simultaneously endows some of these professionals, and especially legal academics, with architectural responsibilities in the construction of the outside universe.

The foregoing should suffice to make clear that, for certain professionals of international law, there could not be a more comfortable position. Those professionals define the vocabularies and ideas that are projected in the universe while being simultaneously portrayed, from an external perspective, as being the sole wielders of spiritual authority about what is going on in this universe. Their position is that of immense authority, all of it veiled and concealed by the idea of effectivity. It does not seem controversial to hold that it is in definition and description that lies the greatest power.[11] By virtue of the smokescreen provided by the idea of effectivity, certain professionals of international law, and especially legal academics, exert such a definitional power in all secrecy and without much formal accountability but that which is market-related or reputational.

Against that backdrop, there seems no doubt that the idea of effectivity will continue to prosper and inform scholarly debates and representations of the world for the next decades. Indeed, as was argued here, effectivity alleviates the fear of certain categories of professionals, and especially legal academics, of being relegated to the periphery as well as their fear of theology. It provides them with a powerful drug against epistemological claustrophobia. Most importantly, it empowers these professionals with definitional power while allowing them to be perceived as being in the back seat. If those professionals relish power (as I believe they do), they would be foolish to forsake the idea of effectivity.

How Compliance Understates Effectiveness

By Timothy Meyer[*]

Customarily, one begins a discussion about the effectiveness of international law by quoting Louis Henkin's famous remark that ''almost all nations obey almost all principles of international law and almost all of their obligations almost all of the time.''[1] For some, this empirical claim supports the notion that international law is a vital tool for furthering international cooperation. For others, though, the implicit suggestion that international law's mere existence might be driving states' behavior is a calamity of causal inference. Even if Henkin's claim is empirically correct, an inference of effectiveness does not follow from compliance. For yet a third group, Henkin's claim may not even be empirically correct. In at least some areas of international law, noncompliance may be relatively high. International law skeptics, in turn, have sometimes suggested that we might infer ineffectiveness on the basis of noncompliance.

In my remarks, I will argue that an excessive focus on compliance may *understate* international law's effectiveness for at least two reasons. First, international law remains principally a system of negotiated lawmaking. As such, compliance disputes are often as much about defining expectations for how states should behave going forward as they are about determining how a state should have behaved in the past. Indeed, noncompliance can be a negotiating tool, indicating a desire to engage with international law rather than ignore it. Second and relatedly, international law can be highly effective at changing state behavior over time,

[11] *See generally* Sahib Singh, *International Law as a Technical Discipline: Critical Perspectives on the Narrative Structure of a Theory, in* Jean d'Aspremont, Formalism and the Sources of International Law 236 (2013).

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[1] Louis Henkin, How Nations Behave 47 (2d ed. 1979).

even if compliance remains low. States may join international regimes expecting to be noncompliant but hoping to obtain some benefits from membership, such as foreign assistance or pressure on domestic governments to adopt certain policies. Noncompliance, in other words, may be part of a strategy to change state behavior over time.

Effectiveness Versus Compliance

At the outset, I should define what I mean by ''effective.'' Effectiveness refers to whether the law has changed a state's behavior from what it would have been in the absence of the law. Basically, a law is ''effective'' when the law is a but-for cause of the state's subsequent conduct. To determine whether law is ''effective'' in this sense, one compares two different behaviors—a state's behavior without the law in question and its behavior with the law in question. The difference in behavior, controlling for other factors that may have influenced the state's behavior, is attributable to the law.

In keeping with a great deal of scholarship, I distinguish effectiveness from compliance.[2] Compliance refers to whether or not a state's conduct meets the prescribed legal standard. Unlike effectiveness, compliance does not ask whether the law influenced the state's behavior. Compliance does require, however, a more concrete notion of what the legal rule mandates than does effectiveness. We cannot know whether a challenged action violates a state's obligation to provide foreign investors fair and equitable treatment unless we define more specifically what that obligation entails. Effectiveness, by contrast, does not require information about the content of the legal rule. Instead, all we need to know is whether the law's enactment caused a change in the state's behavior.

