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THE IMPACT OF DESIGN ON THE COMPLIANCE OF STATES WITH INTERNATIONAL AGREEMENTS

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THE IMPACT OF DESIGN ON THE COMPLIANCE OF STATES WITH INTERNATIONAL AGREEMENTS

JAKUB ROBERT WALKO

AUGUST 2011

Master’s Thesis
Submitted in Partial Fulfillment of the Requirements for the Degree of Master of International Affairs at the City College of New York

Advisor: Professor Jean Krasno
This work tackles the question of the importance of design of international agreements on the compliance they elicit on all levels of the global trade regime. Discussing the international legal theories that underpin the different perspectives on this issue and scrutinizing case studies of both large and small treaties this thesis establishes the impact that elements of an agreement’s structure have on its aggregate success. A case study of the GATT/WTO system illustrates the challenges of scale and diversity of trade issues while the study of the OILPOL and MARPOL environmental pollution regimes presents a lens on the practical implementation of an agreement and the evolution of compliance resulting from adjustments to such elements of its architecture as the monitoring components and enforcement mechanism. By analyzing different scales of the international trade system this work seeks to thread particular challenges and lessons that disappear or emerge as one moves from the large system with multiple state actors and significant monetary consequences to a smaller focus where the burden of compliance falls on individual ship captains and harbor inspectors. By investigating the relationship between the state and the individual in compliance matters this work aims to contribute to the scholarship on the optimal path of bringing on the ground realities to diplomatic negotiations. This study carries lessons for the crafting of future international agreements by pointing out areas of concentration that prove most crucial to inducing compliance and offers suggestions for a better method of effectively putting into practice the actual intent of the agreement.
IX. INTRODUCTION, BACKGROUND, AND METHODOLOGY

Should states be incentivized to action or threatened with punishment at the first sign of non-compliance? My research question asks if the nature of the enforcement mechanism of an international agreement significantly impacts states’ compliance with it. Enforcement mechanisms can be divided into many different types, each with its peculiar appeals and flaws. While at first it may appear that deterrence based mechanisms will elicit greater compliance, there are convincing examples of incentive mechanisms that show broad adoption and implementation. My thesis will explore the differences in these approaches to achieving the desired effect through international agreements and aim to determine in what ways the design of different systems impacts what ends up being implanted in reality over longer periods of time.

I predict that the design and structure of an international agreement directly impacts its success or failure. More specifically compliance with an agreement is likely a consequence of the ease of implementation, available resources, and the specificity and severity of the consequences of breaching it. Well designed, detailed, and practical agreements are likely to meet with high levels of compliance whereas vague and overly ambitious efforts likely permit the existence of loopholes that push enforcement into the area beyond the resources or will to comply of a state. The impact of design is likely comparable across a range of issues though the scale of specificity and effort must be proportionate to the scope of the task.

The debate over the type of enforcement mechanisms in international agreements is becoming increasingly important in a world without global government and yet one
which necessitates a large number of governance regimes. With growing interdependence and the disputes that go with it the number of international agreements on all types of issues is skyrocketing. A better understanding of the effects that each type of mechanism has on the compliance with written agreements would contribute to the analysis of the best means of achieving the original purpose of the treaty, protocol, or other legal accord, and avoiding the often encountered pitfall of international agreement with no domestic compliance. How agreements are designed has crucial consequences for their eventual adoption.¹ For this thesis I will use WTO agreements and compliance as a case study, in addition to Ronald Mitchell’s analysis of regime design.

My thesis will be organized according to the following framework:

1. Introduction, background, and terms.
   a. Here I introduce the concepts to be researched and provide readers with a brief history of international agreements and the general trends of international law. This will be essential to the understanding of why my thesis is important and in which direction this research area will be heading in the future. Additionally I define terms, especially given complex and confusing methodology issues found in this area of research.

2. Review of literature
   a. I give an overview of the available literature on this issue, aiming to provide a balanced review of the most recent scholarship and findings.


a. In this section I present many of the questions that may arise as part of this study and also provide some of the justifications for pursuing methods of compliance up to this point. I also explore what assumptions those make and offer possible outcomes of my study.

4. Competing theories and the nature of compliance.
   a. In this section I outline some of the theories currently being used to address treaty design and the various levels of compliance international agreements enjoy. Observing the evolution of international legal theory I attempt to discuss the nuanced differences to best explain the direction from which scholarship in this area comes from and what particular perspectives it may inherently take.

5. GATT/WTO system case studies.
   a. This serves as my first case study, analyzing the nature of the dispute settlement mechanism in the WTO and what its structure means for the resolution of issues between member states. I am particularly interested in the design of the mechanism and what effect it bears on whether the disputes are settled, resolved, or remain open. I additionally explore what lessons, if any, are to be found in the compliance literature that tackles issues of this scope and if universal lessons can be drawn from it.

6. Regime design and Ronald Mitchell’s work.
   a. My second case study deals with implementation and compliance on a smaller level, focusing on particular treaties and how their structure affected what took place on the ground. I am interested in the evolution of
the design of the oil pollution treaties, the obstacles to their implementation and enforcement, and what devices within the treaties produced the effects most closely aligned with the original intentions of the agreements.

7. Findings and conclusions.

a. In the final section I pool my findings and show any trends I have discovered by demonstrating connections and drawing as clear as possible distinctions between the various models of eliciting compliance.

Within the scope of this work several terms must be defined in order to reference particular cases with clarity. The broadest category I aim to use will be “international agreements” which I will use to describe both the kinds of documents that the term traditionally refers to but also additionally the consequences of treaties, namely court decisions and recommendations of bodies created from treaties and ones which are understood to be coming from some original international agreement. In those cases while a particular decision may not necessarily be accepted by a state if it is bound by treaty to recognize the decisions of the court or body I will nevertheless treat it the same way I would a state that is non-compliant with a provision of a treaty it has signed.

I will also use the term “regime” according to Stephen Krasner’s definition of “[i]mplicit or explicit principles, norms, rules and decision-making procedures around which actors’ expectations converge in a given area of international relations,” particularly with regards to norms found in industries (such as shipping or other forms of trade) and subsets of international agreements (such as environmental or trade
agreements). Regime will not necessarily be legally binding, but depending on the case will form a general consensus norm that the vast majority of actors abide by. Fringe cases and outliers will, as much as possible, be given individual attention but due to the grey edged areas of some international regimes they may not always be helpful or representative of any significant value in their cases.

For the purpose of this thesis, a “voluntary mechanism” will be defined as one characterized as a recommendation and not carrying enumerated consequences of non compliance. Such agreements, often termed “soft” law, usually function by utilizing diplomatic guarantees or national honor, and as such don’t carry measures of punishment other than a damaged reputation. Voluntary agreements are also routinely thin on monitoring mechanisms and for some states may end at a simple promise to undertake the goals of such an agreement at some point – hardly a useful implementation of what is international law. Such agreements are easier to reach and are the preferred means of reaching international agreements on the improvement of the standard of living, alleviation of poverty and often and unfortunately human rights.

Mandatory mechanisms, conversely termed “hard” law, on the other hand carry specific stipulations and present often severe consequence of noncompliance. These may range from a loss of voting ability to sanctions or even outright military intervention. They tend to be lengthier and involve protracted negotiations by expert bodies and notoriously face difficulties in national ratification. Nevertheless they are the preferred means of dealing with economic and military matters as they demonstrate the necessary clarity for mutual understanding between all parties. Rarer and more difficult mandatory agreements are often praised for their high compliance rate but are not usually scrutinized
in terms of the question of having been the best approach to resolving any particular problem. My research will try to determine where each of these mechanisms is applicable and whether the improved compliance with one justifies its use despite the various tradeoffs suffered during negotiations. Additionally I draw distinctions between compliance and effectiveness with the former placing focus on the meeting of guidelines or requirements of agreements, regardless of circumvention or dishonesty while the latter will determine the efficacy of agreement design on creating the change originally intended during the negotiations of the agreement. The difference is an important aspect of data analysis as many states take genuine measures to come into compliance but face circumstantial difficulties (like poverty or low governmental budgets) while others may come into compliance much more easily but choose not to behave in the spirit of the law in other areas.

The definition of compliance presents the greatest challenge as it creates the greatest degree of problems in scholarship in this area. While a large variety of definitions exist for this term I have chosen to adopt the simplest, hoping that it will lead to the easiest determination of the existence or non existence of the effect that I’m researching. Compliance will mean the degree of effort made to meet the general intention of the agreement. Compliance will be high when states mobilize resources and demonstrate volition to achieve the agreed upon goals. It will conversely be low when little effort exists or violations blatantly persist despite the agreement.

Further methodology will be discussed at a later point when I will include the different perspectives offered on the issue by the broad IR schools and draw distinctions between interests and goals. The realist and liberal schools offer substantially different
explanations and I hope to find explanatory power in aspects of both and determine which of their conclusions prove most useful while being mindful of the assumptions contained by both and the explanatory pitfalls they represent.

To best illustrate the argument that the type of enforcement mechanism matters significantly I have refined my selection of case studies to demonstrate compliance on the level of the state and the actual implementation of policy changes. My thesis focuses on the GATT/WTO compliance mechanism to illustrate choices on the international level where these agreements begin, and use international agreements on the conduct of oil shipping vessels for a more practical analysis of actual compliance on the very end of an agreement. By using both a macro and a micro level of analysis I am able to evaluate the strengths and weaknesses of each type of compliance and determine which produces meaningful results and at what rates.

The GATT/WTO case study is uniquely crafted to study compliance in that it describes a case involving a similar member body, the same core issues (economic), within a system of similar legitimacy, over a statistically significant number of decades, and yet shows the differences of a shift between voluntary and mandatory enforcement. Before the WTO, GATT suffered from a 30% noncompliance rate (interestingly largely from democracies) but it could be argued that the negotiations were not as difficult without the pressure of a binding system. Upon the establishment of the WTO compliance rates have risen as a result of the consequences of not following the agreements but negotiations are now more prone to be stalled and the mandatory nature of the agreements as well as the dispute settlement process are highly controversial.

Through my research I hope to identify the specific tradeoffs of each process and determine the usefulness of each scheme and its applicability to agreements outside of the WTO system. Through this study I also plan to analyze the incentives for particular state behavior to comply with the various mechanisms and determine what motivates them to do so. For this purpose I will use competing views of prestige, economic interest, regional power politics, etc. as various means of analysis.

Crucial to this case study is an analysis of the WTO dispute resolution mechanism and its effect on compliance rates. Through its three stages: consultation, litigation, and implementation the mechanism offers an interesting glimpse into what does and does not work within international negotiations. For example, the initial 60 day mandatory consultation period resolves 46% of disputes showing strong evidence that lengthier negotiations contribute to better understanding and would imply a stronger design for agreements. The system as a whole resolves approximately two thirds of disputes to the satisfaction of both sides, an encouraging statistic if it carried over to broad international law.

