the first in a series of agreements addressed to the issue-area.

Activists in all fields lament that the treaty process tends to settle on a least-common-denominator basis. But the drive for universality (or universal membership in the particular region of concern) may necessitate accommodation to the response capability of states with large deficits in financial, technical, or bureaucratic resources. A common solution is to start with a low obligational ante and increase the level of regulation as experience with the regime grows. The convention-protocol strategy adopted in a number of contemporary environmental regimes exemplifies this conception. The Vienna Convention on the Protection of the Ozone Layer, signed in 1985, contained no substantive obligations but required only that the parties "in accordance with the means at their disposal and their capabilities" cooperate in research and information exchange and in harmonizing domestic policies on activities likely to have an adverse effect on the ozone layer.[46] Two years later, as scientific consensus jelled on the destructive effect of CFCs on the ozone layer, the Montreal Protocol was negotiated, providing for a 50 percent reduction from 1986 levels of CFC consumption by the year 2000.[47] By June 1990, the parties agreed to a complete phaseout.[48]

The pattern has a long pedigree, extending back to the ILO, the first of the modern international regulatory agencies, whose members agreed in 1921 only to "bring the recommendation[s] or draft convention[s] [prepared by the organization] before the authority or authorities within

[45] See Articles of Agreement of the International Monetary Fund, Article 14, in UNTS, vol. 2, 1945, p. 1501; and Montreal Protocol, Article 5.

[46] Vienna Convention for the Protection of the Ozone Layer (signed 22 March 1985 and entered into force 22 September 1988; hereafter cited as Vienna Ozone Convention), Article 2(2), in *International Legal Materials,* vol. 26, 1986, p. 1529.

[47] Montreal Protocol, Article 2(4).

[48] London Amendments, Annex 1, Articles 2A(5) and 2B(3).

whose competence the matter lies, for the enactment of legislation or other action.[49] The ILO then became the forum for drafting and propagating a series of specific conventions and recommendations on the rights of labor and conditions of employment for adoption by the parties.

The effort to protect human rights by international agreement may be seen as an extreme case of time lag between undertaking and performance. Although the major human rights conventions have been widely ratified, compliance leaves much to be desired. It is apparent that some states adhered without any serious intention of abiding by them. But it is also true that even parties committed to the treaties had different expectations about compliance than with most other regulatory treaties. Indeed, the Helsinki Final Act, containing important human rights provisions applicable to Eastern Europe, is by its terms not legally binding.[50]

Even so, it is a mistake to call these treaties merely "aspirational" or "hortatory." To be sure, they embody "ideals" of the international system, but like other regulatory treaties, they were designed to initiate a process that over time, perhaps a long time, would bring behavior into greater congruence with those ideals. These expectations have not been wholly disappointed. The vast amount of public and private effort devoted to enforcing these agreements evinces their obligational content.

ACCEPTABLE LEVELS OF COMPLIANCE

The foregoing section identified a range of matters that might be put forward by the individual actor in defense or excuse of a particular instance of deviant conduct. From the perspective of the system as a whole, however, the central issue is different. For a simple prohibitory norm like a highway speed limit, it is in principle a simple matter to determine whether any particular driver is in compliance. Yet most communities and law enforcement organizations in the United States seem to be perfectly comfortable with a situation in which the average speed on interstate highways is perhaps ten miles above the limit. Even in individual cases, the enforcing officer is not likely to pursue a driver operating within that zone. The fundamental problem for the system is not how to induce all drivers to obey the speed limit but how to contain

[49] Constitution of the International Labor Organization, 11 April 1919, Article 405, 49 stat. 2722.

[50] Conference on Security and Cooperation in Europe, Final Act (1 August 1975), Article 10, in *International Legal Materials*, vol. 14, 1975, p. 1292.

deviance within acceptable levels. So, too, it is for international treaty obligations.

"An acceptable level of compliance" is not an invariant standard. The matter is further complicated because many legal norms are not like the speed limit that permits an on-off judgment as to whether an actor is in compliance. As noted above, questions of compliance are often contestable and call for complex, subtle, and frequently subjective evaluation. What is an acceptable level of compliance will shift according to the type of treaty, the context, the exact behavior involved, and over time.

It would seem, for example, that the acceptable level of compliance would vary with the significance and cost of the reliance that parties place on the others' performance.[51] On this basis, treaties implicating national security would demand strict compliance because the stakes are so high, and to some extent that prediction is borne out by experience. Yet even in this area, some departures seem to be tolerable.