Compliance and effectiveness are thus two different scales upon which legal rules can be measured. A rule can exhibit (1) high compliance and high effectiveness; (2) low compliance and low effectiveness; (3) high compliance and low effectiveness; or (4) low compliance and high effectiveness. International relations scholars have frequently argued that international law may reside largely in category (3).[3] States are both the subjects and the authors of international law. The concern is therefore that states will agree to ''shallow'' commitments—obligations that do not require them to change their behavior significantly from what they would do in the absence of a treaty. These shallow commitments produce high levels of compliance but few changes in state behavior. In short, if we are interested in effectiveness, compliance rates may be a red herring.

While international relations scholars worry that effectiveness cannot be inferred from compliance, other commentators seem willing to infer ineffectiveness from noncompliance. Based on concerns that compliance rates in certain areas of the law may be low, some argue that international law is a weak tool for coordinating state behavior, essentially putting international law into category (2) above. At the extreme, these claims suggest that individual noncompliant acts show that international law is ineffective generally, an argument Peter Spiro has referred to as the ''Perfect Compliance Fallacy.''[4]

[2] *See, e.g.*, Kal Raustiala, *Compliance and Effectiveness in International Regulatory Cooperation*, 32 Case W. Res. J. Int'l L. 387 (2000); Lisa Martin, *Against Compliance, in* Interdisciplinary Perspectives on International Law and International Relations: The State of the Art (Jeffrey L. Dunoff & Mark Pollack eds., 2013).

[3] *See, e.g.*, George W. Downs, David M. Rocke & Peter N. Barsoom, *Is the Good News About Compliance Good News About Cooperation?*, 50 Int'l Org. 379 (1996).

[4] Peter Spiro, *Ukraine, International Law, and the Perfect Compliance Fallacy*, Opinio Juris (Mar. 2, 2014), http://opiniojuris.org/2014/03/02/ukraine-international-law-perfect-compliance-fallacy/.

The effectiveness of international law is thus under strain from two directions. Strong reasons exist to think that even when we observe compliance we cannot necessarily infer effectiveness. At the same time, there is a temptation to view compliance as a necessary but insufficient condition for inferring effectiveness, and therefore to infer ineffectiveness from noncompliance.

Compliance Understates Effectiveness

In contrast to these pessimistic arguments, I worry that an excessive focus on compliance understates the effect international law has on state behavior. Compliance may understate effectiveness for at least two reasons. First, international legal rules are indeterminate. States are constantly contesting the meaning of legal rules. Treating contestation as a failure to comply risks severely underestimating the extent to which international law influences state behavior. Second, international legal rules may exhibit low compliance but high effectiveness for a number of reasons, including the fact that governments and domestic groups may push to join international agreements in the hopes that noncompliance can be a tool to change state behavior over time. I discuss each of these reasons below.

(Non)Compliance as Lawmaking

The view that effectiveness cannot be measured from compliance rests on a claim that law's effect on behavior is inextricably linked to the process of lawmaking. Much scholarship understands this connection sequentially. First, states negotiate international rules; then, they change their behavior (or not) in response to those rules. Foreseeing the need to comply tomorrow with the rules they negotiate today, states make it easy on themselves.

I share the view that effectiveness cannot be understood without first understanding international lawmaking. But this sequential lawmaking/compliance framework fails to adequately describe the pervasive role that lawmaking plays, including in compliance decisions and assessments. Like all law, international legal rules are usually imprecise and therefore require interpretation. States regularly use claims about noncompliance to test and advance particular interpretations of legal rules. Indeed, states may use noncompliance as a tool to renegotiate international legal rules.[5] For example, Monica Hakimi has recently argued that arguably unlawful efforts to boost enforcement against Iran for possible violations of the Nuclear Nonproliferation Treaty are best understood as lawmaking, rather than enforcement, activity.[6]

Lawmaking thus goes side by side with—not only before—compliance. The continuing and constant nature of lawmaking means we must be very hesitant to infer ineffectiveness based on noncompliance. Such an inference wrongly assumes that states abandon their role as lawmakers once an agreement has been concluded. It assumes that after states enter an agreement, noncompliance indicates the agreement's failure to change the state's behavioral incentives and thus represents an institutional failure to create cooperation. This is not necessarily true. Just as initial negotiations among different possible rules have distributive consequences, so too does interpretation. Noncompliance might well reflect a state's commitment to an international agreement but its preference for an interpretation of that agreement under which it captures more of the gains from cooperation.

