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International Law, International Relations and Compliance

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Commitments are a persistent feature of international affairs. Disagreement over the effect of international commitments and the causes of compliance with them is equally persistent. Yet in the last decade the long-standing divide between those who believed that international rules *per se* shaped state behavior and those who saw such rules as epiphenomenal or insignificant has given way to a more nuanced and complex debate. Regime theory, originally focused on the creation and persistence of regimes, increasingly emphasizes variations in regimes and in their impact on behavior. The legal quality of regime rules is one important source of regime variation. At the same time the proliferation and evolution of international legal agreements, organizations and judicial bodies in the wake of the Cold War has provided the empirical predicate and a policy imperative for heightened attention to the role of international law.

Across many issue-areas, the use of law to structure world politics seems to be increasing. This phenomenon of legalization raises several questions. What factors explain the choice to create and use international law? If law is a tool or method to organize interaction, how does it work? Does the use of international law make a difference to how states or domestic actors behave? These questions are increasingly of interest to IR theorists and policy-makers alike. The core issue is the impact of law and legalization on state behavior, often understood in terms of compliance. While the distinction should not be overstated, legal rules and institutions presume compliance in a way that non-legal rules and institutions do not. Law and compliance are conceptually linked because law explicitly aims to produce compliance with its rules: legal rules set the standard by which compliance is gauged. Explanations of why and when states comply with international law can help account for the turn to law as a positive phenomenon, but they also provide critical policy guidance for the design of new institutions and agreements.

This chapter surveys the study of compliance in both the international relations (IR) and international law (IL) literature.[1] In many ways, the compliance literature is a microcosm of developments in both fields, and particularly of the rapprochement between them (Abbott, 1989; Koh, 1997; Slaughter Burley, 1993; Slaughter et al., 1998b). For IR scholars interested in reviving the study of international law in their discipline, it was a natural step to focus first on questions of whether, when and how law 'mattered' to state behavior. For international lawyers eager to use IR theory to address a host of theoretical and practical legal problems, the mechanisms of compliance were an equally natural starting point. Indeed, it is a rare conference or collaborative project between scholars from both disciplines in which compliance is not the focus of at least one paper. Future studies on compliance are also likely to prove an important empirical testing ground for the value of theoretically sophisticated interdisciplinary work. Our overview of theories of compliance is thus in many ways a review of the burgeoning body of 'IR–IL' scholarship.

The first part of this chapter defines the concept of compliance, distinguishing it from the related but distinct concepts of implementation and effectiveness. We also focus primarily on compliance with treaties, rather than with the broader categories of rules that international lawyers term 'customary international law'. The second part reviews the

major theories advanced by IR and IL scholars through the 1990s, setting forth a chronological account. Part three situates these theories in the context of a typology of six different sets of variables that scholars from both disciplines have identified as influencing the existence and degree of compliance. Part four reviews a range of more recent empirical studies of compliance, as well as the results of cognate analyses of regime design, legalization and the choice of hard law versus soft law. The chapter concludes by identifying a number of open questions.

Compliance as a Conceptual Variable

We define compliance as a state of conformity or identity between an actor's behavior and a specified rule (Fisher, 1981: 20; Mitchell, 1994: 30). Some analysts distinguish 'compliance', in the sense of conformity for instrumental reasons such as avoidance of punishment, from 'obedience', defined as behavior resulting from the internalization of norms (Koh, 1997; Kratochwil, 1989). For present purposes, however, we do not gauge compliance by reference to motivations. Compliance as a concept, in our definition, is agnostic about causality. Compliance is also not uniquely applicable to *legal* rules, though that is our focus here. Nor is the impact of legal rules limited to compliance – as we discuss below, legal rules may change state behavior even when states fail to comply. The important point to underscore is that most theories of compliance with international law are at bottom theories of the behavioral influence of legal rules. Indeed, in practice the line between theories of compliance and theories of the 'effectiveness' or impact of rules can blur. We return to this issue below.

Political scientists have traditionally not distinguished legal from non-legal rules or norms, or have treated the difference as causally insignificant. By contrast, most IL scholarship treats compliance with treaties and compliance with non-legally binding commitments as driven by quite different processes. Law *qua* law, in this view, carries particular obligations and implicates special norms of behavior and decision processes. However, IR scholars are increasingly interested in distinguishing legal from non-legal rules, and IL scholars are increasingly interested in 'soft law' or non-legal rules. Despite this convergence, an interdisciplinary assessment of compliance theory must be sensitive to these disciplinary differences in conceptualizing the dependent variable.

Compliance is distinct from, but closely related to, two concepts that are increasingly important in contemporary regime theory: implementation and effectiveness (Victor et al., 1998). Implementation is the process of putting international commitments into practice: the passage of legislation, creation of institutions (both domestic and international) and enforcement of rules. Implementation is typically a critical step toward compliance, but compliance can occur without implementation; that is, without any effort or action by a government or regulated entity. If an international commitment matches current practice, for instance, implementation is unnecessary and compliance is automatic. Compliance can also occur for reasons entirely exogenous to the agreement: economic collapse in the former Soviet Union, for example, has produced perfect, but coincidental, compliance with many environmental agreements. Or implementation may be thorough but be overwhelmed by exogenous, uncontrollable factors. Thus implementation is conceptually neither a necessary nor a sufficient condition for compliance, but in practice is frequently critical.

Effectiveness is a concept defined in varying ways: for example, as the degree to which a rule induces changes in behavior that further the rule's goals; improves the state of the underlying problem; or achieves its policy objective (Keohane et al., 1993: 7; Young, 1994: 140–62). The connection between compliance and effectiveness is also neither necessary nor sufficient. Rules or regimes can be effective in any of these senses even if compliance is low. And while high levels of compliance can indicate high levels of effectiveness, they can also indicate low, readily met and ineffective standards. Many international agreements reflect a lowest common denominator dynamic that makes compliance easy but results in a negligible influence on behavior. Here is the source of the vexing question of the significance of high observed levels of compliance. From an effectiveness perspective more compliance is better, *ceteris paribus*. But regimes with significant non-compliance can still be effective if they induce changes in behavior. The key point is that the sheer existence (or lack) of compliance may indicate little about international law's impact on behavior; consequently, studies of compliance must be translated into normative prescriptions about institutional design with great care.

The Literature: General Theories of Compliance

A review of the IR and IL literatures on compliance can be organized into many different narratives: the progression of each discipline separately; the conjunction of the two disciplines as captured by cross-cutting analytical categories; the ways in which each discipline responds to the other. We tell the story chronologically, noting important work in each discipline as it arises. The story is a bit longer,

but ultimately more interesting and enlightening. At times the two disciplines interact dialectically; at other times they speak past each other. Increasingly, IR and IL scholars are working collaboratively.

We skim the literature through the 1980s, noting only the most visible features of the landscape, but review the 1990s in greater detail. For much of the Cold War, IL scholarship on compliance was part of the larger project of demonstrating that 'international law mattered' (Falk, 1968).[2] The standard move, although it took many different guises, was to deny or downplay the relevance of a layman's domestic vision of law as something to be enforced. Enforcement requires an enforcer, which the international system manifestly does not have. Law, however, can and does perform many functions other than constraint.

The leading legal scholars of the Cold War era, such as McDougal, Chayes, Henkin, Schachter and Falk, all developed accounts of international law in which rules and institutions both reflect and advance state interests. The American Society of International Law sponsored a series of monographs on important international crises in which scholars traced the 'role of international law', not in determining the outcome, but in shaping or facilitating it. Looking back, many contemporary scholars have been inclined to see writers in this period as making a virtue of necessity: the Cold War froze international law in a primarily facilitative mode. In fact, however, much of the scholarship during this period laid the foundation for the compliance theories that have dominated the debate in recent years.

How Nations Behave

Henkin first published his celebrated book, *How Nations Behave*, in the late 1960s. As his title suggests, he ranges well beyond law, embracing politics and policy and explicitly focusing on the impact of law on behavior. He argued that nations behave largely in compliance with international law. Advancing an argument common among IL scholars, Henkin suggested that norms of respect for law shape decisions in myriad ways that often escape attention because they are quiet and routine. This produces selection bias that causes critics to focus on the rare cases of non-compliance rather than the overwhelming cases of compliance – hence his famous aphorism that 'it is probably the case that *almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time*' (Henkin, [1968] 1979: 47; emphasis in original). Yet on the question immediately posed by political scientists – *why* do nations comply? – Henkin is less clear. He invoked legal process arguments to show how the need for plausible justification and argument in international law – its necessary procedural, discursive qualities – bounds state behavior and systematically encourages states to move closer to the compliance end of the spectrum.[3] But he also claimed that a suite of factors – reputation, reciprocity, norm observation, domestic politics and many others – weighs in favor of compliance in almost every case.