This case study offers another important dimension of compliance, the difference between developing and developed countries, which I will discuss very briefly. It is often forgotten that the implementation of law is by no means an even playing field. Regardless of whether the issue is national costs of changing to comply or the ability to interpret the law there is a large gap between states in what happens after their representatives sign

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4 Simmons, Beth A., “International Law and State Behavior: Commitment and Compliance in International Monetary Affairs” The American Political Science Review, Vol. 94, No. 4 (Dec 2000), 819-835
agreements. The WTO resolution process is legally intensive with protracted negotiations that require a substantial investment of both time and money in order to bring the expertise necessary to articulate and fight for the desired stipulations. Unfortunately many developing nations can’t afford full time WTO representation, not to mention full legal teams capable of effectively researching, analyzing, and arguing their cases. As the following table shows poor countries’ participation in the process is severely hampered:

### Table 1. WTO Dispute Participation by Members’ Level of Development

<table>
<thead>
<tr>
<th>Member Income Category</th>
<th>Number of WTO Members</th>
<th>Number of WTO Disputes as Complainant</th>
<th>Number of WTO Disputes as Defendant</th>
<th>Percent of WTO Members’ Total Exports</th>
</tr>
</thead>
<tbody>
<tr>
<td>Low</td>
<td>44 (34%)</td>
<td>20 (7%)</td>
<td>20 (7%)</td>
<td>3.8%</td>
</tr>
<tr>
<td>Lower-Middle</td>
<td>33 (26%)</td>
<td>48 (17%)</td>
<td>35 (12%)</td>
<td>12.4%</td>
</tr>
<tr>
<td>Upper-Middle</td>
<td>26 (20%)</td>
<td>35 (12%)</td>
<td>46 (16%)</td>
<td>10.2%</td>
</tr>
<tr>
<td>High</td>
<td>26 (20%)</td>
<td>183 (64%)</td>
<td>185 (65%)</td>
<td>73.6%</td>
</tr>
<tr>
<td>Total</td>
<td>129 (100%)</td>
<td>286 (100%)</td>
<td>286 (100%)</td>
<td>100%</td>
</tr>
</tbody>
</table>

Similarly, poor countries achieve full concessions from the negotiations in 40% of cases versus 75% for wealthy countries. Without being full participants in an international body where substantial amounts of money is at stake how can one expect poorer nations to fully engage in other international negotiations where outcomes are “merely” symbolic issues of human rights or education? This perspective on the issue should aid my

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argument that resources to participate and implement agreements are essential in a prudent design.

For my second case study I plan on using Ronald Mitchell’s work on regime design for a more practical perspective on what specifically elicits compliance at the end of an international agreement. His analysis of the impact of regime design on effectiveness scrutinizes the case of agreements on the transport of oil and in particular the discharge of oil polluted water near harbors. He identifies this area as one where international agreement is difficult and yet his work shows that increasing transparency, the ability to create meaningful sanctions, lowering costs of compliance, and actively working on preventing compliance violations end up significantly altering compliance with agreements. The empirical studies on compliance of shipping vessels are useful in that they provide evidence of concrete actions being taken as a result of new international agreements. More importantly they demonstrate empirically which provisions of international law faced the greatest amounts of resistance and what shipping companies and states did to try to circumvent them. By incorporating this on-the-ground level of analysis I show that compliance is highly dependent on the costs and practical considerations of putting agreements into practice.\(^6\)

Mitchell’s study of the two subregimes for international oil pollution control raise interesting questions as to the determinants of action taken on the micro level in response to macro international demands. With the discharge subregime illustrating initial international efforts at controlling oil pollution and the subsequent equipment subregime demonstrating further efforts I will be able to analyze the particular effects of each and

why some aspects worked while others didn’t. Mitchell’s findings that the compliance with the seemingly less politically and economically desirable subregime was actually higher should lead us to reconsider our assumptions about what method yields the best results.

Mitchell’s conclusion that regime design impacts compliance serves as an important factor of analysis in my thesis. It is of particular importance for being at odds with conventional theories of hegemonic power and economic interest which fail to explain the variance in the adoption of the different subregimes. While competing theories can contribute to understanding the constraints of actor choices or what levels of compliance are possible (in other words a very poor country will never be able to comply with extravagantly expensive international demands) they simply do not fit the cases as well as regime design.

Tracking the friction of compliance from the international agreements down to the practical implementation will allow me to determine which enforcement measures have the best rates of success and what design best serves to achieve the goals of those crafting the agreements in the first place. It’s clear that design matters but which ones and how much remains to be seen. There is a middle ground between lofty, broad recommendations that may result in zero change and small, precise measure that face no problems and carry big effects. Exactly what that middle ground is and which components from both extremes do and do not work will be determined by my thesis.

I offer competing perspectives for what makes the difference with regards to particular agreements but will also incorporate broader IR theories and their implications
for this analysis. I hope to discover whether the study of compliance shows a national intent in line with liberal views of cooperation and mutual understanding or if it falls under more simple national interests where actors predominantly negotiate for the results that most suit their national goals at the lowest cost. A debate of what prompts state actions and leads to international debate will be important in establishing if states go to a place like the WTO simply to maximize their gains from trade or if smoother, more efficient functioning of the system, or even ideological goals like environment considerations are ever important motivators for action.

The GATT/WTO case study offers an idea of the degree of participation with both contentious and un-contentious agreements while the oil tankers production data should yield clear reactions to implementing both. These two case studies will provide a reference point for trade related agreements as a whole and demonstrate to what extent the structure of the agreement matters. Lastly, I hope to ascertain what level of satisfaction has been provided by the enforcement mechanism embedded within the WTO. By understanding their satisfaction with the process I hope to shed light on why states continue participating in the proceedings and whether they do so solely for selfish benefit or if they derive other benefits.

I propose to demonstrate that the enforcement mechanism matters in compliance and effectiveness and that the ability of a mechanism to serve its purpose depends on the nature of the problem tackled. I plan to analyze the incentives to compliance and the

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8 Simmons, Beth A., “International Law and State Behavior: Commitment and Compliance in International Monetary Affairs” The American Political Science Review, Vol. 94, No. 4 (Dec 2000), 819-835
tradeoffs of mandatory agreements and try to determine whether states value changing their way for the better significantly enough to warrant the delay of mandatory requirements for change. I aim for my thesis to provide a contribution to the discussion of the effectiveness of international law.
X. REVIEW OF LITERATURE

The literature I have used in my research focuses on four general areas and is reviewed accordingly below; those are: the work on international legal theories and compliance, Ronald Mitchell’s studies of the implementation of international environmental agreements, empirical and historical studies of the GATT/WTO decisions and mechanisms, and other scholarship on implementation and compliance.

Simmons’ “Compliance with International Agreements”\(^9\) reviews alternative perspectives to realism to determine if and how they contribute to understandings why compliance exists in the international sphere. The three alternative perspectives are rational functionalism, domestic regime-based explanations, and normative approaches and the piece outlines their premises while discussing the difficulties of both methodology and study in the area of compliance. Covering seminal authors in each school of international relations theory Simmons gives a concise but informative overview of the variable approaches to scholarship of this issue.

Further, Simmons’ “Capacity, Commitment, and Compliance: International Institutions and Territorial Disputes”\(^10\) elaborates on the conceptual framework of compliance in the realm of territorial disputes. While for the purpose of this thesis territorial issues are treated as having a different nature than trade matters\(^11\) this article

\(^11\) There are numerous reasons for this, chiefly that territory is more easily quantifiable and monitored than economic practices which need substantially different mechanisms and thus often
offers a good analysis of the two level nature of decision making and enforcement, as well as giving a good treatment to the matter of national prestige – a difficult to measure variable that makes up a substantial component of the system of international legitimacy. The role of legal institutions and their contributions to domestic foreign policy decision making is also discussed here. Lastly, the article relates to my arguments by drawing a link between trade and territorial disputes and gives treatment to the historical evolution of arbitration of these cases.

I use Simmons’ and Hopkins’ “The Constraining Power of International Treaties: Theory and Methods”\(^\text{12}\) to evaluate the empirical dimension of the study of compliance and build on this research in conjunction with Jana von Stein’s previous work on a model addressing the question of whether treaty agreements simply reflect underlying state preferences. This article provides a thorough discussion of both methodology and variable analysis and is instrumental to the assessment of any quantifiable aspects of this study. The impact found through the correlation of several variables is the groundwork for my determination of important elements of my thesis.

Similarly, “International Law and State Behavior: Commitment and Compliance in International Monetary Affairs”\(^\text{13}\) discusses reasons for state compliance with trade regulations, the role and scope of the enforcement mechanism, and the elements of state prestige. Quantitative studies of compliance with Article VIII of the International

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\(^{13}\) Simmons, Beth A. “International Law and State Behavior: Commitment and Compliance in International Monetary Affairs.” American Political Science Review. Vol. 94. No. 4. December 2000. 819-835
Monetary Fund are used to support the argument that international regulations carry a substantial impact on the choices of states, at least in the financial areas. Chiefly, the impact of compliance from regional blocs is scrutinized here with particularly attention paid to the rates of compliance based on the actions of neighboring states and the types of governments in question.

I use Martha Finnemore and Kathryn Sikkink’s discussion of international norms in “International Norm Dynamics and Political Change”\textsuperscript{14} to refine methodology and discuss the evolution of political norms in international institutions and how their creation impacts the perspective with which states often approach international law. Finnemore and Sikkink argue that the disparity in scholarship between “what the world is” and “what it ought to be” shapes how norms are understood and adopted in both academia and international relations in practice. This will serve as a basis for my analysis of the competing views of compliance and their possible change in light of the shifting realities of the world.

Kal Raustiala’s “Form and Substance in International Agreements”\textsuperscript{15} translates much of the work on norm creation into a discussion on the types of and reasons for international agreements. Giving treatment to the historical role of formal agreements in all strata of cooperation Raustiala dissects their structure, legality, and substance of such norms. Of particular interest here is the analysis of the functional and liberal views in international relations theory and the identification of the essential trade off inherent in

\textsuperscript{14} Finnemore, Martha; Sikkink, Kathryn “International Norm Dynamics and Political Change” International Organization. Vol. 52. No. 4 Autumn, 1998. 887-917
cooperation. This article, while inconclusive, has been helpful in providing a wealth of research questions and proposing some of the strengths and weaknesses of analysis through particular theoretical lenses.