In the case of the NPT, indications of deviant behavior by parties have been dealt with severely. In the 1970s, U.S. pressures resulted in the termination of programs to construct reprocessing facilities in South Korea and Taiwan.[52] Recently, a menu of even more stringent pressures was mounted against North Korea, which signed an IAEA safeguard agreement and submitted to inspection [for a time].[53] The inspection and destruction requirements placed on Iraq under UN Security Council resolution 687 [and the sanctions imposed for violation represent], an extreme case of this severity toward deviation by NPT parties.

Although over 130 states are parties to the NPT, the treaty is not universal, and some nonparties have acquired or are seeking nuclear weapons capability.[54] Despite these important holdouts, compliance

[51] Charles Lipson, "Why Are Some International Agreements Informal," *International Organization* 45 (Autumn 1991), pp. 495–538.

[52] See Joseph A. Yager, "The Republic of Korea," and "Taiwan," in Joseph A. Yager, ed., *Nonproliferation and U.S. Foreign Policy* (Washington, D.C.: Brookings Institution, 1980), pp. 44–65 and 66–81, respectively.

[53] See David Sanger "North Korea Assembly Backs Atom Pact," *The New York Times*, 10 April 1992, p. A3; and David Sanger, "North Korea Reveals Nuclear Sites to Atomic Agency, *The New York Times,* 7 May 1992, p. A4. The initial U.S. response included behind-the-scenes diplomatic pressure and encouraging supportive statements by concerned states at IAEA meetings. See L. Spector, *Nuclear Ambitions: The Spread of Nuclear Weapons, 1989–1990* (Boulder, Colo.: Westview Press, 1990), pp. 127–30. Japan apparently has refused to consider economic assistance or investment in North Korea until the nuclear issue is cleared up.

[54] Countries that have not ratified the NPT include Argentina, Brazil, China, France, India, Israel, and Pakistan. See Spector, *Nuclear Ambitions,* p. 430.

with the NPT by the parties remains high. In fact, prominent nonparties including Argentina, Brazil, and South Africa have either adhered to the treaty or announced that they will comply with its norms.[55] Although there have been some significant departure from its norms and less than universal acquiescence, the nonproliferation regime is surviving.

If national security regimes have not collapsed in the face of significant perceived violation, it should be no surprise that economic and environmental treaties can tolerate a good deal of noncompliance. Such regimes are in fact relatively forgiving of violations plausibly justified by extenuating circumstances in the foreign or domestic life of the offending state, provided the action does not threaten the survival of the regime. As noted above, a considerable amount of deviance from strict treaty norms may be anticipated from the beginning and accepted, whether in the form of transitional periods, special exemptions, limited substantive obligations, or informal expectations of the parties.

The generally disappointing performance of states in fulfilling reporting requirements is consistent with this analysis.[56] It is widely accepted that failure to file reports reflects a low domestic priority or deficient bureaucratic capacity in the reporting state. Since the reporting is not central to the treaty bargain, the lapse can be viewed as "technical." When, as in the Montreal Protocol, accurate reporting was essential to the functioning of the regime, the parties and the secretariat made strenuous efforts to overcome the deficiency, and with some success.[57]

The Convention on International Trade in Endangered Species (CITES) ordinarily displays some tolerance for noncompliance, but the alarming and widely publicized decline in the elephant population in East African habitats in the 1980s galvanized the treaty regime. The parties took a decision to list the elephant in Appendix A of the treaty (shifting it from Appendix B, where it had previously been listed), with the effect of banning all commercial trade in ivory. The treaty permits any party to enter

[55] Reuters News Service, "Argentina and Brazil Sign Nuclear Accord," *The New York Times,* 14 December 1991, p. 7; "Brazil and Argentina: IAEA Safeguard Accord," U.S. Department of State Dispatch, 23 December 1991, p. 907; Reuters News Service, "South Africa Signs a Treaty Allowing Nuclear Inspection," *The New York Times,* 9 July 1991, p. A11; and "Fact Sheet: Nuclear Non-proliferation Treaty," U.S. Department of State Dispatch, 8 July 1991, p. 491.

[56] U.S. General Accounting Office, *International Environment: International Agreements Are Not Well-Monitored,* GAO, RCED-92–43, January 1992.