This list of factors influencing compliance is remarkably rich. It is too rich, however, to yield a clear theory of why and when states do and do not comply. Henkin offered instead an argument *of* compliance, coupled to a wide-ranging but largely unweighted analysis of relevant factors. None the less, his work set the standard of the period and remains a touchstone for compliance scholars.

Replacing Law with Regimes

In the 1980s American political scientists rediscovered international law under the banner of regime theory.[4] The famous 'Regimes' volume recapitulates many of the functionalist and constructivist insights advanced by IL scholars in the 1960s and 1970s.[5] On the other hand, to give IR scholarship its due, *After Hegemony* and its progeny formalized and systematized many of the insights generated by the international lawyers. Regime theory was genuinely a theory, or rather a collection of theories. It assumed that compliance with international commitments was possible, even likely. States would only establish regimes when it was in their long-term interest to cooperate. They thus needed mechanisms to prevent short-term defection at the expense of other states. But once assured that other states were cooperating and complying, each should perceive its own interest in following suit.

Regime theory flourished through the 1980s, as scholars demonstrated its applicability to security issues as well as economic problems and expanded the repertoire of causal mechanisms through which regimes facilitate cooperation. The initial focus, however, was more on regime formation than impact. Nevertheless, a divide between rationalist and constructivist approaches to compliance was already emerging, one that would become much more apparent in the focus on regime compliance through the 1990s. Early constructivist scholars emphasized mechanisms that drew on the normative power of rules and the importance of shared knowledge and discourse in shaping identity and interests (Keohane, 1988; Kratochwil, 1989). While constructivists in IR have not generally tackled compliance *per se*, they are starting to (Checkel, 2000; Risse et al., 1999). From a constructivist perspective, compliance is less a matter of rational calculation or imposed constraints than of internalized identities and norms of appropriate behavior. It is a line of theory that is particularly congenial to many IL scholars; we discuss this linkage further below.

Legitimacy Rules

By the end of the 1980s, IL scholars were finally off the defensive of the Cold War years. A decade of obsession with 'regimes', coupled with the fall of the Berlin Wall and the promise of a new era of global cooperation, created an opening for a new scholarly focus on the particular properties of law. Speaking for the international legal profession, Franck proclaimed that 'we are in a post-ontological era' (1992). Freed from the need to demonstrate the existence, much less the relevance, of international law as law, he set forth a bold argument about compliance and legitimacy (Franck, 1990).

Franck's central thesis was that 'in a community organized around rules, compliance is secured – to whatever degree it is – at least in part by the perception of a rule as legitimate by those to whom it is addressed' (1988: 706). Despite this prefatory hedging of dependent and independent variables, he presented the theory as a general theory of compliance in which legitimacy is the crucial causal factor. The legitimacy of rules exerts a 'compliance pull' on governments that explains the high observed levels of compliance of international law. This notion of compliance-pull, rather than compliance itself, is actually the dependent variable of the analysis. Franck defined legitimacy in terms of four elements. Textual determinacy refers to the clarity and transparency of the commitment itself. This is not simplicity *per se*; rather, the rule must be able to clearly 'communicate its intent' in specific situations. Symbolic validation is the communication of authority through ritual or regularized practice. Coherence refers to consistency in application and in context with other rules. Adherence means the degree a rule fits within the normative hierarchy of rules about rule-making, or secondary rules, in Hart's influential schema (Hart, 1994). Together, these four characteristics determine 'right process'. Right process, by creating the perception of legitimacy, in turn determines the compliance pull of a rule. Ultimately, the theory claims a chain (or cycle) of causation between right process and state behavior. Legitimacy determines compliance pull, but compliance pull is also the measure of legitimacy. While influential in IL circles, Franck's theory faced criticism from IR scholars: from a rationalist-instrumentalist perspective, the argument is essentially circular (Keohane, 1997: 493).

What distinguishes the legitimacy theory of compliance is its focus on rule-making processes, and the qualities of rules themselves, rather than on rational, strategic interaction. While Franck did not explicitly engage the then-emerging constructivist literature, his argument is quite consistent with many constructivist assumptions and insights. The theory of state behavior embedded in legitimacy theory is non-instrumental: rather than game theory or bureaucratic politics, Franck invokes theories of legal process and obligation. The recurring image is of international society rather than cooperation under anarchy.

Compliance with International Court Decisions

With the end of the Cold War both international and 'supranational' courts and tribunals proliferated (New York University Journal of International Law and Politics Symposium, 1999).[6] Members of the international community created war crimes tribunals for Rwanda and Yugoslavia, negotiated an international criminal court and added a standing Appellate Body and new dispute settlement rules to the World Trade Organization. Implicit in these moves to create new judicial institutions was a belief that legal decisions are distinctive; that law provides a way to engage complex political issues in a more neutral, less overtly power-laden, and perhaps more predictable manner. Some existing judicial bodies also saw their role and power grow in the 1980s and 1990s. One of the most significant and interesting examples was the European Court of Justice (ECJ). This global turn to judicial bodies spawned a wide-ranging literature, with many implications for compliance theory.

In Europe, 1992 marked the completion of the single market in the European Community; the accompanying hoopla refocused attention on the process and mechanisms of European integration. The ECJ, a key player in this process, was credited by some with having 'constitutionalized' the Treaty of Rome and laid the legal foundation for the single market. Legal scholars and judges such as Stein, Weiler and Mancini offered detailed and powerful accounts of how the ECJ had gradually secured compliance with its judgments and created a far more powerful role for itself than the founders of the Community had ever envisaged (Mancini, 1989; Stein, 1981; Weiler, 1991). Political scientists such as Garrett and Weingast, on the other hand, portrayed the ECJ as the relatively docile creature of state interests (Garrett and Weingast, 1993).

Slaughter[7] and Mattli, a lawyer and a political scientist, drew on the legal literature in developing (or reviving) a neofunctionalist account of compliance with supranational judicial decisions. They argued that the ECJ had adroitly built bridges between supra- and sub-national actors, created spillover of various kinds, and exploited its nominally apolitical character to insulate itself from direct political interference. The result was that European governments could not ignore or reject ECJ decisions without countering their own courts and thus opening themselves to charges of flouting the rule of law domestically (Burley and Mattli, 1993). Garrett countered with further evidence of both rational expectation on the part of state actors

and apparent acquiescence on the part of the ECJ; the resulting debate extended for several years (Garrett, 1995; Mattli and Slaughter, 1995; Garrett et al., 1998; Mattli and Slaughter, 1998).

The key issue in this debate was the extent to which the ECJ had engineered greater compliance with its decisions relating to the Treaty of Rome and subsidiary Community legislation than the member states either expected or desired. Proponents of this view emphasized domestic linkages as the key causal mechanism in fostering compliance – links between the ECJ and domestic litigants and courts. Scholars such as Weiler, Stone Sweet and Alter developed distinctive variants of this basic explanation, exploring the motives of domestic courts for engaging in such linkages, cross-national variation, and variation among different types and levels of courts in one country (Slaughter et al., 1998a; Volcansek, 1997; Weiler, 1994).[8]

At the same time, the study of compliance with supranational court decisions has extended well beyond Europe to issue-areas such as human rights, trade and the environment. In 1997 Helfer and Slaughter distilled the experience of the ECJ and the European Court of Human Rights in terms of three sets of factors that appear to have contributed to the effectiveness of those two tribunals (Helfer and Slaughter, 1997). A number of legal scholars have applied the 'checklist' developed in this article to other tribunals, such as the Inter-American Court of Human Rights and the NAFTA Commission on Environmental Cooperation (Knox, 2001). Other more general theories of effective supranational adjudication highlight features of institutional design such as judicial independence, access by private litigants, the degree of 'embeddedness' in domestic and transnational society, and the reliance on progressively linked caselaw (Keohane et al., 2001; Schneider, 1998; Stone Sweet, 1999, 2000).

Among international courts other than the ECJ, arguably the most widely studied and influential is that of the GATT/WTO system. The number of disputes before GATT/WTO panels has increased dramatically since the late 1970s, and the creation of the WTO substantially legalized the GATT dispute process. Two leading trade law figures, Jackson and Hudec, have long debated the impact of legalization on compliance with GATT/WTO decisions, prefiguring the broader studies of legalization now under way among IR scholars. Jackson (and many others) insist that the steady shift to more formal rules and processes in GATT dispute resolution, culminating with the WTO provision that panel decisions be automatically binding, has enhanced compliance with those decisions and hence the effectiveness of not only the dispute resolution process but the trade regime as a whole. Hudec, on the other hand, agrees that legalization of the dispute process altered compliance, but challenges the view that further legalization will have any impact (Hudec, 1999). Whether the WTO has struck the appropriate balance and achieved 'optimal legalization' is now debated by IR and IL scholars alike (Barfield, 2001; Goldstein and Martin, 2001). Part of that equation is the impact of legalization on compliance. As many have noted, non-compliance with WTO rulings is likely to remain a problem so long as the system permits long delays between bringing suit and a final ruling and so long as the compensation that may be authorized is limited to plaintiff's 'damages' rather than defendant's gains. Why, when and how the WTO – and the GATT before it – produces compliance with rulings remain critical questions that have been taken up by many scholars interested in compliance and the role of law; we discuss some of the current research below.