At the root of this problem is the fact that, despite the proliferation of international tribunals in recent decades, international law remains principally a system of negotiated lawmaking

[5] Timothy Meyer, *Power, Exit Costs, and Renegotiation in International Law*, 51 Harv. Int'l L.J. 379 (2010).
[6] Monica Hakimi, *Unfriendly Unilateralism*, 55 Harv. Int'l L.J. 105, 108 (2014).

in which states retain primary control over the evolution of legal rules.[7] Compliance disputes involve efforts to reach a common expectation among states about whether a legal rule permits a particular action going forward. The compliance architecture of many international agreements, especially in the environmental area, reflects this very different role for compliance disputes. Many treaties give the Conference of the Parties (COPs) the ability to make recommendations regarding the implementation of treaties and to devise non-judicial noncompliance procedures. For example, under the Montreal Protocol an Implementation Committee considers reports of noncompliance and makes recommendations to the full Meeting of the Parties (MOP), which then decides on the appropriate course of action. In following this process, the MOP—the parties themselves—use compliance disputes to define treaty obligations with greater precision.

Low Compliance, High Effectiveness

Excessively focusing on compliance can also obscure the fact that much of international law may actually be in category (4)—it may have low levels of compliance but high levels of effectiveness, particularly if viewed over time. Indeed, creating noncompliance may be part of a strategy to boost effectiveness. Human rights treaties might exhibit high degrees of effectiveness if they push states towards improving their aggregate human rights practices, even if they exhibit low levels of compliance when measured at particular moments in time. Put differently, we have to allow for equal opportunity in our skepticism about the connection between compliance and effectiveness. If we are unwilling to infer effectiveness from compliance, we should pause before inferring ineffectiveness from noncompliance.

Two brief examples illustrate how states can use their own noncompliance as a strategy to increase the effectiveness of international law. First, as Harold Koh notes, many states follow a policy of ''ratification before compliance.''[8] They may do so in the hope of receiving foreign assistance, either financial, technical, or otherwise, to help bring them into compliance. Such states will naturally have low compliance rates, but these rates may mask efforts to comply. Second, Beth Simmons has found that ratifying human rights treaties can improve human rights practices in the presence of mobilized domestic constituencies and independent courts.[9] This suggests that states may join international agreements in situations in which they (or perhaps more accurately the groups within the state pushing for ratification) expect some noncompliance in the near-term, but hope to use that noncompliance as part of a strategy—one that might build lobbying efforts and court challenges around noncompliance—for changing behavior over time.

Conclusion

Efforts to study international law's effects have tended to focus on how individual legal rules change state behavior. Rules are useful for third parties adjudicating disputes among states. But as we move from questions of state responsibility to questions of how law affects behavior, we quickly see that focusing on rules artificially separates those rules from the

[7] For a discussion of the distinction between negotiated and adjudicated lawmaking, see Harlan Grant Cohen, *International Law's Erie Moment*, 34 Mich. J. Int'l L. 249 (2013).

[8] Harold Hongju Koh, U.S. Dept. of State Legal Adviser, Opening Remarks at the United Nations' Committee on the Rights of the Child Concerning the Optional Protocols to the Convention on the Rights of the Child (Jan. 16, 2013), https://www.aclu.org/human-rights/opening-remarks-legal-adviser-harold-hongju-koh-united-nations-committee-rights-child.

[9] Beth A. Simmons, Mobilizing for Human Rights: International Law in Domestic Politics (2009).

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processes that create and maintain them. The larger processes of contesting and defining the meaning of law, both internationally and domestically, often use noncompliance as a tool to prod behavioral change. Legal regimes, in other words, may encourage a kind of creative destruction. Inferring ineffectiveness from noncompliance risks underestimating the value of these creative acts and how, even if noncompliant, they keep states engaged with each other and the international legal system as a whole.

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