[57] See Report of the Secretariat on the Reporting of Data by the Parties in Accordance with Article 7 of the Montreal Protocol, UNEP/OzL.Pro.3/5, 23 May 1991, pp. 6–12 and 22–24; and Addendum, UNEP/OzL.Pro.3/5/Add.1, 19 June 1991.

a reservation to such an action, in which case the reserving party is not bound by it. Nevertheless, through a variety of pressures, the United States together with a group of European countries insisted on universal adherence to the ban, bringing such major traders as Japan and Hong Kong to heel.[58] The head of the Japanese Environment Agency supported the Japanese move in order "to avoid isolation in the international community."[59] It was freely suggested that Japan's offer to host the next meeting of the conference of parties, which was accepted on the last day of the conference after Japan announced its changed position, would have been rejected had it reserved on the ivory ban.

The meaning of the background assumption of general compliance is that most states will continue to comply, even in the face of considerable deviant behavior by other parties. In other words, the free-rider problem has been overestimated. The treaty will not necessarily unravel in the face of defections. As Mancur Olson recognized, if the benefits of the collective good to one or a group of parties outweigh the costs to them of providing the good, they will continue to bear the costs regardless of the defections of others.[60]

It seems plausible that treaty regimes are subject to a kind of critical-mass phenomenon, so that once defection reaches a certain level, or in the face of massive violation by a major player, the regime might collapse.[61] Thus, either the particular character of a violation or the identity of the violator may pose a threat to the regime and evoke a higher demand for compliance. [Thus, in many of the situations in which the United States

[58] For a report of Japan's announcement of its intention not to enter a reservation on the last day of the conference, see United Press International, "Tokyo Agrees to Join Ivory Import Ban," *Boston Globe,* 21 October 1989, p. 6. Japan stated that it was "respecting the overwhelming sentiment of the international community." As to Hong Kong, see Jane Perlez, "Ivory Ban Said to Force Factories Shut," *The New York Times,* 22 May 1990, p. A14. The Hong Kong reservation was not renewed after the initial six-month period. Five African producer states with effective management programs did enter reservations but agreed not to engage in trade until at least the next conference of the parties. See Michael J. Glennon, "Has International Law Failed the Elephant," *American Journal of International Law* 84 (January 1990), pp. 1–43, especially p. 17. At the 1992 meeting they ended their opposition. See "Five African Nations Abandon Effort to Resume Elephant Trade in CITES Talks," *Bureau of National Affairs Environment Daily,* electronic news service, 12 March 1992.

[59] United Press International, "Tokyo Agrees to Join Ivory Import Ban," *Boston Globe,* 21 October 1989.

[60] Mancur Olson, *The Logic of Collective Action* (Cambridge, Mass.: Harvard University Press, 1971), pp. 33–36.

[61] For a discussion of critical-mass behavior models, see Thomas Schelling, *Micromotives and Macrobehavior* (New York: Norton, 1978), pp. 91–110.

accused the Soviet Union of egregious violations of the ABM Treaty, and although nuclear security was involved,] the violations did not threaten the basic treaty bargain. The United States responded with a significant enforcement effort but did not itself destroy the basic bargain by abrogating the treaty. In the CITES elephant case, involving relatively peripheral national interests from the realist perspective, a reservation by Japan would have threatened the collapse of the regime. A concerted and energetic defense resulted.

DETERMINING THE ACCEPTABLE COMPLIANCE LEVEL

If, as we argue above, the "acceptable level of compliance" is subject to broad variance across regimes, times, and occasions, how is what is "acceptable" to be determined in any particular instance? The economists have a straightforward answer: invest additional resources in enforcement (or other measures to induce compliance) up to the point at which the value of the incremental benefit from an additional unit of compliance exactly equals the cost of the last unit of additional enforcement resources.[62] Unfortunately, the usefulness of this approach is limited by the impossibility of quantifying or even approximating, let alone monetizing, any of the relevant factors in the equation and markets are not normally available to help.

In such circumstances, as Charles Lindblom has told us, the process by which preferences are aggregated is necessarily a political one.[63] It follows that the choice whether to intensify (or slacken) the international enforcement effort is necessarily a political decision. It implicates all the same interests pro and con that were involved in the initial formulation of the treaty norm, as modified by intervening changes of circumstances. Although the balance will to some degree reflect the expectations of compliance that the parties entertained at that time, it is by no means rare, in international as in domestic politics, to find that what the lawmaker has given in the form of substantive regulation is taken away in the implementation. What is "acceptable" in terms of compliance will reflect

[62] See Gary Becker, "Crime and Punishment: An Economic Approach," *Journal of Political Economy* 76 (March/April 1968), pp. 169–217; and Stigler," *The Optimum Enforcement of Laws*," p. 526.