Many readers are likely to draw an immediate and instinctive distinction between compliance with the decisions of international tribunals, whether courts or arbitral panels, and compliance with more general international rules. Differences certainly exist – tribunal decisions are targeted toward specific parties in a specific dispute; the background conditions that ultimately gave rise to some kind of adjudication may suggest that the parties either are particularly likely or particularly unlikely to comply (they may be exhausted or they may have just begun to fight!); the decisions may or may not have wider precedential value. On the other hand, given that compliance with domestic law is often measured in the first instance by a willingness to comply with the decisions of domestic courts, the two types of compliance are clearly deeply related in many ways. They may both be the product of a deeper variable, such as a more general predisposition to uphold the rule of law, or they may reinforce one another. One of the challenges for future compliance research is to sort out some of these similarities and differences.

Theorizing Across the IR–IL Divide

In 1993 Chayes and Chayes published a general theory of compliance in *International Organization* (Chayes and Chayes, 1993). The theory was 'managerial' in that it rejected sanctions and other 'hard' forms of enforcement in favor of collective management of (non)performance. This approach tied together many themes in the IL literature with insights from IR theory. Managerialism begins with the premise that states have a propensity to comply with their international commitments. This propensity stems from three factors. First, because international legal rules are largely endogenous, an assumption of rational behavior predicts that states have an interest in compliance with rules.[9] Second, compliance is efficient from an internal, decisional perspective. Once a complex bureaucracy is directed to comply, explicit calculation of costs and

benefits for every decision is itself costly. The agreement may also create a domestic bureaucracy with a vested interest in compliance. Third, extant norms induce a sense of obligation in states to comply with legal undertakings. This sense of obligation, managerialists argue, is empirically self-evident in state behavior, particularly the 'time and energy ... [that states devote] to preparing, negotiating, and monitoring treaty obligations' (Chayes and Chayes, 1993: 186–7). Following Henkin, Chayes and Chayes conceive of compliance as a continuum with the appropriate or tolerable level of compliance set through an interactive, sometimes tacit process. The Anti-Ballistic Missile regime, for example, tolerated several installations by the Soviet Union that skirted, if not crossed, the margin of compliance, yet were not fully challenged by the United States. While instances of non-compliance clearly occur, the key managerial claim is that they are generally inadvertent. They result from state incapacity or serious resource constraints; from interpretively contestable treaty provisions, meaning that the commitment itself is ambiguous; or from unavoidable or unanticipated time lags between commitment and performance. For these reasons the managerial model has been dubbed the 'no-fault' theory of compliance.[10]

Prescriptively, Chayes and Chayes's theory of compliance suggests several ways to improve compliance. For example, ambiguity can be reduced through more specific rules (though specificity may come at the price of increased bargaining costs). Agreements can promote compliance by incorporating a transparent information system, with transparency referring to the adequacy, accuracy and availability of information about policies and actions of other states (Finel and Lord, 1999; Mitchell, 1998). Extensive review of performance can create assurance among the parties. Assistance, either technical or financial, can help put non-compliant states back on track. The overall focus should be non-confrontational, forward-looking and facilitative in nature. As Chayes and Chayes note, many of their prescriptions are already common diplomatic practice.[11] But managerialism provides a synthesizing theory that justifies and draws them together into a coherent whole.

'On Compliance' and later *The New Sovereignty* launched an important and heated debate about the sources and significance of compliance at a time when IR and IL theorists were increasingly talking to one another. In a trenchant critique, Downs, Rocke and Barsoom advanced what is sometimes called the political economy or enforcement theory of compliance. This theory emphasizes the strategic dimensions of cooperation, the central role of enforcement, and the endogenous quality of rules and institutions (Downs, 1998; Downs et al., 1996). Of central importance to the political economy approach is the relationship between enforcement and the nature of regime commitments – specifically, their 'depth'. As regimes deepen, demanding greater changes from the status quo, the gains from cooperation grow. Yet incentives to behave opportunistically – to violate the agreement – also grow. Deeper agreements as a result require correspondingly harsher punishments to deter non-compliance and sustain cooperation.

Thus enforcement theory suggests that much of the evidence of high compliance with international law is merely indicative of the 'shallowness' of many international agreements and should not be generalized to more demanding cases. As Downs, Rocke and Barsoom put it, the empirical findings of the managerial school 'are interesting and important but ... its policy inferences are dangerously contaminated by selection problems' (1996: 379–80). In deeper, more demanding cooperative regimes, the domestic interests affected and the costs and benefits involved are more significant, and, they argue, the deepest regimes have in fact used the most extensive enforcement systems. The precise level of enforcement can be understood based on state incentives. In the GATT, as noted, sanctions for non-compliance correspond to the victim's losses, rather than the defector's gains. If enforcement is the key to compliance, Downs and Rocke argue, this provision 'guarantees that [GATT sanctions] will not function as an effective deterrent' (1995: 134). Yet they argue deductively that these weak sanctions make sense when the power of informational uncertainty about domestic demands for non-compliance (in this context, trade protection) is taken into account. If domestic demands for protection were fully known *ex ante*, they could be incorporated into the agreement itself.[12] Instead, moderate sanctions preserve the overall cooperative system while permitting some politically necessary acts of non-compliance.[13] Thus a domestic attribute – uncertainty about domestic demands for non-compliance – helps determine the level of enforcement and hence the observed levels of compliance. The politically optimal regime, in this case, is one with some non-compliance.[14]

The debate between managerialists and enforcement theorists is important and ongoing. It has deep roots; at its heart it reflects a fundamental division about the nature of law that permeates domestic as well as international jurisprudence. Law can be understood as rules and as process; it can be embraced and enforced; it is both an instrument of its makers and an autonomous entity.

Political scientists all too often assume a relatively flat and formal conception of law, at least when contrasted with the complexity and range of lawyers' understandings of law. At the same time, however, political scientists are often less constrained than lawyers in challenging those understandings and demanding empirical evidence. As

the management–enforcement debate demonstrates, the clash of different understandings can yield very different policy implications; it also invites onlookers to determine which empirical situations best fit which model. And it yields a very rich agenda for further research.

Norms and Compliance

In the 1990s the rise of constructivist theory dovetailed with work by legal scholars long interested in the normative basis of compliance (Checkel, 1999). Both strands of research built on or reflected earlier treatments of the role of norms and law, in particular the work of the English School scholars, such as Bull (1977), and early constructivists such as Kratochwil (1989) and Ruggie (1975). Much IL scholarship echoes the flavor and ontology of constructivist theory. Franck's legitimacy theory suggested that state behavior is determined not by rational calculation but by normative processes and specifically legitimacy. Even managerial theory stresses the key role of norms of behavior and the social context within which non-compliance is addressed. In these norm-oriented theories enmeshment in a legitimate, iterated, transnational process of legal production and interpretation cabins state behavior *vis-à-vis* international law.

A more recent exemplar of this approach is Koh's theory of 'obedience' with international law. Obedience is rule-induced behavior caused when a party has 'internalized [a] norm and incorporated it into its own value system' (Koh, 1997, 1998: 628). Thus obedience is compliance motivated not by anticipation of enforcement but via the incorporation of rules and norms into domestic legal systems. Incorporation in turn stems from what he terms 'transnational legal process'. This transnational legal process has three sequential components: interaction, interpretation and internalization. States comply with or obey rules because of variations in this process of internalization. Full internalization produces obedience rather than simply compliance.

Ultimately, Koh's definition of obedience conflates the theory's independent and dependent variables – internalization defines obedience but also explains it – limiting the power of the argument. As a result, rather than explaining why and when states follow international rules, Koh instead describes an empirical pathway to obedience – or, more precisely, a pathway to norm incorporation into domestic law – and details the ways in which transnational actors and practices influence this process.

