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The Managerial Thesis in Law

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The management school is built on the discovery that state compliance with international accords is typically rather strong, and that enforcement has played little or no role in establishing and maintaining that record. According to Abram and Antonia Chayes, what secures compliance isa plastic process of interaction among the parties involved in which the objective is to rebuild, in the micro context of the specific dispute, the balance of advantage that existed before [1]–[3], created the agreement Noncompliance is not always, and maybe not even typically, the outcome of purposeful defiance of the legal norm, according to members of the management school. 4 When compliance issues do arise, they should be treated as isolated administrative malfunctions rather than infractions or self-serving efforts at exploitation. Noncompliance may be attributed to 1 treaty vagueness and indeterminacy, 2 state capacity limits, and 3 uncontrolled social or economic change. Not surprisingly, the management school views formal and even informal enforcement tactics with suspicion. Punishment is not only improper in the absence of any exploitative purpose, but it is also prohibitively expensive, politically charged, and coercive.

Retaliatory noncompliance often proves unlikely because the costs of any individual violation may not warrant a response and it cannot be specifically targeted, imposing costs on those who have consistently complied without hurting the targeted violator enough to change its behaviour, writes Ronald Mitchell. As a consequence, arrangements emphasising punishment as a way of eliciting conformity are not of much value in international society, according to Young. Cases of seeming noncompliance are issues to be handled, not offences to be penalized. As in other managerial situations, the dominant atmosphere is that of actors engaged in a cooperative venture, in which performance that appears to be unsatisfactory for some reason represents a problem to be solved through mutual consultation and analysis, rather than an offence to be punished, write Chayes and Chayes. The primary drivers of this process are persuasion and argument. To induce compliance and preserve collaboration, the following techniques are required enhancing conflict resolution processes, 2 technical and financial help, and 3 increasing transparencies. The last point is crucial: The high penalty is imposed on a person that intends to violate the law[4]–[6].

The Endogeneity and Selection Problems

It is easy to see why the management school's conclusions imply that both international institutions and international law have a significantly brighter future than most international relations professionals have assumed over the previous fifty years. Aside from starkly defying many realists' and neorealists' negative assumptions about the incapacity of cooperation and soul to exist in an anarchic society, they also contradict the assertions of cooperation scholars in the rational-choice school. Such academics stress the importance of enforcement issues in regulatory systems, characterising them as mixed-motive games with a high risk of self-interested exploitation, as opposed to coordination games with a low risk. Those results provide credence to the widely held belief that the rational-choice tradition's fondness for the recurring prisoners' dilemma has caused it to overemphasize enforcement while underemphasizing the possibility of voluntary compliance and purely voluntary conflict settlement[7]–[9].

To even begin to overcome the challenges that endogeneity poses for understanding the role of enforcement in regulatory compliance, we must control for the basis of state selection; that is, those features of international agreements that serve the same function for states as musical difficulty does for

school orchestras. One such contender is what we call the depth of collaboration. The depth of an agreement is defined by international political economists as the amount to which it necessitates behind-the-border integration in terms of social and environmental norms, as well as the lowering of trade obstacles. Yet, in this context, the depth of a deal refers to the amount to which it captures the collective gains possible via perfect collaboration in one specific policy area.

Any estimate of the level of collaboration is clearly quite rough. There are undoubtedly policy areas where the possibility for collaboration is significantly lower than in others, for a variety of reasons. In such circumstances, our depth measurement will make collaboration look shallower than it is. However, if one is willing to concede, as both managerialists and more traditional institutionalists do, that there are significant cooperative benefits that have yet to be realised in areas such as arms control, trade, and environmental regulation, this depth of cooperation measure provides a rough idea of what states have accomplished. In turn, we may utilise it to analyse compliance statistics and evaluate the function of enforcement.While this measure of depth is far from perfect, there is no reason to believe it is biassed in such a way that it distorts the relationship between the depth of cooperation defined by a given treaty, the nature of the game that underpins it, and the amount of enforcement required to keep it in place.According to our model's assumptions, if tariff levels are high, both states may gain by negotiating a reduced tariff deal. 6Yet, there is an incentive to take advantage of the other party's trust; that is, A's best one-period reaction to side B's cooperative tariff level is always to increase tariffs. Self-interest will prohibit such cheating only if the penalties outweigh the advantages. To create a climate in which this disincentive prevails, governments must impose a penalty for defection. In this situation, one punishment method states that state A should start by following the treaty, but if B breaks it even slightly, state A should react by abrogating it agreement or otherwise lowering its degree of compliance for some predetermined amount of time.