[63] Charles E. Lindblom, *Politics and Markets* (New York: Basic Books, 1977), pp. 254–55. At the domestic level, the decision whether to intensify enforcement of the treaty implicates a similar political process, as the continuous debates in the United States over GATT enforcement testify. Our work-in-progress includes a consideration of second-level enforcement.

the perspectives and interests of participants in the ongoing political process rather than some external scientific or market-validated standard.

If the treaty establishes a formal organization, that body may serve as a focus for mobilizing the political impetus for a higher level of compliance. A strong secretariat can sometimes exert compliance pressure, as in the IMF or ILO. The organization may serve as a forum for continuing negotiation among the parties about the level of compliance. An example of these possibilities is the effort of the International Maritime Consultative Organization (IMCO) – and after 1982 its successor, the International Maritime Organization (IMO) – to control pollution of the sea by tanker discharges of oil mixed with ballast water.[64] IMCO's regulatory approach was to impose performance standards limiting the amount of oil that could be discharged on any voyage. From 1954, when the first oil pollution treaty was signed, until the 1978 revisions, there was continuous dissatisfaction with the level of compliance. IMCO responded by imposing increasingly strict limits, but these produced only modest results because of the difficulty of monitoring and verifying the amount of oil discharged. Finally, in 1978 IMO adopted a new regulatory strategy and imposed an equipment standard requiring all new tankers to have separate ballast tanks that physically prevent the intermixture of oil with the discharged ballast water. The new requirement was costly to tanker operators but easily monitored by shipping authorities. Compliance with the equipment standard has been close to 100 percent, and discharge of oil from the new ships is substantially nil. The sequence reflects the changing configuration of political strength between domestic environmental and shipping constituencies in the members of IMO (and IMCO) which was originally referred to as a "shipping industry club."

Again, after a considerable period of fruitless exhortation in the International Whaling Commission, Japan finally agreed to participate in a temporary moratorium on whaling that had been proclaimed by the organization when the United States threatened trade sanctions under the Marine Mammal Protection Act.[65] The Japanese ban on ivory imports shows a mixture of economic and reputational threats. The United States

[64] Ronald Mitchell, "Intentional Oil Pollution of the Oceans: Crises, Public Pressure, and Equipment Standards," in Peter M. Haas, Robert O. Keohane, and Mark A. Levy, eds., *Institutions for the Earth: Sources of Effective International Environmental Protection* (Cambridge, Mass.: MIT Press, forthcoming).

[65] See Steinar Andresen, "Science and Politics in the International Management of Whales," *Marine Policy*, vol. 13, no. 2, 1989, p. 99; and Patricia Birnie, *International Regulation of Whaling* (New York: Oceana, 1985).

hinted at trade sanctions, and the conference of the parties of CITES threatened not to schedule its next meeting in Kyoto if Japan remained out of compliance.

If there are no objective standards by which to recognize an "acceptable level of compliance," it may be possible at least to identify some general types of situations that might actuate the deployment of political power in the interest of greater compliance. First, states committed to the treaty regime may sense that a tipping point is close, so that enhanced compliance would be necessary for regime preservation. As noted above, the actions against Japan on the ivory import ban may have been of this character. After the high visibility given to the CITES moves to ban the ivory trade, there would not have been much left of the regime if Japan had been permitted to import with impunity.

Second, states committed to a level of compliance higher than that acceptable to the generality of the parties may seek to ratchet up the standard. The Netherlands often seems to play the role of "leader" in European environmental affairs both in the North Sea and Baltic Sea regimes and in LRTAP.[66] Similarly, the United States may be a "leader" for improving compliance with the NPT, where its position is far stronger than that of its allies.

Finally, campaigning to improve a compliance level that states concerned would just as soon leave alone is a characteristic activity for NGOs, especially in the fields of the environment and of human rights. NGOs increasingly have direct access to the political process both within the treaty organizations and in the societies of which they are a part. Their technical, organizational, and lobbying skills are an independent resource for enhanced compliance at both levels of the two-level game.

CONCLUSION

The foregoing discussion reflects a view of noncompliance as a deviant rather than an expected behavior, and as endemic rather than deliberate. This in turn leads to de-emphasis of formal enforcement measures and even, to a degree, of coercive informal sanctions, except in egregious cases. It shifts attention to sources of noncompliance that can be managed by routine international political and managerial processes. Thus, the improvement of dispute resolution procedures goes to the problem

[66] See Peter M. Haas, "Protecting the Baltic and North Seas," in Haas, Keohane, and Levy, *Institutions for the Earth*.