In some cases internalization involves slow acquiescence to an emerging standard governing a coordination problem, as was the case with US adoption of elements of the Law of the Sea Convention. The most theoretically interesting instances of internalization, however, begin with norm entrepreneurs and issue-networks (Keck and Sikkink, 1998; Nadelmann, 1990). These transnational actors require stages upon which to interact – what Koh terms 'law-declaring fora' – and it is in these courts, legislatures and international organizations that an interpretive community develops. Once such a community construes a norm and finds a state in violation, 'a complex process occurs, whereby international legal norms seep into, are internalized, and become embedded in domestic legal and political processes' (Koh, 1996: 205). This argument closely resembles the 'spiral model' of human rights norms developed by Risse, Ropp and Sikkink (1999).

A core implication of Koh's argument is that compliance is driven by the efficacy of domestic law; what creates compliance with an international rule is its transformation into a domestic rule. While this analysis seemingly puts domestic politics and institutions in a central position, Koh argues that the effectiveness of internalization depends primarily on the characteristics of the rule in question, not on domestic attributes of the state in question. As other commentators have noted, doing so downplays a potentially major explanatory variable (Keohane, 1998). And because he does not look at compliance and non-compliance comparatively, Koh cannot say when non-compliance should occur or what the optimal response should be. Yet his analysis has been influential, perhaps because, with its focus on 'obedience' and internalization, it taps into the widespread belief that compliance with legal rules is qualitatively different than compliance with other sorts of rules or standards and cannot be captured through rational choice or strategic analysis.

Our broadly chronological review of the literature through the 1990s reveals a number of vigorous debates and plenty of propositions for empirical testing. It also reveals growing links between the disciplines. Currently, a small but increasing number of legal scholars are drawing on IR paradigms to refine their analyses (Slaughter, forthcoming); IR theorists are looking to IL scholarship for data, hypotheses and empirical insights. From the perspective of IR theory, it may be tempting to discount many of the arguments and analyses put forward by IL scholars on the grounds that they are insufficiently rigorous or methodologically flawed. Lawyers similarly often dismiss much of the IR literature on the grounds that it is impenetrable and largely irrelevant to the pressing practical problems lawyers observe. But both sides risk losing the forest for the trees.

IL scholars are often more creative and insightful in conceptualizing what they experience both as scholars and as working lawyers. They may not test the theories they generate; the theories themselves may also be insufficiently specified. Nevertheless, they generate new ideas, new hypotheses and sharp

analyses of what they observe. IR scholars, on the other hand, often seem more focused on working out models than grappling with pressing policy questions – over the short or long term – confronting states in the international system. Yet their ingrained skepticism, insistence on specifying precise causal relationships, and determination to examine as wide a range of cases as possible to avoid generalizing from a very particular set of particulars, challenge IL scholars in productive ways.

Components of Compliance

The contemporary study of compliance is becoming more self-consciously theoretical and careful as it becomes more interdisciplinary. Some theories of compliance, particularly but not exclusively those developed by lawyers, mix multiple types of variables. The advantage of these approaches is their potential for multicausal synthesis; the disadvantage is the difficulty of disentangling and weighing the relative importance of different variables. Disaggregating compliance theories into their component parts should help sharpen and refine them for empirical testing, not necessarily to exclude or disprove the impact of particular variables but to understand better how they interrelate (Finnemore and Sikkink, 1998: 909–15; Moravcsik, 1997: 541–7).

To clarify the causal basis of many of the theories we have reviewed, we cluster potential explanatory variables under six broad conceptual categories: problem structure; solution structure; solution process; norms; domestic linkages; and international structure. We describe these categories briefly and illustrate them with examples drawn from the theories reviewed above. Although these categories are not mutually exclusive, they provide a template to help situate and compare different theories. They also provide an overview of the breadth of possible influences on compliance as a whole.

Problem Structure

The category of problem structure encompasses strategic interaction and the nature of the underlying substantive problem. At the most basic level, incentives to comply in coordination games differ from those in collaboration games. Similarly, problems that involve small numbers of states may dampen the public goods nature of enforcement efforts and thus enjoy higher levels of compliance than comparable multilateral agreements. Some relevant behaviors are more transparent than others, allowing them to be more easily monitored. The regulatory scope and complexity of the underlying problem can also influence the capacity to comply and hence the likelihood, *ceteris paribus*, of observed compliance. Compliance with the International Whaling Convention, for example, which requires little action by most states, should be higher than compliance with many narcotics agreements, which require pervasive and costly domestic regulation action.

To illustrate, both managerial and enforcement approaches emphasize variables of problem structure, notwithstanding their many differences. They share a common focus on explicit treaty commitments in regulatory arenas marked by collaboration games, domestic–international interactions and complex social learning. Issues such as trade, arms control and environmental protection are marked by the complex nature of the underlying problems, the regulation of diffuse, private actors, and the intersection of pre-existing domestic regulatory regimes and nascent international regimes (Raustiala, 1997). From an enforcement perspective, the nature of the necessary enforcement institution flows from the nature of the problem: the type and degree of cooperation that must be achieved. Managerialists share this emphasis; they simply disagree on the impact of the problem structure. They reason that failures to comply are not due to the depth and severity of the demands imposed and the resulting domestic opposition, but rather to the capacity to comply and different understandings of what compliance requires. They would thus design very different institutions to address these problems.

Solution Structure

Solution structure, closely related to problem structure, comprises the specific institutional design choices of agreement, such as the nature and content of the primary rules of behavior, the employment of punitive measures, or the use of capacity-building programs. These design elements range widely. For example, conduct rules can be more or less specific. The activity that is chosen as the primary focus of regulation can be more or less transparent and hence more or less monitorable (Mitchell, 1998). The choice of rules can raise the costs of compliance or lower them; for example, the choice of tradable pollution permits in the Kyoto Protocol on climate change may lower aggregate compliance costs compared to discrete, non-transferable pollution targets, thereby promoting compliance.

The debate over compliance with ECJ decisions illustrates the intersection of problem structure and solution structure variables. Garrett and his co-authors argue that states faced the problem of how to deepen integration among themselves – a problem of deep cooperation – and deliberately granted power to the ECJ as a pre-commitment mechanism to help them overcome predictable obstacles to achieving their long-term goals. Given the problem structure, the ECJ was an ideal solution

due to the tradition of judicial independence and to the likelihood that national courts would enforce ECJ judgments. Mattli, Slaughter, Alter, Stone Sweet, Weiler and others generally agree on the diagnosis of the problem, but would point out that some states were prepared to commit themselves more wholeheartedly than others and that they all expected the ECJ to function more like an international court, without direct means of enforcing its judgments. These authors argue that compliance with EU rules is much more a function of solution structure, but in ways unanticipated by member states. Creating the ECJ, and specific rules allowing national courts to send cases involving EU law to the ECJ for decision, let the ECJ build an independent power base through links to domestic courts and constituencies. It also served to transform many political disputes into legal disputes, thereby harnessing the symbolic and practical impact of legal discourse.

Solution Process

Solution process encompasses the methods by which the cooperative solution is developed, and the qualities of the processes by which the institution operates. The inclusiveness, fairness and perceived legitimacy of the process of creating collective rules may influence the degree that states or other actors accept and internalize those rules. Theories employing process variables of this type are largely found in the legal literature, but these theories often draw upon a societal conception of international relations well developed by the English School.[15]

IL scholars have long emphasized the ways in which the legal discourse created by a treaty and developed within an international institution establishes a common language and shared assumptions that can gradually contribute toward a common interest in resolving problems of compliance (Chayes and Chayes, 1995). This 'construction' of common interests through repeated interaction is the causal mechanism for how legal process affects state behavior. Koh makes this argument explicitly, drawing on constructivist IR literature and focusing on transnational rather than international legal process. States come to *obey* through changes in their perceived interests over time, changes that occur due to enmeshment in a transnational process of legal production and legal interpretation. Legitimacy theory is similar: many of Franck's key variables relate to the process by which the legal rule is developed, and his overarching claim – that compliance stems from the legitimacy derived from 'right process' – is fundamentally a solution process argument. More recent work in IR theory focused on deliberation and argument also reflects, to the degree it engages with compliance issues, solution process variables.[16]

Norms

Under this broad rubric are variables focused on the strength and quality of international norms. The adoption or inculcation of new norms within states may lead to changes in state interests, identity and behavior. Because norms are collective, the role of socialization looms large in many norm-based accounts and hence there is substantial overlap with the previous category of solution process. Constructivists acknowledge that states may comply with norms instrumentally, 'to demonstrate that they have adapted to the social environment' (Finnemore and Sikkink, 1998: 903). But states also operate in part by figuring out, or being socialized toward, the 'right thing' in a particular or general context. In other words, they may follow a logic of appropriateness rather than one of consequences (Finnemore and Sikkink, 1998: 888; March and Olsen, 1998).[17] Socialization is the causal mechanism or pathway through which norms operate; socialization, in turn, results from long-term participation in a norm-governed process. But some norms apparently have more influence than others; they are more likely to be internalized, more likely to trigger justifications in the event of deviation. Why?

