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Conceptual, Methodological and Substantive Issues Entwined in Studying Compliance

Harold K. Jacobson
University of Michigan

AFTERWORD

CONCEPTUAL, METHODOLOGICAL AND SUBSTANTIVE ISSUES ENTWINED IN STUDYING COMPLIANCE

*Harold K. Jacobson**

INTRODUCTION

In his insightful introduction to this collection Jose E. Alvarez refers to the popularity of studies of "why nations behave." He explains this popularity as a response to the increasing waves of international regulation that have occurred during the closing years of the twentieth century, regulation that frequently involves issues previously left to nation states. As one who has been a participant over the past decade in an effort to discover answers to the question that Alvarez put so clearly,[1] I am pleased by the broad interest that the subject has gained and feel privileged to have an opportunity to comment on a range of studies beyond our own, to explore what has been accomplished by the collective effort, and to frame issues that could benefit from further investigation and urge that this research be undertaken. As a political scientist, I am grateful to be able to state in a legal journal my firm belief that this topic must be explored jointly by legal scholars and social scientists and to express gratitude to those legal scholars who have worked on the topic with social scientists. These two broad themes will define my essay. Examining the articles in this collection will provide a base but not the only base for my comments.

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* Jesse Siddal Reeves Professor of Political Science and Senior Research Scientist, Center for Political Studies, Institute for Social Research, University of Michigan. Ph.D., Yale University (1955); M.A., Yale University (1952); B.A., University of Michigan (1950).

1. The Research Consortium on National Compliance with International Environmental Agreements of the Committee on Research on Global Environmental Change of the Social Science Research Council. Edith Brown Weiss, Francis Cabell Brown Professor of International Law at the Georgetown University Law Center, and I have chaired this consortium. The principal product of the consortium's research, *Engaging Countries: Strengthening Compliance with International Environmental Accords*, will be published in the fall of 1998 by the MIT Press.

TO WHAT EXTENT DO NATIONS BEHAVE?

At the outset, I must raise a cautionary flag concerning one aspect of the condition of compliance studies that was generally so accurately characterized by Alvarez. He stated that the question of *why* nations behave is seen by some as more relevant than the traditional question of *whether* nations behave. True, but our stressing the belief that the question of why is more relevant risks our assuming that we know more than we actually do about the extent to which nations comply with international norms, both formal binding obligations and soft law. Louis Henkin's much quoted statement, "It is probably true that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time,"[2] is undoubtedly correct but when it was stated it begged specification of the word almost which appears in the sentence four times. Thirty years after the sentence first appeared in print, our ability to specify what almost means in each of the instances when it is used in the sentence is little better than it was then.

Indeed, the issue has become even more complicated, partly because of our improved understanding of the nature of compliance and partly because of the increasing waves of international regulation to which Alvarez referred. It is more complicated because we now know that particularly with respect to the obligations that have come into force more recently compliance is not an either or issue. It is not the case that nations can always easily be judged to be in compliance or not with their obligations, rather the issue frequently is to determine to what extent are nations in compliance. To illustrate the point with a trivial example, drivers may obey speed limits on some but not all roads, or not exceed seventy mile per hour limits, but regularly drive thirty-five miles per hour in thirty mile per hour zones. We could specify that the driver was in compliance some of the time with some of the speed limits, but the question that is posed in international relations is usually more general. It would be, "are speed limits obeyed?" Analogous situations to this trivial example arise with treaties such as the Convention on International Trade in Endangered Species[3] that impose multiple and frequently complex obligations. Moreover, as Abram Chayes and Antonia H. Chayes have so clearly demonstrated, judging compliance

2. LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2d ed. 1979).

3. Convention on International Trade in Endangered Species, Mar. 3, 1973, 27 U. S. T. 1087, T.I.A.S. No. 8249.

frequently involves interpretation of exactly what the obligations mean in complicated contexts.[4]

Systematic knowledge about the extent of compliance of nations with the many international obligations that they have accepted is relatively limited. We know a good bit about compliance with traditional arms control and trade agreements. The number of parties to many arms traditional control treaties is limited, the obligations are relatively clear, and the stakes involved if nations did not comply could be very high. Governments and international governmental organizations (IGOs), particularly the Western European Union, the Organization for Security and Cooperation in Europe, and the International Atomic Energy Agency, have elaborate systems to monitor arms control. Because trade agreements can involve issues of considerable monetary importance, private parties and governments both have strong interests in monitoring them carefully, and the World Trade Organization has robust dispute settlement mechanisms that are used extensively.