More historical perspectives can be drawn from Oscar Schachter’s “The Twilight Existence of Nonbinding International Agreements”\textsuperscript{16} which contains an older, but valuable perspective on the reasons why states choose binding and non-binding systems of international cooperation and what the expected compliance with each might be. In light of the nonbinding nature of some of the agreements Schachter asks if states may consider those outside of international law, an important determination when studying compliance within the increasingly accepted, in some ways, norms that any kind of agreement between two state actors may constitute a contract and thus law.

I extensively use the work of Abram and Antonia Handler Chayes\textsuperscript{17} on both the theories of compliance as related to the concept of sovereignty and the treaty process with a step by step analysis of the data reporting, verification and monitoring, and management. The historical explanation of the evolution of international legal theory is an important background to the understanding of why states behave in particular ways in the international arena and what may be done to induce action from such actors.

To further assess the above research and supplement it with other competing theories I will make use of Harold H. Koh’s extensive review of Chayes’ work\textsuperscript{18}.

Tackling the question of why nations obey international law, Koh begins with a general overview of the problem of sovereignty and forced compliance. He then follows the historical changes in the fluctuating struggle between the desire to cooperate and stick to agreed upon principles and the need to both establish self reliance and reaffirm sovereignty. Koh surveys a valuable breadth of literature on the subject and gives several perspectives on what, in practice, appears to be the impetus in compliance, whether it is the fear of sanctions or the loss of prestige.

The first case study I use for measuring compliance consists of the broad overview of cases within the GATT/WTO system and the extent to which international agreements yielded effective compliance on the relevant matters. For historical background and the general trends in the GATT/WTO system I use The Evolution of the Trade Regime\(^{19}\), profiling the origins, evolution, and mechanisms of the system and their place in international law. The book contains a thorough discussion of the process of negotiations in the GATT/WTO and sheds light on the degree to which individual state preferences are reflected in the final agreements that are negotiated. By going into the details of the political logic and institutional rules of the process it makes it possible to gain a greater understanding of the successes and failures of the specific cases of negotiations.

To further understand the negotiating process (before the dispute resolution mechanism) I draw on cases of the European Community's interactions within the WTO and the different institutional preferences for how the cases have been handled. J. H. H.

Weiler’s *The EU, the WTO, and the NAFTA* discusses commonalities and differences in trade negotiations on the regional and global levels and analyzes what is lost and gained in the process at each stage. Of particular note is the case of environmental regulation which finds vastly different standards depending on which states and on what level the subject is considered.

After the overview of the GATT/WTO system negotiations and issues I will make use of several articles for a close examination of the WTO’s dispute settlement process, an area that should shed the most light on what the body determines and what the eventual compliance is. Work in this area by Jackson, Hudec, and Davis, condensed into “The Role and Effectiveness of the WTO Dispute Settlement Mechanism” contains several recent cases between the larger members of the WTO and frames the issues of compliance in terms of both methodology and the desired effects. The subsequent critique by Hudec and Davis provides additional takes on the questions proposed by Jackson (does the mechanism work?). This discussion is further supplemented by the open dialogue regarding multilateral trade negotiations between these and other scholars at a much earlier meeting of the American Society of International Law. In tandem they offer a slice of the understanding of where the most contentious areas of the dispute mechanisms and the compliance with its conclusions lie and how they have changed as the GATT system evolved into the WTO.

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22 Herzstein, Robert E., Hudec, Robert E., Graham, Thomas R., Jackson, John H., DeKieffer, Donald E., Gadbaw, Michael “Multilateral Trade Negotiations: Dispute Settlement” *Proceedings*
In order to determine any present differences between compliance from ordinary negotiations and the decisions of the dispute settlement panel I will use “To Settle or Empanel? An Empirical Analysis of Litigation and Settlement at the World Trade Organization”\(^{23}\) which covers the cost benefit analysis of quick, though imperfect adoption as opposed to prolonged negotiations under the dispute settlement panel. Most importantly, this study breaks down the statistics for compliance based on government type, which may be an important determinant of eventual adoption of the agreed upon decisions. Similarly, an analysis of the type of issue being discussed, whether it’s an easily quantifiable and divisible type or more of an all-or-nothing issue plays an important role in what type of agreement is reached and what the end result of that agreement may be.

Further work on this issue studies the disparity of power in the WTO and how it may affect what kind of state preferences make up the eventual agreement. “Power Plays & Capacity Constraints: The Selection of Defendants in WTO Disputes”\(^{24}\) looks at the number and kind of cases presented by smaller WTO members and how they fare in the dispute settlement process. This issue is directly linked to the compliance of those members due to the strong hypothesis that compliance may be directly related to the capacity to comply far more than any political will or ability to negotiate details.

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\(^{24}\) Guzman, Andrew T., Simmons, Beth A. “Power Plays & Capacity Constraints: The Selection of Defendants in WTO Disputes” MISSING CITE
Lastly, I will address the issue of the contribution of large international agreements to compliance as a whole by looking at Edward D. Mansfield and Eric Reinhardt’s “Multilateral Determinants of Regionalism: The Effects of GATT/WTO on the Formation of Preferential Trading Agreements”25 which debates whether large trading blocs force states to pursue regional solutions that more closely represent both their capacities and interests. Preferential agreements and discriminatory trading practices may not fit the general world trade agenda but nevertheless deserve study for the lessons they may yield for compliance and structuring and to discover to what extent the design of these agreements reflects particular preferences rather than more universal goals.

The second major case study I use in this thesis focuses on Ronald B. Mitchell’s work on regime design26 27. Mitchell’s work focuses on environmental treaties with a particular focus on those governing oil tankers and shipping. In his study, Mitchell looked at compliance with agreements on the ground, paying close attention to what effects were yielded through each kind of mechanism included in the agreement. Looking at the different means of eliciting compliance this work provides valuable resources in terms of the variation between inducing states towards change and coercive action taken as a result of established non compliance. Conversely to the GATT/WTO case this study focuses heavily on smaller actors that collectively drive state attitudes towards these issues. Industrial opinions stemming from the costs that individual companies bear

provides important clues as to why compliance may or may not find adoption on the ground in practical terms despite whatever may happen in the meetings on the international level.

Lastly, Jose Alvarez’s work gives a survey of the competing theories on compliance and the problems in recent scholarship of this issue. Alvarez addresses both questions of scope and perspective and offers interesting insights into why compliance studies may result in particular outcomes and to what extent they are dependent on variables beyond the scope of the study.\textsuperscript{28}

XI. QUESTIONS, ASSUMPTIONS, EXPECTATIONS

My main research question is: does the type of structure of an international agreement affect how often and to what degree it is complied with? My research generally focuses on the reasons for the way current international agreements are designed, the reasons for that design, and the eventual success or failure of different types of design. Particularly I am interested in the question of deterrence and inducement based agreements and whether they yield disparate results in compliance. Through the analysis of the negotiations of trade agreements I aim to understand why a state may pursue a regional, international, mandatory, or voluntary character to the instrument being created and whether those preferences seem to indicate a general belief in selfish maximum gains or rather follow a different logic, such as common good, or perhaps different benefits derived from cooperation with other states. Whether agreements simply reflect individual state preferences is difficult to study but I will attempt to do so using current scholarship on preferences. Additionally I look at what constitutes compliance, the methods through which it is measured, and the ways it is statistically represented. I also give treatment to the question of state size and representation in the GATT/WTO system and to what degree smaller states are adequately represented in the crafting of agreements. Lastly, I hope to establish where the impetus for international trade agreements originates within a state, whether they are industry-driven preferences that have to do with company profit, or political preferences detached from an identifiable specific profit motivation.
There are several obstacles to broad assumptions in this field of study. For one, rational choice theory would dictate that the motivations of states or industry are driven by fairly simple maximization efforts, states would pursue power and industries would pursue profit, relatively similar concepts. However, as we are unable to determine the detailed calculus of particular economic and political choices it is difficult to establish what a preference for a particular decision is based on. For example, it is impossible to determine whether a particular company is supportive of an international decision on trade in its industry out of clear, quantifiable reasons, or perhaps because it sees some change as inevitable and would rather choose a policy contrary to its profit now in favor of gaining reputation or profits from public image in the future. In exactly the same way a small state may demonstrate certain preferences in order to bargain on other issues more relevant to its industries or interests. For the purpose of these studies I will assume that industries are driven primarily by bottom line profit motivations while states, at least in so far as less public trade negotiations go, aim for the most economically beneficial return on their own predominant industries, i.e. a country will negotiate fervently on corn if it has a large corn industry and significantly less so if it does not. This opens the door to studying compliance by observing cases where a country has to comply with a preference it did not favor, begging the question: to what extent are states complicit in non compliance in protest of a norm they do not see as legitimate or adequate, or simply one that is not in their interest to support. Further, I will make the assumption that all actors present in negotiations are aware of the same information and are adequately represented. This creates a problem for small states which I will show as having often inadequate budgets. However, as it is impossible to determine whether a state deems its
representation satisfactory or not I will work under the judgment that when present a state considers itself aware of the issues and acting in its self interest.

Perhaps the largest assumption I need to make in this study is one that has to do with the honesty of states with regards to implementation and compliance. It is often impossible to determine how genuinely a state desires to implement an agreement within its own territory. However, as scholars generally do not have access to data on the capacity committed to a particular agreement by a government it is necessary to assume that a signed agreement will be one that a state does its best to adopt, while an adopted agreement is one where a state will do its best to implement. Malevolent and secretive compliance evasion, i.e. one that is not brought before an international court or raised at some level of open negotiations, must be assumed to exist only to an insignificant degree or else it buckles not just the system of international trade agreements but rather trust and cooperation in the international system as a whole. This assumption does not stand at the microeconomic level where the choices of particular companies or industries are taken to exploit regulations to the maximum (and often beyond) exhibiting behavior as close as possible to the legal line that their preference takes them to. Accordingly companies are assumed to not disobey law on purpose but may do so to some degree in their misinterpretation of the law or the degree of its applicability and how firmly it is to be followed.

