



**Essential Readings in Environmental Law**  
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## **COMPLIANCE MECHANISM IN THE CLIMATE CHANGE REGIME**

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### **OVERVIEW OF KEY SCHOLARSHIPS**

#### **Theories of Compliance**

1. von Stein, J., “International Law: Understanding Compliance and Enforcement”, in Denmark A. Robert, (ed.), *The International Studies Encyclopedia*, (Wiley-Blackwell, 2010).
2. Chayes, A., and H. A. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*, (Cambridge: Harvard University Press, 1995).
3. Downs, W. G., D. M. Rocke, and P. N. Barsoom, “Is the good news about compliance good news about cooperation?” (1996) 50:3, *International Organization*, 379-406.
4. Bodansky, D., *The Art and Craft of International Environmental Law*, (Cambridge: Harvard University Press, 2010).

#### **Practical Consideration**

5. Beyerlin, U., P. T. Stoll, and R. Wolfrum, (eds.), *Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue between Practitioners and Academia*, (Leiden: Martinus Nijhoff Publishers, 2006).
6. Ronald, B. M., “Regime Design Matters: International Oil Pollution and Treaty Compliance”, (1994) 48:3 *International Organization*, 425-458.

#### **Compliance in the Climate Regime**

7. Brunnée, J., “A Fine Balance: Facilitation and Enforcement in the Design of a Compliance Regime for the Kyoto Protocol”, (1999-2000) 13 *Tul. Envtl. L.J.* 223.
8. Brunnée, J., M. Doelle, L. Rajamani, (eds.), *Promoting Compliance in an Evolving Climate Regime*, (New York: Cambridge University Press, 2012).

#### **Theories of Compliance**

1. **J. von Stein’s** *International Law: Understanding Compliance and Enforcement* provides a concise overview of the literature on compliance and enforcement from a variety of fields, including law, economics and political science. The article examines

some of what the author considers being the foundational works (both historic and recent) in the compliance/enforcement debate and seeks to outline a framework in which the issues can be more comprehensively addressed. Setting out the politics of compliance, **von Stein** also looks at the sources of compliance, the chief mechanisms for enforcement and the challenges associated with various methods and models. The article concludes by exploring the concept of flexibility, which is increasingly informing international agreements, and points out that norms and standards in international law tend to be overlooked by scholars, despite the prominent role that they play in influencing state behaviour.

2. In their book titled, *The New Sovereignty*, **A. Chayes** and **A. H. Chayes** unpick the “dense and complex web of norms, rules and practices” that influence states’ compliance with international regimes, and outline their suggested model for ensuring compliance. **Chayes** and **Chayes** argue that the enforcement model, which relies on coercive measures to ensure compliance with international treaties, lacks legitimacy and is too costly, both in economic and political terms. They propose instead a managerial model that relies on co-operation and assumes that States are generally inclined to comply with international obligations as a matter of efficiency, self-interest and the generally accepted principle that international treaties are to be obeyed. After outlining the key sources of non-compliance and what the authors consider to be the fundamental flaws in the coercive enforcement model, the book addresses the various elements of the management model and argues that a more holistic approach to compliance is needed. The case is made that the increasingly interdependent international system has changed the nature of sovereignty and that states are now required to submit to the pressures of international regulatory regimes if they wish to play an active part in the international system. This is key to understanding how best to achieve compliance, which the authors argue can be induced through a system based on justification, discourse and persuasion, little-appreciated but fundamental instruments of maintaining compliance.
3. **G. Downs**, **D. Rojke** and **P. Barsoom**, in their article titled, *Is the good news about compliance good news about cooperation?*, challenge the notion that a managerial approach to compliance is the future for international agreements, and present factual exceptions to the school’s “unqualified generalizations” about the causes and remedies for non-compliance. They propose their own model for compliance that links the required enforcement level to the “depth of cooperation”, or the extent to which a treaty or international agreement captures the collective benefits available through perfect cooperation (i.e. the extent to which a State is required to change its behavior to benefit from the agreement). The authors provide a Realist counter-point to the claims made by the managerial school and argue that enforcement not only remains a relevant consideration in international compliance mechanisms, but is often a necessary tool.