We know considerably less about the extent of compliance with international norms that involve social welfare, human rights, and the environment. The International Labor Organization has long had highly developed mechanisms for checking compliance with international labor conventions,[5] but beyond this international governmental organizations have generally not been deeply engaged in measuring compliance until recently. We also know less about compliance with new forms of arms control and trade agreements. It was only in the run-up to the 1992 United Nations Conference on Environment and Development held in Rio de Janeiro that concern with compliance with international environmental accords became a major issue.[6] Prior to that time the evidence that was available was primarily anecdotal and supplied by nongovernmental organizations. This information was useful, but it was not systematic.

If we are to sharpen our understanding of *why* nations behave, we must understand better than we do now the extent to which and the cir-

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4. *See* ABRAM CHAYES & ANTONIA H. CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995).

5. *See* ERNST B. HAAS, HUMAN RIGHTS AND INTERNATIONAL ACTION: THE CASE OF FREEDOM OF ASSOCIATION (1970); ERNEST ALFRED LANDY, THE EFFECTIVENESS OF INTERNATIONAL SUPERVISION: THIRTY YEARS OF I.L.O. EXPERIENCE (1966); Virginia A. Leary, *Nonbinding Accords in the Field of Labor*, *in* INTERNATIONAL COMPLIANCE WITH NONBINDING ACCORDS 247–64 (Edith Brown Weiss ed., 1998).

6. *See* THE EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL AGREEMENTS (Peter H. Sand ed. 1992); Survey of Existing International Agreements and Instruments and Its Follow Up, U.N. Doc. A/Conf. 151/PC/103, Addendum 1 (1992); U.S. GOVERNMENT ACCOUNTING OFFICE, INTERNATIONAL AGREEMENTS ARE NOT WELL MONITORED (GAO/RCED 92-43, 1992).

cumstances in which nations behave in accord with the norms that they have accepted. It is obvious from what we know that the behavior of some nations is closer to the international norms they have accepted than that of others, that nations follow some norms more than they follow other norms, and that nations' behavior with respect to international norms changes over time. Calibrating these variations is an essential step toward understanding better the causal mechanisms that produce them.

The articles in this collection reflect this weakness in our knowledge. With the partial exception of the contribution by David S. Ardia, there is very little information in them about the actual behavior of nations. In his contribution, Ardia eloquently describes weaknesses and lacunae in the legal structure of the regimes for ocean management and then adduces evidence of the decline in ocean fish and mammal stocks to support his conclusion that the regimes require strengthening. He makes a strong case for his argument.

The argument could be refined and strengthened through additional research. During the same period that fish and mammal stocks have declined, the world's population has increased substantially and dietary habits have changed, increasing the demand for proteins and particularly for fish, thus the problem has become more complex. In addition, fishing techniques have altered. Different regimes for different fish and mammal stocks have had differing degrees of success, and the behavior of States in these regimes has varied.[7] In his study of international oil pollution at sea, Ronald Mitchell vividly demonstrated that compliance can be dramatically improved when treaty provisions take into account actors' incentives and their material and managerial capacities.[8] For example, when the International Convention for the Prevention of Pollution from Ships was modified to rely on equipment standards rather than discharge limitations, compliance became much easier to monitor and increased sharply. Oran Young has shown how complex the domestic politics concerning fisheries management within a single country, the United States, can be.[9] Because of the importance of the United States as a market and the U.S. fishing industry, any scheme for strengthening compliance would have to take account of the incentives of various actors within the U.S. political scene. The broad point is that Ardia's proposal for an International Marine

7. *See* M. J. Peterson, *International Fisheries Management*, *in* PETER M. HAAS, ROBERT O. KEOHANE & MARC A. LEVY, INSTITUTIONS FOR THE EARTH: SOURCES OF EFFECTIVE INTERNATIONAL ENVIRONMENTAL PROTECTION 249–305 (1993).

8. *See* RONALD MITCHELL, INTENTIONAL OIL POLLUTION AT SEA: ENVIRONMENTAL POLICY AND TREATY COMPLIANCE (1994).

9. *See* ORAN R. YOUNG, RESOURCE REGIMES: NATURAL RESOURCES AND SOCIAL INSTITUTIONS (1982).