During cooperative times, each side's tariff is meant to be restricted to PA, P0 A and PB, P0 B, however during punishment periods, both sides' tariffs are expected to be raised to some noncompliant level.In this model, the temptation to cheat increases fast as the treaty's cooperativeness increases, but the treaty's advantages increase more slowly. This is what limits the number of treaties that may be supported. The penalty durations required to sustain treaties of varying sizes. A shorter term would expose the pact to cheating since it would not be long enough to wipe out all of the profits from breaching the treaty. For example, a treaty requiring a 5% tariff reduction needs just two periods of punishment; the best treaty that can be supported with the maximum penalty of indefinite length is 37.19%. The rise in the ratio of the advantage of cheating to the benefit of cooperating indicates that more harsh sanctions here severity denotes duration of punishment are required to dissuade defection as the benefits of the treaty and the associated restrictiveness of its conditions grow. While the rate of growth in value with increasing punishment duration slows, the benefit obtained by extremely lengthy punishments is still several times that obtained by punishment lengths of one or two periods. The graph's main argument is that the deeper the agreement, the harsher the consequences necessary to maintain it.

Ideally, one would want to investigate the relationship between enforcement and depth of cooperation, but as previously said, we concur with the management school's view that such strictly enforced regulatory agreements are uncommon. If the management school is true, the lack of strong enforcement mechanisms or the informal fear of enforcement should have no effect on the level of collaboration. There should be several instances of governments committing to drastically shift their course at the time a treaty was signed yet paying little attention to enforcement.If game theorists are correct that most key regulatory agreements are some kind of mixed-motive game, any tendency of states to avoid committing themselves to punishing noncompliance is likely to be associated with either a world with relatively few deeply cooperative agreements or a world with rampant violations. We assume the former to be accurate because we agree that although regulatory infractions occur, they are rare.

Second, we will investigate the management school's assumption that self-interest seldom plays a visible role in treaty breaches, and that violations are instead driven primarily by a mix of contractual

ambiguity, state capacity restrictions, and uncontrolled social and economic shifts. This assumption is contested by us since the collection of breaches should be less influenced by selection than the set of treaties. This is because, in the absence of perfect knowledge and proper enforcement, we anticipate the rate of violation associated with mixed-motive game treaties to be significantly greater than the rate of violation associated with coordination game treaties. As a result, even if there are fewer such treaties, they would be overrepresented in any sample of breaches compared to coordination game-based accords.

The Rarity of Deep Cooperation

Is our hunch true that conclusions regarding the relevance of enforcement are likely to be tainted by selection? Is there proof, for example, that there is minimal need for enforcement since there is little deep cooperation? Let us begin by reviewing the list of armaments treaties signed by the United States since 1945. see appendix B. We should point out that, although important, a number of accords, such as the Hot Line agreement and the United States-Union of Soviet Socialist Republics Ballistic Missile Launch Notification Agreements do not directly limit an armaments production, such as the quantity and/or position of a missile.

A major portion of those that do, such as the Outer Space Treaty, the Seabed Arms Control Treaty, and the Antarctic Treaty, entail commitments to preserve the status quo trajectory rather than drastically modify it. At the time the accords were signed, neither the Soviet Union nor the United States had cost-effective plans for large weapons systems in these regions, nor did they have a strategic goal that required such a system. The fact that this condition has essentially persisted is why Chayes and Chayes can declare that there has been no reported departure from the obligations of these accords during a four-decade period. 16 The fact that there was greater enforcement in this instance than is formally contained in these agreements may also have had a factor. Both the Soviet Union and the United States were surely aware that if one breached an agreement in a spectacular way, the other would almost certainly react in kind. Notwithstanding the fact that these expectations were formed implicitly, they are no less genuine than those specified expressly in the treaty. While we do not deny that obtaining tangible reassurance of a rival's intentions through a treaty is valuable, it is hard to convince ourselves that these treaties demonstrate the deep cooperation that would have occurred if the superpowers had each agreed to cancel major modernization programmes or drastically reduce their defense budgets. The similar argument may be made in relation to the Anti-Ballistic Missile Treaty ABM.