29 Profit maximizing behavior carries with it an implicit incentive to exploit the system for maximum gain making it difficult to establish the following of laws as a solid rule. As can be seen in countless cases of economics individual companies will work to exploit tax codes, regulations, and other loopholes in the system. However, as the vast majority of those cases remain within the law, or at the very minimum within some degree of reasonable legal discussion, it can only be assumed that legal obedience is a broadly followed function of the international trade regime.
I expected that my study would yield a clear result for the type of compliance for the two main categories of international agreements – mandatory and voluntary. In this area I expected that compliance with mandatory agreements will be higher but it is difficult to ascertain how this will change when I adjust the interoperation of results for the category of the issue treated in each case. I expected that on economic issues compliance should be good given that the repercussions for not following the agreement can be a severe loss of profit. On other issues, beyond the scope of this work, I expected that compliance with a mandatory agreement on, for example, disarmament will be low whereas a voluntary agreement might be less ambitious and thus complied with more frequently. I expect that most states see trade agreements as significantly beneficial to their agendas and that in general whatever trade-offs they sustain they elicit a positive return on participation in the international trade regime. For this reason I think levels of non-compliance that can be identified as those where failure occurs due to the conflict of state preferences and the decision of the international panel to be low and that states usually do in fact do their best to implement agreements. However, in terms of capacity I expect that neither states, nor industries commit sufficient capacity to compliance efforts due to high costs. This may not be a reflection of how seriously an agreement is treated but simply that there is often a significant gap between those elements of diplomatic representation responsible for negotiations and the elements of a state responsible for the monitoring and enforcement of such agreements. I would additionally predict that agreements that most clearly stipulate monitoring mechanisms have the best rates of compliance. Those mechanisms must be easy to implement and cost effective, addressing
the predicted shortfall in capacity to enforce, thus the design of the structure of the agreement should result in significant differences in compliance.
XII. THEORIES OF LAW AND COMPLIANCE

Recent decades have seen a significant uptick in scholarship regarding international law and subsequently its effects on state behavior. Studies have ranged from sweeping, generalized work aiming to establish the common denominator of which law works and which doesn’t to specific case studies carefully scrutinizing particular facets of systems, such as the effectiveness of decisions of the IMF. Methodology has been a great obstacle with unclear and often undefined differences between the measurements of implementation, compliance, and effectiveness that make it difficult to establish just what a particular scholar is measuring and to what extent it is an improvement or simplification of previous work. As a result of this increasing competition problems have erupted with scholars scrutinizing the objectivity or credibility of each other’s models of study, particularly between empiricists looking at hard data and those taking a more theoretical approach.  

The bulk of the arguments stem, unsurprisingly, from divergent views of the place of the state in the international system and the degree to which it either positively or negatively responds to incentives or whether it is more of a norm abiding creature aware of more complex issues. Regardless of what a scholar’s perspective is on the international system and the character of the state it is irrefutable that some sort of international interaction exists and that regardless of causality or correlation at least some international agreements are complied with. Whether that constitutes coincidence, as an oversimplified

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realist might say, or law, as an oversimplified liberal might claim is a question that requires a contemplation of the reasons why international norms exist, as well as why, and how they are created.

Harold Koh, Abram and Antonia Handler Chayes, and Thomas Franck’s work on sovereignty and international agreements does a lot to show the evolution of scholarship on this issue since the 1970s when Louis Henkin made the bold assertion in his work *How Nations Behave* that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.” The question of why obey international agreements is closely connected to the question of the power of international norms and the sovereignty of the state, all central to international relations theory and far beyond the scope of this discussion.

The will or duty to honor agreements can be identified from several historical sources. Be they the “law of nature,” or honor, or the sanctity of promises due to a moral obligation legal theory mainly evolved in that with time more and more emphasis was placed on the process of establishing norms within the Grotian “international society.” Whereas the pre-Westphalian concept of law was more concerned with a moral, divine, or universal system, after 1648 customary state practice took over in the establishing of rules between states. Subsequently legal obligation arose as a concept of behavior in line with custom and emerging norms, in opposition to something that was purely done voluntarily by a state, thus laying the ground work for the idea of obligation out of

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33 Franck, Thomas M. Fairness in International Law and Institutions Oxford University Press. 1998
34 Henkin, Louis How Nations Behave Columbia University Press. 2nd ed. 1979
previously granted consent to comply. Legal positivism, under Thomas Hobbes, asked for causal explanations as to why nations obeyed and concluded that as no sovereign existed on a world scale then these customs could not be law as they were unenforced. Immanuel Kant’s work in opposition to this idea called for greater interdependence as a possible route to global peace, arguing that the connections that bound states together would make war less likely due to the increasing costs of such a course of action. Meanwhile, Jeremy Bentham, who coined the term “international law” put forward a proposal for a codified system of international laws, arising out of custom, and progressing into an established system governed by a solid system of courts.

As a result of these developments four general perspectives on compliance with law emerged. The realist perspective on international law argued that given the absence of the global authority, and thus few concrete means of punishing non-compliance international law did not truly exists and was thus never fully obeyed, instead being followed rather coincidentally. The second cut, coalesced around Hobbes and termed rationalistic, proposed that states followed laws when they found them in alignment to their preferences and that while they did derive benefit from such a situation there was little incentive to go against their own preference for the sake of compliance. The Kantian, liberal, perspective firmly rejected zero sum theories and focused on the benefits of cooperation where law was not only guided by mutual benefits but, more importantly, by moral principles of justice and fairness. The fourth perspective, process-based, looked to the interactions with other states as the motivation to establish mutual norms and law judging the engagement of multiple parties as something that brought them together and encouraged a greater depth of cooperation and mutual understanding.
While the process based approach, encompassing the idea of prestige gained from cooperation, gathered steam in the early to mid 20th century the Cold War created new realities for international norms and any future envisioned for them. Realism gained at the expense of other perspectives and despite the existence of a newly formed system of international institutions with much promise the governing politics of the two superpowers left little room for ideas of international standards, and even less of any kind of enforcement against the wishes of those same superpowers that wrote most of the rules. This trend, in which realists saw international law as too utopian, also created a separation between the studies of international relations and international law with one focused much more clearly on the bipolar system of power while the latter looked at defining norms and finding universal commonalities in legal practice among the states.  

Two schools of advocacy of international law emerged in the US, the New Haven School of International Law, rooted in legal realism and arguing that the legal process itself is decisionmaking representing the application of policy to reflect both the need for order and social choices, and the International Legal Process School, which also stressed process but did not see international law as something separate, viewing it instead as the undetermined intersection of the work of legal scholars and policy makers, without a life of its own. While the two schools encompassed most of the scholars researching the issue of compliance neither really addressed the underlying question of why nations comply with international law or how often they do. Nevertheless, the divergent orientations of the two camps made it possible to foster continuing debate on the subject and formed the basis for further investigation into the issue of compliance.  

As the 1970s and 80s increasingly brought the spotlight onto international norms and institutions more political scientists began admitting that evidently whatever international law was it did contribute to compliance by making dispute resolution possible, by allowing states dialogue in which they could signal their preferences, and by opening up space for the providing of information on compliance within the sphere of this dialogue. However, despite this advancement the often avoided terms reminiscent of a real study of international law, choosing instead to focus on everything international law consisted of without explicitly identifying it as such. Thus “principles, norms, rules, and decision making procedures” featured in a lot of study but were held to be entirely functional benefits of cooperation between states as opposed to something stemming from the power of norms on their own. Work on compliance by Robert Fisher did a lot to correct this imbalance and brought the analysis of international law back into serious scholarship. Thomas Franck’s more recent work follows in this vein presenting the reason why powerful states follow “powerless” rules as being “because they perceive the rule and its institutional penumbra to have a high degree of legitimacy” further defining a norm’s legitimacy as “its rule clarity or determinacy; its symbolic validation by rituals and other formalities its conceptual coherence; and its adherence to right process, or conformity with the organized normative hierarchy of the international rule system.” However, this approach was criticized by scholars like Robert Keohane who did not recognize the connection between legitimacy and compliance, and who was joined in his criticism by other scholars from a variety of schools of legal theory.

37 Franck, Thomas M. Fairness in International Law and Institutions Oxford University Press. 1998
Following the end of the Cold War and the dissolution of the Soviet Union, international law scholarship entered a phase of uncertainty as the existing schools had to come to grips with the altered power structure and the emergence of trade agreements like the conclusion of the Uruguay round of the GATT, NAFTA, and the consolidation of the EU. With sovereignty diminished through these agreements international law took center stage and became a mixture of several legal theories attempting to move beyond simple ratification and into a sphere of increased legitimacy. This new system has been characterized by:

...new channels opening for the interpretation of international and domestic law through judicial decision, legislation and executive action. New forms of dispute resolution, executive action, administrative decisionmaking and enforcement, and legislation have emerged as part of a transitional legal process that influences national conduct, transforms national interests, and helps constitute and reconstitute national identities.\(^{38}\)

The treatment of compliance in this new system has been categorized into four strands, each rooted in some previous historical perspective on the issue.

The first, rationalist, reiterates the familiar idea of compliance with international law due to the state preferences it already reflects. In this approach, argued by scholars like Robert Keohane\(^{39}\), there is a comprehensive and highly complex idea of a long term state preference for gains which states craft in the system of cooperation. Based on repeated prisoner’s dilemma experiments these states are supposed to have figured out that cooperation presents them with the greatest return over a long period of time and


\(^{39}\) In addition to Duncan Snidal, Oran Young, Kenneth Abbott, and John Setear, among others.
thus have become invested in the tweaking of the norms which inherently already represent their original choices.  

The second, sometimes called “liberal” strand, characterized by the recognition of the capacity of rules to impact state behavior and modify it in ways that do not necessarily fully reflect that state’s original preference. Scholars like Andrew Moravcsik and Anne Marie Slaughter pay particular attention to the domestic politics of the state in question under the belief that the nature of the government is correlated with the degree to which it will comply with international norms. As Koh points out, this is a reinvention of the Kantian idea of “democracies don’t fight other democracies” instead suggesting that “democracies participate in legal agreements with other democracies” because the costs of resolving their disputes through simple adjudication will be order of magnitude smaller than any alternatives.

The third major strand, constructivist, argues that international law is falsely perceived as norms and ideas seen “out there” when in reality states and societies are products of existing norms. Because societies are already constructed out of commonalities, be they religious, philosophic, or other types of ideational they determine what states are and form a crucial role in what their self identities consist of. This strand, also connected to Grotian and English School traditions, maintains that by nature the international system is beneficial to the states established in it which in turn derive benefit from repeated observance of the agreed upon rules.

40 Unfortunately for political science and international relations we don’t have an alternate world where we could test to what degree, if at all, the world has worked in favor of the West and what alternative configurations might exist.
The last strand, focusing on process, is built on a mixture of concepts all stipulating that the interaction of states in the international system shapes their preferences and results in compliance. This idea is built on the previously mentioned work of Abram and Antonia Handler Chayes\textsuperscript{41} as well as Thomas Franck\textsuperscript{42} and Harold Koh’s\textsuperscript{43} which each argues a slightly different dimension. Because of the suggested explanatory strength of this approach the subtle differences in compliance models of the three camps within this strand are worth exploring and critiquing.