Monitoring and Coordination Agency could be refined and strengthened if more were known about the behavior of nations.

Ardia does rely heavily on one of the generalizations that has emerged from the empirical work on compliance. All empirical studies of compliance have shown how effective non-governmental organizations can be and how important they are to strengthening compliance especially with obligations dealing with social welfare, human rights, and the environment.[10]

We need to learn more about the extent of compliance. This would provide a strong foundation for analyses to improve understanding of *why* nations behave, which would in turn enhance our capacity to offer effective prescriptions.

APPROACHES TO THE STUDY OF COMPLIANCE

In his contribution to this collection, Benedict Kingsbury argues that the concept of compliance does not and cannot have meaning "except as a function of prior theories of the nature and the operation of the law to which it pertains."[11] He shows clearly that different theories of international law offer different explanations for compliance.

A positivist political scientist, which I profess to be, would accept these different explanations as hypotheses to be investigated. Compliance may in some measure be a matter of rational calculation of costs and benefits, and it may also in some measure be the result of individuals adhering to their internalized sense that laws should be obeyed. It is true as Kingsbury maintains that social scientists have not found it easy to probe and measure internalized norms, but doing this has been the core of a great deal of social science research, and this research has produced much useful knowledge.[12] Internalized norms are very much part of the conceptual framework of positivist social scientists.

Note that I have stated these two possible explanations so that they can be regarded as complementary. Most positivist social scientists believe that there are usually multiple rather than single explanations for behavior and take it as one of their tasks to attempt to ascertain the relative influence of each of the several explanations. In our study of

10. Harold K. Jacobson & Edith Brown Weiss, *Strengthening Compliance with International Environmental Accords: Preliminary Observations from a Collaborative Project*, 1 GLOBAL GOVERNANCE 119 (1995).

11. Benedict Kingsbury, *The Concept of Competing Conceptions of International Law*, 19 MICH. J. INT'L L. 345, 346 (1998).

12. For a good summary of some of this work see *Micropolitical Theory, Vol. 2 in* HANDBOOK OF POLITICAL SCIENCE (Fred I. Greenstein & Nelson W. Polsby eds., 1975).

compliance with international environmental accords, Edith Brown Weiss and I and our collaborators,[13] found that compliance was affected by four clusters of variables: (1) Characteristics of the Activity; (2) Characteristics of the Accord; (3) Characteristics of the International Environment; and (4) and Characteristics of the Country. Cost-benefit calculations were involved in only a few of the more than thirty variables that we determined had an effect on compliance. This list of variables included attitudes and values of both general publics and leadership elites.

Although positivist social scientists believe that there are generally multiple explanations for behavior, we also seek to discover the most parsimonious explanations possible. Thus, when we find a variable that explains a large proportion of the variance in behavior, we emphasize it. George Downs contribution to this collection is in this tradition. Drawing on the insights of game theory, he develops an elegant theory concerning the circumstances in which enforcement will make important contributions to compliance.

Kingsbury also argues that theoretical work is needed to clarify and make cognizable within standard international relations theories the distinctive features of law. I could not agree more with this argument. For many years after the Second World War, social scientists studying international relations ignored institutions, particularly international law, in their quest to gain a positivist understanding of behavior. Happily that period and the motivations that led to it are past, and institutions have been rediscovered.[14]

Downs' contribution is an example of the work that is being done by positivist social scientists in rediscovering institutions. The place of enforcement mechanisms in international accords is very much an institutional question. Downs' contribution analyzes the interaction between the subject matter covered in a treaty, the characteristics of the parties, and the relative importance of enforcement mechanisms. It does not provide a cookbook type recipe for drafting treaties, but it does pro-

13. Our research consortium included in addition to ourselves: Danae Aitchison, Murillo Aragao, Anthony Balinga, Laszlo Bencze, Erach Bharucha, Piers Blaikie, Stephen Bunker, Abram Chayes, Antonia Handler Chayes, James Clem, Ellen Comisso, Liz Economy, Fang Xiaoming, James Vincent Feinerman, Koichiro Fujikura, Michael Glennon, Saul Halfon, Peter Hardy, Allison Hayward, Ronald Herring, Philipp Hildebrand, Takesada Iwahashi, Jasmin Jagada, Sheila Jasanoff, Tim Kessler, Ron Mitchell, Elena Nikitina, Kenneth da Nobrega, Michel Oksenberg, Jonathan Richards, Gideon Rottem, Alberta Sbragia, Thomas Schelling, Cheryl Shanks, John A. Mope Simo, Alison Steward, David Vogel, Wu Zijin Zhang Shuqing, Andrea Ziegler, and William Zimmerman.