For a norm-based theory the answer must lie in the properties of norms themselves: both in their substantive character and in whether they are legalized or not, and to what degree. Mainstream legal analyses argue that the status of a commitment as law implicates norms of obligation flowing from the special role of law as an ordering principle within societies.[18] Emblematic is the statement in a leading legal treatise that 'the fact that the USA has promised *by treaty* to defend the European members of NATO against ... attack means that the USA is more likely to honor its promise than it would have been in the absence of a *legally* binding promise ...' (Akehurst, 1993: 5, emphasis in original). Non-compliance with legal norms usually entails particular forms of justification. This justificatory discourse can bound the range of possibilities and alter the costs of non-compliance. One can point to seemingly effective non-binding agreements, such as the Helsinki Final Act, to challenge these claims, but the formal or informal nature of international agreements may have different causes and consequences for compliance.[19]

As discussed above, Franck and Koh take norm-based analysis a step further, suggesting that compliance-inducing properties vary even among legal rules. Thus, Franck argues, drawing on his legitimacy theory, that each legal rule or obligation has 'an inherent pull power that is independent of the circumstances in which it is exerted, and that varies from rule to rule' (1988: 712). Similarly, Koh's transnational legal process theory posits that the effectiveness of internalization depends primarily on the characteristics of the norm or rule at stake.

Domestic Linkages

A growing number of compliance theories emphasize structural links between international institutions and domestic actors.[20] This linkage can operate in at least three distinct ways. Some institutions are designed to be enforced through the provision of access to domestic actors who have an incentive to promote enforcement. Second, the operation of the agreement or regime may itself alter the preferences or power of domestic actors, promoting or inhibiting compliance. Third, some theories look beyond individual domestic actors and link the likelihood of establishing such mechanisms and making them work to the political and legal systems of participating states.

Several of the theories reviewed above rely strongly on domestic linkages, as do analyses of different issues in world politics that do not present themselves as theories of compliance but provide relevant insights. Mattli and Slaughter, following Weiler, emphasize both the ability of the ECJ to develop links with national courts and the European lower courts' willingness to interact with the ECJ. Alter has subsequently challenged the uniformity of this willingness, but relies equally on the importance of domestic actors to overall compliance levels (Alter, 1998, 2001). Many scholars also point to the desire and capacity of individual litigants to seek remedies in supranational tribunals and monitor the results. More generally, Koh's entire theory of transnational legal process depends on the incorporation of international obligations into transnational and from thence domestic legal processes. Closing the loop, Helen Milner's work on protectionism in advanced industrial states suggests that international regimes may create changes in the preferences of domestic actors that lead to greater incentives for compliance (Milner, 1988; Moravcsik, 1997). In short, shifts in the preferences of societal actors, whatever the proximate cause, can in turn shift the compliance preferences of governments.

Yet under what conditions are such linkages to domestic actors, with their associated effects, possible? Here theorists must look to a range of domestic factors: political, legal, economic, social and cultural. Mattli and Slaughter argued that an important factor in explaining relative compliance levels between the ECJ and other supranational tribunals is the ability of the ECJ to hook into domestic rule of law traditions. European governments cannot flout the judgments of domestic courts that incorporate an ECJ ruling without risking the subversion of the entire domestic legal system (Alter, 1998: 134). Such opportunities simply do not arise with supranational tribunals exercising jurisdiction over states without a strong domestic rule of law tradition. Helfer and Slaughter generalize these claims to all supranational tribunals, noting further that at least in the human rights context, states with strong domestic legal systems premised on a commitment to the rule of law generate the types of cases that are well-suited for supranational tribunals (Helfer and Slaughter, 1997: 333–4).

An even further step is to posit a more general relationship between domestic regime type or institutions and propensity to comply. Slaughter, following Keohane and Nye, Henkin, and Doyle, argued that legal relations among liberal states are likely to be different than relations among non-liberal states or between liberal states and non-liberal states (Slaughter, 1995).[21] She defined 'liberal states' as states with some form of representative democracy, a market economy based on private property rights, and constitutional protections of civil and political rights (1995: 509).[22] Raustiala and Victor suggest that, at least in environmental cooperation, liberal states appear more likely than illiberal states to create and participate in the structures for regularized monitoring and implementation review that often enhance compliance (Raustiala and Victor, 1998). Checkel, in his study of compliance with European social and legal norms, argues that 'the structure of domestic institutions seems to be key in explaining variance in the mechanisms through which compliance occurs' (2000: 34). Other research has disaggregated the concept of a 'liberal state', measuring democracy separately from 'rule of law systems', defined 'by the willingness of their citizens to employ peaceful means of dispute resolution and by key institutions, such as a strong court system' (Kahler, 2001: 674; Simmons, 2001). Here the results get more complicated. Brown Weiss and Jacobson conclude: 'democratic governments are more likely to do a better job of implementing and complying with international environmental accords than nondemocratic governments ... This generalization does not always hold, however, and democratization does not necessarily lead automatically or quickly to improved compliance' (1998b: 533). Based on a study of the international monetary regime, Simmons doubts 'that democracy itself is a positive influence on the rule of law in international relations. On the contrary, there is more reason to associate compliance with the extent to which the polity in question respects institutional channels for mediating domestic conflict and protecting property rights than with a participatory or competitive political system' (2000b: 599–600). Busch and Reinhardt similarly cast doubt on the propensity of democracies to comply with GATT rulings, arguing that the data indicate that democracies are in fact less likely to comply (Busch and Reinhardt, 2000).

Yet a further distinction should be drawn between the propensity of liberal states to comply with international rules generally versus the decisions of supranational tribunals. Although the experience of the EU, for which liberal democracy is a

prerequisite to admission, appears to offer strong evidence of covariance between compliance with domestic judicial decisions and willingness to comply with supranational decisions, the relationship may in fact be inverse in many cases. Moravcsik, for instance, has demonstrated that at least in the context of human rights regimes, liberal states with strong and stable domestic legal systems may be less likely to enter into regimes with strong enforcement mechanisms likely to change domestic law (Helfer and Slaughter, 1997: 332–3; Moravcsik, 2000: 220). The United States has shown only a limited willingness to abide by rulings of the International Court of Justice; similarly, compliance by liberal and/or democratic states with decisions of the WTO Appellate Body has been mixed. Overall, the relationship between liberal democracy and compliance is more complex and less predictable than often assumed.

International Structure

By generally influencing state behavior, systemic or international structural variables may also alter compliance levels and compliance choices. Highly institutionalized systems may create positive spirals of compliance by embedding states in regularized processes of cooperation that are mutually reinforcing (Ikenberry, 1998/9). Bipolarity may increase compliance with rules within alliances while multipolarity may decrease it by inducing shifting balances and creating credible threats of exit. Hegemonic systems may permit a single state to coerce compliance or use its market power to induce compliance. Chayes and Chayes advance a more unconventional structural variable. In their view, the international system itself has become a 'tightly woven fabric of international agreements, organizations, and institutions that shape [states'] relations with each other and penetrate deeply into their internal economics and politics' (Chayes and Chayes, 1995: 26). This transformation goes beyond interdependence, which highlights mutual dependence and vulnerability but which still assumes a baseline of separation, autonomy and defined boundaries. Chayes and Chayes argue instead that fundamental changes in the structure of the international system – from a largely unregulated place to a landscape criss-crossed by regulatory agreements and institutions – have changed the very meaning of sovereignty. Sovereignty is now best conceptualized not as freedom from interference but as 'status', which in turn depends critically on participation in international regimes (Chayes and Chayes, 1995: 27).[23]

How do these structural transformations affect compliance? This 'connection to the rest of the world and the political ability to be an actor in it are more important than any tangible benefits in explaining compliance with international regulatory agreements' (Chayes and Chayes, 1995: 27). The logic here is a constructivist logic of appropriateness, rejecting cost–benefit calculations in favor of far less tangible benefits, closer to the sense of 'we-feeling' that Karl Deutsch identified as a key dimension of security communities (Adler and Barnett, 1998). Nevertheless, the key variable explaining increased compliance is a structural shift.

This structural explanation is likely to be more powerful when combined with the domestic-level variables discussed above. Some states are more likely to seek status through standing in international institutions than others. Studies of newly democratizing countries in Eastern and Central Europe and their willingness to bear remarkable burdens in the hope of becoming a member of NATO and the EU identify both rational calculations about security and economic benefits and constructivist yearnings for political validation of a particular social and historic identity (Checkel, 2000). These debates will have to be resolved empirically. Overall, however, it seems likely that the desire to participate in international institutions, as well as to enter into specific agreements, will vary along all sorts of historic, political and even ethnic lines.