Although the pact may have established an important benchmark that prevented both parties from taking advantage of technical advances achieved after the treaty's signing, neither side have had technology or the funding to deploy a substantial system when the treaty was signed in 1972. When President Johnson and Premier Kosygin initially started talking in 1967, Soviet ABM activities were restricted to a spare system around Moscow, while the US stated that it would begin deploying a thin system to protect against Chinese assault and inadvertent launches. 18 As antiballistic system technology has progressed and focus has switched away from defence against a terrorist state. Neither the first Strategic Arms Limitation Talks SALT Interim Agreement nor SALT II were very comprehensive. The interim arrangement froze the number of intercontinental ballistic missile ICBM launchers at the status quo level the US had none under construction at the time, and the Soviet Union was allowed to finish those it was building, but it allowed increases in the number of submarine-launched ballistic missiles SLBMs on both sides and failed significantly to limit qualitative improvements in launchers, missiles, or a variety of systems that allowed for such improvements.

SALT II mandated considerable reductions in the number of active launchers or bombers on either side while allowing the number of ICBMs equipped with multiple independently targeted reentry vehicles MIRVed ICBMs to rise by 40% between the time of signing and 1985. When this statistic is combined with the number of cruise missiles authorised for each bomber, the overall number of nuclear weapons is increased by 50-70 percent. According to Jozef Goldblat, In course, agreements on intermediate-range nuclear forces INF, conventional forces in Europe CFE, and strategic arms reduction discussions START are more comprehensive. The first calls for the removal of intermediate- and shorter-range

missiles in Europe; the second calls for drastically reduced conventional forces; and the third calls for a 30% reduction in strategic nuclear delivery vehicle arsenals and a 40% reduction in warheads. 21 Although one may argue that the number of responsible weapons under START is less than the total number of weapons, the reduction are considerable in terms of either the status quo at the moment of the agreement or each state's trajectory. Do this imply that deep agreements with no enforcement provisions play an essential role in weapons control.

Managers may react to this study by saying that there are compelling grounds to believe that the relationship between enforcement and depth of cooperation in international commerce and the environment differs from that in security. Not only are many of the participants clearly distinct, but security has always been governed by the realism logic that managerialists find so lacking. We are not opposed to this argument. Cooperation dynamics may change among policy domains, just as they may vary over time within the same policy area. Yet, the domains are not as distinct as one would assume or wish, at least in terms of the link between enforcement and level of collaboration.The history of a given policy area in which laws have been progressively tight over time may provide the greatest measure of the link between the depth of cooperation and enforcement. According to game theory, when regulatory standards tighten, the scale of the penalty required to prevent defection must likewise grow. Even if the system reaches some type of dynamic equilibrium, there should be some palpable indication of this in the presence of poor information.

If we exclude the events in armaments control that happened following the demise of the Soviet empire, the finest instances of progressively rising depth of cooperation may be found in commerce and European integration. In each instance, the role of enforcement has grown in proportion. For example, Thomas Bayard and Kimberly Elliott conclude that the Uruguay Round has significantly lowered many of the most severe trade barriers throughout the globe, but they also highlight the World Trade Organization's WTO increased power to react to and punish trade infractions.

Individual parties can no longer manipulate infractions since they are more automated. Panel setup time limitations have now been reduced to nine months, with panels completed within eighteen months, avoiding the interminable delays under GATT. With the approval of panel findings, the idea of consensus voting has been flipped; formerly, both sides to a disagreement had an automatic veto on panel recommendations and reprisal. Unless unanimously rejected, the new method requires automatic implementation of panel recommendations, including permission for retribution. Sanctions had previously been used just once in GATT history. In the absence of a retraction of the violating practise or compensation to the defendant, retribution will henceforth be automatically approved. We think that the WTO's negotiation history shows that the higher demanding levels of cooperation attained by the Uruguay Round would not have been attainable without reducing the risk of self-interested manipulation by member states.