Chayes’s compliance work focused on treaties on arms control and the environment and aimed to show the success or failure of regimes established by treaties and an explanation for why each occurred. They identify efficiency, national interest, and regime norms as the three key areas to determining compliance faulting imprecise language, limited capacity, and implementation delays as the chief causes of failures of agreements. Their “management” model of compliance sees states motivated to compliance due to their interaction with their peers. The peers can expose non-compliant behavior producing shame and diminishing the standing of the state in the eyes of the international system. Under this idea, no matter the costs of complying with some agreement, they must not be as grave as the standing and power lost through the international system. Because the system is interactive reasons for non compliance can be presented in front of international panels or be discussed among interested parties, leading to a dispute settlement process. Lastly, should the reason prove legitimate in the

\textsuperscript{42} Franck, Thomas M. Fairness in International Law and Institutions Oxford University Press. 1998
eyes of the peer states the norm or law itself can be restated. Accordingly, the managerial model permits the application of norms to the international system while internalizing the resolution of its problems and subjects itself to continual rephrasing and evolution. This also paves the way for the involvement of non-state actors like civil society and international organizations which are given tools such as data collection, monitoring, and strategic review to keep another check on state compliance with agreements.44

Harold Koh identifies four flaws in this model. First, the managerial model asserts a judge-like figure in the dispute resolution process among states. While present in domestic law as a result of the court system structure the international society does not have any such figure with the comparable power. Whereas it can be argued that an international judge could always have the power of sanctions it is neither similar to the power of a judge in domestic disputes nor does it yield credibility to a model which means to have interaction among states resolve issues. In this way the model appears almost utopian, arguing essentially (and in an oversimplified manner) that states are always capable of agreeing and working out their problems. Secondly the model assumes loss of prestige due to non compliance but Koh points out that this is more specifically only true when there is no dispute over the interpretation of what the treaty was meant to encompass. It may be true that a state will appear hypocritical or weak if it backtracks on an agreement it voluntarily signed but suppose it simply makes the case that it did not see it the same way, a perfectly reasonable opinion on the legality of a document. In this situation, ideally, the matter would enter the dispute settlement process, but if a state chose not to it could linger in the grey area of reinterpretation for an undetermined period

of time without suffering the loss of or diminished standing from blatant violation and non compliance. Third, the model does not fully address the issue of “true” state preferences. As mentioned previously in the methodology this is an area where certain assumptions have to be made to make the quantitative study of compliance possible. While the Chayses similarly work under the assumption that states mean what they say and sing agreements they wish to follow there is realistically much left to be desired in cases where states do little to internalize the norms they agreed to on the international level. Regardless of how genuine the effort on the diplomatic side, norms that never percolate to domestic executive, legislative, or judicial actions do little to bring true norm incorporation to the practical areas that treaties generally seek to target. Lastly, it makes the assumption that there are commonalities in all treaties that make them equally fair, enforceable and open to discourse. While the interactive process is meant to iron out a lot of these details it is unreasonable to expect issues like human rights to meet with the same global consensus as for example trade regulation. What elements comprise a legitimate or fair treaty, one that is fully subject to the interactive process and not something that a state might reject or give up on outright?

To address this question it’s helpful to turn to the analysis of legitimacy and compliance by Thomas Franck. He argued that there exists a correlation between the fairness/legitimacy of the rules and compliance. Franck maintains a quasi rationalistic perspective at once recognizing the existence of calculated cost benefit rational choice model while relying heavily on the concept of compliance “peer pressure” in the international system. Because of the importance of interaction with the other states,

process becomes once again the focus in this model seeing discourse and negotiation as the key elements to the state determination of the fairness and subsequently legitimacy of the agreement. Despite these explanatory strengths this argument lacks clarity on the exact end game of legitimacy vs. justice debate \(^{46}\) and does not provide helpful explanations on how norms are internalized by states.\(^{47}\)

An interesting test of these theories is presented by Koh in the form of the 1972 Anti-Ballistic Missile Treaty between the US and the USSR. In order to proceed with the “Star Wars” program the Reagan administration proposed to reinterpret the treaty which over the course of eight years saw debate in the public and private spheres of discourse, from Congressional hearings to newspaper articles. The Reagan, and subsequently Bush, administrations maintained that their legal reinterpretation of the treaty was fair and correct until 1993 when the Bush administration finally chose to abandon the reinterpretation on the grounds of improved cooperation rather than an error of reinterpretation. One could argue, as Koh does, that in the late 1980s the United States effectively violated the treaty under the guise of reinterpretation and as the matter never reached any kind of a court or adjudication some of the theories of international law and compliance outlined previously fall miserably short of their aims when viewed in the Cold War context. Koh argues that theories are highly complementary, each with weaknesses but on aggregate find explanatory power similar to what the three images do

\(^{46}\) Franck makes the point, controversially, that rules arising out of discourse must be implicitly legitimate as they are the result of the process of negotiation between parties. Kantian scholars would however, disagree that simply because something has been discussed that it is inherently fair. On this point the model becomes open to interpretation with states possibly taking the stand that an agreement was negotiated – thus fair, while others could argue that it had been incomplete or imperfect, thus not necessarily fair in the sense of being “just.”

\(^{47}\) Franck, Thomas M. Fairness in International Law and Institutions Oxford University Press. 1998
for Kenneth Waltz’s argument for neorealism – different levels that interact with each other to explain behavior. The rationalistic interest theory may oversimplify matters by condensing everything into plus and minus matters open to miscalculation and while it finds room to explain trade and disarmament matters where the pieces of the puzzle come in the currency of numbers it fails in human rights and environmental agreements that don’t deal specifically with quantities or easily agreed upon numeric values. The liberal cut is on the other hand somewhat ignorant of the impermanent nature of government and offers explanations only in a snapshot when a country is or is not liberal, not accounting for shifts in national governance like states that fall back into dictatorship or grow apart or unevenly in democratic progress from their peers. This theory does not quite account for the reciprocal power of international norms themselves, which may (from the constructivist position) impact the states as much as they are originally reflective of their values and preferences. It has been argued that international norms on trade and shipping have existed for centuries in a decent state of governance regardless of the character of the state that engaged in it. Ships of commerce were received equally in progressive as in authoritarian countries for hundreds of years without any codified agreements or anything beyond customary practice. While constructivism accounts for the power of the international norms and how it impacts states but it doesn’t fully give treatment to the extent to which these norms and the cohesion they produce stems from the interdependence and interaction found within the system, i.e. the compliance may not exist simply because the international system exists. Clearly each of the theories offers explanations in many cases and often no supplement is needed. However, on aggregate,
they represent a much richer body of work helpful to scholars of compliance than any one of them does.
XIII. COMPLIANCE IN THE GATT/WTO SYSTEM

Given the diversity of opinions on compliance theory it comes as no surprise that scholarship of the issue is sometimes in contradiction. Essentially, the larger the system in question the more problems arise in the study of just what compliance is and how it should be measured. A good example is the case of the GATT/WTO system where one may observe an evolution of rules governing international trade through the various decades, and how the system coped with new challenges. While a discussion of the entire system is far beyond the scope of this work I discuss the GATT dispute system and how it changed into the WTO dispute settlement mechanism. The question arises, is the DSM effective and what kind of compliance with its decisions can be gathered so soon after its creation.

The original General Agreement on Tariffs and Trade dispute settlement came out of the agreement’s Article XXIII which ambiguously determined procedures for consultation in cases where a state was acting in a way that nullified the benefits of the agreement. The inherent problem with this system was that GATT was always meant to make up a part of the International Trade Organization (ITO) which, in its draft charter, called for a strong, clear settlement process with the eventual ruling of the World Court should negotiations fail. As the ITO failed to materialize the GATT system was left with a makeshift process with unclear details of procedure governed entirely by what became customary practice within GATT.
Initially issues were settled through diplomatic negotiations that took place at the semiannual meetings of the members, then progressing to ad hoc committees, and eventually more permanent dispute committees. After 1955, it was decided that a dispute resolution panel of experts would settle these types of matters representing a change from a more legislative, multilateral process to a judicial one. The right to suspend reciprocity was utilized only in one case, in 1953, when the Netherlands brought a case against the US regarding the restriction of dairy imports (as the Netherlands was not acting on its authorization to restrict wheat flour imports from the US due to its perceived ineffectiveness) and the panel evolved to focus heavily on mediation and negotiations, being at once criticized for not crafting more concrete rules or clarifying the understanding of existing norms. The GATT panel usually created a report on the issue at hand and would pass it on to the agreement’s Council, an entirely customary practice. The custom also followed that upon the consideration of the issue by the Council an approval of the panel’s report by consensus meant that the decision would become de facto binding whereas an absence of consensus would absolve the losing party of any need to comply. The main, and effectively lethal defect of this system was that since any member could raise objections at the Council’s discussion of the matter it effectively gave a everyone, even the member being “judged” a veto over the binding nature of the decision.

The 1980s saw greater refinement in the GATT process and the division of cases into two distinct but in fact completely unequal camps: non-violation cases which alleged some form of improper behavior in terms of the rules of the agreement (which saw about three to eight such cases in GATT history) and violation cases (which saw several
hundred cases). While the system worked to the best of its ability it suffered from huge formational problems including ambiguity of goals, undefined procedures, problematic rules of participation of involved parties in the dispute process, and scattered systems of panel authority, among others. The Uruguay round of trade talks created the Dispute Settlement Understanding (DSU) aimed at resolving a lot of these problems. Particularly the new mechanism would unify the dispute settlement process out of the collection of panels, preventing the blocking of panels from addressing complaints, and simplify the panel structure. Because it was no longer possible to block the consensus adoption of the body’s decisions all decisions became consensus based and thus became binding on the losing party.

At the present, the WTO settlement mechanism is initiated by WTO states against other members and referred to consultations between the involved states. Panel members are chosen by all involved parties and rules are agreed upon. After arguments are presented consultations ensue and a report is crafted by the panel and reviewed for comments by involved parties. This report is submitted to the Dispute Settlement Body and adopted with a binding resolution. If a party is still unsatisfied with the decision it can proceed by referring it to the Appellate Body which has a final say on the issue. This system clearly engages states to negotiate as much as possible and is in support of the model fostering agreement through the bringing together of the parties involved. Theoretically a state can choose to do nothing and reject the verdict but it would not gain anything by that action under any of the theories as it would lose reciprocal agreements with other states. Under this model of an international agreement the “losing” outcome, or the worst case, is not being exploited but rather missing out on mutual benefits. As a
result there is an inherent incentive to participate and states should be averse to either stretching out proceedings or not complying with the rulings.  