14. *See* JAMES G. MARCH & JOHAN N. OLSEN, REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS (1989); ROBERT O. KEOHANE, INTERNATIONAL INSTITUTIONS AND STATE POWER (1989).

vide insights that would be useful in such an exercise. In his *Foreword*, Alvarez cautions those engaged in compliance studies to avoid quixotic searches for "recipe books." Downs' contribution shows how scholarship can avoid this and provide knowledge that usefully clarifies policy choices.

Kingsbury is correct in arguing that the social science project of rediscovering institutions has not been completed and that the collaboration of positivist social scientists with international legal scholars can make a useful contribution to this project. The exploration of *why* nations behave is a perfect opportunity for this collaboration.

Kingsbury finally argues that not all international legal concerns about compliance can be encompassed in a positivist project. This is true, but there is also more to social science than can be encompassed in a positivist project. Positivist social science seeks to concentrate on factual statements and to avoid value judgments. Positivism is not the only philosophical strand in social science. Social criticism has always been an important component of social science. This has involved both critiques of existing institutions, policies, and outcomes and also defining more desirable conditions. It is probably the case that normative orientations have greater prominence in international legal studies than they do in social science, but there are certainly common elements of normative work in both streams of scholarship. To date, the social scientists who most actively have been involved in compliance studies have generally been positivists, but others with different orientations could and should be enlisted. Their involvement will be increasingly needed as compliance studies progress from analysis to prescription. Prescriptions rest on value judgments, which are not the forte of positivists.

THE EXPANDING DOMAIN OF INTERNATIONAL REGULATION

The increasing waves of international regulation to which Alvarez referred in the *Foreword* to this collection have expanded greatly the domain of regulation. As international regulation has expanded into areas that previously were the exclusive province of nation states new issues regarding compliance have arisen. Procedural innovations have accompanied the expansion of the domain of international regulation. The appropriateness and efficacy of these innovations are open questions. Moreover, as international regulation has become more deeply engaged with issues that previously were dealt with by nation states the same political and social forces that affect the treatment of these issues

within nations come into play when nations collectively attempt to deal with them.

Three contributions in this collection illustrate these points, those by Christopher C. Joyner, Natasha A. Affolder, and Kenneth J. Vandevelde. They are particularly interesting because they deal with issues—Antarctica, violations of humanitarian law, and international investment—that are different than those that are usually cited in discussions of these points; namely, social welfare, human rights, and the environment. Because these three issues involve individual and national security and significant financial stakes they are often more salient than the traditional set of issues, and thus the procedural innovations put in place in these areas probably receive greater immediate scrutiny than those put in place in other areas. The innovations are interesting in themselves, as are the contributions they make and the problems they create. The points that emerge from analysis of them have general applicability.

Joyner shows how the basic commitments set forth in the 1959 Antarctica Treaty[15] have been elaborated into a complex regime that regulates virtually all aspects of activity in the Antarctic region. The process of elaborating the regime has involved the adoption of recommended measures. This process developed in an ad hoc manner, then in 1995 was formalized. The recommended measures ultimately become hard law, but they become soft law as soon as they are adopted, and remain soft law until all Contracting Parties to the Antarctica Treaty approve them. The process allows great flexibility for governments; it also provides stimuli for them to come into compliance.

The Contacting Parties to the Antarctica Treaty are collectively managing a continent and its surrounding waters in ways that are analogous to ways that nation states have managed their territories. National governments frequently pass broad laws that are then elaborated by more detailed regulations that are adopted through more flexible procedures. The regulations themselves often contain provisions for flexibility in implementation. The process that Joyner analyzes is in many ways like this model. It could be applied in other areas of international regulation, particularly those of social welfare and the environment. One of the most salient findings of the project on compliance in which I have been engaged is that different countries have different problems in bringing their practices into compliance with international obligations. The process that Joyner describes seems admirably suited to dealing with these differences.

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15. The Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71.