Testing Old Theories and Generating New Ones

The theories of compliance discussed above have proliferated against a backdrop of the rising salience of compliance issues in contemporary international affairs. Interdependence, particularly thick among the OECD states, has led to a panoply of regimes addressing a wide array of issues raised by the deepening economic and social ties among many states. The complexity of these regimes and the powerful political and economic interests influenced by them have made compliance a central concern. Also noteworthy is the remarkable and largely contemporaneous increase in international judicial bodies. Compliance is consequently rising in importance as a field of inquiry. Yet compliance remains a relatively young field. Many core concepts are debated and empirical testing of compliance theories is limited. The lack of systematic, multi-case comparative studies has restricted the nature of the claims and prescriptions that compliance theorists can offer. Brown Weiss and Jacobson have attempted such a venture, with results that require further testing and that demonstrate the difficulty of the task (Brown Weiss and Jacobson, 1998a). Yet notwithstanding their difficulty, empirical case studies help refine theoretical hypotheses and determine the conditions under which particular claims are valid or invalid.

More is needed. Simmons emphasizes the need for careful validation of claims, the identification of baselines against which to measure compliance, and the importance of finding objective ways to measure intersubjective understandings (Simmons, 2000a). Joerges and Zürn are undertaking a major research initiative comparing levels of compliance at the national, European and international levels (Joerges, 2000; Zürn, 2000). In addition, empirical work is proliferating in various areas that do not necessarily focus on compliance, but nevertheless generate important evidence and insights for compliance debates. This section reviews the current literature in four interrelated categories: the role of enforcement, regime design, legalization, and the choice between 'hard' and 'soft' law. All four categories are cutting edge areas for IR/IL scholarship, increasingly conducted by IR and IL scholars working together. Each contains a number of the components of compliance identified above; scholars working in these areas could usefully examine their results in light of this broader overarching framework. Such an effort would be a valuable step toward more cumulative knowledge.

The Role and Importance of Enforcement

A number of recent studies have produced evidence germane to the managerial–enforcement debate. Consistent with the prescriptions of enforcement theory, the reform of the GATT dispute resolution process as part of the creation of the WTO strengthened the enforcement powers of the WTO and the retaliatory powers of member states in tandem with an increase in depth of cooperation. However, recent work by IR scholars, often using statistical analyses of GATT/WTO disputes, indicates a more mixed story about the influence of GATT enforcement that substantially alters and extends the debate. In terms of compliance with GATT dispute decisions, Busch and Reinhardt, building on Hudec's pioneering work, show that total non-compliance with GATT panel rulings approached 30 per cent, and almost 60 per cent of rulings failed to elicit full compliance (Busch, 2000; Busch and Reinhardt, 2000). This low level of compliance does not, however, indicate that the GATT dispute process was ineffective. Rather, the major effect of the dispute process seemed to *precede* the issuance of a ruling (Busch and Reinhardt, 2000; Reinhardt, 2001). The key variables explaining compliance with panel decisions were economic; for example, the more highly dependent a losing defendant was on the plaintiff's export market, the more likely was compliance. More interestingly, contrary to many intuitions about democracy and law, democracies were comparatively *less* likely to comply with GATT rulings (Busch and Reinhardt, 2000).

Ultimately, Busch and Reinhardt's findings suggest, echoing arguments made by others, that a focus on compliance can obscure other important aspects of the role of legal rules. While the role of enforcement structures in promoting compliance appears more nuanced than previously thought, so is the role of compliance management. Many environmental treaties contain implementation and compliance review institutions that broadly follow managerial precepts (Raustiala, 2001a). These review institutions generally include regularized collection of relevant data – often self-reported by governments, reviews of performance, and processes for the adjustment of regime commitments in light of new information (Victor et al., 1998). By creating an ongoing process of performance review, for example, the institutions of the Montreal Protocol – which include an Implementation Committee, a Non-Compliance Procedure, a Multilateral Fund for developing country parties and various expert 'assessment panels' – manage compliance with the complex regulatory requirements. Human rights accords employ similar review systems: the UN Human Rights Committee considers its function to 'assist State parties in fulfilling their obligations under the [International Covenant on Civil and Political Rights], to make available to them the experience the Committee has acquired in its examination of other reports and to discuss with them various issues relating to the enjoyment of rights enshrined' in the Covenant.[24] These review institutions, with their largely non-confrontational and forward-looking approach, engage in the collective supervision and facilitation of performance that lies at the heart of managerial theory.

Yet empirical research into the Montreal Protocol highlights the ways in which actual regimes often combine enforcement with managerial elements – sometimes in informal ways. The Protocol's Non-Compliance Procedure, in which the Implementation Committee meets with non-compliant parties in closed sessions and recommends a compliance plan, has received extensive attention. In practice, part of the power of the Committee to address non-compliance has stemmed from a decision by the Global Environment Facility (GEF), an organization formally external to the Protocol which funds projects related to ozone depletion. In the first cases of non-compliance, involving several Eastern European states and Russia, the GEF was providing funds for the incremental costs of implementing the Protocol (Victor, 1998). The GEF decided to withhold additional funds for those states until their compliance plans were approved by the Implementation Committee. The GEF played no formal role in the content of the plans, but continued disbursement of funds was in practice predicated on a positive 'report card' from the Committee. As Raustiala and Victor argue, this

aid conditionality can be interpreted as supporting either managerial or enforcement theory (Raustiala and Victor, 1998). The existence of assistance tied to a discursive process fits with the cooperative, capacity-building thrust of managerialism, while the link between compliance and funding, which in practice has been critical to the success of the procedure, is consistent with enforcement theory.

Positive Theories of Regime Design

For many political scientists, compliance issues are becoming a sub-set of the larger domain of regime design. As Mitchell frames the issue: 'Why do states design regimes the way they do? ... Why do some regimes appear to rely on tough sanctions, others on financial incentives, and others on what appear to be little more than exhortation?' (1999: 1). Mitchell first analyzed regime design in terms of compliance with the intentional oil pollution regime, which governs routine pollution resulting from tanker operations (1994). Two distinct sub-regimes existed, one based on ship equipment standards and one on discharge standards at sea. Compliance with the ship equipment regime has been far higher than with the discharge standard regime. Mitchell attributed this variation to the structure of the treaty provisions, specifically the way in which the equipment sub-regime ensured that actors who had the incentives to comply with and enforce the treaty had the ability and legal authority to do so (Mitchell, 1994: 327).

More recently, Mitchell has explored the sources of regime transparency, arguing that transparency is influenced both by features of an issue area and by the regime information system (Mitchell, 1998). Specifically, 'effectiveness-oriented systems' impose transparency requirements that are usually easier to satisfy than 'compliance-oriented systems' (Mitchell, 1998: 114–15). In a similar vein, Mitchell and Keilbach analyze state responses to a typology of problems, focusing particularly on situations of asymmetric externalities (Mitchell and Keilbach, 2001). They distinguish between problems involving externalities imposed on strong victims versus weak victims. These different situations lead states to choose among three mechanisms to deter non-compliance: issue-specific reciprocity, coercion (linking non-compliant behavior to sanctions) or exchange (linking compliant behavior to rewards).

This latter research is part of a larger collaborative project on regime design. Directed by Koremenos, Lipson and Snidal, the project advances hypotheses about the relationship between distribution problems and enforcement problems, on the one hand, and regime scope, membership and centralization of enforcement mechanisms, on the other (Mitchell and Keilbach, 2001; Koremenos et al., 2001).[25] This kind of research may play an important role in advancing understanding of compliance and its connection to discrete institutional choices. Analyzing multiple cases and controlling for key variables – whether problem structure, solution structure, or others – allows an assessment of the *relative* effectiveness of different strategies.

Legalization

As political scientists discovered and embraced regime theory in the 1980s and 1990s, many international lawyers questioned the value of lumping 'rules, norms, principles and decision-making procedures' together. Some insisted that '[IR] scholars need to be told that international law is different from the other factors they study' (Byers, 1997: 205; Farer, 1991: 196).[26] A growing number of IR theorists are seeking to understand how *legal* rules affect behavior differently from non-legal rules, or, more broadly, from norms. The phenomenon of international 'legalization', however, has a number of definitions. In one formulation, it refers not only to the obligatory status of a rule as part of the system of international law, but also to the rule's relative precision and the delegation of its interpretation and application to a third-party tribunal (Abbott and Snidal, 2000).[27] For other analysts the question involves the 'judicialization' of international affairs as much as 'legalization'.[28] Definitions aside, the core issue of interest is the significance and impact of law and courts in the international system, as compared to less formal and binding prescriptions and dispute resolution mechanisms.