4. In the chapter “International Carrots and Sticks” of his book titled, *The Art and Craft of International Environmental Law*, **D. Bodansky** highlights the fact that international environmental law is a fundamentally political process of balancing competing interests that blurs the lines between law and politics. Compliance with international environmental instruments and regimes takes place within a continuum of legal and non-legal compliance mechanisms, and this chapter examines the doctrinal, explanatory and policy questions that this raises. Having examined the potential causes for non-compliance and possible responses (from traditional dispute settlement to multilateral non-compliance mechanisms), **D. Bodansky** then contrasts the traditional enforcement model with the newer managerial one. **D. Bodansky** concludes that as the ultimate goal of compliance mechanisms is to ensure an appropriate level of compliance, rather than perfect compliance, the more flexible, fundamentally political procedures that are emerging in new international environmental regimes are more appropriate. He also points out that compliance mechanisms are better at encouraging the “average state” to do better, rather than compelling a “bad state” to mend their ways.

### **Practical Considerations**

5. Building on the idea that “Law is only as good as it is obeyed”, **P. Beyerlin, P. Stoll and R. Wolfrum** in *Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue between Practitioners and Academia*, examine the compliance mechanisms to several multilateral environmental agreements (MEA), including the *Kyoto Protocol* and the *Basel Convention*, and conclude that the effectiveness of compliance mechanisms is directly linked to the soundness of the treaty that they are designed to enforce. Having provided insight into the structure and functioning of several current international compliance mechanisms, the authors turn their attention to the practical and technical aspects of the compliance process. They conclude that the traditional confrontational methods of enforcement are of limited efficacy. Recent MEAs highlight a trend of placing cooperation and partnership at the heart of new compliance mechanisms, and whilst the authors agree that this is a positive step they also suggest that one needs to fully consider the short-comings and uncertainties of this approach. The authors advocate for a combined approach as the best way to achieve compliance and enforcement. They conclude that the interplay between the structure of a given treaty and the way in which compliance is organized is an essential element of successful enforcement. Although all compliance control mechanisms have some common elements, each MEA needs its own tailor-made compliance control mechanisms which are clear-cut and well-defined, have a precise time-limit and take into consideration the nature of the parties as well as the effects/costs of non-compliance (which are collective, treaty-community costs in the environmental context, and are not borne solely by one state).

6. Compliance with international regimes, and the elements that contribute to or undermine it, is dependent on a large number of factors that are not always easily separated. As such, it is sometimes difficult to determine to what extent a specific factor may influence compliance, not just within a given regime but also in general. The international regime controlling intentional oil pollution is somewhat of an exception in this sense. **R. Mitchell** examines the regime in his article titled, *Regime Design Matters: Intentional Oil Pollution and Treaty Compliance*, and draws from it suggestions about how regimes should be crafted in order to best achieve compliance. Two different compliance regimes were implemented under the intentional oil pollution regime, and it is by comparing these that **R. Mitchell** reaches the conclusion that regime design is an essential element in achieving compliance. **Mitchell** argues that the underlying strategic choices made by regime-designers and treaty-makers have consequences for the levels of compliance that can be achieved. Regimes with greater transparency, a higher likelihood of forceful responses to detected violations and coerced compliance, which are built on existing institutions, are likely to have better compliance than those that do not have these features. Although **Mitchell** recognizes that the success of a regime depends on features unique to the specific issues being addressed, the article is useful in highlighting key strategies that have been shown to be useful under an existing regime.

### **Compliance in the Climate Regime**

7. **J. Brunnée**'s article titled, *A Fine Balance: Facilitation and Enforcement in the Design of a Compliance Regime for the Kyoto Protocol*, explores some of the challenges of creating credible and widely acceptable mechanisms to address non-compliance by looking at the complex example of the Kyoto Protocol. After a brief overview of the relevant features of the Protocol that informed the development of the non-compliance mechanisms and procedures, **Brunnée** focuses on the design of the regime and offers suggestions as to how the regime could develop in order to strike the correct balance between state sovereignty and the need for a robust approach to non-compliance. Using practical examples from negotiations that were on-going at the time of writing and adopting a pragmatic approach, the author argues that given the unique challenges posed by the Kyoto Protocol, any non-compliance mechanisms needs to go beyond the facilitative (and managerial) approach adopted by other MEAs and should contain "teeth". This article provides a case study of a complex regime that explores the most effective means of ensuring compliance, whilst providing insight into the evolution of binding norms within international regimes and the influences that these can have on state behaviour. Until the Kyoto Protocol, MEAs predominantly adopted a facilitation approach to compliance.