In her contribution, Affolder deals with the decision of Trial Chamber II of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, "to allow for the use of measures including confidentiality and anonymity to protect witnesses."[16] This decision has elicited both strong support and strong criticism.[17] The issues that are involved have been controversial in national legal settings as well, and different countries lean toward different solutions. Affolder carefully analyzes the sources that the majority ruling and the dissenting opinion relied on to justify their arguments and conclusions. In terms of developing a broad understanding of compliance, her contribution illustrates how quickly detailed issues of legal procedure that have not previously been addressed, arise and how complicated it is to settle them. More broadly, her contribution makes it clear that when penalties are enforced for violations of norms the perceived legitimacy of the procedures through which violations and penalties are determined is crucially important.

Vandevelde deals with issues relating to compliance raised by Joyner and Affolder in a broader context. He shows how a regime has developed for the protection of foreign direct investment and describes this regime. The principal components of the regime are more than 1,300 bilateral investment treaties, more than two-thirds of which have been concluded since 1990. He argues that foreign direct investment is a crucial component of a liberal global economy, but for this component to be secure a multilateral agreement would be essential. This agreement should "deepen the global consensus on liberalization of investment flows," promote "a commitment to liberalism among domestic investors in host states," and provide "a multilateral framework for addressing market failures and curbing excessive redistribution programs."[18] The Organization for Economic Cooperation and Development has been sponsoring negotiations for such an agreement.

Vandevelde is absolutely right that for there to be substantial compliance by nations with a multilateral agreement on foreign direct investment the first step would have to be to strengthen the global consensus on the many issues involved, and he correctly perceives that this could not be achieved unless there were agreed ways of addressing market failures.

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16. Natasha A. Affolder, *Tadić, The Anonymous Witness and the Sources of International Procedural Law,* 19 MICH. J. INT'L L. 445, 446 (1998).

17. *See* Christine M. Chinkin, *Due Process and Witness Anonymity*, 91 AM. J. INT'L L. 75 (1997); Monroe Leigh, *Witness Anonymity is Inconsistent with Due Process*, 91 AM. J. INT'L L. 75 (1997).

18. Kenneth J. Vandevelde, *Sustainable Liberalism and the International Investment Regime,* 19 MICH. J. INT'L L. 373, 396 (1998).

Consensus could be developed and strengthened through the negotiations themselves. The issues involved have been addressed within nation states. They, however, have not been addressed collectively in a detailed way. There are differences among nation states in the ways that they have settled the issues. In this broad context of actions that would seriously affect entire economies, Vandevelde clearly sees the need for the perceived legitimacy of the regulations and the means for enforcing them. The need for flexibility comes through throughout his analysis.

CONCLUSION

The three contributions on which I have just commented explain why a traditional subject in international law has achieved renewed prominence, why new questions have been raised in this traditional subject matter area, and why the answers that have been given to both old and new questions have new dimensions. Compliance is a subject with which international law has long been concerned. Legal scholarship has produced a rich literature on the subject, and the best of this literature has always been concerned with *why* nations behave.[19]

What is new is that the focus of and requirements for international regulation have expanded. Traditional international regulation dealt with issues that arose at nations' borders, war and international trade and matters directly related to these issues such as arms control. Increasingly international regulation deals with issues that arise within nations' borders.[20] This has been forced by the pressures that a growing global population has placed on the earth, by increasing economic integration among nations' economies, and by a growing sensitivity to and desire to achieve respect for human dignity.

Some aspects of the answers to the question why do nations respect the norm that States should not use military force to settle territorial disputes apply to the question how can nations be induced to cease production of ozone depleting substances, but the issues are so different that there must be a strong presumption that beyond common explanations there are separate explanations in each case. The theoretical and empirical studies that have been conducted so far demonstrate that this

19. For a relatively recent summary of this traditional scholarship see ROGER FISHER, IMPROVING COMPLIANCE WITH INTERNATIONAL LAW (1981).

20. *See* ROBERT Z. LAWRENCE, REGIONALISM, MULTILATERALISM, AND DEEPER INTEGRATION (1996). The preface to this volume and to the other volumes that have been produced by the Brookings Studies on Integrating National Economies makes this argument clearly and sharply.

is indeed the case. These studies also demonstrate how useful collaboration between international legal scholars and social scientists can be. Both groups can bring tools that are vital to examining problems of compliance with international regulations also covering within border issues.

Exploring *why* nations behave, if not a new question, certainly has new aspects. It is a venture that can be enriched by collaboration. This collection demonstrates both points.