In the time since the creation of the WTO in 1995 several cases have been taken up that may shed some light on compliance within this obligatory system. While initially there were no objections over compliance with the mechanism from the major trading nations problems began to appear in 1998 with the EU and US argument over banana tariffs. The negotiations didn’t yield the desired result and already at its filing the issue was causing friction between the two trading superpowers for five years. The Dispute Settlement Body (DSB) decided that the EU had behaved contrary to the agreed upon trade rules and mandated compliance with fair trade. The mechanism provides for a reasonable period of time when the report has to be implemented, either through mutual agreement or through the body’s decision depending on the practicability of the situation (this has usually meant ninety days on the early cases decided by the DSB). Members also have the option (though it is unclear exactly to what extent this is possible) to comply with the DSB decision or offer compensation to the other party for the breach of trade rules. In the case of the bananas the EU did not comply in a reasonable time and despite an appeal its tariffs system was in clear violation of the trade rules. The WTO authorized the US and other plaintiffs to levy trade sanctions on the EU over this issue and it was not until 2009 that the EU crafted an industrial relief package for the former European colonies to help offset their losses due to the mandatory lowering of the trade

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49 The case mostly involved preferential tariffs for former European colonies in the Caribbean for the export of bananas to the EU. American companies operating out of South America complained that this was in breach of the WTO rules and repeatedly filed against the EU.
tariffs. Upon its conclusion the case stretched back over 15 years of negotiations and while it had failed to yield compliance from the EU in a timely manner as envisioned by the WTO the end result did validate the process of negotiations and retaliatory removal of concessions.

Other high profile cases offer a similar view of the mechanism, the 2002 US steel tariffs brought forward by President George W. Bush imposed heavy tariff restrictions on the import of steel into the US. Envisioned by the administration as a temporary measure to protect American steel industry jobs it faced high levels of criticism from major American trading partners like the EU and Japan, both of which invested heavily into making their steel industries profitable in the world market. The US was taken to the dispute panel at the WTO which ruled against the US tariffs in a major decision which was expected to spark a major trade war. Expecting that the decision by Bush was motivated by political strategy of preserving jobs in states like Michigan and Pennsylvania the EU responded with targeted sanctions at Michigan made cars and Florida oranges. As the WTO rejected the American appeal in the case and approved the over $2 billion sanctions that the EU proposed the US eventually reluctantly agreed to comply and withdrew the tariff by December of 2003, explaining that the intended effect had already been achieved and that their removal was in line with the idea at their conception.

These two major cases may not necessarily be representative of the WTO dispute process but they point to a large problem that seems to doom questions of compliance on the global, macroeconomic level. Even if one is to omit the large issues with
methodology\textsuperscript{50} the obstacles to monitoring of the extraordinarily complex state economic actions make monitoring a nearly impossible task. As will be presented in the maritime oil pollution case systems with multiple paths of failure for monitoring mechanisms often prove inadequate and the scope of actions is too broad here. One can argue that the US has “complied” with the WTO ruling based on the lifting of the tariffs on foreign imports. However, the US provides substantial subsidies to steel producers which entirely offset the low tariffs that permit the EU and Japanese steel producers to be competitive in the American market. The subsidy issue is at heart of a number of pending WTO cases and has presently stalled the latest round of WTO talks where a rift has emerged between developing and developed countries.

As a result unless we eliminate every way for a state to offset the losses it suffers from lower tariffs on products entering its borders it’s extremely difficult to assess what “true” compliance is, i.e. to what extent has the intent of the ruling been followed. The best we can do is hope that states are motivated to follow the rules even if full scale quantitative evidence of this may not ever be available. We can also apply a very narrow definition of compliance where we equate it to the plaintiff’s satisfaction with the actions of the losing state in a dispute or settlement. In this assumption if a case has been settled by the WTO then one could say that the parties reached an agreement and the problem is no longer outstanding. This remains to be assessed given the fact that while early after

\textsuperscript{50} I have made only cursory mentions of this issue as it warrants scholarship that would comprise volumes of work. Methodology represents an overarching problem in most of the fields associated with studying compliance, be they international relations theory or legal terminology. Simply put the semantics of this dispute are beyond the scope of this work which seeks to maintain simple, commonly understandable, and to the greatest degree possible – interchangeable, terminology for the general presentation of the problem rather than a detailed accounting for use in comparative studies.
1995 the WTO enjoyed high rates of settlement and resolution it has since then accumulated an increasing caseload of pending disputes.

More accurate levels of true compliance with the intent of the agreement will be extremely difficult to determine until the conclusion of the WTO trade negotiations that specify the legality of national actions like subsidies and other domestic incentives to producers. Unless such restrictions are placed on governments the number of ways to gain favorable status within the system remains virtually unlimited. However, despite this seemingly indeterminate nature of the system there is some evidence that can be gathered regarding why it is that states participate and comply with the system. In a little under a decade since the creation of the WTO the US has be either a complainant or a defendant in 51% of all cases taken up by the body. Members of the European Community are the second most active participant, appearing in 40% of cases.  

This illustrates that the two largest trading blocks in the world do actively participate in the international agreement. Because both sides win and lose this would lend quite a lot of credibility to theories of compliance arguing for the power of interaction in treaties. Research suggests that states often go to the dispute settlement mechanism when they have a very high level of trade interdependence as “these countries have an especially strong incentive to reduce transaction costs and to make the rules of international trade transparent and consent.”

DEFENDANT STATES IN WTO CASES
COMPLAINTANT STATES IN WTO CASES
The lower participation of smaller or poorer states has several possible explanations. One is that the rules of the international agreement do not align with the preferences of those states and instead are, as is often alleged, instruments of the wealthy states of the world. However, given that these same states are voluntary members of the trade regime it must indicate that even if they are not full participants they must recognize the agreement and see the possibility of deriving some benefit from it. If the agreement was not viewed as legitimate then the small states would not be members, instead 18% of cases are filed by developing nations against the developed world, showing that those states are willing to incur the costs of litigation for the purpose of resolving their dispute.

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NOTE.—Complainants are listed first in each pair. Numbers in parentheses are percentages.

A more likely explanation for lower participation of developing states stems from capacity constraints. As the WTO grows the legal resources needed to make sense of the various components of the system grow exponentially and some states struggle to allocate sufficient resources to make the most of it. Data shows that while small states may not have the resources to pursue multiple large cases their participation in the system is not treated in any other way than that of large states. The complainants win approximately
90% of cases in the WTO and this figure holds true both for developed and developing states. By all statistical accounts all members of the WTO enjoy equal treatment and receive similar benefits\(^{53}\) lending little evidence to theories citing existing state preferences as the impetus for participation in international agreements.

\textbf{CASES FILED BY INCOME CATEGORY BY YEAR}

\begin{center}
\includegraphics[width=\textwidth]{cases_graph.png}
\end{center}

\(^{53}\) In the sense that they are not discriminated against within the agreement. Whether free trade benefits developing or developed states, as realists might argue in defense of their argument is beyond the scope of this work.
CASES FILED BY DEVELOPMENT STATUS BY YEAR

Comparison by # of Cases of Complainants over Time by Level of Development

Year


# of Cases Filed

Developed
Developing
Despite the challenges of establishing compliance on the international level there is much to be learned from particular cases of treaties which have been followed over a satisfactory period of time. One such example is Ronald Mitchell’s investigation and analysis of oil pollution at sea.\textsuperscript{54} Mitchell studied compliance with two major environmental treaties and compared results based on a large pool of data which showed large differences between the effects of the different provisions of each treaty. His conclusions about on the ground compliance fill the gap created by inconclusive scholarship on the macroeconomic level of this issue, and yield significant evidence that the architecture of international agreements carry a significant impact on the subsequent compliance.

Mitchell’s study deals with the oil pollution created by routine byproducts of oil shipping. While most people place their focus on large scale spills and other acute environmental disasters routine tanker discharges account for approximately two thirds of all oil pollution created by shipping (this includes major oil spills and ship sinkings).\textsuperscript{55} This stems from the technicalities of oil transport, particularly that oil that is offloaded after transport leaves behind a residue that clings to the walls of the ship’s tanks and cannot be further dispensed of in port. Even though this oil represents a tiny fraction of the total cargo it can become quite significant when one considers both the capacity of modern oil tankers and the frequency of shipping. Upon leaving port the ship takes on

\textsuperscript{54} Mitchell, Ronald B. \textit{Intentional Oil Pollution at Sea} MIT Press, Cambridge, MA 1994
\textsuperscript{55} Mitchell, Ronald B. \textit{Intentional Oil Pollution at Sea} MIT Press, Cambridge, MA 1994 p. 72
ballast for stability and subsequently discharges the seawater mixed with residue oil (called slops) before taking on more oil for the net trip. This discharge amounts to significant amounts of oil being dumped into ocean or coastal waters and can amount to major environmental damage.

International efforts at regulating this problem have the longest history of any environmental international agreement. Debated as early as 1926 it became a focus of a 1954 agreement at the International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL). Subsequently the agreement was refined and superseded by the International Convention for the Prevention of Pollution from Ships in 1973 and its protocol (MARPOL) in 1978\textsuperscript{56}. Initial aims at regulating the pollution problem consisted of the designation of protected areas where discharge was prohibited. Under this plan ships could maintain their practice but away from places that would affect coastal life or cause the accumulation of large amounts of slops. Other measures early on specified maximum amounts of discharge per mile of ocean, a maximum amount per voyage, and the use of monitoring equipment to makes sure the water being discharged met delineated standards. Two convincing technological advancements also help with the problem. The first, segregated ballast tanks (SBT) installs a separate piping system for a portion of the ship’s tanks in a way that carries the ballast sea water away from the exposure to the residual oil. A second possibility, crude oil washing (COW) replaces seawater with crude oil for the cleaning of the ship’s tanks so that the residue mixes with the oil used for washing collecting more crude and reducing waste. However, this second method still exposes the seawater to the oil though it generates reduced discharge. A regular tanker

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56 Mitchell, Ronald B. \textit{Intentional Oil Pollution at Sea} MIT Press, Cambridge, MA 1994 p. 70
discharges approximately 248 tons of oil without any monitoring, SBT reduces that to 168 tons while COW does to 100 tons. However, a combined SBT, COW system generates only 53 tons of discharge. MARPOL mandated the use of both these systems in tankers with the International Maritime Organization (IMO) placed in charge of the collection of the information on compliance.