8. **J. Brunnée, M. Doelle, and L. Rajamani's *Promoting Compliance in an Evolving Climate Regime*** provides a comprehensive assessment of the climate regime's compliance system and insight into the regime's evolution. In addition to examining the current framework, the book also explores possible future ones that may develop if the compliance regime shifts from an international-treaty based system to one controlled at the domestic level (as suggested by the *Copenhagen Accord*). The first part of the book seeks to situate the compliance question in the broader analytical context of international law and compliance theory. **J. Brunnée's** chapter "Promoting compliance with multilateral environmental agreements" highlights the interplay between international law and international relations, and provides an overview of the theoretical and conceptual underpinnings of compliance. The chapter also examines how the mainstream theoretical schools of compliance (Realism and Constructivism) have been integrated into the design of MEA compliance regimes, both in general and specifically in the context of the *United Nations Framework Convention on Climate Change* (FCCC). The author concludes that normative socialization, justification processes and cost-benefit calculations are important compliance dynamics, but that both theory and practice suggest that it is necessary to have sticks and carrots, and that the various approaches to compliance, rather than being at odds, can actually be complementary and mutually reinforcing in a compliance regime. The second part of the book explores the conceptual moorings and operational experience of the Kyoto compliance system, dealing with the current system as well what can be drawn from it and used as a possible blueprint for the emerging climate regime.

In chapter 4 of the book *Key Features of the Kyoto Protocol's compliance system*, **R. Lefeber** and **S. Oberthür** examine the Kyoto Protocol's unique compliance system and the experience that has been garnered since it began operating in 2006. They argue that the system provides a landmark in international climate policy and global environmental governance. After briefly exploring the main elements of the compliance system and its institutional set up, the authors provide an assessment of the operation of the scheme, identifying progress, successes and what they consider to be major gaps and weaknesses that have been revealed by the operation of the system. They conclude with observations on the future relevance of the compliance system, arguing that its overall design and individual elements have established a proper benchmark for other compliance systems.

In the chapter "Experience with the facilitative and enforcement branches of the Kyoto compliance system" **M. Doelle** explores whether there are any lessons about system design that can be drawn from the operation of these branches of the Kyoto Protocol, and whether or not they are capable of addressing any challenges that may arise from a restructuring of the international climate change regime. **M. Doelle** argues that the Enforcement Branch (EB) of Kyoto is the first time that an MEA has taken enforcement

seriously and as such serves as a particularly interesting case study. Despite cautioning against drawing firm conclusions from limited experience, the author concludes, having reviewed the cases that have been brought before both branches, that the compliance system shows promise by encouraging constructive facilitation whilst also ensuring reasonably effective, efficient and fair enforcement. Although the system is currently under-utilized, it offers a good model for future compliance efforts.

In the concluding chapter of the book, the editors, **J. Brunnée**, **M. Doelle** and **L. Rajamani**, emphasize the importance of considering context and the particular characteristics of a given multilateral environmental agreement in designing an effective compliance system. As the context of the climate regime has changed in recent years, the regime itself has also undergone a transformation, and several possible compliance challenges resulting from this are identified. The editors offer suggestions about key areas in which they feel improvements can be made as negotiators make structural and substantive choices about the post-2012 climate regime. Along with better triggering, improved transparency and more adequate consequences for non-compliance, it is argued that the role of key actors also needs to be reconsidered.

### **Definitions**

1. Compliance “Degree to which state behavior conforms to what the agreement prescribes or proscribes”. Compliance must be distinguished from effectiveness (von Stein, 2). “An actor’s behaviour that conforms with an explicit treaty provision” (Mitchell, 429)
2. Enforcement “the act of compelling compliance with a law” (Beyerlin et al. 3). A “multi-faceted concept that encompasses a wide spectrum of means of compelling compliance with the law”, that is much broader than imposing penalties (Beyerlin et al. 23); “existence of sanctions or some material consequence in the event that noncompliance occurs” (von Stein, 2).