The Causes and Cures of Noncompliance

The primary purpose of the management school's compliance inquiry is to develop more effective techniques for resolving compliance issues in regulatory regimes. It is therefore beneficial to move our focus away from the probability of selection and the link between depth of cooperation and enforcement and towards why and how compliance issues that do exist may be addressed.The GATT, as the cornerstone of a sometimes troubled postwar trade system, offers scholars with a plethora of information regarding the reasons of noncompliance and the members' abilities to cope with them. GATT breaches include EC payments and subsidies to oilseed growers, quantitative sugar limitations in the United States, beef and citrus import restrictions in Japan, and Canadian export restrictions on raw salmon and herring. 23 This is only a sampling of the many discriminatory strategies that nations have tried to appease protectionist political factions in violation of GATT principles and standards.

Some of these issues stem from ambiguity regarding what constitutes noncompliance, but no one argues that a significant number of infractions have occurred. The GATT's founders were cautious not to confine its monitoring or dispute resolution methods to specifically forbidden acts. Instead, they focused

enforcement provisions on the cancellation or reduction of expected benefits. Indeed, Article 23 allows for the initiation of settlement procedures if any contracting party believes that any benefit accruing to it directly or indirectly under this agreement is being nullified or impaired, or that the achievement of any objective of the agreement is being hampered as a result of another contracting party's failure to carry out its obligations under this Agreement, or b another contracting party's application of any measure,

Ambiguity regarding what constitutes noncompliance is a cause of some of these issues, but no one disputes that a significant number of infractions have occurred. The GATT's founders were cautious not to confine its monitoring or dispute resolution methods to specifically forbidden acts. Instead, they focused enforcement measures on the cancellation or reduction of benefits that nations would anticipate. Indeed, Article 23 allows for the initiation of settlement procedures if any contracting party believes that any benefit accruing to it directly or indirectly under this agreement is being nullified or impaired, or that the attainment of any objective of the agreement is being hampered as a result of another contracting party's failure to carry out its obligations under this Agreement, or b another contracting party's application of any measure.

Yet, enforcement has played a vital, albeit contentious, part in the GATT's functioning and progress. Between 1974 and 1994, the United States imposed or openly threatened retribution in half of the GATT disputes it brought. It did so in the absence of any GATT action, and in five situations that Bayard and Elliott think would have been subject to GATT jurisdiction. 26 Observers such as Robert Hudec attribute improved enforcement and such justified disobedience of the GATT's dispute settlement procedure as an essential component of the GATT legal reform process. 27 Others, like as Alan Sykes, credit Section 301 and Super 301 unilateralism for inspiring paradoxically, given the management school's assertions the WTO's strengthened dispute resolution processes.According to Bayard and Elliott's recent analysis, the US Trade Representative usually handled the Section 301 crowbar effectively and productively, utilizing an aggressive unilateral policy to encourage support overseas for improvement of the multilateral trading system.

Even in the case of environmental regimes, which are the source of many managerialist examples, compliance plays a larger role in triumphs than one would think, and its lack is noticeable in several major failures. Compliance with the poorly enforced agreements made by eleven international fisheries commissions, for example, was very difficult until recently. These compliance issues were not primarily caused by agreement ambiguity or societal and economic developments.State capacity was more important since monitoring catches is expensive, but experts think that wealthy countries, who were often the primary offenders, could have dealt with the monitoring problem if they considered it was in their best interests. The essence of the issue was the paradox of collective action: governments saw little need to put pressure on their fishermen to follow regulations that other nations were likely to disregard. 30 The establishment of 200-mile exclusive industrial estates was a significant advancement since it made enforcement considerably simpler. As a result, the function of enforcement is expanding.