The years following OILPOL and MARPOL showed that absent incentives states do not report on their own compliance. Mitchell points out that non reporting does not necessarily mean non compliance however and the monitoring scheme has resulted in all types of reports, including those of non compliance, and failures to report despite existing compliance. 57 Unlike what one might expect the treaties did not ask whether facilities to discharge the slops existed in certain ports, rather it asked whether facilities adequate to trade existed, creating a nuanced incentive for ship captains to report on the state of the port. Essentially the concern from the shipping industry had to do with the extra time that the ship had to spend in the discharge facility getting rid of the slop. A simple system was expected to a be a failure due to this delay which is why the agreement pushed for the construction of facilities for the speedy resolution of this task. In the years following OILPOL and then MARPOL few reports were submitted and ship captains were concerned about the consequences of reporting ports to the treaty secretariat despite the incentive that doing so would reduce their time in port. Without a clear enforcement mechanism and even despite heavy lobbying by states and organizations for the filing of

the reports only a fraction of states complied and often without any meaningful information. 58

In 1982 a Memorandum of Understanding (MOU) was signed by the fourteen European members of the agreement and called for the inspection of a quarter of tankers entering the states’ ports. The agreement called for a different report system, whereas the original recommendations asked for forms to be filled out and submitted. The new scheme used telex machines to record basic information about the ship and the nature of their violation (if any). This data was then automatically relayed to computers and the port didn’t have to worry about any further action. Because the data is aggregated by the computer system into annual numbers and not disclosed by country outside of diplomatic sessions, there exist no real incentives to avoid compliance. Data collection is also very simple and computerized and has resulted in every country reporting annually even if they have fallen short of the 25% threshold. The data below also shows that the level of development of a state significantly impacts whether it reports and falls in line with the Cheyse and other scholars’ theory that “developing states often have inadequate financial and administrative capacities and domestic concern to report” in addition to the fact that low capacity to report often reflects the low capacity to both construct facilities and to enforce. 59 60 There is also a disparity between the views of governments and industry on this matter. Governments 61 will want to bring compliance to a treaty they signed but most likely do not view it as a big enough issue to openly confront another.

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60 Mitchell, Ronald B. Intentional Oil Pollution at Sea MIT Press, Cambridge, MA 1994 137
61 Again, under the assumption that states want to do what they agree to.
state over an unsubmitted report, therefore the incentive for diplomats to work on advancing the treaty is generally low and they do not derive any direct positive or negative benefits from the reporting. On the other hand the negative consequences of reporting to the shipping industry are large as tankers have to spend extra time in port complying with the procedures and undergoing inspections so the incentive there is to definitely not comply. Without reducing at least a portion of the negative incentive greater compliance is unlikely to be achieved. The data also shows that even in developed states the incentive to report when the reporting is time consuming is lower as the paper reports to the treaty secretariat historically hovered under half of those submitted to the computerized system.

62 Especially when this happens in ports with few inspectors and slow facilities.
These cases seem to show that the level of self reporting of compliance in treaties is directly correlated to the ease of reporting, and the degree to which this is important rises sharply with the decreasing level of development of the state being asked for information. Additionally, the MOU created summary reports to show progress with compliance, giving a dimension to the data that made participants feel a sense of success or failure, rather than the duplication of data by the IMO which did not improve on the available data and refrained from issuing opinions on progress or compliance, leaving participants with no sense of the consequences of their reporting. The MOU removed a
complicated and ill defined bureaucratic obstacle to reporting and through the use of technology and easy submissions elicited greater compliance.

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There are also noticeable differences in the enforcement of particular provisions of OILPOL and MARPOL. Under OILPOL’s system violations occurred when a tanker either discharged oil in prohibited zones or discharged excessive amounts in other waters. The former was easily detectable but the latter, which constituted the vast majority of violations, was problematic. First the state had to establish that oil was discharged, measure the amounts vs. the mileage traveled, and prove that the discharge belonged entirely to the tanker in question. Even if fault was established the offender usually left the port long before the verdict was passed and without an effective transnational system of punishment the offender faced no adverse consequences. Authorities observed that they often had major problems policing coastal waters for non environmental violations, how were they expected to achieve monitoring and prosecution. As reliable technology

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*aThis chart depicts the number of reports received from the fourteen member states of the Memorandum of Understanding (MOU) on Port State Control. For example, in 1990 all fourteen MOU states filed reports on enforcement with the MOU, six MOU states filed reports on enforcement with IMO, and thirteen MOU states filed reports on reception facilities with IMO.*

63 Quite a problem in congested shipping passages.
to monitor discharge was not even available until after MARPOL ship captains didn’t even have a way of measuring whether they were in violation of the quotas.

In 1969, an amendment to OILPOL changed the discharge quota to a maximum of $\frac{1}{15,000}$th of the total cargo capacity of the ship. This innovation allowed ports to detect how much oil was discharged rather than having to track the vessel on the ocean. Another monitoring issue resolved by treaty refinement was the permission granted to inspectors to board ships from different states. Previously illegal this permitted better inspections and included all vessels in the monitoring scheme. Despite these efforts, the improved detection did not translate into improved enforcement as states now dealt with the “adequate fines” question of the treaty. Undefined and lacking further terms it resulted in a complicated monitoring mechanism with almost negligible level of punishment.

Not much changed until the MARPOL conference and the subsequent protocol talks in 1978 which were meant to enter into force in 1983. The conference proposed broadening the enforcement capabilities of states in coastal water but this proposal was rejected after fears surfaced that jurisdiction issues would arise between port and flag states. However, a major innovation entered the treaty with the International Oil Pollution Prevention (IOPP) certificate which, valid for five years, was to be required of every tanker entering a port and was awarded based on the presence of monitoring technology. This meant that the the treaty shifted responsibility for the presence of compliant mechanisms on the tanker from the port authority looking to catch violators, to nonstate actors in each chain of the shipping business looking to ensure legality. Whether it was construction or insurance the industry was no longer free to leave the matter of pollution in the hands of the monitoring body. Ships without IOPP certificates were not legally
allowed to leave the port until the deficiency was rectified. This approach effectively flipped the problem on its head, whereas previously the monitoring job was reliant on the efforts of multiple steps of the system, each without any particular incentive to action, it was now up to several different components of the industrial system to make sure that the IOPP was present and valid or the tanker would lose money sitting in port under detention. The potential losses to a tanker were now substantially greater whereas the costs of compliance were already present in the construction and certification phase, far removed from the actual work of the tanker itself. Traditional monitoring of egregious actions still fell to the government but the simple obligation to verify and confirm IOPP certificate resolved the bulk of the cumbersome detection work that fell beyond the capacity of most states. 65

### IOPP discrepancies

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a“Discrepancies” can include the IOPP certificate’s being unavailable, on board equipment’s not matching the certificate, or on board equipment’s not functioning. Countries include only those providing reports using IMO’s mandatory reporting format. Blank spaces indicate years in which the country did not report; zeros indicate reports indicating no discrepancies.

bCombines reports from the Federal Republic of Germany and the German Democratic Republic for the years prior to 1990.
The issue can thus be characterized according to two mechanisms: discharge limits and equipment standards. Discharge limits were a deterrence based strategy with limited incentives to comply and a strong economic incentive not to. They failed to properly match the actions and rules needed for compliance with the capacity of actors to detect and punish violations. States responsible for monitoring (port states) had virtually no means of prosecuting discharge violators while states that did have that ability (flag states) had virtually no incentive to emphasize punishment as the violations were not directly affecting them. Changing the discharge measuring standards positively affected the ability of port states to detect violations but left the legal prosecution and incentive questions in the same kind of gray area as they were initially. While the compliance with these rules has risen there is no evidence that it was anything other than a correlation to the rise in compliance with the subsequent equipment regime, thus representing an example of coincidental compliance rather than a treaty induced type.66

The push for equipment standards was not genuinely made until the very late 1970s when countries decided to require SBTs and other equipment that comprised the IOPP monitoring scheme. Treaty negotiators were prudent to compromise on the requirements for current tankers while maintaining that newly constructed ships would have to abide by all the established rules. As a result tankers at the time had a choice of implementing SBT or COW systems while new construction mandated both. This was important as SBTs were generally economically disadvantageous, costing approximately $1,500 per tanker trip while COW was hugely positive, saving approximately $9,000. Previous numbers showed that both had to be implemented to have the best effect. Additionally, while the discharge fines routinely averaged below $10,000 the cost of an entire tanker being

detained in port until the non compliance was rectified was extraordinarily high to any tanker owner. Data shows that tankers were not being fitted with SBT before MARPOL and that the retrofitting largely took place when the ship was being already worked on for the economic incentives derived from COW. The adoption of SBT even in cases where, due to the presence of COW, it was no longer necessary, shows that treaty induced compliance rose sharply due to the structure of the MARPOL protocol. The equipment standards no longer relied on forcing states to improve their detection and monitoring systems and made treaty compliance significantly easier and more practical. Treaty compliance piggybacked on existing industrial monitoring infrastructure, where countries already spend significant amounts of money. Port officials, insurance companies, and lawyers, were better suited to assure that all the appropriate practices were being followed than aerial reconnaissance aircraft and invasive boardings by inspectors. This case clearly shows that the design of a treaty carries a large impact on the degree to which its provisions are implemented and complied with.

<table>
<thead>
<tr>
<th>Equipment on board</th>
<th>1979 and prior</th>
<th>1980-82</th>
<th>Post-1982</th>
</tr>
</thead>
<tbody>
<tr>
<td>SBT and COW</td>
<td>32</td>
<td>94</td>
<td>98</td>
</tr>
<tr>
<td>SBT or COW</td>
<td>94</td>
<td>99</td>
<td>100</td>
</tr>
<tr>
<td>Total SBT</td>
<td>36</td>
<td>98</td>
<td>99</td>
</tr>
<tr>
<td>(alone + with COW)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total COW</td>
<td>89</td>
<td>95</td>
<td>99</td>
</tr>
<tr>
<td>(alone + with SBT)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SBT alone</td>
<td>4</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>COW alone</td>
<td>58</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Neither SBT nor COW</td>
<td>6</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>MARPOL requirement</td>
<td>SBT or COW</td>
<td>SBT only</td>
<td>SBT and COW</td>
</tr>
<tr>
<td>Compliance level (%)</td>
<td>94</td>
<td>98</td>
<td>98</td>
</tr>
</tbody>
</table>


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Percentage of tankers equipped with SBT and COW
(1991 fleet by year of construction)
XV. FINDINGS AND ANALYSIS

Compliance remains a difficult area of study. Its methodology is complicated and problematic and measuring it across a large body of international law proves highly challenging. While the research surveyed universally struggled to establish facts about international laws beyond particular cases studies no conclusive explanation for why states obey international law currently exists. Similarly, no single identifiable component of international agreements seems to elicit perfect compliance and as is the case with other aspects of international relations theory. Complementary approaches seem to work best when one studies diverse cases.