A recent special issue of *International Organization* devoted to legalization poses two general questions: why do governments choose legalized institutions over other forms of institutions, and what are the consequences of legalization? Kahler distills a number of the 'functionalist' reasons typically advanced to explain the choice of legalized rules and a third-party mechanism to interpret and apply them: 'Government commitments are more credible under precise agreements of high obligation; delegated authority to interpret those commitments may also strengthen compliance. Legalization may be particularly important in providing an institutional solution to commitments fulfilled over an extended period of time' (Abbott and Snidal, 2000; Kahler, 2001: 279). From this perspective, the consequences *are* the cause.

The studies in the IO volume yield some interesting preliminary results relevant to questions of compliance. First is the importance of power asymmetries among states establishing a new regime, with power defined not only in terms of material resources but also in terms of relative access

to legal resources (Kahler, 2001: 665–6). Asian governments, for instance, have resisted legalization within APEC largely due to the far greater legal resources available to the United States, which give it a substantial advantage in disputes framed in legal rather than diplomatic terms (Kahler, 2001: 665–6). A second finding supports the importance of domestic and transnational actors in enhancing compliance. Many of the authors in the IO volume detail the role of domestic actors in enhancing compliance with legalized regimes, particularly through the formation of 'compliance constituencies'. These can include lawyers, judges and members of the business community. In addition, national politicians may favor legalized agreements to tie their hands in dealing with domestic interest groups whose demands they seek to resist or to bind their successors to policies they favor (Goldstein, 1996: 556–7; Moravcsik, 1997: 225–9).

More constructivist treatments of legalization emphasize the significance, for bureaucrats, litigants and politicians, of engaging in legal discourse and framing disputes as legal issues. In a separate study of the growing role of courts in France, the EU and the WTO, Stone Sweet develops a theory of judicialized governance that depends on the incentives of individuals to bring disputes before a third-party tribunal, the incentive of judges to maintain and maximize their legitimacy, the resulting creation and expansion of law, and the resulting likelihood that still more disputes will be framed in legal terms and brought before a third-party tribunal (Stone Sweet, 1999, 2000). This argument, like that of many others in the legalization debate, stresses the role of the individuals and groups that are constituencies for compliance.

Yet what exactly motivates the formation of a compliance constituency? Is it the material benefits to be gained by actors whose interests are advanced through a particular international agreement? Or is it, as Stone Sweet and Koh would argue, the *process* of engaging domestic actors in ongoing discursive practices of explanation, justification and persuasion framed by both the existence of legal rules and a tribunal to interpret them? Are these two sets of variables interrelated? How can they best be harnessed as a matter of regime design to enhance compliance?

Another core issue concerns the capacity of legalization to trigger resistance to international regimes and hence diminish compliance. A number of scholars argue that legal constraints may prove undesirably tight. Hudec, and Goldstein and Martin, have made this claim regarding the GATT governments' decision to render panel decisions automatically binding under the WTO agreement (Barfield, 2001; Goldstein and Martin, 2001; Hudec, 1999). Similarly, Alter describes ways in which the progressive construction of the EU legal system has resulted in a greater ability for resistant national courts to block compliance with EU law (Alter, 1998, 2001). Stone Sweet concludes that European constitutional courts enjoy social legitimacy due to their ability to draw 'an ever-widening range of actors, public and private', into normative discourse (Stone Sweet, 2000: 149, 152). But the flipside is that social legitimacy is likely to be limited to those actors with the capacity to participate in legal discourse. Those who lack such capacity, as Kahler points out, are likely to resent and resist the expansion of law. At a time of rumbling opposition to 'globalization' and many of the international legal institutions associated with it, compliance research could usefully incorporate a distributional analysis of precisely who is empowered and disempowered by the growing expansion of law and legal discourse.

Soft Law versus Hard Law

In practice, states legalize agreements or institutions in different ways. IL scholars have long noted the existence of 'soft law': instruments or rules that have some indicia of international law but lack explicit and agreed legal bindingness. Soft law is seemingly proliferating, and scholars have begun to explore the relative advantages and disadvantages of hard and soft law and the ways these advantages may explain the choices of states. Much of the debate over soft law among IL scholars, which is too extensive to chronicle here,[29] either addresses the question whether soft law will ultimately undermine the entire international legal system or tries within a doctrinal framework to determine whether soft law is law at all (Dupuy, 1991; Nanda, 1996; Weil, 1983). From an IR perspective, however, the more interesting question concerns the causality of the observed variation, and its significance for behavioral outcomes of interest, such as compliance.

For example, Abbott and Snidal claim that states often 'deliberately choose softer forms of legalization as superior institutional arrangements' (2000: 423).[30] Echoing a number of IL scholars, they argue that different factors condition states' choice of soft law, including transaction costs, uncertainty, implications for national sovereignty, divergence of preferences and power differentials (Abbott and Snidal, 2000: 423). While soft law is less credible than hard law, it provides needed flexibility under conditions of uncertainty. This argument is rationalist and functional in nature. In contrast, Toope offers a constructivist analysis of soft law, using Kratochwil's conception of law as the result of 'a continuing dialogue between norm and fact, and between means (process) and ends (substance)' (2000: 97; Kratochwil, 1989: 181–211). For Toope, the rhetoric of law shapes politics and leads to the emergence of 'common meanings' (Toope, 2000: 97). From common meanings, common values can

coalesce that can in turn underpin 'more far-reaching rules of international law' (Toope, 2000: 98). What does such a conception of law mean for soft law? Soft law creates a crucial framework for conversation, in which states in turn may alter their conception of their interests and even identity. Ultimately agreement on harder rules becomes possible. Understanding this continuum is useful to counter 'the professional instinct of lawyers ... to negotiate seemingly "binding" agreements as soon as possible' (Toope, 2000: 98). On the contrary, Toope argues, the 'pre-legal or "contextual" regime may actually be more effective in guiding the relations of international actors' (2000: 98).

While these two analyses of soft law differ dramatically, they share the claim that soft law agreements are not just failed treaties but can be a superior institutional choice. Raustiala and Victor link this argument directly to compliance, suggesting that when uncertainty about implementation costs and outcomes is high – as is often the case with complex environmental treaties – concern with compliance systematically leads states to negotiate lower standards, creating agreements that are readily complied with but largely ineffective as prods to behavioral change (Raustiala and Victor, 1998). In other words, *contra* Abbott and Snidal, they argue that uncertainty does not always lead states to choose soft law. In some cases, states opt for legally binding but substantively weak accords instead. In this context soft law agreements may be normatively preferable, because they avoid the detrimental impact of compliance concerns on the relevant legal standards but energize many of the processes that influence state behavior and effectiveness. This analysis also introduces domestic level variables into the hard–soft question: domestic political preferences and governmental responses, rather than purely functional concerns, often account for the choice of hard or soft law (Raustiala, 2001b).

Other studies have looked explicitly at soft law compliance, with many scholars claiming that compliance is very high (Brown Weiss, 1997; Shelton, 2000). While this observation has been taken to demonstrate the utility of soft law agreements, it raises many of the same methodological and theoretical concerns about compliance analysis that legally binding treaties do. High compliance with soft law, as with hard law, can reflect selection bias and/or indicate a shallow rather than a successful regime. Consequently, Raustiala argues that comprehensive analysis of international agreements – whether hard or soft – should distinguish three separate dimensions: the form of the agreement; the substance of the agreement, understood following Downs et al. (1996) as deep or shallow; and the structure for review of performance, whether judicial dispute tribunal or simple self-reporting (Raustiala, 2001b). States, as the architects of regimes, trade these three dimensions off one another. Since each dimension is an endogenous element of regime design, a failure to control for substance or structure can confound efforts to assess compliance – and similarly can confound efforts to understand the choice between hard and soft law.

Conclusion and Open Questions

Research on compliance with international law is gradually coalescing around several basic approaches at the theoretical level, turning to more systematic empirical research to test hypotheses, and engaging an increasing number of IR and IL scholars, often together. It is also generating questions as fast as it is answering them. We conclude by presenting a few of the more central and interesting open questions.

Reconceptualizing the Means of Production of Compliance

Debates about compliance often revolve around alternative means for the production of compliance. Assistance and deterrence – carrots and sticks – dominate. Relatively less explored have been prevention and *ex ante* controls. Prevention refers to the construction of barriers to non-compliance as a part of a regime's solution structure. For example, to prevent the saving and planting of proprietary, patented bio-engineered seeds, Monsanto initially chose not to rely upon farmers' compliance with intellectual property laws or on enforcement mechanisms within domestic jurisdictions. Instead Monsanto developed what is popularly dubbed 'the terminator gene': a gene that causes the next generation of seed to be sterile (Mann, 1999).[31] Non-compliance with intellectual property law – copying – is effectively prevented. Similarly, Mitchell's study of the oil pollution regime illustrates how tankers built with equipment standards were rendered incapable of illegally discharging oil. While the ship-building process was contingent on the behavior of other actors (such as classification societies) the outcome was the permanent prevention of non-compliance by ship operators.[32]

Prevention thus defined is part of a broader class of *ex ante* strategies. Most compliance strategies are *ex post* strategies, relying on the delivery or threat of a sanction in the event of breach. An *ex ante* process promotes compliance by changing internal decision processes or preventing non-compliance. *Ex ante* control strategies have been explored in domestic politics; they could be usefully extended to studies of international compliance (McCubbins et al., 1989).