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A example that the managerialists say is an archetypal of their method exemplifies the complimentary link between transparency and enforcement. Mitchell describes the case as an effort by the International Maritime Consultative Organization IMCO and its successor, the International Maritime Organization

IMO, to control deliberate oil pollution by oil tankers. From 1954 through 1978, the administration had limited success, and oil emissions were three to thirty times the permitted limit. 33 With the negotiation of the International Convention for the Prevention of Pollution from Ships MARPOL in 1978, the IMO shifted techniques and started to restrict oil pollution by mandating tankers to have segregated ballast tanks SBT. Notwithstanding the lower cargo capacity and higher expenses of equipping new and ageing oil tankers with the new technology, and despite significant incentives not to install SBT, tanker owners have done so as required.

Why was the equipment regime so much more successful at getting people to comply? It is not difficult to claim that greater enforcement was far from insignificant. The [equipment violations regime] created the framework for a noncompliance response system including significantly more powerful consequences than those available for discharge breaches, for example. 35 Statements like this imply that, although improved openness was important to MARPOL's success, ships without the International Oil Spill Prevention IOPP licence might be prevented from conducting business or detained in port.The enormous opportunity costs of having a ship blocked from port or detained might cause a tanker owner to reconsider... A single day of detention cost a tanker operator $20,000 in opportunity costs, significantly more than the normal penalties levied. Detention provisions have influenced behaviour because they impose... substantial penalties on the violation, making their usage more believable and powerful.Detention is a severe enough punishment to dissuade a ship from repeating the offence.

Enforcement and the future of cooperation

The importance of the incidents presented above resides not in their representation of typical occurrences of noncompliance, but in their prominence and position as counterexamples to the management theory's unqualified prescriptions. These should also make us dubious of claims that mixed-motive game-based collaboration with the incentive for one or both parties to defect if they can get away with it plays a little role in regulatory regimes. If some have consistently overestimated the relevance of interstate cooperation in solving mixed-motive games, many should not make the opposite mistake of assuming that the latter and enforcements inconsequential. This is particularly true given the expected growth of regulatory cooperation.

We don't intend to suggest that the management paradigm and a refusal to accept that enforcement is often essential are the main elements blocking greater collaboration. Certainly, governments have motives to avoid strict enforcement. The dilemma is whether it is preferable to deal with such reluctance by stating that its significance has been greatly overstated or by attempting to correct the situation. We plainly favour the second option, and we feel that managerialists' notion of collaboration and compliance diverts political scientists' attention away from a slew of issues that are directly within their purview. For example, the great majority of political economic experts would claim that the reason the GATT has met compliance issues and governments have not achieved the cooperative gains that would be attainable via more active enforcement measures is due to an agency problem.

Political leaders, if not the consumers who make up their constituencies, are better off if they give in to protectionist demands during times e.g., recessions, after a technological breakthrough by foreign competition when interest groups are likely to pay a premium that is greater than the electoral punishment they are likely to receive. Because the timing of such events is unpredictable, and also most leaders are similarly vulnerable to such events, they deal with the situation by enacting penalties for violations that are high enough to discourage constant defection while remaining low enough to allow self-interested defection when circumstances demand it. Even leaders of states that are more committed to free trade for whatever reason are hesitant to increase the penalty for violations to a very high level because they suspect probably correctly that the protectionist premium is at times far greater than the cost of any credible punishment for violations. Consequently, their hand is restrained not by a respect for the unintentional character of defection, but by an awareness for how unintentional it is.

This is a feature of political competence that the management school seldom considers and that technological aid is unlikely to cure. It is, however, inextricably linked to the construction of domestic

political institutions as well as foreign regimes. One conceivable option is to limit regime membership to nations that will not be need to defect often. The theory is that whatever value is lost by excluding such governments from the regime can be more than offset by allowing those who are included to establish and enforce a greater level of cooperation in this example, a higher level of free trade. This might explain why, in contrast to the large-n coordination concerns of ecomanagement theory, many profoundly cooperative regimes have a small number of members whereas regimes with a large number of members engage in only superficial cooperation. Is this a genuine trade-off? Must states occasionally choose between treating an environmental or trade issue vigorously and attempting to form a community of states? We have no idea. What we do know is that ignoring the problem because of high compliance rates and a lack of enforcement is extremely premature.

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