Following the overview of the evolution of international legal theory on compliance one has to suspect that some perspectives offer more explanatory power than others. The reasons for compliance do not appear to be universal and often the investigations have led to a theoretical black hole where many variables are able to provide some degree of explanation, but are not sufficient. If, however, one makes certain reasonable assumptions and tries, as much as possible, to exclude those variables that are exogenous to the agreements themselves it may be possible to observe some faint patterns of explanatory theory. On the world scale, the case of compliance in the GATT/WTO system proved far more elusive than expected. While it may be the case that the nascent nature of the WTO system, and thus something of a short institutional history in terms of its major dispute organ, may be to blame for limited data sets, the evidence emerging out of the old GATT system has been as confusing and inconclusive as
anything found in the world of human rights or environmental treaties. Voluntary agreements have a record of indeterminate implementation that can be well reflected by realist perspectives on the subject. This is certainly true the further one goes back in history where preferences shaped what agreements states entered into and neither the letter of, nor the intent of, the “international law” was followed when it did not benefit the power structure of the state. In the post WWII world, however, and certainly more broadly after the end of the Cold War, norms, regulations, and laws have evolved in a new way.

What is the status of compliance with WTO decisions? It’s difficult to determine and depending on how the question is phrased it can range from 0% to 100%. Whatever the actual outcome of WTO decisions there is a clear conclusion: states participate in the WTO system beyond the simple standing of selfish preferences. This is evident in the increasing participation of states, the active engagement in disputes, and the choice of the WTO DSM as a preferred means of resolving disputes over traditional trade wars. Additionally, there are broad definitions of compliance that are undeniably satisfied by the actions of the losing states. Tariffs are lifted after complaints, actions are taken, methods are changed. Whether they are offset by other actions is in a strict sense irrelevant because the agreement itself is followed. This gives the WTO, at least, a marginal level of legitimacy as a forum for, at the very least, discussion, if not, at the very least, some degree of power in the international trade regime.

Participation in the WTO system gives credibility to the perspective of international law focusing on interactions and process. Scholars like Guzman and Simmons argue that interdependence brings states to resolve their disputes through the
DSM but the banana wars and US steel cases do demonstrate the power of these norms to change the actors that participate in them. Neither strict liberal nor realist theories lend good explanations to the outcome of those two cases. Cooperation was not the best outcome in either unless one dips their toes in the argument that it’s cooperation in the long term and the overall benefit that matters. Similarly, power does nothing to explain it as not only did the two largest trading superpowers lose their preference but they also lost prestige in the exchange. But the reality was such that both lost, and both appealed and lost again, and complied, and most importantly went back to the system and their usual participation in it right afterwards. No boycotts of the WTO or secessions from the trade regime were proposed even if sensationalism does make everyone feel that the world is on the brink of agreement disintegration at all times.

It is disappointing that despite very good, ambitious, and comprehensive studies of some issues in the WTO system the compliance question cannot be satisfactorily answered. It’s almost possible to understand the frustration of a newly crafted treaty that, after much time invested, is not on a clear path to success. The expectations for compliance should be good and the system does appear to function even if it is riddled with questions and potential kinks to be worked out. In the absence of the further trade talks that stipulate exactly how greater transparency can be introduced to states there exists, unfortunately, potential for increasingly inventive ways to elude compliance with an agreement should a party choose to. A more likely outcome is that transparency will grow out of negotiations because other members have the highest incentive to ensure compliance with decisions and may use the resolution of disputes as bargaining chips effectively swapping either promises or transparency of implementation in return for
reciprocal agreements. Whatever the outcome there is sufficient evidence that the WTO system as a whole promotes compliance even if the record of specific cases remains to be comprehensively determined.

On the ground the question can be answered in a very different way. Compliance with particular treaties is not as difficult to establish and despite the need to work on a case by case basis solid scholarship exists with good evidence and useful conclusions. Work across treaty types warrants the same kind of caution one might expect with the global trade regime problem but treaties of similar type can be expected to have similar features and lessons even if their design might not be interchangeable. The evidence gathered from the work on environmental treaties by Ronald Mitchell clearly points to strong conclusions that are not easily discredited by competing perspectives. While the conclusions may sound all too much as if “it depends” there is sufficient material to show that the architecture of the treaty is the largest determinant of whether it is complied with. Particularly provisions dealing with monitoring, detection, and enforcement warrant closest scrutiny as they, far more than ideological components, determine whether a treaty works or not.

The OILPOL and MARPOL case study offers many lessons but from the theoretical perspective none are more important than the fact that it bridges the ideas of power and preferences with those of cooperation and process to show that compliance can be achieved when one understands that not only is every treaty different but every provision needs to be designed in a particular way. Preferences matter in that the overall volition of a state to take up an issue in the agreement determines what level of resources it allocates to the treaty. Environmental issues may not necessarily win billions of dollars
from national legislatures for monitoring making certain designs in the treaty foolish. How is a treaty like OILPOL supposed to be effective if there are no funds for a fleet of coastal vessels and planes to monitor adherence to its provisions? Conversely, a national defense treaty may have the luxury of greater monitoring demands as the possible threat to the survival of the state will surely elicit a greater number of assets committed to it.

In this case there was large variance between the design of provisions even though they were part of the same treaty and addressed the same problem. This fact alone should hint at large problems with claims of universality of treaty design. The radical shifts in industry behavior between the different standards are evident of treaty induced compliance and are not very well explained by other variables. This would further point to the credibility of the process based theory of international law where the interaction of actors regarding this issue created norms that not only resulted in better design but also percolated down to influence compliance standards on the microeconomic level, in port offices and at shipping insurance companies.

That rules caused change in the behavior of states and industries is clear, before MARPOL no tankers installed SBTs and no port detained tankers for non compliance with environmental regulations. Several factors made the difference in the designs of the provisions that failed and succeeded as part of OILPOL and MARPOL. Ease of reporting was instrumental in the dissemination of information and the increase in the voluntary reporting of violations. Because the successful networks were computerized, provided feedback, and worked to both provide and gather information they reduced the incentives to non compliance. Drawing on a larger group of actors the widely available information provided everyone from ship captains to port operators and inspectors with useful data.
whenever they wanted. This is in stark contrast to the WTO cases where monitoring of entire industries or sometimes even entire economies is an impossible task. The oil cases show that the more avenues for failure in the monitoring mechanism the lower the chances for compliance.

Mitchell theorizes that effective treaty compliance stems from the ability to fill the gaps in what he calls the “strategic triangle of compliance.”68 Pictured with each end of the triangle as either “Legal Authority,” “Appropriate Incentives,” or “Practical Ability” this concept points to the need for complementary action to stem from any treaty mechanism. If two ends of the triangle exist then the aim of the treaty should be the third one, only then will the treaty have sufficient economic and legal incentives to motivate action in a way that is greater than the motivation to escape compliance. Perfect compliance will often prove impossible; rather, practical and feasible demands should be coupled with smart incentives to motivate change. Because different treaties focus on different actors provisions should also cater to certain audiences. The dissemination of information in treaties on arms control may not be as important as that in environmental accords because non state actors play a smaller role in the former while holding a strong position in the latter. When crafting a treaty diplomats need to ask fundamentally different questions, concerning themselves less with what needs to be done and rather with who makes the difference and how to best incentive them.

Beyond these incentives treaties should make use of existing forms of monitoring and enforcement rather than inventing new ones. The enforcement mechanism for almost

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every treaty is quite complicated, be that ocean water monitoring for pollution or the inspection of agricultural policies in large multilateral trade agreements. The practice of “piggybacking” on existing industries of enforcement – areas of industry already regulated – brings established cultures of compliance to bear on whatever the compliance challenge might be. By introducing a part of the treaty into an existing compliance or monitoring system the chances that inadequate resources will be allocated to the treaty are reduced and as inspectors or experts are already at work on one measure their training or start up time will be greatly diminished with an expanded job description, rather than the creation of a whole new body of monitoring. Another prescription involves the removal of legal barriers to enforcement. Without effective fines and precise treaty language the legal consequences of non-compliance become irrelevant and the incentives to comply diminish to zero. The legal authorization to monitor actors from other states and place fines on all those party to an agreement regardless of state of origin are important features that foster the effective application of treaties. As can be seen there are numerous lessons to be learned from successful treaties that find applicability in other cases. As has been mentioned before issues, treaties, and even provisions within the same agreements cannot be crafted in a universal, generalized way if they are to elicit desirable levels of compliance. The close evaluation of the appropriate means of implementing the provisions of international agreements saves the time lost on the continuous revision of language to address failed means of enforcement.

Based on these case studies there is an observable degree of impact that negotiations and interaction have on the participants in the international trade regime. States may enter the system with their particular preferences but the treaties discussed
have, to varying degrees, elicited compliance from actors that was not necessarily aligned with their direct preference. It can be argued that these preferences were also reshaped due to the process, as is evidenced by the changed stance of ship building countries in response to shifting standards on tanker construction. Process based legal theory offers convincing explanatory power for why nations behave the way they do as the system reshapes and is reshaped through the interactions of actors over time to yield norms that may substantially differ from the original designs. The GATT system evolved from a means of fostering trade to a behemoth with its own jurisdiction and powers, capable of power sometimes comparable to the members that make it possible. Similarly OILPOL began with big ambitions but modest design and through its subsequent reincarnations underwent large, and in some areas, total changes in how it was structured, what it sought to control, and what power was given to it to achieve these goals. The design of these agreements, the presence and power of the process of these negotiations and the norms they revolve around is well illustrated in these cases and serves as a further piece of the puzzle in the question of why states comply with international agreements.

On aggregate the design of the agreement is clearly consequential on all levels of international trade. Globally, patterns of compliance remain elusive as loopholes and complexities make the system difficult to monitor and study yielding only a partially satisfying answer to the question of compliance. Despite this hindrance, it can be concluded that this falls precisely in line with the conclusion on regime design, as the reason for the problems of compliance on the global scale can be attributed to the vague, poorly structured agreement that underpins the global trade regime. The changes in the settlement of disputes between GATT and the WTO are a reflection of the refinement of
language and process in the new agreement and come out of the direct need to address this area of weakness. The current treaty has many other weak areas which the ongoing trade negotiations are slowly working to eliminate. A satisfactory study of compliance on this level remains elusive, and will likely stay that way until states find a means of tackling the immense complexity of the global economic system. Until then, the WTO agreement remains an improved, but imprecise text which lacks clear and practical means of implementation, monitoring, and enforcement. Similarly, the analysis of the compliance with oil shipping regulations yields further evidence to the argument for the importance of design. In this case efforts to address capacity and enforcement led to major changes in the compliance with the international agreement. When easier means of monitoring, practical economic incentives, and a clearer legal framework were established compliance rose in response to the strengthened agreement. These cases show that regardless of scale the design of international agreements is directly tied to the levels of compliance to be expected.


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