Primary Rules and Solution Process versus Secondary Rules and Problem Structure

Our review reveals a clear divide between theories focusing on primary rules (solution structure) and solution process and those that emphasize secondary rules and problem structure. Franck and Koh, for instance, each insist on the quality of primary rules (solution structure) and the solution process as central determinants of compliance variation. Legitimacy, rule-making processes and coherence within the structure of existing rules are central threads in their arguments about compliance. Most IR scholars instead stress solution structure largely in terms of secondary rules – rules about non-compliance and enforcement – and emphasize problem structure, a concept that rarely appears in IL treatments. When the quality of primary rules is identified as causally relevant, as in the oil pollution case, it is the mapping of problem structure onto solution structure that is important: the way in which the shift to equipment standards tapped into existing industry practices and avoided the monitoring problems associated with discharge standards (Mitchell, 1994). Similarly, much of the literature on compliance with the decisions of international tribunals emphasizes solution structure not in terms of the process that produces the rules, but rather the design of a dispute resolution process that creates incentives for litigants and national courts to promote the enforcement of treaty provisions (Keohane et al., 2001). The rules governing dispute resolution fall within the category of secondary rules; their power lies not in their pedigree as legal rules so much as in their responsiveness to a problem structure in which states are disinclined to sue one another and domestic constituencies able to stalemate each other in the domestic political process.

This divide is testable. What is required is a research design and careful selection of case studies to highlight variation in primary rules – such as relatively legitimate rules versus less legitimate rules – versus variation in secondary rules and their relationship to problem structure.

Compliance versus Effectiveness

The distinction between compliance and effectiveness has been central to much recent regime research, in particular for environmental regimes. Most studies of effectiveness employ a behavioral definition, looking not to actual changes in a given problem but rather to behavioral changes that are causally linked to the regime. Some relevant research has, as a result, ignored compliance in favor of a focus on effectiveness. Other research has attempted to understand how compliance and effectiveness interact. For example, in his study of the European acid rain regime, Levy argues that non-compliance can be part of a successful regulatory strategy. The early acid rain treaties were not designed to establish binding rules. Rather they acted as 'a normative register, indicating both what behavior was considered legitimate and which countries had accepted such a standard as a guide to national policy' (Levy, 1993: 77). Failure to comply with these normative benchmarks led to increased domestic and international pressure and to a re-evaluation of interests. Weaker standards might have produced higher compliance, but would not have induced this process of normative benchmarking and persuasion. This argument highlights the complexity of the interaction between compliance and effectiveness.

Much of the contemporary debate over compliance revolves around the causes of compliance and issues of regime design. In the end, however, the study of compliance goes beyond these questions, and implicitly examines the foundations of international institutions and of international order. If compliance with international rules is ephemeral, or results purely from the exercise of power and coercion, the ability of international law and institutions to order world politics is greatly limited. Conversely, if compliance is empirically demonstrable, theoretically understandable and prescriptively manageable, then the case for the role of international law and institutions in achieving global order is strong. IR and IL scholars have a joint agenda in compliance research, an issue that now lies at the heart of international relations theory.

Notes

1 One of the byproducts of the increased focus on compliance has been a proliferation of reviews of the compliance literature: Kingsbury, 1998; Koh, 1997; Scott, 1994; Simmons, 1998.

2 Various intellectual histories of the evolution of international law and international relations from 1945 forward can be found in Kennedy, 1999; Koh, 1997; Slaughter Burley, 1993.

3 Henkin recognized that for certain, 'political' accords, meaning accords relating to core security issues, legal process matters much less. (Henkin, [1968] 1979).

4 This is, of course, an oversimplification. Scholars such as John Ruggie and Oran Young, who were already writing about regimes in the 1970s, had never lost sight of international law (Ruggie, 1975; Young, 1979). And 'English School' scholars such as Hedley Bull had continued to emphasize the study of international law as a pillar of international order (Bull, 1977).

5 See Slaughter Burley, 1993: 220.

6 Supranational refers to tribunals that hear cases from individuals as well as states.

7 Formerly Anne-Marie Burley.

8 The volume *The European Court and National Courts – Doctrine and Jurisprudence* includes country studies by European scholars applying a common template to explore issues of compliance with ECJ decisions, as well as a set of cross-cutting analyses placing these compliance issues in a wider context (Slaughter et al., 1998a).

9 This is, of course, highly dependent on the structure of the strategic environment. The essence of the *n*-person prisoners' dilemma is that actors have an interest in collective rules that diverges from their individual incentives.

10 An early version of Downs et al. (1996) used this phrase in the title.

11 For example, Checkel notes that the Council of Europe is very reluctant to impose sanctions on non-compliant states, and has instead sought to use 'a new, non-public monitoring procedure designed not to sanction, but persuade recalcitrant members to move toward compliance' (2000: 32).

12 Downs and Rocke suggest this explains the exceptional treatment of agriculture, textiles and other sensitive areas (Downs and Rocke, 1995).

13 One might term this 'the Goldilocks theory' of compliance – the sanctions are not too strong or too weak, but rather 'just right' under the circumstances.

14 This echoes the theory of efficient breach; a concept within contract theory that breach is efficient – and therefore should be permitted – if the costs of performance to the breaching party are so large that the breach would in theory permit compensation to the aggrieved party yet still leave the breaching party better off than under an enforced performance rule.

15 See, for example, Bull, 1977.

16 See, for example, Checkel, 2000; Risse, 2000.

17 By contrast, 'rationalists' envision states engaging in careful calculations of costs and benefits, following a logic of consequences (Finnemore and Sikkink, 1998). Norms of conduct may influence actors in both ways, even over time: in her study of contractual norms in the diamond industry, Bernstein quotes a dealer stating that 'when I first entered the business, the conception was that truth and trust were simply *the* way to do business, and nobody decent would consider doing it differently. Although many transactions are still consummated on the basis of trust and truthfulness, this is done because these qualities are viewed as good for business, a way to make a profit' (Bernstein, 1992: 157).

18 'There is an influence for law observance in the very quality of law, in the sense of obligation which it implies' (Henkin, [1968] 1979: 60). Of course, this statement can be seen as merely restating the issue: law is followed because law is obligatory.

19 Analyses of variation in form include Abbott and Snidal, 2000; Hillgenberg, 1999; Lipson, 1991; Raustiala, 2001b.

20 Liberal theories focus on variation in the preferences of individuals and groups in domestic and transnational society as well as variation in their representation by domestic government institutions. Liberal theories of compliance, like all Liberal theories, are more likely to start from the ground up, emphasizing the conditions necessary for some states to be more likely to comply than others or some institutions to be more embedded than others. Institutionalist theories can point to the importance of embedding international institutions in domestic society without focusing on variation in the relative ease or likelihood of embeddedness.

21 See also Doyle, 1983a. Henkin suggests that this may be so because the liberal democracies of the West, the creators of most extant international law, created it in their own image and interest (1979: 3).

22 See also Keohane and Nye, 1977.

23 Sovereignty as status is old as well as new; see Gong, 1984.

24 Work of the Human Rights Committee Under Article 40 of the Covenant on Civil and Political Rights, UN GAOR, Human Rights Committee, UN Doc A/48/40 (1993).

25 For an explication of the overall design of the project and the hypotheses advanced by the editors and tested by the various authors, see Koremenos et al., 2001.

26 In addition to the various political scientists and international lawyers engaged in the legislation debate, see Arend, 1998.

27 Compare Alec Stone Sweet's definition of legal norms as a 'sub-set of social norms', a sub-set 'distinguished by their higher degree of clarity, formalization, and binding authority' (Stone Sweet, 2000: 11).

28 Stone Sweet is the most prominent scholar studying the 'judicialization' of politics, both within specific countries, across countries and in the international realm (Stone Sweet, 1992, 1999, 2000).

29 See, for example, Cassese and Weiler, 1988; Dupuy, 1991; Schachter, 1977; Shelton, 2000.

30 As Abbott and Snidal acknowledge, they are building here on the pioneering work of Charles Lipson. Lipson's work presaged the current debate by almost a decade (Lipson, 1991).

31 Monsanto has since withdrawn the planned terminator technology.

32 See also Lessig, 1995.

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